# Topic Area Paper for 2022-2023 Debate Season

#### Contributors

Evan Alexis

Jeff Buntin

Sophia Dal Pra

Akash Deo

Nathan Fleming

Ethan Greer

Teja Leburu

Mikaela Malsin

David Rooney

Maeve Sanders

Anthony Trufanov

Dash Weinhardt

Tim Wegener

Greg Zoda

#### Note

Throughout the top section of the paper, we opted to reduce our use of inline evidence, instead hyperlinking to evidence in the index. If you see blue, underlined text, you can Control + Click it on Windows, or just click it on Mac, to see the corresponding piece of evidence.

### Executive Summary

The topic for 2022-2023 should focus on the expansion of legal personhood to new entities.

Legal personhood is the ability to sue and be sued, and often correlates with having some set of legal rights and obligations. It is a prerequisite for your interests ‘counting’ in the legal system. The topic will focus on the mechanism of conferring personhood and the ways in which this conferral affects allocation of rights and liabilities.

The topic is timely and educational. It touches on an area the community has never debated. It touches on newly developing technologies that will fundamentally reshape society. It’s sci-fi and it’s in the weeds. It squarely presents a set of K controversies that will lead to incredibly high-quality K research and debates on both sides.

AFFs will start with the premise that some entity’s interests are insufficiently protected by law, or some entity is going unjustly unpunished or undeterred from bad acts, because of its lack of personhood status.

NEG responses will focus on the doctrinal consequences of creating new types of entities that can be held liable, alternative liability structures built on existing law, and critiques of the concept of using legal personhood as an inclusive mechanism.

### Why Debate Legal Personhood?

The debate over legal personhood is timely, unique, and accessible:

#### 1. The community has never debated a topic that touches on this foundational aspect of jurisprudence.

Debate topics are at their best when they force students and coaches to investigate new areas of literature and learn about controversies that impact their lives in ways we never understood or expected. Legal personhood debates offer this in spades. Legal personhood is the connective tissue of our legal system; it sets the terms on which anyone gets to take advantage of its protections, or is subjected to its controls.

At the same time, the proposed resolution – focusing on EXPANDING the category – takes on the dispute from an accessible direction. Unlike antitrust and many other ‘jurisprudential’ topics, which force students down boring jurisprudential rabbit holes, this topic takes a concept that underpins our entire legal system and brings it to new areas that are fascinating, relevant to our daily lives, and have practically no existing caselaw. Meanwhile, the dramatic nature of the change required means advocates for topical AFFs have stirred up an intense controversy in legal writing, and have provoked many to offer more incremental solutions to the problems AFFs will undertake to solve. This combination – foundationally important concept applied to a cutting edge, interesting new area – makes this the very best kind of legal topic.

#### 2. Relevant technology has only recently reached sufficient levels of maturity.

A much larger, bidirectional version of this topic was already proposed in 2013-2014 as part of a broader proposal to change federal definitions. Almost a decade has passed, and the terrain of the debate has shifted radically. Artificial intelligence and machine learning technologies make revolutionary breakthroughs seemingly every week. Biotechnology has progressed to the point where pressing questions about legal categories are about to confront courts around the world. Legal writing about this topic is recent and urgent.

#### 3. This topic will lead to extremely high-quality K debates.

We have never debated such a squarely metaphysical topic. The question – what is a person – presents important questions of line drawing that directly speak to who we are. Are we defined by our autonomy, or our relationships to others, and to our past? Should there be a role for capacity in our understandings of personhood, or do such justifications reinforce able normative definitions? How do we grapple with legal personhood’s past and present as a device for excluding groups of people from civic life?

Unlike other topics for which questions posed by critiques are arguably more peripheral to the literature base, the literature on legal personhood grapples with these issues squarely. This leads to an incredibly specific NEG evidence set, as well as an incredibly responsive AFF evidence set. To anyone looking to take their K debating to the next level – on either side – this topic presents an excellent opportunity to do so, making research accessible while retaining an incredibly high skill cap for nuanced application and explanation.

#### There has never been a better or more pressing time to debate about the boundaries of legal and moral personhood.

Joshua C. Gellers 21, associate professor of Political Science at the University of North Florida, Research Fellow of the Earth System Governance Project, and Core Team Member of the Global Network for Human Rights and the Environment, “Introduction,” Rights for Robots: Artificial Intelligence, Animal, and Environmental Law, Routledge, 2021, pp. 1–14

Can robots have rights? This question has inspired significant debate among philosophers, computer scientists, policymakers, and the popular press. However, much of the discussion surrounding this issue has been conducted in the limited quarters of disciplinary silos and without a fuller appreciation of important macrolevel developments. I argue that the so-called “machine question” (Gunkel, 2012, p. x), specifically the inquiry into whether and to what extent intelligent machines might warrant moral (or perhaps legal) consideration, deserves extended analysis in light of these developments.

Two global trends seem to be on a collision course. On the one hand, robots are becoming increasingly human-like in their appearance and behavior. Sophia, a female-looking humanoid robot created by Hong Kong–based Hanson Robotics (Hi, I Am Sophia…, 2019), serves as a prime example. In 2017, Sophia captured the world’s imagination (and drew substantial ire as well) when the robot was granted “a citizenship” by the Kingdom of Saudi Arabia (Hatmaker, 2017). While this move was criticized as a “careful piece of marketing” (British Council, n.d.), “eroding human rights” (Hart, 2018), and “obviously bullshit” (J. Bryson quoted in Vincent, 2017), it elevated the idea that robots might be eligible for certain types of legal status based on how they look and act. Despite the controversy surrounding Sophia and calls to temper the quest for human-like appearance, the degree to which robots are designed to emulate humans is only likely to increase in the future, be it for reasons related to improved functioning in social environments or the hubris of roboticists.

On the other hand, legal systems around the world are increasingly recognizing the rights of nonhuman entities. The adoption of Ecuador’s 2008 Constitution marked a watershed moment in this movement, as the charter devoted an entire chapter to the rights of nature (RoN) (Ecuador Const., tit. II, ch. 7). Courts and legislatures different corners of the globe have similarly identified rights held by nonhumans—the Whanganui River in New Zealand, the Ganges and its tributaries in India, the Atrato River in Colombia, and Mother Nature herself (Pachamama) in Ecuador (Cano-Pecharroman, 2018). In the United States, nearly 100 municipal ordinances invoking the RoN have been passed or pending since 2006 (Kauffman & Martin, 2018, p. 43). Many more efforts to legalize the RoN are afoot at the subnational, national, and international levels (Global Alliance for the Rights of Nature, 2019). All of this is happening in tandem with legal efforts seeking to protect animals under the argument that they, too, possess rights. While animal rights litigation has not had much success in the United States (Vayr, 2017, p. 849), it has obtained a few victories in Argentina, Colombia, and India (Peters, 2018, p. 356). These worldwide movements cast doubt on the idea that humans are the only class of legal subjects worthy of rights.

These trends speak to two existential crises facing humanity. First, the rise of robots in society calls into question the place of humans in the workforce and what it means to be human. By 2016, there were approximately 1.7 million robots working in industrial capacities and over 27 million robots deployed in professional and personal service roles, translating to around one robot per 250 people on the planet (van Oers & Wesselman, 2016, p. 5). The presence of robots is only likely to increase in the future, especially in service industries where physical work is structured and repetitive (Lambert & Cone, 2019, p. 6). Half of all jobs in the global economy are susceptible to automation, many of which may involve the use of robots designed to augment or replace human effort (Manyika et al., 2017, p. 5). In Japan, a labor shortage is driving businesses to utilize robots in occupations once the sole domain of humans, especially where jobs entail physically demanding tasks (Suzuki, 2019). The country’s aging population is also accelerating the demand for robot assistance in elderly care (Foster, 2018). Some have questioned whether robots will come to replace humans in numerous fields such as, inter alia, agriculture (Jordan, 2018), journalism (Tures, 2019), manufacturing (Manyika et al., 2017), and medicine (Kocher & Emanuel, 2019). Others have argued that robots have and will continue to complement, not supplant, humans (Diamond, Jr., 2018).

The forward march to automate tasks currently assigned to humans for reasons related to economic efficiency, personal safety, corporate liability, and societal need is proceeding apace, while the ramifications of this shift are only beginning to be explored. One recent article suggests that the results of the 2016 U.S. presidential election may have been influenced to a non-trivial extent by the presence of industrial robots in certain labor markets (Frey et al., 2018). On a more philosophical level, advancements in technology, especially in the areas of artificial intelligence (AI) and robotics, have elicited discussions about the fundamental characteristics that define humans and the extent to which it might be possible to replicate them in synthetic form. What is it that makes humans special? Our intelligence? Memory? Consciousness? Capacity for empathy? Culture? If these allegedly unique characteristics can be reproduced in machines using complex algorithms, and if technology proceeds to the point where nonhuman entities are indistinguishable from their human counterparts, will this lead to the kind of destabilizing paradigm shift that occurred when Galileo confirmed the heliocentric theory of the universe?

Second, climate change threatens the existence of entire communities and invites reflection about the relationship between humans and nature. Despite the hope inspired by the widespread adoption of the Paris Climate Accord, recent estimates of the impact of Nationally Determined Contributions (NDCs) to the international agreement show that the world is on track to experience warming in excess of 3°C by 2100 (Climate Analytics, Ecofys and NewClimate Institute, 2018), a number well above the global goal of containing the rise in temperature to only 1.5°C. At the current rate of increasing temperatures, the planet is likely to reach the 1.5°C threshold between 2030 and 2052, with attendant impacts including sea-level rise, biodiversity loss, ocean acidification, and climate-related risks to agricultural or coastal livelihoods, food security, human health, and the water supply (IPCC, 2018). As such, climate change presents a clear and present danger not only to physical assets like lands and homes, but also to social institutions such as histories and cultures (Davies et al., 2017).

Acknowledgment of a changing climate and the degree to which it has been exacerbated by human activities has given rise to the idea that the Earth has transitioned from the Holocene to a new geological epoch—the Anthropocene (Crutzen, 2002; Zalasiewicz et al., 2007). Although some have taken issue with this proposal on the grounds that it masks the underlying causes responsible for the environmental changes observed (Haraway, 2015; Demos, 2017), others have found the concept useful for exploring the limitations of current systems and probing the boundaries of nature itself (Dodsworth, 2018). On the former point, Kotzé and Kim (2019) argue that the Anthropocene

allows for an opening up of hitherto prohibitive epistemic “closures” in the law, of legal discourse more generally, and of the world order that the law operatively seeks to maintain, to a range of other understandings of, and cognitive frameworks for, global environmental change.

(p. 3)

In this sense, the pronouncement of a new geological era offers an opportunity for critical examination of the law and how it might be reconceived to address the complex problems caused by industrialization. On the latter point, the Anthropocene renders human encounters with the natural world uncertain (Purdy, 2015, p. 230). It suggests the “hybridization of nature, as it becomes less and less autonomous with respect to human actions and social processes. To sustain a clear separation between these two realms is now more difficult than ever” (Arias-Maldonado, 2019, p. 51). More specifically, the Anthropocene presents a serious challenge to Cartesian dualism by rejecting ontological divisions in favor of a single, Latourian “flat” ontology defined by ongoing material processes, not static states of being (Arias-Maldonado, 2019, p. 53). In this reading of modernity, humans are both part of nature and act upon it (Dodsworth, 2018, p. 36). As a result, the boundary between humans and nonhumans has effectively collapsed.

The two trends—the development of machines made to look and act increasingly like humans, and the movement to recognize the legal rights of nonhuman “natural” entities—along with the two existential crises—the increasing presence of robots in work and social arenas, and the consequences of climate change and acknowledgment of humanity’s role in altering the “natural” environment— lead us to revisit the question that is the focus of this book: under what conditions might robots be eligible for rights? Of course, a more appropriately tailored formulation might be—under what conditions might some robots be eligible for moral or legal rights? These italicized qualifications will prove important to the discussion in Chapter Two regarding the relationship between personhood and rights, and the interdisciplinary framework I put forth in Chapter Five that seeks to respond to the central question motivating this study. But before arriving at these key destinations, we need to first develop a common understanding about the kind(s) of technology relevant to the philosophical and legal analysis undertaken here.

### T Legal

#### The resolution clearly meets the ‘legal’ requirement. Legal personhood is fundamental to the law. Who counts as a legal person determines the applicability of everything else in the legal system.

Alexis Dyschkant 15, Ph.D. in Philosophy, University of Illinois Urbana-Champaign, In Progress. J.D., Illinois College of Law, December 2014. M.A. in Philosophy, University of Illinois Urbana-Champaign, 2012, B.A. in History and Philosophy, University of Illinois Urbana-Champaign, 2010, “Legal Personhood: How We Are Getting It Wrong,” University of Illinois Law Review, vol. 2015, no. 5, 2015, pp. 2075–2110

What it means to be a legal person is fundamental to any understanding of the law. The term "person" bears special meaning in the U.S. Constitution,' in order to make contracts or hold property you must be a legal person,2 and most importantly legal persons are the sole bearers of rights and duties.' While there is disagreement about how precisely to formulate a definition of legal personhood, the key element of legal personhood seems to be the ability to bear rights and duties.' Black's Law Dictionary defines a legal person as an entity "given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being."'

This definition reflects a modern trend to associate legal person- hood with humanity; however, any entity that is capable of bearing rights and duties should, in principle, be capable of being a legal person:

So far as legal theory is concerned, *a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person*, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.6

### Uniqueness

Past seasons have heavily featured lines of argument focused on link uniqueness---recent enforcement, or litigation, that have strongly resembled topically permitted actions. Such lines of argument would be essentially impossible on this topic.

Although legal personhood has been in the news, and although court systems all over the world have been experimenting with the consequences of changing the boundaries of legal personhood, **no topical action has ever been taken in the United States**; in other words, **an entity not composed of humans has never been made an autonomous center of legal relations**.

The remarkable stability of this statement means this topic is impervious to disruption by transient political events, such as COVID, Midterm Elections, or Ukraine.

It bears emphasizing, because this fact shapes the viability of a variety of NEG positions: **the AFF authors are very much out on a limb**. The vast majority of proposals dealing with issues identified by AFF authors take a far more measured approach than inventing new categories of legal entities out of whole cloth.

#### Ultimate active control by human beings has served as a universal firewall for which entities are granted the status of legal personhood.

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

The maxim that “extraordinary claims require extraordinary evidence” applies to the laws of men no less than it applies to the laws of nature. The central thesis of Bayern's articles is that it is already possible for an unsupervised artificial intelligence system to obtain legal personhood under existing law.15 To me--and, I would wager, to most lawyers and laypeople alike--that is an extraordinary claim. Historically, legal systems have only recognized (1) human beings and (2) entities endowed with “legal personhood”--that is, the ability to \*265 sue, be sued, and take actions in the world that the legal system will enforce--but that are ultimately and actively controlled by human beings.16 [FOOTNOTE 16 BEGINS] The only notable exception is that animals were occasionally charged with crimes in late medieval and early modern Europe. See generally E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS (1906). Of course, this exception was limited; because animals are, as far is anyone is aware, unable to enter contracts and own property, their participation in the legal system was strictly limited to the criminal and quasi-criminal sphere. See id. at 4 (noting that describing actions against animals as “civil” is a misnomer because they “were not suits to recover for damages to property, but had solely a preventive or prohibitive character.”). [FOOTNOTE 16 ENDS] Bayern's argument, if correct, would mean that legislatures have inadvertently created a new category of legal person--the first in history to be free of active human control.

#### Corporations are categorically different than anything allowed by the topic because they already have personhood and are human proxies.

Richard L. Cupp 21, John W. Wade Professor of Law at Caruso School of Law, 2021, Considering the Private Animal and Damages, Washington University Law Review, Vol. 98, Issue 4, p. 1313-1342

5. Equating "Persons" with Humans and Their Proxies

The Naruto court at least implied that a legal person is a human or a human proxy, such as a corporation. For example, Judge Smith's concurrence noted that

the Federal Rules only authorize next friend suits on behalf of "a minor or an incompetent person." Per the text, this can only apply to human persons, not any "minor" or "incompetent" corporations or animals. Importantly, the historical background of [the next friend statute] limits the use of next friends to only human persons. 153

Of course, corporations are also legal persons, but the court recognized that they are merely proxies for humans: "Corporations and unincorporated associations are formed and owned by humans; they are not formed or owned by animals." 154

Naruto's apparent nod to the exclusively human foundation of legal personhood impliedly precludes the treatment of animals as legal persons in private law damages actions. The Nonhuman Rights Project, Inc., an organization focused on expanding legal personhood to at least some animals, acknowledged and complained about Naruto's implicit limitation of personhood--contending, of course, that the court was wrong. 155But despite complaints from animal rights activists, this aspect of Naruto adds to a growing body of cases that point out the centrality of humanity to legal personhood in response to efforts to name animals as plaintiffs. 156

#### This is not a trivial distinction. While there have been changes in which rights are granted to entities already considered persons---such as the Citizens United case on corporate free speech, or the Hobby Lobby case on corporate religious freedom---the fact of corporate personhood is centuries old and by no stretch a ‘thumper.’

Carson Holloway 15, Assistant Professor of Political Science at the University of Nebraska at Omaha, “Are Corporations People?,” National Affairs, Fall 2015, https://www.nationalaffairs.com/publications/detail/are-corporations-people

But contrary to what we may hear from Elizabeth Warren and ThinkProgress, corporations are, as a matter of fact, people in the eyes of the law. They have been since the beginning of the American republic, making corporate personhood deeply rooted in our legal and constitutional tradition.

When conservatives point out, as Mitt Romney notably did in his presidential campaign, that corporations are and should be considered people for certain purposes, they're pointing out what the left seems to have forgotten. They're pointing out that, though corporations may not be natural persons — that is, discrete, individual human beings whose rights somehow originate in nature — corporations nevertheless are and should be entitled to certain legal and constitutional rights.

This is not to say that corporate rights operate in the same way as do the rights of natural persons. In many cases the law justifiably treats the rights of natural persons and artificial persons differently. It is to say, however, that respect for the rights of corporations, no less than respect for the rights of individuals, is advantageous for our social order and has been essential to America's development as a prosperous, free, and good society. Accordingly, America's perpetuation as such a society requires that we understand and defend corporate personhood and corporate rights against this criticism from the left.

THE LONG TRADITION OF CORPORATE RIGHTS

The idea that corporations have legal rights, and therefore a kind of personhood, is not an invention of contemporary conservatives. Its roots stretch all the way back through the history of American law and deep into the English common-law tradition. That tradition was captured most comprehensively — and communicated to the American founders most forcefully — by William Blackstone's Commentaries on the Laws of England. The very table of contents of that work bears witness to the legal tradition of granting rights to corporate persons. Chapter 18, "Of Corporations," is placed in "Book the First: The Rights of Persons."

Corporations as legal forms, Blackstone explained, are "artificial persons," created by law "for the advantage of the public." The rights accorded to the corporate form, he thus suggested, were granted in order to encourage cooperation among individuals with a view to socially useful ends. Without the corporate form, an association of individuals could not make binding rules to govern its members or internal structure. Without certain rights, it could not hold property indefinitely as an association — the death of the association's members would mean the death of the association. Without granting corporations certain rights, individuals could not securely create an association that would have a life, an identity, and a mission that could continue from one generation to the next.

#### It's not only settled, but widely accepted as legal fact because corporations are subject to ultimate human control.

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

We live in a society that is in no way ready or willing to accept A.I. personhood. A.I. systems have not yet reached a level where personhood would make economic--much less ethical--sense. But the current imprudence of creating A.I. personhood may be a function of the current state of the technology. These are still early days in the history of A.I. and many of the same objections that are commonly expressed about granting personhood to A.I.--most notably that it would discourage people from taking responsibility for their creations--were also said about the then-novel concept of corporate personhood in the 19th century. Gilbert and Sullivan even wrote an operetta--“Utopia Limited”--whose plot revolved around the chicanery and lack of responsibility that widespread adoption of the corporate form could wreak.131 Those objections have never completely gone away, but nevertheless the idea of corporate personhood is firmly entrenched. Society has grudgingly accepted the legal fiction of corporate personhood because humans retain ultimate control over a corporation's actions and because the corporate structure encourages investment and economies of scale.

## AFF Ground

Broadly, this topic includes three kinds of AFFs: those that create new liabilities, those that create rights, and those that bestow personhood wholesale. These AFFs will spread across a variety of areas (possibly bounded by a list, if such an option is preferable):

#### Animals

This area focuses mainly on giving animals rights. These rights can be aimed at improving animal well-being because of animals’ moral status as sentient or suffering beings, K approaches that give animals rights for anthropocentrism reasons, or giving animals a property interest in nature for broad biod/environment reasons.

#### Nature

This area would include giving rights to nature as a whole, specific natural entities like rivers and ecosystems, and non-Western ideas about nature and personhood such as personhood for spiritual entities inhabiting natural objects or ancestral personhood.

#### Future Generations

Conceptually, this area connects to a very similar debate as the nature area. It looks at what rights future generations can claim against currently existing legal persons. These mostly have to do with maintaining a livable biosphere.

#### Organizations

This area focuses on collections of humans. It includes corporations, churches, and other limited liability entities. All non-human entities that have, to date, been granted legal personhood have been entities in this area. **Under all but one of our recommended wordings, nearly all controversies in this area are not topical because corporations already have the status of personhood.**

#### Partial / potential humans

This area focuses on giving rights to biological entities that are partially, but not entirely human. This includes potential humans, such as fetuses, as well as human-animal hybrids, such as chimeras. Justifications include ethics and creating legal clarity / social norms for research.

#### Robots

This area would focus on autonomously operating machines. This includes AI, algorithms of a certain sophistication, autonomous weapons, and potentially decentralized blockchain or internet of things networks. Mechanisms vary from bestowing natural personhood, to treating AI like corporations, to imposing specific rights and liabilities, such as criminal liabilities or intellectual property rights for AI inventions.

#### K AFF Areas

We have included a variety of advocates for K approaches to the topic. Most of these will use the concept of ‘legal personhood’ as a jumping off point for criticizing strict and limited conceptions of legal reformism in favor of other approaches.

Expanding legal personhood is intimately tied to debates that arose in past struggles over legal inclusion. Critiques focus on the western liberal propertied subject, underlining its gendered, racialized, nature and its willingness to construct experiences like pregnancy and disability as states of exception.

AFFs can build on [Moten’s concept of jurisgenerativity](#_Blackness_transcends_juridical) to propose alternative understandings of what underpins the law. They can advocate understandings of personhood that depart from Western legal norms, such as [feminist relational personhood](#_This_conception_of). They can [reject](#_The_traditional_category) the concept of personhood altogether, arguing that it is constitutively antiblack.

## NEG Ground

The biggest structural flaw with topical AFFs is the requirement to use an **extremely suboptimal mechanism**: granting rights to new entities. ‘New legal entity key’ warrants will be extremely scarce. NEG innovation will stem from new ways to close rights and liabilities gaps, coupled with a serviceable set of topic-wide DAs, incredibly strong area-specific + AFF-specific DAs, and critiques of using the legal personhood mechanism.

#### Spillover DA

This [set of DAs](#_Yes_Spillover) will be the NEG’s most versatile tool. Because of the strength of the topic’s [link uniqueness](#_Uniqueness) and judicial focus, ‘slippery slope’ and ‘precedent’ arguments have unique purchase. This DA would broadly say that cases similar to the plan would use the plan as a precedent, and that this There are several viable flavors:

--AFF-specific. Some objections to particular proposals invoke specific precedent-setting objections. An example of this is the [Abortion DA](#_Yes_Spillover---Animals_AFF---Fetus) or [AI DA](#_Yes_Spillover---Animals_AFF---AI) vs Animal Rights.

--Area-specific. This DA would argue that small reforms in an area link to big objections to that area. An example of this is the [Animal Rights DA](#_Yes_Spillover---Animals_AFF).

--Topic-wide. In its broadest form, DA would argue that the ‘firewall’ between humans and their proxies and non-humans has prevented spiraling personhood claims, and that the plan would entail ‘breaching the wall,’ resulting in harms from personhood in other topic areas.

#### Court Clog DA

Everyone’s favorite. Personhood entails ability to sue and be sued. Coupled with the line-drawing problems that come with expansion, NEGs can credibly argue that expansions would lead to a surge of time- and resource-intensive litigation.

#### Court Legitimacy / Rule of Law DA

In addition to typical arguments about controversial decisions hurting court legitimacy, NEGs have access to a more specific argument about the delegitimizing effect of proliferating ‘legal fictions’ that underscore the law’s distance from ‘real world’ structures and arrangements.

#### Politics DA

This is a good politics topic due to the unprecedented nature and size of the change being proposed by AFF advocates. Many AFFs will be pushed to use legislative actors to mitigate the link to spillover arguments, a dynamic which the NEG can counter using the politics DA.

#### Area NEG

Each area of the topic has strong NEG objections particular to the category of cases. Small AFFs can be linked to area-wide objections through stronger versions of the broad ‘spillover DA’ argument. Just a few examples include:

--[Medical Research DA](#_NEG---Medical_Research_DA) vs Animals and Partial/Potential Humans AFFs: this DA would argue that giving animals rights creates onerous requirements for their use in medical research, slowing medical and pharmaceutical innovation.

--[Economy DA](#_NEG---Econ_DA) vs Nature AFFs: this DA would argue that giving nature rights would result in extremely strict regulation of polluting activity, which would harm the economy.

--[Duties DA](#_NEG---Duties_of_Nature) vs Nature/Animal Rights AFFs: this DA argues that the creation of rights for animals or nature makes them subject to legal duties as well, which would be abused by companies seeking compensation for natural disasters.

--[Rights Creep DA](#_NEG---Rights_Creep_DA) vs AI AFFs: this DA argues that the creation of limited rights for AI will lead to spiraling rights assertions, preventing controls on AI that are necessary to stop it running out of control.

--Human Rights DA vs [Animals](#_NEG---Precedent_DA) / [Nature](#_NEG---Human_Rights_CP) AFFs: awarding rights to inanimate objects waters them down. This results in weaker human rights protection.

#### New Entity PIC / Nearest Person CP

This CP category is quite broad and diverse but will be the NEG’s most powerful weapon on the topic. It includes a variety of subgenres which compete because they impose rights and obligations on already existing persons, instead of creating new categories. These genres include:

--[Regulation](#_NEG---Animal_Welfare_CP) of [Existing](#_This_area_seems) Legal Persons: regulatory schemes can prescribe what existing legal persons must or are forbidden from doing. For example, regulations can ban abortion without establishing fetal personhood or ban mistreatment of animals without establishing animal rights.

--[Positive Rights](#_NEG---Human_Rights_CP_1) of Existing Legal Persons: rights expansions can force the government to take actions that solve the case. For example, instead of giving nature itself rights, many advocates propose strengthening the human right to a clean environment.

--[Changes to liability](#_NEG---Liability_Reform_CP): many AI liability proposals argue that AI itself must be made liable because designers cannot anticipate rogue AI behavior, which prevents damages awards under a negligence standard. NEGs can propose replacing the negligence standard with strict liability.

#### Personhood K

This is an *extremely* good K topic; possibly the best in recent memory. It is hard to name a philosophical tradition with nothing to say about the idea of personhood and its legal equivalent. Arguments range from legalism (securing rights through law is bad) to feminist critiques (it is bad to conceptualize personhood as something individuals possess in isolation from one another) to disability critiques (it is bad to justify expanding the circle of personhood through reference to able normative traits) to race and antiblackness critiques (arguments for inclusion in legal personhood mask the constitutive exclusion of blackness from personhood). This should provide ample options for any team concerned about their ability to keep up with complexity to develop a generic, yet tailored strategic option.

Uniquely to this topic, many K arguments are focused on the **mechanism of expanding legal personhood** and **expanding rights**. [This evidence](#_The_nature_component) highlights the unique focus of this literature base on the personhood mechanism. As a result, K arguments can serve as net benefits to some of the CP strategies described above. [Wolfe 2013](#_NEG---K---Juridical_Ks) in the Animals section is a fantastic specific example of this.

#### Area K

In addition to broad critiques of legal personhood, there are critiques of applying this concept to specific areas. For example, there are [critiques](#_NEG---K---Postcolonial_Critical_Ani) of promoting animal rights through assimilation into western legal categories, or [colonialism](#_NEG---K---SCT) critiques of ‘rights of nature.’

#### Personhood PIC (Optional)

Our proposed resolution does not allow [this CP](#_Personhood_PIC) to compete. We believe it is quite overpowered. However, against a resolution that requires the AFF to grant the status of legal personhood, NEGs can simply confer the AFF’s specified rights and obligations without conferring the status.

#### States CP (Optional)

Our proposed resolution uses a United States actor. The intention of this is to make [the states CP](#_States_CP) non-competitive. However, if a resolution is chosen that uses a federal actor, states can undertake a variety of the reforms proposed by the topic, with net benefits about federal courts or the federal agenda.

## Wording

### Wording---Top

#### Recommendation

*The United States should expand the range of non-human entities that have legal capacity to possess rights and/or incur obligations of legal personhood in the United States.*

Noteworthy details:

--‘Range of entities.’ This phrasing builds in uniqueness / limits out incremental adjustments to what rights something that is already a legal person can have. It would **exclude** things like making **more obligations of personhood attach to corporations**, or **giving corporations more rights**. It would force the AFF to **breach the firewall** described by the [Scherer 18](#_Ultimate_active_control) evidence that has thus far limited personhood to natural persons or organizations made up of natural persons.

--‘Legal capacity to possess rights and/or incur obligations.’ This phrasing comes from [here](#_‘Legal_Person’---Rez_Phrasing).

--‘Rights and/or obligations of legal personhood.’ This phrasing renders non-competitive CPs that grant rights without formally conferring legal personhood as a status. These are pretty much unbeatable (see the [personhood PIC](#_Personhood_PIC) in the NEG section). While their ‘avoids net benefit’ argument is tenuous because of the nearly identical action taken, the evidence is likely good enough to outweigh any solvency deficit.

#### This does not allow the AFF to evade ‘personhood bad’ DAs since it would still require ‘creating a new category of rightsholders.’ Doing so would still ‘entail great… costs’ even if it did not use the personhood label.

Berg 7 [Professor of Law and Bioethics, Case Western Reserve University Schools of Law and Medicine. B.A., Cornell University, i99o; J.D., 1994, Cornell University. "Of Elephants and Embryos: A Proposed Framework for Legal Personhood." https://www.fordham.edu/download/downloads/id/3307/natural\_law\_colloquium\_fall\_2015\_cle\_materials.pdf]

Before discussing categories of legal personhood, it is worth considering whether there is such a thing as "personhood" law in the first place.'" It could be that there are simply a number of different areas of law that define persons in different ways depending on the purpose of the law, but no cohesive "law of persons." The argument for this view may be similar to ones that have taken issue with new categorizations of specialty areas of law, such as Internet law. These arguments maintain that the issues arising out of technological developments break down into basic legal areas such as contract, tort, or criminal law, and there is no unifying theme that justifies a special label." It is certainly true that there is no express definition of "person" in the Constitution, nor has the Supreme Court proffered one." Moreover, different state and federal statutes define "person" differently, depending on their goal.'3 Focusing our attention on a personhood law as a whole, however, is a useful endeavor. It is likely to lead to greater clarity in a variety of areas of law (e.g., corporate law, animal law), as well as provide a framework under which we can consider the application of current laws to new developments, such as artificial intelligence.'4 As a result, conducting an in-depth evaluation of legal personhood is both necessary and useful.

Even if there is a coherent law of personhood, why focus on that as opposed to merely evaluating the issue in terms of legal rights, without the "personhood" label, or with a new "pseudo-person" label?'" First, our current system of laws is set up to focus exclusively on the rights of persons and not of other entities. 6 Persons have rights, duties, and obligations; things do not.'7 Although there have been challenges to this binary framework, 8 thus far the United States legal system has maintained the distinction. As a result, creating new legal categories to address the rights of entities along a moral continuum would entail great educational and other costs.'9 Second, as will be made clear by the arguments below, currently existing personhood categorizations are flexible enough to accommodate a variety of different levels of rights, and thus there is little need to create a new category of rights holders.

‘Of legal personhood’ serves the limiting function of requiring the rights and obligations conferred to be ones that are conventionally associated with legal personhood. There should not be a floor for which specific rights/obligations must be conferred, and this phrasing does not create one; see the ‘capable of legal relations’ evidence (which says any capacity for autonomous legal relations makes one a legal person) and the ‘cluster property’ evidence (which says no specific rights are required for personhood).

--‘In the United States.’ Many advocates, especially in the nature area, are about natural entities that have already been recognized as legal persons by other judicial systems. This makes clear that if an entity is not eligible for rights and obligations in the US, it is included in the topic.

The intent of this phrasing is NOT to limit the range of entities to ones that are in the United States---‘in the US’ modifies ‘rights and/or obligations,’ NOT ‘entities.’

#### Options for a list

Those concerned about the breadth of the topic may wish to add a list. We do not think the range of AFFs that can confer personhood and survive the very strong regs CP + moderately strong spillover DA is broad enough to justify this. Lists are clunky, inelegant, and exacerbate the T research burden. Nevertheless, if the committee were to choose this approach, here are some areas to consider:

Animals

Partially or potentially human biological entities

Future generations of humans

Nature

Organizations

Robots

#### Recommended list

If the TC recommends a list option, we suggest the following be included:

*The United States should expand the range of non-human entities that have legal capacity to possess rights and/or incur obligations of legal personhood in the United States to include representatives of one more of the following:*

*--Animals*

*--Nature*

*--Machines*

### Wording---Other Options

#### Binary

*The United States should expand the range of non-human entities classified as legal persons.*

This phrasing assumes legal person is a binary classification / status and may not permit the AFF to specify which rights / obligations in particular would be conferred by a personhood designation.

There are two fatal flaws with this wording. First, forcing the AFF to invoke personhood as a classification makes competitive the CP to bestow the rights and obligation without the status. This is the Personhood PIC in the NEG generics section. It is unanswerable by most AFFs. Second, it is unlikely that the vague wording would stop the AFF from attempting to specify particular rights and obligations in the 1AC; all that would be achieved with this option is encouraging plan vagueness.

For these reasons we do not recommend this option.

#### Incidents of Legal Personhood

*The United States should expand non-human entity eligibility for incidents of legal personhood.*

This is the broadest phrasing. The term ‘incidents of legal personhood’ comes from Kurki 19, Because it does not require expanding eligibility to new entities, it allows granting new rights or obligations to entities that already have legal personhood status. This would let the organizational law area back into the topic, creating uniqueness problems and making the topic much larger. We do not recommend this wording.

#### Nature + AI Only

*The United States should expand the range of non-human entities that have legal capacity to possess rights and/or incur obligations of legal personhood in the United States to include non-human nature and/or non-human machines.*

Jasmine Stidham mentioned a far more limited list as a potentially viable option for controlling the topic’s size. Her suggestion was to include nature only. Our inclination is that this is too small/homogenous to sustain a year of debates. AI + nature may offer a way to limit fringe chaos while including much of the core debate.

#### Other descriptive phrases

The intent of our proposed phrasing – “have legal capacity to possess rights and/or incur obligations” – is to describe legal personhood without using the term and unlocking NEG access to CPs that take the equivalent action without using the term.

Several other phrases can be used in its place:

*The United States should expand the range of non-human entities treated as autonomous centers of legal relations in the United States.*

(Negri 21)

*The United States should expand the range of non-human entities able to undertake acts that produce legal effects in the United States.*

(Ricci 19)

*The United States should expand the range of non-human entities able to sue and be sued in the United States.*

(LII ND)

### Wording---Other Notable Issues

#### ‘Class of entities’

The United States should confer upon a class of entities eligibility for rights and/or obligations of legal personhood.

This phrase can be substituted in for ‘entities’ in a variety of other wordings. Its goal would be to limit out AFFs that only confer personhood to a specific entity (one AI, one corporation, etc) rather than a class of entities. This makes the resolution clunkier, however, and the common law nature of personhood designations means that limiting the AFF to only one entity does not meaningfully affect NEG ground. If these restrictions turned out to be less effective, however, a ‘class’ phrasing could be one potential remedy.

#### United States

We feel strongly that the topic should say United States, not USFG.

There is a states CP debate on this topic but it is pretty peripheral to the main controversy and as far as we can tell essentially fatal to the corporate law area, since corporate identity is defined almost exclusively via state law (as you might have discovered from the quo warranto CP on the antitrust topic). Rights of nature has the best preemption answers. Robots has uniformity / patchwork-type stuff that in practice usually gets nuked by uniform fiat, but maybe specific examples fare better.

It might be worth rolling the dice on this if NEG ground was agent specific. However, it is mostly not. Any AFF that claims a real advantage will make spillover/modeling arguments that any NEG can impact turn regardless of actor.

## AT: Other Concerns

Here are some of our preemptive thoughts about concerns presented during drafting.

#### AT: ‘This is weird’

1. Feature, not bug.

No question---this topic has potential to be a bit of a chaos muppet. If you are looking to rehash the same assurance debate for the tenth time this is not the topic for you.

That said… topics that require learning something totally new and going out of your comfort zone are good. Think about when you are having fun doing debate prep. It is probably not when you are Googling the same five terms to dig out your politics DA or the newest War on the Rocks take about Taiwan. It is probably when you learned something new or you ventured into an area not knowing what the AFF or NEG was going to be, but discovered something anyway.

This topic likely contains many debates you have never thought about. It did for many of the contributors. Variety is the spice of life.

2. The weirdness varies.

Even if some parts of this topic get quite weird and deep, others are extremely accessible. River rights is one where debaters of any skill level can find value in engaging. It is deep, but plays on relatively straightforward themes. It was used successfully by many younger labs as an easy springboard into the water topic. It’s a ‘flex AFF,’ defensible both from the left and the right. If a team wishes to circumvent the weirdness, there are easy options to achieve this.

#### AT: ‘We just debated something huge and complicated… can we please just have a small / meat and potatoes topic’

1. Even at its biggest and most complex, this topic is far smaller and more accessible than antitrust.

Antitrust was economy-wide. It was based on common-law principles and statutes over a hundred years in the making. Each rule of reason case made you go back to school on complex economics. You could rabbit hole on subsets of subsets of sectors for weeks and feel like you haven’t made a dent.

This topic is not like that. There is NO law in most of these areas. There are not really existing precedents to master---only a broad framework for understanding how the status of personhood impacts standing, rights, and obligations. This can be learned once. Even though there is variance across areas, it is variance in how these principles are applied, not really in the principles themselves.

2. Forced simplicity is bad; the reliable option to simplify is good.

Meat and potatoes debates can be awesome, but when the topic’s wording or focus compels them, that is a sign that the controversy is superficial and unlikely to sustain a year of debates.

A better path is to allow the AFF to create complexity while giving the NEG tools to manage it. This topic has that in spades. The K is quite good. The ‘Nearest Person’ CP is a generic theme that centrally challenges most AFFs and can be coupled with the strong spillover or court clog DAs. This grants the NEG reprieve from the arms race while giving debaters who would like to accept the AFF’s invitation down the rabbit hole the option to do so. This set of options is strong enough that, if anything, it is the AFF that is disadvantaged.

#### AT: ‘Personhood K is overpowered’

1. It’s not; the topic just squarely presents the question. That’s good for everyone!

It is true that the AFF mechanism is something that K NEG can speak to very specifically. It is also true that the NEG Ks of the AFF mechanism are answered specifically by the AFF literature. If you do not really know how to do K research this topic sets the barrier to entry at the floor. If you do know how to do K research on either side, there is potential for growth in argument sophistication with no ceiling or skill cap.

These are obviously good things. If you are proceeding from the premise that specific clash is good and depth of research is desirable, this is a topic that strongly encourages both of these qualities in K debates.

This is a legal rotation; you are not going to escape debating about legalism or colonialism or the antiblackness of the law. It is better for everyone when the debate being had is literature-based instead of contrived.

#### AT: ‘Personhood PIC is overpowered’

1. The TC should ensure that the overpowered version of this CP is not competitive.

There is a ‘Personhood PIC’ that competes by conferring all the rights and obligations associated with personhood without conferring the status of personhood. This is the evidence set under Personhood PIC / Confer Rights CP in the NEG section. It is basically unbeatable.

For this reason the topic wording should not require the AFF to confer the status of personhood, instead allowing the AFF to merely confer rights and obligations onto entities which, due to their status as non-persons, cannot currently receive them.

#### AT: ‘We rejected the 2013-14 federal definitions paper’

1. A lot has changed in nearly a decade

You will notice that most cards in the literature section are very recent. This is because, with the exception of the animal rights and nature areas, arguments for expanding personhood categories are a response to newly evolving technologies that were not being considered by the mainstream in 2013. This is especially true of the biotech and AI areas.

This is not to say the area lacks a scholarly pedigree. The seminal works for two of the areas are older than one might expect:

For nature/animals:

Christopher D. Stone 72, Thomas McCarthy Trustee Chair in Law at the University of Southern California School of Law, “Should Trees Have Standing?: Law, Morality, and the Environment,” Oxford University Press, 1972, Google Books

For AI:

Lawrence B. Slocum 92, Professor of Law and William M. Rains Fellow, Loyola Law School, Loyola Marymount University. B.A. 1981, University of California at Los Angeles; J.D: 1984, Harvard Law School, “Legal Personhood for Artificial Intelligences,” 70 N.C. L. Rev. 1231, <http://scholarship.law.unc.edu/nclr/vol70/iss4/4>

…to say nothing of the indigenous and sci-fi traditions on whose foundations these scholars build.

2. Subset + Bidirectionality

That paper nominated personhood as one of several terms whose definition needed to be ‘changed’ by a topical plan. The bidirectionality of this mechanism was viewed as necessary because meaningful debate about personhood in 2013 had to include corporate personhood. Because of the degree to which other areas have developed, neither bidirectionality nor including corporate personhood are needed for a robust topic.

# Wording Evidence

## Legal Person

### ‘Legal Person’---Rez Phrasing

#### Legal personhood is the capacity to possess rights and incur obligations.

Dalton Powell 20, Duke University School of Law, J.D and LL.M. in Law & Entrepreneurship expected, May 2020; Truman State University, B.S., May 2017, “Autonomous Systems as Legal Agents: Directly By the Recognition of Personhood or Indirectly By the Alchemy of Algorithmic Entities,” 18 Duke L. & Tech. Rev. 306, WestLaw

I. RESTATEMENT (THIRD) OF AGENCY: DEFINITION OF PERSONHOOD

Fortunately, the Restatement (Third) of Agency has provided a definition of person11 and extensive commentary to support this definition.12 For the purposes of agency, a person is (1) an individual, (2) an organization that “has legal capacity to possess rights and incur obligations,” (3) a governmental entity, or (4) any other entity that “has legal capacity to possess rights and incur obligations.”13 The guiding principle underlying each of these categories of person is the “capacity to be the holder of legal rights and the object of legal duties.”14

Capacity to be the holder of legal rights and the object of legal duties is clarified by references to the Restatement (Third) of Agency sections outlining the capacity to serve as a principal or agent.15 In defining legally recognized persons' capacity as principals, the Restatement differentiates between individuals and non-individuals.16 The “law applicable” to non-individuals governs the capacity of non-individuals.17 The legal capacity of persons who are entities, like corporations, is governed by “the legal regime by virtue of which such \*310 person exists ... and functions.”18 For example, a Delaware corporation's capacity as principal would be determined by the Delaware corporate law that enabled the corporation's creation. The Restatement also differentiates between individuals and non-individuals in determining whether actors have capacity as an agent.19 Non-individuals' ability to act as an agent depends on “the law through which the agent has legal personality.”20 Like the prior example in the context of a principal, a Delaware corporation's capacity as an agent would be determined by the Delaware corporate law.

This quality of capacity to hold rights and be subject to duties distinguishes legally recognized persons--whether individuals or non-individuals--from purely organizational entities and mere legally consequential instrumentalities.21 Because characterization as purely organizational entities or mere legally consequential instrumentalities precludes personhood, such a characterization also precludes the ability to act as an agent or principal. Purely organizational entities are entities, like trusts or estates, that cannot be “directly the object of liabilities and the holder of rights.”22 Animals or inanimate objects are prototypical examples of merely consequential instrumentalities that a person uses to alter his, her, or its own legal rights and obligations.23

Characterization as a merely consequential instrumentality is the more significant possible limitation on personhood than characterization as a purely organizational entity.24 The reporter's note cites a case in which dogs are characterized as instrumentalities when used as a dangerous weapon for purposes of an armed-robbery statute.25 Another case describes dogs as non-persons who are thus unable to be subject to suit.26 The cases summarized in the notes generally deny sentient animals the possibility of personhood even while recognizing that animals are \*311 complex beings with independent purposes, desires, and aversions.27 The Restatement's approach sets some threshold level of autonomy that separates persons from “inanimate objects or a nonhuman animal.”28

The Restatement also clearly states that “a computer program is not capable of acting as a principal or an agent.”29 The Restatement supports the general statement that computers are incapable of being an agent with a quote that computer programs are not juridical persons.30 The Restatement and the cited article both reference electronic agents, computer programs without independent volition and designed as tools for their users, as a key example of why computers cannot be agents.31 The Restatement classifies computer programs as “instrumentalities of the persons who use them.”32 Despite the clear initial statement of the incapability of personhood and classification of computer programs as instrumentalities, subsequent discussion of computer programs cracks the door for the future personhood of computer programs by qualifying the instrumentality classification to computer programs available “[a]t present.”33

### ‘Legal Person’---Legal Relations

#### It is an entity treated as a person for legal purposes

LII ND, “Legal Person,” https://www.law.cornell.edu/wex/legal\_person#:~:text=Overview,property%2C%20and%20enter%20into%20contracts.

Overview

Legal person refers to a human or non-human entity that is treated as a person for limited legal purposes.

Typically, a legal persons can sue and be sued, own property, and enter into contracts.

Business Law

"Legal person" is used frequently within the field of business law.

Laws dealing with business organizations (i.e. corporations, partnerships, limited liability companies, etc.) often use the term "legal person," so that the laws apply to humans, as well as non-human business entities.

Election Law

"Legal person" has relevance in election law as well. In Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), the Supreme Court upheld legal personhood for corporations which want to contribute to political campaigns.

#### It is the state of being an autonomous center of legal relations

Sergio M. C. Avila Negri 21, Department of Private Law, Federal University of Juiz de Fora, “Robot as Legal Person: Electronic Personhood in Robotics and Artificial Intelligence,” Frontiers in Robotics and AI, vol. 8, 12/23/2021, p. 789327

In the verbalized legal world, the term “legal person” refers to an autonomous centre of legal relations. The ascription of legal personhood is based on the assumptions that all legal relations take place among natural person and artificial legal person, such as corporations. Following that, the term natural person refers to a human being. By contrast, the term “legal person” or “legal entity” will be often used in this paper when referring to the artificial legal person.

#### ‘Legal personhood’ merely entails the ability to sue and be sued. Other qualities like having rights and responsibilities are peripheral.

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

A. What Is Legal Personhood?

The concept of personality is fundamental to the conception of law in common-law jurisdictions. Our legal system does not care much about nonpersons, except to the extent that they affect the legal rights and responsibilities of persons. Natural persons--that is, human beings--are the quintessential examples of legal persons. Indeed, Black's Law Dictionary defines “law” in its broadest sense as “[t]he regime that orders human activities and relations.”1 But while natural persons are the most familiar example of legal persons, and the ones endowed with the broadest range of legal rights and responsibilities, various forms of legal personhood have also been extended to other entities, most notably corporations and other business organizations.

The defining feature of legal persons is the ability to participate in the legal system by having the capacity to sue and be sued. Black Law Dictionary specifically \*261 cites this ability to sue and be sued as the defining quality of a “legal entity,” the catch-all term for legal persons who are not human beings.2 Absent the ability to sue and be sued, an entity is not a legal entity and therefore is not a person in the eyes of the law.3 And because such an entity is not a person, it is unable to own properly, create an enforceable contract, or engage in any other act that entails (or could entail) access to the legal system. As a New York court once explained in a case involving a dissolved corporation:

Every action must have parties competent to sue and be sued, and for and against whom a judgment may be rendered. The very existence of a cause of action implies that there is some one entitled to sue and some one who may lawfully be sued, and consequently an action cannot be maintained if there is lacking either the former or the latter .... A civil action can be maintained only in the name of a person in law, an entity, which the law of the forum can recognize as capable of possessing and asserting a right of action .... Thus the rule has been formulated that “in all civil actions the prime requisite as to parties is that the plaintiff ... must ... be either a natural or artificial person”; and that an action cannot be maintained in the name of a plaintiff who is not a natural or artificial person having legal entity to sue or be used.4

Corporations are the most familiar class of artificial legal entities. Like natural persons, a corporation has the right to enter into contracts, own and dispose of assets, and file lawsuits, all in its own name.5 The other defining feature of the corporation is limited liability, which ensures that the owners of a corporation only stand to lose the amount of money, or capital, that they have invested in the corporation if it goes under.6 Together, these features give a corporation a legal existence that is largely separate from its creators and owners.

The underlying theory of corporate personhood is based on economic and (supposedly) social utility. Corporations were granted contract and properly rights to encourage investment, reduce transaction costs, and facilitate large financial and properly transactions,7 all of which are made easier by treating a corporation as an entity legally separate from its owners. Over time, corporations have accreted additional rights and responsibilities, which legal systems have recognized to promote other economic and social goals. Great controversy often surrounds the extension of additional legal rights to corporations, as exemplified \*262 by the polarized reactions to the Supreme Court's Citizens United decision.8

#### Here are some examples of what comes along with the capacity to be sued.

Sergio Alberto Gramitto Ricci 19, Lecturer, Department of Business Law and Taxation, Monash Business School, “Archeology, Language, and Nature of Business Corporations,” 89 Miss. L.J. 43, 2019, WestLaw

E. Corporate Legal Capacities

The Romans granted “corporate” legal capacities to nonhuman entities when the object pursued by a group of persons could not be achieved without turning this group of persons into a subject bearing rights and duties.49 Typical cases requiring the creation of an entity included, for instance, capital-intensive enterprises, geographically spread-out businesses, and projects whose completion would take multiple human lifespans. In other words, any projects requiring asset lock-in, centralized management, capacity to survive the death or will of transient constituencies, and ability to aggregate sufficient assets. Roman “corporate legal capacities” were functionally necessary for achieving objectives of the state, and the Roman corporate formula saw these nonhuman legal entities afforded legal capacity in the following ways: capacity of action, judicial capacity, proprietary capacity, and tortious capacity.50

Capacity of action is the ability to undertake acts that produce legal effects.51 Universitates acted through delegates. For example, towns acted through their functionaries or special delegates: actores, curatores, and syndici. Through these \*56 delegates, universitates could also exercise their judicial capacity, which was the ability to stand in court, sue, and be sued.52

Proprietary capacity is the ability to own assets and bear rights, duties, and liabilities in one's own name.53 The Romans carefully distinguished the property of nonhuman legal entities from that of individuals: the proprietary rights of a town were separate from those of the citizens and vice versa. Thus, citizens did not enjoy any rights--not even pro quota--over the assets of the town, and vice versa.54

Tortious capacity is connected to both proprietary capacity and capacity of action. Tortious (or delictual) capacity is the capacity to commit torts and potentially incur consequential liabilities.55 In a manner that might seem familiar to contemporary corporate lawyers, liabilities that originated from any torts committed by a universitas did not extend to individuals who comprised, or participated in, the universitas.

### ‘Legal Person’---Legal Relations---What About In Rem Jurisdiction?

#### Tl;dr this is a CP

#### In rem means ‘with regards to an object.’ It determines the rights of a plaintiff with respect to a thing. This kind of jurisdiction comes with narrow remedies---for example, affording a plaintiff ownership over the AI---that are much more limited than what would be required by the topic. Instead of rights OVER the AI, the topic would require the AI itself to have the rights or obligations.

Yvette Joy Liebesman & Julie Cromer Young 20, Liebesman is Professor of Law, Saint Louis University School of Law; Young is Visiting Professor of Practice, American University Washington College of Law, “Litigating Against the Artificially Intelligent Infringer,” 14 FIU L. Rev. 259, 2020, WestLaw

Establishing personal jurisdiction over AI as a defendant also requires a determination of whether we deem AI to be a “property.” There are three basic types of personal jurisdiction: in personam, in rem, and quasi in rem.30 Deeming AI to be property allows courts to exercise jurisdiction in rem, determining the rights and liabilities of the world with respect to that property.31 However, a copyright infringement case does not act like a pure \*265 in rem action; at the end of the day, the plaintiff has no wish to determine rights over the AI, she merely wants to protect her authored work. A more suitable approach might be a quasi in rem approach, which allows a court in which the AI is located to attach the AI to the lawsuit, and still consider the liability particular to the copyright infringement action.32 However, because the remedy afforded the plaintiff in a quasi in rem action is limited to the value of the property attached--here, the AI--this may be a less attractive alternative for copyright plaintiffs, who in some instances may be entitled to statutory damages for infringement.33

This leaves in personam jurisdiction, which determines the rights and liabilities of an individual defendant (as opposed to property).34 In personam jurisdiction is dependent upon residence (general in personam jurisdiction) or the location of the cause of action (specific in personam jurisdiction). General in personam jurisdiction is determined by the domicile of the defendant,35 which begs the question: Where does an AI reside? There is the possibility that the AI's program is stored on a remote server,36 such as via Amazon Web Services.37 Indeed, some of these servers store the same program remotely on different servers, to prevent the loss of one server from \*266 affecting the data stored on it.38 It would have to be determined whether the location of the server is the location of the AI's residence, or if there is another location where the AI resides, sufficient to confer state citizenship upon it.39

### ‘Legal Person’---Holding Rights / Duties

#### It means autonomous existence, capability to bear rights, and possession of an array of rights and duties. It has to be bestowed by the state. It does not have to be the same rights as an organization’s human components, nor their aggregate.

Sergio Alberto Gramitto Ricci 19, Lecturer, Department of Business Law and Taxation, Monash Business School, “Archeology, Language, and Nature of Business Corporations,” 89 Miss. L.J. 43, 2019, WestLaw

F. The Past and the Present of Legal Personality

We typically refer to corporations as “legal persons” because state action is necessary to give them birth and make them subjects bearing rights, liberties, and duties. This lexicon implicitly places emphasis on the role of the state and aims to differentiate legal persons from natural persons, who do not need the state in order to come to light. Moreover, a legal person's legal capacity is commonly referred to as “legal personality” or “legal personhood.”56 Because the state determines what legal capacities are provided to legal persons, legal personality is not a formula \*57 that attributes to nonhuman legal entities the same rights, powers, liberties, and duties that characterize a human being. Legal personhood and legal personality are linguistic symbols, whose normative power depends on the arrays of rights and duties that a state grants to nonhuman legal entities. Similarly, the term legal person is a linguistic symbol that indicates a nonhuman legal entity with legal capacity, in which the extension of its legal capacity depends on what rights and duties a state attaches to such legal entity.

Legal personality and legal persons should not be interpreted as artificial “persons” or “personalities” that reflect morals, ethics, rights, and duties typical of human beings. Legal personality is a linguistic symbol that indicates the characteristics of a legal person: autonomous existence, capability to bear rights and duties, and possession of an array of rights and duties.

The term “legal personhood” was coined relatively late. A great deal of credit is owed to Thomas Hobbes for the diffusion of current discourse into concepts such as “legal personality” or “things personated.”57 Such linguistic symbols raise a number of interpretative issues, mostly related to the appropriation of the concept of persona. There is often confusion in the contemporary debate over political rights and civil liberties for corporations, as the term “person” may seem to suggest that corporations possess some sort of human dimension. Such a misunderstanding, however, is inconsistent with both the origins of corporations and the precise lexical distinctions originally made by those who invented corporations, the Romans.

Two ideas have contributed significantly to the misconception of corporations as persons: first, the use of “legal person” as a semantic symbol; and second, the illusion that when a multitude of human beings are turned into one autonomous subject, this subject ought to derive rights and duties from the humans participating in the juridical subject.58 In Hobby Lobby, the Supreme Court seemed to be charmed by this “aggregate theory”--which understands corporations as an aggregation of human beings--when it declared that a legal person “is simply a \*58 form of organization used by human beings to achieve desired ends.”59

However, raising corporations to the level of human beings simply because they are the product of aggregations of human beings fails to consider two critical elements. First, the aggregated subjects have heterogeneous components that are not necessarily human. In fact, many of the participants in a corporation are legal persons themselves; this is evident when we look at the aggregation of shareholders in business corporations. Second, when Hobbes used the word “person” in the acclaimed Leviathan, he was referring to the agent acting on behalf of “inanimate things” in order to endow them with legal capacity. Hobbes explained that “inanimate things” (such as a town, for example) become “things personated” through reliance upon the authority and legal capacity of a legally capable agent who acts as the human “mask” (“persona”) of nonhuman entities.60

Drawing on the etymology of the Latin word “persona” (“mask”), Hobbes suggested that “inanimate things” obtain legal capacity by virtue of the authority of the agent. Thus, the Hobbesian scheme of legal capacity for nonhuman entities does not stem from a delegation of authority from a principal to an agent, but rather from the transferal of the agent's legal capacity to the otherwise incapable nonhuman principal. Simply put, Hobbes constructed legal personhood for “inanimate things” on the transferal of the human attributes of the agent to the nonhuman principal. The original use of the terms “legal persons” and “legal personality” referred to the human nature of the agent who then could represent inanimate things. It did not mean that nonhuman legal entities were legal persons because they were “composed” of aggregated human beings. Nor did it mean that they were legal persons simply because they received an array of rights identical to those enjoyed by natural persons.

Ultimately, modern corporations--just like Roman universitates--do not have rights and duties that preexist political \*59 action. Legal capacity for nonhuman legal entities exists exclusively as the product of a state's creation and concession of rights and duties. A corporation's mere existence and ability to bear rights and duties necessarily depends on political action.61 Moreover, because corporations do not possess human nature, they do not enjoy the rights and liberties provided by natural law--or, as the Romans called it, Ius Naturale.62

G. Separation from Individuals

Legal persons receive rights and duties as well as the capacity to interact with natural persons and other legal entities in the legal domain from the state, not from individuals.63 A legal person's rights and duties are distinct from those of individuals and other legal persons that have an interest in them.64

The Romans specified that individuals have no property rights over a nonhuman, legal entity's assets and that individuals cannot be held liable for a nonhuman, legal entity's liabilities and vice versa.65 Legal scholars refer to this fundamental principle of corporate law as “asset partitioning.”66 Yet, asset partitioning is just a byproduct of a nonhuman legal entity's separateness from individuals. All duties and rights--not only property rights over assets--of a legal person are distinct and separate from those of individuals.

Ultimately, a legal person's separateness can be explained through the formative mechanics of legal personhood. The state grants legal capacity to nonhuman entities and determines which rights and duties they have. The rights of human beings who comprise a nonhuman legal entity do not permeate into the legal subjectivity of the entity existing as a legal person. In other words, legal personhood is not a mechanism that aggregates the rights \*60 and duties of individuals through the formation of a new entity.67 It follows that individuals cannot multiply their rights and exercise them twice-- that is, an individual cannot exercise their rights on a personal level and then again on a legal entity level. Furthermore, the human nature of individuals in no way affects the legal capacities of nonhuman legal entities, legal persons.

Legal personhood is the regula juris through which a state creates new, separate subjects capable of acting in the legal domain, and it bestows rights and duties upon them. Philosophically speaking, legal persons are characterized by a form of otherness from the individuals participating in them. This form of otherness translates into the corporate separateness that plays a pivotal role in corporate law.

#### It doesn’t have to be fully equivalent to people and can consist only of obligations.

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

Full-fledged legal personality for AIs equivalent to that afforded to natural persons, with all the legal rights that natural persons enjoy, would clearly be inappropriate. To take a banal example, allowing AI to vote would undermine democracy, given the ease with which anyone looking to determine the outcome of an election could create AIs to vote for a particular candidate.221 However, legal personality comes in many flavors, even for natural persons such as children who lack certain rights and obligations enjoyed by adults. Crucially, no artificial person enjoys all of the same rights and obligations as a natural person.222 The best-known class of artificial persons, corporations, have long enjoyed only a limited set of rights and obligations that allows them to sue and be sued, enter contracts, incur debt, own property, and be convicted of crimes.223 However, they do not receive protection under constitutional provisions, such as the Fourteenth Amendment's Equal Protection \*377 Clause, and they cannot bear arms, run for or hold public office, marry, or enjoy other fundamental rights that natural persons do.224 Thus, granting legal personality to AI to allow it to be punished would not require AI to receive the rights afforded to natural persons, or even those afforded to corporations. AI legal personality could consist solely of obligations.

#### It is the condition of having the rights and responsibilities of natural persons

Nina Strohminger & Matthew R. Jordan 22, Department of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania, “Corporate Insecthood,” Cognition, vol. 224, 07/01/2022, p. 105068

Though these studies are suggestive, none of them have examined folk judgments of corporate personhood directly. We are given little sense of how these whiffs of personhood stack up against other entities: How does Google's personhood compare with a fetus, a robot, a tree? Nor do we have much sense of whether there is variance in perceived personhood across corporations (is Google more of a person than Pfizer?), and what might determine this variance. Perhaps most significantly, we know nothing of whether anthropomorphic personhood impacts willingness to grant rights and responsibilities to corporations—that is, legal personhood. (Following jurisprudential convention, we will use the term “legal personhood” to refer to the condition of having the rights and responsibilities of natural persons.)

#### It requires a variety of attributes, like free will. This determines capacity to possess rights and obligations and allows the legal system to give the entity’s actions legal effect.

Elvia Arcelia Quintana Adriano 15, J. D. degree awarded by the National Autonomous University of Mexico and Regular professor in Commercial Law, Economic Law, “Natural Persons, Juridical Persons and Legal Personhood,” Mexican Law Review, vol. 8, Elsevier, 07/01/2015, pp. 101–118

IX. Conclusions

A legal entity is a legal construct, created by the combination of five elements: an entity or subject of law, free will, subjective rights, obligations, and legal personhood.

As a practical matter, the juridical person distinguishes itself through the recognition of its legal personhood, which allows it to acquire certain rights and be subject to certain obligations. As such, the actions of a legal entity demonstrate its will.

In addition to identifying the holder of rights and obligations, legal person hood helps ensure that actions realized by the business entity have legal effect.

The factual situation that gives an identity to the juridical person and the relevant legal regime's recognition of it are what gives the juridical person its legal personhood, which is a factor that distinguishes it from other subjects that also possess free will and are capable of exercising rights and fulfilling obligations.

Having set forth arguments in support of this thesis, we can state that the focus of this study does not form part of the physical person. Therefore, it can be applied to juridical persons, which are fictional entities in the real world but very real ones in the world of law.

Indeed, legal entities have five elements:

First, they must have the ability to possess rights.

Second, they must have free will pursuant to that set forth in its articles of incorporation.

The third and fourth elements, which are related to its subjective rights and obligations, exist within a corporation because it has will. However, there are cases in which express authority is necessary to create rights and obligations, due to conduct and circumstances that establish authority without the volitional aspect.

Based on the ideas above, we can confirm that legal personhood is a creation of law, whose role is to identify the subjects of certain rights and obligations, and grant legitimacy to actions realized pursuant to those rights and obligations.

The fifth element of legal personhood, on the other hand, encompasses several elements. One of these is a factual situation identifying it and that occurs when it adopts one of the types of business associations provided for in the General Law of Business Corporations. In addition, upon recognizing these types of business associations we find another aspect of legal personhood; namely the law's recognition of the legal entity's separate identity.

In sum, we can conclude that the legal entity can be defined as follows: A juridical person is an abstract subject created under law and having free will, rights, obligations, and legal personhood, which give it a separate identity within legal relationships and make it a generator of economic, financial, and commercial obligations.

Personhood is the individualization of the legal entity through a factual situation in which it finds itself overseen by a legal rule that allows one to distinguish it from other entities in the business law relationships within the area of law in which the matter unfolds.

### ‘Legal Person’---Individuation

#### An important element of personhood is individuation. Legal personhood status must allow legally distinguishing between like members of a class.

Elvia Arcelia Quintana Adriano 15, J. D. degree awarded by the National Autonomous University of Mexico and Regular professor in Commercial Law, Economic Law, “Natural Persons, Juridical Persons and Legal Personhood,” Mexican Law Review, vol. 8, Elsevier, 07/01/2015, pp. 101–118

In sum, we can conclude that the legal entity can be defined as follows: A juridical person is an abstract subject created under law and having free will, rights, obligations, and legal personhood, which give it a separate identity within legal relationships and make it a generator of economic, financial, and commercial obligations.

Personhood is the individualization of the legal entity through a factual situation in which it finds itself overseen by a legal rule that allows one to distinguish it from other entities in the business law relationships within the area of law in which the matter unfolds.

### ‘Legal Person’--- =/= Natural Person

#### Does not imply being a literal person

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

Justice brought a negligence per se160 claim based on Oregon’s anti-cruelty statute.161 This claim integrated two longstanding criminal law principles: “ﬁrst, that animals are properly considered the victims of animal cruelty crimes and second, that victims of crimes have a right to sue their abusers in civil court for damages for injuries caused by the defendant.”162 Oregon law recognizes sentient beings as victims of a crime.163 The argument is that Justice, although not a person, has a right to legal personhood. Legal “personhood” does not require one to be human. For example, corporations, ships, and rivers in India and New Zealand have been granted legal personhood.164 Similar to legal personhood protection for these entities, assigning legal personhood to animals would merely require that someone be appointed to advocate for their interests and to vindicate the rights the law recognizes for the animals, which may mean a minimum standard of care and protection in this instance.165

#### It has nothing to do with whether you are human or with any biological attribute

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

The term “person” is not exclusively reserved for human beings.116 The current and historical recognition of animals is as “rightless legal things.”117 However, the New York Supreme Court Appellate Division, Fourth Department, recently held in People v. Graves that “it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals.”118 The court further stated that “personhood is ‘not a question of biological or natural’ correspondence.”119 NhRP also attached expert scientiﬁc afﬁdavits to the petition. The report by Joyce Poole provides:

Elephants have evolved to move. Holding them captive and conﬁned prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior. Held in isolation elephants become bored, depressed, aggressive, cata- tonic and fail to thrive. Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants.120

### ‘Legal Person’--- = Legal Personality

#### Same as legal personality

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

In recent years, momentum has been building in the Australian civil society community to achieve greater protection of the GBR so that one of the country’s greatest assets is not lost. One such effort has been the push to have the GBR granted legal personhood.239 [FOOTNOTE 239 BEGINS] 239 Legal personhood is referred to as “legal personality” in Australia; however, these terms are interchangeable. [FOOTNOTE 239 ENDS] Current environmental law in Australia is based on principles of short-term economic gain rather than long-term sustainability.240 Where legisla- tion establishes restrictions on potentially detrimental impacts to the World Heritage value of the GBR, it also carves out exceptions to this protection, enabling harm of any magnitude to be approved by the relevant minister.241

### ‘Legal Person’---Excludes Dead / Defunct

#### Legal persons cannot be dead or defunct.

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

One additional observation relevant to assessments of the potential scope of artificial personhood is that a person or entity must be in active existence to have legal personality. Dead or fictitious persons and defunct entities cannot file a lawsuit, nor can anyone file suit on their behalf:

The capacity to sue exists only in persons in being, and not in those who are dead or who have not yet been born, and so cannot be brought before the court. Thus a proceeding cannot be brought in the name of a deceased plaintiff; such a proceeding is a nullity. Thus, where an association has no corporate existence either de jure or de facto, ... it cannot do any act whatever as a legal entity. It cannot take title to real or to personal property, convey real property, maintain proceedings to condemn land, acquire rights by contract or otherwise, or incur debts or other liabilities, either in contract or in tort, unless by operation of an estoppel; nor can it sue or be sued .... The dissolution of a corporation implies its utter extinction and obliteration as a body capable of suing or being sued, or in whose favor obligations exist or upon which liabilities are imposed.9

A dissolved entity thus may have some residual legal existence for the purpose of winding up its affairs, but that is all. It would not have standing to sue to vindicate rights the entity might have had when it still was in active existence.

### ‘Legal Person’---Cluster Property / Incidents

#### Legal personhood is a ‘cluster property’ which broadly refers to being treated as a legal person by the prevailing legal system. It implies that the entity being designated a person bears certain legal rights and obligations.

Visa A.J. Kurki 19, Academy of Finland Postdoctoral Fellow at the Law Faculty of the University of Helsinki, received his PhD in 2017 from the University of Cambridge, has published on legal personhood, rights theory, and animal law, is also vice president of the Finnish Society for Legal Philosophy, “The Incidents of Legal Personhood,” A Theory of Legal Personhood, Oxford University Press, 08/08/2019, pp. 91–126 DOI.org (Crossref), doi:10.1093/oso/9780198844037.003.0004

How can a theory best account for these beliefs? I should first mention one thing Legalists got right: legal personhood is not an intrinsic attribute of an entity; rather, a necessary condition for the legal personhood of any entity is that that entity is treated as a legal person by the prevailing legal system. Whether or not X is a legal person is thus an institutional fact. Claiming otherwise would imply that one’s legal personhood cannot be changed by legal norms and decisions, and such an account would be unable to explain phenomena such as slavery and corporations, which clearly have to do with legal decisions: slaves can be freed and corporations founded and dissolved. The labels ‘natural person’ and ‘artificial person’ can in this regard be misleading because—as Neil MacCormick puts it—‘[t]he so-called “natural person” is in its legal personhood necessarily as juristic as the so called “juristic” person’.3 Natural personhood as a legal category depends on legal decisions just as much as artificial personhood.

There are of course conceivable ways of using the phrase ‘legal person’ that would not make reference to a legal status. A Kantian theorist could employ ‘legal person’ to refer to a being that possesses Kantian moral personhood as well as the cognitive and linguistic capacities in order to be able exercise his, her, or its rights legally. ‘Legal person’ can also plausibly refer to the idea of human beings presupposed by the law or by a branch of law, as in the phrase ‘criminal law’s person’.4 One could in this context criticize the law for, say, having too rational an understanding of human beings. I am not saying such usages are wrong, but if we wish to understand the legal (p.93) institutions of slavery and corporate personhood, or if we wish to grasp what the Nonhuman Rights Project is demanding, we must treat legal personhood as a status that can be bestowed and taken away by the legal system.

However, Legalists have provided simplistic accounts of the institutional nature of legal personhood. X’s legal personhood cannot be said to depend on any single characteristic; legal personhood is rather a cluster property. This central feature of the Bundle Theory will be addressed next.

Legal Personhood as a Cluster Property

Describing legal personhood as a cluster property is, in fact, rather popular. This description is used by Ngaire Naffine and Richard Tur, among others.5 However, these accounts typically rely on a nonstandard understanding of what a cluster property is. Naffine writes:

[L]egal personality is made up of a cluster of things: specifically, it comprises single or multiple clusters of rights and/or duties, depending on the nature and purpose of a particular legal relation. Rights and duties [ … ] can come in thick and thin bundles, in larger and smaller clusters, which means that we are actually different legal persons in different legal contexts.6

What Naffine means by ‘contexts’ here is for instance that foetuses hold fewer rights than adults. Hence, the cluster-property nature of legal personhood means, according to Naffine, that different legal persons can hold different rights and bear different duties. She then notes that legal personhood in this regard resembles ownership, which can be understood as separate but connected incidents such as possession, liberty to use, and so on.

The legal person of Naffine and Tur is, however, not a cluster property in any ordinary sense. The phrase denotes standardly a property whose extension is determined based on a weighted list of criteria, none of which alone is necessary or sufficient.7 Ownership according to the bundle-of-rights analysis is a cluster property. For instance, the fact that John is permitted to use a car counts as a reason towards the conclusion that he owns the car, but it is not a sufficient reason to conclude that he owns the car because he could simply have rented it. On the other hand, John’s being prohibited from using the car is an insufficient reason to conclude that he (p.94) does not own the car, because he could have rented it out. But the Orthodox View—subscribed to by Naffine and Tur—does provide necessary and sufficient criteria for an entity’s legal personhood. One is a legal person if and only if one holds legal rights and/or bears legal duties.8 The mere fact that legal persons are diverse in their instantiations does not mean that legal personhood would be a cluster property in this standard sense of the phrase. The analogy between legal personhood (according to the Orthodox View) and ownership would work if the cluster-property nature of ownership depended on the fact that different persons can own different types of things and different numbers of things. But this is not the reason why ownership is a cluster property.

Legal personhood according to the theory offered here is a cluster property in the ordinary sense, as it consists of interconnected but disseverable incidents. There is no exact border between legal personhood and nonpersonhood. The incidents can, however, be grouped in various ways.9

#### It does not mean equivalence to natural personhood---rather, it is a functional categorization that means bearing rights and duties.

Abraham Singer 19, Assistant Professor, Department of Management, Quinlan School of Business, Loyola University Chicago, “Toward A Pragmatist Approach to Corporate Personality and Responsibility: Why Democracy Matters,” 17 Geo. J. L. & Pub. Pol'y 795, WestLaw

I. THE CORPORATE PERSON: SOME BASIC POINTS

I begin by noting that I use the term “corporate person” in the conventional sense, not as a claim about the humanity of the corporate entity. Following Maitland, I use the term to indicate its status as a “right-and-duty-bearing-unit.”5 I take this to be a fairly uncontroversial claim. Yet, in stating it this way, notice that one immediately screens out a particular (and particularly popular) criticism of the doctrine, which claims that treating a corporation as a person is to unjustifiably and immorally conflate the corporate with the human. By using “person” not in the idiomatic way many use it, but in the more technical Maitlandian sense, we can mostly set this criticism aside. By taking this minimal definition of corporate personhood as a starting point, we also start with the assumption that there is nothing inherent to the idea of corporate personhood that says corporations are \*798 the same, or require the same or similar treatment, as human persons. When we ask the question: “how should we understand corporate personhood?” we are essentially asking: “what sorts of rights and duties ought we to understand the corporation as having? What powers and constraints ought we, as a society, impose upon and expect of a corporate entity?”

#### What are examples of incidents of legal persons?

From Kurki 19:

- fundamental protections: protection of life, liberty, and bodily integrity

- capacity to be the beneficiary of special rights

- capacity to own property

- insusceptibility to being owned

- standing

- victim status in criminal law

- capacity to undergo legal harms

- capacity to administer the other incidents without a representative, e.g. the capacity to enter into contracts

- criminal-law responsibility

- tort-law responsibility

- other types of legal responsibility

### ‘Legal Person’---Cluster Property / Incidents---Extra

#### Personhood is ill-defined but it is a spectrum not a binary---for example, a pet can be more than property but less than a person

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

The court ﬁrst acknowledged that the term “legal personhood” is not deﬁned nor is it synonymous with being a human being.62 The court also noted the increasing recognition of nonhuman animals, speciﬁcally pets, as more than just property, if not quite as persons, by courts and legislatures.63 [FOOTNOTE 63 BEGINS] 63 Id. at 912 (“[P]ets and companion animals are gradually being treated as more than property, if not quite as persons, in part because legislatures and courts recognize the close relationships that exist between people and their pets, who are often viewed and treated by their owners as family members.”). [FOOTNOTE 63 ENDS] While the court thoughtfully discussed both primary and secondary sources for and against the extension of legal personhood status for nonhuman animals, it ultimately declined to make its own determination on thed issue.64 The Court denied the petition for a writ of habeas corpus and dismissed the case.65 Justice Jaffe ultimately afﬁrmed the property status of nonhuman animals, noting that “[t]he past mistreatment of humans” who were once classiﬁed as property – “whether slaves, women, indigenous people or others” – does not “serve as a legal predicate or appropriate analogy for extending to nonhu- mans the status of legal personhood.”66

### ‘Legal Person’---Cluster Property / Incidents---Examples

#### This excerpt describes each of these ‘incidents’ in more detail. This card is very long and I am not processing it; it is reproduced here if you are curious what something on the above list entails in more detail.

Visa A.J. Kurki 19, Academy of Finland Postdoctoral Fellow at the Law Faculty of the University of Helsinki, received his PhD in 2017 from the University of Cambridge, has published on legal personhood, rights theory, and animal law, is also vice president of the Finnish Society for Legal Philosophy, “The Incidents of Legal Personhood,” A Theory of Legal Personhood, Oxford University Press, 08/08/2019, pp. 91–126 DOI.org (Crossref), doi:10.1093/oso/9780198844037.003.0004

Passive and Active Incidents

The passive incidents of legal personhood can be divided into two categories, laid out in Table 3.1.

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The substantive incidents have chiefly to do with what non-procedural claim-rights and liabilities are held or can be acquired by an entity X. If X’s life, liberty, and personal integrity are protected, then the number of duties owed by ‘the world’ towards X is larger than otherwise. If X has the capacity to be the beneficiary of special rights and the capacity to own property, then X can acquire special rights against determinate parties and ownership-related claim-rights ‘against the world’. Finally, even though X can simultaneously be the property of someone else and endowed with numerous incidents of legal personhood, a certain tension exists between these two attributes. This tension will be analysed briefly later in this chapter.

The second group has to do with the legal remedies available to X if the duties held towards X are not respected. These include standing, which is (primarily) the capacity to demand the enforcement of one’s claim-rights in court; the capacity to undergo legal harms, which may lead to restitution or compensation; and having a victim status in criminal law (comprising both substantive and procedural elements pertaining to criminal law).

In addition, active legal persons (such as adults of sound mind and, to a limited extent, sufficiently developed children) are endowed with incidents that are enumerated in Table 3.2.

Graphical user interface, text, application, email

Description automatically generated

Adults of sound mind can exercise legal competences in various legal contexts, whereas legal minors must generally have a representative. In addition, adults’ (p.96) behaviour is regulated, for instance through criminal law, and they are held responsible for their behaviour (onerous legal personhood).

Similar features have been identified as central for active legal personhood by numerous legal scholars, including MacCormick and scholars writing in the German tradition.14 Some legal traditions have also incorporated the active/passive distinction rather neatly into the Orthodox View, which explains legal personhood as the holding of legal rights. For instance, according to French taxonomy, all legal persons including children can ‘enjoy’ legal rights (la capacité de jouissance) whereas adults of sound mind can also ‘exercise’ their rights (la capacité d’exercice).15 The latter capacity is roughly similar to what I term legal competences.

Before moving on to examine the individual incidents of legal personhood, I should make some general remarks. Despite the clustered nature of legal personhood, it is still not wholly reducible to its individual components. Much as the incidents of ownership together make ownership central to modern capitalist economies, the incidents of legal personhood are interconnected in numerous ways. These connections will be explored later, but I mention here the concept of legal platform, which will be salient in Chapter 4. A legal platform is a bundle of legal positions (‘rights and duties’) that are integrated. The legal positions’ being integrated means that they are susceptible to being affected by each other in a certain manner: for instance, if John owns a house but incurs debts due to a contract he has entered, he may end up losing the house. On the other hand, if the debts are incurred by John’s single-person corporation, he will likely not lose the house. The corporation and John’s natural legal platform are thus two separate legal platforms.16 Legal platforms are primarily administered through acts-in-the-law. Individuals who are sui juris take care of the administration themselves—though they may choose to delegate this responsibility—whereas minors are ordinarily represented in this regard by someone else.

(p.97) Passive Incidents of Legal Personhood

Protection of Life, Liberty, and Bodily Integrity: Fundamental Protections

I was earlier rather critical of Steven Wise’s analysis of legal personhood. Even though his claim that only legal persons can hold legal rights is untenable, I agree with him that the so-called dignity-rights that he is advocating for some nonhuman animals would be central in their legal personhood.

According to Wise, dignity-rights have to do with bodily integrity and bodily liberty. Any dignity-right ‘contain[s] a core of fundamental liberty-rights that can be protected either as in rem immunity-rights or claim-rights’.17 Wise claims that ‘[u]nlike a bare liberty-right, which requires at least an association with a claim-right to be a dignity-right, bare immunity-rights may be dignity-rights in and of themselves; alone they may constitute the most fundamental legal rights, such as bodily integrity and bodily liberty’.18 Wise has here in mind how constitutional bills of rights often work: they disempower the lawmakers and other officials from passing certain kinds of laws.19 As the parliament is unable to pass any law that would constitute a violation of someone’s bodily liberty, that liberty is accompanied by a corresponding immunity vis-à-vis the parliament, rather than a liability. These are of course important points, but we should be careful when assessing how they relate to the topic at hand.

For instance, nonhuman animals do not bear any duties in the contemporary Western legal systems with which I am familiar. The creatures are therefore in possession of only liberties. Would their legal position be changed significantly—with regard to their legal personhood or otherwise—if, say, a constitutional amendment would disempower the state from imposing duties upon nonhuman animals? In most respects, this change would be quite irrelevant. It would be rather surreal to talk of the animals’ dignity-rights to personal liberty when they could still be imprisoned in cages and killed for food. This is why claim-rights, reinforced by immunities, are the (p.98) central component of this incident of legal personhood. Liberties are of course often important as well, but without claim-rights they are usually not enough.

Whether a claim-right is a fundamental protection is determined both by the interests safeguarded and by the hierarchically high status of the claim-right.

First, fundamental protections safeguard the life, personal liberty, and/or bodily integrity of their holder. Habeas corpus is a fundamental protection, and the lawsuits initiated by the Nonhuman Rights Project, demanding that nonhuman animals be afforded the writ of habeas corpus, are thus mainly focused on this incident. Similarly, the proposed ‘personhood amendments’ in some American states, which would define foetuses as persons for the purposes of criminal law, also pertain to the fundamental protection of life.20 The Roe v Wade case, which declared state limitations on first-trimester abortions to be unconstitutional, essentially denied fundamental protections to first-trimester foetuses.21 Furthermore, as I have noted in the preceding chapter, one of the legal ramifications of a slave’s being freed was that the slave received numerous robust claim-rights pertaining to his or her life, liberty, and bodily integrity—both against the former owner and ‘against the world’.

Second, fundamental protections occupy a high hierarchical status. They are thus close to what Ronald Dworkin calls ‘rights as trumps’: safeguards that protect individuals against consequentialist policy considerations—even if this protection may not be absolute.22 Such protections are often codified in a constitution or in other legal sources that are hierarchically superior to ordinary statutes. Protections accorded to nonpersons, on the other hand, are often subject to different kinds of limitations: animal welfare statutes often prohibit the infliction of unnecessary suffering on animals. This formulation implies that the animal’s interest in not being afflicted with suffering can more easily be subverted by other considerations. However, the difference between persons and nonpersons in this regard is a matter of degree, pertaining to the types of purposes for which one’s legally protected interests may be sacrificed. The concrete meaning of the word ‘necessary’ cannot in this context be understood without asking: ‘Necessary for what purpose?’ Nonpersons’ interests can typically be sacrificed for a wider array of purposes than those of legal persons. For instance, many contemporary legal systems allow for the killing of certain animals for recreation or for economic reasons, whereas the intentional deprivation of human life is allowed for far fewer purposes, typically to protect the fundamental interests of some other natural person(s).23 Slaves occupied a position similar to that of (p.99) animals: for instance, Georgia provided in 1816 that masters could be prosecuted for the ‘unnecessary and excessive whipping’ of their own slaves—many also forbade ‘cruelty’ towards slaves, much like the so-called animal cruelty laws nowadays.24

What I mean by this ‘hierarchically high status’ is the following. A claim-right has a hierarchically high status if the considerations underlying the claim-right normally prevail against competing considerations and interests, including property interests. I mentioned above that the fundamental protections of legal persons are typically enshrined in legal sources that are hierarchically superior to ordinary statutes. However, this does not have to be the case. It may very well be that some extant legal systems can—without the need for any constitutional changes—extend to nonhuman animals protections that prevail against property interests and other important considerations. However, such putative extensions can in many cases pose constitutional problems. A striking example is the infamous Dred Scott case, decided by the US Supreme Court in 1858, where the Court ruled that Africans brought over as slaves and their descendants were not, and could not be, citizens of the United States and consequently could not for instance sue in the federal courts.25 Furthermore, the Supreme Court decided that the Missouri Compromise, which had limited slavery in certain northern states, was unconstitutional because it interfered with the constitutional protection of property:

[T]he same instrument, which imparts to Congress its very existence and its every function, guaranties [sic] to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation; and, farther, that the only private property which the Constitution has specifically recognised, and has imposed as a direct obligation both on the States and the Federal Government to protect and enforce, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.26

(p.100) This decision did not have much practical import because the Missouri Compromise had already been superseded by the Kansas–Nebraska Act. However, it serves as an example of how constitutional provisions can affect who or what is a legal person in a given legal system. Constitutional provisions that protect property ownership could hinder certain steps towards the legal personhood of animals if, say, a proposed act of parliament would seek to limit severely what animal owners can do with their property.

Certain legal systems have recently included animals in constitutional provisions. Germany, for instance, amended § 20a in its Basic Law in 2002 to include nonhuman animals:

Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.27

This can be seen as a small step towards animal legal personhood, but it should not be exaggerated: the protection of animals in the German constitution is a ‘state objective’ (Staatsziel). State objectives in German constitutional law ‘outline a specific program for activities of the state and serve as a guideline for interpreting statutes and administrative rules’.28 They do not generate directly any (Hohfeldian) rights.29 However, one important consequence of the 2002 constitutional amendment was that it allowed for the constitutionality of animal welfare statutes even in cases where these would conflict with certain constitutional rights such as the freedom of religion, the freedom of teaching, science and research, and the freedom of artistic expression.30 So the amendment can be seen as an improvement of the status of animals, as it allows the state to protect animals even in certain situations where this may conflict with the fundamental rights of legal persons. Consequently, if the amendment allows for certain claim-rights held by animals to stay in place despite the fact that they are in tension or conflict with some fundamental rights held by natural or artificial persons, then such claim-rights held by the animals can be said to be fundamental. However, the number of such claim-rights is likely to be small for now.

Capacity to be a Party to Special Rights

What Neil MacCormick has termed passive transactional capacity incorporates many of the important features of passive legal personhood. I start with MacCormick’s list of examples that he takes to fall under the scope of passive transactional capacity:

(p.101)

When it comes to private law, one may be able to be the beneficiary of a promise albeit incapable of making a binding promise oneself, or even of accepting the terms of a conditional offer. One may be capable of becoming an owner of property by gift, even if incapable of managing it. [ … ] One may be capable of being the beneficiary of a guardian’s or a trustee’s duties as such, even though one is incapable of enforcing ‘in one’s own right’ any breaches of duty.31

I agree that all of these examples have to do with legal personhood. However, they are quite disparate and should be analysed separately. This heterogeneousness becomes apparent when MacCormick tries to summarize this capacity as the ‘[c]apacity to take the benefit or the burden created through a certain transaction’ and as ‘the capacity to be acted upon with legal effect through some form of legal transaction or act-in-the-law, whether the effect be beneficial or detrimental’.32 These characterizations are rather vague. For instance, slaves and animals can surely take on the ‘burden’ created through a transaction if they are sold, especially if the seller has treated his slaves or animals relatively well whereas the buyer is cruel towards his. MacCormick specifies what he means by the taking of a burden:

It is a feature of [legal] transactions that not only must the active part in them be taken by some person with appropriate capacity to act in that way, but it must also be the case that the person to whom the performance is directed is endowed with sufficient capacity for the transaction to take its intended effect. The same would apply to transactions the intended effect of which is to effect the imposition of some legal burden on the other party. A burden such as a legal duty can be imposed only on a being that is capable of being a duty-bearer.33

There are numerous unclear points here. First, MacCormick’s ‘burdens’ include, but are not limited to, duties. He does not specify what the other types of burdens are. Second, with the ‘capability of being a duty-bearer’, MacCormick is not referring to the conceptual domain of duties but rather to who or what can, for instance, be bound to a legally enforceable contract. Thus, if the legal representative of a severely mentally disabled individual signs a health-insurance contract in the name of the principal, the principal can come under the burden of the contract in that the insurance fees are to be paid using the principal’s money rather than the representative’s money.34 It is, however, somewhat misleading to say that the burden would constitute a duty for the principal, given that the principal is not legally required to perform or omit any action because of the contract. Rather, the principal holds a liability and even a claim-right with regard to the payment of the fees, as the representative is duty-bound and empowered to pay the fees on the principal’s behalf. I will return to this issue shortly.

There are consequently numerous issues to develop with regard to MacCormick’s account. Some issues concerning the representation of passive legal persons will (p.102) be discussed in Chapter 4, whereas I will now consider the elements of which MacCormick’s passive transactional capacity consists. I maintain that the capacity can be understood in terms of two primary incidents—the capacity to be a party to special rights and the capacity to own property. In addition, these incidents often require the support of numerous other incidents, such as legal standing.

I have already argued in Chapter 2 that the ‘capacity to hold rights’ that some scholars associate with legal personhood can partly be understood as the capacity to hold what Hart termed special rights, which ‘arise out of special transactions between individuals or out of some special relationship in which they stand to each other’ and where ‘the persons who have the right and those who have the corresponding obligation are limited to the parties to the special transaction or relationship’.35 Another element of this ‘capacity to hold rights’ is the capacity to own property, which will be discussed in the next section. Property ownership is not a special right according to Hart, because the relevant claims are held against ‘the world’ rather than merely against the parties to the relationship.

Hart’s account of special rights must be qualified in certain ways to make it applicable here. The most important features of special rights as incidents of legal personhood are that these rights must (1) follow from exercises of legal competences and (2) be limited to the parties who perform the transaction and/or to the parties in whose name the transaction is performed. What I mean by legal competences will be outlined later in this chapter. Point (2) pertains chiefly to the being who acquires claim-rights or duties as a result of the transaction. Hart’s theory of special rights is based on his early will theory of rights, which does not ascribe rights to children, mentally disabled individuals, or nonhuman animals. I maintain, however, that even such individuals and creatures can be parties to special rights because they can be represented by others, who then have fiduciary duties towards their principals.

Understanding MacCormick’s examples in terms of special rights and ownership goes a long way in explaining numerous extensional beliefs regarding legal personhood. Infants and corporations can be the beneficiaries of legally enforceable contracts, whereas animals cannot and slaves could not. Special rights held by passive parties can hence be understood as claim-rights against, say, a promisor, a guardian, or both.36 I will return to the details of how passive legal personhood works in Chapter 4, when addressing who or what can be a passive legal person.

(p.103) Capacity to Own Property, and Not Being Property

Owning property is a very important hallmark of legal personhood.37 It ties together numerous incidents of legal personhood: for instance, X’s being the beneficiary of special rights that involve the payment of a sum and X’s capacity to receive monetary compensation for torts both presuppose the capacity to own property. This capacity is also central to the concept of legal platform, which will be addressed in the following chapter. Yet another important incident is that of not being property, that is, insusceptibility to being owned.

Property ownership also forms an important part of MacCormick’s passive transactional capacity. He notes pithily that ‘[t]hose who doubt [the significance of passive transactional capacity] may wish to reflect on the fact that a gift of property on trust for the benefit of a baby is valid, whereas one for the benefit of a pet dog is not’.38

Beings paradigmatically endowed with legal personhood—natural persons and artificial persons—can own property, whereas beings paradigmatically classifiable as nonpersons—animals, slaves, and foetuses—are normally unable to do so. Human children typically gain the capacity to own property at the moment they are born, and artificial persons when they are registered. Animals, slaves, and foetuses, on the other hand, cannot or could not own property.39 There are some exceptions, however. Many Roman masters enabled their slaves to own property under an arrangement called peculium, whereas such an institution did not exist in the North American form of slavery.40 The fact that pets can be the beneficiaries of trusts in some US states is also a highly interesting development, and a step towards their legal personhood. The case of pet trusts also illustrates why the incidents of legal personhood must be treated separately: even though these animals can be said to own property, causing harm to one of them cannot currently constitute a tort towards the animal; one cannot subsequently be liable to pay the animal compensation.

Yet another incident of legal personhood is that one is not an object of ownership, that is, property. Natural persons cannot be owned, whereas animals and slaves are susceptible to being owned. However, X’s legal personhood and X’s being an object of ownership are not inherently incompatible—as the example of business corporations illustrates—even if the matter is complicated. There is of course a certain tension between being both an owner and property. Notwithstanding, assuming (p.104) that one accepts the analytic ‘bundle’ theory of ownership as articulated by Anthony Honoré, there is no reason to assume that objects of ownership cannot also own property.41 Honoré distinguished eleven ‘standard incidents’ of ownership. I will list ten of them here as summarized by Hugh Breakey (the eleventh one—the prohibition of harmful use—is often omitted by contemporary scholars, as it is not considered to pertain to ownership per se but to conduct in general):

1. The right to possess: to have exclusive physical control of a thing;

2. The right to use: to have an exclusive and open-ended capacity to personally use the thing;

3. The right to manage: to be able to decide who is allowed to use the thing and how they may do so;

4. The right to the income: to the fruits, rents and profits arising from one’s possession, use and management of the thing;

5. The right to the capital: to consume, waste or destroy the thing, or parts of it;

6. The right to security: to have immunity from others being able to take ownership of (expropriating) the thing;

7. The incident of transmissibility: to transfer the entitlements of ownership to another person (that is, to alienate or sell the thing);

8. The incident of absence of term: to be entitled to the endurance of the entitlement over time;

9. Liability to execution: allowing that the ownership of the thing may be dissolved or transferred in case of debt or insolvency; and,

10. Residuary character: ensuring that after everyone else’s entitlements to the thing finish (when a lease runs out, for example), the entitlements return to vest in the owner.42

Honoré did not mean that all of these incidents would be necessary conditions for ownership; he rather intended this as an example of ‘full’ (liberal) ownership, which would bear more or less resemblance to actual instances of ownership.

The instances can be divided into ‘active’ (presupposing a relatively sophisticated reasoning capacity) and ‘passive’ (presupposing only the capacity to enjoy the benefits of property) quite neatly, as shown in Table 3.3.

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This can show us why it makes sense to speak of, say, animals’ owning property: even though they cannot partake in the active elements of legal ownership, the majority of the elements of ownership can nevertheless be meaningful in the case of animals. It should of course once again be noted that the active/passive classification is not always clear-cut. For instance, talking of animals’ right to use money does not really make sense; the primary benefits of having money are the possibility of buying goods and services through the exercise of competences and, for some people, the pleasure one derives from simply having money. Both (p.105) presuppose the mental capacity to understand the concept of money, which is why it is not very meaningful to talk of one’s right to use money unless one has the mental faculties for this. (The money can of course still be beneficial for animals and infants, if their guardian uses the money to their benefit.) On the other hand, it does make sense to talk of a mentally disabled individual’s protected liberty to live in his apartment.

I conclude that even passive legal persons may own property. However, this does not yet answer the question of whether one can be both a subject and an object of ownership. An obvious example of this is business corporations, which serve a double function as both persons and property: they participate in certain legal relations as property, and in others as persons. Their owners may sell or donate their stake in the company, it can be used to cover the owners’ debts, and so on. On the other hand, the corporation itself may own property, has standing in courts, and so on. We should now distinguish corporate group agents from other types of business corporations. I will argue in Chapter 5 that many groups can be understood as agents that are separable from their members; the group intentions, beliefs, and desires are formed through collective decision-making. This is also true of most corporations. Business corporations can be understood as a shared project: as exercises of joint intentionality in which the shareholders have a stake. The project is not usually under the sole control of any single shareholder, which is why it makes sense to say that it is a legal person and a legal actor in its own right. The fact that companies are property in fact constitutes the group agency of the company, for the aggregate function through which companies are governed is usually connected to the ownership of stock with voting rights.43

(p.106) On the other hand, not all business corporations really are as described above: in particular, companies that are owned by one human being alone, and where he or she governs the company alone, are not group agents. In this case, the corporation is better understood as merely a separate legal platform, that is, a bundle of legal positions. Such a platform might serve its owner for taxation purposes and—especially in the case of limited-liability corporations—enable devoting assets to a certain goal.44 Such corporations are under the total control of their single owner, in contrast with group persons; they have no will apart from that of their owner. This is what separates them from slaves. Slaves had a will of their own, even if this will was not recognized in private law, disempowering them from performing acts-in-the-law.45

Could slaves have owned property, so that it would not simply have been an extension of their master’s property as in the case of companies with a single owner? We should firstly recall the institution of peculium that enabled slaves to own property at their master’s pleasure. The slave was of course not protected against his or her master, as the master could revoke the peculium at any point. However, no logical necessity calls for this revocability; the master could very well be placed under an obligation not to forcefully take the slave’s belongings and under a disability to alter this duty. The master’s incidents of ownership pertaining to the slave would consequently have been reduced. This is also why it is possible that animals could own property without the abolition of their status as property. In order for such an arrangement to be more than nominal, an animal would need to have a guardian who would take care of the active incidents of ownership, but the animal could still be the beneficiary of the passive incidents. Again, this can only be meaningful if the entitlements of the animal’s owner are restricted accordingly.

To sum up, when analysing the relationship between a being’s status as a subject of ownership and a being’s status as an object thereof, one must distinguish three cases: (1) business corporations qua organized human collectivities, (2) business corporations qua legal platforms, and (3) individual human beings and animals. In the case of organized collectivities, the group agency of the corporation functions through its being an object of ownership, and this is what enables it to act as a subject of ownership. In case (2), the single-person corporation is merely another ‘mask’ through which its owner acts legally. Case (3) is different in that the owner and the object of ownership have different wills and/or interests. Regardless, creating some form of limited ownership for the slave or animal is possible.

(p.107) I will return to the topic of property ownership as an incident of legal personhood numerous times over the course of this book.

Standing

Only legal persons are normally recognized as parties of lawsuits. Civil-law jurisdictions are quite explicit about this; for instance, the German Code of Civil Procedure connects legal personhood to Parteifähigkeit, ‘the capacity of being a party to court proceedings’.46 French legal scholars have similarly maintained that an animal could only be represented in a lawsuit if it were redefined as a legal person, though such an arrangement would not have to amount to the kind of ‘full’ legal personhood that natural and artificial persons enjoy.47 Common-law jurisdictions are slightly more liberal in this regard. American judges in particular have occasionally considered the merits of cases with animal plaintiffs, even if such cases are anomalies.48 Historically, American slaves generally lacked standing, though some states such as Virginia enabled slaves to sue for their freedom.49

Denying someone legal standing can take two different forms, which correspond to two different elements of the concept. Let us start with a dictionary definition:

Standing is the ability of a party to bring a lawsuit in court based upon their stake in the outcome. A party seeking to demonstrate standing must be able to show the court sufficient connection to and harm from the law or action challenged.50

(p.108) Two elements need to be distinguished here:

- the invested aspect of standing: viz., the articulated recognition that X has a ‘stake in the outcome’ which renders enforceable any of X’s claim-rights that are affected;51

- the competence-related aspect of standing: viz., the legal competence of X to pursue the case in court.

The invested element of standing has to do with whether an entitlement of X is recognized by the legal system as enforceable in court. If the legal system does not recognize X’s invested standing, then the claims of X are (1) unenforceable in courts or (2) enforced only circumstantially when they happen to coincide with someone else’s enforceable rights. Invested standing may also be reflected in administrative procedures. For instance, according to Finnish administrative law, ‘[a] person has standing as a party to an administrative matter where his/her rights, interests or obligations are affected by the matter’ (emphasis added).52 Such parties must be heard before the matter is decided, and they have the standing to challenge in court the decision reached in the matter.

The competence-related element empowers a party to decide whether to pursue the suit or not (and is thus, in fact, an active incident). For example, in criminal cases, the legal system may recognize the victim as someone with invested standing yet without the prerogative to decide whether the case is pursued. There are also various situations where one lacks the competence to pursue a case despite having invested standing. Obvious examples are cases where the legal system denies competence to someone because his or her mental faculties are deemed insufficient for legal competence, such as with children and mentally handicapped people. However, not all cases of denied competence have such justification, as with the now-obsolete common-law doctrine of coverture: ‘If the wife be injured in her person or her property, she can bring no action for redress without her husband’s concurrence, and in his name, as well her own; neither can she be sued.’53

This doctrine recognized the wife’s invested standing to a limited extent but did not enable her to take legal action independently. Similar doctrines have been in place in various jurisdictions; for example, the Swedish and Finnish doctrine of guardianship did not exempt women from owning property altogether but provided that (p.109) most legal competences pertaining to the property had to be exercised by the husband or some other male, or could only be exercised by the wife with the man’s permission.54 In such cases, the property was acknowledged as belonging to the wife, giving her invested standing in any lawsuits over the property, yet she was denied the competence to decide whether to pursue any such lawsuits.

In addition, abstract standing and standing in casu can be distinguished. Abstract standing is close to the German idea of Parteifähigkeit; it concerns whether X has invested and/or competence-related standing at all in a given legal system. Standing in casu, on the other hand, pertains to one’s standing in a particular case. In a discussion of legal personhood on a general level, abstract standing is more important. A lack of abstract standing often results in the summary dismissal of a lawsuit, and abstract standing could indeed perhaps be described as ‘the standing to have one’s standing in casu seriously considered’. One relevant case is Citizens to End Animal Suffering and Exploitation, Inc. et al. v New England Aquarium, et al., where the organizations named as plaintiffs tried to get a dolphin, Kama, accepted as the plaintiff of the case.55 The case was dismissed without the consideration of merits—because of lack of standing—in keeping with the denial of legal standing to animals in most modern legal systems. Animals typically lack both invested and competence-related standing even though legal protections are accorded to them.56

The enforceability of environmental law has also occasionally been hampered because no-one has had the standing to sue polluters. Different solutions have been devised to address this problem. In the US, courts have resorted to the notion of aesthetic injury, granting human beings the standing to sue ‘in virtue of the injuries they incurred as the result of defendants’ actions that threatened to significantly diminish the species of animal’.57 Christopher Stone has argued that even trees could be granted legal standing, and justified his proposal at least partly by the claim that the standing of trees and other natural objects would enhance the enforcement of (p.110) environmental mandates.58 In some European countries, the legislator has instead opted to grant certain authorities and/or environmental non-governmental organizations a statutory standing to sue. In these cases, there is typically no requirement that the plaintiff show any personal involvement in the matter; the authority or organization is rather understood to be representing a general interest. It consequently does not have invested standing (because its claim-rights are not directly affected) but is only endowed with the competence-related aspect of standing.

I have here highlighted some of the key features of standing with regard to legal personhood, but some aspects of the multifaceted notion have been left unexplored. For instance, the focus has here been on standing as the ‘capacity to sue’, but one could also discuss standing as the ‘capacity to be sued’. The diplomatic immunity enjoyed by the representatives of foreign nations does not free them from following the laws of their host country, but it does give them immunity from prosecution. However, diplomatic immunity and other similar institutions—often relating to politicians and heads of state—do not have much bearing on the questions that this investigation seeks to understand. They are consequently not addressed further.

Capacity to be Legally Harmed

Tort liability is one important legal institution for remedying certain kinds of harm caused to others. It is restricted by several factors such as causation and culpability, but also by the fact that typically only harm done to a legal person is classified by tort law as harm to a recognizable victim.59 If an animal is harmed by a human being, this can typically only engender tort liability if the economic interests (or, in the case of subjective valuation, the ‘sentiments’) of the animal’s owner are harmed simultaneously. For instance, if the hoof of a racehorse is tortiously harmed by someone, the owner of the horse may sue the tortfeasor for damages. However, the welfare losses of the horse are not legally recognized; if the owner thinks that having the horse is no longer economically viable, he may decide to have it killed and use the compensation he has recovered for a completely different purpose.60 Slaves have typically occupied a similar position—only their owners have been able to recover compensation for harm inflicted to the slaves.61 Foetuses are a different case: they are not (p.111) property, which is why there is no owner who could recover damages. Foetuses that are born alive can typically recover damages for harm that has been caused to them tortiously, in accordance with the ‘born alive’ rule that is widely in force in many Western jurisdictions.62 On the other hand, if the foetus perishes before being born, the damages cannot be recovered.

David Favre has made an interesting proposal for a cause of action which would enable a (domestic) animal to be a plaintiff in a tort case. According to the proposal, the plaintiff—an animal represented by a human being—would have to show the following elements in order to be afforded a legal remedy:

1. That an interest is of fundamental importance to the plaintiff animal;

2. That the fundamental interest has been interfered with or harmed by the actions or inactions of the defendant;

3. That the weight and nature of the interests of the animal plaintiff substantially outweighs the weight and nature of the interests of the human defendant.63

If these criteria are met, the defendant would be required to provide a tort-law remedy for the plaintiff. In Favre’s model, three remedies would exist: money damages, injunctive relief, and title transfer. Money damages would be provided for harm already caused, whereas injunctive relief would be available if the tort is ongoing. Finally, title transfer would involve transferring the creature to a new owner if the current owner is unable to improve the living conditions of the animal.64 Favre notes correctly that any payment of monetary damages would have to take place through the establishment of a trust for the animal.65 Favre is writing in the US context where trusts are available, but if his model were applied in civil-law countries that do not know of trusts, the money would likely have to be treated as belonging explicitly to the animal itself.

Capacity to Count as a Victim

Closely related to many of the aforementioned incidents—yet distinguishable from them—is the capacity to count as a victim of criminal offences. Take the fundamentally different statuses of newborn children and foetuses. As Dwight G. Duncan notes, ‘a doctor deliberately taking the life of a woman’s infant seconds after birth with or without the woman’s permission is infanticide, but a doctor deliberately (p.112) taking the life of a woman’s infant any time before birth is effectuating the woman’s constitutionally protected right to abortion’.66 (Duncan is here referring, hyperbolically, to the US Constitution.) Even though abortions are legally regulated, and some such regulations can be said to generate claim-rights for foetuses, the legal protection of newborn children is considerably more robust; not only are the claim-rights held by the children more numerous, but the sanctions for contraventions of those claim-rights are more severe. Furthermore, foetuses and newborn children have different procedural statuses in the criminal trials of many countries.

Similarly, it would be wrong to say that animals in contemporary Western legal systems and slaves in the antebellum US are not or were not legally protected at all. These individuals and creatures have been defended by criminal-law protections which have typically proscribed at least particularly gratuitous or cruel conduct towards these groups. The safeguards have not necessarily coincided with the interests of the slaves’ or the animals’ owners. However, the protection of these groups has often been framed as the protection of something other than the welfare of the animals or slaves themselves; for instance, the South Carolina Slave Code of 1740 justified the criminalization of the wilful killing of slaves by adverting to the odiousness of cruelty ‘in the eyes of all men who have any sense of virtue or humanity’. Similarly, animal welfare laws are still occasionally claimed to be protecting, for instance, the moral feelings of human beings.67 Animal welfare crime is not treated in the same way as analogous crimes committed against legal persons. For instance, animal welfare crimes are often treated as victimless crimes; procedural rules pertaining to victims do not usually include animals.68 In addition—as noted above—the animal typically cannot receive compensation for the harm it has suffered; any monetary sanction or compensation goes to the animal’s owner or to the state. Finally, in jurisdictions where being an ‘offended party’ is a procedural role in criminal trials, the animal cannot be an offended party.69

(p.113) Summing Up

To conclude, passive legal personhood consists of three substantive incidents—fundamental protections, the capacity to be a party to special rights, and the capacity to own property—and three incidents that have to do with the enforceability of one’s substantive incidents, as well as with sanctions that may be applied if the duties pertaining to the substantive incidents are not fulfilled. Before considering the benefits of this new approach as opposed to the Orthodox View, I will present the active incidents as well.

Active Incidents of Legal Personhood

We have so far been focusing on the passive incidents of legal personhood, with which even small children and mentally severely disabled individuals are currently endowed. However, according to one of the main extensional beliefs from which I have proceeded, there are some relevant legal differences between the legal personhood of the just-mentioned individuals and that of adults of sound mind. That difference consists in whether one is endowed with the active incidents of legal personhood. I identify two such incidents: the capacity to perform acts-in-the-law (legal competences) and legal responsibility (onerous legal personhood). Western contemporary legal systems do not enable toddlers or people with serious mental deficiencies to enter into contracts, nor are such creatures or individuals punished for their wrongdoings in the fora of criminal law.

I should note here that the threshold between being an active and a passive legal person is not clear-cut. For instance, there are usually legal rules that determine an age of majority, but typically even younger people may enter into some contracts and be liable for some of their actions. This is why some scholars distinguish between ‘capacity’, ‘limited incapacity’, and ‘total incapacity’.70 I will return to this issue in Chapter 4, as well as to the question of who or what can be a passive and/or active legal person.

Legal Competences

A notion closely associated with legal personhood is that of will or choice. The concept of will was important in the German philosophy of the eighteenth and nineteenth centuries, and has ever since been central in the will theories of rights. This will has also been connected with legal personhood for a long time. The firmest (p.114) such connection emerges when legal personhood is taken to be the holding of will-theory rights. Such a conception of legal personhood is not tenable, for reasons laid out in the preceding chapter, but legal personhood and having a legal will are nevertheless closely related.

A rather stark example of the connection between legal personhood and will is the 1858 verdict of the Virginia Supreme Court of Appeals in Bailey v Poindexter’s Executor.71 The late slave owner John Lewis Poindexter had in his last will and testament determined that his slaves either be freed—in which case they would need to leave the State of Virginia—or be publicly auctioned. The slaves themselves could choose which option they preferred. (These rather bizarre terms were due to the conditions set out in state legislation, which declared that any manumitted slave would need to leave the state within a year from the manumission or be reenslaved. Thus, emancipation was accompanied by exile.) However, the high court determined—against precedent—that any will granting such a choice to a slave is void. The majority opinion held that Poindexter had ‘endeavored to clothe his slaves with the uncontrollable and irrevocable power of determining for themselves whether they shall be manumitted’.72 The manumission could depend on other types of events but not on slaves’ choices, because giving legal recognition to such choices would imply endowing the slaves in question with ‘legal capacity’.73 Similarly, the doctrines of coverture and the Swedish–Finnish guardianship restricted women’s capacity to dispose of their property, to sue and so on. All these examples involve restrictions on the legal competences of women and slaves.

Defining competence

The term ‘act-in the-law’ (also ‘legal act’, ‘legal transaction’) is used, especially among Continental jurists, to refer to intentional acts that constitute the creation, upholding, or termination of entitlements, particularly in the field of private law. ‘Competence’ or ‘capacity’ refers to one’s ability to perform acts-in-the-law. Because of the ambiguity of ‘capacity’, I will use ‘competence’ here.

I should begin by stressing that legal competences ought not to be confused with Hohfeldian powers. I have already mentioned in Chapter 2 that if a volitional act causes a change in legal relations, this is an exercise of a Hohfeldian power. Not all such acts are acts-in-the-law, however. X’s having a Hohfeldian legal power with respect to Y and Z means that X can, through volitional conduct, effect a change in a legal relation that currently obtains between Y and Z. X does not actually have to (p.115) intend to cause the legal change in question as long as X’s volitional conduct causes the change.

The Hohfeldian power is consequently quite wide-ranging, given that hitting somebody constitutes an exercise of a power because legal relations have been changed through the performance of a volitional action. Thus, a homeless person could commit a crime in order to spend the night in jail, and this would constitute an exercise of a legal power according to Hohfeld’s account. For some theorists, this constitutes a counterexample to the Hohfeldian conception, which seems to yield counterintuitive results. Another well-known putative counterexample is moving house, which is an intentional action that has legal consequences but is regarded by many theorists as not an instance of an exercise of a legal power.74 In any case, the Hohfeldian power is clearly too expansive for our current purposes, as children and even nonhuman animals change legal relations through volitional conduct all the time. The Hohfeldian power is thus not very helpful when distinguishing passive and active legal personhood. The narrower concept of competence, on the other hand, is crucial in this distinction.

The notion of competence has been central in Anglo-American legal philosophy ever since H. L. A. Hart made the famous distinction between power-conferring and duty-imposing rules, though he used the label ‘power’ instead of ‘competence’ to refer to the notion. He wrote:

Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.75

Hart was likely not referring to Hohfeld’s conception of a legal power, but rather to a more circumscribed notion that corresponds with the Continental idea of competence. Indeed, Hart himself recognized the relationship between power-conferring rules and competence.76 I have elsewhere argued for the following definitions of legal competence and act-in-the-law:77

Legal competence:

1. X holds the competence C to effect the legal consequence r if and only if X can perform an act-in-the-law to bring about r.

2. If X holds C, any act by X that effects r is an exercise of C.

(p.116) Act-in-the-law:

Act A, performed by X, constitutes an act-in-the-law if and only if

1. X performs A with the intention to bring about the legal consequence r, and

2. the fact that X has performed A in order to bring about r is an element of a set of actually occurrent conditions minimally sufficient for r.

The definition employs the logical structure of minimal sufficiency. I have already presented the idea of minimal sufficiency in Chapter 2—when discussing Bentham’s test—but I will mention its main features here. A set of facts is minimally sufficient for some state of affairs S if and only if (i) the set is sufficient for S and (ii) every element in the set is necessary for the sufficiency of the set. We can contrast minimal sufficiency with joint sufficiency. If my signing a contract is sufficient in order for me to become bound by that contract, then my signing that contract while wearing a green hat is (ordinarily) also sufficient. The signing and the hat-wearing are thus jointly sufficient for the contractual obligations to obtain. However, these two conditions are jointly not minimally sufficient, because the hat-wearing is in fact completely irrelevant for the legal consequence. Nor is minimal sufficiency equivalent to the logical structure where certain conditions are individually necessary and jointly sufficient for a state of affairs S to obtain; the elements in a set that is minimally sufficient for S might not be individually necessary conditions for S.

To conclude, acts-in-the-law are acts which effect changes in legal relations in virtue of the fact that they have been performed with the intention to effect the change in question. Legal institutions in which participation involves the performance of acts-in-the-law are typically restricted to legal persons: slaves and married women who were for many purposes denied legal personhood could not perform the acts-in-the-law required for, say, a contract. However, one can be unable to perform acts-in-the-law and yet be a legal person, as infants exemplify. In this case, an infant typically needs a representative who performs the acts-in-the-law on the infant’s behalf. In addition, being able merely to perform acts-in-the-law while representing someone else is not indicative of legal personhood. Slaves in ancient Rome could perform acts-in-the-law, but they were merely representing their masters. One must hold competences pertaining to one’s own legal platform, if the competences are to count as an incident of legal personhood.

Onerous Legal Personhood

Yet another distinction between nonhuman animals and infants on one hand, and adults of sound mind on the other, is the fact that adults of sound mind are held legally responsible for their acts in various ways. Such responsibility functions through genuine duties, that is, duties accompanied by the prospect of legal sanctions. I am referring in particular to criminal and civil responsibility: in contemporary Western legal systems, only legal persons can be sued for their wrongdoings, and only they (p.117) can be subjected to criminal sanctions. I call this element of legal personhood onerous legal personhood.

Onerous legal personhood is, of course, not the only way of controlling entities. Most obviously, inanimate beings are controlled through other means than by demanding some type of conduct of them: enacting a legal duty for a bridge not to collapse does not save lives. Though legal systems usually require some kinds of conduct of animals, such requirements are usually understood as the duties of human beings who are legally obligated to take measures in order to ensure that animals under their control do not cause harm to public or other persons’ interests. This is not to say that modern legal systems would not impose some punishment-like institutions on animals: for example, dogs that attack human beings may be euthanized because of their aggressiveness. Nevertheless, the institutions of private-law and criminal-law responsibility are not applied to assess the behaviour of nonhuman animals in the same way as that of legal persons. If we leave out the historical curiosity of animal trials, animals are not prosecuted or held tortiously liable for their actions.

The fact that women have historically often occupied a kind of ‘grey zone’ between full legal personhood and nonpersonhood is also occasionally reflected in their legal responsibility. Blackstone writes:

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore any deeds executed, and acts done, by her, during her coverture, are void [ … ]. And in some felonies, and other inferior crimes, committed by her through constraint of her husband, the law excuses her: but this extends not to treason or murder.78

Onerous legal personhood again illustrates the interconnectedness of the incidents of legal personhood: for instance, most forms of tort liability are only feasible if one can own property. Corporations are held civilly—and occasionally criminally—liable, which is made feasible by the fact that corporations can own property. However, criminal responsibility has been ascribed to slaves despite their not being legal persons for most other purposes. Considering an adult human being of sound mind a nonperson in the eyes of the criminal law—meaning that he or she could not commit crimes—would often be an impractical choice. It would tend to undermine one of the elements of the minimum content of natural law as set out by Hart, since the ability of humans to harm one another would not be fully recognized by one of the primary legal institutions that the society uses to control behaviour.79 Andrew Fede explains why slaves could be accused of crimes in the antebellum US:

[W]hy did the law not treat the slave like property that could not be criminally liable? The answer lies just below the surface of the various colonial codes. Slaves were, biologically, people who could commit crimes against third parties. When a master’s slave injured a third party’s (p.118) right, somebody had to be held criminally responsible. There were only two alternatives—the master and the slave. The former was unacceptable under all theories of common law jurisprudence. The slave had to be the candidate for criminality.

[ … ]

The law had to recognize the fact [ … ] that slaves could commit crimes that endangered the public peace and implicated the purposes of criminal law. [ … ] Slaves, moreover, violently attacked persons and committed property crimes that impaired the rights of third parties in society. [ … ] This conflict of interests was easily solved by the criminal law of slavery.80

The fact that slaves were criminally liable shows also why Hans Kelsen’s claim—‘that a slave is legally no person, or has no legal personhood, means that there are no legal norms qualifying any behavior of this individual as a duty or a right’81—does not accurately depict the institution of slavery. Some aspects pertaining to this incident will be discussed in Chapter 4, which is why I will not address legal responsibility further here.

Assessing the Bundle Theory

This chapter has laid out the incidents of legal personhood. I have shown through examples how paradigmatic legal persons are typically endowed with these incidents whereas paradigmatic nonpersons typically lack these incidents. My account will be further developed in Chapter 4, which will be focused on numerous questions about active and passive legal personhood. I will now consider some benefits of my approach over the Orthodox View, and then discuss the connections between legal personhood and other personhood conceptions.

First, my approach is consistent with the central extensional beliefs regarding legal personhood. Second, it avoids the most glaring pitfalls of the Orthodox View. As legal personhood is not treated as a strictly binary concept here, I can account for the fact that slaves held some claim-rights but were not legal persons, and that women’s path to ‘full’ legal personhood was a matter of gradual change over time. The fact that slaves were legal nonpersons in general but could nevertheless be sentenced in criminal trials is hard to explain if legal personhood is defined as the holding of any rights and/or the bearing of any duties. This difficulty is exemplified by Kelsen’s assertion that slaves did not bear any duties. Similarly, claims such as ‘women were not legal persons in England in the nineteenth century’ may be correct, but clearly wrong is any suggestion that English women of that time held no legal positions that are classifiable as rights or duties. It would be equally bizarre to claim that granting these women just one right or duty each would have turned them into legal persons tout court. The whole issue can be better understood by approaching legal personhood as (p.119) a cluster property, whereby one can gradually gain personhood-related benefits and burdens. Relatedly, the proposed theory can take into account the fact that children acquire active incidents over time as they grow, until they become active legal persons at the age of majority. The analysis of these ‘grey areas’ will be refined in the next chapter, where I will distinguish independent, dependent, and purely passive legal personhood. I will return to the limited legal personhood of slaves in the next chapter as well, denoting it purely onerous legal personhood.

Third, the Orthodox View relies wholly on the contested concept of a right. This is obviously not a fatal problem in itself, but it is ceteris paribus better for a theory to rely on as few contested concepts as possible. My theory does, of course, rely on some contested concepts and evaluative assumptions as well, but the central assumptions are relatively uncontroversial, and the success of the theory does not turn on any of the more controversial assumptions—such as that animals are of ultimate value. I should also mention that, even though I have eschewed the use of the term ‘right’, there is nothing inherently wrong with talking about ‘personhood rights’ or ‘rights of legal personhood’. One who accepts the interest theory may perfectly well speak of beneficiary ownership as an array of personhood rights. Will theorists may also speak of such rights at least as far as active legal persons are concerned. I have mostly refrained from employing such terminology here, in order to stay neutral between the will and the interest theories. The distinction between personhood-related rights and other rights may nevertheless help us understand what the Nonhuman Rights Project and other animal rights advocates are doing: they are not content with the limited ‘thin’ rights currently held by animals, and demand that personhood rights be extended to these creatures.

Finally, my approach can explain the relatively common distinction between the protection of animals that lack legal personality and the protection of animals through legal personality. For instance, the New York Supreme Court, Appellate Division, denied the ‘rights paradigm’ to the chimpanzee Tommy but maintained that animals are nevertheless protected by animal welfare statutes.82 If we understand ‘rights’ as claim-rights here, the court’s distinction does not make sense, given that animals already hold numerous claim-rights against certain forms of conduct.83 However, the court was treating right-holding and legal personality synonymously in its verdict. If we replace ‘rights paradigm’ with ‘legal personhood’ in the verdict, it does make more sense, as the court affirmed that the incidents of legal personhood pertaining to habeas corpus ought not to be granted to Tommy.

(p.120) Separate or Connected?

My account raises the question whether there is any single overarching ‘legal personhood’, or whether instead one should address each of the different legal incidents separately.84 There is, however, good reason to understand ‘legal personhood’ as a cluster designation rather than as an umbrella term that encompasses separate issues.

Legal personhood is, in a way, analogous to what Western legal systems portray as its opposite: thinghood. What is characteristic of things (in one legal sense of the word ‘thing’) is that they can be owned, and ownership consists of combinable and disseverable incidents. However, this analysis and the fact that not all the incidents are present at every instance of ownership have not led legal scholars to stop addressing ownership in favour of discussing only these separate incidents. There are probably several reasons for this, but one such reason is that the incidents of ownership constitute a functional whole, which is also an institutional foundation of modern capitalist economies. The individual incidents of ownership are interconnected in numerous ways: for instance, ownership could not facilitate the achievement of Pareto optimality—where no one could be made better off without making someone worse off—unless ownership included the liberty to use, the right to security (claim-right against others taking the thing without permission), and transmissibility. If one only had the liberty to use and the right to security, one could not sell or give the thing in question to someone who values it more; and if a thing could only be transmitted but not used, then no one could enjoy the thing. This is only one example of how the separate incidents of ownership together give the institution of ownership its societal meaning.

The incidents of legal personhood are similarly interconnected in various ways. They together enable legal personhood to fulfil its various functions in a Western society. I have already mentioned numerous examples of this interconnectedness: Legal contracts are, in most cases, only feasible if one can be held responsible for not respecting one’s obligations. At the same time, many forms of legal responsibility presuppose ownership rights. The concept of civil liability requires in a typical case that both the plaintiff and the defendant have the capacity to own property and have legal standing; that the plaintiff has the capacity to be legally harmed; and that the defendant can be held legally responsible. In this way, legal personhood unifies different aspects of the legal system. It allows for the assignment of reward and blame to the same entities. This is what justifies considering legal personhood as an overarching entity even if its nature is encapsulated by a cluster concept: its elements are interwoven and interact in various ways.

(p.121) I should also touch briefly on the issue of what is a sufficient number of incidents to constitute legal personhood tout court for an entity that is endowed with the incidents. I have repeatedly maintained that there is no clear-cut division between legal persons and nonpersons. There are clear and central cases, such as the legal personhood enjoyed by adults of sound mind in contemporary Western jurisdictions, but the penumbra between the clear cases of legal personhood and nonpersonhood is vast. In addition, because of the cluster-property nature of legal personhood, a binary question about X’s personhood or nonpersonhood may not always be appropriate. One must often rather ask about the respects in which X is a legal person. Corporations are legal persons for most purposes, but not all purposes.

Property ownership is a major feature of legal personhood that unifies numerous incidents of legal personhood, but it is not a necessary condition of legal personhood tout court. Consider, for instance, a radical scenario where the property status of nonhuman animals would be abolished and where they would receive fundamental protections on a par with those which natural persons currently enjoy. These fundamental protections would be accompanied by robust criminal-law safeguards so that the intentional killing of a nonhuman animal would constitute homicide. Finally, if a human being’s interference with an animal’s claim-rights were ongoing, the animal would have the standing to sue the human for injunctive relief. It would be appropriate to call such an arrangement legal personhood tout court even though the animals would not have the capacity to own property.

Yet another question pertaining to legal personhood tout court is the relationship between passive and active legal personhood. The passive incidents can constitute legal personhood for their holder, whereas the active incidents alone are not sufficient for legal personhood tout court. Let us take slavery as an example. Slaves were potential malefactors in the eyes of the criminal law in the US. They also held some competences pertaining to criminal trials, and were thus endowed with both of the active incidents of legal personhood. Now, even though the method of reflective equilibrium would allow for the reconsideration of the extensional belief pertaining to slaves, my theory does not give rise to a need to reclassify slaves as legal persons tout court. The number of incidents they were endowed with was simply too limited to warrant classifying them as legal persons tout court. A legal person endowed only with active incidents can merely be burdened by onerous legal personhood and be empowered to act as the agent of someone else, as with the slaves of ancient Rome who represented their masters.

Legal Person and Subject of Law

As I have mentioned, many non-Anglophone jurisdictions currently use ‘subject of law/right(s)’ and ‘legal person’ synonymously. Because terms and phrases such as Rechtssubjekt can be understood as ‘subject of rights’, my claim that animals currently hold rights despite not being ‘subjects of rights’ (i.e. legal persons) may seem odd. One (p.122) solution to this conundrum is to distinguish ‘subject of law’ from ‘legal person’, as Tomasz Pietrzykowski has proposed.85 I will now develop this idea further. Disentangling ‘subject’ and ‘person’ allows for a complementary approach to the incidents of legal personhood, an approach that especially jurists with a civil-law background may find appealing. Whereas legal personhood is a cluster concept, ‘legal subjecthood’ refers to one’s status within a field of law or with regard to a legal institution.

I have above distinguished active and passive incidents of legal personhood, as well as substantive and remedy incidents. When addressing legal subjecthood, it is useful to contrast the substantive incidents with the procedural incidents. We can use these two bifurcations—active/passive and substantive/procedural—to assess the status of an entity under a particular area of law. Let me take contract law as an example, illustrated in Table 3.4.

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The four categories will become clearer if we compare infants, adults, and nonhuman animals. Contracts can be entered on behalf of an infant (passive–substantive), and the contract can enforced in court in the infant’s name (passive–procedural). Infants are therefore passive subjects of contract law. Being an active subject of contract law, on the other hand, has chiefly to do with competences and duties. Adults of sound mind can decide which contracts to enter into and whether to sue over a contract; they must also fulfil the ensuing duties personally unless they have delegated the responsibility. They are therefore both active and passive subjects of contract law. Animals, however, are neither passive nor active subjects of contract law; they cannot be parties to contracts, nor to lawsuits over contracts.86

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The subjects of contract law and tort law (see Table 3.5) are also legal persons in contemporary Western legal systems. However, let us take an example where such a coextension does not apply, that is, where the subjects of some area of law are not legal persons. Nonhuman animals are in Finland protected under the Animal Welfare Act87 as well as other legislation. I will here focus on that part of Finnish (p.123) animal welfare law that is classifiable as administrative law (thus excluding the criminal-law provisions). Animal welfare law provides sentient animals with claim-rights pertaining to their treatment; at least some of these claim-rights are likely classifiable as fundamental protections. However, animals are in many ways ‘invisible’ when it comes to the procedural aspect of animal law. For instance, consider a situation where an animal welfare inspector makes a decision on whether owner O has maltreated animal A. Only O is a considered party to the decision and is therefore empowered to challenge the decision in court; no one can challenge the decision on A’s behalf. The animal is therefore not endowed with the same procedural status as the owner.

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Animals are therefore subjects of animal welfare law insofar as the passive–substantive aspect is concerned (see Table 3.6). However, classifying animals as legal persons is regardless not warranted, because the animals are only endowed with meagre fundamental protections and lack most of the other incidents of legal personhood.

I will in the next chapter address further the ‘building blocks’ of legal personhood, but I will simply note here that I take legal personhood as well as legal subjecthood to consist of three primary components: passive legal personhood/subjecthood consists chiefly of claim-rights, whereas active legal personhood/subjecthood comprises competences and duties. This is reflected in Tables 3.4 and 3.5.

(p.124) To summarize, according to the distinction suggested here, legal personhood is a cluster concept, and one must be endowed with a significant number of the incidents of legal personhood in order to qualify as a legal person tout court. On other hand, one is a subject of law with regard to some area of law or a legal institution. Animals are not legal persons but regardless are passive subjects of animal welfare law. Similarly, countries that currently treat foetuses as persons for the purposes of criminal law could instead denote foetuses ‘subjects of criminal law’—or, even less ambiguously, ‘passive subjects of criminal law’, to make clear that foetuses are not criminally liable.

### ‘Legal Person’---Good Stasis

#### It’s good to debate about

Sergio Alberto Gramitto Ricci 19, Lecturer, Department of Business Law and Taxation, Monash Business School, “Archeology, Language, and Nature of Business Corporations,” 89 Miss. L.J. 43, 2019, WestLaw

INTRODUCTION

The question what is a legal person? has received almost as many answers as what is a human?1 In an era where legal persons hold wealth and power comparable to those of nation states, shedding light on their nature and mechanics as well as on fundamental questions about their rights is crucial for defining the relations between legal persons and human beings.

Corporations have existed as separate legal entities for millennia.2 Travelling in time to when the first corporations were created helps us understand the inherent structure of current corporations.

The first corporations were not business companies but rather cities and towns.3 These were the city of Rome and the \*45 towns over which it had sovereignty.4 The Romans were the first to decide that nonhuman entities could have capacity of action, proprietary capacity, and tortious capacity.5 Roman towns and cities could contract, sue, be sued, own assets, bear liabilities, and commit and suffer torts in their own names.6 They could act on the same footing as individuals while remaining distinct from them.7 Thus, assets, rights, duties, liabilities, obligations, and the very existence of towns and cities were perfectly separate from those of their citizens. These nonhuman legal entities could exist and bear their rights and liabilities in perpetuity.8 This is how the Romans made the Eternal City eternal.9

Unlike natural persons, who bore many rights and duties through natural law, and unlike contemporary corporations, which originate from the action of private parties, Roman corporations were created through political action. The Romans originally invented legal capacity for cities and towns and extended its application to other nonhuman entities whenever the state had an interest in making them rights-and-liabilities-bearing subjects. This is how the Romans invented corporations, which they dubbed universitates.10

Derived from the Latin “in unum vertere,” which translates to “to turn a multitude into one,” universitas, in contemporary language, would translate to corporation or legal person--and these terms are used interchangeably throughout this Article. However, the Romans never defined legal capacity for nonhuman entities as “legal personality” or “legal personhood,” nor did they define nonhuman legal entities as “legal persons.”.

\*46 The Romans never adopted the lexicon of personality for nonhuman entities because the Latin word “person” carried specific connotations predicated exclusively on individuals by virtue of their human nature. In Ancient Rome, every physically sound human was a person.11 Ius Naturale--the branch of Roman law that recognized certain rights as inherent to humans by virtue of being living beings--afforded an array of “rights of the personality,” such as religious freedom, to any “person.”12 Nonhuman legal entities were not persons and were not human; accordingly, the Romans did not bestow religious liberties on nonhuman legal entities.

## United States

### Includes States

#### It includes state actions

Shamelessly borrowed from the court reform paper <3

Oakley 9 American Civil Procedure: A Guide to Civil Adjudication in US Courts, Edited by John Bilyeu Oakley, Professor of Law at the University of California, Davis, and Vikram D. Amar, Professor of Law and Associate Dean for Academic Affairs of the School of Law of the University of California at Davis, Kluwer Law International, 2009, page 19

Although it is commonplace today to refer to “the United States” as a single entity and as the subject of statements that grammatically employ singular verbs, it is important to remember that “the United States” remains in many important ways a collective term. The enduring legal significance of the fifty states that together constitute the United States, and their essential dominion over most legal matters affecting day-to-day life within the United States, vastly complicates any attempt to summarize the civil procedures within the United States. Within the community of nations, the United States is a geopolitical superpower that acts through a federal government granted constitutionally specified and limited powers. The organizing principle of the federal Constitution,1 however, is one of popular sovereignty, with governmental powers distributed in the first instance to republican institutions of government organized autonomously and uniquely in each of the fifty states. Although there are substantial similarities in the organization of state governments, idiosyncrasies abound.

## Verb

### Definitions---“Expand”

#### “Expand” is to make larger

Collins Dictionary No Date. https://www.collinsdictionary.com/us/dictionary/english/expand-the-range-of

Definition of 'expand'

expand

(ɪkspænd IPA Pronunciation Guide)

Explore 'expand' in the dictionary

VERB

If something expands or is expanded, it becomes larger. [...]

#### “Expand” is to increase in size, number, or importance.

Cambridge Dictionary No Date. “Meaning of expand in English.” https://dictionary.cambridge.org/us/dictionary/english/expand

expand

verb [ I or T ]

US /ɪkˈspænd/ UK /ɪkˈspænd/

B2

to increase in size, number, or importance, or to make something increase in this way:

The air in the balloon expands when heated.

They expanded their retail operations during the 1980s.

#### “Expand” means “to make something that already exists more extensive”

Law Insider No Date. “Expand definition.” https://www.lawinsider.com/dictionary/expand

Expand. “Expand” means to “make something that already exists more extensive.” The MDP amendments “expand” MDPs by creating a new zone that applies to existing parks and allowing for more density—and ultimately the expansion of this housing type. Council interprets “expand housing choices in all neighborhoods” to mean increase housing choices throughout the City as a whole. Council does not interpret this to mean that every single zone must allow for all housing types but rather Council interprets this policy to ensure that the city-wide there is a variety of

#### “Expand” means to increase the extent, number, or scope

Merriam-Webster No Date. “expand verb.” https://www.merriam-webster.com/dictionary/expand

Definition of expand

transitive verb

1: to open up : UNFOLD

2: to increase the extent, number, volume, or scope of : ENLARGE

### Definitions---“Expand the Range”

#### “Expand the range” means to make something greater in size, number, or importance

Oxford Learner’s Dictionaries No Date. “Definition of expand verb from the Oxford Advanced Learner's Dictionary.” https://www.oxfordlearnersdictionaries.com/us/definition/english/expand

​ [intransitive, transitive] to become greater in size, number or importance; to make something greater in size, number or importance

Metals expand when they are heated.

Student numbers are expanding rapidly.

a greatly expanded version of his earlier book

A child's vocabulary expands through reading.

expand to do something The waist expands to fit all sizes.

The gallery's focus will expand to include the work of modern artists.

expand (from something) to something By 1999, the event had expanded from two to three days.

expand something They are continuing to expand the range of goods and services they offer.

to expand a programme/service

In breathing the chest muscles expand the rib cage and allow air to be sucked into the lungs.

There are no plans to expand the local airport.

expand something into something The short film is being expanded into a full-length documentary.

#### “Expand the range” means adding new items in a category

David Bryan Sentelle ’01. United States Court of Appeals for the District of Columbia Circuit. WorldCom, Inc. v. FCC, 238 F.3d 449, 454, 2001 U.S. App. LEXIS 1381, \*10, 345 U.S. App. D.C. 70, 22 Comm. Reg. (P & F) 123 (D.C. Cir. February 2, 2001). Nexis.

New services are those services that, by definition, "expand[] the range of service options available to consumers." Id. P 37. Previously, an LEC needed a waiver to offer a new switched access service that did not fit into the preexisting rate structure. The LEC was required to demonstrate that such a waiver was in the "public interest." Finding that existing "new service rules impede the introduction of new services," id. P 37, the FCC Order eliminates the required "public interest" showing and allows LECs to file tariffs for new services with only one-day's notice. LECs are still prohibited from offering "new services outside of price cap regulation." Id. P 43.

### Definitions---“Expand the Definition”

“Expand the definition” means to include more entities under a particular term

Kathleen O’Malley 18. United States Circuit Judge of the United States Court of Appeals for the Federal Circuit. Charleston Area Med. Ctr., Inc. v. United States, 940 F.3d 1362, 1368, 2019 U.S. App. LEXIS 30894, \*13-14, 2019-2 U.S. Tax Cas. (CCH) P50,265, 124 A.F.T.R.2d (RIA) 2019-6396, 2019 WL 5250710 (Fed. Cir. October 17, 2019). Nexis.

But the changes between the language in the two Acts actually cut against the Taxpayers' argument. Congress removed the limiting phrase "now or hereafter organized in the United States for profit . . ." and added the inclusive word, "includes." This demonstrates that Congress meant to expand the definition of corporation in the 1918 Act. See Second Circuit, 809 F.3d at 88 (finding that the § 7701(a) "serve[s] to expand the federal tax law meaning of 'corporation' beyond entities that would ordinarily fall under the term; it offers no hint that Congress intended to contract the ordinary meaning of the term in any way."). Indeed, that the 1916 Act included language specifying that the joint-stock companies and associations included in the section must be for-profit indicates that such companies and associations are not necessarily for-profit and further weakens the Taxpayer's reliance on the noscitur a sociis canon of statutory interpretation.

#### To “expand the definition” is to alter it to make it broader.

Shirley M. Watts 21. Judge, Court of Appeals, 6th Appellate Judicial Circuit. Travelocity.com LP v. Comptroller of Md., 473 Md. 319, 343-344, 250 A.3d 175, 189-190, 2021 Md. LEXIS 200, \*34-35, 2021 WL 4988290 (Md. April 30, 2021). Dissenting opinion.

In our view, Chesek bolsters our analysis. The "subsequent legislation"—the 2015 amendment—is "helpful to determine the legislative intent[]"—that an accommodation intermediary was not included in the definition of vendor liable for the sales and use tax. Chesek, 406 Md. at 462, 959 A.2d at 804. As noted, one of the stated purposes of the 2015 amendment was to "alter[] the definition of 'vendor' under the State sales and use tax to include an accommodations intermediary." 2016 Md. Laws ch. 3 (H.B. 1065 & S.B. 190 (2015)). The amendment clarified the intent of the General Assembly to expand the definition of a vendor liable for the sales and use tax to include an accommodations intermediary. However, prior to the 2015 amendment, an accommodations intermediary was not included.

In sum, altering the definition of a vendor liable for the sales and use tax to include an accommodations intermediary such as Travelocity indicates that Travelocity was not part of the definition before the amendment. Thus, the subsequent legislative history reflects that Travelocity was not liable for the sales and use tax during the audit period.

#### “Expand the definition” means to include more things in a definition---can be so broad as to rewrite the definition entirely

Dori Contreras 22. Chief Justice, Court of Appeals of Texas, Thirteenth District. Miranda v. Farley, 2022 Tex. App. LEXIS 59, \*1, 641 S.W.3d 504 (Tex. App. Corpus Christi January 6, 2022)

On appeal, Farley argues "[i]t would be absurd to require that a forensic pathologist whose conduct otherwise meets the definitions of 'medical care' or 'heath care,' must perform an autopsy on a live patient to fulfill the requirements of the statute." We disagree. See Ross, 462 S.W.3d at 501. To the contrary, as the Hare court recognized, it would be absurd and nonsensical to expand the definition of "patient" to include anything, living or dead, upon which a physician may pass medical judgment. To do so would be to effectively read the word "patient" out of the statute. See Chevron Corp. v. Redmon, 745 S.W.2d 314, 316 (Tex. 1987) ("We will give effect to all the words of a statute and not treat any statutory language as surplusage if possible."). Although the Legislature intended for the TMLA to have "expansive application," Loaisiga, 379 S.W.3d at 256, its application is not limitless. The Legislature could have easily defined "patient" to include subjects of post-mortem examinations—and it could have specifically included such examinations within the scope of "health care" of "medical care"—but it did not. See Union Carbide Corp. v. Synatzske, 438 S.W.3d 39, 52 (Tex. 2014) ("We . . . presum[e] the Legislature included words that it intended to include and omitted words it intended to omit."). This Court will not expand the definition beyond the plain meaning of the words used in the statute.

### Definitions---“Eligibility”

#### “Eligibility” means the fitness or suitability to be allowed to do something

Merriam-Webster No Date. “eligibility noun.” https://www.merriam-webster.com/dictionary/eligibility

Definition of eligibility

: the quality or state of being eligible : fitness or suitability to be chosen, selected, or allowed to do something

The applicants must meet all requirements for eligibility.

… should "Shoeless Joe" Jackson, of "Black Sox" infamy, also be granted eligibility for the Hall of Fame?

— David A. Kaplan

Mass mailings go out to low-income areas, and if a letter is returned as undeliverable, the party uses it to challenge that voter's eligibility.

— Sasha Abramsky

#### “Eligibility” means “meeting the requirements”

Louis B. York ‘96. Justice for the New York County Supreme Court, Civil Term in the 1st judicial district of New York. Nunez v. Dinkins, 168 Misc. 2d 684, 688-689, 641 N.Y.S.2d 983, 986-987, 1996 N.Y. Misc. LEXIS 127, \*9-10 (N.Y. Sup. Ct. February 21, 1996). Nexis.

"Where the terms of a statute are clear and unambiguous, 'the court should construe it so as to give effect to the plain meaning of the words used.' " ( Matter of Auerbach v Board of Educ., 86 NY2d 198, 204 [1995], quoting Patrolmen's Benevolent Assn. v City of New York, 41 NY2d 205, 208 [1976].) Thus, a court should ascribe to the words used their "ordinary and usual meaning" unless the statute or ordinance clearly indicates that the words should be given a different meaning. (McKinney's Cons Laws of NY, Book 1, Statutes § 232.) To determine the plain meaning of a word, courts often consider the dictionary definitions of the word. (See, e.g., Matter of New York State Clinical Lab. Assn. v Kaladjian, 85 NY2d 346, 353-354 [1995], quoting Pierce v Underwood, 487 US 552, 564 [1988]; Matter of Duell v Condon, 84 NY2d 773, 780 [1995]; see also, McKinney's Cons Laws of NY, Book 1, Statutes § 234 [where term is not defined in statute, dictionary meanings are useful guideposts].)

As plaintiffs contend, the Administrative Code is clear on its face. The common meaning of the word "eligible" is "fit and proper to be chosen" or "meeting the stipulated requirements." (See, e.g., Black's Law Dictionary 521 [6th ed 1990]; Random House Dictionary of the English Language 632 [2d ed unabridged 1987].) There is nothing in the SCRIE Statute that indicates that the word is to be given any other meaning; therefore, this definition should be used. (See, Matter of Duell v Condon, 84 NY2d, supra, at 780.) A tenant's "eligibility date", then, is the date on which the tenant first met the stipulated requirements for a SCRIE.

### Definitions---“Expand…Eligible”

#### Expanding the range of eligible entities means applying a definition in additional contexts

Thomas L. Ambro 16. United States Circuit Judge of the United States Court of Appeals for the Third Circuit, Prometheus Radio Project v. FCC, 824 F.3d 33, 36, 2016 U.S. App. LEXIS 9688, \*1, 44 Media L. Rep. 2480, 64 Comm. Reg. (P & F) 1465 (3d Cir. May 25, 2016). Nexis.

One of the Federal Communications Commission's major initiatives for fulfilling its statutory obligation to promote minority and female broadcast ownership has been to give eligible entities certain preferences. The Commission has said that an eligible entity is one that qualifies as a small business under the revenue-based definition used by the Small Business Administration. The Commission has expanded its use of the eligible entity definition by applying it in other contexts. For instance, its rules have aimed to give these entities financing preferences, provide them with construction extensions, and generally encourage them to own broadcast operations. The Commission has defended its revenue-based definition as a legally supportable means of promoting minority and female ownership because the criteria are race and gender neutral. However, the main criticism has been that there is a lack of evidence showing that small businesses are more likely to be owned by minorities or females.

#### Expanding the range of eligible entities means broadening the definition

JILL BARTEE AYERS 21. Circuit court judge in the 19th judicial district, State v. Glavin, 2021 Tenn. Crim. App. LEXIS 389, \*8-9, 2021 WL 3708724 (Tenn. Crim. App. August 20, 2021). Nexis.

In 2008, the legislature expanded the definition of an eligible petitioner to include a person who had been "charged and convicted with a misdemeanor or felony while protesting or challenging a state law or municipal ordinance whose purpose was to maintain or enforce racial segregation or racial discrimination[.]" T.C.A. § 40-32-101(f) (2008) (emphasis added). Despite the broadening of the statute to include convicted offenses, expunction was available only in the most rigid of circumstances. Id. § 40-32-101(f)(1)(E)(i) (thirty-seven years or more must have elapsed since the date of conviction and the petitioner must not have been convicted of any other offense during that time except minor traffic violations).

In 2012, the legislature expanded the expunction statute in a significant way by adding Subsection (g). By doing so, the legislature defined an "eligible petitioner" to include a class of persons convicted of generally non-violent, non-sexual, and non-drug misdemeanor or felony offenses. T.C.A. § 40-32-101(g)(1)(A)-(C). Since the 2012 enacted legislation, a person can petition for expunction if convicted of one Class E felony among a list of Class E felonies with a sentence of three years or less. Id. § 40-32- 101(g)(1)(A). At the same time, the legislature prohibited 40 specifically enumerated misdemeanors from expunction. Id. § 40-32-101(g)(1)(B). Since the inception of Subsection (g), evading arrest remains an eligible offense for expunction while DUI remains ineligible. Id. § 40-32-101(g)(1)(A)(xxix) cf. Id. § 40-32-101(g)(1)(B)(xlv).

#### Expanding the entities eligible means making a category more inclusive

John Lahtinen ‘3. Associate Justice of the Appellate Division, Third Department (Plattsburgh, Fourth District). In re Estate of Post, 2 A.D.3d 1091, 1093-1094, 769 N.Y.S.2d 332, 334-335, 2003 N.Y. App. Div. LEXIS 13565, \*7-8 (N.Y. App. Div. 3d Dep't December 18, 2003)

We find the evidence sufficient to expand the eligible careers to be considered in the first tier to include, as requested by petitioner, medical imaging technicians, nurse anesthesiologists, laboratory technicians, cytologists, occupational therapists, physical therapists and respiratory therapists. The tiered approach suggested by petitioner ensures that decedent's specific intent is first fulfilled, with resort to conditions consistent with his general intent used only when necessary to comply with EPTL 8-1.8 (a) (1). We agree with the Attorney General that the second tier option of expanding the geographic area to include all of Saratoga County and removing the gender requirement \* for potential applicants is closer than the other option to the general intent of decedent. This second tier option, which is available only after exhaustion of the first tier, ensures that the trust can comply with EPTL 8-1.8 (a) (1).

#### Expanding eligibility means increasing the range of things that qualify

Lax & Neville LLP 19. Law firm, 12/26/19. “SEC Proposes Amendments to the Definition of Accredited Investor That Could Expand Eligibility.” https://www.newyorksecuritieslawyerblog.com/sec-proposes-amendments-to-the-definition-of-accredited-investor-that-could-expand-eligibility/

On December 18, 2019, the SEC voted to propose amendments to the definition of accredited investor, potentially vastly changing suitability criteria for investors. This change could have a significant impact both on investors who may gain access to a now-expanded range of private placements and on the viability of damages claims for sales practices abuses related to private placements.

One of the main criteria that would be changed in the proposed amendments is net worth. The proposals would expand eligibility to individuals with professional knowledge, experience, or certifications. Expanded eligibility criteria was also proposed for institutional investors.

SEC Chairman Jay Clayton said the following with regard to the proposal:

The current test for individual accredited investor status takes a binary approach to who does and does not qualify based only a person’s income or net worth. Modernization of this approach is long overdue. The proposal would add additional means for individuals to qualify to participate in our private capital markets based on established, clear measures of financial sophistication. I also am pleased that the proposal specifically recognizes that certain organizations, such as tribal governments, should not be restricted from participating in our private capital markets.

Changing eligibility criteria is a controversial subject. Some analysts note that net worth is not necessarily an accurate predictor of investment savvy or financial literacy, and that barring investors who fail to meet a specific net worth requirement could be viewed as punitive, unnecessary, and restrictive of their access to potentially higher yield investments in the current low interest rate environment. Conversely, other experts argue that increased eligibility could hurt unsophisticated investors by exposing them to risky private placements and increasing rates of sales practice abuse.

### Contextual Ev---“Expand the Definition”

Expanding the definition of personhood has been the aim of previous court cases.

Rebecca Ferrari 20. J.D., 2020, Associate at Cooley LLP. “Federal Protection for "Fur-Babies": A Legislative Proposal,” 47 Pepp. L. Rev. 821 (2020) Available at: https://digitalcommons.pepperdine.edu/plr/vol47/iss3/5

The Nonhuman Rights Project has filed a series of cases attempting to expand the definition of legal personhood to include animals, even if it means placing animals lower on the hierarchy than natural or artificial persons.103 Many of these cases involve an animal, owned by a private party, confined in detrimental or harmful conditions.104 The Nonhuman Rights Project regularly attempts to file habeas corpus writs on behalf of confined animals, but courts consistently reject these claims and decline to consider animals legal per- sons.105 Other organizations have abandoned Wise’s pyramid and instead ad- vocate for legal standing in lower courts to remedy an animal’s harm, garner- ing mixed results.106

#### Expanding the definition of a person is a legal pathway that was used on the road to abolition.

Andrea Morris 18. Science and technology journalist, ongoing contributor to Forbes, 3/13/18. “Can You Be A Person If You're Not Human?” https://www.forbes.com/sites/andreamorris/2018/03/13/can-you-be-a-person-if-youre-not-human/?sh=3184700b2f7f

Things can’t represent their own interests in court. Only persons can represent their interests in court. It’s a catch-22 if you (or someone acting on your behalf) think you’ve been miscategorized as a thing and your goal is to convince a judge that you’re actually a person. A writ of Habeas Corpus is a loophole in this catch-22. The Writ of Habeas Corpus (The Great Writ) is a historic legal pathway used by slaves to gain legal personhood and freedom. It was critical to the abolition of slavery and the expansion of the legal definition of person to include all humans, not just light-skinned humans.

Now the Great Writ is being sought to expand the definition of legal person again.

Here’s how it works:

A writ of habeas corpus is a court order that says a custodian or jailer must bring their prisoner to court to prove they’re being lawfully detained.

Living beings in the thing category can be lawfully detained by virtue of being property.

The NhRP filed a writ on behalf of Tommy and Kiko asking the court to ‘assume without deciding’ that their clients are persons, not property, and are therefore being unlawfully detained.

If the writ is granted, Tommy and Kiko’s owners have to appear before a judge to argue that Tommy and Kiko are being lawfully detained because the chimps are property.

If the court decides Tommy and Kiko are not property, the two great apes get transplanted from the thing category to the person category where they can begin to receive freedoms, rights and protections.

Unprecedented.

To give you an idea of the unprecedented nature of this case, affidavits and amicus briefs in support of NhRP’s motion have been submitted by The Center for Constitutional Rights as well as biologists, psychologists, primatologists, anthropologists, and philosophers from around the world.

#### Courts are unlikely now to expand the definition of personhood

Richard L. Cupp Jr. 16. John W. Wade Professor of Law and Associate Dean for Research, Pepperdine University School of Law, October 2016. “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals' Property Status.” 60 SMU L. REV. 3 (2016). https://scholar.smu.edu/smulr/vol60/iss1/2

This effort to identify precise gradations of consciousness and practical autonomy in the face of such uncertainty and lack of consensus is not likely to impress most courts. Indeed, the intricate and strained model developed may in fact provide ammunition for arguments against per- sonhood for animals. It serves to highlight the probability that courts will, at least for many years, reject finding new rights that would create significant social upheaval given the present lack of certainty or consen- sus about animal consciousness and autonomy. Fetuses aside, defining a human "person" is at present probably viewed as a fairly straightforward undertaking for courts; the more uncertainty and complexity would be required to expand the definition to some nonhumans, the less likely courts will be to undertake the leap.

“Expand the definition” in the context of nature

Meet Kaur 20. Senior advocate & solicitor (Singapore) with a keen interest in international environmental law, climate change law, international investment law & sustainable development. She was in private practice for many years and also served as General Counsel to the Building & Construction Authority of Singapore for 12 years, 12/16/20. “Giving nature a voice through legal rights?” https://www.ercs.scot/blog/giving-nature-a-voice-through-legal-rights/

What if natural resources were granted rights?

Surely recognising the natural environment and habitat such as rivers and woodlands as legal entities with their very own rights might overcome barriers to their protection under the law? One would have thought that the answer would be an obvious, yes, especially since there is an imperative for us to recognise and to protect the natural environment in which we live, such that both humans and the ecosystem will be better served and protected in the long-term.

However, it is not always as obvious or as simple as it would seem. In recent years, several, arguably tactical, public interest litigation (PIL) cases have been launched in different countries,[1] that have revolved round the idea of giving nature legal rights.

The concept of according rights to nature was raised as early as in 1971 by Professor Christopher Stone of the University of Southern California in response to a decision from a United States circuit court that was on appeal to the US Supreme Court. The Ninth Circuit Court of Appeals had refused to recognise that the Sierra Club, a charity, had the legal right (referred to as ‘standing’) to bring a judicial review action to restrain planning approval of a skiing development in the Sequoia National Forest. Professor Stone, in his famous essay Should Trees Have Standing? Towards Legal Rights for Natural Objects,[2] proposed what was a radical idea at the time – to give nature its own rights to prevent the courts from making decisions like this. The Supreme Court upheld the Ninth Circuit’s decision in Sierra Club v Morton,[3] but one of the Supreme Court judges, Justice William O. Douglas, who had come across and read Stone’s seminal article, used it as the basis of his dissenting judgment.

More recently, and in a similar vein, Cormac Cullinan in his book Wild Law[4] describes the concept of human laws taking an ‘Earth-centred’ approach so as to live in harmony with nature, namely, ‘Earth Jurisprudence’. He explains how a new governance system where humans being in tune with their natural environment can decide on what is needed to regulate the relationship between humans and nature to ensure and maintain balance and integrity. He illustrates how humans and nature have equal rights to existence and that rights of nature (to exist and flourish without being there purely for human ownership, use and consumption) must be acknowledged and recognised in human law.

Empowerment to nature – gaining traction

Whilst rights are generally associated with people, in corporate law corporations or companies are recognised as having rights, hence having ‘legal personhood’ (or a legal identity) in the eyes of the law. So why not nature as well? Ever since the idea was first postulated, it has been simmering over several decades and is now gaining traction.

For example, Ecuador amended its national constitution in 2008 to recognise and include the rights of nature. This is revolutionary in that it grants the right to everyone to be able to go to court to protect nature and to get restorative relief in the event of damage.

In 2014, the High Court in the northern Indian state of Uttarakhand recognised and granted legal rights to the Ganges and Yamuna rivers, but these were subsequently revoked by the Indian Supreme Court.[5]

New Zealand passed a law[6] in 2017 to grant legal personhood to the Whanganui River. The law places joint guardianship of the river in the hands of a committee of local indigenous Maori community members and representatives of the government.

Destruction and abuse of nature – making it a crime?

A bold idea that has resurfaced recently is to make ecocide, i.e. the destruction and abuse of nature a crime that can be prosecuted under the International Criminal Court (ICC).[7] The proposal of making ecocide a crime does come with practical difficulties, such as defining ecocide under the law, who would be held responsible, and how to enforce it.

However, more importantly, it actually comes down to the political will of powerful countries to want to push out a global law that makes ecocide a crime. But what is encouraging and perhaps offers a ray of hope is that a recent policy paper from the ICC Office of the Prosecutor[8] placed importance on environmental destruction when selecting cases for prosecution within their legal powers and limitation. It may not happen immediately, and it will take time, but at least there is an acknowledgement of its importance at the higher levels of governance.

Conclusion

Apart from the recognition that nature is not just a resource to be owned and used at will, rights allow nature to ‘fight’ back. Its entrusted guardians can enforce its rights to protect it, to get damages for its remediation, and to hold accountable those that seek to abuse it. Certainly, the usual barrier of the right to pursue a matter in court by a non-governmental organisation (NGO) on behalf of nature will be resolved.

Rights to nature are yet to be enshrined in Scottish law. Scotland is progressive in setting ambitious targets in its climate change action plans. However, it is also important to have laws in place to recognise and accord the rights of nature. The process will certainly need to be accelerated as time is certainly not on our side.

ERCS, with its mission to advocate for policy and law reform, can be a voice for nature. But how? It can do so by ‘pushing’ relevant governmental departments for policy change and law reform, and by garnering public support through provision of advice and information.

Perhaps, in addition to lobbying for change, a tactical launching of a PIL case that deals with environmental protection and the rights of nature can be considered? After all, as noted by the lawyer acting in Colorado River v State of California,[9] “[f]or a lawsuit to succeed in securing personhood status for nature, public pressure must increase and a light must be shined on the courts to expand the definition of rights. We must pack the courthouses so judges can see for themselves that there is a real-world consequence to denying this movement”.[10]

#### “Expand the definition” in the context of corporate personhood

Michael Hiltzik 13. Pulitzer Prize-winning journalist and author who has written for the Los Angeles Times for three decades, 11/26/13. “Supreme Court to rule on whether corporations pray.” https://www.latimes.com/business/hiltzik/la-xpm-2013-nov-26-la-fi-mh-supreme-court-20131126-story.html

Anticipating that the issue would land in the laps of the Big Nine, we examined the issue back in October. At the heart of the cases -- known informally as Hobby Lobby and Conestoga Wood, after the plaintiff firms -- is an effort to expand the definition of corporate “personhood” to cover the practice of religion. Federal appeals courts are split on the issue, which is why the Supreme Court has interested itself. Oral arguments are expected to be scheduled for March.

The Supreme Court’s most notable expansion of corporate “personhood” rights was the infamous Citizens United case of 2010, which granted corporations the equivalent of free-speech rights in election law. The decision has helped to open the floodgates to billions of dollars in self-interested corporate cash in political campaigns.

#### Robots context

Joshua C. Gellers 21. Associate professor of Political Science at the University of North Florida, Research Fellow of the Earth System Governance Project, and Core Team Member of the Global Network for Human Rights and the Environment. *RIGHTS FOR ROBOTS: ARTIFICIAL INTELLIGENCE, ANIMAL AND ENVIRONMENTAL LAW*, pp. 82-83. https://library.oapen.org/bitstream/id/521be842-c3bb-466f-be16-3bd285f181da/9781000264579.pdf

In People ex rel. Nonhuman Rights Project, Inc. v. Lavery (Lavery I),23 the NhRP sought to appeal a New York State Supreme Court judgment denying the group’s application to initiate a habeas corpus proceeding on behalf of Tommy, a chimpanzee, whom they argued was being unlawfully detained. According to NhRP, Tommy was “living along in a cage in a shed on a used trailer lot along Route 30 in Gloversville, New York” (Nonhuman Rights Project, n.d.). The case revolved around the question of whether or not Tommy qualified as a “per- son” capable of possessing an “interest in personal autonomy and freedom from unlawful detention.”24 The NhRP argued that chimpanzees exhibit cognitive abili- ties similar to those found in humans, including autonomy and self-awareness. Therefore, they should be considered persons eligible for the protections available under the writ of habeas corpus. The court declined to expand the definition of a legal person to include animals, finding that “animals have never been considered persons for the purposes of habeas corpus relief.”25

In rendering its decision, the court examined the concepts of person and legal personhood, and evaluated the extent to which they might apply to nonhumans. To clarify these terms, the judges looked to Black’s Law Dictionary, which defined “person” as both “[a] human being” and “[a]n entity (such as a corporation) that is recognized by law as having the rights and duties [of] a human being” (empha- sis omitted).26 Finding the possession of rights and duties central to the descrip- tion of a person and thus required for the demonstration of legal personhood, the court then cited domestic case law in the U.S. supporting this connection between incidents and personhood. The specific aspect in which chimpanzees fell short and corporations proved defensible was legal accountability. For the judges, the “incapability to bear any legal responsibilities and societal duties” made the extension of legal personhood and thus legal rights to chimps “inappropriate.”27 Further, the court held that New York’s animal cruelty laws offered sufficient safeguards for animals, and encouraged the petitioners to press the legislature to enhance the legal protections available to chimpanzees. Following several unsuc- cessful attempts to appeal the court’s decision and the filing of a second habeas corpus petition,28 which was also denied, appealed, and denied again, the case came to an end in 2018, when the New York Court of Appeals denied a motion to allow NhRP to appeal.

Aside from the facts that the court appears to have conflated natural persons with artificial persons, referring to both simply as kinds of “persons,”29 and that “persons” and “legal personhood” are used interchangeably,30 a small but mean- ingful definitional issue led to a potentially erroneous conclusion about Tommy’s legal status. As attorney for the petitioner Elizabeth Stein indicated in her letter to the Clerk of the Court in the First Department’s Appellate Division, the definition of “person” featured in Black’s Law Dictionary (7th edition) misquoted two of its supporting sources, which actually promoted the idea that a “person” entails a being who has rights or duties (Stein, 2017). Although this was an important oversight, the case failed to muster the judicial support necessary to proceed.

The tortuous path that the Lavery I case traveled along the way to validating the status quo illuminates the gap between legal arguments advanced by animal rights advocates and the jurists charged with deciding their merits. The NhRP utilized a properties-based approach to extending rights to animals that would have such nonhuman entities qualify for moral and/or psychological personhoods, which serve as a prerequisite for legal personhood. But the New York State Supreme Court rebuffed this argument, observing a dearth of precedent finding that animals are persons, relying on a definition of legal personhood that requires entities to be capable of exercising both rights and duties, and finding that chimpanzees do not possess either of these capabilities.

Two key insights from this judgment foretell the likelihood that courts might extend rights to robots. First, at least in the U.S. context, the properties-based approach to animal rights is insufficiently persuasive for obtaining judgments in favor of protecting nonhuman entities on the basis of their individual rights. Short of demonstrating that intelligent machines can effectively execute duties and be held legally accountable for their actions, they are unlikely to be deemed persons under the law. Pursuit of this objective is frustrated by the fact that legal scholars and technologists have yet to come to an agreement regarding how to best address the myriad legal accountability issues intrinsic to AI (i.e., Lehmann et al., 2003; Hallevy, 2010; Doshi-Velez & Kortz, 2017). As the court indicated, corporations, unlike chimpanzees, are associations of humans that bear legal duties. Only those entities in possession of moral agency and the capacity for societal responsibility can exercise duties and thus be considered legal persons entitled to rights.

Second, if the category of legal persons comprises only those entities capable of duties, responsibility, and accountability, then, absent scientific evidence sug- gesting technological beings are capable of these things, the only way they can obtain legal rights would be through one of the theories extending legal person- hood to corporations. For instance, a robot rights group could form an association on the grounds that they possess a common interest in the welfare of AI, with all of the attendant privileges, responsibilities, and liabilities contained therein. Then the robot could be considered a legal person whose accountability reaches back to the humans who incorporated on its behalf. However, this strategy would likely fail to protect all intelligent machines, and it would depend on a property rights–like model that might invite controversy among animal liberationists. An alternative would be to classify robots as legal minors and designate humans as persons in loco parentis who serve as their guardians. Such humans could then be considered responsible for the actions of technological entities. This approach has already been deployed in an Indian case involving the personhood of rivers (O’Donnell, 2018, pp. 142–143).31

#### Expanding the definition of a person could grant legal rights to, e.g., embryos

Kathy Lohr 12. Correspondent for the National Desk of National Public Radio, 1/27/12. “Abortion Debate Likely To Heat Up In 2012.” https://www.npr.org/2012/02/01/145980360/abortion-debate-likely-to-heat-up-in-2012

And there's another strategy that worries abortion-rights activists — the "personhood" campaign. It's a state-by-state effort to pass a constitutional amendment that would expand the definition of a person and grant legal rights to embryos. Last month, the president of Personhood USA, Keith Mason, spoke at the group's forum for GOP presidential hopefuls in South Carolina.

#### More fetus evidence

Mamta K . Shah ‘1. J.D., Hofstra University, 2001. "Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life," Hofstra Law Review: Vol. 29: Iss. 3, Article 5. http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss3/5

Vo v. Superior Court198 required the Arizona Court of Appeals to “decide whether the killing of a fetus can constitute first degree murder under” Arizona's homicide statute.m DeSpite the Arizona Supreme Court’s holding in Summerfield v. Superior Court:30 permitting a tort action for the wrongful death of a viable, unborn fetus?” the Vo court excluded a viable, unborn fetus from the deﬁnition of “person” in the context of criminal homicide.202 The court distinguished its power to expand the deﬁnition of “person” in a civil action such as that in Summerﬁeld from its authority to extend the applicability of a homicide statute.203 First, the court identiﬁed Arizona as a “code state”204— Arizona had abolished all common law crimes and only the legislature retained authority to deﬁne and create crimes.205 Thus, the courts are “legislatively precluded from creating new crimes by expanding the common law through judicial decision.”206 Because the legislature is presumed to have been aware of the viability standard articulated by the Summerfield court when enacting the murder statute, its failure to expressly deﬁne the term “person” to include a viable fetus reﬂects the legislature’s intent to exclude an unborn, viable child from the protection of the murder statute.207

### Contextual Ev---“Confer Personhood”

#### Contextual ev for “confer legal personhood”

Joanna J. Bryson et al. 17. Professor at Hertie School in Berlin, with Mihailis E. Diamantis and Thomas D. Grant, September. “Of, for, and by the people: the legal lacuna of synthetic persons.” Artificial Intelligence and Law volume 25, pages273–291 (2017). https://link.springer.com/article/10.1007/s10506-017-9214-9

Every legal system must decide to which entities it will confer legal personhood. Legal systems should make this decision, like any other, with their ultimate objectives in mind. The most basic question for a legal system with respect to legal personhood is whether conferring legal personhood on a given entity advances or hinders those objectives. Those objectives may (and, in many cases should) be served by giving legal recognition to the rights and obligations of entities that really are people. In many cases, though, the objectives will not track these metaphysical and ethical truths. Sometimes legal personhood may be denied to real people in order to serve odious ends, like perpetuating privileges for some smaller group of people. Other times, a legal system may grant legal personhood to entities that are not really people because conferring rights upon the entity will protect it or because subjecting the entity to obligations will protect those around it.

#### “Confer personhood” in environment/corporation context

Joanna J. Bryson et al. 17. Professor at Hertie School in Berlin, with Mihailis E. Diamantis and Thomas D. Grant, September. “Of, for, and by the people: the legal lacuna of synthetic persons.” Artificial Intelligence and Law volume 25, pages273–291 (2017). https://link.springer.com/article/10.1007/s10506-017-9214-9

As discussed above, legal systems can confer legal personhood on non-human entities. In almost every case, these will have both fewer rights and fewer obligations. Consider the legal personhood that environmental features now have in several countries–the Whanganui river and Te Urewera national park in New Zealand (Rousseau 2016), the Ganges and the Yamuna rivers in India (Safi 2016), and the entire ecosystem in Ecuador.Footnote10 Of necessity, the legal rights and obligations accorded to these environmental features differ from those given by their respective nations to human beings. In the case of the Whanganui River, for example, the primary concern was to ensure the rights of the river not to be owned (Calderwood 2016). Corporations in the United States may be the legal persons with the suite of legal rights and obligations most closely approximating those given to human beings. A detailed constitutional jurisprudence has grown around the issue. While the U.S. Supreme Court seems on track to affirm that corporations have nearly every constitutional right and obligation, it has balked in some rare instances, such as the right against self-incrimination at criminal trial.Footnote11

#### “Confer personhood” in the context of animals

Scott A. Chesin 21. Lawyer for SHOOK HARDY & BACON L.L.P., 9/24/21. “AMICI CURIAE BRIEF OF AMERICAN VETERINARY MEDICAL ASSOCIATION, NEW YORK STATE VETERINARY MEDICAL SOCIETY, AND AMERICAN ASSOCIATION OF VETERINARY MEDICAL COLLEGES IN SUPPORT OF RESPONDENTS.” https://library.oapen.org/bitstream/id/521be842-c3bb-466f-be16-3bd285f181da/9781000264579.pdf

B. Conferring Legal Personhood on Animals Would Undermine Animal Welfare and Lead to Significant Adverse Consequences

As indicated, the veterinary community is deeply concerned about the adverse implications of allowing such outside groups to interfere with or possibly harass animal owners in their ability to own, direct, and care for their animals. If this writ is granted, a third party could readily petition a court for custody of an animal if it disapproves of how the owner is lawfully treating the animal, to stop an owner from euthanizing an animal (which is one of the hardest decisions of ownership), or to prohibit spaying or neutering an animal by arguing the animal would be deprived of its reproductive rights. None of these outcomes would seem farfetched anymore.

## Other Words

### Substantial

#### The term ‘substantial’ is ambiguous but worth retaining in this context to signify important linkages and continuities to the core of what constitutes personhood.

Bartha Maria Knoppers & Henry T. Greely 19, Centre of Genomics and Policy, McGill University, “Biotechnologies Nibbling at the Legal ‘Human,’” Science, vol. 366, no. 6472, American Association for the Advancement of Science, 12/20/2019, pp. 1455–1457

We care about living organisms that are human in their characteristics, but they do not always need to have exactly human characteristics. “Human beings” typically have two arms and two legs, but we recognize as human those without all those limbs, through amputation or congenital condition, as well as people with artificial limbs. Possession of a “human genome” is part of being a legal natural person, but we need to recognize both that a genome is neither in itself sufficient (a human lymphocyte is not a legal person) nor, in exact detail, necessary. Like the body, the genome needs only to be “substantially” human. Unusual or rare variations are not disqualifying in themselves but form part of the decision. The same is true of humans with some tissue from nonhuman organisms or some mechanical implants. It is also true of nonhuman organisms with some human tissues or DNA; a mouse with a human immune system should not be seen as substantially human or a natural legal person. Similarly, some version of “substantially” could be applied to definitions of brain death, not to require some kind of “higher brain death” rule but to avoid complexity when small bits of living brain, either in vivo or in vitro, are used to assert that the legal natural person still lives.

What constitutes “substantially” in these contexts will not be measurable by percentages or similar specific tests but will be a judgment call—like many such legal terms, such as “unreasonable” or “best interests.” Using “substantially” will not provide an exact answer but will give the decision-maker ( judge, jury, or other) some guidance, just as “beyond a reasonable doubt” says something more than “preponderance of the evidence” when considering the burden of proof and “reckless” means something beyond “negligent” when considering culpability for injuries. For the most part, this should be possible in the interpretation of the meaning of the word “human,” without requiring new legislation. As a result, its application may vary from judge to judge and culture to culture while still, as a concept, providing some useful guidance.

The other big question is when we treat molecules, cells, tissues, organs, or bodies as “human” in terms of deserving respect. Again, “substantially” might be a useful part of the definition. Additional consideration may include whether the body part was ever a part of a natural legal person. If a kidney grew in a natural legal person, that argues for it being “human” even if it had a very odd morphology, function, or even genome. A kidney grown totally in a laboratory, even if a fully human kidney, may not deserve respect if it was never inside or “part of” a natural legal person. But a kidney from a pig, genetically modified to function in a human, might not be viewed as “human tissue” while in the pig but be so viewed if it had functioned inside a natural legal person for years.

We have attempted to address the classical legal dualisms defining “human,” an approach that may be useful to the law, at least until our cultures arrive at better ways of understanding and approaching these new realities. Rules that include the word “substantially” are never fully satisfying. Nevertheless, in a universe where things blend into each other and living organisms are not cleanly divided into Platonic natural kinds, they may be the best filter we can apply: a malleable term for contextual and proportionate evaluation. “Substantial” is already a term in, inter alia, copyright and data protection law and therefore is an analytic tool the law already possesses. Such rules here will no doubt still lead to close or contested decisions—how to treat a SHEEF for example—but we believe that more frequently they can lead to results that we are (substantially) comfortable with while still preserving the core of our legal dualisms. In practice, our human families do not always meet exact definitions with perfect edges, but we can see substantial connections among them. On the spectrum from living cell to organism to human being, with all their new biotechnological variations, to a natural, legal person (alive or dead), perhaps the concept of membership in the hazily bordered human family can serve as a useful source for the delimitation of the “human.”

# Evidence Index + Area Survey

## Top

Below is our evidentiary survey of live debates across the topic areas. Each hat focuses on a loosely-defined category of AFFs that roughly corresponds to that area in the event that a list topic is chosen.

Each header labeled AFF Area contains an assortment of AFF and NEG evidence about a particular plan.

## Animals

### Inherency/UQ

#### Animals aren’t legal persons---recent cases squarely address the issue

Briana Hopes 21, Senior Managing Editor, Volume 23, Tulane Journal of Technology and Intellectual Property. J.D. candidate 2021, Tulane University Law School; B.A. 2014, Mass Communication: Public Relations, Louisiana State University, “Rights for Robots? U.S. Courts and Patent Offices Must Consider Recognizing Artificial Intelligence Systems as Patent Inventors,” 23 Tul. J. Tech. & Intell. Prop. 119, Spring 2021, WestLaw

A. Animals

1. Current Legal Personhood Status

The discussion on the legal personhood of animals has been and will continue to be a longstanding topic of conversation. Litigation seeking animal legal personhood is “in its infancy and will likely continue to expand into the foreseeable future.”98 In 2017, a New York appellate court issued a “landmark ruling rejecting an animal rights organization's efforts to assign legal personhood status to chimpanzees.”99 The organization sought habeus corpus relief for two caged chimpanzees.100 In this case, the \*130 petitioners, a Massachusetts nonprofit corporation, contended that chimpanzees are entitled to habeas relief because their human-like characteristics render them “persons” for purposes of CPLR article 70.101 CPLR article 70 “provides a summary procedure by which a ‘person’ who has been illegally imprisoned ... can challenge the legality of the detention.”102 Although the word “person” is not defined in the statute, the court concluded that there was no support that the definition includes non-humans.103 The court did agree that the petitioner's evidence demonstrates the intelligence and social capabilities of chimpanzees; however, the petitioner did not provide any evidence “that the United States or New York Constitutions were intended to protect non-human animals' rights” or that the Legislature intended to expand the term “person” beyond humans.104

In addition, the Ninth Circuit has stated that Congress would have to authorize Article III standing for animals, but the court indicated that there would no issue if they were to authorize it.105 The Ninth Circuit in Cetacean Community v. Bush stated, “we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships.”106

2. The “Monkey Selfie” Case

Although the “Monkey Selfie” case involves whether an animal can receive copyright protection, this case presents a very similar question as the DABUS team: can a non-human have intellectual property rights?107

In Naruto v. Slater, the United States Court of Appeals for the Ninth Circuit held that a monkey and all other animals lacked statutory standing under the Copyright Act because they were not human.108 In the case, a wildlife photographer visiting a reserve in Indonesia in 2011 left his camera unattended at the reserve.109 While the camera was unattended, a seven-year-old crested macaque named Naruto allegedly took several \*131 photographs of himself (“Monkey Selfies”) with the photographer's camera.110 In 2014, the photographer published the Monkey Selfies in a book and identified himself as one of the copyright owners of the Monkey Selfies.111 However, throughout the book, the photographer admits that Naruto took the photographs at issue.112 People for the Ethical Treatment of Animals (PETA) filed a “Next Friends” complaint against the photographer on behalf of Naruto alleging copyright infringement.113 The United States District Court for the Northern District of California granted the motions to dismiss by the plaintiffs on the grounds that the complaint did not establish standing under Article III or statutory standing under the Copyright Act.114 The district court concluded that although Naruto might have had Article III standing, he failed to establish statutory standing under the Copyright Act.115

The Ninth Circuit affirmed the district court's decision and agreed that Naruto did not have statutory standing under the Copyright Act.116 The court looked to their circuit's precedent in Cetacean Community v. Bush and stated that “if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing.”117 They further stated that the Copyright Act “does not expressly authorize animals to file copyright infringement suits under the statute.”118

### AFF Area---Core Animals AFF

#### Courts have refused to grant protection to animals---granting legal personhood is the necessary systematic change

Jessica Lindimore 20, associate in Ice Miller’s Real Estate Group and former editor-in-chief of the Journal of Animal and Environmental Law, Fall 2020, PEOPLE, PROPERTY, OR PET-INFLUENCERS?, Journal of Animal and Environmental Law, Vol. 12, p. 44-57

1. Animal Personhood

The animal personhood status approach is seeking a radical change to the way the American legal system views animals. Instead of working within the confines of the current system, the animal personhood approach seeks to have animals viewed as equals to human beings. Under the personhood approach, denying animals rights denies them basic protections that could easily be afforded to them under the law. Legal rights would allow animals, or people on their behalf, to 1) take legal action for injury done to them [animals] 2) to have a court recognize and take account of that injury and 3) to receive legal relief that benefits them. Giving animals rights would guarantee that the law not only recognizes but also protects their interests. 10

The argument against granting animal's rights is that it is simply too complicated, and that the pursuit of animal personhood would yield borderline absurd results. This argument also assumes that even intelligent and informed people might not be able to agree on the interests of animals given that suffering or cruelty can sometimes be subjective. This argument is further bolstered by the fact animals lack the skills to converse with people. As a result, opponents of animal rights argue that society simply is not equipped to protect the individual interests of animals. 11However, proponents of animal personhood point out that there are other legal situations where the interests of the protected parties are not explicit. 12Specifically, parties such as corporations, infant children, estates, municipalities, and even universities all hold rights but are unable to speak on their own behalf. Instead, these parties rely on appointed representatives or guardians to speak on their behalf. 13Similarly, it is argued that the interests of domesticated animals could be discussed by their owners rather than relying on the animals themselves.

Opponents of the animal personhood approach further argue that awarding animals' personhood status would not only be too far but would also be difficult to undo. They suggest that once animals are recognized as persons, there will be no going back. This is an especially effective counterargument when considering how many animals contribute to the economy. If the status of animals is changed, resulting in a detriment to the economy, any possible benefit to humans could potentially be negated. Further, as humans, it is difficult to get around the fact that on many levels we just do not view animals as equals. The most obvious example being our diet. With the majority of the population consuming at least some animal products, it is difficult to reconcile the idea of seeing animals as persons without radically changing some of our industries and habits. This is unattractive for many reasons, such as the economic impact as well as grappling with the potential of having to very seriously change the way humans consume food.

Proponents of animal personhood argue that this logic is akin to the "slippery slope" argument. Proponents say that removing animals from the legal category of "property" and granting them rights just means granting them protection implicit in that type of right. These rights would include: access to legal action, consideration before a court, and the possibility of compensatory relief. 14Further, even if animals are granted these rights, does not mean the interpretation of these rights in the animal context would have to mirror interpretation in the human context. 15

Currently, there are various non-profit organizations actively litigating for animal rights. The Nonhuman Rights Project and the Animal Legal Defense Fund being two of the most prominent. The Nonhuman Rights Project seeks to change the common law status of great apes, elephants, dolphins, and whales from property status to beings with the capacity to possess any legal right given to legal persons. 16The organization focuses heavily on animal personhood status and has filed numerous lawsuits asking courts to recognize animals, who are allegedly suffering dignitary harms, as having personhood status. The Animal Legal Defense Fund was founded by attorneys and focuses primarily on litigation for the advancement of animal rights. Out of the two groups, the work of the Nonhuman Rights project is more prominent in working to advance the personhood status, whereas the Animal Legal Defense Fund focuses more on protecting the welfare of animals.

In recent litigation the Nonhuman Rights Project has been filing writs of habeas corpus on behalf of animals. While their work has largely focused on wild animals the analysis is still relevant when considering domestic animals. A writ of habeas corpus is typically used to seek relief on behalf of a human Detainee. However, the Animal Legal Defense Fund has been advocating that this form of relief should also extend to animals detained in inhumane conditions such as zoos. The Nonhuman Rights Project postures that highly intelligent animals such as primates possess so many anthropomorphic qualities that it would be inhumane to not extend them the same rights and protections as legal persons. Further, proponents of animal personhood such as the Nonhuman Rights Group argue that welfare approaches- such as increased protections in the form of legislation- do not offer enough protections to animals with so many human-like characteristics. The Nonhuman Rights Group claims that some animals have so many similarities to humans that the only logical way to protect them is through personhood status.

In 2017, the Nonhuman Rights Project filed a writ of habeas corpus on behalf of two chimpanzees in which the Supreme Court of New York held that the trial court properly declined the petitioner's order to show cause because their human-like characteristics did not render them "persons" for the purposes of New York Law. 17The relevant law the Court applied in this case was NY CLS CPLR § 7002 and § 7003. The Court further explained that the chimpanzees were not persons because even though they displayed human-like characteristics they were unable to acknowledge a legal duty or responsibility and that non-humans were not precedential or constitutionally contemplated as having the same rights as humans. 18

The result of this case is not an outlier. The Nonhuman Rights Project has filed numerous suits preceding this matter with no success on securing animal personhood status. In sum, these lawsuits have not been very effective and are typically dismissed quickly. While a quick dismissal is not dispositive, it does not lend anything in the way of optimism to the animal personhood argument in the American legal system. Ultimately, courts are not enthusiastic about recognizing animals as possessing anything other than property status. The reason for this is not because courts fail to recognize the difference between a chair and an animal but simply because they have concluded that those differences do not amount to being viewed in the legal system as possessing a legal personhood status or the rights that come with that status.

Ultimately, the animal personhood approach recognizes that animals have a unique place in society and as such should be protected. For the proponents of this argument, in order to recognize that place in society, animals must be afforded personhood status and all the rights that come with that status. More importantly, the animal personhood approach builds upon the rarely disputed animal rights idea that animals are different from property. While the animal personhood approach is viewed as an extremist philosophy the idea that is central to the argument is not in dispute. Yet, the methodology for recognizing them within the legal system is.

While the animal personhood approach can seem in some instances comparable to hitting a pea with a sledgehammer, there is something to be salvaged from all existing solutions, including the extremist approach of animal personhood. Animal personhood seeks radical and systemic change. I argue that generally this is more along the lines of the kind of change necessary to yield the most equitable results in tort. However, rather than starting with the most radical change, I will argue that the change in animal status should take place gradually and happen in tandem with advancing the rights of humans.

#### Personhood is an ethical imperative

Arian D. Wallach 20, Faculty of Science at the University of Technology Sydney, 05/18/20, Recognizing animal personhood in compassionate conservation, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/

Discussion

Although the belief that nonhuman animals have some moral standing may be broadly shared among conservationists, compassionate conservation is distinguished by the recognition of nonhuman personhood. Proponents call to include all sentient beings as persons in conservation's moral community through the cultivation of compassion (Ramp & Bekoff [2015](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0051); Wallach et al. [2018](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0063)). Critics of compassionate conservation generally deny the personhood of all beings but humans by calling for the continuation of programs that harm sentient beings, who are often intelligent, emotional, and social, for the perceived greater good of conservation.

On scientific and ethical grounds, there are good reasons to extend personhood to nonhuman animals (Midgley [1985](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0042); Rose [2011](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0055); Dayan [2018](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0014)). The burden of proof should no longer lie with those who seek to expand conservation's moral community, but with those who wish to enforce narrow boundaries (Laham [2009](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0038)). For compassionate conservationists, sentience is sufficient grounds to recognize personhood. Others may believe that different qualities are morally relevant, and we invite ongoing dialogue on this important topic. But as a starting point, personhood should not be a status automatically limited to humans. Holding humans separate and aloft from the rest of the living world has legitimated the historic and ongoing exploitation of the more‐than‐human world, which is arguably the reason conservation was needed in the first place (Plumwood [1993](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0049)).

Opposition to compassionate conservation is often linked to the legitimate concern that at times conservationists are faced with difficult choices: harm individuals or lose species (Rohwer & Marris [2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0054)). Under such tragic circumstances, it is not clear that any decision can be made with moral impunity (Batavia et al. [2020](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0003)). Our most quotidian moments harm sentient beings, and choices must be made that inevitably prioritize some over others. How then is one to act ethically if every act holds the potential to harm fellow persons? There is no easy answer (Batavia et al. [2020](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0003)). But if one takes seriously the notion that all sentient beings are persons, forming and pursuing conservation objectives founded on mass killing would become inconceivable. The default of domination would be replaced with a default of compassion. This does not mean that one never harms a person nor that there cannot be variations in our obligations to different persons (Plumwood [2008](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0050); Robinson [2014](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0053)). Between perfectly equal moral status for all and categorical moral segregation of the few lies a wide expanse where a more inclusive and contextual moral terrain can be explored.

Conservationists who restrict personhood to humans may still attribute other animals some degree of moral standing. For example, Hayward et al. ([2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0030)) state, “most mainstream conservationists are keen to embrace ethical concern for individual animals as an important element in conservation best practices, but only to the extent that it is consistent with landscape‐level methods of protecting native biodiversity.” In other words, the “compassionate tail [should not] wag the conservation dog” (Hayward et al. [2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0030)). For compassionate conservationists, this is not good enough. Relegating compassion to a virtue to be dragged behind action (or worse, to be docked) does little to limit the entrenched violence regularly enacted against sentient beings in conservation programs. Beyond simply replacing lethal tools with nonlethal tools to achieve the same ends, compassionate conservation challenges the very agendas and logics underlying conservation. For example, rather than merely asking how biodiversity can be protected from feral cats with nonlethal tools, one is able to ask what is revealed when feral cats are accepted as part of biodiversity (Wallach et al. [2020](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0066)).

That no clean biological or evolutionary boundary separates humans from other animals is widely accepted, yet a stark ethical dualism persists, and abandoning it remains an almost unthinkable proposition. Some suggest that compassionate conservation is too subversive to even be allowed space at the table, going so far as to proclaim that “compassionate conservation is not conservation” (Driscoll & Watson [2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0019)). Such a diktat risks harming the open exchange of ideas on which scholarship depends. If conservation's sole purpose is to protect native ecological collectives with little regard for other moral claims, then it is fair to say that neither compassionate conservation, the wider academic community, nor prevailing social values are aligned with conservation (van Eeden et al. [2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0061); Gbedomon et al. [2020](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0024); Manfredo et al. [2020](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0040)). The time has come to change this entrenched definition of conservation. As Deborah Bird Rose ([2011](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0055)) said, “animals haunt the Western imagination, a haunting entailed by and sustained through our long‐lasting, but now crumbling, dualisms.”

Prevailing social values are shifting to align with views promoted by compassionate conservation (Manfredo et al. [2020](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0040)). The moral recognition of personhood for nonhuman animals is even beginning to influence law. In 2019, an orangutan named Sandra was the first to be released from a zoo following Argentina's ground‐breaking legal recognition of nonhuman personhood. Addressing the press, Judge Elena Liberatori stated, “with that ruling I wanted to tell society something new: that animals are sentient beings and that the first right they have is our obligation to respect them” (BBC [2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0004)). The implications of these societal shifts are not trivial for conservation.

Compassionate conservation is not a challenge to conservation per se, but a good‐faith response to growing societal recognition worldwide that nonhuman animals feel, that they have lives, experiences, and relationships that matter to them, and that should matter to us (e.g., European‐Parliament [2010](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0021); Kansal [2016](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0035); Africa‐Union [2017](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0001); Bruskotter et al. [2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0009); van Eeden et al. [2019](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0061); Manfredo et al. [2020](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7540678/#cobi13494-bib-0040)). It is not farfetched to suggest that changing social values makes the transition to more compassionate forms of conservation unavoidable. Compassion sits at the heart of many religious and ethical traditions—not because it is obvious or simple, but precisely because it is difficult and demanding. We embrace compassion for its ability to bridge between ourselves and Earth's great diversity of persons. Compassionate conservation offers a way forward, to seize the challenges and opportunities that rise in the dust of our crumbling dualisms.

#### Sentience justifies legal personhood

Courtney Holdron 13, attorney at Oshawa Law Firms, The Case for Legal Personhood for Nonhuman Animals and the Elimination of their Status as Property in Canada, https://central.bac-lac.gc.ca/.item?id=TC-OTU-42864&op=pdf&app=Library&oclc\_number=1032907251

2. Moral Personhood to Legal Personhood

Nonhuman animals who have met the criteria for moral personhood are entitled to no longer be classified as property since they are entitled to equal moral consideration of their interests as members of the moral community298. The property status of nonhuman animals cannot be retained for nonhuman animals who qualify as moral persons as it does not reflect the fact that they are entitled to equal consideration of interests, and the property status is incompatible with an entity being a moral person. The principle of equal consideration of interests has no meaningful application to nonhuman animal interests if they remain the property of humans since their interests will always count for less than the interests of their owners299. Nonhuman animals have an interest in not suffering, especially with regards to their use by humans no matter how “humane” that use may be said to be300 . Canadian law recognizes that a mentally disabled human being has an interest in his or her life301 and in not being treated “exclusively as a means to the ends of others even if...”302 he or she “does not have the same level of self-consciousness that is possessed by normal adults; in this sense, she is similarly situated to all other sentient humans, who have an interest in being treated as ends in themselves irrespective of their particular characteristics.”303. As Gary Francione points out, “Indeed, to say that a mentally disabled person is not similarly situated to all others for purposes of being treated exclusively as a resource is to say that a less intelligent person is not similarly situated to a more intelligent person for purposes of being used, for instance, as a forced organ donor. The fact that the mentally disabled human may not have a particular sort of self-consciousness...has no relevance to whether we treat her exclusively as a resource and disregard her fundamental interests, including her interest in not suffering and in her continued existence” 304 . Nonhuman animals who have been shown to be sentient are in a comparable situation to infants, and persons who are mentally incompetent. As they are protected from being used as a resource, and comparable sentient nonhuman animals are not awarded the same protections it can be said that Canadian society is failing to adhere to the principle of equal consideration of interests305. Thus, as there is no morally relevant characteristic that distinguishes humans from nonhuman animals for the purpose of denying them moral personhood, and the application of the principle of equal consideration of interests has shown that they are entitled to be treated as moral persons, sentient nonhuman animals are entitled to have their status as property removed306 .

Sentient nonhuman animal persons have a claim to legal personhood, which is grounded in the fact that they have morally significant interests that are capable of being represented in law, and that the principle of equal consideration of interests requires that they be represented in law307. Evidence for the claim that nonhuman animals have interests and they are capable of being represented in law is provided by Canadian animal law. As shown in Chapter 2, federal and provincial and territorial anticruelty and welfare legislation recognize that nonhuman animals have a morally and legally significant interest in not suffering308. Furthermore, the idea that nonhuman animals have their own legal interests has been recognized in varying degrees in the U.S.A. and internationally309, which will be discussed further in Chapter 4. The interests of sentient nonhuman animals can be said to include avoiding mental suffering, physical suffering, injury and death. Courts have already dealt with these interests under the heading of pain injury in American civil law, which shows that courts are competent to provide remedies to successful claims should nonhuman animals be granted legal personhood310. The characteristic of sentience as the sufficient condition for legal personhood is justified on the grounds that suffering is the appropriate measure for standing determinations because case law demonstrates that a showing of physical injury or suffering can constitute a claim of action311. Second, the history of North American laws, culture and religion demonstrates that the guiding principles that Canadian and American society is based on are that humans do no harm to others312, and a just system will treat like cases alike313. Thus, nonhuman animals who are identified as moral persons will be granted legal personhood if the legal system is to be seen as just by treating like cases alike. As humans are moral persons and are entitled to legal personhood it can be said that nonhuman animal moral persons are also entitled to legal personhood. This is supported by the fact that they have interests that are capable and ought to be represented in law. Their interests in not suffering are morally significant interests that deserve legal protection as justified by the guiding principle of do no harm to others, and the equal consideration of interests. The claim for legal personhood for sentient nonhuman animals is further strengthened by the fact that legal personhood is not inherently limited to human beings in Canada. For example, the Crown has been recognized as a legal person314 as have corporations315 .

### AFF Area---Animal Property Rights

#### Animal property rights should be expanded as a mechanism for protecting nature

Karen Bradshaw 21, Professor of Law and the Mary Sigler Fellow at Sandra Day O'Connor College of Law at Arizona State University, “Should Marine Species Own the High Seas?,” Nautilus, 1/27/21, <https://nautil.us/should-marine-species-own-the-high-seas-11846/>

Later this year, the United Nations will finish hosting the final negotiations on a new conservation treaty for the high seas, as waters that lie outside national jurisdiction are known. These cover more than half of Earth’s surface and contain much of the planet’s biodiversity. The moment marks a tremendous opportunity in humanity’s losing battle against biodiversity loss.

Thus far, however, conversations about how best to protect the high seas have missed a crucial element, one that could well be the single boldest, most important conservation move that humankind could make: recognizing the property interests of the marine species now living there.

Every whale and shark and sea turtle, every tuna and toothfish, every octopus and even every salp and sea urchin and anemone, has a right to own their part of the ocean.

What does it mean to say that animals have a right to own property? To many people this might seem like a radical idea. Those who follow animal law might say that it’s too big an ask. After all, it’s generally understood that in the United States and most of the world’s nations, animals have very limited legal rights. When activists have fought for legal personhood for animals—as when the People for the Ethical Treatment of Animals sued SeaWorld for allegedly violating the 13th Amendment rights of orcas, or the Nonhuman Rights Project’s habeas corpus lawsuits on behalf of captive chimpanzees and elephants—they have usually lost.

It’s not so unprecedented, though. Many existing laws afford certain non-human animals legal interests to the environments in which they live. In the United States, for example, thanks to the federal Bald and Golden Eagle Protection Act, a golden eagle’s claim to the tree in which she nests outweighs the right of the tree’s human landowners to cut it down. Most public lands—approximately one-third of the landmass of the United States—are partially managed for animal interests. In the past decade, most states have enacted laws allowing pets to own property bequeathed to them in trust. Some tribal nations in the U.S. have afforded legal personhood to natural entities, such as wild rice in Chippewa ceded territories, which would allow humans to file lawsuits in tribal courts on behalf of rice. Outside the U.S., New Zealand’s Whanganui River was granted legal personhood in 2017, and Ecuador’s constitution explicitly recognizes the rights of nature to persist and regenerate. Once-unthinkable assertions of rights for nature’s beings are becoming commonplace.

These developments lay the foundations for explicitly recognizing wildlife as property owners. In contrast to how legal scholars historically viewed property—with ownership as an all-or-nothing affair—new models envision property rights as overlapping, a pluralistic conception of ownership in which humans and nonhumans alike can both have legally actionable interests in the same physical space. In this way, modern property law is beginning to embrace what many Indigenous cultures never forgot: Plants and non-human animals are our co-participants in life on Earth.

As applied to the high seas, this suggests that marine species could be understood as owners of the oceanic commons they occupy or, at least, co-owners with the recognized interests of nation-states. Under nearly every legal standard except the unstated qualifier of being a member of the human species, marine animals have property interests to the ocean.

What would this mean in practice? It could take a number of legal forms. One option is for marine species to hold ocean waters in trusts, similar to existing trusts for domestic animals. Humans would be appointed to manage ocean ecosystems for the benefit of the nonhuman living there. They wouldn’t need to consider the fate of every individual fish, but would be legally required to protect the well-being of species and populations.

Alternatively, the United Nations might look to the influential work of philosophers Sue Donaldson and Will Kymlicka, who have theorized that different kinds of animals could be accorded different types of citizenship. Donaldson and Kymlicka write that domestic animals ought to be treated as full citizens of our own societies, while wild creatures can be likened to citizens of other nations. The United Nations might might even create a legal nation-state for marine species, with humans representing them in international affairs.

The United Nations could also simply list marine species as a member of the ocean commons, affording legal recognition of animal interests alongside that of the nations that collectively own the high seas. This would require subsequent treaties to consider wildlife interests.

In all these cases, a formal recognition of rights would advance marine species’ interests in the high seas—and not merely through the human-centered goal of sustainable fisheries management of fisheries, but by elevating the larger biodiversity goals that are at the center of the high seas treaty negotiations now taking place.

Every whale and shark and sea turtle, every tuna and toothfish, every octopus and even every salp and sea urchin and anemone, has a right to own their part of the ocean.

Right now, however, negotiators at the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction—as the U.N. body drafting the treaty is formally known—are actually moving in the opposite direction. They’re considering dividing the high seas between nations and regions. Nonhuman rights are not on the table.

To be sure, this is part of conversations that also include proposals for marine protected areas and restrictions on high seas fishing, both of which of which would do much to advance the interests of non-human ocean users. But divvying up the ocean without formally acknowledging the ownership interests of the creatures now living there replicates the fatal flaw that colonial governments made when they demarcated land boundaries. Rather than being required to consider the rights of wildlife in future actions, countries and regional management organizations will be able to diminish them even further.

That’s especially likely if regional fisheries management organizations acquire more power, which seems likely. They have a poor track record of biodiversity preservation—and, if given the chance, nations engaged in economic competition over the high seas’ resources will engage in a race-to-the-bottom. Devastating biodiversity loss will almost certainly occur, hastening the sixth extinction.

To avoid further expropriating Earth from other species, the new treaty should permanently title the high seas to its animal occupants. This would radically shift humankind’s trajectory—but, vitally, it would not eliminate human uses of the high seas. Humans could still catch fish and ship goods. It would simply require animal interests in having thriving ecosystems to be represented far more robustly than they have been.

The high seas represents a rare opportunity to preserve animal interests on a global scale; the United Nations has the power to shift the course of life on Earth for the better. We must not waste it.

#### Bradshaw has written a lot about this---from the CV

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### AFF Area---Animal Standing

#### Legal standing for animals in courts of law allows for legal protection of biodiversity

Veerle Platvoet 20, doctoral researcher at the University of Helsinki with the ANIWERE project, Spring 2020, The Attribution of Limited Legal Personality to Nonhuman Species, Journal of Animal Ethics, Vol. 10, No. 1, p. 49-57

INTRODUCTION

In the history of the planet there have been five mass extinctions so far ([Ceballos et al., 2015](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242#b2)). The exact cause was different every time, but all extinctions shared a common origin. They were all most likely caused by a rapid change in climate. If species do not have enough time to adapt to new circumstances, they die ([Kolbert, 2015](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b11)). It is not possible yet to conclude that the sixth mass extinction is happening right now, as not even all species who exist are known. This makes it hard to define the exact rate of extinction. However, there are clear indications that the rate of species going extinct now is a lot higher than normal ([Ceballos et al., 2015](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b2)). According to the Millennium Ecosystem Assessment (2005) by the World Resources Institute, 12% of all birds, 23% of all mammals, and 32% of all amphibians are threatened with extinction. The fast rate is not entirely remarkable, considering the change in climate that is happening right now. Climate [End Page 49] change is one of the biggest threats to our ecosystem, and there is no doubt that the rapid change in climate is once again causing species to go extinct because they are not able to adapt themselves fast enough.[1](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "f01) It is becoming general knowledge that humans have caused climate change by emitting greenhouse gases in the atmosphere ([Dupuy & Viñuales, 2015](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b6)).

In addition to climate change, there are more elements causing species to go extinct. The second reason is the destruction of ecosystems ([Eldridge, 2001](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b7)). As humans became more abundant, they replaced areas of nature with concrete cities. By doing so, habitats of species were destroyed, causing the species to go extinct or causing a reduction of habitat, which makes it harder to find a mate or maintain a territory big enough to survive. The construction of cities is not the only reason for the destruction of habitats. Other examples include deforestation to locate cattle for grazing, or the construction of infrastructure. Third, humans have overexploited species for all kinds of purposes. When people first encountered magnificent species like rhinoceros or elephants, they hunted them for their meat, skin, or ivory. These latter products were sold as jewelry or medicine and became huge business. Now people are trying to preserve species who have become victims of poaching through international conventions like the Convention on International Trade in Endangered Species (CITES), but there are not that many specimens left and some species have already become extinct through overexploitation.[2](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "f02) A fourth reason is the introduction of alien species, which is done consciously and unconsciously. As a result of alien species, native species can become extinct because they are not used to the competition that the new species brings.[3](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "f03) The last main threat to extinction is pollution. Pollution is especially dangerous to species living in the oceans, as ships carrying polluting substances such as oil can cause huge environmental disasters. It is very likely that these changes in the ocean cause many marine species to go extinct.

What becomes obvious in listing these elements is the presence of human influence. Pollution can come naturally in the form of earthquakes or volcanic eruptions, but the rate at which species are going extinct at this current time can only be attributed to human behavior.

In conclusion, a loss of biodiversity is happening at a faster rate than normal, and it is being caused by human behavior. This is problematic because it affects the vulnerability of ecosystems. The earth functions as one giant ecosystem. One of the consequences of eliminating whole ranges of species is that the ecosystem can be altered in a way that is irreversible and forces all the remaining species to adapt themselves ([Chapin et al., 2000](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b4)). A lot of studies in this field have been done, analyzing the consequences of the introduction of alien species or the eradication of domestic species. The populations of coyotes in Southern California provide an example. They were being depleted because they were an unwanted species, and as a consequence, the numbers of raccoons and feral cats went up, which posed a threat to a high number of bird species in the area ([Millennium Ecosystem Assessment, 2005](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b14)). Thus, by changing the ecosystem that is the earth, those in the human race put themselves, and all remaining species, in danger.

It is obvious that, by continuing business as usual, problems for our global ecosystem in the long term will arise. Nowadays people are more concerned with the environment [End Page 50] than roughly 50 years ago, but the number of people who are willing to sacrifice the lifestyle they have grown accustomed to is not high enough. Politicians are generally concerned with getting reelected and are thus not willing to adopt unpopular policies with only long-term benefits. Therefore, the rule of law is the most hopeful approach to tackle biodiversity loss. From this perspective, change will come bottom-up, but politicians will have to change their policies in order to obey the law. If national courts attribute legal personality to species, this will ultimately become a general principle of law recognized by civilized nations, and therefore a source of international law ([Statute of the International Court of Justice of 1945](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b20)). This article discusses an additional solution to the biggest environmental problem of this world: attributing—limited—legal personality to nonhuman species in international law.

THE CONCEPT OF LEGAL PERSONALITY

As legal personality differs depending on the perspective that is taken, it is best to explain it in both municipal law and international law. Therefore, this section discusses them separately.

Legal personality gives an entity rights and duties that can be enforced before a court. A legal person does not necessarily have to be a natural person: Companies have long been recognized in law as having legal personality ([Shaw, 2014](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242#b18)). The type of personality determines the set of rights and duties. In most municipal legal systems, a child is a legal person but needs to reach a certain age before he or she obtains the right to vote. Legal personality is, as most concepts in law, not fixed. In 1772, the highest court of Great Britain decided that a man who had been a slave in England could not be removed from England against his will, thus giving him rights and therefore legal personality ([Somerset v. Stewart, 1772](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b19)). In the United States, companies required a legal personality in 1818 ([Trustees of Dartmouth College v. Woodward, 1819](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b23)). The scope and character of the legal personality depends on the law. For example, women in the Netherlands already had legal personality when this was extended with a constitutional right to vote in 1917. Different domestic legal systems attribute legal personality to different entities, but there is a pattern visible in which legal personality can be altered and extended to fit the basic principles of society. When the standards of society change, so does the concept of legal personality. Nonhuman species do not have a legal personality now, but if biodiversity is required to keep the ecosystem intact, the attribution of a legal personality could prove a useful approach.

Legal personality in international law is more difficult. The exact meaning and requirements of "legal personality" are much debated. Its need is obvious in law: There must be an entity that can be identified to possess rights or duties ([Klabbers, 2005](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242#b10)). The International Court of Justice provided an answer in the [Reparations for Injuries (1949)](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b17) case, stating that international personality means that an entity is a subject of international law and capable of bringing international claims to maintain these rights. However, this does not necessarily mean that subjects of international law can bring international claims. Only states can be parties to the International Court of Justice, but international law does recognize fundamental rights of the individual ([Lauterpacht, 1947](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b12)). A possible explanation would be [End Page 51] the stream of thought that states and international organizations are the primary subjects of international law, with the capacity to recognize other legal persons as subjects of international law ([Vukas, 1991](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b25)). Peoples such as minorities would then qualify as secondary subjects of international law, as they have the right to self-determination.[4](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "f04)

In conclusion, states and international organizations definitely enjoy international legal personality in the full sense. They have rights and duties and can enforce these in court. Individuals, minorities, indigenous peoples, or nongovernmental organizations (NGOs) are often thought of to have a legal personality but are unable to enforce their rights in an international court.

In current times, nonhuman species do not have any legal personality. They are recognized in international law as a species, and the Convention on Biological Diversity (CBD) has been adopted to keep the human species from interfering with the nonhuman species. However, they remain objects of the majority of the provisions in the CBD, not subjects. The thought of establishing legal personality of nonhuman species, and therefore the capacity to maintain rights and enforce these in court, is considered absurd. In history, the same reaction can be found many times when certain groups were merely considered as objects and therefore without any rights.

As previously discussed, it is obvious now that children have the right to life, to education, and to other rights but need to acquire a certain age of adulthood before obtaining the right to vote. In ancient Roman times, children were considered as things, belonging to the father of the house, and it was his choice to sell them, kill them, or marry them off ([Stone, 2010](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b21)). Much more recently, in the 19th century, people of color did not have the right of citizenship because they were inferior ([Dred Scott v. Sandford, 1856](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242" \l "b5)). That a group of beings is not entitled to any rights because the group is of a different age, color, gender, nationality, mental health, or religion than the Caucasian males who were considered as the replica of the image of God in Western societies was normal until very recently. The same goes for species. Because nonhuman species are not human, they are not entitled to the right of life or any other basic rights.

Claiming that such species should have the capacity to enforce these rights in court is not a demand for unrealistic events. It remains obvious that no other species than the human species who have developed modern democratic society should have the right to vote in elections. It simply means that other species than the human species have the right to survive on earth. Considering the failure of the CBD and its targets to achieve its objectives, the possibility of enforcing the provisions in court would very well be the right solution. There are many arguments that can be made as to why law is necessary. Law helps construct a society because order is necessary for a stable existence. It is believed that without law, society would become anarchy, a so-called state of war in which it is every person against every person, as philosopher Thomas Hobbes was convinced of. Ergo, law is part of everyday life to protect humans against themselves and each other. It is known that biodiversity is required in our ecosystem for multiple reasons, one of which is that we do not know its value, and biodiversity loss can damage the ecosystem and therefore human life irreversibly. Giving an endangered species the right in court to enforce the provisions from the CBD obliging a state party to, for example, establish a [End Page 52] system of protected areas to conserve those species, will sustain biodiversity in the most effective way possible. This does not call for the unrealistic event of a species standing in court. It means that attorneys can stand in court on behalf of a species, as has been done many times for mentally disabled people, children, or others who are not capable of defending their own in court.

As previously noted, this change would have to come bottom-up. One approach would be the recognition of legal personality of nonhuman species in municipal legal systems. This would ultimately become a general principle of law recognized by civilized nations, and therefore a legitimate source of international law ([Shaw, 2014](https://muse-jhu-edu.turing.library.northwestern.edu/article/754242#b18)).

### AFF Area---Cetaceans

#### Cetaceans category solvency advocate

David M. Pena-Guzman 21, associate professor at the School of Humanities and Liberal Studies at San Francisco State University, 2021, CETACEAN CULTURAL RIGHTS: A THIRD GENERATION OF RIGHTS AT SEA, Animal Law, Vol. 27, p. 83-113

III. THIRD-GENERATION RIGHTS: THE NEW FRONTIER OF ANIMAL RIGHTS?

Up until now, the literature on third-generation rights has assumed these rights apply only to human groups. 51This article, however, challenges this assumption by specifying the formal conditions under which third-generation rights are activated and arguing that these conditions hold for cetaceans.

As suggested in Part I, for any group of individuals to be considered a suitable recipient of third-generation rights, three criteria must be met:

1. LEGAL PERSONHOOD. Third-generation rights only apply to groups made up of legal persons. In modern legal culture, a person (as opposed to a thing) is a special entity with interests and capacities recognized as worthy of legal protection. 52Personhood, therefore, marks entrance into the domain of rights and is a precondition for rights discourse. 53

2. CULTURE. Third-generation rights only apply to cultural groups, meaning groups of legal persons bound by shared cultural knowledge and practices. This means that neither a group of persons who do not have any cultural properties (e.g., a group of neonates in a maternity ward) nor a group of persons who have cultural properties but whose principle of association is not itself cultural (e.g., a group of adult humans who are part of the same international soccer team) qualify as a cultural group. Although the definition of cultural group is debated in legal literature, third-generation rights are usually intended for: (a) groups united by a national identity (e.g., the people of India or the people of Uruguay), (b) groups that share a political history and occupy a territory that is not yet considered an independent state (e.g. the people of Quebec or the Zapatistas of Southern Mexico), or (c) groups that pivot on ethnic markers and cultural traditions (e.g., the Roma people of Europe or the Amazigh people of the Maghreb). 54

3. RECOGNITION OF GROUPS AS UNITS OF LEGAL ANALYSIS. Third-generation rights only apply if groups are possible rights-bearers, which is to say, if they represent a category to which rights legally attach.

These are the formal conditions under which third-generation rights acquire force. It remains to be seen whether they are met in the case of cetaceans. If they are, it would mean that cetaceans meet the requirements for legal personhood, that they are cultural beings who organically form cultural groups in nature, and that the groups they form can be treated as units of legal analysis.

IV. DO CETACEANS MEET THE CONDITIONS FOR THIRD-GENERATION RIGHTS?

Based on what we know about cetaceans' behavioral, emotional, and cognitive profiles, these creatures meet the criteria for third-generation rights, including the right to cultural preservation expressed in Article 6 of the 2010 Declaration on the Rights of Cetaceans: Whales and Dolphins. 55

A. Cetacean Personhood

One of the obstacles to overcome when thinking of cetaceans as legal persons is our folk intuition about the meaning of person. 56In everyday speech the term person is often used interchangeably with human. This is somewhat understandable since all the humans we meet daily - parents, neighbors, friends, coworkers, and so on - are commonly understood to be legal persons. The problem is that this usage can mislead us by making us believe that since all the humans we encounter are persons, all persons must be human. This is both a logical and legal mistake. Logically, it exemplifies the fallacy known as affirming the consequent. 57Legally, it overlooks the law's distinction between being a human being and being a legal person, since there exist entities that are persons but not human (e.g., corporations) and entities that are human but not legal persons (e.g., fetuses). 58The difference boils down to the fact that human is a biological category that refers to organisms belonging to the species Homo sapiens, whereas person is a legal category that refers to beings capable of bearing rights. 59It is the gap between these concepts that explains the ongoing legal debate on nonhuman personhood, which hinges on whether animals can qualify as persons under the law. 60

The case for cetacean personhood has been made by numerous authors. 61One of them is James Yeates, an animal welfare expert from the University of Bristol who embraces a deontological approach to cetacean personhood. 62Inspired by the moral philosophy of Immanuel Kant, Yeates argues that contemporary human rights discourse is founded upon the Kantian concept of dignity, and that consistent application of this concept requires extending human rights protections to all creatures who meet the criteria for Kantian dignity, regardless of whether they are human. 63Yeates's turn to Kant's ethical writings is surprising because Kant is mostly remembered by animal rights defenders as someone who denied animals moral status and insisted that humans have no direct moral duties toward them. 64In Kant's view, any duty owed toward an animal is only indirect. 65It is something humans must refrain from doing, not because they owe it to the animal, but because they owe it to themselves and to their fellow human beings. 66In a provocative move, however, Yeates sees promise in Kant's transcendental philosophy and argues that Kant's ethical philosophy can be made hospitable to animal rights discourse by downplaying the distinction between direct and indirect duties and harnessing instead the power of Kant's claim that what grounds a creature's dignity is their "rational nature." 67Any animal with a rational nature a la Kant is an autonomous being entitled to all the benefits that ride on the back of Kantian dignity, including modern human rights. 68

But what does it mean to have a rational nature a la Kant? According to Yeates, Kant equates having a rational nature with having a rational will, which is a will capable of practical reason. 69As proof that cetaceans possess wills of this sort, Yeates presents evidence that cetaceans have a theory of mind, since they form complex beliefs about each other's intentions. 70Second, cetaceans engage in metacognitive reflection, since they pass variations of the Sally-Anne Test that became famous among child psychologists in the 1980s. 71Third, cetaceans have abstract mental concepts that they use to mediate their relationships with external nature. Fourth, cetaceans engage in various types of purposive behaviors, such as teaching. 72Fifth, cetaceans act on the basis of norms of reciprocity, which proves they have reasons for actions that express their normative nature. 73Finally, cetaceans even have complex linguistic capacities that include grasping extensions of syntactical rules and using signals to coordinate collective action: 74

Bottlenose dolphins can distinguish between human commands where the chronology of the words is relevant to the action required, for example differentiating between "left ball then right hoop" and "right ball then right hoop." One studied dolphin appeared to understand extensions of a syntactic rule and could extract syntactically meaningful sequences from longer meaningless sequences of commands. These results suggest that dolphins thereby understand that the adjective refers to the noun it precedes and that "then" is a temporal conjunctive. This implies that they can implicitly represent and appreciate the grammatical structure (i.e., syntax) of language (in human commands) which, in turn, may rely on an ability to utilize words as concepts combined into overall concepts (rather than considering combinations of words as isolated, novel concepts). Obviously, if cetaceans have languages, this evidence supports their having mental states even under definitions of mental states that posit language as a necessary condition. 75

All this evidence, Yeates concludes, "should, in Kantian terms, be considered sufficient for the ascription of autonomy." 76Indeed, the most potent reason to include cetaceans in Kant's moral universe is simple. Cetaceans already act as if they belong to it by exhibiting moral behavior: 77

It could also be argued that cetaceans show evidence of ostensibly moral behavior. Dolphins, bottle-nosed whales, killer whales, and grey whales have all been reported as coming to the aid of conspecifics who are sick or giving birth, fighting off aggressors and pushing them to the surface. There is also substantial evidence of cetaceans helping humans. Wild bottlenose and Irrawaddy dolphins herd fish into fishermen's nets, which they accompany with a characteristic rolling dive, the height of which indicates how many fish there are. There are also innumerable anecdotal tales of dolphins and whales saving and helping humans. These actions may be only ostensibly moral or merely social, but for Kant no one's behavior can be more than ostensibly moral. 78

Cetaceans, it seems, are more than moral patients; they are moral agents, too. 79

Paola Cavalieri's psychological approach complements Yeates's deontological proposal. 80"The concept of person," she writes, "is the concept, not of belonging to a certain species, but of being endowed with certain mental traits." 81The two traits that matter most for her are self-consciousness and intentionality. 82She argues that animals who have a sense of the past, present, and future - which constitutes self-consciousness - and who see themselves as the source of their own movements and behaviors - which constitutes intentionality - qualify as legal persons, regardless of their morphology, evolutionary history, or genetic makeup. 83Like Yeates and many other animal rights advocates, Cavalieri mobilizes a host of scientific research to show that cetaceans possess these traits. 84They are endowed with immense cognitive horsepower. They remember the past, inhabit the present, and anticipate the future. 85They navigate their world in such an intelligent manner that they often outwit the very humans who seek to study, capture, or even hunt them. 86By the end of the book, is anyone really surprised when it is Moby Dick who ultimately drags Captain Ahab to his death - and by a harpoon, of all things? 87

### NEG---K---Black Studies

#### Animal personhood displaces the question of black de-personhood

**Boisseron 18** (Bénédicte, Boisseron is Professor of Afroamerican & African Studies, specializing in the fields of black diaspora studies, francophone studies, and animal studies. She received an M.A. in English from Université Denis Diderot (Paris, France) and a Ph.D. in French and Francophone Studies from the University of Michigan. *Afro-Dog: Blackness and the animal question*. Columbia University Press, 2018.)DR 22

Institutionalized color blindness results in making not just race but also racial discrimination a nonproblem. Racial irrelevance is a slippery slope: When one’s blackness can no longer figure in the question, it creates a différend that gags racialized victims, preventing them from voicing their feeling of inadequacy due to their race. Racial différends often begin with good intentions since they are supposed to positively highlight the progress made on behalf of the victim, so much so that the subject no longer needs to be perceived as a victim. But the flip side is that racial irrelevance ushers activists onto the next battle, leaving the preceding one behind instead of looking at both, together, as one ongoing battle. Che Gosset’s online essay “Blackness, Animality, and the Unsovereign” is an important contribution to the investigation of intersectionality because of the way Gosset exposes the sequential nature of racial and non-human animal activism. As Gosset writes, for “many in animal liberation and animal studies, abolition is imagined as **teleological**; **first slavery was abolished** and **now** forms of animal captivity must be, too. It is **as though animal is the new black** even though **blackness has already been racialized through animalization**.”38 This logic of subsequence, in which the clairvoyance that once benefited the chattel slave should now apply to animals, leads to a dangerous kind of racial blindness. It presupposes that we have progressed beyond blackness in our considerations of (de-) personhood, when blackness should constitute the primary matrix in which we think about **animal rights**: “**Blackness remains the absent** presence of much **animal studies** and animal liberation discourse.”39 Making the presence of blackness relevant in animal studies requires an understanding that the racial question is not a stepping- stone to a main point but rather the platform on which the animal should be addressed. But instead, **blackness has often been brought up** in animal discourse only to be brushed aside with a rhetoric that, as Gosset so poignantly puts it, introduces the animal as the new black, thus presenting the racial question as passé.

We can trace back the “animal as the new black” rhetoric to the (aforementioned) English utilitarian philosopher Jeremy Bentham, one of the forefathers of the modern animal rights movement. Inspired by the universalist values of the French Revolution, Bentham made a plea in An Introduction to the Principles of Morals and Legislation for universal compassion for all sentient beings, a plea that led him to compare the fate of blacks with that of animals in the eyes of the law.

The day has come, I grieve to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing as, in England for example, the inferior races of animals are still. The day may come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate.40

Bentham’s animals- slaves comparison precedes his famous anti- Cartesian comment on interspecies suffering: “What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? . . . The question is not, Can they reason? nor, Can they talk but, Can they suffer?” 41 Bentham wants to believe in a better world for all sentient beings and sees French Universalist thought as a model to follow. Having printed the book in 1789, the year of the French Revolution and of the Declaration of the Rights of Man and of the Citizen, the British philosopher saw a giant step forward in the French disregard for the color of the skin in their pursuit of human rights. That said, because in 1789 slavery had not yet been abolished in the French colonies,42 Bentham’s comment about the French perception of blackness addresses a momentum rather than a completion. Yet, while Bentham thought in terms of momentum, his followers in the twentieth and twentyfirst centuries tend to put emphasis on the question of completion, which explains the modern logic of sequences such as “after the black comes the animal.” In his groundbreaking Animal Liberation, Utilitarian philosopher and forefather of the modern animal rights movement Peter Singer famously uses Bentham’s comparison between black rights and animal rights to stage his theory. Singer popularized Richard D. Ryder’s term, “speciesism,” which the former defines as, “by analogy with racism . . . 43 a prejudice or attitude of bias toward the interests of members of one’s own species and against those of members of other species.” 44 Singer situates Bentham’s passage at a time when, Singer writes, “black slaves had been freed by the French but in the British dominions were still being treated in the way we now treat animals.” 45 But again, in 1789 the blacks in the colonies had not yet been freed: in 1790, the French National Assembly had indeed granted political rights to free blacks and mulattoes in Saint- Domingue, but the number of free blacks amounted to a very small portion of the black population, the majority of which was still enslaved and living under the 1685 Code Noir (Slave Code), an edict that codified the cruel and unjust treatment of slaves by masters throughout the French colonies until 1848 (except for Saint- Domingue, where a slave rebellion broke out in 1791, leading to independence in 1801). Bentham’s comment most likely did not imply that French slaves had been freed, but only that the French, and particularly the Société des amis des noirs (Society of the Friends of the Blacks), had been able to see past skin color in their pursuit of human rights and their public opposition to the Code Noir. **For Singer** to imply completion is symptomatic of the modern trajectory of animal liberation and animal studies that looks at black and animal intersectionality with a conditional logic— “**if freedom happened once with blacks**, it should happen again with animals”— even though Bentham then, and Alexander, Wilderson, Stevenson, and Dayan now, would argue that **rights** for blacks are still in a state of momentum and are **yet to be brought to** **completion**. As Claire Jean Kim says, **this kind of analogizing** “den[ies] the continuing derogation of **Blacks as subhumans**, and **conceal[s] the unfinished status of the Black struggle** (as well as the reasons why it will always remain unfinished)” 46— reasons that the Afro- Pessimist movement exposes in detail.47 Blackness and de- personhood are not yet a thing of the past. As **Saidiya Hartman writes**, “if slavery persists as an issue in the political life of black America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but **because black lives are still** **imperiled** and **devalued** by a racial calculus and a political arithmetic that were entrenched centuries ago.” 4

#### Legal personhood assimilates into antiblackness and crowds out alternative ways of relating to animals

**Jackson 20** (Zakiyyah Iman Jackson, Associate Professor of English and Director of the Center for Feminist Research at the University of Southern California. *Becoming Human*: *Matter and Meaning in an Antiblack World*. New York University Press, 2020)DR 22

Becoming Human: Matter and Meaning in an Antiblack World argues that key texts of twentieth-century African diasporic literature and visual culture generate unruly conceptions of being and materiality that creatively disrupt the human–animal distinction and its persistent raciality. There has historically been a persistent question regarding the quality of black(ened) people’s humanity. African diasporic literature and cultural production have often been interpreted as a reaction to this racialization—a plea for human recognition. Becoming Human takes a different approach, investigating key African American, African, and Caribbean literary and visual texts that critique and depose prevailing conceptions of “the human” found in Western science and philosophy. These texts move beyond a critique of bestialization to generate new possibilities for rethinking ontology: our being, fleshy materiality, and the nature of what exists and what we can claim to know about existence. The literary and visual culture studied in Becoming Human neither rely on **animal abjection** to define being (human) nor reestablish “human recognition” within liberal humanism as an **antidote to racialization**. Consequently, **they displace the very terms of black(ened) animality** as abjection.

Becoming Human argues that African diasporic cultural production does not coalesce into a unified tradition that merely **seeks** inclusion into liberal humanist conceptions of “the human” but, rather, frequently **alters** the meaning and significance of **being (human**) and engages in imaginative practices of worlding from the perspective of a history of **blackness’s bestialization and thingification**: the process of imagining black people as an empty vessel, a nonbeing, a nothing, an ontological zero, coupled with the violent imposition of colonial myths and racial hierarchy.1 Toni Morrison’s Beloved, Nalo Hopkinson’s Brown Girl in the Ring, Audre Lorde’s The Cancer Journals, Wangechi Mutu’s Histology of the Different Classes of Uterine Tumors, Octavia Butler’s “Bloodchild,” Ezrom Legae’s Chicken Series, and key speeches of Frederick Douglass both critique and **displace** the racializing assumptive logic that has grounded Western science’s and philosophy’s debates on how to distinguish human identity from that of the animal, the object, and the nonhuman more generally. In complementary but highly distinct ways, these literary and visual texts articulate being (human) in a manner that neither relies on animal abjection nor reestablishes liberal humanism as the authority on being (human). Instead, they creatively respond to the animalization of black(ened) being by **generating a critical praxis of being**, paradigms of relationality, and epistemologies that alternately expose, alter, or reject not only the racialization of the human–animal distinction found in Western science and philosophy but also **challenge** the epistemic and material terms under which **the specter of** animal life acquires its authority. What emerges from this questioning is an unruly sense of being/knowing/feeling existence, one that necessarily disrupts the foundations of the current hegemonic mode of “the human.”

While we often isolate African diasporic literary studies from the fields of science and philosophy, I contend that African diasporic literature and visual culture introduce dissidence into philosophical and scientific **frameworks that dominate definitions of the** human: evolution, rights, property, and legal personhood. By reading Western philosophy and science through the lens of African diasporic literature and visual culture, we can situate and often problematize authoritative (even if troubling) conceptualizations of being and material existence, demonstrating that literary and visual cultural studies have an important role to play in the histories of science and philosophy. Using literature and visual art, my study identifies **conceptions of being that do not rely on the animal’s negation**, as repudiation of “the animal” has historically been **essential** to **producing** classes of **abject humans**. Becoming Human reveals that science and philosophy share many characteristics with literature and visual art despite the espoused objectivity and procedural integrity of scientific and philosophical discourses. In debates concerning the specificity of human identity with respect to “the animal,” science and philosophy both possess foundational and recursive investments in figurative, and arguably literary, **narratives** that **conceptualize blackness as trope**, metaphor, **symbol**, and a kind of fiction. Instead of thinking of philosophy and science as separate and unrelated sites of knowledge production, my study reveals their historical entanglement and shared assumptive logic with regard to blackness. As conceived by evolutionary theory and Western Enlightenment philosophy, extending into legalistic conceptions of personhood, property, and rights, **antiblackness** has sought to justify its defacing logics and arithmetic by suggesting that **black people are most representative of** the abject animalistic dimensions of humanity, or the beast.

While many scholars have critiqued the conflation of black humans with animals found in Enlightenment discourses, I argue that prior scholarship has fundamentally misrecognized the logic behind the confluence of animality and racialization. I reinterpret Enlightenment thought not as black “exclusion” or “denied humanity” but rather as the violent imposition and appropriation—inclusion and recognition—of **black(ened) humanity** in the interest of plasticizing that very humanity, whereby “the animal” is one but not the only form blackness is thought to encompass. Plasticity is a mode of transmogrification whereby the fleshy being of blackness is experimented with as if it were infinitely malleable lexical and biological matter, such that **blackness is produced as** sub/super/human at once, a form where form shall not hold: potentially “**everything and nothing” at the register of ontology**.2 It is perhaps prior scholarship’s interpretation of this tradition as “denied humanity” that has facilitated a call for greater inclusion, **as** **a corrective** to what it deems is a historical exclusion of blackness. One consequence of this orientation is that many scholars have essentially ignored alternative conceptions of being and **the nonhuman** that have been produced by blackened people.

This project examines how African diasporic literary and visual texts generate conceptions of being that **defy** the disparagement of the nonhuman and “the animal.” The terms of African diasporic art and literature’s canonization have suggested that African diasporic cultural production does little more than refute racism and petition for assimilation into the very definition of humanity that produces **racial hierarchy** or, as Henry Louis Gates Jr. would put it in The Signifying Monkey: A Theory of African-American Literary Criticism: “[T]he texts of the slave could only be read as testimony of defilement: the slave’s representation and reversal of the master’s attempt to transform a human being into a commodity, and the slave’s simultaneous verbal witness of the possession of a humanity shared in common with Europeans” (Gates 140).3 Rather than seek an assimilationist transubstantiation via the “Talking Book,” the texts in my study are better understood as providing **unruly** yet **generative** conceptions of **being**—generative because they are unruly. Yet, they are not always framed as an explicit critique of the dominant—thereby **refusing the terms of liberal multicultural recognition**, which require either the **evocation of animalized depictions of blackness** in order to point out the suffering these images cause or the reversal of stereotype in a bid for “inclusion.” Instead, they often **just get on with upending** and **inventing** at the edge of legibility. The chapters in this book explore the critique and innovative thought that emerge from within the contradictions of competing conceptions of modernity’s crucible—the human. I argue that the cultural production examined in the following pages reveals a contrapuntal potential in black thought and expressive cultures with regard to the human–animal distinction.

In order to facilitate a fuller appreciation of the conceptions of ontology identified in Becoming Human, I pose three arguments that fundamentally reframe the animalization of blackness. First, I argue that philosophers’ and historians’ emphasis on antiblack formulations of African reason and history have overlooked the centrality of gender, sexuality, and maternity in the animalization of blackness.4 Namely, I argue that black female flesh persistently functions as the limit case of “the human” and is its matrixfigure. This is largely explained by the fact that, historically, the delineation between species has fundamentally hinged on the question of reproduction; in other words, the limit of the human has been determined by how the means and scene of birth are interpreted. Second, I demonstrate that Eurocentric humanism needs blackness as a prop in order to erect whiteness: to define its own limits and to designate humanity as an achievement as well as to give form to the category of “the animal.” Third, I look beyond recognition as human as the solution to the bestialization of blackness, by drawing out the dissident ontological and materialist thinking in black expressive culture, lingering on modes of being/knowing/feeling that gesture toward the overturning of Man.

In debates concerning the specificity of human identity with respect to “the animal,” science and philosophy foundationally and recursively construct **black femaleness**, maternity, and **sexuality** as an essential index of abject human animality. Furthermore, gender, maternity, and sexuality are central to the autopoesis of racialized animalization that philosophers, theoreticians, and historians of race hope to displace. While black feminist and queer theories of race have underlined the intersectional nature of gender, race, and sexuality, few studies have ventured to identify the autopoetic operations of these very intersections (Maturana and Varela 78). Therefore, any study that attempts to provide an account of how racialization operates must offer an explanation of the intransigent, recursive, self-referential, and (re)animating power of abject constructs of black gender and sexuality. Contributing to studies of the longue durée of antiblackness and “afterlife of slavery,” I offer a materialist theory of both blackness’s ontologized plasticization and the temporality of antiblackness whereby I extend and revise Sylvia Wynter’s theories of sociogeny and the autopoesis of racialization, in other words, antiblackness’s auto-institution and stable replication as a system and its consequences for our being both bios and mythos.5

### NEG---K---Juridical Ks

#### Tradeoff between responsibility towards animals and legal personhood

Wolfe 2013 (Cary, Bruce and Elizabeth Dunlevie Professor of English at Rice University. Founding Director, 3CT: Center for Critical and Cultural Theory. Before the Law: Humans and Other Animals in a Biopolitical Frame University of Chicago Press 2013)DR 22

The underlying problem is thus clear. **Animals are things and not persons** under United States **law** — things that may or may not have legal status depending on whether or not they have a property relation to an entity designated a “person,” who thus has a legal interest in, and standing to argue on behalf of, the animal in question. One **obvious** **solution** to this rather counterintuitive state of affairs — and it would be one with wide- ranging economic consequences — would be to eliminate the property status of **at least some** nonhuman animals by granting them some form of personhood, making them, in turn, potential bearers of rights.9 **But** even within existing legal doctrine, we find **considerable disagreement** about the appropriateness of the “rights” framework for recognizing and protecting the standing of nonhuman animals. On one side, we have legal theorists such as Richard Posner, Cass Sunstein, and Richard Epstein, who believe that the adaptation of the rights model to animals is fundamentally wrong-headed. Epstein, for example, believes that we should continue to treat animals as property, not persons (even in some limited sense), and argues that we should work to minimize harm to animals as long as it does not compromise human gains. He grounds his position in what he regards as a well- justified speciesism. “The root of our discontent,” he writes, “is that in the end we have to separate ourselves from (the rest of) nature from which we evolved. Unhappily but insistently, the collective we is prepared to do just that. Such is our lot, and perhaps our desire, as human beings.”10 And Posner holds that the most sound approach to the issue is a “humancentric” one that eschews “philosophical argument.”11 “Legal rights,” he argues, “have been designed to serve the needs and interests of human beings, having the usual human capacities, and so make a poor fit with the needs and interests of animals.”12

Now I agree with Epstein about a point I have argued in some detail elsewhere: that **animal rights** philosophy, in spite of itself, continues to rely on a speciesist (or better, perhaps, anthropocentric) model of **subjectivity** in its criteria for determining which beings deserve rights.13 And I think Posner is right that there is “a sad poverty of imagination” in thinking that the issue of animal protection can only be addressed under the rubric of rights.14 But I would also agree, and more fundamentally, with those at the other end of the animal rights argument — philosophers such as Singer, Cavalieri, and Tom Regan, and legal scholars such as Steven M. Wise and Gary Francione — that positions such as Posner’s and Epstein’s rely on a thoroughgoing ethnocentrism thinly disguised (and sometimes not disguised at all) as a hard- nosed legal pragmatism giving “straight talk” to the airy philosophers (such as Singer) or those legal scholars overly influenced by them (such as Wise).15 Posner, for example, wholly subordinates the question of rights to economic utility and political expediency, holding that “legal rights are instruments for securing the liberties that are necessary if a democratic system of government is to provide a workable framework for social order and prosperity. The conventional rights bearers are with minor exceptions actual and potential voters and economic actors. Animals do not fit this description.”16 And Epstein is even more bald in his deployment of what Regan has called the “might makes right” position: “Let it be shown,” he asserts, “that the only way to develop an AIDS vaccine that would save thousands of lives is through painful or lethal tests on chimpanzees. . . . An animal right to bodily integrity would stop that movement in its tracks. It will not happen, and it should not happen.”17

Such positions are question- begging in the extreme, I think, and are easily disposed of, as Singer disposes of Posner’s in an exchange that began in the online magazine Slate. Singer’s criticism makes the same point as Tom Regan’s observation that a theory such as Posner’s “takes one’s moral breath away . . . as if, for example, there would be nothing wrong with apartheid in South Africa if few white South Africans were upset by it.”18 As Singer rightly observes, Posner’s legal “pragmatism” is in fact “an undefended and indefensible form of selective moral conservatism.”19 And as for the pragmatics of its “pragmatism,” the Posner / Epstein line fares no better. Posner, like Epstein, suggests that the property status of animals is actually a boon to their protection, “because people tend to protect what they own,” and like Epstein he suggests that what we mainly need is more vigorous enforcement of laws that prevent “gratuitous cruelty.”20 In a similar vein, Epstein holds that such a position at least “blocks some truly egregious practices without any real human gain, gory lust to one side.”21 But Epstein’s contention only gives the lie to Posner’s insistence that few of us are “so indifferent to animal suffering, that we are unwilling to incur at least modest costs to prevent cruelty to animals,”22 for as Singer points out, anticruelty laws do not apply to the case where the largest amount of animal suffering by far takes place — namely, factory farming. Against what Posner calls, without a trace of irony, “the liberating potential of commodification,” Singer points out that “we don’t have to wonder how many animals suffer and die because they are someone’s property,” because we know that of the nine to ten billion animals raised for food in the United States each year, the vast majority — easily several billion — spend their entire short lives in the brutal conditions of the factory farm.23 Indeed, such anticruelty laws do not even apply to the overwhelming majority of animals used in biomedical research, product testing, and the like, because (as I have already noted) the US Animal Welfare Act of 1966, as amended under the Senate leadership of Jesse Helms in 2002, specifically excludes birds, mice, and rats — that is to say, about 95 percent of the animals used in such research.24

As even this brief sketch suggests, one might well conclude that we find an increasingly fraught disjunction between existing legal doctrine and our ability to do justice to nonhuman animals, even as our knowledge of what are taken to be their ethically relevant characteristics and capacities (to suffer, to communicate, to engage in complex forms of social behavior and bonding, and so on) increases dramatically year by year. And more specifically — to stay within the purview of rights discourse a moment more — we find increasing conceptual pressure on the difference between what legal philosophers call “will- based” and “interest- based” theories of rights. The former is rather baldly represented by Posner et al., and the latter grounds the positions of not just Singer and Regan but also of renowned legal philosopher Joel Feinberg, who argues in his influential essay “The Rights of Animals and Future Generations” that it is not enough to say simply that we have (indirect) duties regarding animals (the familiar view made famous by Kant25); rather, we have (direct) duties to (at least some) animals because what is fundamental here is not that they can understand or claim their rights but that — like human infants and mentally impaired people — they are beings who have “conative urges,” the “integrated satisfaction of which constitutes their welfare or good” that, as such, deserves protection.26 Though content to remain within both analytic philosophy and rights discourse, Feinberg’s position is related in important ways to attempts to think beyond existing legal frameworks and their philosophical underpinnings in the work of philosophers such as Cora Diamond, Judith Butler, and Jacques Derrida. While Derrida, for his part, is sympathetic with those who protest against the way animals are treated in factory farming, product testing, biomedical experimentation, and the like, he nevertheless believes that “**it is preferable not to** introduce this problematic concerning the relations between humans and animals into the existing **juridical framework**” by extending some form of human rights to animals.27 This is so, he argues, because “to confer or **to recognize** rights for ‘animals’ is a surreptitious or implicit way of **confirming** a certain **interpretation** of the human subject” — an interpretation (and this is demonstrated, it seems to me, in the positions of both Posner and Epstein) that “will have been the lever of the worst violence carried out **against nonhuman living beings**.”28 So while Derrida is sympathetic with the motivations behind calls for animal rights to protect them from violence, he doesn’t support the rights framework per se.29 And so, Derrida concludes, “For the moment, we ought to limit ourselves to working out the rules of law [droit ] such as they exist. But it will eventually be necessary to reconsider the history of this law and to understand that although animals cannot be placed under concepts like citizen, consciousness linked with speech, subject, etc., they are not for all that without a ‘right.’ It’s **the very concept of right** that will have to be ‘rethought.’”30

A crucial point of emphasis in Derrida’s articulation of our **ethical responsibility to animals** is shared by Cora Diamond, and likewise she finds it actively evaded by **the rights model**. For Diamond as for Derrida, our shared **vulnerability** and finitude as embodied beings forms the **foundation of our compassion** and **impulse toward justice** for animals — a vulnerability that gets “deflected,” as she puts it, **by the rights model** and the kinds of argument it deploys (*pro or con*), with its emphasis on agency, reciprocity, and the like. As Diamond puts it,

The awareness we each have of being a living body, being “alive to the world,” carries with it exposure to the bodily sense of vulnerability to death, sheer animal vulnerability, the vulnerability we share with them. This vulnerability is capable of panicking us. To be able to acknowledge it at all, let alone as shared, is wounding; but acknowledging it as shared with other animals, in the presence of what we do to them, is capable not only of panicking one but also of isolating one. . . . Is there any difficulty in seeing why we should not prefer to return to moral debate, in which the livingness and death of animals enter as facts that we treat as relevant in this or that way, not as presences that may unseat our reason?31

From this vantage, to try to think about our ethical obligations to animals by deploying the rights model misses the point, not just because the question is thicker and more vexing than the thin if- P- then- Q propositions of a certain style of analytic philosophy but also because “when genuine issues of justice and injustice are framed in terms of rights, they are thereby distorted and trivialized.” This is so, Diamond argues, because the rights model, going back to its origins in Roman law, is concerned not with justice and **compassion** but with “a system of entitlement” and with **who gets what** within such a system. Instead, she argues, what is crucial to our sense of the injustice done to animals is our repulsion at the brute subjection of the body that they so often endure. For Diamond, the “horror of the conceptualizing of animals as putting nothing in the way of their use as mere stuff” depends on “a comparable horror at human relentlessness and pitilessness in the exercise of power” toward other human beings (in the practice, say, of torturing political prisoners).32

### NEG---K---Postcolonial Critical Animal Studies

#### Has a robust critique of animal personhood

**Deckha 21** (Maneesha Deckha, Professor and Lansdowne Chair in Law, University of Victoria. *Animals as legal beings: Contesting anthropocentric legal orders*. University of Toronto Press 2021. Table omitted)DR 22

As with all entrenched legal terms, contemporary invocations of Western understandings of **personhood** to denote legal subjects flow from a particular historical trajectory. A primary concern with personhood as developed in the British common law and extended to settler-colonial legal systems like Canada’s is the hierarchical nature of this background. While the open-ended, non-biologically rooted legalist accounts of legal personhood circulate in jurisprudence, it is clear that another vision – one that Naffine terms rationalist – of the legal person dominates in legal jurisprudence.56 The rationalist vision of who qualifies as a legal person **privileges the intelligent human agent** who can make decisions as well as accept accountability. As Naffine underscores, the underlying narrative about the creation of rational actors engaged in legal transactions and encounters is the social contract theory inspired by seventeenth- and eighteenth-century Lockean and Kantian political philosophy as well as by Cartesian dualistic thinking.57 This narrative imagines a fully formed adult human who is independent, autonomous, and intelligent, who can be held accountable due to these qualities, and who freely enters into society in this state in order to take advantage of law’s ordering power to maximize his self-interest in staying this way.58 Critical to this path of self-actualization and self-maximization is the ability to contract to acquire property.59

In this narrative, it is obvious that personhood was reserved for an elite sector of humanity: white, able-bodied, cisgender heterosexual men of property. **This concept accentuated** stratifications of class, sexual orientation, gender, race, ability, and age at the time when these stories of creation were formulated and advanced.60 As Anna Grear adeptly explains, it is these “human hierarchies of being,”61 disavowing the feminine and the embodied,62 that are embedded in “law’s central subject,”63 the anthropos. Tracing a “critical legal reading of its genealogy,” Grear outlines how law’s rationalist person was **central to** European capitalist and imperial expansion, colonial Othering, theft of Indigenous lands, and environmental devastation occasioning the current phenomenon of the Anthropocene as well as global neoliberal governance.64 All those not residing under the aegis of the white, able-bodied, propertyholding masculinity to which the anthropos correlated were devalued as feminized, close to nature, and of the body.65 Indeed, law’s **person** houses a vision of “the human … that was always intended **selectively to bring within its orbit** only those beings who fit a relatively **narrow set of criteria** for **inclusion** in the circle of humanity proper.”66 Grear identifies this mainstay figure of “liberal legal anthropocentrism” as a “cipher bearing only attenuated resemblance to a living human being.”67 Moreover, this vision of the “human” was not unique to law; this very particularized idea of the “human” has been similarly partial historically and even today vis-à-vis certain dehumanized/animalized populations that nonetheless biologically belong to the human species.68

But it is not just the exclusionary historical origins of this concept and the marks it has left to this day that are concerning. Returning to the examples of the Great Ape Project and the Nonhuman Rights Project, we can now more clearly apprehend a further element of the criticism that followed the initiative, namely, that a focus on great apes and other culturally popular or revered animals will reinscribe humanism and anthropocentrism. The problem is not simply that an initiative that privileges certain human-like or human-enough animals as persons excludes all other animals, but that the exclusionary historical imprint of **personhood** inclines the concept in the present to systemically disfavour those that do not match the Western, able-bodied, propertied, human male identity through which personhood was first consolidated. In other words, it is not just that animal advocate petitioners make an encumbered choice “to convert ‘otherness’ into ‘sameness’”69 in campaigns in which personhood or classic civil and political rights for an animal or animals are sought. The personhood model in fact encourages a route that inevitably highlights the differences and putative inferiority of the excluded **animals** that fall **outside** the litigation’s parameters as well as the included animals whose **residual embodied non-humanness**, despite this latter’s group “honorary human” status, haunts the category itself. According to elitist, masculinist, racialized, and able-bodied understandings of what humans are, all **animals** are not, and likely **never** will be, “human” enough to either “merit” personhood as a protective legal status or to receive adequate legal protection once deemed “**persons**”; that the substandard treatment of dehumanized humans persists **despite** their personhood is a persuasive indicator that similar substandard treatment will befall animals if they become “persons.”70

Law is still anthropocentric, yes, and extends personhood to all biologically designated humans, but its understanding of the human and thus legal person is delimited by a “Cartesian/Kantian tradition of Western philosophy that exalts human minds and excises the body and all things associated with nature as exterior to this rational mind.”71 Thus, **even if** personhood campaigns on behalf of animals avoided sameness discourses, and were potentially or actually theoretically **inclusive of all animals**, personhood as a category would still be premised on a sharp mind/body split that exalts **a certain** **type** of reasoned **cognition**. Fitting beings that the law has traditionally disavowed as legal subjects because of their location in these Cartesian/Lockean/Kantian dichotomies as “mere bodies” into the coveted category of personhood that is still tightly correlated to anthropocentric exaltation of human minds, and thus “the foundations of modern liberal legal subjectivity,” will be difficult.72 As Sheryl Hamilton has also argued in her work canvassing an array of liminal humans and non-humans,73 the push to encapsulate these beings can result in an awkward fit into a category that has a clear culturally constructed originating and exclusionary identity.74 A central part of this identity is the degradation of embodiment that the concept has entailed, making it nearly impossible for those whose current-day corporeal manifestations do not cohere with the “white, property owning, acquisitive, broadly Eurocentric masculinity that acts upon a world constructed as a juridically striated, territorialized extensa”75 to qualify as legal persons.

*B. Personhood and Animality as Mutually Exclusive*

Colin Dayan’s work adds a strong historical current to Hamilton’s argument by charting the multiple ways in which personhood cannot be counted on **to secure** the protections one would wish because of the cultural narratives in which the law is embedded and from which it draws strength – **narratives** on which jurists and legislators are quick to rely. In The Law Is a White Dog: How Legal Rituals Make and Unmake Persons, 76 Dayan reveals the “sorcery of law” in creating persons and things.77 In doing so, she also importantly illuminates personhood’s steadfast reliance on the concept of animality and the figure of the subhuman. Dayan’s entire book considers law’s agency in defining personhood – how it assigns personhood to some, denies it to others, and withdraws it when social forces coalesce to make withdrawal acceptable.78 In this latter regard, Dayan discusses at length the concept of civil death – where one is legally alive but no longer a person in law; her main examples come from American slavery, but she traces the residue of slave law in contemporary examples of prisoners in the United States and “detainees” at Guantanamo Bay.79 Dayan considers how personhood can be so quickly lost and reveals the law’s role in, as she puts it, creating these “negative” and “disfigured” models of personhood for human beings.80

Dayan’s work exposes how heavily definitions of legality and illegality are bolstered by cultural narratives, among them the familiar narrative of dehumanization through animalization.81 The efficacy of dehumanization discourses in legitimating **slavery** is well-known. Dayan helpfully stresses the same point in relation to contemporary penal politics: “Before the state can punish, it must appear to know what is being judged. **The rules of law** and leeway within them enact and enable a philosophy of personhood and create the legal subject. They also recognize forms of punishment that are activated for people of a certain ‘nature’ or ‘character’ – those labeled unfit, barbaric, subhuman, or ‘the worst of the worst.’”82 Dehumanization thus emerges as an extremely popular strategy to legitimate the stripping away of rights from human beings that then enables treatment and violence that would otherwise be unacceptable.83 It has been used over many centuries and in many instances of war and ethnic conflict and, as Dayan demonstrates, in homegrown domestic policies when the state intervenes in the bodies of its subjects through its biopolitical projects.84 It is through **dehumanization that personhood is lost**; discursively and materially, humanization becomes a **prerequisite** for personhood. To be a person, one has to be seen as human. Put differently, animal personhood is an oxymoron in anthropocentric legal systems.

Samera Esmeir highlights the same associations between property/ personhood and animality/humanity but from the obverse angle. She elucidates the tight entwining of legal personhood with human identity such that any violation of this legal status is immediately perceived and represented as a loss of humanity:

Contemporary liberal assertions equate illegal oppression and practices of expulsion from the juridical order with exclusion from humanity. It is often argued that violence ensuing from the abandonment of persons beyond the pale of the law not only violates their humanity but also, and perhaps more crucially, dehumanizes them or constitutes them as less than human. While the objective of these critical assertions is to expose the radical evil that illegal violence can institute, they also establish an **equation** between the protection of the law and the constitution of humanity, effectively granting the former a magical power to endow the latter.85

Esmeir argues that law, particularly British colonial law and modern international human rights law, constitutes the human through the conferral and respect of rights-bearing status – so much so that the predominant frame advanced when a person’s or people’s rights are violated is not depersonification but dehumanization. Esmeir terms this understanding of humanity, as dependent on and **sublimated to** the legal status of personhood, a “juridical humanity.”86 She is dismayed by the hold that law exacts on our understanding of what it means to be human and is further concerned that the narrative of dehumanization that attends stories about human rights violations in the global South continues a colonial legacy whereby **racialized non-Western subjects** are forever waiting to be saved by the magical powers of AngloAmerican law to humanize them.87 In this postcolonial critique of law, personhood is not a justice-conferring category but rather a vehicle that constitutes the human and that claims to protect human rights through long-standing **colonial premises** about the **humanizing** and **enlightening** effects of Western legal systems on the rest of the world.88 Is it thus part of a set of “imperial narratives,” whereby force is narrated as a gift, **as if empire is what gives the Other freedom**, what brings the Other into modernity.89 In other words, colonial law makes humans through the assignment of personhood. One has to be a person to be a human because that is what personhood signifies.

This colonial humanizing function of personhood is perceptible in contemporary human rights contestations. When we want to recognize the personhood and human rights of groups today, we humanize them. Importantly, this **means ascribing** the **traits** associated with dominant masculinist and Western understandings of what it means to be **human** canvassed above: rationality and the capacity and desire for independence and non-relational autonomy. Conversely, when the desired outcome is the depersonification of purportedly human subjects, the strategy elected is to dehumanize these subjects. This entails the ascription of traits associated with dominant understandings of what it means to be less than or non-human: animality, the subordination of the mind to the body, and the rejection of Western values. **Liberal legal subjectivity cannot escape the power of the human–non-human binary** in creating its preferred legal subjects and their corresponding masculinist and colonial exclusions. As feminist, postcolonial, and queer theory scholars discussing violence at Guantanamo Bay and Abu Ghraib and other contemporary “states of exception” have commented, this masculinist and **colonial** and **humanist logic** of legal personhood and rights is not exceptional, but “symptomatic of the very nature of the predominant liberal democratic system and of the liberal notion of human rights.”90 Liberal humanism’s traditional exclusions in mapping out the category “human” that generated law’s understanding of the “person” have not disappeared;91 they are still at work in shaping legal subjectivity, its extension and denial.92

Viewed within this frame, personhood is further and irrevocably tainted **as a viable option for respecting animals**, and all their alterity, as legal subjects. Animality is a contra-indication for personhood because persons are made through proving their **humanity** and unmade when that **humanity** is **called into serious question**. So it is not simply the case that animals are legally property and thus need only to be moved outside of this category and made persons **for** **legal benefits to flow**.93 Instead, animal law advocates are facing a situation where the very category of property is defined through animality. Returning to Delaney again, we see the force of these associations between property and animality:

A being, a baboon, a dolphin, a pit bull, is doubly objectified, doubly reduced by prevailing discourses of power. First, it is reduced to “animality” and all that that means and doesn’t mean. Second, it is reduced to property and all that that entails. It is positioned within forms of meaning, and so positioned within circuits of power vis-à-vis the legal subject and vis-à-vis the state as the guarantor of the rights of ownership. Its figurations as animals, as nature, as body, on the one hand, and as property on the other hand, are mutually reinforcing and neither can be severed from the other. Because it is “an animal” it can be treated like property; because it is property it can be treated like an animal.94

If we accept that in general, “animality is not simply **outside** of the social order and its **mechanisms of subjectification** [but] is foundational to it,” the sheer magnitude of the influence of the human/ non-human divide to law’s foundational divide between property and personhood that Delaney outlines is obvious.95 In law, it is this **animalized underpinning** of property that constitutes property’s real and imagined polar opposite: personhood, which itself is rendered indissociable from humanity for living beings.96 **How can animals be legally represented through a legal category that has** traditionally repelled them and constituted itself against them? Furthermore, how can animals then move easily into a new legal category **that is virtually synonymous with humanity** (and problematically relies on subordinated alterities to shore itself)?

Personhood campaigns, especially those like the Nonhuman Rights Project that actively deploy sameness logic to be persuasive – but also, critically, campaigns that do not do this – thus intensify existing hierarchies. This intensification occurs **among humans and animals** but also across these categories as well. When advocacy efforts concentrate on those animals most like humans (in the hope that decisionmakers will be persuaded of the injustice of the disparate treatment between subjects that are otherwise alike due to certain shared capacities), they implicitly grant honorary human status to those animals.97 These animals are invariably what Cary Wolfe, in discussing the species grids that organize societies, has called the humanized animals.98 Wolfe asserts that every stratified society encodes a hierarchical species grid that contains four categories organizing human-human and human-animal relations. In descending order, these categories are: humanized humans, animalized humans, humanized animals, and, at the bottom, animalized animals.99 Although **humanized animals** are still subordinated to humanized and animalized humans, they are still culturally superior to the **animalized animals** in any given culture. Personhood campaigns seeking to envelop humanized animals in the protective cover of personhood by emphasizing these animals’ similarity to humans may benefit humanized animals – not an insignificant achievement by any measure – but they also reinforce cultural attitudes about why law can continue subordinating animalized animals.100 And it is **the latter category** into which most animals (consider farmed animals and trawled fish) are placed.101

*C. Binary Reinforcement*

Ciméa Barbato Bevilaqua educes a final critique of the personhood model: its reinforcement of the binary vision of legal subjects and legal objects. Personhood proceedings do not disrupt the dichotomy at the heart of the legal system, which problematically forces virtually every type of entity into one of two categories.102 Indeed, the seemingly intractable presence of the term in the law is a reason why some animal scholars who might otherwise abandon the term given its theoretical resonance opt to tolerate it for animals.103 If we allow personhood to continue, however, aspirations toward personhood will **always already rely on** the **Otherness** of things, all of them non-human. As much as legal strategies downplay animal difference in the hope of humanizing animals, some level of difference will always remain, making humanizing strategies always already precarious and unpredictable. As Bevilaqua notes, this is the case even for animals that are doubly humanized – first, by their genetic similarity to humans, like the chimpanzees at the heart of the Nonhuman Rights Project litigation in New York, and second, by their living arrangements in close proximity to humans, like the chimps Lili and Megh at the heart of Austrian personhood litigation. The latter have been infantilized through care practices (sleeping in children’s beds, being fed through a bottle, having a “nanny” as their caregiver) despite their adult status in chimpanzee lifespans.104 In litigation, the similarities of chimpanzees like Lili and Megh to humans in genetic heritage, sociality, and the ability to impart culture intergenerationally can be stressed,105 but the non-humanity of the chimpanzees can never be fully erased. This insight should lead us to the same conclusion that the discussion in this part of the book has repeatedly drawn – personhood as a legal concept fits at some levels but not others, and **attempts to pursue it** for even humanized animals merely entrench the paradigmatic human identity that defines it.

Efforts to personify some animals will thus **necessarily** accent the thingness of other beings, again not merely excluding other animals from the argument but pushing them deeper into the realm of the property/thing. For Bevilaqua, the legal status for animals that is most consonant with this critical appraisal of personhood for animals is one that can recognize that animals are not things without insisting they be persons.106 Whether she would endorse Hamilton’s model of personae as a better alternative to personhood is an open question, but these two theorists are united in their rejection of personhood for liminal beings – and, in the case of Bevilaqua, for animals – as a route to granting full legal protection for these beings.

#### Personhood cannot be reclaimed

Deckha 21 (Maneesha Deckha, Professor and Lansdowne Chair in Law, University of Victoria. *Animals as legal beings: Contesting anthropocentric legal orders*. University of Toronto Press 2021. Table omitted)DR 22

Certainly, changing the core attributes of personhood to signal a relational, socially connected, reciprocating actor who may or may not be human – features often ascribed to persons in many non-Western cultures where interspecies relations are visible and normalized108 – would likely be a momentous and welcome development for most of the beings concerned.109 What if personhood as it operates in settlercolonial Canadian law could be stripped of its current content and supplanted with these new associations to denote something altogether different from the rational, culturally unencumbered, socially dislocated, wealth-maximizing human actor? And what if this could be done without personhood being defined in a binary fashion against the category of property? As much as some non-Western understandings of personhood would be a thorough disavowal of dominant colonial understandings of personhood inherited from European worldviews, I worry that personhood even robustly reimagined, and thus distanced from its current roots in Canadian law, would never fully shed the dominant traditional (and problematic) **associations** **embraced** by mainstream jurists and legal actors. If we are going to supplant the Western liberal legal understanding of personhood in settler-colonial jurisprudence with a completely different understanding of personhood, **why not** aim for a new term altogether rather than **retaining personhood**? The next chapter discusses a replacement for personhood that could be applied to animals once their propertied status has been eliminated. As will become apparent, multiple points of overlap exist between my proposed replacement – beingness – and Indigenous and other non-Western understandings of personhood as outlined earlier.

#### Alt of “Beingness”

Deckha 21 (Maneesha Deckha, Professor and Lansdowne Chair in Law, University of Victoria. *Animals as legal beings: Contesting anthropocentric legal orders*. University of Toronto Press 2021. Table omitted)DR 22

If property is inherently exploitative and **personhood is inherently anthropocentric**, anthropocentric legal systems seeking to shift toward a multispecies orientation **must** respond to animals through a new transformative legal subjectivity, one that doesn’t merely refine personhood’s parameters or take paradigmatic human ontologies as its model. I call this new legal status, with apologies to Martin Heidegger, “beingness.” Beingness is a status that is meant to provide, at a minimum, the legal recognition that personhood is meant to afford, but it would be a legal subjectivity that caters to the ontologies of breathing, embodied creatures.3 Beingness would undercut the traditional account of who counts in law – the white, male, property-owning actor – and its residual emphasis on independence, wealth maximization, disembodiment, and rationality despite the gradual expansion of personhood to absorb humans traditionally excluded. In contrast to legal personhood, legal beingness does not glorify these elusive features of the proper legal subject. Rather, it replaces them with concern for capacities and values meant to shatter the existing parameters of who matters to law to allow animals (and, very likely, other non-humans, of which I say more in the next chapter) to count as legal subjects. As such, beingness will allow animals to receive legal protections against the instrumental use their present property status permits.

As table 1 reveals, the main elements of beingness are embodiment (and the revaluation of the body and emotion this entails), relationality (and the social embeddedness and attention to power relations but also interdependence this entails), and vulnerability (and the materiality and attention to pain and suffering this entails). Beingness is thus directly oriented toward salient features of animals’ lives that personhood does not easily accommodate and that property presently disavows. It is a better alternative than either as a protective legal subjectivity for animals. To support this claim, this chapter (1) expounds upon and draws together beingness’s three main constitutive elements into an analytical tapestry to explain the orientation of a legal subjectivity based on these interrelated features, and (2) explains why animals descriptively and normatively qualify as embodied, relational, and vulnerable beings whose corresponding needs obligate anthropocentric legal systems to respond.

Specifically, I deploy feminist understandings of relationality along with contemporary social theories of the body, vulnerability, and precarity to argue that the law should draw attention to the vulnerability and precarity that animals experience as embodied and relational beings due to the fact that they are legally situated as property. My discussion of embodiment reviews why critical theorists across the board demand the discursive and material rehabilitation of the body – marginalized bodies in particular. I explain why animal bodies fit into this critical repertoire as a type of marginalized body requiring rehabilitation. My discussion of relationality invokes feminist argumentation for such a reorientation of law and ethics in how we understand subjectivity as well as animal-focused relational accounts to demonstrate why animals should be considered relational beings and the corresponding value of a legal system that classifies them as such. Finally, the discussion of why the law should embrace vulnerability as a foundational concept forefronts Judith Butler’s influential understanding of vulnerability and precarity to scaffold legal subjectivity and applies it to animals.

This chapter thus details the three principal elements of beingness and builds upon the anti-anthropocentric reformulation of law’s foundational architecture in the previous chapter. My aim is to synthesize multiple strands of feminist philosophy, social theory, and legal analysis to develop/articulate a new, **more animal-friendly legal subjectivity** that can **concretely create legal change for animals** while avoiding pressing animals into the anthropocentric and otherwise exclusionary mould of personhood. This chapter articulates why a new legal subject position for animals grounded in embodiment, vulnerability, and relationality can better respect animals as social and material beings than personhood would.

I acknowledge at the outset that a valid criticism of the legal being proposal is the complete novelty it poses for the Canadian legal system. Personhood, while still a remote possibility for animals, is at least a concept that is currently intelligible within the common law and civil law and to legislators (notwithstanding the paradoxes in how it is interpreted by jurists).4 Yet other jurisdictions and legal systems suggest that the concept of beingness, at least in name if not in the full meaning I wish it to convey here in terms of **protections equivalent to legal personhood**, could be intelligible to law. Germany and Austria have inaugurated fellow-beingness status for animals in their jurisdictions.5 As Sabine Lennkh notes, the concept was inaugurated to recognize dignity, humanity, compassion, and justice in animals, bestowing them with inherent value, dignity, and identity.6 Although it sounds path-breaking for animals, anthropocentric interpretations of beingness have precluded any revolutionizing impact.7 Applications of beingness so far are thus quite distant in scope and ambition from the **aim of legal beingness**: a legal end point for non-human animals that can serve as a route “to resistance that breaks through human/animal bipolarism and redresses continuities between all violated bodies.”8 Yet the existence of the term in existing legal systems in some jurisdictions signals some level of receptivity to creating new legal categories for animals beyond personhood. This chapter explores what a considerably more substantive definition of beingness could look like.

### NEG---K---Settler Colonialism

#### Legal incorporation of animals enables settler nationalism

Gillespie & Narayanan 20 (Kathryn Gillespie is a feminist geographer and critical animal studies scholar. Broadly, her research explores the violence of anthropocentrism under capitalism, with a focus on the entanglements of race, species, and gender in sites of animal agriculture, food production, and other everyday geographies. Yamini Narayanan is Senior Lecturer in International and Community Development. Her work is focussed on two major themes: the nexus between animals and urban planning in India; and the intersections of speciesism, casteism and racism in the ways in which animals are enrolled in nation-building projects. ‘Animal Nationalisms: Multispecies Cultural Politics, Race, and the (Un)Making of the Settler Nation-State’ Journal of Intercultural Studies, 41(1), 1-7)DR 22

This special issue has two mandates. One, we ask why and how animals continue to be foundational to cultures of nationalism and racial demarcation in settler colonies. Postcolonial critical animal studies scholars have drawn attention to the ways in which racialisation (as a process frequently foundational to projects of nation-building) is intimately entangled with what Maneesha Deckha calls a kind of ‘species thinking’ wherein categories of human, subhuman, and nonhuman operate to create a violatable Other (Deckha [2010](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys); see also Kim [2015](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys); Ko and Ko [2017](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)). We are interested in how animals themselves are used to **reproduce** and sustain animality and its role in **nationalistic practices of** exclusion, violence, and supremacy. The making of nations is persistently an anthropocentric endeavour, **both** in its exclusion of nonhuman animals as serious **subjects** belonging to the nation, **and** in the ways that they are instrumentalised for **nationalistic ends**. Indeed, modern discourses on the ‘humane’ treatment of animals that originated in Britain, for instance, reflect the nation as **the epitome of racialised human civilisation**, wherein Britain could justify ‘its assumed superiority over **other** nations, “races”, and cultures’ (Howell [2015](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys): 1). This anthropocentrism is embedded in nearly every aspect of nation-making – from the fundamental anthropocentrism of state legal institutions (Deckha [2013](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) and global capitalist economies (Nibert [2013](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) to majority cultural practices involving animals (Kymlicka [2018](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) and the neo-colonial ways that animality and indigeneity are **strategically appropriated** for the crafting of a particular kind of nation (García [2014](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)).

Two, we aim to re-imagine how animals may feature in more ‘inclusive nationalisms’ or ‘just nationalisms’ that attend to difference within and across species. Variations of environmentalism and eco-citizenship are interwoven with nation-building narratives, and are beginning to variously unsettle and reframe the nation-state (Yeh [2009](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys); Goldman [2005](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)). In 2015, for instance, **New Zealand recognised animals as ‘sentient’** beings. However, such mandates are yet to manifest **meaningfully** worldwide in ways that protect animals from human exploitation, and there remains a question of whether legal reforms can even substantially represent the interests of nonhuman animals when **law itself** is an anthropocentric institution (Deckha [2013](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)).

A critical **constitutive** element of nationalism, an ideology characterised not by ‘ethnicity, but by a single public culture and a set of shared political goals’ is its use of evocative symbols (Cerulo [2001](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys): 10328). Barker and Galasinski ([2001](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys): 124) define **national identity** itself as ‘a form of imaginative identification with the symbols and discourses of the nation-state’. In nation-making, symbols may be instruments of legitimising specific nationalisms, or perform divisive, even polarising actions (Šarić and Luccarelli [2017](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)). Such symbols are typically tangible or intangible forms of culture or heritage such as flags, monuments, or even language or arts (Šarić and Luccarelli [2017](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) – or indeed, sentient nonhuman animals. Certain species of **animals** are evoked as signals of inclusion or exclusion of certain races, making animal bodies critical vectors of nation-making, and even violent nationalisms. Animal bodies may be **eulogised** as the national motherland itself, as in India, where the Mother Cow is indistinguishable from a racially pure, ‘upper’ **caste** Hindu **Mother** **India** (Narayanan [2019](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)). This racialised celebration of the cow, seen another way, is also a weaponisation of the cow with reference to the subjects of **racial othering**, in this case, Muslims and ‘**low’ caste Hindus**. Being attentive to the subjectified lifeworld experience of these animals and the dismantling of their racialised symbolism, throws open a number of key questions on the real interconnections between racism, speciesism, anthropocentrism, and the implications therein for racialised humans and nonhumans.

To these ends, we ask: How can a consideration of animals’ lived experiences and discursive mobilisation illuminate a more robust understanding of nationalism, racism, and anthropocentrism? How are settler nation-states implicated in instrumentalising and exploiting animals for nationalistic ends – and indeed, thus implicated in the rise of global military imperialism, right-wing nationalism, and lasting impacts of settler colonialism? How might a decolonial and de-anthropocentric approach lead to a radical unmaking of nations built and sustained through racial, settler-colonial, and anthropocentric violence?

The articles included in this special issue interrogate these questions through a variety of lenses and geographic contexts. Chloe Diamond-Lenow ([2020](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) illuminates how **US military** working **dogs** are weaponised and understood in multiple ways in the ‘war on terror’ – as technologies of intimidation, as equipment to be maintained, as heroes to be celebrated, and as pets or companions. These dogs, and the **affective registers** they inhabit, reveal the varied dimensions of how **nationalism drives** and supports projects of war.

In a different geographic context, Esther Alloun ([2019](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) brings us to the increasingly polarising militarised context of the Israeli occupation of Palestine. Here, she theorises how veganism and animal rights are **weaponised** to **reify the Israeli nation-state** and **enact further violence on Palestinians**, who are framed in Israel’s nationalist discourses as apathetic to the plight of animals – a foil against which the Israeli state frames itself as an empathetic protector of animals. Alloun’s ethnographic research reveals a very different reality that lays bare the ‘veganwashing’ at the centre of these multispecies cultural politics.

Christopher Mayes ([2020](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) analyses the dual mobilisation of sheep and fencing in the eradication of Indigenous peoples from what became the settler nation-state of Australia, and in the selective inclusions and exclusions of immigrants to Australia. Sheep were used as tools of settler colonialism, and fencing – justified by a perceived need to contain these sheep – became a technology of land enclosure and **dispossession**, helping to solidify an Australian nation. Sheep, and wool production in particular, remain central to Australian agricultural economies, reproducing settler violence and human domination over animals.

Highlighting another settler nation-state and its entanglements with white supremacist violence, Stephanie Rutherford ([2020](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) centres the symbolism of the wolf in understanding right-wing nationalism located in Canada and the United States. Originally, the wolf was seen as a threat to be eradicated by settlers, systematically hunted until their numbers dwindled. More recently, however, factions of right-wing nationalists and members of the ‘alt-right’ have deployed iconography of the wolf to solidify their white supremacist orientation. Rutherford excavates this phenomenon in the context of right-wing nationalism.

As a way of looking forward, Maneesha Deckha ([2020](https://www.tandfonline.com/doi/full/10.1080/07256868.2019.1704379?src=recsys)) offers a speculative path for undoing nationalist legal systems. She tracks the anthropocentrism of settler-colonial legal organisation, and imagines possibilities for **Indigenous legal orders** to reconfigure and **transform** how animals are conceptualised and protected, and how Indigenous cosmologies and politics can be centred – a kind of unmaking of the settler nation-state.

### NEG---Animal Welfare CP / Nearest Person CP

#### Human responsibility over legal personhood is a better and competitive approach with animal rights

Richard L. Cupp 16, John W. Wade Professor of Law at Caruso School of Law, April 2016, ESSAY: FOCUSING ON HUMAN RESPONSIBILITY RATHER THAN LEGAL PERSONHOOD FOR NONHUMAN ANIMALS, Pace Envtl. Law Review, Vol. 33, Issue 3, p. 517-541

II. APPLAUDING AN EVOLVING FOCUS ON HUMAN RESPONSIBILITY FOR ANIMAL WELFARE RATHER THAN THE RADICAL APPROACH OF ANIMAL LEGAL PERSONHOOD

When addressing animal legal personhood, the proper question is not whether our laws should evolve or remain stagnant. Our legal system will evolve regarding animals and indeed is already in a period of significant change. One major reason for this evolution is our shift from an agrarian society to an urban and suburban society. Until well into the twentieth century, most Americans lived in rural areas. Most American families owned or encountered livestock and farm animals whose utility was economic.

Now we are an urban and suburban society, and relatively few of us are directly involved in owning animals for economic utility. Rather, when most of us now encounter living animals, they are most frequently companion animals kept for emotional utility. Most of us view the animals in our lives as in terms of affection rather than as financial assets. As law gradually reflects changes in society, transformation in our routine interactions with animals doubtless has influenced the trend toward providing them more protections in many respects.

A second major reason we are evolving in our legal treatment of animals is the advancement of scientific understanding about animals. We are continually learning more about animals' minds and capabilities. As we have gained more understanding of animals, we have generally evolved toward developing more compassion for them, and this increasing compassion has been, to some extent, and will continue to be, increasingly reflected in our protection laws. 33

This evolution is a good thing, and it is probably still closer to its initial significant acceleration in the twentieth century than it is to a point where it will slow down. In other words, it seems quite probable that we will continue in a period of notable change in our treatment of animals for some time. We will continue evolving; the only question is how we should evolve.

Two unsatisfactory positions and a centrist position may be identified in answering this question. One unsatisfactory position would be clinging to the past and denying that we need any changes regarding how our laws treat animals. A second unsatisfactory position on the other extreme would be to radically reshape our understanding of legal personhood, with potentially dangerous consequences.

A centrist alternative to these extremes involves maintaining our legal focus on human responsibility for how we treat animals, but applauding changes to provide additional protection where appropriate. As emphasized by the Third Department in unanimously dismissing the NhRP's Lavery appeal: "our rejection of a rights paradigm for animals does not, however, leave them defenseless." 34 When our laws or their enforcement do not go far enough to prevent animals from being mistreated, we should change our laws or improve their enforcement rather than assert that animals are legal persons.

#### Solves animal neglect problems

Richard L. Cupp 21, John W. Wade Professor of Law at Caruso School of Law, 2021, Considering the Private Animal and Damages, Washington University Law Review, Vol. 98, Issue 4, p. 1313-1342

Creating animal legal personhood is not necessary to address the medical care funding problem presented in cases such as Vercher. Straightforward solutions are available within an animal welfare paradigm. When the defendant in Vercher reached a plea bargain agreement for criminal animal neglect, the court only required that the defendant pay for the medical care and other expenses caused by the neglect up to a specific date. 102 However, the complaint in Vercher asserted that further medical care and neglect-related expenses have been incurred since that date and that yet more expenses would be incurred in the future. 103The complaint asserted that tort damages, with the horse as a legal-person plaintiff, were needed to obtain the neglect-related expenses that were already incurred and would be incurred after the cut-off date set forth in the criminal sentencing. 104

Simply, the horse owner's payment of medical and other neglect-related expenses should not have been allowed to end as of the date of her plea bargain. Assuming it was within the court's power, the plea bargain should have required the owner to pay future neglect-related expenses in addition to past neglect-related expenses. If, for some reason, courts presently do not have the power under Oregon law to require payment of future neglect-related expenses in plea bargains, the Oregon legislature should explore amending its animal neglect statutes to allow for this. The extraordinary step of creating animal legal personhood, however, is not justified, and it is especially inappropriate when straightforward approaches within our existing legal framework are available.

### NEG---Medical Research DA

#### Spillover effects from even limited rights claims would crush medical research.

Kathy Hessler 14, Clinical Professor of Law and Director of the Animal Law Clinic, “When Animal “Legal Personhood” Gets Personal,” Lewis & Clark Law School, 2014, https://law.lclark.edu/live/news/26010-when-animal-legal-personhood-gets-personal

Visiting Professor Steven M. Wise and Clinical Professor of Law Kathy Hessler were targeted for comment when Wise, through his nonprofit organization the Nonhuman Rights Project, filed a series of lawsuits demanding judges issue a writ of habeas corpus on behalf of four chimpanzees. The suits, which ultimately sought to move the chimpanzees out of neglectful situations and into a sanctuary, asked three New York judges to recognize for the first time that chimps have a right of bodily liberty.

Despite the legal limitations inherent to “legal personhood”—which, for example, do not grant an individual the right to vote, marry, or hold public office—the lawsuits drew opposition. Some critics argued that a legal system already overburdened with crimes against humans should not be concerned with expanding the legal rights of animals. Others were concerned about a “slippery slope” of increasing rights for chimps that would lead to the crippling of medical and scientific research as well as species conservation.

#### Activists’ legal goals continue costly litigation---prevents research funding and causes a chilling effect

Richard L. Cupp 7, John W. Wade Professor of Law, Pepperdine University School of Law “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status,” Southern Methodist University, 2007, 60 SMU L. Rev. 3 (2007), https://www.animallaw.info/article/dubious-grail-seeking-tort-law-expansion-and-limited-personhood-stepping-stones-toward

A New Tort in effect emphasizes this by promoting the appropriateness of applying its tort action to some of the most important uses of animals in society, which are also among the favorite targets of animal rights activists. Many animal rights legal activists vehemently oppose most or all scientific research on laboratory animals. In addition to legal efforts to limit or eliminate scientific research on laboratory animals, a radical fringe's terrorist attacks against animal researchers and research laboratories have highlighted the passion such research efforts generate.

A New Tort chooses to utilize a chimpanzee in a scientific research laboratory as the context for one of its three primary hypotheticals demonstrating how its proposal would operate. The chimpanzee in the article's hypothetical is kept in a manner meeting the requirements of the Animal Welfare Act but is not given all of the environmental amenities that some activists believe are appropriate. If a legal representative for the chimpanzee (again, the burgeoning legal animal rights community would supply a surfeit of volunteers for this role) were to sue to attain a better environment in the research laboratory, A New Tort states that “under the proposed tort, [the research laboratory] would have to make its case to a court.”

Such a consequence could be disastrous for HIV research and other areas of medical research that rely on the use of animals. As addressed below, Favre proposes that his tort include money damages awards, and such awards would of course have a chilling effect on research. However, even if researchers were usually found by jurors to have acted appropriately in caring for the chimpanzee, and thus money damages awards were few, the litigation would likely be devastating to medical animal research.

In tort lawsuits, litigation costs--primarily attorney's fees and expert witness fees--often exceed the money damages awarded. Even when no damages are awarded, litigation costs for each lawsuit can cost hundreds of thousands or sometimes even millions of dollars. For example, in asbestos litigation, in which most cases settle rather than lingering through a full trial, a study found that out of the $70 billion spent on asbestos litigation between the 1960s and 2002, $40 billion was spent on legal fees rather than on judgments.

The tendency for lawsuits to settle, as illustrated in asbestos litigation, keeps litigation costs from being even higher, as would be the case if most lawsuits proceeded all the way through trial. According to one study, ninety-eight percent of lawsuits settle before trial. Unfortunately, there are strong reasons for concern that animal tort lawsuits would settle significantly less frequently than do typical tort lawsuits, making animal tort lawsuits even more expensive to litigate. Tort lawsuits typically settle because both parties believe that settling is in their best financial interest. However, as noted above, activist Steven Wise probably spoke for most attorneys interested in animal law when he stated that money damages are often not the most important matter in animal-related tort lawsuits. Creating stepping stones toward abolishing or eroding the property status of animals is likely much more appealing to animal rights activists than is making as much money as possible from lawsuits. Although settlements would doubtlessly sometimes be reached, much of the motivation for compromise from the plaintiff's perspective in traditional tort litigation would be absent. Further, it is expected that animal rights activists would be cognizant that numerous lengthy legal battles might drain research laboratories' resources and limit their ability to continue undertaking such research. Even if very few of the lawsuits result in judgments, opening up tort litigation in this context might well signal the end of scientific research that presently provides enormous public health benefits.

#### Medical research and food industries are irrevocably harmed

Kelsey Kobil 15, J.D. Candidate, The Dickinson School of Law @ Pennsylvania State University, “When it Comes to Standing, Two Legs are Better than Four”, 10-1-15, 120 Dick. L. Rev. 621 (2015).

Professor Epstein and Judge Bablitch envisioned the chaos that would result from granting legal rights to animals, and this chaos will begin if animals are granted standing to sue. Hundreds or even thousands of cases would clog the court dockets if animal rights activists could file suit with animals as the plaintiffs, with these "plaintiffs" ranging from cattle on farms, to monkeys in laboratories, to domesticated cats and dogs in households.1 54 Furthermore, courts would be tasked with handling claims and regulating industries that Congress intended to be controlled entirely by administrative agencies. 55

Additionally, the chaos caused by granting animals standing to sue would extend beyond court congestion. The medical research field is largely dependent on animal testing. 156 Although there is admittedly some excessive and unnecessary testing present in the medical research industry, using animals in medical research is a conflict that cannot be avoided. 1 57 Furthermore, Congress explicitly chose to exempt birds, rats, and mice that are bred for research from the AWA. 158 Animal rights activists argue, however, that human advancement, even when directly related to human health, can never justify animal suffering. Similarly, the meat and dairy industries directly depend on humans consuming animals. Congress actively supports these industries, and the Agriculture Act 160 provides for an estimated $956 billion to support the programs protected under the act.' 6 ' The Agriculture Act provides subsidies for crop insurance, rural development, research, and commodities.162 Interestingly, although the Agriculture Act does not directly subsidize farmers who raise animals for human consumption, estimates suggest that roughly two-thirds of the budget for subsidizing commodity crops actually subsidizes crops that are used as animal feed. 163 Congress has explicitly' 64 and implicitly authorized using animals in the medical 165 and meat industries. If Congress grants animals standing to file suit in court, it will destroy the same industries that it actively supports.

Wise admits that if the animals enabling the medical and meat industries to flourish are granted rights, the industries will be "severely affected[.]' 166 "Severely affected" is an understatement. How can the meat and dairy industries continue to function if cows, pigs, and chickens are permitted to sue their owners for the bodily injury and harm that directly results from human consumption? If animals are granted legal personhood status, the medical, meat, and dairy industries will be irrevocably harmed.

### NEG---Politics DA

#### Giving animals personhood causes backlash---whether the actor is Courts or Congress

Richard L. Cupp Jr. 15, John W. Wade Professor of Law, Pepperdine University School of Law, “Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals Climate, Energy, and Our Underlying Environmental Ethic: Essay,” Pace Environmental Law Review, vol. 33, no. 3, 2016/2015, pp. 517–541

VI. THE POLITICAL PROCESS IS IMPORTANT IN ADDRESSING THIS TYPE OF PROPOSED CHANGE

As noted above, it seems quite likely that Americans will continue to push for more protections of animals through the democratic process, and that is a good thing. But of course most citizens would oppose making animals legal persons, and courts need to demonstrate restraint and to respect the democratic process. Courts applying common law do not always need to wait for legislatures to act, but the more monumental the potential change, and the more it would violate the views of most citizens, the more thoughtful courts need to be about whether it is appropriate for them to make the change.

### NEG---Precedent DA

#### Extending personhood can erode rights for people with disabilities

Richard L. Cupp 16, John W. Wade Professor of Law at Caruso School of Law, April 2016, ESSAY: FOCUSING ON HUMAN RESPONSIBILITY RATHER THAN LEGAL PERSONHOOD FOR NONHUMAN ANIMALS, Pace Envtl. Law Review, Vol. 33, Issue 3, p. 517-541

I. ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE LAVERY LAWSUITS WOULD POSE THREATS TO THE MOST VULNERABLE HUMANS

A danger that is underestimated and far out on the horizon may be more likely to advance from threat to harm than a similar danger that is immediate and clearly seen. One of the most serious concerns about legal personhood for intelligent animals is that it presents an unintended, long-term, and perhaps not immediately obvious threat to humans - particularly to the most vulnerable humans.

Among the most vulnerable humans are people with cognitive impairments 24 that may give them no capacity for autonomy or less capacity for autonomy than some animals, whether because of age (such as in infancy), intellectual disabilities, or other reasons. 25 To be clear, supporting personhood based on animals' intelligence does not imply that one wants to reduce the protections afforded humans with cognitive impairments. Indeed, my understanding is that the Lavery briefs seek to pull smart animals up in legal consideration, rather than to push humans with cognitive impairments down. 26

However, despite these good intentions, there should be deep concern that over a long horizon, allowing animal legal personhood based on cognitive abilities could unintentionally lead to gradual erosion of protections for these especially vulnerable humans. The sky would not immediately fall if courts started treating chimpanzees as persons. As noted above, that is part of the challenge in recognizing the danger. But, over time, both the courts and society might be tempted not only to view the most intelligent animals more like we now view humans but also to view the least intelligent humans more like we now view animals.

Professor Laurence Tribe has expressed concern that the approach to legal personhood set forth in a much-discussed book by Steven M. Wise might be harmful for humans with cognitive impairments. The book, Rattling the Cage, was published in 2000, and it broke new ground in setting forth arguments for intelligent animal legal personhood directed at a popular audience.; 27 In 2001 Professor Tribe stated "enormous admiration for [Mr. Wise's] overall enterprise and approach," but cautioned:

once we have said that infants and very old people with advanced Alzheimer's and the comatose have no rights unless we choose to grant them, we must decide about people who are three-quarters of the way to such a condition. I needn't spell it out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust. 28

Mr. Wise later responded in part: "I argue that a realistic or practical autonomy is a sufficient, not a necessary, condition for legal rights. Other grounds for entitlement to basic rights may exist." 29 But Mr. Wise also noted that, in his view, entitlements to rights cannot be based only on being human. 30 I did not find in the Lavery briefs an explanation of why, despite Mr. Wise's apparent view, that being part of the human community is not alone sufficient for personhood; he and the NhRP think courts should recognize personhood in someone like a permanently comatose infant. If the argument is that the permanently comatose infant has rights based on dignity interests, but that dignity is not grounded in being a part of the human community, why would this proposed alternative basis for personhood only apply to humans and to particularly intelligent animals? Would all animals capable of suffering, regardless of their level of intelligence, be entitled to personhood based on dignity? If a rights-bearing but permanently comatose infant is not capable of suffering, would even animals that are not capable of suffering be entitled to dignity-based personhood under this position? 31 The implications of some alternative non-cognitive approach to personhood that rejects drawing any lines related to humanity may be exceptionally expansive and problematic.

Further, good intentions do not prevent harmful consequences. Regardless of the NhRP's views and desires regarding the rights of cognitively impaired humans, going down the path of connecting individual cognitive abilities to personhood would encourage us as a society to think increasingly about individual cognitive ability when we think about personhood. Over the course of many years, this changed paradigm could gradually erode our enthusiasm for some of the protections provided to humans who would not fare well in a mental capacities analysis. Deciding chimpanzees are legal persons based on the cognitive abilities we have seen in them may open a door that swings in both directions regarding rights for humans as well as for animals, and later generations may well wish we had kept it closed. 32

## Future Generations

### Note on the Area

#### What are future generations?

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020, pp. 44

The term “future generations” is difficult to define. It could refer to all future people, some future people, all future generations (focusing on the generation as such, not on its members), some future generations (e.g., temporally closer future generations), certain future age groups or birth cohorts, future groups (e.g., future generations of Romanians), future members of a certain future group, or types of future people.2 It remains to be determined which of these groups should be the holder of the legal rights ascribed to “future generations.” Some aspects of intergenerational equity may be relevant to all members of future generations, such as a shared interest in a sustainable ecosystem. Under international human rights law, there is a similar focus on what is owed to all future people and on the corresponding universal rights that all legal systems should provide. Future people, however, will most likely be a diverse collection of individuals of different and even conflicting interests, which in turn may impose different demands on current generations. Accordingly, the use of the term “future generations” is much more versatile, potentially referring to a variety of different future groups and types of people.3

### Inherency/UQ

#### Future generations currently lack independent rights and standing

Joerg Chet Tremmel 6, Fellow at the London School of Economics and Political Science, “Establishing intergenerational justice in national constitutions,” Handbook of Intergenerational Justice, Edward Elgar Publishing, 2006, pp. 201

The establishment of ecological intergenerational justice into national constitutions

Some states have already taken action and implemented some clauses for the protection of the ecological interests of future generations. However, Poland, Germany, France, Switzerland, South Africa, the Czech Republic and all the other countries named in Tables 10.1 and 10.2 have not become ecologically sustainable states. In fact, all academic disciplines which are concerned with this subject agree that these states, albeit to a differing extent, are still breaching the fiats of ecological sustainability. How come? The clauses which were mentioned in Tables 10.1 and 10.2 share several weaknesses: first, most of them do not lay down a public right for each individual citizen. Instead they formulate a state objective which is legally something different than a public right.7 Second, they are too vague.

A state objective, unlike an individual right, obliges above all the legislature but also the executive power, the administration and the jurisdiction to consider it in executing each state activity. Admittedly, the individual citizen has no right to prosecute a claim for certain adjudications of environmental protection if the legislature, executive power and jurisdiction are not acting. That does not mean that lawsuits are impossible, they can occur if a state organ becomes the litigator in a complicated procedure. In Germany, for instance, the Federal Constitutional Court (FCC) can be occupied with Article 20a by way of a judicial review of the constitutionality of laws. That can be for example a litigation between the federal republic and a state (Art. 93 I No. 3 Constitution associated with par. 13 No. 7 and 68 et seq. FCC) and the litigation between public bodies (Art. 93 I No. 1 No. 3 Constitution associated with par. 13 No. 5 and 63 et seq. FCC). However, so far Art. 20a has not been the subject of a lawsuit before the Federal Constitutional Court.

There is a second and more important problem with Article 73 of the Swiss, Article 74 of the Polish, Article 24 of the South African, Article 20a of the German Constitution and the other clauses listed in Table 10.2. It is not included what the concrete responsibility is that present generations have towards future generations in terms of ecological sustainability. Art. 24 of the Greek Constitution or Art. 54 of the Lithuanian one just stipulate the ‘protection of the natural environment’. But what level of protection?

At the moment, these articles only contain an undetermined demand. Their legal character would be radically different if it demanded that concrete rules of management for ecological sustainability were applied to it. Law Courts can only amend the legislature and executive authorities when they transgress their obligations. The norms raise hope for an ecological, sustainable policy that the state does not want, or has, to fulfil. In their current version they conceal the fact that the principle of ecological sustainability has not, as yet, been incorporated in the constitutions and therefore that people will carry on living at the expense of future generations.

### AFF Area---Future Generations

#### Future generations should have a positive right to a stable climate.

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020, pp. xii-xvi

In addition to the vulnerable climate justice communities that face climate adaptation challenges in the Anthropocene era, there are three populations in the global community that are most vulnerable and least equipped to protect themselves. These categories – collectively referred to as “the voiceless” in this book – include future generations,3 [Begin FN 3] 3 For purposes of this book, the term “future generations” includes today’s children and unborn children of the future. These populations share the common vulnerability of inheriting a planet plagued by the climate change crisis and relying on unsatisfactory existing regulatory strategies to protect themselves from environmental catastrophe. [End FN 3] wildlife, and natural resources. Domestic and international legal principles and initiatives are beginning to recognize rights and responsibilities that apply to the voiceless community; however, these protections have yet to be pursued across all three communities of the voiceless and have not been considered collectively in the context of climate change and climate justice. This book seeks to identify the common vulnerabilities of the voiceless and how the law can evolve to protect their interests more effectively in the face of climate change impacts.

Three themes apply to the collective protection of the voiceless in the Anthropocene era. First, these populations are similarly impacted by climate change in a manner that the law overlooks and that requires application of stewardship principles inherent in the public trust doctrine and in constitutional mandates in a growing number of countries. Second, their common vulnerability underscores the need for a new rights-based legal regime to respond to climate adaptation challenges. Third, recent developments in atmospheric trust litigation, rights-based litigation for protection of wildlife, and legislative initiatives conferring legal personhood rights to natural resources make the time right for this book. Each category has made progress in an independent yet piecemeal manner in limited contexts in recent years, but more coordinated and broad-scale efforts are necessary.

This stewardship-focused and rights-based revolution will face significant challenges in the years ahead, primarily because it represents a departure from the successful but inflexible and outmoded command-and-control paradigm of environmental regulation that has been in place since the 1970s. Another challenge in ushering in this new regulatory model is striking a balance between anthropogenic stewardship and ecocentric legal personhood as mechanisms of legal protection. To achieve this balance, this book proposes a continuum of common but differentiated rights. Given how different categories of humans have different degrees of rights-based protections (individuals vs. corporations, adults vs. children, etc.), and how developed and developing countries bear different responsibilities to manage climate change impacts, a continuum of rights-based protections for future generations, wildlife, and natural resources can be implemented based on capacity for stewardship. In this regard, future generations of humans should have the most rights and responsibilities. They should have a positive right to inherit a stable climate as future climate stewards.4 Positive rights are accompanied by responsibilities that only humans can bear. By contrast, wildlife and natural resources should have negative rights-based protections. For wildlife, this would entail the right to be free from abuse and unlawful confinement, and for natural resources (and some forms of wildlife), it would involve a right to be free from unsustainable use.

There are several reasons why this rights-based paradigm is necessary now. First, the failures of traditional international environmental governance are more apparent than ever. After more than a decade of efforts to incorporate human rights language into the international climate change treaty regime, the Paris Agreement and its limited reference to human rights in the preamble of the agreement underscores the urgency to bypass the gridlock of traditional international treaty diplomacy to create a rights-based approach outside of that framework. By contrast, domestic courts and legislatures have offered significant promise to advance a rights-based approach.

Second, the command-and-control paradigm of environmental regulation is not adequate to address the problem of climate change. That regulatory model was widely employed in the first two decades of climate regulation at the domestic and international levels with a focus on climate mitigation. When it became apparent that climate mitigation efforts would not be able to halt and reverse climate change impacts, the focus of climate change regulation shifted to adaptation. With the shift to adaptation, rights-based considerations emerged and the field of climate justice was born.

The arsenal of federal environmental statutes in the 1970s in the United States was an effective regulatory system to address the domestic air, water, and land-based pollution crises. By contrast, climate change is a global problem with planetary implications that must draw on a more potent tool box of legal mechanisms. Recent legislative developments in legal personhood protections for natural resources, similar efforts in the courts for wildlife, and atmospheric trust litigation for future generations are important steps in this paradigm shift. Atmospheric trust litigation in the United States and abroad may be the tipping point for this legal revolution.

Third, the need for meaningful action is urgent. The sixth mass extinction that scientists predict may arrive this century is not just another episode of “the strong will survive and we will see who remains” transition, because it threatens the viability of humans as stewards of ecosystems. Climate change magnifies the natural and unnatural threats to ecosystems and puts the earth on a collision course with eco-catastrophe. Every crisis is an opportunity, however. Climate change threatens to decimate the earth and it threatens to do so quickly as a “threat multiplier” with critical “tipping points” 5 in the near future. Yet the urgency of this pending ecocatastrophe could be the impetus to transform our legal system to respond effectively with rights-based legal mechanisms for the voiceless.

Fourth, in promoting this paradigm shift toward enhanced stewardship duties and rights-based protections, this effort can capitalize on the momentum from recent legal victories in protecting the common vulnerability of marginalized climate justice communities. Climate change regulation is already starting to be perceived and applied as a human rights and justice issue, which has enabled marginalized climate justice populations like indigenous peoples to secure procedural and substantive protections in the climate change impacts context. Moreover, international human rights law has embraced the connection between climate change and human rights in UN resolutions and through the work of a special rapporteur on human rights and the environment. The progress made and lessons learned from protecting the vulnerable can serve as a valuable foundation on which to advance the effort to protect the voiceless. The voiceless community is just starting to see legal protections and advocates for their cause. Earlier calls for their protection were limited to academic discourse in foundational and groundbreaking works by Edith Brown Weiss,6 Christopher Stone,7 and Peter Singer.8 The forward thinking on these issues from decades past now has an opportunity to take root as a response to the climate change crisis and as an extension of the law’s effort to protect the vulnerable from climate change impacts. The time has come to implement those prescient visions for protection of the voiceless.

It is no longer a matter of whether this legal revolution will occur, but only a matter of when and how. The environmental management paradigm of the twentieth century is not sustainable. Striking examples of this reality are how the maximum sustainable yield model of fisheries management contributed to the collapse of global fisheries and the multiple use and sustained yield model of forest management similarly facilitated the demise of once-abundant forests in the United States. In both of these contexts, regulatory models are shifting to preservation-based strategies, such as marine and terrestrial protected areas to replace the (un)sustainable use model. These preservation-oriented approaches reflect the growing recognition of the intrinsic ecosystem value of these resources, irrespective of their value for human consumption.

Rights and responsibilities should offer a mix of benefits and burdens to those who hold them. The most common argument opposing the recognition of legal personhood rights for wildlife is that they are unable to bear human responsibilities. Yet those human responsibilities are not being fully engaged by humans in their relationship to wildlife and natural resources. Human responsibility means little if it is not exercised at least in part for the benefit of the vulnerable and voiceless. Unfortunately, human “responsibility” toward the voiceless has been to abuse the right to develop and seek economic gain in a manner that jeopardizes the sustainability of wildlife and natural resources. Efforts in the US in the past three decades to roll back the ambitious scope of protections for wildlife and natural resources under the Endangered Species Act (ESA) are a prime example of this clash between stewardship objectives and anthropocentric economic development values. The ESA is controversial by design because it is among the few environmental statutes that do not place human needs and objectives first. A new stewardship ethic of eco-responsibility is needed to protect all living entities’ right to sustain themselves on the earth as a potent weapon in the struggle to endure in the face of the environmental and human rights impacts of the Anthropocene era.

The timing is right for this volume given the recent “perfect storm” of legal developments in these three voiceless communities. The Nonhuman Rights Project’s legal personhood cases on behalf of primates and mammals have garnered national and international attention; legislative and judicial developments in legal personhood for natural resources in the United States and abroad have been in the headlines regularly in the past year; and the Juliana case, building on a longstanding tradition of protection of future generations, has been dubbed the “environmental trial of the century” as it works its way through multiple procedural challenges in US federal courts. These developments in the protection of the voiceless provide a valuable foundation on which to develop a stewardship-focused and rights-based approach to climate change adaptation.

#### Here’s an explicit solvency advocate!

Manuela Niehaus & Kirsten Davies 21, Macquarie Law School, Macquarie University, Australia and Faculty of Law, Universität Hamburg, Germany, “Voices for the voiceless: climate protection from the streets to the courts,” Journal of Human Rights and the Environment, Vol. 12, Issue 2, pp. 228–253, https://www.elgaronline.com/view/journals/jhre/12-2/jhre.2021.02.04.xml

The cases discussed here demonstrate that one way in which human rights law de lege ferenda could respond to the climate emergency would be to establish legal rights for future generations. These rights should not only be morally binding upon the present generation and its governments, but should be legally enforceable.114 Hiskes argues that future generations are entitled to action being taken today, even if that means sacrifices by present generations as ‘the living have to do more than be sorry for the environmental damage we have wrought; we must take steps to alleviate it and its future impact on our successors’ human rights’. 115 Thus, the idea of future generations having rights is an important vehicle for striving for greater climate protection today, for the benefit of future and present generations.

Notwithstanding its potential, some argue that intergenerational equity is a relatively broad principle, entailing moral obligations but not legal rights for generations unborn:116 how could persons yet to be born have rights? Some scholars invoke the ‘non-identity’ argument,117 arguing that unborn, undetermined people cannot have rights.118Against this conclusion, one line of counter argument is that law is not unfamiliar with rights that will have an effect in the future (including on as yet undetermined rights holders). For example, Weston argues that the US legal system recognizes the long-term ground lease – generally for a period of 99 years.119 Future-bindingness is therefore no objection in other contexts and is in fact a mundane and central function of law. Furthermore, in the US, the public trust doctrine (PTD) has frequently been used to protect future generations in court. The PTD, which predates the US Constitution, could also help to overcome the argument that only present generations can enjoy rights.

Inherent in the PTD is the idea that the sovereign, be it federal or state government, is limited in its exercise of sovereignty over natural resources belonging to all persons.120 In her decision in Juliana, Judge Aiken explained that ‘[t]he natural resources trust operates according to basic trust principles, which impose upon the trustee a fiduciary duty to “protect the trust property against damage or destruction”’, a duty owed ‘equally to both current and future generations’. 121 Several other US courts have invoked the PTD to defend the rights of young people.122 Accordingly, Blumm and Wood see growing evidence of an evolving precedent establishing the atmosphere as a PTD resource.123 This means that ‘[t]he government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust’. 124 Thus, while the individual members of future generations cannot be determined, it can be said that a future generation as such will exist and that the interests of this generation have to be protected.125

Colombia provides an exemplar of how the environmental rights of future generations (‘derechos ambientales de las futuras generaciones’) 126 could be legally instantiated. In Dejusticia y otros v Presidencia de la República y otros (often referred to as the Future Generations case),127 25 plaintiffs claimed violation of their rights by the on-going deforestation of the Colombian Amazon. Despite the Colombian government’s commitment to reach zero deforestation during the Paris Agreement negotiations, deforestation rates were 44 per cent higher in 2016 as compared to 2015.128 The plaintiffs argued that they will spend most of their adult lives in the period between 2041 and 2070 – a time period in which the annual temperature of Colombia is expected to gradually increase by 1.6° Celsius.129 The impacts of this rise in temperature will affect their rights to a dignified life, health, food, and water.130

The right to a healthy environment is embedded in Colombia’s Constitution (Article 79), while other fundamental rights protect the environment in one way or another (the so-called ‘Constitución Ecológica’ 131). These provisions are a hybrid of rights and duties to protect the environment, not only for the present generation, but also for generations yet to come. The court reasoned that

the scope of protection of the fundamental rights is each person, but also the ‘other’. The ‘neighbour’ is otherness; its essence, the other people that inhabit the planet, also encompassing other animal and plant species. In addition, it includes the subjects not yet born, who deserve to enjoy the same environmental conditions experienced by us.132

The court explicitly acknowledged the existence of environmental rights of future generations. It based these rights on the ethical duty of solidarity and on the intrinsic value of nature.133 All persons, born or not yet born, share the same natural resources. Therefore, solidarity between generations is indispensable to a point where solidarity and environmentalism become inseparable.134 The ‘obligation of human solidarity with nature’ then ‘constitutes the essential content of “the true values that daily facilitate life”, both in its present and future dimensions’. 135 Moreover, referring to an earlier decision of the Colombian Constitutional Court which declared the Atrato river a legal entity,136 the Supreme Court has recognized the Colombian Amazon ‘as a “subject of rights”, entitled to protection, conservation, maintenance and restoration led by the State and the territorial agencies’. 137

Remarkably, the Colombian case was based on both human rights law and the rights of nature. Thus, it managed to reconcile two different concepts of how to protect nature, one of them being a human right to a healthy environment and the other an ecocentric approach, straddling a distinction dating back to the underpinnings of traditional environmentalism and human rights law.138 The Court thus made it clear that humans do not stand ‘outside’ the environmental system but are part of it.

#### Constitutional changes solve extinctions and climate change

Adrian Treves et al. 18, Nelson Institute for Environmental Studies, University of Wisconsin-Madison, “Intergenerational equity can help to prevent climate change and extinction,” Nature Ecology & Evolution, Vol. 2, pp. 204-207, 2018, https://www.nature.com/articles/s41559-018-0465-y

Intergenerational equity

Constitutions command intergenerational equity

Indeed, constitutions have the potential to protect future citizens better than other legal frameworks8. Constitutions supersede other laws in a jurisdiction because they establish sovereignty (“the mode in which a state is constituted or organized; especially, as to the location of the sovereign power”9) and last longer than the ephemeral laws or regulations set by the branches of governments elected and appointed by current adults. For democratic governments, current and future generations of citizens enjoy equal sovereign power. Several nations respect sovereign public trust principles, despite the lack of express constitutional commands about the biosphere. For example, the US Supreme Court’s landmark case of Illinois Central Railroad in 189210 upheld the perfect equality of current and future legislatures: no legislature could deprive a future one of its power to protect nature as a public trust. That case declared that the US public trust was permanent, and the trustee governments could never abdicate their duties to preserve the trust unimpaired, whether by grant, sale or contract. This ruling has not been modified or overruled by subsequent decisions3,11,12, and the decision has been cited in an ongoing case in which young people have made constitutional claims against the US federal government over its climate policies and regulations (Box 1).

These plaintiffs have argued, successfully thus far, that constitutions command intergenerational equity13 — the ethical and legal principle that current and future generations have equal rights. As the US Constitution does not mention the environment, the plaintiffs have also argued that the ancient sovereign public trust doctrine applies to the atmosphere13. The public trust doctrine in the USA obligates the government to act as trustee for nature and other public resources, including wild organisms3,6,11,14. Indeed, the crux of many such atmospheric trust cases in the USA and other countries with public trust doctrines is whether intergenerational equity and public trust principles are judicially enforceable fiduciary duties, or merely aspirational goals for government trustees.

Intergenerational equity might counter situations in which the rights of future generations are overlooked in the current adult-dominated political process. In general, current marketplaces recognize the costs associated with resource exploitation and present consumption, but discount uncertain future consumption, and the benefits and costs of preservation and restoration for future citizens and the biosphere12. Across multiple environmental sectors and levels of governments, decision-makers characteristically prohibit or permit use of the environment by following narrow statutory commands, which often fail to achieve broad, lasting protection for air, water, soil and species6,12,15. Youth and the unborn are typically voiceless in current legislatures and executive branches, so they are powerless to preserve the future legacy from current impairment. But if the needs of non-voting youth, current adults and future generations were contemplated as co-equal when the fiduciary trustee is making decisions on environmental use, then preservation would be treated equitably alongside short-term exploitations. We predict the outcome would be slowed or reversed species endangerment and CO2 emissions.

#### It's modeled internationally

Elizabeth Dirth 18, M.A. Utrecht University, Sustainable Development, “A Global Review of the Implementation of Intergenerational Equity,” Utrecht University Master’s Thesis, 2018, https://studenttheses.uu.nl/handle/20.500.12932/28652

In addition, there has been significant criticism from the legal scholarship on this topic that an international norm does not exist (Anstee-Wedderburn, 2014). This is a contested claim, and one which seems increasingly incorrect from this research, other recent scholarship and other recent international political developments. However, Rosencranz (2003) explains that the only way that these concepts receive legal substance and can become uncontested international legal norms is to enforce them through domestic law and domestic cases, to build up precedent and demonstrate enforceability of these rights. Therefore, the enforcement of these constitutional clauses does not just contribute to implementation of intergenerational equity locally, but it also contributes to the development of an international legal norm which could have more serious ramifications around the world. Many of the more recent court cases are locating their case increasingly in the international political context, and any future interpretations of the national right to a healthy environment should local itself within this context too in order to strengthen this right locally and internationally (Peter K Waweru v. Republic of Kenya, 2006).

#### It's an example of conferring rights

Joerg Chet Tremmel 6, Fellow at the London School of Economics and Political Science, “Establishing intergenerational justice in national constitutions,” Handbook of Intergenerational Justice, Edward Elgar Publishing, 2006, pp. 201

Sometimes it is argued that a substantial characteristic of the term ‘right’ is attributed to the possibility to renounce them. According to this argument, one can indeed claim that future generations cannot have rights because they are not able to renounce them. However, this understanding of the term ‘right’ is problematic because neither animals, nor children, nor mentally handicapped persons would then have rights. ‘The situation in which future subjects are prevented from asserting their rights against those alive today due to logical reasons, and where present subjects do not assert their rights because of contingent reasons cannot be a conclusive reason to withhold moral rights from one group and not the other’ (Birnbacher 1988, p. 98).

#### Rulings must be certain and clear

Elizabeth Dirth 18, M.A. Utrecht University, Sustainable Development, “A Global Review of the Implementation of Intergenerational Equity,” Utrecht University Master’s Thesis, 2018, https://studenttheses.uu.nl/handle/20.500.12932/28652

7.4.2 Court Cases

The past couple of years have seen a significant surge in court cases which force the implementation of intergenerational equity, even at the time of concluding this research, there were new cases being introduced that could not be included here. However, the main challenge of these cases is the enforceability of their outcomes. Even when cases are specifically defending the rights of future generations related to a stable climate and action on climate change, there remains a deficit between the case outcome and any outcomes 'on-the-ground'. Cases should be more explicit about their expected outcome, and judicial systems must have a monitoring framework for guaranteeing enforcement of rulings. In a broader context, the enforcement of the stipulated outcomes may simply depend upon the record of enforcement of judicial rulings in general in any given country, and their underlying recognition of and respect for the rule of law. In this case, whether or not a court case is the most effective application should be considered.

In cases where the concept of intergenerational equity has been reference in the outcome but there is not clear operationalization of it, one of the biggest challenges is that it is not clear what the requirement is (Lawrence, 2016). The question of what must be preserved, what is just, and what is sufficient to fulfil the human and environment rights and obligations to future generations has not been clearly defined by many of the cases that have been studied here. This aspect of reform is not as much for the court system to consider, but those who instigate the cases to consider the enforceability of the outcome and the end result and impact in the process. Any new court case must include clear aims, outcomes and expectations, how they contribute to intergenerational equity and how they can be enforced to strengthen the effectiveness of this type of mechanism.

### NEG---Case

#### Future gens rights impossible – non-identity problem.

Joerg Chet Tremmel 14, Fellow at the London School of Economics and Political Science, “The non-identity problem: an irrefutable argument against representation of future generations?,” Theories of Sustainable Development, Routledge, 2014, pp. 127-130

The non-identity problem

In the literature, a particular intergenerational ethical problem has been discussed since the end of the 1970s 5 under such headings as “the non-identity problem” (Parfit, 1987, p. 359) or “the future-individual paradox” (Kavka, 1982, p. 186). It has been viewed as such a serious challenge to the justification of any obligation towards future generations that the debate over the extent of such obligations, which began during the 1970s with a number of remarkable collections of essays (Bayles, 1976; Sikora & Barry, 1978; Partridge, 1980), has ebbed. 6 Mulgan (2002) has noted that the “non-identity challenge” is to this day “plaguing present Western theories of generational justice” (p. 8). By the same token, Wolf (2009) states, “The non-identity problem calls into question whether distant future persons might claim rights against members of the present generation. . . . For this reason, some theorists have more or less abandoned the idea of intergenerational justice altogether” (p. 96). Parfit (1987), too, sees the significance of the non-identity problem as very great, claiming:

We may be able to remember a time when we were concerned about effects on future generations, but had overlooked the Non-Identity Problem. We may have thought that a policy like depletion would be against the interest of future people. When we saw that this was false, did we become less concerned about effects on future generations? (p. 367) 7

Parfit’s statement can be interpreted to the effect that intellectually gifted people cannot deny the validity of the NIP. And indeed, for a time, it did achieve the status of a kind of paradigm in the Kuhnian sense among philosophers (Kuhn, 1963). They stopped discussing the rights or wrongs of it, and were concerned only about researching issues within the paradigm itself (Cohen, 2009). 8

The NIP can be formulated as follows: The present actions of members of the currently living generation determine not only what the conditions of life of future people will be, but also which people will exist (Kavka 1978, p. 192). If the NIP is a valid argument, actions in the present change the contents of the telephone book of the future, hence leading to “disappearing victims” and “disappearing beneficiaries” (Partridge, 2007, p. 3). If there were certain future persons who simply did not yet exist, there would be no NIP; the reason that there is a puzzle, however, is that certain persons will never exist if we behave in a particular way.

In this context, the terms “same-people choices” and “different-people choices” have become established (Parfit, 1987, p. 356). Decisions in the framework of an ethic which is valid in the near term, spatially and temporally (the “neighborhood ethic”), generally change neither the number nor the identity of those affected by an action, and are hence “same-people choices.” But if the identity of future persons is affected, we are in the realm of “different-people choices.” The latter occur whenever our decisions determine who is to reproduce with whom and, consequently, which individuals are to be born and populate the future (Page, 2007, p. 133). The NIP theoreticians further distinguish between “different-people/samenumber choices,” and “different-people/different-number choices,” depending on whether the number of people, too, would change.

Parfit (1987) has established a “time-dependence claim” (TDC), which he initially formulates as follows:

TDC1: If any person had not been conceived when he was in fact conceived, it is in fact true that he would never have existed. (p. 351; emphasis in original)

Since Parfit seeks to make his argument as strong as possible, he takes the female menstrual cycle into account. If the combination of the egg and sperm cells were to occur a few minutes, hours or days earlier or later, it is almost 100% certain that a different sperm cell would be involved, because every second, a man’s genetic endowment, consisting of some 200 million gametes, is constituted anew (Partridge, 2007, p. 3). In the case of the female egg cell, however, the same cell may be involved regardless of whether the insemination occurs a little earlier or a little later. Hence, Parfit (1987) formulates a second version:

“TDC2: If any particular person had not been conceived within a month of the time when he was in fact conceived, he would in fact never have existed.” (p. 352)

Parfit rightly takes the fact into account that the identity of a person is at least partially constituted by his or her DNA. Mulgan (2002) reformulates Parfit’s idea, and calls it the “genetic dependence claim”: “If any particular person had not been created from the particular genetic material from which they were in fact created, they would never have existed” (p. 6).

In this context, the debate about “wrongful life” is interesting. 9 This refers to cases in which it is against the interests of children to be born in certain circumstances. The standard example is the case of a doctor who has been approached by a couple wishing to have a child. Because of a mild hereditary disease in the family, the hopeful parents decide in favour of in vitro fertilization in connection with pre-implantation genetic diagnosis (PGD), in order to ensure that the disease will not be transferred to the child. Of four embryos fertilized outside the womb, three bear the genetic defect, and one does not. The doctor then erroneously selects one of the embryos with the defect, which is then implanted into the woman and carried to term by her. When the parents notice after the birth of their child that it does in fact carry the hereditary disease, they sue the doctor for damages. Under the “genetic-dependence claim,” the doctor has in fact inflicted harm upon the parents, but not upon the child itself, for if the mother had, as the parents desired, received the healthy embryo, they would not have conceived the now existing child, but instead a different, non-identical one. Hence, the child has no grounds to complain. In this example, it is assumed that the child, in spite of its hereditary disease, will be able to lead a “life worth living,” in any case a better one than none at all. The question as to whether there is such a thing as a life which is “not worth living” is difficult to answer. 10 In the following, we will assume that there are such lives, for instance if a newborn child were to be born with a hereditary disease which would lead to its death after a few months, and which is known to cause great pain. If the “geneticdependence claim” is valid, the paradoxical condition arises that any person with a life better than one “not worth living” could never be harmed by any action which was causal for his or her existence. When speaking of harm, it is usual to compare the existing situation of a certain person with the situation which would prevail if the harmful action had not taken place. If the former situation is worse than the latter, the conclusion to be drawn is that the person has suffered harm. Parfit (1987) refers to a “two-state requirement” (p. 487); Meyer (2003), more accurately, refers to the “better-or-worse-for-the-same-person” condition (p. 6). “Non-existence” cannot be considered the situation of a person. In such a “non-identity context,” the usual concept of damages and payment for damages is inapplicable: “We can no longer say that the persons harmed are worse off than they otherwise would have been. Had the harmful action not occurred, the persons in question would never have come into existence,” Laslett and Fishkin (1992, p. 4) conclude. American courts have used the non-identity argument to dismiss wrongful-life suits (Wolf, 2009, p. 96).

So what does all this have to do with generational justice? (2008, p. 460) illustrates the connection by describing the situation of a father who drives to work every day with his car, thus harming the environment. If his daughter were to someday reproach him for this, he could respond that the point in time of his return home to his wife from work in the evening also affected the point in time of their sexual intercourse. If he had instead used his bicycle, he might have caused less harm to the environment, but then his daughter, the one who is now reproaching him, would never have been born. Presumably, a different sperm cell would have fertilized a different egg cell, so that instead of Individual X, Individual Y would have been born. According to the proponents of the non-identity argument, it is not possible to cause harm to future individuals (or to the generations they form), provided their life is worth living.

Consider the following example: If Generation 1 were to ensure that its entire electric power supply were to be generated by nuclear power, so that Generation 2 then inherited huge amounts of radioactive waste, and let us, for the sake of the extreme argument, assume one major nuclear accident per year, the members of Generation 2 would nonetheless be unjustified in making any accusations against Generation 1, for without the massive resettlement measures undertaken for the inhabitants of the contaminated regions, the members of Generation 2 would never have been born. For had the nuclear-power policy carried out by Generation 1 not been implemented, different sets of parents would have met, married and reproduced, so that Generation 2a would have emerged, which would have been non-identical to Generation 2.

The important step taken by Parfit, Kavka and later an entire generation of theoreticians of the non-identity paradigm was to use the NIP not only for reproductive decisions, but also for decisions on policy and on individual life which have only a very indirect connection with reproductive decisions (Roberts and Wassermann, 2009, p. xvii). Only at this point does the NIP become a problem for theories of generational justice and the related research questions, especially in environmental or financial policy. In order to clearly identify this step, which is rarely identified as such in the relevant literature, I will in the following refer to the “non-identity problem as a problem for theories of generational justice” (NIPPTG) when I criticize not the validity of the non-identity argument per se, but the expansion of its scope of application.

### NEG---CIL CP

#### CIL CP – K2 revitalized ILaw

Judge C.G. Weeramantry 8, former vice president of the International Court of Justice, “Commentary on Securing the Rights of Future Generations in international Law,” 2008, https://futureroundtable.org/documents/2238847/0/Judge+C.+G.+Weeramantry.pdf

It is my belief that the main resource for developing and advancing international law is customary international law. It is only when this is sufficiently consolidated that treaty law can follow. I have expressed this view very strongly in my writings. e.g. in my article, “The Contemporary Role of Customary International Law”, in, “Imagining Tomorrow – Rethinking the Global Challenge”, the collection of essays published to mark the United Nations Millennium Assembly.

There is a rich array of principles of customary international law which can be used for this purpose. They need to be developed both individually and in combination with each other. For example concepts of the right to life, the right to found a family, rights of motherhood and childhood, human dignity, the integrity of the human person, the right to health, the right to food, the right to a pure environment, the duty not to cause irreparable damage to neighbouring states, the precautionary principle, the concept of sustainable development, the concept of duties erga omnes, principles of individual responsibility, of trusteeship of earth resources, of intergenerational equity, of planetary responsibility and so forth. A very extensive and powerful list can be completed.

International law, like domestic law, lacks the machinery for the representation of certain interests. Domestic law has sought to address this problem through such procedural innovations as class actions and public interest litigation. Articles such as, ‘Should Trees have Standing?’, by Christopher Stone, written as long ago as 1972 have made their impact through stimulating domestic lawyers to devise new means of representation of interests that have no direct voice within the legal system. Likewise long years ago far thinking jurists like Justice Douglas thought in terms of giving standing to natural objects, like streams and rivers. Why cannot this principle be extended to human beings? To deny this is to foreclose to future generations their rights to the basic fundamentals of civilized existence. Can any legal system allow this, particularly when the violator is fully aware that this will be the result of his or her actions?

On the procedural side we can develop the concept implicit in Article 8 of the Universal Declaration, which gives the right to everyone to an effective remedy for acts violating the fundamental rights granted to him or her. Would not members of future generations have this right? Can we deprive them of it with impunity merely because they are not yet in existence?

Also Article 28 states that everyone is entitled to a national and international order in which the rights and freedoms set forth in the Universal Declaration can be fully resolved. Cannot customary international law develop this concept through the argument that if this is so important to those alive here and now, the underlying concept cannot be given an interpretation which enables the same rights to be shut off to all future generations?

It is time for international law to follow domestic law and devise its own procedural tools for enabling such voiceless interests to be heard. Preeminent among these interests are future generations who at present do not have a locus standi in international law. If international law is to be viewed as a system catering to the needs of civilization, it is a huge lacuna in that system if future generations can be irreparably damaged with regard to absolutely fundamental rights without the legal system giving anyone an opportunity to speak on their behalf.

The concept of intergenerational equity is a step in the correct direction but only a small and inadequate step. It needs to be combined with a procedural mechanism which enables those future generations who are being pillaged and deprived of their birth right to be heard. Customary international law can move in this direction and would be ignoring its basic responsibilities if it did not.

These are all matters to be discussed as the background to the emergence of a crime against future generations. This will help to bring out the culpability of those who knowingly and deliberately perpetrate such damage, shutting their eyes to the irreparable harm and devastation they are causing to generations yet to come.

If the half life of some of the radio active elements that are being tinkered with in the commitment of some of these crimes is 24,000 years, can any responsible legal system permit such acts to be committed, which will so grievously affect a thousand generations to come?

The international legal system at one stage protected only the privileged few among the nation states and disregarded the rights of the rest of humanity. We now deem that to be a travesty of what international law should stand for. We are today using international law in a much more heartless fashion, for we think only of those who are alive here and now and shut our eyes to the rest of the vast family of humanity who are yet to come and to whom we owe a sacred duty. This is a “sacred trust of civilization” if ever there was one.

Strangely, this point of view has not thus far been strongly urged in the international legal system and this is an area par excellence which customary international law must enter. The principles that have to be evolved will commend themselves to the universal conscience of mankind and once formulated will be difficult to resist.

### NEG---K Solves AFF/Movements Key

#### Ks solve the AFF.

Manuela Niehaus & Kirsten Davies 21, Macquarie Law School, Macquarie University, Australia and Faculty of Law, Universität Hamburg, Germany, “Voices for the voiceless: climate protection from the streets to the courts,” Journal of Human Rights and the Environment, Vol. 12, Issue 2, pp. 228–253, https://www.elgaronline.com/view/journals/jhre/12-2/jhre.2021.02.04.xml

To date, the role of social movements in the development of international law has been largely neglected.21 Rajagopal observes, for example, that ‘[l]awyers generally do not concern themselves with mass politics or popular resistance’. 22 Rather, legal scholars work with landmark cases, and thus, ‘forget’ about the movements that give rise to a particular case in the first place. The case becomes the historical event, and such a view highlights the roles of judges and courts, but neglects those of ordinary people as agents of transformation.23

This selectivity of legal focus seems empirically problematic. Many examples, after all, demonstrate that throughout history successive grassroots movements have played pivotal roles in promoting changes in law. For instance, the feminist movement progressively shifted its focus towards women’s inequality in wider international society once women in some nations won the right to vote.24 A new international paradigm subsequently emerged with the United Nations (UN), ‘triggering both the normative advancement of women’s rights and some modest yet uneven improvements in women’s opportunities and status’. 25 As a result, more than 20 international law instruments on gender equality have been adopted since 1945.26

A further example is provided by the emergence of the anti-nuclear movement, which was organized internationally after the bombings of Hiroshima and Nagasaki. The goal was to stop the further development and testing of nuclear weapons and the civil use of nuclear power for energy generation. This civil uprising led to the establishment of the Partial Nuclear Test Ban Treaty27 (PTBT) in 1963. The PTBT became part of customary international law,28 and increased collective activism subsequently led to the landmark Treaty on the Non-Proliferation of Nuclear Weapons in 1968 whereby nations agreed to not acquire or develop nuclear weapons.29

Social movements can even trigger the development of new human rights: Andreas Fischer-Lescano discusses how the protests of the madres (mothers) of the desaparecidos (disappeared people) during the Argentinean dictatorship in the 1970s and 1980s led to the emergence of a new human right.30 During the ‘Dirty War’ from 1976 to 1983 between 22 000 and 30 000 persons were ‘taken away’ by the government because they were suspected of opposing the ruling military junta. Many of those who disappeared were high school students, young professionals, and union workers, often under the age of 35. Commencing in 1977, their mothers started wearing white veils and lamenting the injustice committed against their loved ones in front of the Presidential Palace every Thursday. In Argentina, the madres did not receive much attention in the beginning. But their protests – and thus, the practice of enforced disappearance – became known to the world when foreign politicians and their accompanying media representatives visited Argentina.31 The international media started to cover the protests. In Europe and the United States (US), civil society groups began to protest against enforced disappearance, supported by Argentinian churches, and by churches internationally.32 These protests had significant influence on the development (or effective confirmation33) of a new human right to be free from enforced disappearance, enshrined in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).34

It is evident that, historically, community movements have been integral to sociopolitical dynamics leading to changes in international law. These lessons can inform the current climate change movement. The question that arises is how civil society can act as a successful game changer. To respond to this question, it is necessary to understand which community interests influence the decision-making agenda of public officials. Two agendas can be identified: The ‘formal’ agenda consists of issues that official organs have formally accepted, as found, for example, in court calendars or legislative agendas.35 The broader public agenda comprises issues that ‘(1) are the subject of widespread attention or at least awareness; (2) require action, in the view of a sizeable proportion of the public; and (3) are the appropriate concern of some governmental unit, in the perception of community members’. 36

Roger Cobb et al. have developed three models of how an issue or concern can land in either the public or formal agenda or both. The inside initiative model describes how issues are developed within the governmental sphere. For this model, the supporters of an issue do not seek to expose the issue to the mass public – they do not even want it on the public agenda.37 The mobilization model describes how issues are developed in the governmental sphere and achieve formal agenda status in an unproblematic way. In order to be successfully implemented, however, such issues need the support of the public and, thus, extension from the formal agenda to the public agenda. Only the third model, the outside initiative model, describes how non-state actors can achieve their issues reaching the public agenda, and then the formal agenda.38

This third model is the most applicable to considering the influence of community uprising in response to the climate emergency. Despite their categorization, it should be noted that the models can overlap, and that they do so in accordance with how complex the social structure and its economy is.39 According to the outside initiative model, groups initiate a process in the form of articulating a grievance, which then needs to be translated into specific demands. This translation can occur in myriad ways without the requirement for ‘leaders’ to speak for the whole group.40 The next step is to expand the reach of the issue to other groups and to link it to other issues. For an issue to reach the public agenda, it needs to attract groups beyond the original participants, and especially to engage the general public.41 The general public represents the largest and most important group for mobilization and their support is often a requirement that drives decision-makers to place the issue on the formal agenda.42

Habermas argues that, most of the time, when the public sphere is ‘at rest’, civil society has relatively little influence on the political (national) system and that authority lies with the political system. However, in times of mobilization – ‘critical moments of an accelerated history’ 43 – the balance between the political system and civil society shifts.44 Despite a lesser degree of organization, a weaker capacity of action, structural disadvantages, and little influence on the media, civil society actors can reverse normal communication processes in the political system and shift the entire system’s mode of problem-solving. The periphery – intellectuals, concerned citizens, professionals, and also school children – is more sensitive when it comes to detecting new problems such as climate change and the loss of biodiversity. The periphery holds a ‘crisis consciousness’ that is ‘activated’ once it perceives a social problem, which then leads to a shift of power relations by forcing civil society agendas into newspapers, universities, clubs, and so on.45 The more the public controversies escalate, the stronger the authority of civil actors becomes.46 The issue then becomes so pressing that formal action is driven by the general public. By pressing the issue onto the formal agenda, decision-makers need formally to consider and address it.47

Ecological crises involve a systematic violation of basic rights with long-term destabilizing effects.48 The failure of the nation-state to safeguard its citizens from these self-created risks undermines the power and credibility of institutions, which becomes evident once the system is put to the test by civil society actors such as Greenpeace – as was the case, for example, in the 1995 Brent Spar disaster.49 Consequently, this failure leads to the ‘subpoliticization’ of world society, decoupling politics from government and making politics possible beyond the institutions of the nation-state, involving all sorts of actors, including social movements.50 Politics is not limited to the institutionalized arena, and goes beyond voting rights and representation.51 Social movements can open political space to a broader public, with unique potency, especially at the transcultural global level. This is especially true of existentially urgent issues such as climate change:

In the playful merging of opposites into transcultural global resistance, cosmopolitan society feels its direct power. Everyone knows that nothing is as infectious as success. Anyone who wants to track down what is exciting or thrilling soon discovers that here mass sport and politics fuse with one another on a global scale. It is a kind of political boxing match with active audience participation, all around the world. No normal television entertainment can compete with that; it lacks not only the extra kick of the real, but also the ecological aura of world salvation that no longer meets with opposition.52

Even Hobbes, who famously argued for a strong authoritarian state, claimed that a right to civil resistance exists – linking this to matters of existential urgency: if a citizen has ‘to abstain from the use of food, air, medicine, or any other thing without which he cannot live’, then ‘hath that man the liberty to disobey’. 53

Non-violent and symbolic rule violations raise attention and increase media coverage. They also serve three purposes. They seek to open or re-open political deliberation; they aim to appeal ‘to the sense of justice of the majority of the community’; and they mobilize citizens to stand up for their cause.54 In the climate change context, students striking from school on Fridays, and Extinction Rebellion blocking movement within major cities such as London and Berlin in 2019, can be understood against this background.

## Nature

### AFF Area---Core Nature AFF

#### The core nature affirmative can challenge anthropocentric understandings of nature as ‘property’ and promote environmental protection litigation

Nicola Pain and Rachel Pepper 21, Judges of the Land and Environment Court, December 2021, CAN PERSONHOOD PROTECT THE ENVIRONMENT? AFFORDING LEGAL RIGHTS TO NATURE, Fordham International Law Journal, Vol. 45, Issue 2, p. 317-377

I. ENVIRONMENTAL PERSONHOOD

In 2021, the Intergovernmental Panel on Climate Change ("IPCC") found that the global surface temperature increased faster between 1970 and 2020 than during any other fifty-year period over the last 2,000 years. 2Between 2011 and 2020, annual average Arctic sea ice area reached its lowest level since at least 1850, and global mean sea level has risen faster since 1900 than over any preceding century in the last 3,000 years. 3The IPCC also found that it is virtually certain that hot extremes have become more frequent and intense across most land regions since the 1950s. 4In 2020, the United Nations Secretary-General wrote that the climate emergency demanded an urgent collective global response. 5

Commentators have identified the conferral of legal personality or rights on the environment, often referred to as environmental personhood, as one legal avenue to improve environmental outcomes.

At common law, legal persons are defined by reference to their capability to exercise rights and owe duties. 6Legal persons include natural and juristic persons. 7The civil law equivalent of the juristic person is the moral person. 8Early twentieth century jurist and judge of the Supreme Court of New Zealand, the Hon. Sir John W. Salmond, conceived of the juristic person as an entity, whether real or imaginary, to whom personality has been attributed by way of fiction, 9such as a corporation or trust. 10In common and civil law orthodoxy, natural entities are merely the objects of relations between legal persons. 11Proponents of environmental personhood propose that the environment should be made a subject in its own right through recognition as a legal person or being granted rights as if it were such a person. 12

Concepts akin to environmental personhood are featured in many systems of First Nations customary law. 13For example, Dr Kura Paul-Burke and Dr Lesley Rameka describe the Māori worldview as follows:

A Māori perspective of the natural world encapsulates a holistic epistemological world view. Our ways of knowing, being and doing are connected with Papatūānuku (earth mother), Ranginui (sky father) and their many children, including Tangaroa (oceans). All of whom act as guardians of the natural world and its domains. As ira tangata (humans) our role is that of kaitaiki (caretaker) and it is our obligation to nurture and protect the physical and spiritual well-being of the natural systems that surround and support us. Kaitiaki are agents that perform the task of active guardianship. They are charged with the responsibility to safeguard and manage natural resources for present and future generations. 14

Conversely, in Western jurisprudence the emergence of the concept of environmental personhood can be traced to Christopher Stone's seminal 1972 essay "Should Trees Have Standing?" in which the American professor argued that the natural environment as a whole should be granted rights 15and be empowered to institute legal proceedings in its own right through a guardian entity. 16This would enable courts to take injury to the environment into account and to award relief that would directly benefit the environment. 17

Stone emphasized that environmental personhood was not as radical as it initially appeared, noting that the legal world is populated by inanimate rights-holders: "trusts, corporations, joint ventures . . . to mention just a few." 18Stone further drew a parallel between granting rights to nature and the history of the conferral of rights on oppressed or minority groups in ways "theretofore, a bit unthinkable." 19

The emergence of Earth jurisprudence has reinvigorated calls to provide rights to nature. At a 2001 conference, Thomas Berry, cultural historian, presented an influential set of principles for that movement. These included that, "no living being nourishes itself. Each component of the Earth community is immediately or mediately dependent on every other member of the community for the nourishment and assistance it needs for its own survival." 20Another leading scholar of Earth jurisprudence, Cormac Cullinan, later wrote that society must overcome the "falsehood . . . that we humans are separate from our environment and that we can flourish even as the health of the Earth deteriorates." 21

In the past two decades, several jurisdictions have executed Stone's vision and conferred rights on nature. In 2006, the first environmental personhood regime was implemented in Pennsylvania by way of a local government ordinance. 22In 2008, the rights of nature were recognized in the Constitution of the Republic of Ecuador. 23In 2010, Bolivia enacted laws recognizing the rights of Mother Earth 24and the Universal Declaration of the Rights of Mother Earth was adopted at the World People's Conference on Climate Change and the Rights of Mother Earth. 25In 2014, the International Rights of Nature Tribunal ("IRNT") was first convened in Ecuador by the Global Alliance for the Rights of Nature. 26Since then, legislation has been introduced in New Zealand (Aotearoa) granting legal personhood to the Te Urewera protected area 27and the Whanganui River. 28New Zealand has also entered into a Record of Understanding with Ngā Iwi o Taranaki that confers legal personhood on Ngā Maunga, which includes Mt Taranaki on the North Island. 29In September 2017, the Australian State of Victoria enacted legislation creating the Birrarung Council to act as the independent voice for the Yarra River, although the river itself was not granted legal personhood. 30In 2019, Uganda enacted legislation conferring rights on nature, 31and the Mexican State of Colima amended its constitution to recognize such rights. 32

Courts in several jurisdictions have also upheld the rights of nature. In 2017, the High Court of Uttarakhand in India handed down two decisions granting personhood to major rivers and the ecosystems supporting them. 33Similar decisions exist in Colombia 34and Bangladesh. 35

These developments have prompted some scholars to proclaim that a watershed moment for the rights of nature is underway. 36However, the efficacy and impact of recognizing the existence of such rights remain contestable 37due to a scarcity of empirical evidence assessing the practical impact of conferring rights on nature. 38Notwithstanding the nascent nature of these rights, this article will seek to explore the question of whether personhood can protect the environment.

This article is structured in four substantive parts. Section A identifies the rationale underpinning environmental personhood by analyzing the merits of various arguments in support of conferring rights on nature. Section B evaluates the types of rights of nature that have been entrenched and the corresponding standing mechanisms. A consideration of the methods by which rights of nature have been conferred, and the respective advantages and limitations of each mechanism, is provided in Section C. Finally, Section D provides a summary of curial decisions upholding the rights of nature and a discussion on the role of domestic courts in expanding rights of nature jurisprudence.

A. The Rationale Behind Granting Legal Rights to Nature

Proponents of environmental personhood argue that granting rights to nature may challenge flawed anthropocentric environmental protection legislation and regulation, improve environmental outcomes, and enhance the recognition of First Nations concepts of stewardship. The merits of these arguments are considered in this Part.

1. Challenging Anthropocentrism

While an increasing number of environmental protection laws have been promulgated globally since the mid-twentieth century, these have generally reinforced the notion that nature exists as an object of possession or to provide recreational space for humans. 39Berry first labeled the perceived primacy of humans over all other entities inhabiting the Earth system as "anthropocentrism." 40According to Berry, anthropocentrism is the root cause of the current environmental crisis. 41Lillo considers that disrupting the anthropocentrism of traditional environmental law is the most significant benefit of conferring rights on nature. 42

The anthropocentric focus of environmental protection laws remains commonplace. For example, in Australia, the Environment Protection and Biodiversity Conservation Act 1999 is guided by "principles of ecologically sustainable development" including "inter-generational equity," that is, the concept that "the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations." 43

Stone considered that the adoption of a rights discourse was essential to ensure the protection of the environment because until an entity received rights, humans failed to see it as anything but a "thing" for exploitation. 44He also considered that the language of rights was a powerful tool because when a right is conceptualized it changes the legal language--and therefore subtly shifts the jurisprudence--available to advocates. This encourages the development of a viable body of law, thereby changing how the new rights-holder is viewed. 45In other words, rights offer an enduring value to advocacy as normative jurisprudential constructs. 46

Notwithstanding that the philosophy of environmental personhood is deeply concerned with challenging anthropocentrism, the extent to which rights of nature frameworks achieve this goal varies. For example, in Colombia, curial decisions conferring rights on nature have largely emphasized the ability of ecosystems to support human communities now and into the future, rather than the value of those ecosystems in and of themselves. 47

2 The Enhancement of Environmental Outcomes

Another rationale that underpins environmental personhood is to enhance environmental outcomes. Present state and non-state measures to combat climate change are inadequate to meet the challenges posed by the climate emergency. 48A "silver lining" of the Anthropocene age may be its facilitation of innovative legal models such as environmental personhood. 49Environmental law scholars Louis J. Kotzé and Paola Villavicencio Calzadilla argue that to achieve enhanced environmental outcomes, "lawyers, politicians and academics, among many other role players" need to be open to "alternative, potentially progressive, and possibly more effective juridical framings that focus on preserving Earth system integrity." 50

Environmental protection legislation has traditionally focused on bringing violators into compliance with the law rather than restoring contaminated ecosystems. 51In 1972 Stone remarked upon the inadequacy of the remedies available in traditional environmental protection litigation:

[E]ven if a plaintiff riparian wins a water pollution suit for damages, no money goes to the stream itself to repair its damages . . . even if the jurisdiction issues an injunction . . . there is nothing to stop the plaintiffs from selling out the stream, i.e. agreeing to dissolve or not enforce the injunction at some price. 52

Moreover, plaintiffs have historically struggled to obtain adequate remedies in environmental protection litigation. 53For example, in the United States, many such actions are never tried on their merits, immediately failing on grounds of non-justiciability or lack of standing. 54Kaitlin Sheber, environmental law attorney, states that granting rights to nature would better protect the environment because this would allow more environmental protection lawsuits to be brought, fewer cases would "fall through the cracks" due to lack of standing, and, if an action was successful, any damages awarded would redress the injury to the environment, rather than enrich a human or corporate plaintiff. 55At the very least, granting rights to nature assists in obtaining a favorable decision from a court. 56

#### There are several legal mechanisms by which legal personhood can be conferred

Nicola Pain and Rachel Pepper 21, Judges of the Land and Environment Court, December 2021, CAN PERSONHOOD PROTECT THE ENVIRONMENT? AFFORDING LEGAL RIGHTS TO NATURE, Fordham International Law Journal, Vol. 45, Issue 2, p. 317-377

C. Creating Rights of Nature

Rights have been conferred on nature by way of constitutional enactment, statutory enactment, local government ordinance, Tribal Code, and curial decisions. This Section will focus on the former four methods of rights creation and their respective advantages and limitations. Court-conferred personhood will be considered in Section D of this article through several case studies.

1. Constitutional Recognition

The constitutional enactment of the rights of nature has greater legal and normative force when compared to other modes of recognition. This is due to the status of constitutions as supreme laws, generally prevailing over statute to the extent of any inconsistency and requiring special measures for their amendment, such as legislative supermajority or referendum. 193Furthermore, enshrining environmental rights constitutionally can augment the social and legal legitimacy of these rights. 194

As stated in Section B above, however, the efficacy of constitutional rights of nature will be diluted if the relevant provisions are poorly drafted, ambiguous, unaccompanied by sufficiently broad standing regimes, or if constitutionally entrenched pro-development prerogatives compete with those rights. 195Additionally, although a strong protective measure, the constitutional recognition of the rights of nature is difficult to secure. 196For example, any attempt to amend Australia's Constitution to include the rights of nature would face numerous obstacles, including the Australian public's reticence to constitutional amendment, the lack of clarity around whether there is a constitutional power to implement such a measure, and Australia's continued dependence on the natural resources sector. 197

The difficulty of constitutionally entrenching the rights of nature is exemplified by the fact that only one state--Ecuador--has adopted this course. Former Ecuadorian President Rafael Correa, a democratic socialist, was elected to office in 2006 on a progressive platform. 198Correa incorporated the promise of constitutional reform into his mandate and called for a referendum to draft a new constitution through a participatory process. 199The main proponents of the incorporation of personhood provisions into that instrument were a group of environmentalist lawyers and activists. It is unlikely that their efforts would have succeeded if not for the groundwork laid by environmental social movements of prior decades 200and the fact that by the late twentieth century, Ecuadorian First Nations groups were powerful political actors organized into a national movement led by the Confederation of Indigenous Nationalities of Ecuador. 201

It would appear that Ecuador's constitutionally entrenched rights of nature resulted from a unique political moment in Ecuador's history.

2. Statutory Rights of Nature

Statutory personhood regimes also carry significant legal force, and, where implemented on a national level in federal systems, usually prevail over incompatible state legislation. 202As Zartner considers with respect to the Te Awa Tupua Act, "Now codified as national legislation, Te Awa Tupua is on equal legal footing with other laws such as the Resources Management Act. It 'sits alongside other statutes,' but it doesn't invalidate existing laws. Correspondingly, other laws cannot invalidate consideration of Te Awa Tupua and the interests of the Whanganui." 203

Moreover, the Te Awa Tupua Act provides that any person exercising functions under twenty-five enumerated statutes "must recognise and provide for" the status of Te Awa Tupua as a legal person and Tupua te Kawa. Tupua te Kawa are the intrinsic values that represent the essence of Te Awa Tupua contained in section 13 of the Te Awa Tupua Act. 204That is, the values of Tupua te Kawa must be reflected in the outcome of any decision made by an officer pursuant to those twenty-five statutes. 205

However, much like Ecuador's constitutional rights of nature, statutory rights of nature have been implemented because of unique political moments and the enhanced visibility of First Nations voices. For example, the enactment of the Te Awa Tupua Act resulted from the culmination of over a century of First Nations activism. 206The Whanganui iwi had asserted their claim to the Whanganui River since 1873. In 1990, a claim relating to the Whanganui River was filed in the Waitangi Tribunal on behalf of the Whanganui iwi. 207Negotiations between the Whanganui iwi and the government of New Zealand occurred from 2002 to 2004, re-commencing in 2009. In March 2017, the settlement between both parties was codified in the Te Awa Tupua Act. 208

Similarly, Bolivia's statutory recognition of the rights of nature coincided with a rise in the political power of First Nations peoples, following the election of the country's first Indigenous president, Evo Morales, in 2005. 209

3. Local Government and First Nations Recognition of Rights of Nature

In the United States, local government ordinances and First Nations laws confer personhood on natural resources. 210

The Tamaqua Borough Sewage Sludge Ordinance, passed in 2006, 211recognized the Tamaqua Borough ecosystem in Pennsylvania as a legal person capable of enforcing civil rights. 212Similar rights of nature ordinances have been passed in Santa Monica, California, Shapleigh, Maine, and Exeter, New Hampshire. 213As of 2016, more than 150 local communities in more than twenty-four towns and cities had passed rights of nature ordinances in the United States. 214

However, these ordinances have proven vulnerable to invalidation. 215For example, on February 26, 2019, Toledo, Ohio, passed the Lake Erie Bill of Rights ("LEBOR"). 216LEBOR conferred on the Lake rights to "exist, flourish, and naturally evolve" and held liable any entity that violated Lake Erie's rights. 217LEBOR was enacted following several years of educational campaigns coordinated by a grassroots community movement in partnership with the Community Environmental Legal Defense Fund, an organization that has been involved in the nature's rights movement in the Americas since the 1990s. 218However, the ordinance was declared invalid in its entirety in early 2020 because it was unconstitutionally vague and exceeded the power of the municipal government in Ohio. 219

Several First Nations communities in the United States have also implemented rights of nature. For example, in 2019 the White Earth Band of Ojibwe in Minnesota formally recognized the intrinsic rights of wild rice. 220

Similarly, the Navajo Nation Code 2003 Title I § 295 provides that, "All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist." 221

Because First Nations law enjoys greater sovereignty than local government ordinances in the United States, such provisions are likely to have greater longevity than local government ordinances such as LEBOR. 222

Grassroots efforts to implement rights of nature are likely to continue to expand as communities adopt innovative ways to combat environmental degradation. Recently, the Blue Mountains City Council became the first Australian local government to recognize environmental personhood when it supported a mayoral minute on March 31, 2021 during a council meeting, seeking the integration of the concept of the rights of nature into its future operations and planning. 223Significantly, Blue Mountains City Council encompasses a World Heritage National Park. 224

#### More legal mechanisms:

Christiana Ochoa 21, Professor of Law at Indiana University Maurer School of Law, Fall 2021, NATURE'S RIGHTS, Michigan Journal of Environmental and Admin. Law, Vol. 11, p. 39-86

C. Legal Persons or Legal Natural Actors

1. Nature as Legal Person(s)

In most Western and Western-influenced legal systems, humans have historically been the only legally cognizable subjects of the law. Municipalities have subsequently become recognized as legal persons (although with vastly divergent powers) 148and now trusts and corporations have also come to be seen as legal persons. 149The ability to recognize non-human actors as legal persons has thus provided one categorical conception of how to think of non-human natural actors. If corporations can have personhood, and be conferred rights, why not non-human natural actors, too? 150

There are important distinctions between human and non-human natural actors that require consideration. Lakes, rivers, and forests cannot speak for themselves, are not conscious of their rights-as-rights, cannot represent themselves in court and cannot bear duties. 151While these are important distinctions, advocates point to the ability to appoint advocates to represent and speak for nature. This is what we do for infants and those otherwise incapable of representing themselves, and it is also what corporations do, after all. 152

As will be discussed in greater detail below, many countries that recognize nature's rights have done so in response to the pressing need to fully recognize their indigenous communities. Recognizing, even, their ontological or metaphysical perspectives, in which nature is a person, or natural actors are persons. With this being the case, recognizing the legal personhood of nature may be the most effective route to bestow rights on nature. As Gwendolyn Gordon has noted:

[D]espite the many ways in which corporate personhood may be useful in theorizing environmental personhood, perhaps there is one very fundamental difference between the two: while corporate personhood might be imagined as merely legalistic, the regimes outlined here each imagine something more. For example, the notion of nature as living is not merely legalistic for any of the indigenous worldviews important to ushering in these regimes in Latin American and New Zealand. The rights of nature regimes here described seem both to require and to generate new ways of looking at the relationship between human beings and the natural world. 153

2. Nature as Legal Natural Actor(s)

Another possibility for legal cognizability of nature is to shed the requirement that legal actors fir into the definition of "persons." Authors advocating this position argue that to fully recognize the rights of nature, it is essential to begin to de-center humans such that humans and non-human actors become more fully "co-constituted and entangled." 154

Under this conception, we should not be thinking about human's rights for non-humans, but instead should focus carefully on legal cognizability and, most importantly, on recognizing that non-human natural actors will, in se, have their own set of "needs" that must be protected. What is called for may be a consideration of rights that is contextual so as not to obscure the uniqueness of non-human natural actors. 155We might do well to grant "'river rights' to rivers, tree rights to trees, or ecosystem rights to ecosystems." 156At the very least, the idea here would be to grant non-human natural actors the rights to "exist, flourish, and naturally evolve." 157

III. NATURE'S RIGHTS ON THE GROUND

An increasing number of domestic and international legal institutions have been shifting toward recognizing nature's rights. This Part will first treat domestic legal systems by detailing the developments, constitutions, legislation, and court decisions of a number of foreign legal systems. It will then turn to international institutions, including the United Nations and the Inter-American Court of Human Rights (IACtHR), among others.

A. Domestic Legal Systems

This section will present the shift in a set of the domestic legal systems that have moved in this direction. The examples below represent a set which, taken individually and collectively, demonstrate the variety of methods countries have utilized to open standing, personhood, and rights to non-human natural actors. The material that follows provides a rough chronology 158of the development of nature's rights throughout the world and, thus, moves through space across the globe and back again, rather than focusing on one region of the world and then proceeding to another. This is because the concept of non-human natural actors having rights has spread quickly and globally such that a global chronology seems most sensible. A few countries have been omitted from this discussion due to space constraints, though they are mentioned at the end of this Part.

1. Ecuador

a. Constitutional Protection

In 2008, Ecuador's new constitution became the first in the world to recognize nature's rights following a debate about whether or not strengthening existing environmental law would be sufficient. 159The resulting rights of nature are placed in equivalent value with conventional human rights and protected by the weight of enforcement which that status provides. 160Specifically, Chapter 7 of the Constitution of Ecuador is entitled "The Rights of Nature," and Articles 71-74 bind government and private actors to the recognition and proliferation of the rights of nature. 161The inclusions of nature's rights in the Ecuadorian constitution was influenced by a combination of indigenous concepts and values and a progressive political agenda. 162

b. Domestic Jurisprudence

Following the adoption of the rights of nature in the Constitution in 2008, the new constitutional order was successfully tested in the national court system, although the long-term enforcement of the court rulings remains unclear. In 2011, a suit was brought on behalf of the Vilcabamba River to enjoin the use of heavy machinery that was being used to build a road on the banks of the river. 163Though the lower court dismissed the case on procedural grounds, the appeals court reversed that dismissal and cited Articles 71-74 in determining that protection was appropriate. The court further established a precautionary principle for further cases involving potential pollution, requiring potential polluters to prove they would not cause significant harm to the environment and allowing the court's understanding of environmental damage to be influenced by the possibility of harm. 164

The precedent set forth in the Vilcabamba ruling has been subsequently upheld. In May 2018, the Constitutional Court of Ecuador recognized the rights of nature as a means to address pollution from agricultural companies. The suit was filed because of a failure of the companies to comply with a 2009 court order. In recognizing the rights of the Alpayacu River, the court cited the protections guaranteed to nature under the constitution. 165

The developments in Ecuador are not impervious to critique. For example, commentators have questioned whether the objective of embedding the rights of nature in the constitution was the result of a political bargain between President Rafael Correa and indigenous leaders who, in turn, supported Correa's expansion of presidential powers in 2008. In addition, Articles 71-74 give the Ecuadorian government effective control over Ecuador's natural resources, potentially limiting the actual enforcement of the rights of nature.

2. Bolivia

a. Constitutional Protection

President Evo Morales was elected as Bolivia's first indigenous president in 2006. One of Morales' campaign promises was to convene a constitutional assembly to address issues of inequality and social injustice, especially as they impacted indigenous communities. 166In 2009, the Bolivian Constitution was amended to include a number of provisions reflecting the worldview and values of Bolivia's indigenous majority, recognizing environmental human rights, and laying the foundation for statutes that enumerate and protect specific rights of nature under Bolivian law.

The Preamble to the 2009 Constitution makes clear the central role of Pachamama in the country's worldview and constitutional order. 167Similar to the principle of "Buen Vivir" or "Sumak Kawsay" in the Ecuadorian Constitution, 168"Suma Qamana," 169"Vivir Bien" 170are embedded in Chapter 2 of the Constitution and represent a biocentric, rather than an anthropocentric, understanding of humans as part of nature. Article 33 states that "everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted so that individuals and collectives of present and future generations, as well as other living things, may develop in a normal and permanent way." 171This provision is significant in its inclusion of future generations and of non-human natural actors, "implying that human beings should act as caretakers to exercise the right on behalf of Mother Earth." 172

Through these provisions, the Constitution "recognizes at the highest constitutional level the importance of ecological integrity, which enables people to create a new future for themselves through a new constitutional framework." 173In this way, although the language in the Constitution does not explicitly "entrench the rights of nature as does its Ecuadorian counterpart," 174it provides an important framework for the country's two statutory laws on the subject, which themselves recognize seven explicit rights of nature and require the implementation of the systems necessary to ensure their proper protection. 175

b. Legislation

The 2010 Law of the Rights of Mother Earth has as its stated purpose the recognition of "the rights of Mother Earth, as well as the obligations and duties of the plurinational state and of society to ensure respect for these rights." 176Article 7 of the statute details seven rights held by Mother Earth: the right to life, biodiversity, water, to clean air, to equilibrium, to restoration, and to live free from contamination. 177The second statute, the Framework Law of Mother Earth and the Integral Development for Living Well of 2012 178"aims to operationalize the rights of Mother Earth set out in the former law in the context of the so-called integral development for Vivir Bien (living well)." 179

3. New Zealand

a. Legislation

In 2014, New Zealand became the first country in the world to create, by way of legislation, legal personhood for a non-human natural actor. The Te Urewera Act of 2014 grants legal identity on Te Urewera (a mountainous, forested area in the Central-Eastern region of New Zealand's North Island), with "all the rights, powers, and liabilities of a legal person." 180The Act further recognizes that, as a non-human natural actor, Te Urewera cannot speak for itself and thus appoints the Te Urewera Board (also created by the Act) to represent Te Urewera. 181

In a separate landmark case, there is the Whanganui River, which is New Zealand's longest river, beginning at Mount Tongariro and extending for 290 km to the Tasman Sea. The river has long held enormous cultural and practical value for Whanganui iwi, the region's Maori tribes. For more than 700 hundred years, Whanganui tribes controlled, cared for, and relied on the river, referring to it as awa tupua, or the river of sacred power. 182However, the arrival of European settlers in the 1800s undermined Whanganui authority over the river and created a familiar colonial power disparity. From the 1880s to the 1920s, the Government of New Zealand (referred to as the Crown) with minimal tribal input or consultation, established a steamer service that ran the length of the river, extracted minerals from its bed, and depleted traditional fisheries. 183Despite generations of petitioning, beginning in the 1870s, by Whanganui iwi to various courts and the Waitangi Tribunal asserting the river's spiritual and substantive significance, the Crown maintained control over the river and the exploitation of its resources. 184

However, seeking to remediate centuries of injustice, the Crown is now attempting to restore custodianship over the river to Whanganui iwi, employing nature's rights as a tool toward achieving this goal and granting legal personhood for the Whanganui River. Te Awa Tupua, otherwise known as the Whanganui River Claims Settlement Bill, was passed into law by the New Zealand Parliament on March 20, 2017. The law confers legal personhood onto the Whanganui River, granting it the same rights and responsibilities as a person under New Zealand law. The stated purpose of Te Awa Tupua is bestowing the river with a legal personality to provide for the river's long-term protection and restoration. 185However, the law is also meant to explicitly acknowledge the special relationship between the Whanganui River and Whanganui iwi, recognizing an "inalienable connection" between the two. 186Additionally, the law posits to "record the acknowledgements and apology given by the Crown to Whanganui iwi." 187

Substantively, Te Awa Tupua provides a comprehensive agenda for establishing personhood and custodianship of the river and meting out $ 80 million NZD in reparations to Whanganui iwi to redress previous "actions and omissions" of the Crown. 188Furthermore, Te Awa Tupua grants another $ 1 million NZD to the establishment of a legal framework to support the Whanganui River. 189Essential to this framework is the creation of Te Pou Tupua, or the human face of Te Awa Tupua, which serves as a body representing and acting on behalf of the interests of the river in its capacity as a legal person. Te Pou Tupua consists of a singular role executed by two people, one appointed by the Crown and one appointed by Whanganui iwi with interests in the Whanganui River. 190The law also establishes the Te Awa Tupua Fund, or Te Korotete o Te Awa Tupua, which consists of a $ 30 million NZD grant to be put toward the support of the "health and wellbeing of the river." 191

Te Awa Tupua is innovative for several reasons, not the least of which is the method in which legal personhood was granted to the Whanganui River. There is no precedent in the Constitution Act of 1986 or the Treaty of Waitangi, New Zealand's founding documents, nor in court rulings for the legal personality of rivers. 192Rather, Te Awa Tupua was conceived and passed by a modern Parliament as a means of reckoning with past harm caused by the Crown to Whanganui tribes. The Act further aims to recognize the Maori understanding of the river as an "indivisible and living whole" that cannot be fragmented. 193Still, granting the Whanganui River legal personality leaves it under the control of the Crown rather than the Maori, and passage of the law is recent enough that it remains to be seen whether legal personhood is an effective means of river protection. 194

Also, in 2017, the Crown entered negotiations toward a Settlement Act regarding Mt. Taranaki, or Taranaki Maunga that, as of this writing, is in its final stages. 195Once the Settlement Act is finalized, the mountain will be recognized as an ancestor and will have legal personality, similar to that granted to the Whanganui River and the entire Te Urewera region. The rights of Taranaki Maunga will also be administered by a joint Crown-Iwi governance entity like the one established for the Whanganui River. 196

4. Colombia

a. Domestic Jurisprudence

Through opinions written in response to tutela actions, 197the Constitutional Court and the Supreme Court have advanced a biocentric and eco-centric vision of Colombian constitutional law. It was through a tutela action, for example, that the Constitutional Court recognized the public right to a healthy environment over twenty years ago. 198And it was a tutela action that resulted in the Constitutional Court's issuing its transformative decision in the Atrato River case.

The Atrato River Basin is home to numerous indigenous and Afro-Colombian communities, including the populations that worked with the Center for Social Justice Studies "Tierra Digna," to use the tutela mechanism to petition for the protection of fundamental human rights connected to the Atrato River: life, a healthy environment, food, water, and health. In response, the Court took the unprecedented step of declaring that the Atrato River is itself a subject of rights in order to effectuate its protection, conservation, maintenance and restoration. 199In doing so, the Court stated that it is time to move toward a realization of the view that humans are "an integral part and not the simple dominator of nature" so that we can more adequately regulate our effects on the environment. 200The Court also pointed to the emergence of the rights of nature in foreign and international tribunals as a basis for its decision. 201

The Court further recognized the rights of the Afro-Colombian and indigenous communities in the Atrato River region as primary guardians of the river, with the capacity to protect the river in accordance with their customs, uses and traditions. 202The decision thus includes these communities in the governance of the river far beyond the role they had previously held with respect to the river. 203

Building on the Atrato River decision, Colombia's Supreme Court later recognized the Colombian Amazon as a subject of rights and further recognized the rights of future generation. 204The decision, which was premised on the government's duties under the Paris Climate Agreement to eliminate deforestation by 2020, required various ministries to create an action plan, within four months of the decision, to eliminate deforestation in the Amazon. 205It also required the government to work with the petitioners, affected communities, environmental researchers and other interested parties to create, within five months of the decision, an "intergenerational pact for the life of the Colombian Amazon." 206

Furthermore, in the years since, lower provincial courts have adopted the Atrato River case's "ecological constitution" framework to recognize rights for the Cauca, La Plata, Magdalena, and Otun Rivers. 207In 2018, the Constitutional Court also recognized the rights of the Paramo de Pisba, a high-altitude ecosystem in North-Central Colombia. 208

5. The United States

Currently, traction for the establishment and enforcement of nature's rights has failed to materialize at the national level in the United States. However, the development of the rights of nature has advanced in the U.S. tribal system and in local ordinances and referenda.

a. Tribal Law

At least six Native American nations have implemented the rights of nature. 209Under the theory that Native nations "have the ability and authority to legislate rights of nature under their respective laws, to have those rights adjudicated in Tribal Courts and upheld in federal courts," 210the shift toward recognizing nature's rights by Native tribes may soon come before federal courts for reconciliation.

The Navajo Nation has embedded the rights of nature into the Navajo Nation Code as of 2003, with Title I § 205 asserting that "all creation" has its own laws, rights, and freedoms. 211This provision places a responsibility on Navajo Nation's executive agencies: "all persons and entities, including agencies, departments, enterprises and other instrumentalities of the Navajo Nation itself and agencies of other governments, can and do affect the environment, and that it is the policy of the Navajo Nation to use all practicable means to create conditions under which humankind and nature can exists [sic] in productive harmony." 212

Similarly, in September 2018, the Ho-Chunk Nation "voted overwhelmingly" in favor of the addition of the Rights of Nature to its tribal constitution. 213In addition to ascribing ecosystems, natural communities, and species within Ho-Chunk Nation territory with inalienable rights to existence and proliferation, the constitutional amendment also prohibits hydraulic fracturing, fossil fuel extraction, and genetic engineering. 214Furthermore, in 2017, the Ponca Nation of Oklahoma also passed a statute specifically recognizing the rights of nature in response to the environmental harms caused by fracking. 215

Other U.S. tribes have taken a more targeted approach, declaring the legal personhood and rights of specific non-human natural actors rather than nature as a whole. 216In 2019, the Yurok tribe granted legal personhood to the Klamath River under tribal law, the first in the United States to do so. 217According to the Yurok Tribal Council, the river now has the right to "exist, flourish, and naturally evolve; have a clean and healthy environment free from pollutants; [and] to have a stable climate free from human-caused climate impacts." 218The river has been afforded new status in accordance with traditional Yurok understandings of the river as essential to the existence of the tribe, as well as in response to the negative impacts of climate change and pollution on the river's salmon populations. 219

In a related vein, in 2018, the White Earth Band of Ojibwe in Minnesota enacted a law recognizing the natural rights of manoomin, or wild rice. 220The law establishes a legal basis for the protection of manoomin and its ability to flourish, deeming its protection essential to the health and welfare of the White Earth Band, as well as to its economic security. 221In addition to the grain itself, the law also protects the fresh water habitats in which it grows and prohibits their endangerment by the State of Minnesota or others. 222

b. Legislation, Referenda, and Ordinances

In 2019, in the face of increasing lake water pollution and incidences of toxic algae bloom, 22361% of citizens of the City of Toledo, Ohio voted to pass a Referenda to Amend the City's Charter which would include a section entitled "Lake Erie Bill of Rights" (LEBOR). 224LEBOR reads, in part: "we, the people of the City of Toledo, declare and enact this Lake Erie Bill of Rights, which establishes irrevocable rights for the Lake Erie Ecosystem to exist, flourish and naturally evolve, a right to a healthy environment for the residents of Toledo, and which elevates the rights of the community and its natural environment over powers claimed by certain corporations." 225In February of 2020, a federal judge found LEBOR to be unconstitutional due in part to vagueness, asserting it was unclear from the document what "conduct infringes the rights of Lake Erie and its watershed to 'exist, flourish, and naturally evolve.'" 226The State legislature has also since passed language in an appropriations bill which purportedly serves to nullify LEBOR. 227

Other communities have attempted to use local ordinances and municipal legislation to open space for nature's rights in the United States. For example, Tamaqua Borough in Pennsylvania, in 2006 adopted a local ordinance in response to coal mining practices recognizing that: "[b]orough residents, natural communities, and ecosystems shall be considered 'persons' for the purposes of the civil rights of those residents, natural communities, and ecosystems." 228Similar ordinances have been passed in dozens of cities in the United States, recognizing nature's rights in some form. 229

c. Domestic Jurisprudence

Many cases that have been brought before courts in the United States addressing the conferral of rights of nature are challenges to the above-described local ordinances. However, there have been a few attempts to establish nature's rights through the courts alone.

For example, in 2017, a Colorado district court dismissed a case brought on behalf of the Colorado River Ecosystem requesting legal personhood for the ecosystem and a recognition of the ecosystem's rights to "exist, flourish, regenerate, be restored, and naturally evolve." 230The defendants and, later the plaintiffs (under threat of sanctions), filed motions to dismiss. 231In support of dismissal, the government cited a failure to overcome the protections of Sovereign Immunity, a lack of standing, a failure to claim actual or imminent injury traceable to actions by the state that would be redressable by recognition of rights in the Colorado River. 232

d. Legislative Reactions

In reaction to the developments detailed above, some state legislatures have recently begun introducing legislation preventing the recognition of standing or rights in nature, as well as prohibiting the ability of human persons to take legal action on behalf of or representing nature. Florida 233and Missouri 234are among the first states to introduce such legislation.

6. Other Countries

India, 235Bangladesh, 236and Peru 237have all taken substantial steps towards granting rights to nature, although these measures have faced significant challenges. As of this writing, Argentina, Australia, Bangladesh, Brazil, Canada, Guatemala, Mexico, Spain, and Uganda have also moved in the direction of recognizing nature's rights. National-level proposals for legislation or constitutional amendment are under consideration in El Salvador, France, the Netherlands, Nigeria, and Portugal. 238

B. International Tribunals and Institutions

In addition to the growing number of countries recognizing nature's rights, international bodies and tribunals are also increasingly moving in this direction. For example, at the global level, the United Nations General Assembly, in connection with its Seventh Interactive Dialogue on Harmony with Nature: stated that "recognition of nature's rights in local, national, and international law" will aid in reaching the 2030 Sustainable Development Goals. 239

At the regional level, recent developments in the Inter-American Court for Human Rights (IACtHR) will bear on the legal systems of each of the states that are party to the Organization of American States, especially those that have submitted to the Court's jurisdiction. The IACtHR first recognized environmental human rights as falling under Article 26 "Progressive Development" of the American Convention in an Advisory Opinion responding to questions from Colombia regarding state responsibility to ensure environmental human rights in the face of transborder pollution. 240The Court's opinion "reaffirmed that human rights depend on the existence of a healthy environment" and the Court held that "states must take measures to prevent significant environmental harm to individuals inside--and outside--their territory." 241

For the first time, the Court also recognized an "autonomous" right to a healthy environment, under Article 26 of American Convention (Progressive Development). 242The Court stated that this autonomous right protects forests, rivers, seas, and other ecological areas as having juridical interests in themselves, even when the rights of humans are not at issue. 243It also recognized the emergence of jurisprudence and constitutions recognizing the juridical personhood of nature. 244The Advisory Opinion went on to recognize the importance of procedural environmental rights to the protection of human rights. This includes the rights to access to information, 245to public participation in decisions regarding the environment, 246and to access to justice with respect to the violation of environmental rights. 247In recognizing these procedural rights, the Court also referenced the progress within Latin America toward the realization of a treaty establishing these procedural environmental rights, as well as specifically implementing state obligations to protect the rights of individuals and groups advocating environmental rights. 248

In the landmark contentious case Indigenous Communities Members of the Lhaka Honhat Association v. Argentina, the IACtHR applied its previous reasoning to acknowledge environmental human rights as falling under Article 26 of the Charter. Importantly, the Court went a step further to recognize rights of nature, stating that the right to a healthy environment includes a duty to protect "components of the environment, such as forests, seas, rivers, and the other natural features, as interests in themselves, even in the absence of certainty or evidence about how it affects individual people." 249

### AFF Area---Core Nature AFF---Rivers

#### Congress should establish legal personhood for rivers, with a framework allowing federal, state and tribal representation for rivers’ interests---that’s key to sustainability and only possible through federal action

Meredith N. Healy 19, J.D. Candidate, University of Colorado Law School, 2019, “Fluid Standing: Incorporating the Indigenous Rights of Nature Concept into Collaborative Management of the Colorado River Ecosystem,” Colorado Natural Resources, Energy & Environmental Law Review, <https://www.colorado.edu/law/sites/default/files/attached-files/healy_web_edition_pdf.pdf>

Across the globe, what was once unthinkable is now coming into practice: national governments have acquiesced to their indigenous peoples’ beliefs that natural resources such as trees and rivers deserve the same rights generally reserved for humans. These governments are starting to recognize the rights of nature by bestowing legal personhood. Black’s Law Dictionary defines a legal person as “a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.” The rights that flow from legal personhood form a basis for judicial activism by conferring certain rights and recognition normally reserved for humans and legal fictions such as corporations.

In the United States, individuals who would like to represent natural resources such as rivers may only sue on a case-by-case basis as next friends because the judicial system affords no specific legal guardianship for natural resources. These next friends operate as third parties advocating on behalf of an injured party. In general, there is no way for these third parties to represent the interests of a river absent an injury to the third party. For example, both states and tribes are currently limited to claims for economic injuries rather than direct environmental injuries to rivers. This lack of recourse is written into the National Environmental Policy Act (“NEPA”), which requires preparation of an Environmental Impact Statement (“EIS”) whenever a proposed major federal action will significantly affect the quality of the human environment.8 Notably, NEPA only requires an EIS when the human environment might be significantly affected, not only when the particular ecosystem itself.

If the United States were to recognize the rights of nature, such rights might grant an entity recognition for purposes of the Due Process and Equal Protection Clauses. This would remove the need to ask courts to stretch their imagination to consider roots and rivulets citizens for purposes of the Privileges and Immunities Clauses in Article IV Section 2 and the Fourteenth Amendment of the United States Constitution. Recognizing the legal rights of nature might provide a more direct way for environmental advocates to represent the interests of rivers and other natural resources without having to claim third-party injury.

This Note will begin with an introduction to the recent global development of the rights of nature. From South America to Oceania, national judiciaries and legislatures have reached back to their indigenous roots to recognize how the rights of nature can be used to protect natural resources from wanton degradation. In Part II, this Note will review how the United States has developed environmental policies apart from any recognition of the rights of nature aside from the human environment, and how Justices Douglas’ and Blackmun’s dissenting views in the landmark environmental standing case, Sierra Club v. Morton, lay dormant until recent years when grassroot movements revived independent protection for natural resources through legislative and judicial advocacy. Part III will discuss local government attempts to recognize the rights of nature in the face of corporate resistance, and the ill-fated recent attempt to obtain judicial recognition of the rights of nature in The Colorado River Ecosystem, et al. v. State of Colorado. Part IV will explore a comanagement framework that would allow a currently resistant American culture to blend our own indigenous knowledge with the existing environmental advocacy mechanisms in the case of the Colorado River Ecosystem. This Note recommends that Congress consider establishing a strategic Colorado River Ecosystem guardianship group that incorporates federal, state, and tribal representation, as well as a non-governmental, appointed citizen representative for the Colorado River Ecosystem. This approach could ensure sustainability of multiple interests in the river and the river itself without rocking the boat.

#### Legislatively creating rights for rivers sets up a strong, flexible framework for water governance that addresses economic and environmental stressors on water resources

Erin L. O’Donnell 18, Senior Fellow at Melbourne Law School; and Julia Talbot-Jones, Visiting Fellow at the Australian National University, 2018, “Creating legal rights for rivers: lessons from Australia, New Zealand, and India,” Ecology and Society, Vol. 23, No. 1

In analyzing the case studies from Australia, New Zealand, and India we have reached three key conclusions about the granting of legal rights to rivers. First, legal rights for nature can be created within a range of legal and institutional settings to address a number of complex socio-environmental and economic problems. One of the most unexpected findings from this analysis was that the legal rights for rivers approach can be used to address problems motivated by economic, cultural, or environmental factors as in the case of Australia, New Zealand, and India, respectively. In addition, it can be used to complement legislative frameworks ranging from state ownership models through to water markets, highlighting the broad potential applicability of the approach.

Second, it is possible to create legal rights through both judicial and legislative channels. This makes legal rights a flexible water governance tool with its own set of opportunities and limitations. Achieving change through legislative channels, as occurred in Australia and New Zealand, can be slow, but effective. In contrast, the Indian case showed that legal rights for rivers can be granted rapidly through the judicial process, but can be equally rapidly undermined by further rulings. Although the High Court of Uttarakhand created some very broad legal rights for the Ganges and Yamuna rivers, the rulings lack the institutional depth of the legislated examples in Australia and New Zealand. In India, the absence of broader government engagement raises questions about the Ganges and Yamuna rivers’ guardians’ likely ability to act, given the absence of financial support, institutional capacity, and statutory independence. The recent appeal to the Supreme Court of India is demonstrative of the type of uncertainty that could be created by granting legal rights to rivers through the judicial system.

Third, this analysis suggests that granting rights to nature no longer sits on the fringes of environmental law. These three cases represent a development in environmental law and demonstrate a new way in which nature can be granted legal standing. Where nature has been given legal rights previously, namely in Ecuador and Bolivia, a distinct limitation of the approach has been the inability to give the rights force and effect. This analysis shows that the approaches taken in Australia and New Zealand could overcome some of the challenges experienced in the earlier cases and deliver outcomes to the benefit of the environment and society.

The cases evaluated here shine light on how legal rights for rivers can be used to address a range of issues commonly observed in water resources management. As pressures on freshwater systems continue to increase, understanding the opportunities and limitations provided by this new legal approach will allow decision makers to make more informed choices when considering ways of addressing their context-specific socio-environmental and economic pressures.

#### Scaling up rights of nature at the federal level is key to reorient environmental regulation away from prioritizing corporate interests

Kai Huschke 20, the Northwest and Hawaii Organizer for the Community Environmental Legal Defense Fund; and Simon Davis-Cohen, research and communications associate for the Community Environmental Legal Defense Fund, 4/16/20, “The EPA Has Abandoned Its Duty To Protect the Environment. ‘Rights of Nature’ Laws Can Fill the Void,” <https://inthesetimes.com/article/trump-epa-covid-19-environmental-law-rights-of-nature-air-water-pollution>

Authoritarian governments often prepare laws they wish to pass and have them ​“ready to go” when opportunity strikes. That’s what Fionnuala Ni Aolain, a United Nations Special Rapporteur on Counterterrorism and Human Rights, recently told the New York Times.

“They draft laws in advance and wait ​‘for the opportunity of the crisis to be presented,’” Ni Aolain explained.

It’s clear to us that greed-fueled bad actors are taking this pandemic as just such an opportunity. Corporate lobbies have quietly pushed through laws criminalizing fossil fuel protests. Congress approved an unprecedented and unnecessary handout to corporate America. Pipeline companies want to classify new pipelines as ​“essential,” including TC Energy, which got the green light and began constructing the infamous Keystone XL pipeline. The federal government appears to be mulling a bailout for the fossil fuel industry. And, last but not least, the Trump administration ordered the Environmental Protection Agency to stop enforcing anti-pollution laws in some cases, removing what anemic oversight the EPA once held over corporate polluters, effectively suspending the agency while taking action to roll back some environmental protections permanently.

The EPA’s response to the Covid-19 pandemic ― effectively ceasing enforcement of federal environmental laws ― will, regardless of the motivations for this unprecedented decision, negatively impact peoples’ lives. This means that many communities, and the life-giving ecosystems they depend upon, are on their own.

In this moment, many people are in shock, and for good reason. For others, however, this pandemic has not caused system failure but merely exposed it. Innumerable communities across the U.S. know from first-hand experience that federal and state ​“regulations” do not safeguard water, public health, and the ecosystems they rely on. Critically, they also understand the system of pollution ​“permits” are a tool for the repression of democracy.

State and federal environmental laws have failed to avoid mass species die offs, cancers, public health catastrophes, pervasive pollution, and the climate emergency.

Legalized Harm

Under this system of law, communities are forced to accept activities that are ​“permitted” by ​“environmental” law. The democratic powers of such communities to govern corporations are superseded by federal and state regulations and judge-made laws, like corporate ​“personhood,” that function to both legalize things that harm people and the environment and prevent communities from protecting themselves.

Native nations, as well, have been assaulted by ​“environmental” laws that ​“permit” and ​“regulate” pipelines through sacred land. For decades, such permits have always superseded the self-determining authority of these nations, often enshrined in treaties, to say ​“no.”

Part of the problem is that old environmental laws treat ecosystems as property and function to legalize the status quo. They offer polluters a shield of legal protection through the ​“permit” process.

Rights of Nature

For years, many communities who have experienced this system firsthand have felt abandoned by their federal and state ​“environmental” regulators. Many have taken their destiny into their own hands and stepped outside the modern paradigm of environmental law. We must follow their lead.

In the past decade, multiple Native nations and dozens of United States municipalities have passed enforceable Rights of Nature laws. Arguably, 2019 was the movement’s biggest year in United States history. Here’s a rundown of what happened this past year:

The residents of Toledo, Ohio adopted the Lake Erie Bill of Rights, the first law in the U.S. to secure legal rights for a specific ecosystem.

Residents of Exeter and Nottingham, New Hampshire enacted laws elevating the rights of ecosystems above the rights of corporate polluters.

The Yurok tribe in the U.S. recognized legal rights of the Klamath River.

The High Court in Bangladesh recognized legal rights of rivers.

The National Lawyers Guild amended its constitution to include the rights of ecosystems.

A New York assemblyman proposed a law to recognize the rights of Lake Erie.

The Youth Climate Strike included Rights of Nature (and respect for indigenous sovereignty) in their list of demands.

Rights of Nature bills were introduced in Australia and the Philippines.

In Colombia, the Plata River was recognized as a ​“subject of rights.”

Quietly, 2020 is shaping up to be another historic year.

Just ahead of the EPA announcement, for the first time in U.S. history, a community successfully pressured a state to enforce a local Rights of Nature law.

After seven years of community activism, the Pennsylvania Department of Environmental Protection (DEP) revoked a permit for a frack waste injection well in Grant Township, Pennsylvania. DEP officials cited Grant Township’s Home Rule Charter, which banned injection wells as a violation of the Rights of Nature, as grounds for their reversal.

“Grant Township’s Home Rule Charter bans the injection of oil and gas waste fluids,” the DEP wrote. ​“Therefore, the operation of the [waste injection] well as an oil and gas waste fluid injection well would violate that applicable law.”

Our colleague Chad Nicholson worked with Grant residents on the measure.

“This decision,” he said in a statement, ​“does not validate the actions of the DEP, but rather vindicates the resistance that communities like Grant have engaged in to force governmental agencies into doing the right thing.”

Time to Scale Up

We live in a moment when multiple and radically different futures are possible. Some believe the pandemic is a once-in-a-generation opportunity to remake society and build a more just and sustainable future. Meanwhile, authoritarians and corporations are taking advantage of the moment to concentrate power and secure their future profits.

In conjunction with new enforceable human rights to water, Rights of Nature is a ​“ready to go” peoples’ paradigm shift. It is time to scale it up — crucially — such that those rights nullify the property rights of corporations when there is a conflict.

We are talking about a course correction whereby the authority of human communities to govern the purpose and behavior of corporations is recognized and enforced. It means changing the very purpose of the law that binds us together. It means thinking about what is really ​“essential,” and driving that life-centered ethic into the law.

Communities across the country have already begun to rethink how human law treats the ecosystems our societies depend on. This new paradigm is long overdue.

#### Standing plus a framework of stakeholder representatives advocating for the interests of rivers is a seismic change in water resource protection

Doesn’t link to federalism because incorporates state interests

Meredith N. Healy 19, J.D. Candidate, University of Colorado Law School, 2019, “Fluid Standing: Incorporating the Indigenous Rights of Nature Concept into Collaborative Management of the Colorado River Ecosystem,” Colorado Natural Resources, Energy & Environmental Law Review, <https://www.colorado.edu/law/sites/default/files/attached-files/healy_web_edition_pdf.pdf>

Federal recognition of the rights of nature would (1) ameliorate standing doctrine without requiring wholesale overhaul of the environmental advocacy scheme, (2) provide a moral victory for tribes that already recognize the legal rights of nature, (3) set a necessary framework for protecting natural resources within the U.S. legal system, and (4) allow for an implementation of a system of guardians for major natural resources. This proposed recognition comes at a time when it is becoming more apparent that the federal government might not reasonably be relied upon to advocate successfully for natural resources’ best interests. As renowned Western water legal scholar Charles Wilkinson remarked, “the water laws that . . . arose for good reason in a particular historical and societal context, the westward expansion of the nineteenth century . . . simply do not square with the economic trends, knowledge, and social values of the modern West.”

A. Acknowledging the Rights of Nature Would Further

American Environmental Goals

While federal laws such as NEPA, the ESA, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act mandate that federal land management agencies consider certain indigenous cultural resources on and near the lands they manage, natural resource conservation goals may be more effectively met if land managers consider traditional ethnic knowledge to complement Western views. Rather than a blanket application of federal laws aimed at an amalgam of initiatives, local incorporation of the indigenous rights of nature tailored specifically to the resource to be managed would fill the gaps between the variety of procedural and substantive environmental laws.

B. Indigenous Background

While recognition of the rights of nature may seem to be a foreign concept in the United States, it has roots in some indigenous American cultures. In his exploration of the sharp division between American federal government and American Indian views of nature, American Indian scholar Walter Echo-hawk stated that “tribal religions cannot be considered in a vacuum, but must be understood within the context of the primal world, for tribes in their aboriginal places are embedded in their indigenous habitats so solidly that the line between nature and the tribe is not easy to establish.” In describing tribal views of nature, Echo-hawk quoted Black Elk (Lakota), “[T]he Great Spirit . . . is within all things; the trees, the grasses, the rivers, the mountains, and the four-legged animals, and the winged peoples.” Incorporating such indigenous viewpoints in the United States federal courts has been inconsistent to date.

Inconsistent federal recognition of such views may reflect the differing values of the more than 500 federally-recognized tribes within United States borders .146 Some tribes have introduced indigenous viewpoints of natural resources into federal litigation, but judicial responses have not appeared consistent. In 2001, a federal district court recognized the Klamath and Yurok tribes’ culture and tradition when weighing tribal and non-tribal reliance on the Bureau of Reclamation’s regulation of the Klamath River during a severe drought. The Klamath River ecosystem hosted three fish species listed as “endangered” or “threatened” under the ESA. Indirectly supporting indigenous views, the court ruled for the tribes based on the plain language of the ESA, stating that the Bureau of Reclamation had a responsibility under the ESA that overrode the rights of non-tribal irrigators.

In 2016, the Blackfeet Nation in Montana succeeded in protecting sacred lands from oil development. The United States Department of the Interior cited deference to sacred tribal lands when it cancelled drilling leases in the Badger-Two Medicine area. However, that success was short-lived. In September 2018, the District Court for the District of Columbia held that the decision to cancel one of the oil and gas leases was arbitrary and capricious. Judge Richard J. Leon’s decision made no reference to sacred tribal lands.

Perhaps one of the strongest federal recognitions of indigenous views came via the permanent protection of the Taos Pueblo Nation’s “most sacred shrine:” the Blue Lake in northern New Mexico. The Taos Pueblo Nation believed that the lake was a living entity, and that if the lake ceased to exist, the tribe itself would cease to exist. Even though the Taos Pueblo Nation persuaded the federal government to protect the Pueblo Nation’s sacred waters from recreational overuse, this victory— and that of the temporary reprieve at Badger-Two Medicine—remains rare. In Idaho v. Coeur d’Alene Tribe of Idaho, the Court affirmed state control of waterbeds seemingly without concern for location or import to native tribes. The federal courts’ reasoning did not appear to rely on indigenous peoples’ views of natural resources, even in those cases the tribes won. However, non-indigenous environmental groups continue to challenge the Western utilitarian view that natural resources are to be used and not heard.

C. Proposed Guardianship Framework

The United States is likely not yet ready to incorporate indigenous beliefs into of the rights of nature, but if the government assigned nongovernmental coalitions of guardians—a kind of guardian ad litem for natural resources—to major rivers, environmental advocates would be permitted to: (1) proffer a guardian who can focus exclusively on the longterm representation of one river; and then (2) delegate funding to protect other resources adequately. Further financial support from federal or state governmental agencies could be considered as well, but the reduction in plaintiffs bringing suits on behalf of the river would perhaps balance the costs of permanent guardianship.

This framework would ensure legal representation of the natural resource’s long-term interests. For example, legally-appointed river guardians might advise federal and state agencies on permit applications for multiple nearby mining operations. The guardians would have a stronger, more sustained case for the river because their advocacy would not be limited to case-by-case scenarios. Because the Colorado River Ecosystem would have permanently appointed guardianship, advocacy for the ecosystem would be broader than just ad hoc participation in notice and comment rulemaking every time there was a perceived threat to the ecosystem. In litigation, the Ecosystem would be a named party rather than property, developing reliance for opposing parties whose interests in the river may be currently subject to litigation by multiple adversaries. In that way, guardians for the Ecosystem could develop a co-management plan that focused on long-term health of the river.

Additionally, appropriating water rights would be considered not only by seniority but with consideration of the effects of the appropriator’s use on the river. This seismic shift in water law would effectively establish the most senior water right as that of the river itself. Although this would upend Colorado’s water doctrine of prior appropriation, challenges to the “first in time, first in right” doctrine are not without precedent.

An exception to the prior appropriation doctrine in Colorado was realized in 2009 when the Colorado legislature recognized the acequia water management system. The acequia water management system does not appropriate water in order of seniority but instead recognizes a pre-American system that apportions the water equally among property owners along a communal ditch.161 Because Colorado recognizes one exception to the prior appropriation doctrine, it is feasible that the state might also consider excepting river-ecosystem guardianship.

Like the legislative establishment of guardians for the Whanganui River, Congress could be the instrument for creating guardianship of the Colorado River Ecosystem. By establishing the guardianship through the legislature and not the judiciary, the State’s constitutional claims would be countered by providing a private right of action. Additionally, rather than two guardians as seen in New Zealand, or one special master as recommended by Deep Green Resistance, a strategy group of parties from federal and state governments, private environmental non-profits, and tribal representation would best represent the diversified needs of those citizens who value and depend on the Colorado River Ecosystem. This legislatively established panel could balance the divergent needs of each entity in relation to the river.

1. Federal Representation

The guardianship of the Colorado River Ecosystem would include a federal representative. Obvious choices would include a nominee from an agency already entrusted with representing administration’s principles, such as the EPA, NMFS, or USFWS. This would capitalize on expert knowledge at the federal level and acknowledge federal interests in protecting natural resources. As administrations change and their policies on natural resources fluctuate, this federal representation might be tempered by the viewpoints of the other members of the strategy group. Even though some federal agencies like those listed above were conceived as guardians for public lands, the Colorado River Ecosystem would also need representation outside of the government because the river flows past—and is appropriated by owners of—private and locally-held lands. Additionally, federal agencies may have directives for natural resource use that conflict with those of the proposed strategy group.

The challenge with a federal representative is how and whether to appoint or elect the representative. If the federal representative were appointed by the executive branch, the Colorado River Ecosystem might fall prey to political whims. Further, if this representative’s term was tied to who is in office, continuity would be a concern. One solution would be to internally elect or appoint a career staffer from within the executive branch, perhaps from the Department of the Interior, and establish five- to ten-year terms that may exceed a single administration.

2. Non-government Citizen Representation

Just as with the Whanganui, the Colorado River Ecosystem should include representation by individuals not specifically directed by the federal government, state government, or tribal interests. Appointing a non-governmental citizen as guardian for the Colorado River Ecosystem would relieve environmental groups of the burden of showing human injury for every case. These groups could still advocate for the river but would need only show injury to the river and not to themselves. Several water-resources groups are already in place and could nominate an advocate to speak for private environmental interests.

The challenge with selecting a non-government citizen representative is twofold. First, the interested parties could run the gamut from non-profit environmentalists to corporate natural-resource extractors. Second, a mechanism for electing or appointing this guardian would need to be created. An election might empower the local citizenry, but lobbying could result in representation by the wealthiest entity rather than the one most committed to the river ecosystem’s health and integrity. Alternatively, appointment by any state party to existing river management agreements could either result in representation by an individual committed to the river ecosystem’s health and integrity or a political favor by whichever political party is in power at the time.

3. Tribal Representation

The Colorado River Ecosystem is fortunate to already have a coalition of tribal and state representatives that share ideas and perspectives about the use and management of the river. The Ten Tribes Partnership has navigated “the Law of the River”—the intricate network of state and federal statutes, regulations and judicial decrees, interstate compacts, and treaties that affect water management decisions in the Colorado River Ecosystem—for more than two decades. Such longterm, large scale tribal coordination to protect natural resources reflects a trend of increased tribal collaboration in the West. Recently, the Bears Ears Inter-Tribal Coalition brought together the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Pueblo of Zuni, and Ute Indian Tribe with the goal of restoring the Bears Ears National Monument in southern Utah. These intertribal coalitions show promise for future intertribal coordination and collaboration with external governments and agencies aligned to protect natural resources.

Native American tribes in the Colorado River Ecosystem recognized water as a centerpiece of life well before our current legal system placed restrictions on its use. Redress for injury to a tribe’s water rights has generally been limited to interference with court-defined beneficial uses rather than intrinsic value or sacred use.

Tribal co-management could turn the tide on litigation based on protecting for rivers for their sacred value. In 2016, the Navajo Nation sued the EPA in response to the Animas River spill.171 Following the release of nearly three million gallons of toxins into the Animas River, the Navajo Nation sued the EPA for economic injuries to the Nation and its people, noting that the EPA “incredibly did not inform the [Navajo] Nation that a toxic plume was advancing toward their sacred [San Juan] River for nearly two days.”172 The Nation claimed that the river held sacred importance to their people, embodying their principle of “hozho,” or beauty, order, and harmony in the Navajo universe.173 Disrupting hozho would disrupt the entire Navajo way of life.174

The district court first consolidated the Navajo Nation’s case with that of the State of New Mexico.175 Because the State of Utah and plaintiffs with property interests adjacent to the river also brought suit for damages to the Animas River in other jurisdictions, the court consulted a Multidistrict Litigation Panel.176 The Tenth Circuit, sua sponte, consolidated Navajo Nation v. EPA with New Mexico v. EPA.177 This case has now been in litigation for over two years without ever getting to the opening brief stage because plaintiffs cross multiple jurisdictions. The case is now pending further consolidation with non-tribal interests, potentially diluting the impact of tribal views.

In the Whanganui River Report, the New Zealand Crown Government recognized the importance of tribal authority and ownership of the Whanganui River aside from the common law conception of river ownership.178 In this way indigenous peoples along the Colorado River, like the Maori indigenous people, might be able to reclaim management of lands lost in settlement. Ironically, it was the civil rights movement in the United States that led the Maori to begin their fight for recognition of tribal authority and ownership of the Whanganui; it is only fitting that the Maori now lead indigenous peoples on the other side of the globe in their quest for repatriation of natural resource control.

The counterargument to tribal representation on the Colorado River Ecosystem is that, unlike the one Whanganui iwi tribe, multiple tribes hold an interest in the Colorado River. Electing just one tribal guardian might be efficient but surely not representative of all tribal interests.

4. State Representation

Because of the competing interests of state and federal governments, state representatives would be needed to address state concerns as the Colorado River passes through their territories. This could lead to multiple state appointees because the Colorado River crosses state boundaries. Multiple state representatives would allow for competing upstream and downstream interests to have equal voices. Because of the number of state representatives interested in ensuring the health and use of the river within their boundaries, bureaucratic bloat could be a concern.

Framework for interstate collaboration is already in place. In December 2017, the Bureau of Reclamation asked representatives from the seven Colorado River Basin States—Colorado, Wyoming, Arizona, New Mexico, Nevada, California, and Utah—to draft Drought Contingency Plans. These plans mark the most recent cooperative effort in a long history of multistate cooperation resulting from the binding and obligatory compact signed by those states in 1922. While states may resist ceding control over what was traditionally well within their sphere of influence, states’ histories of considering economic development over other public interests makes it necessary to have a heterogeneous strategy group.

CONCLUSION

Co-management guardianship of the Colorado River Ecosystem could provide the meaningful protection necessary for the long-term survival of the River and the communities that depend on it. Because legal personhood based on the inherent rights of nature may still be a long way off, this guardianship framework could provide a model for the protection of other river ecosystems across the United States.

To ensure that these limited rights of nature are protected effectively in the case of the Colorado River Ecosystem, a guardianship council like the one used to represent the interests of the Whanganui River could be appointed, perhaps as a result of negotiations localized to the river ecosystem. To provide for a variety of viewpoints on the best representation of the natural resource, this council should include federal, state, local non-governmental, and tribal representatives as necessary. While formation of this council may initially appear unwieldly or politically charged, over time this type of guardianship may mature into a legally-recognized device capable of replication across the United States. Weaving natural resources guardianship into the federal government’s current interpretation of Article III standing might invite traditional ethnic knowledge into American federal jurisprudence so that moral rights of nature, now absent among American legal fictions, once “made visible can no longer be denied.”

#### Rights for nature are feasible---they require avoiding harm and remedying prior damage---it’s a filter for all agency decisionmaking on resource use---the full framework’s key to avoid extinction from environmental decline

Oliver A. Houck 17, Professor of Law, Tulane University, Winter 2017, “ARTICLE: Noah's Second Voyage: The Rights of Nature As Law,” Tulane Environmental Law Journal, 31 Tul. Envtl. L.J. 1

A final concern is perhaps the most obvious, and seemingly the most challenging to answer even for those most open-minded to nature's claim. How, in practice, would legal rights in nature be articulated, and what would they entail? 201We might sensibly start by examining what has already taken place. While some see nature rights as Mission Impossible, others have been making it happen.

The first stab at the architecture of legal rights came in 1984 with the U.N. World Charter for Nature, earlier mentioned. 202A process of legislation that spanned nine years, three drafts, and the comments of over fifty countries produced a final document announcing bold principles (number one: "nature shall be respected and its essential processes shall not be impaired"), followed by over thirty "functions" and steps for implementation. 203Perhaps the most relevant of these were that (1) actions causing "irreversible" damage be avoided; (2) those posing "significant risk" not proceed until impacts were "fully [\*37] understood"; (3) that damaged areas be "restored"; and (4) that nonrenewable resources (e.g., minerals, the principal source of conflict) be developed compatibly with "the functioning of natural systems" … a nature bottom line. 204

To be sure, as a Declaration none of this language was enforceable, but its level of detail, its use of the word "shall," and the supporting statements of its drafters indicates the expectation that at least some of the signing members would, as with the U.N. Declaration on Human Rights, convert these principles into law. Twenty-five years later, two of them did.

Ecuador rising largely from Andean roots led the way. The impacts of mining and oil exploration had brought massive protests, some of them violent, from indigenous communities across the region. 205Nature rights were inextricably entwined with their daily lives, a symbiosis captured in the word "Pachamama," not simply a belief but a way of relating to everything else around them. 206Upon his election in 2007, President Correa - a Ph.D. economist (University of Illinois) and former Minister of the Economy - made two overtures that startled the world. 207

The first was an offer to forego oil development in Yasuni National Park, a World Heritage Site and one of the most biologically important environments on earth, at the sacrifice of billions of dollars in revenues … if nations of the world reimburse 50% of these losses in compensation. 208Supervised by an international trust, much of the monies would be used to protect and improve the lot of indigenous peoples in the region. Although Ecuador itself, minerals-dependent and by no means a wealthy country, would be absorbing 50% of the hit, the world turned him down. No U.S. official even acknowledged it. In 2013 [\*38] Correa announced defeat and opened a small area of the Yasuni Park to oil exploration. 209Saving Pachamama in one large coup was not going to work.

The other initiative moved from the ground up. Also in 2007, Correa called a constitutional convention, which the following year produced three new articles conferring rights on nature itself. 210Promoted strongly by a coalition of indigenous groups called the Pachamama Alliance (in turn supported by scientists, state legislatures, and several international NGOs), 211the articles were at first blush breathtaking, even unimaginable … and they remain so in some quarters today.

Article: 71 announced the "right of Pachamama to be respected," including "the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes," and the right of standing for every "individual, community, people, or nationality" to demand that public authorities comply. 212Article: 72 added a right to restoration, over and above indemnification for damages under other laws. 213Article: 73 [\*39] provided special protections for endangered species and ecosystems. 214As written, these obligations are absolute. 215They were yet reinforced by a later amendment inverting the burden of proof in cases of real or potential damage to nature. 216Until recently only one exception to them, for the Yasuni exploration, had been made. 217

In 2017, nine years after enactment, Ecuador's articles were reexamined in a legislative process leading to a rights of nature code. The first draft of the code contained little language on them and met considerable opposition. 218After debate, a second draft reinserted the rights of nature, but with few specifics. 219After more debate, a final bill went to the President with each of the above articles restored, and some yet strengthened. 220At last count, fourteen judicial decisions have cited these rights with approval. 221

Pausing to reflect on the Ecuador experience, three aspects are particularly instructive. The first is that they include each element of the ethical framework: existence, perpetuation, and restoration. The second is their orientation, which, aside from safeguards for endangered species, is explicitly ecosystem-focused. To be sure, wildlife and other species are protected within ecosystem function, but as with the U.N. Declaration earlier, Ecuador kept its eye on the larger prize. The third is that Ecuador was not alone.

[\*40] Bolivia followed closely and went on to up the ante. In 2015, driven by the same impulses as its neighbor (it is also part of the Andean universe) and after elections, it came under the direction of Latin America's first indigenous President, Evo Morales. 222In April 2010, on the heels of a failed climate change convention in Copenhagen, Bolivia hosted a World People's Conference on Climate Change and the Rights of Mother Earth, which, with more than 32,000 participants from fifty-four countries, produced a Declaration of its own, presented to the G-7 nations and the U.N. Secretary General later that year. 223Importantly, it was also presented to the national legislature, which then adopted ten principles, the most relevant of which were the right of nature to its own existence, to its diversity in a natural state, and to restoration. 224Environmental ethics anno dominium 2000 made law.

In 2012, Bolivia enacted a more detailed version, Framework Law of the Mother Earth and Integral Development for Living Well, which affirmed the legal rights of Pachamama and rejected material production and consumption as national goals. 225In addition to specific prescriptions for, inter alia, renewable energy, organic agriculture, and corporate conduct, 226the legislature created a new Ministry of Mother Earth and an ombudsman to receive and respond to citizen complaints. 227Citizens and organizations were, as in Ecuador, given standing to defend nature's rights wherever they might arise. 228On paper, at least, Bolivia too was going to make it happen.

From these roots, legal principles of nature rights emerge: (1) to avoid disruption of basic ecosystem functions; (2) to avoid harm to all natural areas where alternatives are available; (3) to avoid critical areas [\*41] altogether; (4) to mitigate prospective damage fully and in kind; and (5) to restore damage already incurred. None of these principles are rocket-science; several are found in existing (if limited in scope) national programs. More detailed prescriptions are contained in the earlier referenced Draft European Directive, 229with structures for implementation and enforcement (including criminal law, a daunting provision). 230A similar structure was presented to the Ecuadorian Assembly in 2008, complete with decision-making matrix and flow chart, but has not yet been adopted. 231With which, thirty-five years after its adoption, the U.N. Declaration of 1982 has born its first offspring, more mature, more considered, and ready for take-off. What remains is to let it go forward and evolve. 232

This evolution will demand respect for existing environmental programs that have their own, often more-targeted missions and some significant accomplishments to their name. They also have significant handicaps, however, some shackled by their authorizing statutes, 233more still by the lack of budget and personnel (nowhere abundant), and nearly all by political challenges that may leave them vulnerable, where functioning at all. Which is where rights of nature, properly perceived, kick in.

Properly viewed, rights of nature need not be a separate regulatory system, raising obvious difficulties with redundancy and conflicts. It [\*42] need not be a system at all, but rather a pulse-check in the nature of due process that ensures decisions from line agencies also meet standards fundamental to the earth as a whole. This has been the approach of several U.S. states and many courts abroad in the interpretation of similarly broad mandates. 234Most resource development does not put species of ecosystems at serious risk, but for those that do, nature rights can be a significant partner to existing programs, reinforcing them against the same pressures that led to their creation in the first place. Their next best friend.

There are some of course who would argue that nature rights cannot, and should not, play so fundamental a role. We have met several arguments earlier in this Article: . 235Taking them singly or in concert, it is hard not to conclude that, whatever science and ethics tell us about humans and the natural world, these people simply do not want them to be fundamental. According to a recent contributor to the National Review:

I keep writing about [nature rights] because - like cancer, early detection and eradication surgery is the key to stopping this madness… . [A] malevolently malignant attack on human thriving that, if allowed to take hold, presents an existential threat to human exceptionalism and the moral values of Western civilization. 236

[\*43] Whether humanity can loosen the shackles of this view sufficiently to appreciate, and accept, the exceptionalism of other life may be the ultimate question of this field.

There are some who have done just this, including the former Chief Justice of the Supreme Court of the Philippines, Hilario Davide. 237In a case of first impression invalidating large sales of virgin timber previously authorized by the government, Davide wrote:

As a matter of fact these basic rights [preserving the rhythm and harmony of nature] need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned … it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology are mandated … the day would not be too far when all else would be lost not only for the present generation but for also for those to come - generations which stand to inherit nothing but parched earth incapable of sustaining life. 238

#### Legal personhood for nature’s totally feasible---corporate rights prove the law can easily accommodate the interests of non-human entities

Erin L. O’Donnell 18, Senior Fellow at Melbourne Law School; and Julia Talbot-Jones, Visiting Fellow at the Australian National University, 2018, “Creating legal rights for rivers: lessons from Australia, New Zealand, and India,” Ecology and Society, Vol. 23, No. 1

Protecting the environment through judicial process is one of the lasting legacies of the rapid expansion of environmental law that occurred through the 1960s and 1970s (Plater 1994, Gunningham 2009). Over this period, environmental law emerged as a distinct discipline and a range of legal tools were established to protect the environment from the impact of human activities (Sax 1971, Grinlinton 1990, Preston 2007, Fisher 2010). Since then, most environmental law has focused on either protecting particular special or iconic features, or by placing sustainable limits on development and use of resources (Doremus 2002, Stallworthy 2008, Fisher 2010, Godden and Peel 2010). However, these approaches have often obscured the particular interests of “nature” behind the effects of environmental degradation on human interests (Carlson 1998, Bertagna 2006, Sands 2012). For example, the public trust doctrine (Sax 1970) places emphasis on the public use of natural resources (Preston 2005) rather than the protection of nature itself. Addressing this obscurity has become one of the core challenges in environmental law.

The key question has become how to best represent the environment in court, and how to frame the legal challenges to deliver “judicial protection of nature for the sake of nature itself” (Daly 2012:63). Stone (1972) proposed a method to recognize the rights of nature in his seminal paper Should Trees Have Standing?, which showed how nature could be personified in law, so that it could seek legal redress on its own behalf. Stone combined a philosophical argument with key practical steps to enable the environment to become a legal subject. He identified three legal criteria that “go toward making a thing count jurally”: (1) “that the thing can institute legal actions at its behest”; (2) “that in determining the granting of legal relief, the court must take injury to it into account”; and (3) “that relief must run to the benefit” of it (Stone 1972:458 [emphasis in the original]). The essence of these legal criteria is to create the possibility for nature to take action in court to protect its own interests: to give nature itself legal standing.

Although Stone’s proposal has remained on the fringes of mainstream environmental law (Naffine 2012, Warnock 2012), it is premised on a concept widely accepted in law: that legal rights can be conferred on nonhuman entities. The creation of “legal fictions” is a long-standing mechanism to create legal personality for a range of nonhuman entities, including, most notably, for-profit corporations (Micklethwait and Wooldridge 2003, Truitt 2006, Farrar 2007). The advantage of this legal approach is that it creates a new, identifiable, legal entity (the legal person), which includes all the necessary legal rights (standing, contract, and property) for granting the nonhuman entity its own personality. Although there are limited examples of using the legal person in the environmental context, it has been used for many purposes throughout history, including businesses, not-for-profit charities, and religious organizations (Micklethwait and Wooldridge 2003), as well as Hindu deities.[1]

#### Rights of nature are legally feasible---the law’s evolved to recognize rights of non-human legal entities and expanded to grant rights to previously-excluded classes of people---environment’s no different

Oliver A. Houck 17, Professor of Law, Tulane University, Winter 2017, “ARTICLE: Noah's Second Voyage: The Rights of Nature As Law,” Tulane Environmental Law Journal, 31 Tul. Envtl. L.J. 1

Stone's treatise, unsurpassed in the grace of its expression, rested on three legs. He noted, first, that standing and other personal rights had been accorded to corporations, trusts, marine vessels, and a great range of institutions, none of them even biologically alive. 149He went on to point out that law had evolved to recognize rights in slaves, Jews, women, Native Americans, and others hitherto regarded legally as "objects," if regarded at all, each one over fierce resistance entrenched in the past. 150He added, last, that the alternative to recognizing these rights placed environmental interests in a conceptual hole, 151having to defend natural areas like Mineral King against highly lucrative developments because a lone hiker some weekend would dislike seeing it on the horizon. Not a very compelling posture. Perceived as a conflict between two (often-imbalanced) human interests, the most fundamental interest is missing.

Time has solidified Stone's thesis. The range of rights accorded to U.S. corporations and similar business interests now include, inter alia, speech, religion, freedom from government searches, and unlimited [\*27] campaign contributions as "persons" under the law. 152Indeed, the very characterization of these artificial entities as "persons" paves the way for the privileges. At the same time, however, rights-holding has been extended in U.S. law to the mentally disabled, immigrants, and lesbian, gay, and transgender individuals 153who, in recent centuries, were persecuted for these same proclivities and remain so in many countries today. "The arc of the moral universe is long," Martin Luther King once famously predicted, "but it bends towards justice." 154Assuming this to be true, or at least that we want it to be true, and given our increased understanding of the interconnection of all life on earth, it would not seem difficult to allow this life, too, its day in court. The threshold barrier is its standing, and it elicits a chorus of criticism that, in the interest of fairness, deserves its moment in the sun.

#### It's workable and would enable stronger protection for natural bodies.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

Merits

Practical and environmental benefits. The LP mechanism has a number of practical merits when applied to the Reef. As the EDO’s discussion paper points out, it would allow existing recreational, tourist and small-scale commercial uses to continue, while being likely to limit industrial development. Putting the Reef under the guardianship of a board of trustees charged solely with ensuring its biological welfare is also a convincing step away from governance structures likely to be divided internally by competing agendas, potentially sidestepping the GBRMPA’s current structural conﬂict between being a manager of the Reef, its protector, and a servant of state and federal governments, whose Chairman [sic] and board members are ‘chosen’ (GBRMPA, n.d. (c)) by the Federal Minister for the Environment and appointed by the Governor General. The EDO note that a board of trustees could be ‘statutorily required not to allow conﬂicting outside or personal interests to factor into decision making’.

Having standing would give the GBR a voice in its own right. This is of enormous symbolic import, but it is also of great practical value. It allows cases to be brought in the interests of the Reef itself, not only in relation to damaged human interests. It makes it possible to ﬁght inappropriate development on environmental grounds and for the Reef to be awarded damages when accidents occur. It would provide a stronger platform for monitoring and enforcement, a particularly valuable possibility in the light of the EDO paper’s claim, supported by statistical evidence, of the ‘declining enforcement record’ of the GBRMPA and state and federal governments.14 The EDO point out that legal personhood would also likely provide speciﬁable thresholds of unacceptable damage, and the opportu- nity to prohibit speciﬁc destructive practices.

Conceptual. The (relative) conceptual novelty of the LP proposal may perhaps perversely work in its favour in terms of garnering effective popular support. It is likely to appeal to a public gravely concerned about the Reef and fed up with political inaction and ineffectual- ity. The appeals to common-sense, urgency and familiarity that characterise the EDO’s discussion paper are designed to strengthen this support.

Ethico-political. It is possible that the richer legal understanding of human ‘interest’ in nature provided by LP is congruent with non-anthropocentric Indigenous worldviews and conceivable as a move away from a property-based conception of nature. Certainly, the granting of personhood to the Whanganui River was welcomed by some Maori scholars as more fundamentally compatible with the holistic understandings that characterise Indigenous cosmologies and epistemologies (Hutchinson, 2014; Morris and Ruru, 2010; and the October 2014 special issue of the Maori Law Review).

In practical terms, a less anthropocentric framing of the Reef could potentially open the way for a governance structure that gave greater scope for Indigenous representation. In a best-case scenario, the board of trustees model suggested by the EDO might put Indigenous people on a more equal footing than the current ‘partnership’ (GBRMPA, n.d. (d)) model, since conﬁguring governance models from scratch provides an opportunity to make progress in this regard.

For this to be a reality, the LP model would need to draw on the slow work of many decades in which Traditional Owners and their allies have striven to have Indigenous attachments, knowledge, and rights recognised and taken into account (Dale et al., 2016). Indigenous campaigners have called for ‘a new relationship between Traditional Owners and government managers as equitable, foundation partners in any strategy focused on GBR protection’ (Dale et al., 2016: 3). Foundational to this is recognising their ‘rights and interests’ (p. 1) and moving away from a language of ‘joint or co-management’ towards one of ‘shared or co-governance’ (p. 10).

### AFF Area---Core Nature AFF---Standing

#### Affirmatives could also focus on environmental redress---the right to make the environment whole

Aliya Gorelick 21, Research Assistant at Università degli Studi di Parma, October 2021, Standing up for Our Planet: It's Time for an Environmental Standing Doctrine, University of the Pacific Law Review, Vol. 53, p. 179-205

2. Causation and Redressability: Reducing Emissions to Make the Environment Whole

Sustainable development in the Anthropocene depends on a legal recognition that pollutants contribute to climate change. 241The legal recognition must work in tandem with a political commitment to provide a framework to bring suit for the environment and against entities polluting--or failing to sanction polluting--at alarming rates. 242Section i discusses how the Environmental Standing Doctrine would mandate that courts legally recognize that pollutants and emissions directly cause climate change. 243Section ii provides that acceptable remedies under the Environmental Standing Doctrine include emission reduction injunctions. 244

a. Causation: Legally Recognizing Climate Science

The Environmental Standing Doctrine would battle investment influence by removing the courts' causation analysis in climate change litigation. 245Instead, courts would operate under the understanding that emissions directly increase global temperatures. 246This would take the guesswork and political jeopardy out of connecting the dots between emissions, global warming, climate change, and environmental injuries. 247The notion of finding causation draws directly from the Supreme Court's interpretation of climate science from the Clean Air Act in Massachusetts v. Environmental Protection Agency. 248It is necessary to find causation in climate change litigation under the Environmental Standing Doctrine to prevent circuit courts from exercising improper discretion due to investment influence--like the Ninth Circuit's majority decision in Juliana v. U.S. 249

The attorneys and plaintiffs in Juliana plan to bring the case before the U.S. Supreme Court or to settlement discussions with the Biden-Harris administration. 250After filing the landmark case on International Youth Day in 2015, the youth plaintiffs Administration's defense. giant fossil fuel companies came to the Trump One plaintiff said, "[s]eeing giant fossil fuel corporations inject themselves into this case, which is about our future, really demonstrates the problem we are trying to fix." 252Despite multiple amicus curiae briefs filed in support of the youth's landmark constitutional climate lawsuit and the U.S. government's long-standing knowledge of climate danger, the six-year-old case has not yet seen its day in court. 253The U.S. needs a new Environmental Standing Doctrine because of previous Administrations' unwillingness to acknowledge climate science--that fossil fuel emissions cause global temperature increases. 254This is necessary to undercut the influence of investments from oil and gas companies that currently stain political autonomy in the courts. 255

The U.S. judiciary, with the Environmental Standing Doctrine, would join a global trend by conceding that emissions cause climate change. 256Lawyers, on behalf of youth and climate-affected plaintiffs across the globe, are now bringing climate change lawsuits against their governments for failures to adequately mitigate climate change injuries. 257In Ireland, a group of activists won a judgment rendering the Irish government's national climate plan insufficient. 258Ireland's Climate Minister Eamon Ryan said, "[W]e must use this judgement to raise ambition, to empower action and to ensure that our shared future delivers a better quality life for all." 259The case--commonly rereferred to as Climate Case Ireland--is the "first case of its kind in Ireland and only the second case in the WORLD in which the highest national court of law has required a government to revise its national climate policy in light of its legal obligations." 260

Courts across the world legally recognize climate science. 261The U.S. government, on the other hand, is far less receptive to conceding and legally recognizing that emissions cause climate change. 262Funding from polluting entities puts political restraint on the judiciary and the President. 263The epidemic of investment influence from oil and gas companies stunts climate change litigation. 264It is time for courts to judicially adopt the Environmental Standing Doctrine to avoid stunting climate change litigation. 265

b. Redressability: Injunctive Emission Reduction Remedies

Redressability--the third requirement in standing--refers to the remedies a court can grant, upon request, to make the plaintiff whole. 266Remedies under the Environmental Standing Doctrine would include injunctive emission reduction remedies. 267Emission reduction remedies build upon the foundation in which the courts legally recognize climate change. 268Two prominent emissions reduction frameworks at play in the global community are cap-and-trade systems and carbon taxes. 269These two approaches are actively reducing emissions internationally and would be models for injunctions that the judiciary could employ under the Environmental Standing Doctrine. 270This subsection will give an overview of cap-and-trade programs and carbon taxing. 271Then, it will discuss how the Environmental Standing Doctrine will translate those emission reduction frameworks into injunctive relief. 272

The European Union employs a cap-and-trade system and carbon taxing. 273Both methods assign a price to carbon emissions. 274The European Union's cap-and-trade program ("E.U. ETS") sets a maximum limit on carbon emission quantities. 275The trading system allows carbon emission credit trading between companies, thereby creating a carbon emission market. 276That market functions by lowering the emissions cap to ensure that less carbon emissions occur over time. 277Carbon taxing, on the other hand, functions as a set price that determines how much an emitter must pay per one ton of greenhouse gas emissions. 278A carbon tax functions by monetarily incentivizing businesses and consumers to invest in green energy and lower their emissions to avoid higher taxes. 279

The judiciary does not have the authority to enact a cap-and-trade or carbon taxing system. 280In fact, the U.S. does not have a national emission reductions system, which is part of the reason why remedying climate change harms is such a novel obstacle. 281But the U.S. judiciary can translate emission reduction market policies into injunctive relief in climate change litigation. 282Without a national cap-and-trade or carbon taxing system, the U.S. judiciary urgently needs to use injunctions to provide emission reduction remedies. 283

A remedy should provide relief as justice requires to protect legally recognized rights; where there is a right, there is a remedy. 284Emission reduction injunctions are available remedies because anything that lowers emissions is an appropriate remedy for mitigating climate change injuries under the Environmental Standing Doctrine. 285An injunction is a remedy directing a defendant to act or refrain from action. 286When a permanent injunction orders affirmative conduct--like placing a payable tax on carbon emissions--it is a mandatory injunction. 287A permanent prohibitory injunction, on the other hand, prohibits an act--like limiting a polluter's carbon emission percentage annually. 288

Courts determine if a permanent injunction is the proper remedy by asking: (1) was there irreparable injury; (2) are remedies available at law, such as monetary damages, inadequate to compensate for that injury; (3) considering the balance of hardships, is a remedy in equity warranted; and (4) is the relief in the public interest? 289If courts answer each question affirmatively, a permanent injunction is a proper remedy. 290The Environmental Standing Doctrine would encourage courts, upon request, to issue a permanent injunction to mitigate irreparable harm to the environment, thereby satisfying irreparable injury and inadequate remedy at law--questions one and two. 291Additionally, the Environmental Standing Doctrine would establish that equity is warranted and in the public interest because a healthy and safe environment is a natural human right--questions three and four. 292

The U.S. judiciary, upon plaintiffs' request, could utilize prohibitory injunctions to reduce emissions. 293Courts have the authority to enjoin defendants from emitting a certain percentage of emissions annually. 294Courts can also issue mandatory injunctions to tax defendants based on their annual carbon output. 295The Environmental Standing Doctrine would emphasize the judiciary's injunctive remedies to create a judicial emission reduction framework in the context of climate change litigation. 296In theory, the judicial remedies would work in conjunction with any future national emission reduction framework. 297

V. CONCLUSION

Climate change injuries require an updated doctrine to pave the way for proactive legal steps. 298The new Environmental Standing Doctrine would allow standing where there is: (1) an environmental injury, (2) caused by climate change, and (3) redressable by emission reduction remedies. 299An Environmental Standing Doctrine is necessary to remedy environmental harms through climate change litigation. 300Greater impact on the planet comes with greater responsibility. 301This generation's challenge is to prove maturity and mastery not of nature, but of mankind. 302

Current development and use of natural resources pose potential inequity to future generations. 303Future generations are not represented in today's environmental decision-making processes. 304Inadequate representation encourages a depletion of natural resources and degradation in the quality of resources for future generations. 305

The Environmental Standing Doctrine would broaden injury-in-fact by giving environmental entities standing in their own right. 306Additionally, the remedy under this new doctrine would take the form of injunctions that reduce emissions through enjoining emissions by annual percentages and imposing carbon taxes. 307Redressability under the Environmental Standing Doctrine is sufficient if it works towards slowing climate change's progression--slowing the rate of carbon emissions into the atmosphere. 308An Environmental Standing Doctrine is necessary to facilitate climate change litigation in the courts because the current Standing Doctrine is no longer relevant as applied to environmental cases. 309

#### Environmental standing affirmatives can focus on expanding the definition of injury to include environmental injuries

Aliya Gorelick 21, Research Assistant at Università degli Studi di Parma, October 2021, Standing up for Our Planet: It's Time for an Environmental Standing Doctrine, University of the Pacific Law Review, Vol. 53, p. 179-205

IV. THE ENVIRONMENTAL STANDING DOCTRINE: A NEW STANDING DOCTRINE FOR CLIMATE CHANGE CASES

Combatting the harmful effects of climate change requires judicial adoption of a new Environmental Standing Doctrine for environmental cases. 182The Environmental Standing Doctrine would allow environmental injuries alone to satisfy injury-in-fact and it would provide emission reduction remedies to satisfy causation and redressability. 183Creating a new doctrine is the most efficient avenue to facilitate climate change litigation because urging courts to broaden their interpretation of the current Standing Doctrine in environmental cases is unreliable. 184The Ninth Circuit's decision not to redress climate change injuries in Juliana shows that a new doctrine for environmental cases would be more persuasive than a trends in dicta or interpretation. 185The judicial adoption of the Environmental Standing Doctrine is viable because standing itself is a judicially created doctrine. 186Additionally, the Court created logical outgrowths of individual standing, including: organizational standing, third-party standing, and federal taxpayer standing. 187

The U.S. needs a framework that enables mitigation for climate change injuries--including massive wildfires and sea-level rise to air pollution and rising temperatures. 188The current Standing Doctrine's inadequacies expose the need for a doctrine that legally solidifies the connection between global emissions and climate change. 189The new Environmental Standing Doctrine proposed in this Comment would broaden standing requirements by focusing on making the environment whole and providing injunctive emission reduction remedies. 190The Environmental Standing Doctrine would emphasize the Supreme Court's interpretation of standing in Massachusetts v. Environmental Protection Agency to constrain circuit courts' discretion in environmental cases. 191Part A explains who can be parties to the suit under the new Environmental Standing Doctrine. 192Part B describes how parties can present injury-in-fact, causation, and redressability for a climate change suit that relies on the new Environmental Standing Doctrine. 193

A. Legal Personhood: Citizen Suits on Behalf of the Environment

Citizens need an Environmental Standing Doctrine because government regulation is not a failsafe for mitigating climate change injuries. 194A private citizen needs the ability to challenge enforcement efforts when the government is not actively pursuing or achieving goals set out in the national climate plan. 195Without the ability for citizens to demand action from the President or state governors, the government can ignore the will of the people, including their public interest in a safe and healthy environment. 196Under the new Environmental Standing Doctrine, plausible defendants would include any state government, the national government, industry sectors, polluters, and corporations. 197

When discussing the potential for government defendants, it is necessary to address how the Environmental Standing Doctrine would overcome sovereign immunity roadblocks. 198Sovereign immunity protects the U.S. government from lawsuits unless the government waives its immunity. 199However, in Juliana, the plaintiffs started the lawsuit by suing the Oregon state government. 200On the state level, and following Juliana's lead, plaintiffs will not run into sovereign immunity issues because not all states in the U.S. adopt the sovereign immunity doctrine. 201

The issues involved in suing the national government are pronounced and require long-term resolutions to come forth as environmental rights, standing alone, become more customary. 202One possibility is to prove that the government has a statutory duty of care by bringing a public negligence argument. 203This would be more feasible in a country like the Netherlands or Ireland, where the constitution provides their citizens the right to a healthy environment. 204There is surely room to interpret the right to a healthy environment into the U.S. Constitution. 205Until then, plaintiffs can bring suit against their state governments, industry sectors, polluters, and corporations. 206

Adopting an Environmental Standing Doctrine necessitates a shift towards giving natural objects standing in their own right. 207Societies fear giving new entities legal rights. 208The more new entities possess legal rights, the less power majority rights holders retain. 209Although unconventional now, giving legal rights to trees, oceans, and rivers is the next step towards significant domestic and international litigation to protect the environment. 210

Giving natural objects standing in their own right aligns with the principle that human rights and environmental rights are intertwined. 211Under the Environmental Standing Doctrine, natural objects would possess legal rights, much like corporations possess rights from judicially interpreted constitutional legal personhood. 212Legal personhood is a legal fiction where courts recognize an entity's entitlement to legal protection--specifically conservation in the context of the environment. 213Giving the environment legal personhood is a trending reality across the globe. 214For example, in Ecuador and New Zealand, courts recognize that rivers and forests are legal entities with standing in their own right. 215The incentive lies in the benefit of community activism through citizen suits to ensure the long-term wellbeing of the environment. 216

B. The New Environmental Standing Doctrine

The current, antiquated Standing Doctrine requires a concrete and particularized human injury--economic or physical--and a remedy that will completely cure the plaintiff. 217The Ninth Circuit in Juliana showed that there is no incentive to interpret the current Standing Doctrine broadly in environmental cases. 218The Supreme Court ultimately possesses the power to judicially create a new Environmental Standing Doctrine. 219The Court should adopt a new legal doctrine for environmental cases because environmental integrity is the predicate for humanity and other forms of life, and the current Standing Doctrine does not reflect that. 220

This Comment proposes a new Environmental Standing Doctrine that would provide citizens with an avenue to hold the government, polluting entities, and the aggregate community accountable for reaching national climate plan goals. 221The requirements for the new Environmental Standing Doctrine are: (1) an environmental injury, (2) caused climate change, and (3) injunctive emission reduction remedies that could redress the issue. 222Unlike the current Standing Doctrine requiring personal injury for injury-in-fact, the new Environmental Standing Doctrine would allow a purely environmental injury to satisfy injury-in-fact. 223The new Environmental Standing Doctrine would promote the legal recognition of climate science in the courts by acknowledging that reducing emissions will slow the rate of global warming. 224

Courts can employ injunctive emission reduction remedies under the new Environmental Standing Doctrine. 225Section 1 illustrates that injury-in-fact under the new Environmental Standing Doctrine would encompass environmental injury absent human injury. 226Section 2 explains that injunctive emission reduction remedies would satisfy causation and redressability under the new Environmental Standing Doctrine. 227

1. Broadening Injury-in-fact to Include Environmental Injuries

Environmental injury alone--domestically and internationally--should establish injury-in-fact because human rights and environmental rights are more intertwined than the law currently recognizes. 228Article III courts need an Environmental Standing Doctrine because the current Standing Doctrine does not encourage lawsuits on behalf of the environment absent direct economic, personal injury to humans. 229This proposed Environmental Standing Doctrine will permit lawsuits on behalf of environmental harm. 230International human rights law supports the proposition for a new Environmental Standing Doctrine because environmental harm affects transboundary populations. 231Preventing citizen suits on behalf of the environment by requiring human injury undermines private citizens' rights to challenge governmental institutions who are responsible for managing environmental quality. 232Therefore, the new Environmental Standing Doctrine would only require environmental injury to prove injury-in-fact. 233

Instead of harnessing politics to promote sustainability and human welfare, natural resources often double as political weapons. 234This sentiment illustrates why it is necessary for the Environmental Standing Doctrine to legally recognize environmental personhood as a means of finding environmental injury sufficient to sustain standing. 235For example, the United Nations General Assembly stated in the Universal Declaration of Human Rights that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family . . . ." 236This sentiment demonstrates humans' innate dependence on the government's sustainable management of Earth's resources. 237Enforcement of universal human rights--such as the right to a healthy environment suitable to sustain future generations--requires courts to legally recognize that human injuries and environmental injuries are one and the same. 238The fundamental human right to a healthy environment is integral to the Stockholm Declaration on the Human Environment:

The natural resources of the earth including the air, water, land, flora, and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generation[s] through careful planning or management as appropriate. 239

The Environmental Standing Doctrine would allow an environmental injury to satisfy the injury-in-fact requirement for standing in recognition that protection of natural resources is an integral aspect of human welfare, even absent a showing of direct human injury. 240

### AFF Area---Ancestral Natural Personhood

#### Western law should be reformed to recognize ancestral personhood. This is not an endpoint but a generative category that can assist in negotiating tensions between first law and western colonial law.

Martuwarra River Of Life et al. 21, “Yoongoorrookoo,” Griffith Law Review, vol. 30, no. 3, Routledge, 07/03/2021, pp. 505–529

5. The person and the first law tradition: the emergence of the ancestral person

The idea of an ancestral person is thus proposed as a novel and intersectional category of legal personhood located at the encounter between colonial legal systems and First Law. It is important to note that this conceptual category is neither a creature of the colonial Western legal tradition nor of First Law, but rather is a conceptual tool to be negotiated as a bridge between the two. In order to establish the parameters of such negotiation, we want to begin by offering a few preliminary reflections.

Indigenous rights to natural resources are often described as being ‘ancestral’ in nature, based on a deep spiritual connection between people and resources handed down across generations, placing an obligation on people to govern and care for the resources for present and future generations.94 The term ‘ancestral’ is typically defined as meaning ‘relating to, or inherited from an ancestor’,95 and has underpinned conceptions of Indigenous rights in International treaties (such as the International Labour Organisation’s Convention 169 on the Rights of Indigenous and Tribal Peoples),96 as well as the Indigenous land rights jurisprudence arising from it.97 However, recognising pre-existing, ‘ancestral’ rights raises inevitable tensions around continuity, because of the period of time that has elapsed since colonisation.98 At times, this framing of Indigenous interests as ‘ancestral’ has been used by States to exclude Indigenous territorial claims that cannot be positively proven through continuous lines of succession since pre-colonial times, which has led to the ‘freezing’ of Indigenous territorial interests.99 An example of this is found in Chile, where Indigenous rights to water are framed as ‘ancestral rights’, and must be proved to have existed since ‘time immemorial’.100 The same problem occurs in the case of Australian native title rights to water,101 which must be proven pursuant to the maintenance and observance of traditional laws and customs that have been substantially maintained since the colonial claim to sovereignty.102 This restriction of ‘ancestral’ rights has led to the ongoing dispossession of Indigenous lands.103

In the Australian context, concerns have also been raised that a turn to rights of Nature discourse will result in the separation of land and waters from Indigenous people rather than respecting their sovereignty and empowering them to carry out their obligations to Country.104 Other scholars have more broadly argued that the deployment of legal personhood for Nature has led to the law conceiving of Nature in distinctly human terms – and, relatedly, to conceiving rights in distinctively liberal terms.105 Tănăsescu emphasises that ‘the way in which we think of the entities that populate the law matters a great deal … [and] potentially stifles the politically radical act of extending the circle of entities recognized by the law’.106 He then questions whether Indigenous ontologies, including a relational approach to Nature and selective ‘anthropomorphism can be aptly accommodated within the liberal concept of legal person’.

Despite these critiques, many scholars ultimately adopt a nuanced approach to the strategic use of rights discourse. Here the question of whether to risk engaging with the system ‘partly comes down to an assessment of whether they have the power to effect genuine change through this kind of engagement’, which in turn depends on whether one adopts a centralist or pluralist approach to law.107 A pluralist approach, whereby legal norms are constructed by a multiplicity of actors,108 opens up the possibility of radical change, even when faced with the risk of deradicalization. Balakrishnan Rajagopal, for example, recognises the plurality of influences in the ongoing creation of legal norms in his argument for the production of an ‘international law from below’.109 Ultimately, Tănăsescu adopts a similarly nuanced approach by highlighting the New Zealand example of the Te Urewera Act of 2014, which establishes Te Urewera as a legal entity rather than person. He argues that this is one path of avoiding the pitfalls of allowing Indigenous law and ontology to become too entangled with liberal notions of personhood and rights.110 In this example, the Act is a vehicle through which the local Māori Iwi have been able to create space not only for a more relational ontological approach to Nature, but also to claim power through the governance structures and processes that have emerged from the Act.

In Australia, one might ask whether the Native Title Act, for those Indigenous peoples who can meet the high threshold for proving connection to their ancestral lands noted earlier, can recognise a form of ancestral personhood, given that it provides for the recognition of traditional laws and custom in relation to land and waters. However, it is readily apparent that the Native Title Act (at least in its current form) does not deal well with legal pluralism; it is structurally and philosophically ill-equipped to give legal recognition to the concept of the ancestral person. Not only is the Act ultimately anthropocentric in its orientation, but also it is premised on a separation between land and waters, a premise which is antithetical to Indigenous world views.111 Rights and interests under traditional laws and customs can only be recognised by the Act insofar as they do not ‘fracture a skeletal element of our legal system’,112 and thus, accordingly, the Act inevitably reflects a colonial conceptualisation of the environment.113 Determinations of native title typically limit the recognition of water rights to a ‘non-exclusive right to take, use and enjoy that water’114 or to take and use water ‘for personal, domestic and non-commercial communal purposes’115 (or variations thereof). Moving away from these formulaic and anthropocentric descriptions of native title rights to water to encompass a more holistic conception of Country appears unlikely.116 In this sense, existing native title regime may be helpful in giving a voice to native title holders or claimants,117 but despite recent judicial attempts to ameliorate some of its limitations,118 is insufficient to capture the complexity of the normative and legal worldviews underpinning such regimes.

The proposed concept of an ancestral person, therefore, is offered as a dialogical interface between distinct legal orders. To aptly reconcile the distinctive worldviews represented by this pluralist intersection, any conceptualisation of ancestral personhood cannot be derivative, but rather must necessarily be dialogical and co-creative. The aspirational desire of such a novel category is to reach a point of complementary harmony and collective wisdom, while maintaining ongoing awareness of the fact that the idea of the ancestral person as a comparative tool to establish a meaningful dialogue between ontologically distinct legal orders always operates within an asymmetry of power. The concept of an ancestral person as a novel legal category, undoubtedly presents colonial audiences – particularly colonial legal audiences – with a challenge. As an intersectional concept, it is more than a simple tertium genus of personhood. Rather it is a concept that can only emerge from the intersection among, and dialogue with, distinct legal traditions. Its complexities, however, are far more challenging for colonial legal systems than they are for Indigenous people. As a result, the burden is placed upon colonial legal scholars to develop the conceptual tools to fully approach the very idea of an ‘ancestral’ person as a legal concept.

Traditional Western legal theory, in all its permutations, primarily sees law as an exclusively human affair, and one that is bounded and somewhat separate from the ‘non-legal’. Not all matters fall within the category of ‘the legal’, to a Western legal scholar. In contrast, First Law is inseparable from the rest of existence, it cannot be severed from all other components of human life, it suffuses and permeates the entirety of a person’s lived experience. This radical dichotomy is particularly apparent in the instruments and artefacts to both imagine and comprehend ‘the law’. The challenge to the very narrow and limited view of what the law is constituted of, therefore, constitutes the main challenge for colonial legal scholars. To assist in this task, however, the tradition of comparative law can assist: Rodolfo Sacco, in the 1980s, developed the idea of the ‘legal formants’,119 to identify all those elements that define the law while being situated outside its traditional boundaries. Van Hoecke invites legal scholars to what he calls ‘deep legal comparison’,120 the investigation of all those elements that transcend the mere appearance of ‘the law’, while Kaarlo Tuori’s presents a model of law as a pyramid or an iceberg.121 According this pyramid model, the law sits at the top, and underneath it exist a host of deep and not immediately apparent principles – political, ethical and metaphysical. This implies that shifting any of those principles radically shifts the perception and the understanding of ‘the legal’. All these ‘formants’ are necessary to begin to understand, as colonial legal practitioner, the story of Yoongoorrookoo that opened this paper is not just as a story but as a collection of legal principles that determine moral, permissible, and punishable behaviour.

6. Conclusion: the ancestral person and the living waters of the Martuwarra

The concept of the ancestral person presented in the previous section is an invitation to challenge the hegemonic and deeply held legal orthodoxy, while at the same time articulating First Law in terms that are recognisable within the colonial context. Once embraced in these comparative terms, law is no longer something that only humans engage with. Rather, law emerges from the endless interplay between humans and non-human ‘actants’,122 whereby rivers cease to be mere abstract legal persons, and instead become active participants in the very process of legal creation. The description of non-human beings as alive, sacred, emotional and vibrant, which has suffused this paper thus far, differs from current posthumanist, vitalist, materialist, or object-oriented scholarship that depart from traditional cartesian dualism,123 at least by gesturing toward an even less anthropocentric and more relational orientation.124 Rather, ancestral stories and First Law inform and shape the theoretical positioning of this paper, in explicitly maintaining the deep relational structures that these theories call upon.

A practical instance of the application of the ancestral person to capture the plurality of worldviews that surround Nature is, we argue, the present story of the Martuwarra (or Fitzroy River) in the north-western Kimberly region of Australia. Against the normative message of the Yoongoorrookoo story, Anne Poelina and her colleagues describe more than 150 years of invasive colonial ‘development’ in the region.125 Indeed, the interest from the agro-pastoral sector in exploiting the waters of the Martuwarra-Fitzroy River has grown over the last decade, in particular since the publication of the Australian Government’s White Paper on developing Northern Australia.126 At present (in 2021), the government of Western Australia is preparing a water allocation plan for the Martuwarra-Fitzroy catchment as a basis for responding to water licensing requests. The express governmental aim of water allocation process is to maximise the water available for abstraction while maintaining the long-term integrity of the water resource.127 The ongoing water allocation planning process in the Martuwarra-Fitzroy catchment is, however, highly contentious, especially as Traditional Owners are only considered stakeholders while decision-making power about the future of the Martuwarra-Fitzroy River rests only with Government.128 The Yoongoorookoo story, the Martuwarra, and the depth of Aboriginal legal and normative traditions are all silenced within this modern water governance framework, despite a commitment from the State government to protect Indigenous cultural values.

The Martuwarra and her peoples are thus left wondering when will the ‘colonial war’ end? In the words of late senior Elder, Butcher Wise, ‘you came, you took the land, you made us slaves and now you are back for the water; what is going to be left for Blackfellas [Aboriginal people]?’ The Martuwarra Fitzroy River Council (Martuwarra Council) was established in 2018 by six independent Indigenous nations to preserve, promote and protect their ancestral River from such ongoing destructive ‘development’. The Council believes it is now imperative to recognise the pre-existing and continuing legal authority of Indigenous law, or ‘First Law’, in relation to the River, in order to preserve its integrity through a process of legal decolonisation. First Law differs markedly from its colonial counterpart, as its principles are not articulated in terms of rules, policies and procedures, but rather through stories. The story with which this paper begins thus represents an opening into the normative and legal world of the Nyikina people, gesturing toward a host of legal and normative principles that can only be explored by applying an open and dialogical comparative legal methodology.129

Fundamental to First Law in the Martuwarra-Fitzroy Catchment is the role of the ancestors who create and populate the Country such as the Serpents (called Yoongoorrookoo in Nyikina language).130 These Serpents are guardians of the Country, strongly associated with water places.131 The First Law Story of Yoongoorrookoo illustrates how the physical manifestations of the sacred ancestral being, Yoongoorrookoo, is entwined with ethics, values, custom, law, language, and inter-generational obligation, as water moves above ground, down rivers and permeates though groundwater systems.

Walalakoo Aboriginal Corporation (WAC) Elders suggest that water has meaning beyond filling the need to drink and sustain life. Water is connected to identity, culture, livelihoods, and economies. Water is Life, or, as many Aboriginal people call it, it is Living Waters.132 Therefore, a central objective of the Martuwarra Council is to look after Living Waters, care for Living Waters as deeply enmeshed with human health and wellbeing. Living Waters are connected physically and spiritually throughout Booroo (‘Country’ in Nykina), including connections that run through the earth and aquifers. Thus, the management of rivers, billabongs, springs, soaks, flood plains and aquifers are all physically and spiritually interconnected, and based on reciprocal relationships. The Mardoowarra/Martuwarra, as well as all related values, are all strongly associated with water rights and responsibilities that are at once ecological, cultural and spiritual in nature.133

Today, the First Law of the Martuwarra, as well as culture and languages, remain fragile. New emerging storytellers are using modern technology to revive Bookarrarra Stories using multi-media, to reproduce stories in three-dimensional experience of sight, sound and ‘feeling’, or liyan. The concept of liyan incorporates at once a person’s spirit, moral compass and a conscious feeling that positions someone within the cultural landscape and grounds their intuition for ‘reading circumstances’, ‘reading people’ and ‘reading the Country’.134 First Law stories, such as Yoongoorrookoo Creator of the Law, create the opportunity to adapt them in order to keep them alive an in the hearts, minds and liyan of Martuwarra people as well as sharing with all people a complex set of values, ethics and the Law. These First Law stories, reimagined in a digital form, create a pathway for ‘freedom, ethics and civic courage’, an invitation to collective wisdom, cooperation, unity, information sharing and informed consent, the ‘cultural synthesis’ framed by Paulo Freire.135

The gift of the Yoongoorrookoo story, therefore, offers as an invitation to a legal dialogue among distinct legal orders, in the spirit of an emerging ‘Coalition of Hope’,136 whereby the renewed focus on First Law can provide a complimentary worldview encompassing an ethical framework that is able to ground justice and equity in a Law of relationships between human and non-human beings.137 This invitation is paramount to the possibility of imagining, discussing and conceptualising an ‘ancestral person’, whose ontological orientation is best exemplified by the Yoongoorrookoo story in relation to the Martuwarra. Far from leading to any pre-determined outcome, the negotiation of a novel category of personhood offers a creative space to counter the colonial risks of an unquestioned extension of legal personhood to Nature that Virginia Marshall aptly cautions against.138

The co-creation of an ancestral person as a novel legal category able to capture the nuances of First Law while speaking to the need of identifying a specific legal ‘subject’ that can be readily understood within the colonial framework inherited by the Western legal tradition is, in the present instance, instantiated in the Martuwarra. Importantly, the ideas discussed in this article were formally presented to the Martuwarra Council at the ‘Council of Wisdom’ workshop the Council held (partly remotely, due to the extant Covid19 restrictions) in June 2021. At the workshop, all present members of the Council endorsed the idea of an ancestral person as an instance of legal intersection worth pursuing and co-creating further.

The Martuwarra Council’s understandings is that the Law is in the Land because it is from the stars and the earth that laws are grounded. It is therefore the Martuwarra’s peoples deep and continuing relationship with nature to witness and understand why these laws were created. No one is above the Law, according to First Law in the Martuwarra, everyone is equal under the Law, and stories show Yoongoorrookoo a living entity, a sacred ancestral being which continues to hold the Law from the Beginning of Time, Bookarrarra. The invitation to consider an ancestral person as a novel legal category, thus, may be read as a response to the pluralist opening to First Law as advocated by Yoongoorrookoo, ‘So all the people can see that the Spirit of the Law is just’.

#### This conception of personhood is consistent with a relational understanding that rejects atomistic or individualistic rights as the end-all be-all in favor of an understanding that forefronts the interdependence of beings.

Anna Arstein-Kerslake et al. 21, “Relational Personhood: A Conception of Legal Personhood with Insights from Disability Rights and Environmental Law,” Griffith Law Review, vol. 30, no. 3, Routledge, 07/03/2021, pp. 530–555

V. Relational personhood: a new conception of legal personhood

The essence of our argument is that personhood is never independent. Personhood for every individual and natural entity is reliant upon and supported by their environment, relationships, and power dynamics. We are arguing that liberal political theorists in the Euro-western world were wrong to conceive of the legal person as an isolated, atomistic individual. However, we are also arguing that they were correct to conceive of legal personhood as an individual right that has the power to overcome hierarchies of domination and social marginalisation. As such, our conception of legal personhood is one of relational personhood that attaches to the individual or entity and connects them to the world around them. In other words, we believe that it is critical that humans (and, increasingly, natural entities) have a right to be recognised as individual legal persons. We also believe that the law should recognise that the exercise and expression of that legal personhood is often, if not always, a relational process whose success is heavily dependent upon the individual or entity’s environment, relationships, and socio-economic position.

In this paper, we have developed the concept of relational personhood as a way of broadening and deepening our understanding of personhood in general. In addition, we use this concept as a way of explicitly identifying how to give personhood full force and effect, particularly for non-verbal communicators (such as some persons with disabilities, or natural entities such as rivers). Relational autonomy is a mechanism by which individual rights can be operationalised. For clarity, we are not arguing here for the creation of group or community rights (although we also acknowledge that this may be occurring in the field of rights of nature), but about how those individual rights can be operationalised.

We find the work of Watson and colleagues to be instructive in demonstrating the practicality of identifying and creating relationships of sufficient closeness and understanding that they can be a means of giving expression to a communicator who is expressing their will and preference nonverbally. For many people with disabilities, this is essential for the operationalisation of their personhood: rather than privileging the decisions of a guardian acting in the ‘best interests’ of the person, it is now feasible to acknowledge a special relationship as a means of expressing the will of the person directly. This empirical work shows that there is a genuine alternative to substituted decision-making, and shows how the identified indicators could become part of a recognised legal framework.

We also acknowledge that in itself, this recognition of the ‘special relationship’ does not solve the problem of dominance or potential abuse of power. Merely because a relationship is close does not necessarily ensure that the relationship will be one of mutual benefit. However, the concept of relational autonomy requires us to focus not only on the relationship, but to see the relationship as a means towards giving effect to autonomy. The concept of relational personhood explicitly acknowledges that we are all of us in relationships, and that these relationships can be both barriers to, or expressions of, our individual personhood. By bringing these relationships to the fore, we can explicitly identify (and strengthen) the indicators of relational autonomy, and acknowledge and address relationships that undermine autonomy. Every person is vulnerable to relationships of dominance, and rather than relegating such discussions to special circumstances of vulnerability, the concept of relational personhood places this analysis front and centre for all legal persons.

Extending rights to natural entities was historically constructed as an individualised creation of personhood to effectively achieve Christopher Stone’s three elements: legal action at its behest, the consideration by the court of injury to nature itself, and that any relief goes to the benefit of nature.95 However, although an individualised concept of personhood for nature can formally address these three elements, they can only be effectively achieved via the actions of a representative who can understand and act on the expressed preferences or interests of the natural entity. We argue here that relational closeness is the only way to achieve this outcome, by enabling the representative to communicate with the natural entity, as well as facilitating the communication of the natural entity with the rest of the world, including the court system.

As Martuwarra River of Life et al (this issue) describe, the legal personhood of natural entities requires a new, fit-for-purpose form, which they define as an ‘ancestral being’, leaving open the question of precisely which rights and powers would accompany this status in law.96 The ancestral being concept is another way of describing ‘relational personhood’, as the purpose of ‘ancestral’ is to formally acknowledge the interconnectedness between humans and natural entities. Some natural entities have received a recognition in law as a ‘living entity’ rather than a legal person,97 which in the absence of the rights and powers of personhood, depends even more heavily on this relationship, and the willingness of representatives to act.98

There are no easy answers to the question of how we can know what a natural entity’s will and preference is. But relational personhood shows that there is a way to combine autonomy and power (which natural entities may need in order to be protected within Western legal frameworks) with the close relationships of interdependence and interconnection necessary to give expression to nature’s rights and interests. Considering this from an explicitly pluralist perspective also emphasises the laws and protocols that Indigenous peoples have developed over tens of thousands of years in partnership with the world around them. Relational personhood can thus be a powerful tool for an anti-colonial form of environmental protection.

VI. Conclusion

We came together to write this paper because of the expansion of legal personhood over the past decade to explicitly include people and natural entities whose claims to be legal subjects, with rights and powers of their own, have been historically excluded from models of personhood. In particular, we were inspired by the empirical work of Watson et al in developing a model of relational autonomy that can enable a non-verbal person to give effect to their will and preference. In bringing together perspectives from rights of nature scholarship as well as the rights of persons with disabilities, drawing on theory as well as empirical work, we can develop a new understanding of the concept of ‘personhood’ in general, as well as offering specific insights into the recognition of nature as a legal person.

We have discussed how context of disability has furthered our understanding of legal personhood as an inherently relational concept has the potential to overcome entrenched framings of personhood as atomistic, isolated, and individual, built on an assumption of the white, able-bodied, cis gender, upper-middle class male. We have also explored the relationship between legal personhood and domination, and the ways in which legal personhood can be a powerful response to dominance. We have also identified the inherent weakness in the current assumptions of individualised personhood, particularly (but certainly not only) for people with disability.

We have also drawn on the recent developments in environmental law, in which natural entities have been recognised as legal persons and/or the subjects of legal rights in a growing number of jurisdictions. Although we acknowledge the important reasons not to conflate the interests of natural entities (non-humans) with those of people with disability, we also believe that there are important insights for the personhood of natural entities that can be gained from the scholarship on the rights of people with disability.

Our concept of ‘relational personhood’ uses the work of Watson and colleagues on relational closeness and the role of supporters in assisting people with severe cognitive disability to give effect to their personhood. This important empirical work demonstrates the utility of a conception of legal personhood that encompasses the reality of the interdependence of all individuals and entities. We also acknowledge that the indicators of the special relationship identified by Watson and colleagues are not intended as a legal framework by which the relationship is defined or governed. Their work demonstrates that direct expression of a person’s will and preference is feasible, but how this is reflected in the law is the next important step.

We also acknowledge that Euro-Western ways of knowing and being have largely failed (so far) to learn from Indigenous Peoples’ laws and philosophies. In developing this concept of relational personhood, we hope to build a bridge between Euro-Western legal concepts (such as legal personhood) and Indigenous Peoples’ law and protocol that governs the relationship between people and place. We hope that the concept of ‘relational personhood’, and the relational closeness work articulated by Watson and colleagues, can assist in the quest to ‘tease out what the land’s intentions might be’. 99

### AFF Area---Religious Natural Personhood

#### Legal personhood should be extended to the inhabitants of entities enspirited by spirits or numina.

John Studley & William V. Bleisch 18, Studley is an independent ethno-forestry researcher, a Chartered Geographer, a fellow of the Royal Geographic Society and an international fellow of the Explorers Club; Bleisch is the Director of Research and Programs at CERS Explorers in Hong Kong, “Juristic Personhood for Sacred Natural Sites: A Potential Means for Protecting Nature,” Parks, Vol. 24, Iss. 1, 2018, https://parksjournal.com/wp-content/uploads/2018/05/PARKS-24.1-10.2305IUCN.CH\_.2018.PARKS-24-1.en-Low-Res2-2.pdf#page=81

CONCEPTUAL UNDERPINNINGS

Animism is the most ancient, geographically widespread and diverse of all belief systems, adhered to today by some 300 million Indigenous people. It is predicated on the assumption that biophysical entities such as mountains, forests and rocks are typically enspirited by spirits or numina (Sponsel, 2007) or ‘spirits of place’ (ICOMOS, 2008).

A numen is a ‘spirit of place’ or genius loci that is present within an object or place (mountain, forest, spring, idol). Numina were very common in ancient Rome (Mehta-Jones, 2005), and the same concept continues to be widespread among Indigenous people throughout the world. In Tibet, for example, they are known as gzhi bdag (Tucci, 1980), and in the Andes they are known as huacas (Bunker, 2006), exemplified by Pachamama.

The posthuman represents a return to animism and constitutes a qualitative shift in thinking addressing the basic unit of common reference for our species, our polity and our relationship to the other non-human inhabitants of the planet (Clarke & Rossini, 2016).

Ecocentrism, in contrast, is a philosophy or perspective that places intrinsic value on all living organisms and their natural environment, regardless of their perceived usefulness or importance to human beings. It recognises that human beings have responsibility towards the ecosphere and moral sentiments that are increasingly expressed in the language of ‘rights’. O'Riordan (1981) has suggested that Gaia has emerged as a popular symbol of ecocentrism primarily because it has come to be associated with the belief that humankind is not the most important species and human consciousness is not the only means through which nature should be judged and interpreted.

Panentheism, all is in God, is a related concept predicated on an intrinsic connection between all living things and the physical universe which accord with natural laws2. It assumes, however, that there is a separate and greater divine reality outside the material world. Panentheism is part of a gnostic mystic experiential tradition that is informed by Plato, Pierre Teilhard de Chardin and Thomas Berry by which all things are united under the world soul. Berry’s mystic panentheism inspired movements for Earth Jurisprudence, Wild Law and Earth Law, although Berry himself emphasised the physical universe rather than the Earth (Berry, 1988).

LEGAL FOUNDATION OF JURISTIC PERSONHOOD

Roman law recognised both persona natura (natural persons) and persona ficta (fictional persons) which were later known as ‘juristic persons’ (Gierke, 1954). ‘Natural persons’ is the term used to refer to human beings who have certain legal rights automatically upon birth, which expand as a child becomes an adult. A legal or juristic person refers generally to a ‘legal subject’ as an entity capable of holding rights, duties and capacities and includes both juristic and natural persons. This is not a human being, but one which society has decided to recognise as a ‘subject of rights’ and obligations (Shelton, 2015). These ‘rights, duties and obligations’ may include the capacity to sue or be sued, own or dispose of property, seek judicial relief, receive legacies, gifts and inheritances, incur debt, enter into contracts and comply with the laws of the state (de Vos, 2006). Perhaps the most familiar example of juristic personhood is the process of incorporating a business or trust, giving it many of the rights of a human being under the law, including certain protections and the right to sue in court.

The legal concept of personhood resonates with indigenous worldviews. In indigenous societies ‘persons’ are not “a small select group of rational-minded individuals” (Oriel, 2014) but rather personhood is ascribed to a vast range of diverse human and nonhuman entities. From many indigenous perspectives human beings are not in a position to demarcate personhood, for they are just one element of a matrix of reciprocating persons that includes other-than-human persons (OTHP) such as numina.

This article aims to contribute to conservation practice by identifying legal tools (laws and rights) and legal regimes (juristic personhood and spiritual governance) that can safeguard SNS and protected areas. While it is important to avoid the mistake of valuing Indigenous peoples’ and local communities’ worldviews only if they contribute to conservation outcomes (Jonas et al., 2017), juristic personhood could create an interface and legal basis to bolster the effectiveness and endurance of OECM as sites for biodiversity conservation.

RESILIENCE, EFFECTIVENESS AND SCOPE

There may be a temptation to ignore the potential of unconventional legal regimes such as juristic personhood to underpin conservation in enspirited SNS on the basis of an assumption that the underlying beliefs will not survive threats from globalisation and secularisation or that they are too limited in effectiveness or scale. We believe that this would be an error. Indigenous people have shown remarkable resilience and aptitude in recalibrating their cultures, and animism has not died (Tippett, 1973) or been replaced by secularism. Indeed, it has expanded and the communication tools of globalisation have allowed threatened Indigenous people groups to network with each other (e.g. Carlson, 2017). Tibetan lay people, for example, repeatedly have had to find ways of recovering their ancient culture within the space provided by official discourses (Studley & Awang, 2016). When China relaxed its religious policies in the 1980s, Tibetans and many other ethnic groups took full advantage. Many ethnic traditions were revitalised and celebrated and a profound nativisation of culture took place across the Tibetan Plateau. The revival of the gzhi bdag cult enabled lay Tibetans to reclaim their SNS as ‘Tibetan’ (Kolas, 2004) and it provided a means of defiance and ritual protest against oppression (Studley, 2005) Similarly, resurgent indigenous groups (often with a political agenda) have provided the impetus in New Zealand, India and Bolivia that has resulted in these countries granting juristic personhood to enspirited bio-physical entities.

The protection of SNS by most Indigenous people is not predicated on a conservation ethic but on ritual compliance enjoined by the numina that inhabits the SNS. The numina traditionally determine what constitutes ‘good’ and ‘bad’ behaviour within their jurisdiction – i.e. the SNS they inhabit (Studley, 2016). This phenomenon of numina acting as law-givers has been termed ‘spiritual governance’ (Bellezza, 1997, p. 41). Many SNS are actively patrolled by self-organised community protectors (Studley, 2016), who in some cases have been given legal authority even without designation of juristic personhood for the SNS.

Spiritual governance of SNS is also large in geographic scale, being a characteristic behavioural practice by which many of the world’s Indigenous people ritually protect much of the world’s biodiversity in SNS outside formal protected areas (Lynch & Alcorn, 1993). SNS are globally distributed and when aggregated may constitute 12 million km2 or at least 8 per cent of the world’s land surface (Bhagwat & Palmer, 2009). On the Tibetan Plateau alone, SNS have been estimated to cover 25 per cent of the territory (Buckley, 2007), or twice the size of Germany. Furthermore, SNS are nodes in a much larger ecological network and an integral part of the social fabric that permeates the whole landscape or territory.

Juristic personhood and spiritual governance can be important socio-cultural mechanisms that explain the extent of the spiritual dimension in the context of the wider landscape. Legal protection for SNS could complement spiritual governance and norm-based conservation with regulatory and judicial protections to make conservation more effective.

LEGISLATIVE CHRONOLOGY OF JURISTIC PERSONHOOD AND ‘NATURE RIGHTS’ BASED ON EMBLEMATIC CASES

The granting of legal status to other-than-human entities has its origins in the Roman doctrine of public trusts which surfaced again during the 19th century in Colonial India. It has only been in the last twenty years that there has been a nascent trend to grant legal status and rights to spiritual-natural entities. These have been articulated in courts and legislatures under the aegis of legal rights for ‘Mother Earth’ in Ecuador and Bolivia, juristic personhood in New Zealand, India and Colombia, and the recognition of sacred natural sites in Africa. They are presented here in this order.

The doctrine of public trusts

The doctrine of public trusts, which is well established in many countries, seems fit to provide an important staging post on the road to legal personhood (Shelton, 2015). The ancient laws of jus gentium referred to the rules and laws that were common in the nations within the Roman Empire, as formulated by the Byzantine Emperor Justinian and later developed into the ‘public trust’ doctrine (Sandars, 1917) which held that the sea, the shores of the sea, the air and running water were common to everyone. This principle became the law in England, which distinguishes between private property capable of being owned by individuals and certain common resources that the monarch holds in inalienable trust for present and future generations.

Many common law courts have adopted and applied public trust law (Shelton, 2015). These laws confer trusteeship or guardianship on the government, with an initial focus on fishing rights and access to the shore, navigable waters and the lands beneath them. After the publication of an influential law review article by Joseph Sax (1970), courts in the United States began to expand the doctrine of public trusts and apply it to other resources, including wildlife and public lands (e.g. Wade v Kramer, 1984). This is included in the constitutions of Pennsylvania, Hawaii, Rhode Island and Alaska (Shelton, 2015). Public trusts, however, like corporations, are normally constituted only for the benefit of human beings. A more far reaching measure is required to confer juristic personhood and direct rights on other-than-human persons (OTHP) (Hallowell, 2002).

The granting of legal status to other-than-human people

Various attempts have been made in modern times to accord legal status to OTHP. In 1925 colonial judges in India conferred juristic personhood on temples, idols and deities (e.g. Mullick v Mullick, 1925) contingent upon the enspiriting of an idol and Salmond’s definition of ‘person’ (1913). Importantly, an idol (or a temple) does not develop into a juristic person until it is enspirited during a Pran Pratishtha ceremony (Mukherjea & Sen, 2013). Salmond defined ‘person’ (1913, p. 82) in the following way:

So far as legal theory is concerned, a person is any being whom the law regards as capable of ‘rights and duties’. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person even though he be a man.

In a seminal article, ‘Should Trees Have Standing?’, Stone (1972) argued that the granting of legal personality should not be limited to corporations and ships but should include animals, trees, rivers and the environment. Stone’s innovation was to propose that the interests of nature should be represented in court by a guardian and that the burden of proof should rest upon the party that had allegedly compromised the integrity of the ecosystem or organism. Stone’s comments echoed remarks made by US Supreme Court Justice William O. Douglas, who in a dissenting opinion argued in a landmark environmental law case (Sierra Club v. Morton, 1972) that environmental objects should have standing to sue in court.

In the years since Stone’s and Douglas’s comments, various innovations in law (outlined below in chronological order) have allowed for ‘nature rights’ to be recognised in Ecuador and Bolivia, ‘juristic personhood’ to be granted to biophysical entities in New Zealand, India and Colombia, and for SNS to be recognised in Africa.

The case of recognising Mother Earth as a legal entity

In 2008, Ecuador became the first country in the world to declare in its constitution that nature is a legal entity. More specifically, nature was identified as Pachamama, an earth-goddess (mother goddess), who is a huaca or numen who may adopt the persona of the Virgin Mary (Derks, 2009). Both earth-goddesses and numina are world-wide phenomena which date from the Neolithic era. Under Articles 10 and 71–74, the Constitution (Republic of Ecuador, 2008) recognises the inalienable rights of ecosystems; gives individuals the authority to petition on behalf of ecosystems, and requires the government to remedy violations of Pachamama or nature’s rights. It states that: “Nature or PachaMama … has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution” (Republic of Ecuador, 2008, Article 71).

On 21 May 2009, indigenous churches issued a joint declaration at the UN Permanent Forum on Indigenous Issues recommending that the forum recognise Mother Earth as a legal subject (World Council of Churches, 2009)

Bolivia followed Ecuador’s example by similarly amending its constitution to give protection to natural ecosystems (Plurinational State of Bolivia, 2010). The amendments redefined the country’s mineral deposits as ‘blessings’ and established new ‘rights for nature’, namely:

…the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to ecological balance; the right to the effective and opportune restoration of life systems affected by direct or indirect human activities, and the right for preservation of Mother Earth and any of its components with regards to toxic and radioactive waste generated by human activities (Plurinational State of Bolivia, 2010, Article 7).

Furthermore, the government appointed an ombudsman to defend or represent Mother Earth. The constitutional changes made by Bolivia and Ecuador both resulted from and have given new momentum to a ‘Pachamama movement’ (Weston & Bollier, 2013, p. 60) that has spread to sub-Saharan Africa, Australia, Canada, India, Nepal, New Zealand, United Kingdom and the United States. It has had a deep influence on Harmony with Nature resolutions in the United Nations (United Nations General Assembly, 2009; United Nations General Assembly, 2015; United Nations General Assembly, 2016). Efforts have also been made to secure a Universal Declaration of the Rights of Mother Earth at the UN, but these have not been forthcoming to date.

The cases of Te Urewera and Te Awa Tupua, New Zealand

Although the foundations for ‘ecosystems’ to become juristic persons were first laid down by Stone and Douglas in the USA, the New Zealand government translated rhetoric into practice, when it introduced legislation that covered ecosystems.

In 2014, New Zealand was the first nation on Earth to give up formal ownership of a National Park, regulated through the Te Urewera Act (The New Zealand Parliamentary Counsel Office, 2014). The area known by the local Tuhoe as Te Urewera was declared a legal person with “all the rights, powers, duties and liabilities of a legal person” (The New Zealand Parliamentary Counsel Office, 2014, Clause 14(1)).

Personhood means that lawsuits to protect the land of Te Urewera can be brought on behalf of the land itself, obviating the need to show harm to a human being. The new legal entity is now administered by the Te Urewera Board which comprises joint Tuhoe and Crown membership who are empowered to file lawsuits on behalf of Te Urewera and “to act on behalf of, and in the name of, Te Urewera” and “to provide governance for Te Urewera” (The New Zealand Parliamentary Counsel Office, 2014, Schedule 6, Part 2, clauses 17a and 17b). Tuhoe spirituality is directly provided for in Board decision-making, whereby in performing its functions, the Board may consider and give expression to Tuhoe tanga (Tuhoe identity and culture) and the Tuhoe concepts that underpin nurturance, namely: mana (authority, identity), mauri (life-force), kaitiaki (spiritual guardians), tikanga (traditional custom), ture (societal guidelines), tohu (signs and signals), tapu (sacredness), muru (social deterrent) and rahui (temporary bans).

Three years later, the New Zealand House of Representatives passed the Te Awa Tupua (Whanganui River Claims Settlement) Bill (The New Zealand Parliamentary Counsel Office, 2016) at its third reading on 15 March 2017 (Scoop News, 2017), declaring that the Whanganui River was a legal person after 170 years of litigation by the Maori. The legislation established a new legal framework for the Whanganui River (or Te Awa Tupua) whereby “Te Awa Tupua is a legal person and has all the rights, powers, duties and liabilities of a legal person” (The New Zealand Parliamentary Counsel Office, 2016, Clause 14 (1)) predicated on a set of overarching ‘intrinsic values’, or Tupuate Kawa. The legislation makes provision for two Te Pou Tupua or guardians appointed jointly from nominations made by iwi (Maori confederation of tribes) with interests in the Whanganui River and the Crown. Their role is to: “act and speak on behalf of the Te Awa Tupua … and protect the health and wellbeing of the river” (Clause 19 a and b). The Te Pou Tupua is ‘supported’ by a Te Karewao, or advisory committee comprising representatives of Whanganui iwi, other iwi with interests in the River and local authorities. The Te Pou Tupua enter into relationships with relevant agencies, local government and the iwi and hapu (sub-tribe) of the river3.

Furthermore in a ‘statement of significance’ (schedule 8) recognition is also given to the numina or kaitiaki that inhabit each of the 240 plus rapids (ripo) on the Whanganui River and are each associated with a distinct hapu:

The kaitiaki provide insight, guidance, and premonition in relation to matters affecting the Whanganui River, its resources and life in general and the hapu invoke (karakia) the kaitiaki for guidance in times of joy, despair, or uncertainty for the guidance and insight they can provide. (Schedule 8 (3)).

The cases of the Ganga River and Uttarakhand Himalaya, India

On the 20 March 2017, the High Court of Uttarakhand in India (Salim v State of Uttarakhand and Others, 2017) declared that the: “Ganga and Yamuna Rivers and all their (115) tributaries and streams…. are juristic persons with all the corresponding rights duties and liabilities of a living person” (Clause 19).The court appointed three officials to act as legal custodians responsible for conserving and protecting the rivers and their tributaries and ordered a management board be established within three months. The court’s decision was necessary because both rivers are “losing their very existence” (Clause 10) and both “are sacred and revered and presided over by goddesses” (Clause 11).

On 30 March 2017, the High Court of Uttarakhand reexamined a previous (failed) petition (Miglani v State of Uttarakhand and Others) and declared that:

We, by invoking our parens patriae4 jurisdiction, declare glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests, wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridical person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/ legal rights (Clause 2).

In contrast to the earlier judgment, the court recognised the role of other riparian states (under the aegis of an inter-state council), community participation and the importance of extending juristic personhood to the Himalayan ecosystem. It appointed six government officials to act as persons in loco parentis5 of the geographic features in the State of Uttarakhand and permitted the co-option of seven local representatives. The judgment quotes repeatedly from Secret Abode of Fireflies (Singh, 2009), which underlines the sacredness of mountains (as the abode of deities) and of certain Indian trees and plants, and emphasises the ‘rights for nature’.

On 7 July 2017, in an apparent setback, The Supreme Court of India (State of Uttarakhand v Salim) ‘stayed’ the landmark judgment of 20 March (Salim v State of Uttarakhand and Others, 2017) that granted juristic personhood to the Ganga and Yamuna Rivers (and their tributaries). A stay is a suspension of a case or a suspension of a particular proceeding within a case. However, this stay resulted not from a challenge to juristic personhood, which was accepted by the Supreme Court, but as a result of ambiguity regarding accountability of damage done to the rivers (Times of India, 2017).

The case of the Atrato River Basin, Colombia

On the 2 May 2017, it was publically announced in the national newspaper of Columbia, El Tiempo that the constitutional court had declared the Atrato River Basin a ‘subject of rights’ meriting special constitutional protection (ABColombia, 2017). The court called on the state to protect and revive the river and its tributaries and the Chocó. The state was given six months to eradicate illegal mining and to begin to decontaminate the river and reforest areas affected by illegal mining (some 44,000 ha). The court also ordered the national government to exercise legal guardianship and representation of the rights of the river (through an institution designated by the President of the Republic), together with the indigenous ethnic communities (mostly Emberas) that live in the Atrato River Basin in Chocó. The legislation may allow the Emberas to secure standing and protection for some of their jaikatuma or spirit mountains (Justicia y Pas, 2009) and defend their Sitios Sagrados Naturales or SNS (Organización Indígena de Antioquia) (OIA, undated, CRIC, undated).

The case of the African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights resolved in May 2017 to “protect Sacred Natural Sites and Territories” (Clause 44 (iv)). This was in response to a submission from the African Biodiversity Network (ABN) and Gaia Foundation of A Call for Legal Recognition of SNS and Territories and their Customary Governance Systems (ABN, 2016, p. 1), which was predicated on Gaian panentheism.

LITIGATION BASED ON NON‐HUMAN LEGAL PERSONHOOD

There is evidence that constitutional and legal provisions are beginning to give rise to litigation and enforcement based on the legal personhood of nature. In Ecuador there have been two cases:

The first lawsuit (Wheeler v DPGEL, 2011) was filed against the local government near Rio Vilcabamba in March 2011, which was responsible for a road expansion project that dumped debris into the river, narrowing its width and thereby doubling its speed. The project was also done without the completion of an environmental impact assessment or consent of the local residents. The case was filed by two residents, citing the violation of the Rights of Nature, rather than property rights, by the damage done to the river. The case was especially important because the court stated that the rights of nature would prevail over other constitutional rights if they were in conflict with each other, setting an important precedent. The proceedings also confirmed that the burden of proof to show there is no damage lies with the defendant. Though the plaintiffs were granted a victory in court, the enforcement of the ruling has been lacking, as the local government has been slow to comply with the mandated reparations (Daly, 2012).

In a second case (REANCBRN, 2011) on June 2011 the government of Ecuador filed a case against illegal gold mining operations in northern Ecuador in the remote districts of San Lorenzo and Eloy Alfaro. The prosecution argued that the rights of nature were violated by the mining operations, which were polluting the nearby rivers. This case was different from the previous case in that it was the government addressing the violation of the rights of nature. The court’s decision was also swiftly enforced, as a military operation to destroy the machinery used for illegal mining was ordered and implemented (Daly, 2012)

DISCUSSION

Matching indigenous beliefs with modern jurisprudence

Both anthropologists and lawyers recognise that there are major differences and tensions between indigenous beliefs and modern jurisprudence and have suggested alternatives to ‘juristic personhood’. Bohannan (1957) has suggested that ‘juristic’ entities should be locally defined rather than by the court or government and Petrazycki (2011, p. 189–190) has suggested “legal relationships with animated entities” which resonates with animistic relational ontologies. Given the complexities and disparate nature of local definitions and norms it might be easier for enspirited SNS to be “integrated into the circle of ‘legal subjects’ in order to survive” (Stavru, 2016) and for the concept of juristic personhood to be infused with indigenous meaning (Cajete, 2000).

Clearly more research is required in order to address legal systems that do not appear to be fit for purpose and, under the aegis of legal pluralism and a sui generis framework, to identify legal systems predicated on ethno-jurisprudence and customary law.

Congruence with animism

Juristic personhood resonates with the beliefs underpinning most sacred natural sites. SNS are typically enspirited by a unique geospecific spirit with a unique personhood capable of spiritual governance. This is predicated on a pluriversal animistic tradition which does not resonate well with ecocentrism, panentheism or pantheism. Ecocentrism is monistic and the concept of ‘rights’ is a construction from outside an indigenous animistic context (Solon, undated). Panentheism assumes an intrinsic connection between all living things and the physical world and focuses on gnostic mystic advancement in order to merge with the world soul, which is an alien approach for animists. Pantheism is popular in some conservation circles (Harrison, 2004). It does not recognise deities who are personal and anthropogenic and the approach robs particular life forms of their own measure of significance and agency (Plumwood, 1993) and discounts “the particularity of place and ecosystem and the diversity of life” (Northcott, 1996, p. 113).

Legal acceptance

Colonial judges in India (Mullick v Mullick, 1925) were able to employ “the great legal freedom to personify, almost it would seem on a whim” (Naffine, 2009, p. 166) allowing them to infer juristic personhood on an idol and operating on the assumption that an enspirited idol certainly had standing. The colonial judges employed a line of reasoning that mirrors a key element of the argument in favour of legal standing for other OTHP; the directly affected parties deserve the courts’ consideration of their interests, and may also require the courts to appoint appropriate legal representatives to argue their case for them (Totten, 2015). In this context, it appears perverse that dissenting justices in North America could only enquire about standing for natural entities in two cases (Sierra Club v Morton, 1972; Reece v Edmonton City, 2011).

Some scholars have suggested that extensive legislative change would be necessary to recognise legal standing for OTHP. A case such as Reece v Edmonton City (2011), however, suggests that it is already within the power of the judiciary to consider these issues. As Chief Justice Fraser (dissenting) asserted, unusual cases such as Reece6 offer a fertile ground for the growth of law in a changing society. It appears that the judiciary already has at its disposal the legal tools necessary to accommodate standing for SNS and protected areas, and judges need only to make use of them (Totten, 2015).

There appears to be no reason why ‘juristic personhood’ cannot be used as part of a legal regime to ensure standing for protected areas (Sobrevila, 2008) and particularly for enspirited SNS. If numina or SNS are granted legal status as juristic persons they have standing as a plaintiff. If their bio-cultural integrity is compromised (if for example a SNS is threatened with clear felling), then they can seek redress in court through a guardian, and the burden of proof lies with the offending party/parties.

The question of guardians

Although juristic persons have standing, they are also perpetual minors and require guardians to represent their interests (especially in court) ideally under the aegis of a local ‘community of believers’ (Marsilius of Padua 1324 in Emerton, 2015, p. 72). Marsilius embraced a form of democracy that views the people, or the ‘community of believers’, as the only legitimate source of political authority. He argued that sovereignty lies with the people, and that citizens should elect, correct, and, if necessary, depose their political leaders. In the context of Tibetan SNS, for example, appropriate guardians might be the hereditary village leader, or a trance medium, or a divination master that will establish the wishes and demands of the numina. There are a number of judicial options if minors are not represented. Under the aegis of Western jurisprudence, judges are able to appoint, by court order, a guardian ad litum7 for the duration of the legal action or a state guardian parens patriae8 on a longer-term basis. In a Hawaiian court case (MKAH v BLNR, 2013), for example, a descendent of the Kanaka Maoli (native Hawaiians) wrote an affidavit (accepted by the court) that granted him power of attorney to act and speak on behalf of a spirit named Mo’oinanea that inhabits mount Mauna Kea.

Scaling-up

Most enspirited SNS are small, such as those in SW China, and typically average 250 ha (Studley, 2016) and are therefore ritually protected by a small group of local people, which could represent the SNS in court. Challenges arise however in terms of standing for larger natural entities such as the Great Barrier Reef or the Mekong River. The Great Barrier Reef, an important cultural site for many Aboriginal and Torres Strait Islander peoples, is being degraded as a result of global carbon emissions (Marshall & Johnson, 2007), but who will represent it in court and who can be sued? The Mekong is especially sacred to Buddhist and animistic communities who live along its banks in the seven nations (Tibet, China, Myanmar, Lao PDR, Thailand, Cambodia and Viet Nam) through which it flows. It presents different problems because it crosses multiple borders and jurisdictions. As a result, appointing guardian(s) would require transnational regional cooperation, and enforcement would require several countries working together with several sets of national legislation.

Future priorities

Given the current threatened status of SNS in many parts of the world and their lack of recognition, it would appear that the granting of juristic personhood to those SNS that are outside of recognised protected areas is more of a priority than those already under the aegis of conservation designations. Furthermore, juristic personhood is augmented by customary laws, sui generis frameworks and ritual protection of SNS that are often extant in indigenous societies. Although as a legal term ‘juristic personhood’ or its cross cultural equivalent does not exist in lay Tibetan and may not appear in the lexicons of many Indigenous people, as a concept it resonates with animist worldviews and ontologies (Studley, 2016).

Although SNS “occur in all IUCN categories of protected area” (Dudley, 2008) it is apparent that their extent, distribution and spiritual governance is largely unknown, and even less is known about SNS in the homelands of Indigenous people (Studley, 2016). It is vitally important especially when establishing or expanding protected areas to identify and map SNS and to record the expectations of the numina who inhabit the SNS and any customary laws that might affect conservation outcomes, positively or negatively.

CONCLUSIONS

Recent legislation has provided conservationists with new ecocentric legal tools: ‘nature rights’ and ‘earth law’ and legal regimes; ‘juristic personhood’ and ‘spiritual governance’ to safeguard SNS and ecosystems. There is no reason why the legal regime of juristic personhood and ecocentric legal tools cannot both be used to safeguard protected areas and OECM, especially given the use of the latter in litigation in Ecuador (Daly, 2012) and the recent recognition of SNS in Africa (ACHPR, 2017) and elsewhere. The legal regime of juristic personhood and spiritual governance mediated by numina may be the optimal choice for safeguarding enspirited SNS because, unlike ecocentrism or panentheism, it conceptually resonates with the animistic worldview and relational ontologies of many Indigenous peoples.

Although the semantics vary, most of the Indigenous people who live closest to most SNS accept other-thanhuman personhood and experience culturally specific legal relationships with entities who are de facto juristic persons. These relationships are predicated on contractual reciprocity between local people and the numina, which provide protection and blessing providing they are honoured, appeased and empowered to exercise spiritual governance and custodianship over their domain.

Currently, many enspirited SNS in the homelands of Indigenous people are seemingly rendered ‘invisible’ or discursively excluded because they are owned and governed by other-than-human persons. This would seem to be a lost opportunity for conservation, as well as a disservice to Indigenous people. Recognition of enspirited SNS as juristic persons with legal standing should lead to their recognition by IUCN as a governance sub-type of ICCA and OECM under the aegis of a spiritual governance type. The result could lead to the safeguarding of SNS under national law and recognition internationally, a benefit for both Indigenous people and nature conservation. The concept of juristic personhood for rivers, glaciers and mountains could be a significant and effective addition to the tool-box available to conservationists and protected area managers.

#### Similar logic has been recognized for extending legal personhood to idols.

S. M. Solaiman 17, School of Law, University of Wollongong, “Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy,” Artificial Intelligence and Law, vol. 25, no. 2, 06/01/2017, pp. 155–179

Idols as a legal person

An idol is a statue created and worshipped by humans as a god or goddess, perhaps most popularly in the Hindu religion. As a legal person, a Hindu idol has been held to have peculiar desires and a will of its own which must be respected, as held by the Privy Council in Pramatha Nath Mullick v Pradyumna Kumar Mullick (1925) 27 BOMLR 1064 (Mullick) in 1925 (see also Yesey-Fitzgfrad 1925). Hence, Hindu idols have long been judicially recognised in some jurisdictions, such as India, as a legal person, founded upon religious customs (Duff 1929; Lord Shaw in Mullick 1925). Shaw J held in Mullick (1925), which involved a dispute arising out of the controlling and worship of a Hindu family idol, ruled that such an idol is a juristic person and held:

A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a “juristic entity.” It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir, [i]t is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established.

The Privy Council further clarified that a Hindu idol is not a chattel or personal property as such. It ruled that ‘this was not a dedication, in any sense of the word, of the idol as property, nor of the idol at all. It was a dedication of real estate in trust for the idol, recognised as a legal entity, to which such dedication might be made’ (Mullick 1925).

These powerful judicial stipulations resemble the most fundamental feature of corporations in articulating the legal status of an idol.

Although an idol differs overtly from a company in terms of physique, they are comparable to each other in that their attributes of personality are borrowed from human beings who are lawfully entitled to manage them with all the powers, as with a guardian or manager of an infant and his/her assets (Duff 1929; Lord Shaw in Mullick 1925). In other words, an idol’s legal interests are attended to by its managers. Savigny thus rightly compared a corporation with an idol in respect of juristic personality, which is composed of humans (Duff 1929). Consistently, referring to the capacity for rights and liabilities, Duff admits that a recognised idol is a legal person as good as a human being and a body corporate (Duff 1929). This capacity does refer to that of managers of respective idols. When an idol’s legal personality comes to its power of will, a question may emerge as to how to ascertain such a will. Perhaps the best answer would be that whatever the relevant law regards as its power of will, giving due consideration to the interests of the worshipers as well as social interests in materialising the wishes of pious founders, will be the idol’s will (Duff 1929; Lord Shaw in Mullick 1925). To clarify further, the Privy Council in Mullick 1925 pronounced that the will of the idol will be expressed by its guardian, the manager.

Therefore, rights and duties of an idol are those of the individuals having managerial powers. Based on the similarities between corporations and idols in terms of personality attributes, we can draw a conclusion that an idol’s personhood is justified, and that the corpus of an idol is used just as a symbol of power, god or goddess, whose affairs are managed by humans.

#### Intersection with spiritual ecology

Kelly D. Alley 19, Anthropology, Auburn University, “River Goddesses, Personhood and Rights of Nature: Implications for Spiritual Ecology,” Religions, vol. 10, no. 9, 9, Multidisciplinary Digital Publishing Institute, 09/2019, p. 502

### AFF Area---Tribal Food Sovereignty

#### Protect indigenous food supply

Sequoia Butler 20, Senior Managing Editor of the Wisconsin International Law Journal, Fall 2020, " I AM THE RIVER, THE RIVER IS ME " [1](https://advance-lexis-com.turing.library.northwestern.edu/document/?pdmfid=1516831&crid=8c52d6a2-e878-49c7-83a1-9f826dd7e6a7&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A61YW-RDS1-JGBH-B16B-00000-00&pdcontentcomponentid=157324&pdteaserkey=sr3&pditab=allpods&ecomp=szznk&earg=sr3&prid=71ff86aa-4d89-46ba-83c5-f6cb8911591f): HOW ENVIRONMENTAL PERSONHOOD CAN PROTECT TRIBAL FOOD SYSTEMS, Wis. Int'l L.J. Vol. 38, p. 79-107

II. Analysis: How Environmental Personhood Can Benefit the Traditional Foods and Food Systems of Native American Tribes

Environmental personhood, as exemplified by the Maōri in New Zealand, offers Native American tribes in the United States a path for protecting their food sovereignty. Current models used to protect indigenous rights, while beneficial, do not achieve the fullest protection possible, protection that environmental personhood would provide. The current models used are a treaty rights framework and an international human rights framework. Both models involve locating a right, granted by treaty or recognized by an international convention. The identified rights are then used in indigenous petitions or lawsuits to enforce that right in relation to the environment. Both frameworks recognize a place for indigenous epistemologies in crafting policies that adequately address the harms of climate change on tribal lands. 94However, both frameworks fail to assist in truly empowering tribes to act and advocate on behalf of their land, in that tribal leaders are unable to exercise decision-making power in decisions concerning their land.

Environmental personhood permits indigenous tribes to assume a more active role in advocating and protecting their land-related rights. Instead of searching for standing to protect their land-related rights, environmental personhood would establish the tribe as trustee or guardian for the natural object at issue. This Part briefly introduces and analyzes the two models of protecting indigenous environmental rights, and how they fall short. A discussion of environmental personhood as applied to Native American food systems analyzes how environmental personhood is a viable alternative for protecting food systems in light of climate change. Finally, this Part discusses the potential implications of the environmental personhood model.

A. Treaty Rights Framework: Litigating Treaty Rights as a Means of Protecting Indigenous Interests

The treaty rights framework has been used to enforce rights that are specifically enumerated in treaties. In the early 18th and 19th centuries, treaties were used by the American government to expand westward. 95In exchange for ceding control over territory and establishing permanent borders between the United States and tribal territories, Native American tribes were guaranteed rights. These treaties consisted of guaranties that Native American tribes could continue to access traditional hunting, farming, and fishing grounds, as well as receive annuities from the U.S. government. 96Treaties also sometimes imposed requirements on the United States, such as stipulations that the United States provide cloth, tobacco, sugar, flour rations, or armaments to the tribes. 97Most treaties signed by Native American tribes and the U.S. government contained various provisions recognizing the subsistence and cultural rights of Native Americans. 98Rights recognized included gathering wild rice, roots, and berries, as well as maintaining access to traditional hunting or fishing grounds. 99These 18th and 19th century treaties recognized the subsistence and cultural rights belonging to most Native American tribes. 100Despite recognition by treaty, these rights are rarely honored, especially those pertaining to access to traditional lands.

Currently, Native American tribes seeking to enforce treaty rights against the United States, or a state or local government, turn to litigation as a means of enforcement. 101Litigation subjects treaty rights to judicial interpretation, which determines whether those rights are enforceable or not. 102Typically, judicial interpretation of treaty rights leans heavily on the fact that hunting and other subsistence activities were integral parts of the "diet and livelihood" of tribes. 103Without hunting and subsistence rights guaranteed, it is unlikely tribes would have signed the treaty. 104Due to the centrality of hunting and subsistence rights to tribal life, most judges have interpreted subsistence treaty rights as integral to the functioning of a tribe, and have been judicious in upholding and applying those rights. 105

This model is exemplified by the case of New Jersey v. EPA, 106where eleven tribes and fifteen states sued the Environmental Protection Agency (EPA) over their decision to remove coal-and oil-fired electric utility steam generating units (EGUs) from regulation under Section 112 of the Clean Air Act. 107The tribes argued that the removal of these units from regulation would impair tribal fishing rights by allowing an increase in the amount of methylmercury in fish, making it unsafe as a source of food and unsalable. 108They argued further that tribes entered into treaties on the basis that they would be guaranteed permanent fishing rights; the contamination resulting from the EPA's decision would essentially interfere with treaty fishing rights. 109Even though fishing rights formed the foundation of their treaties, the "EPA utterly failed to consider the Tribes' treaty fishing rights, even though they should have formed an important part of the context for that determination." 110

Under a Chevron analysis, the court ultimately concluded that the EPA violated the plain text of Section 112 of the Clean Air Act when it removed EGUs without complying with the requirements of section 122(c)(9). 111 New Jersey v. EPA illustrates how treaty rights are "related to subsistence and environmental protection." 112In this scenario, "if the fish are contaminated, then consuming them threatens the health of tribal members, and ultimately threatens the continued existence of the Tribe itself if tribal members are committed to exercising their treaty rights." 113

B. International Human Rights Framework: How International Human Rights Buoy the Protection of Indigenous Rights

An alternative framework used by indigenous peoples to assert rights are international human rights. An international human rights framework looks beyond the rights guaranteed by a nation-state's domestic treaties, constitution, or statutes. Instead, it is based on covenants, declarations, and treaties made by international organizations or between national governments in support of a specific type of right. Several covenants are key in recognizing the right of indigenous peoples to enjoy their cultural way of life and subsistence rights: The International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries; and the United Nations Declaration of the Rights of Indigenous Peoples.

The International Covenant on Civil and Political Rights (ICCPR), 114adopted by the U.N. General Assembly in 1966, commits signatory parties to the protection of basic civil and political rights of all individuals. 115The broad nature of the rights provided makes it significant to indigenous tribes. The ICCPR acknowledges the right of self-determination where "all peoples" have the right to choose their sovereignty and exercise their rights accordingly. 116Additionally, the ICCPR provides that "in no case may a people be deprived of its own means of subsistence." 117It also provides that "ethnic, religious or linguistic minorities" have the right to "enjoy their own culture." 118Notably, the United States is a signatory to the ICCPR. 119

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) 120commits signatory parties to uphold and protect the economic, social and cultural rights of individuals and non-self-governing and trust territories. 121Article 1 explicitly recognizes the right to self-determination for all peoples. 122The ICESCR goes further than the ICCPR in recognizing a people's right to determine and pursue their political, economic, social, and cultural goals. 123Moreover, the ICESCR includes a protection for individuals asserting that they shall not be deprived of their means of subsistence and are guaranteed the right to "take part in cultural life." 124Similar to the ICCPR, it recognizes rights that are central to an indigenous way of life, while not singling out indigenous people.

The International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169) focuses specifically on indigenous peoples. Created as "a framework for indigenous and tribal peoples' empowerment," 125Convention 169 offers a framework of rights and protections that would enable indigenous peoples to utilize their right to self-determination and "participate in decision-making that affects their lives." 126The rights articulated in Convention 169 are not "special rights," but rather "universal human rights" that are contextualized to the situation of indigenous peoples. 127To this end, Convention 169 affirms the right of indigenous and tribal peoples to "define their own priorities for development." 128Signatory governments are required to coordinate action on protecting these rights, and are prohibited from using integrationist policies that would prevent indigenous peoples from practicing their cultural and spiritual way of life. 129

Articles 14 and 23 of Convention 169 are crucial to recognizing the nexus between indigenous people's land and subsistence rights. Article 14 recognizes the ownership rights indigenous peoples have over lands to which they exclusively resided or "have traditionally had access for their subsistence and traditional activities. 130Article 23 recognizes that traditional activities, such as hunting, fishing, trapping, and gathering, are important to maintaining indigenous culture and economic self-reliance. 131When read together, Articles 14 and 23 acknowledge that land and subsistence activities are central to indigenous peoples' cultural and economic well-being.

The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), a resolution passed by the United Nations in 2007, also defines the rights of indigenous peoples, including rights to cultural expression, identity, health, and economic well-being. 132UNDRIP's purpose is to encourage nation-states to work with resident indigenous peoples, protect indigenous rights, and protect indigenous culture. Article 20 of UNDRIP acknowledges the right of indigenous peoples "to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." 133It also provides that "indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress." 134Article 20 recognizes an explicit right to subsistence and the means used to achieve that subsistence.

The language used in the ICCPR, ICESCR, Convention 169, and UNDRIP acknowledge principles of self-determination, subsistence rights, and cultural rights. It also acknowledges the "link between protecting an indigenous people's means of subsistence and the people's right to culture." 135These rights, as articulated, may be used by indigenous tribes to assert their ability to govern decisions related to the sovereignty and survival of their tribes.

C. Environmental Personhood: A Better Alternative

While the treaty rights and international human rights models equip indigenous peoples with the language needed to assert their rights, an environmental personhood model gives indigenous tribes the mechanisms needed to exercise actual decision-making power over their land. The New Zealand model of environmental personhood has several components. First, it involves the actual grant of legal personhood to the natural object. Second, it establishes an advisory group, whose role and responsibilities encompass managing and caring for the natural object. Third, it establishes a policymaking group, whose role is to create guidance and policies on the preservation of the natural object in conjunction with other non-indigenous interested parties. Altogether, the New Zealand model of environmental personhood provides indigenous tribes with a tool to respond to the effects of climate change on their subsistence rights by allowing them to directly advocate on behalf of their land.

Some Native American tribes have already recognized the utility of applying legal personhood to culturally and spiritually significant natural objects, such as land or food sources. The following applications of environmental personhood are examples of how Native American tribes use an environmental personhood model to protect a certain natural object.

### AFF---AT: States CP

#### Preemption---state-level rights of nature get struck down and preempted by federal courts---at most states can grant human rights to nature which fail---impact’s extinction

Devon Alexandra Berman 19, Joint J.D. Candidate, American University Washington College of Law and University of Ottawa, Common Law Section, Fall 2019, “COMPARATIVE INTERNATIONAL APPROACHES TO ENVIRONMENTAL CHALLENGE: LAKE ERIE BILL OF RIGHTS GETS THE AX: IS LEGAL PERSONHOOD FOR NATURE DEAD IN THE WATER?,” Sustainable Development Law & Policy, 20 Sustainable Dev. L. & Pol'y 15

On February 26, 2019, the citizens of Toledo voted to amend the city's charter to grant the Lake Erie ecosystem the legally enforceable "right to exist, flourish and naturally evolve," establishing the Lake Erie Bill of Rights (LEBOR). 2 Seeking to protect the watershed from further degradation, the LEBOR gave citizens standing to sue polluters on its behalf. 3 The LEBOR deemed invalid any existing or future permit issued to a corporation by any federal or state entity that would violate Lake Erie's rights. 4 The LEBOR is just one example of the developing trend of communities taking a rights-based approach to protect local resources. 5

Less than twenty-four hours after the citizens of Toledo voted to adopt LEBOR, a local farm partnership filed a complaint in the North District Court of Ohio claiming that LEBOR's enactment exceeded the city's authority and was preempted by state and federal law. 6 The case was ultimately rendered moot in July 2019, when Governor Mike DeWine delivered a fatal blow to LEBOR by signing into law a provision stating that an ecosystem does not have standing in Ohio court. 7

The legislature's swift preemption of LEBOR illustrates the inherent shortcomings of a municipal approach. 8 This Article surveys the legal barriers to extending personhood to nature in the United States and concludes that they are likely insurmountable. The Supreme Court's narrow interpretation of constitutional standing requirements precludes citizens from bringing an action alleging direct injury to an ecosystem itself, irrespective of citizen suit language like that contained in LEBOR and other environmental legislation. 9 These institutional barriers support arguments for a state-level approach to environmental protection.

BACKGROUND: GRANTING RIGHTS TO NATURE HAS INTERNATIONAL PRECEDENT

There is a growing trend of countries adopting rights of nature legislation. 10 In 2008, Ecuador became the first country to pass a constitutional amendment enabling any "natural or legal person" to bring an action seeking for the government to comply with its duty to "respect and actualize" nature's right to "legal restoration." 11 When the provincial government widened a road without conducting an impact study, resulting in flooding, two landowners successfully invoked constitutional rights of nature and sued on behalf of the river, and the government was ordered to "restore the riparian ecosystems." 12 In 2015, the Constitutional Court of Columbia upheld standing for plaintiffs opposing mining operations in their communities on the grounds that "standing existed in terms of legitimate representation," and that the right to a healthy environment permeated all other constitutional rights. 13

LEGAL STANDING FOR NATURE IN THE U.S. IS FRUSTRATED BY CONSTITUTIONAL STANDING REQUIREMENTS

Article III, § 2 of the Constitution provides that "[t]he judicial Power" of the federal courts of the United States only extends to specified "cases" and "controversies." 14 The Article III standing doctrine limits the category of litigants empowered to sue in federal court to seek redress for a legal wrong. The Supreme Court has held the "irreducible constitutional minimum of standing" requires the plaintiff to "allege personal injury fairly traceable to defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 15 In environmental enforcement actions, general grievances based on harm to the environment do not meet standing requirements unless the plaintiff can establish a concrete, personal injury that will likely be redressed by a court remedy. 16 For example, environmental groups in Lujan v. Defenders of Wildlife claimed that the government's funding of overseas projects threatened the plaintiffs' ability to observe endangered species. The court rejected the "ecosystem nexus" argument, precluding generalized adverse environmental effects as a basis for standing to challenge the activity. 17 As a result, citizen suit provisions of environmental statutes empower people to seek enforcement of environmental laws, but they cannot be used to circumvent Article III requirements. Based on the narrow interpretation of standing requirements, it is unlikely that the Supreme Court will recognize standing for injuries alleged on nature's behalf. 18

SECURING A CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT AT THE STATE LEVEL

Several states are taking a rights-based approach to preventing environmental degradation by amending their constitutions to include a right to a healthy environment. 19 By framing environmental degradation as a violation of citizens' rights, these amendments require governments to prioritize environmental protection when regulating industrial activity. In [\*16] 1972, Pennsylvanians voted to amend the state constitution and became the first state to enshrine environmental rights to clean air and water through the Environmental Rights Amendment (ERA). 20 The amendment states that the Commonwealth is the trustee of the state's natural resources, "common property of all people, including generations yet to come." 21 In 2013, the ERA was successfully invoked to defeat key provisions of a bill that would have afforded the fracking industry broad powers and exemptions. 22 The Court held that the provisions violated the ERA by preempting local regulation of oil and gas activities and precluding local governments from fulfilling their trustee obligations. 23

This landmark Pennsylvania Supreme Court ruling demonstrated the legal potency of enshrining citizens' right to a healthy environment in state constitutions. In 2017, a landmark case was brought under the ERA against the legislature for allegedly misappropriating environmental protection funds for other uses. 24 In ruling against the legislature, the Court expanded its interpretation of the ERA and held that laws are unconstitutional if they "unreasonably impair" a citizen's ability to exercise their constitutional rights to "clean air, pure water and environmental preservation." 25 The Court reaffirmed that the ERA commits the government to two duties: (1) to prohibit state or private action that results in the depletion of public natural resources; and (2) to take affirmative legislative action towards environmental concerns. 26

Drawing on Pennsylvania's experience, a constitutional amendment to the Ohio Constitution that secures its citizens' right to clean water is a more practical approach for protecting Lake Erie than attempting to confer legal standing through municipal legislation that has limited enforceability. 27

CONCLUSION

Extreme environmental degradation presents an unprecedented threat to human existence. 28 Environmental policy rollbacks under the Trump Administration have decreased environmental regulation and stripped clean water protections. 29 The Supreme Court of Pennsylvania's interpretation of the ERA compels the state government to take positive legislative to prioritize environmental protection. In the meantime, it is becoming increasingly clear that society needs to undergo a radical shift in values in order to effectively mitigate the human impact on the environment.

#### Federal lands---they’re key to the overall environment and only protected by federal standing for nature

Michael Shank 21, the communications director at the Carbon Neutral Cities Alliance and adjunct faculty at New York University’s Center for Global Affairs, 3/19/21, “Protecting federal lands should be a no-brainer,” <https://thehill.com/opinion/energy-environment/544049-protecting-federal-lands-should-be-a-no-brainer>

Undoing former President Donald Trump’s legacy of environmental damage and degradation — and his administration’s many regulatory rollbacks — has been high on President Joe Biden’s 100 days to-do list. The impressive lineup of environmental leaders appointed across energy, transportation, environment and interior departments and agencies indicates the seriousness of Biden’s green agenda. Many in the environmental movement are, rightly, hopeful.

There’s one area in particular, however, where the Biden administration could go further and maximize its environmental impact across agencies; it builds on Biden’s executive order to halt fossil fuel leasing on public lands and water. It sits within the Department of Interior (DOI), now headed by the historic confirmation of America’s first Native American secretary, Deb Haaland. It would start with federal lands and set an important legal rights-based precedent for how we approach and utilize these taxpayer-owned lands.

Here’s the proposal. Federal lands — also referred to as public lands — should be safe for the public and should not threaten or undermine public safety. That seems like a no-brainer. Further, anyone that compromises the public's safety — and the public's “right to be let alone,” which U.S. Supreme Court Justice Louis Brandeis noted were “the most comprehensive of rights" in his dissent in Olmstead v. United States — should be held accountable under the law.

This also seems like a no-brainer. Public lands should, indeed, be safe for the public. And yet they’re not. Public lands are some of the most exploited, extracted and unsafe lands in America — a reality made worse by the Trump administration. But it’s a legacy of heavy extraction that started long before Trump. A recent Government Accountability Office (GAO) report shows that many of the nearly 900 mining operations on federal lands aren’t subject to royalties — meaning that companies are not paying taxpayers for the benefits of drilling on public lands — nor are they required to produce data for the government to review.

This lack of transparency and accountability allows these mining operators — again, on public lands — to pollute and discharge excessive damaging effluents into “12,000 miles of American rivers and streams and 180,000 acres of lakes and reservoirs, destroying drinking-water supplies and crucial wildlife habitat.”

These private companies are operating freely within mining laws that haven’t been updated since the 1870s and extracting public resources on taxpayer-owned land. Not only are they not paying royalties for access to public resources, but they’re also polluting these public resources without paying cleanup costs.

For all these reasons and more, a lawsuit was recently filed in the U.S. District Court for the District of Oregon — and it’s currently being appealed to the U.S. Court of Appeals for the Ninth Circuit — that aims to establish legal protections for Americans when using publicly owned land, whether they're doing scientific research, recreating socially or observing nature and its inhabitants.

It’s long past time that we update the old laws from the 1800s. This lawsuit, which aims to do that and set a new benchmark for treatment of public lands, was brought against the Trump administration’s DOI, the U.S. Department of Agriculture (DOA), the U.S. Department of Defense (DOD), the U.S. Environmental Protection Agency (EPA) and their secretaries.

It will now carry forward and apply to Biden’s administration. Filed by the Animal Legal Defense Fund and others, the lawsuit applies a rights-based framing and reaffirms what rightly should be perceived as citizens' rights — and, by extension, the rights of nature and its inhabitants.

This latest effort to protect public lands isn’t new. President Theodore Roosevelt, an ardent protector of public lands, tried to set a standard for the right use of public lands, encouraging the preservation and right use of forests and the right use of waters. Roosevelt would be horrified with the exploitation, extraction and exhaustion of our public lands and with Trump’s last-minute selling off of oil drilling rights in the Arctic National Wildlife Refuge, just one example of how easily public lands can be exploited for private profit.

That’s why the lawsuit is so important and why Biden’s administration has an opportunity to lead here and return the rights of federally owned lands to the public. Biden put a freeze on new leases on public lands, but what about the old leases? What would it look like in practice if the lawsuit moves forward and successfully secures the right to be “let-alone” on public lands?

It would give Americans freedom from harm on those lands — including the harm from air pollution, water pollution, mining pollution, drilling pollution and more — and the right to clean air and clean water. Again, this seems like a no-brainer. And we have a history of rights-based advocacy on which this lawsuit builds: the right to vote, the right to bear arms, the right to marriage, the right to choose and the right to own property.

The freedoms won in the last century were pitched, packaged and positioned as rights owed to deserving and/or underserved communities. It's an effective proposition, as Americans are fond of the Founders and their rights-based framing. The history of rights-based wins in court is arguably the most compelling story of progress in America.

Now it's time to add to those rights: The right for humans to be let alone and the right of nature — and its inhabitants — to be let alone, too. That is why the ALDF v. U.S. lawsuit is so important. Now, more than ever, we need legal protections — and rights — to ensure that nature is left alone. Until we have a stronger legal foundation for the protection of the public and the natural environment, both will continue to be put in harm's way.

It’s time for the Biden administration to strengthen the right to be let alone, in order to lock in environmental protection. This one move might be Biden’s most effective environmental play this term. We've made much progress in the past century. Now it's time to make more.

#### Enforcement---only federal legal personhood makes it broad and strong---key to the whole aff

Hailey A. Walley 19, BA in Philosophy, Anthropology and Environmental Studies, University of Mississippi, May 2019, “TWO ARGUMENTS FOR EXTENDING LEGAL PERSONHOOD TO NATURE,” http://thesis.honors.olemiss.edu/1565/3/Walley%20Thesis.pdf

Following the establishment of the Global Alliance for the Rights of Nature (GARN) in 2010, Pittsburgh, PA became the first major U.S. city to recognize the Rights of Nature and ban shale gas drilling and fracking as a way to “elevate the rights of people, the community and nature over corporate rights.” 35 Following this momentum, one of the founders of GARN began working with Santa Monica, CA to establish a Sustainability Rights Ordinance. Unlike the Tamaqua Borough ordinance, Santa Monica’s was not in response to an immediate threat to the community, but was rather an extension to a Santa Monica Sustainable City Plan that was established in 1994. In this sense, the Santa Monica case is unique in that it takes a proactive approach in ensuring future sustainable development rather than acting retroactively. But this just shows that extending rights to nature as a tactic for allowing people to protect their rights has some precedent.

Finally, in 2013 and 2014, the Highland and Grant townships of Pennsylvania passed Community Bill of Rights ordinances. Highland Township was the first to do so, and it was spearheaded by Highland’s Water Authority with the help of CELDF in response to the growing concern that fracking would contaminate the region’s water supply.36 It expanded community rights, granted ecosystems in the county the right to exist and flourish, and banned all activities of natural gas and fossil fuel extraction and waste water injection. A year later, Grant Township followed suit in instating a Community Bill of Rights ordinance in response to Pennsylvania Gas and Electric’s filing for a permit to inject waste water into one of the unused wells in the township.37 Considering this township relies entirely on private wells and springs for their drinking water, the residents became concerned that the injected water waste would leak into their drinking-water sources. Thus, they established their own Community Bill of Rights ordinance that prohibited depositing oil and gas waste materials in the township.

In all of these cases, Kauffman and Martin found that they conceptualize Nature on the ecosystem level, rather than individual flora or fauna, and the ecosystems are sets of “natural communities” whose welfare is necessary for the wellbeing of human communities. He found that most of these cases were retroactive approaches to immediate threats, but showed how Santa Monica’s ordinance functions as a precautionary principle to prevent damage in the future. The main issue he found was in their legal standing, considering they are merely community ordinances, which are superseded by State and Federal laws. In fact, the Grant and Highland Townships’ ordinances were contested in court by energy companies, and the court ruled in favor of the corporation by saying that the municipality was overstepping its authority. In response, the residents in both townships developed a new legal structure, the Home Rule Charter, in hopes of enforcing the Rights of Nature in the U.S. federal system. In summary, Kauffman and Martin concluded that, in the U.S., “Rights of Nature is linked to the concept of community rights and is seen as a tool for communities to protect themselves against the vagaries of corporate property rights.”38

IV.5 Applying Kauffman and Martin’s Argument to the Autonomy Argument

I believe that these cases of U.S. counties and cities establishing Rights of Nature provide a great deal of support for my claim that granting such rights can and will act as a tool for protecting individuals from exploitation by corporations and a tyrannical government. The point for which I’m arguing isn’t just a theoretical suggestion: as Kauffman and Martin show, it is building on actual examples that have already been tried in the United States. My own argument, however, extends beyond these examples in two ways. First, I think these examples show that Rights of Nature need to be implemented on a state, and eventually federal, level if they are to be truly enforceable. The fact that these ordinances were contested in court, and the communities ultimately lost, only exemplifies the nature of our government to put the interest of corporations and economic concerns over the well-being of its citizens, which is why it will be important for us promote the extension of legal personhood to Nature on a broader level where it will have to be enforced.

Second, I believe these existing laws could be strengthened by emphasizing how extending rights to Nature protects autonomy. Were the Rights of Nature laws to be based on this concept of personal autonomy, it would help ensure that the individual’s protection and wishes were considered on an equal basis to the economic considerations. The issue now is that corporations are worth much more than nearly any damage they can cause. This makes it difficult for any individual citizen to successfully contest a corporation in court, which is why it is imperative we alter the argument to place focus on the encroachment of an individual’s autonomy rights. Thus, by extending legal personhood to Nature under the caveat of securing personal autonomy rights, it would grant citizens an alternate and broader route to legally contest the exploitative actions by corporations and the government.

#### Corporations will lobby and win because their rights are ensured by Supreme Court precedent

David R. Boyd 17, associate professor of law, policy, and sustainability at the University of British Columbia, 2017, The Rights of Nature: A Legal Revolution That Could Save the World, unpaginated ebook edition

As communities across the U.S. assert that the rights of people, communities, and nature ought to take priority over corporate and property rights, they are provoking a massive legal response from big business. In addition to the cases already highlighted, there are similar lawsuits underway in California, Ohio, Colorado, and New York. When the California city of Compton enacted an ordinance banning fracking within city limits, the Western States Petroleum Association sued. Faced with the might of the oil and gas industry, Compton withdrew its ban. An attempt to put forward a ballot initiative in the state of Washington that would have recognized the rights of the Spokane River was struck down by the Washington Supreme Court on the grounds that water rights are governed by existing state law and can’t be overridden by local governments.

Industry lawsuits against community bills of rights in Broadview Heights, Ohio, and Blaine Township, Pennsylvania, have been successful. Judge Michael K. Astrab said state law gives the Ohio Department of Natural Resources “sole and exclusive authority” to regulate oil and gas wells, overturning Broadview Heights’ voter-approved ban on future wells. Judge Donetta W. Ambrose wiped out large parts of Blaine Township’s ordinances, finding that Blaine “does not have the legal authority to annul constitutional rights conferred upon corporations by the United States Supreme Court.” She also ruled that the township’s drilling restrictions ran afoul of the Pennsylvania Oil and Gas Act.

Courts are striking down community rights of nature ordinances because they are inconsistent with state and/or federal law. To Thomas Linzey, this reinforces his most fundamental point: today’s laws and institutions are antithetical to the rights of natural ecosystems and local communities. Linzey concluded in a CELDF press release, “Communities are recognizing the rights of nature in law as part of a growing understanding that a fundamental change in the relationship between humankind and nature is necessary.” Gus Speth, co-founder of the Natural Resources Defense Council and the former dean of the Yale School of Forestry, agrees, and said to Earth Island Journal, “I am very excited about the move to a rights-based environmentalism. Lord knows we need some new and stronger approaches. And endowing the natural world with rights is a big part of that.”

#### Federal courts will strike down the CP for violating the supremacy clause

Meredith N. Healy 19, J.D. Candidate, University of Colorado Law School, 2019, “Fluid Standing: Incorporating the Indigenous Rights of Nature Concept into Collaborative Management of the Colorado River Ecosystem,” Colorado Natural Resources, Energy & Environmental Law Review, <https://www.colorado.edu/law/sites/default/files/attached-files/healy_web_edition_pdf.pdf>

Following Sierra Club v. Morton, environmental advocacy was limited to a duly-injured advocate with access to the courts claiming injurious impact on a human. Over the past decade, however, American legal and social scholars have begun to question whether this third-party advocacy is the best way to advocate for the environment.74

A. Grassroots Rights of Nature Legislative Campaigns Take on Well-Funded Oil and Gas Industry

From their Mid-Atlantic base, the Community Environmental Legal Defense Fund (“CELDF”) has promoted the rights of nature by providing legislative language to communities around the country.75 In 1995, CELDF began a dual mission to promote local self-government and the rights of nature.76 Since then, over 200 communities have adopted CELDF-drafted local legislation.77

In New Mexico in 2013, the Mora County Board of Commissioners passed a CELDF-drafted ordinance “protecting the rights of human communities, nature, and natural water.”78 The main thrust of the ordinance was the county’s desire that “corporations may not drill, extract, or contract for any oil and gas development.”79 An energy exploration firm filed suit against both the county and its board of commissioners, seeking an injunction to prohibit the defendants from enforcing the ordinance proscribing extractive uses within the county.80 In a 138-page opinion, the United States District Court for the District of New Mexico struck down the ordinance, holding, as pertinent here, that the ordinance violated the Supremacy Clause and was impermissibly overbroad, in violation of the First Amendment.81 Nevertheless, local extractive use industry publications warned that “[w]hile industry, the media and the public might ignore all the commotion created about the hydraulic fracturing discussion, this issue is the beginning of a social movement that is greater than just the oil and gas industry, it is a potential game changer for all of corporate America.”82

In that same year, sixty percent of voters in the town of Lafayette, Colorado, approved the CELDF-drafted “Lafayette Community Rights Act.” Supported by the League of Women Voters and a local grassroots group, East Boulder County United, this measure targeted the hydraulic fracturing oil extraction technique (“fracking”) and proposed “certain rights for city residents and ecosystems as part of the city charter such as clean water, air and freedom from certain chemicals and oil and gas industry by-products.” Less than a year later, the Boulder District Court ruled in favor of the ballot measure’s opponent, the Colorado Oil and Gas Association. Finding the regulation of oil and gas to be a matter of mixed state and local concern, Boulder County District Judge D. D. Mallard held that Lafayette did not have the authority to prohibit practices authorized and permitted by the state.

Similar legislative and judicial attempts by CELDF to codify the rights of nature continue to meet resistance in federal court. In perhaps the organization’s most publicized anti-fracking and rights of nature case, CELDF’s opponent, Pennsylvania General Energy, filed a Motion for Sanctions for $52,000 in attorneys’ fees following the utility’s successful yet prolonged litigation in district and circuit courts. The court reluctantly fined CELDF’s lawyers the full $52,000 for the “continued pursuit of frivolous claims and defenses.”

### AFF---AT: Human Rights CP

#### Rights of nature are better than human rights to nature---the CP institutionalizes environmental destruction

Susana Borràs 16, lecturer of Public international law and International Relations in the Department of Public International Law and International Relations in the Universitat Rovira i Virgili (URV, Tarragona-Spain), 2016, “New Transitions from Human Rights to the Environment to the Rights of Nature,” Transnational Environmental Law, Vol. 5, No. 1, p. 113-143

The recognition and protection of ‘rights of nature’ represents a new approach in the field of environmental law. Traditionally, legal systems have considered nature as ‘property’ and have promoted laws to guarantee the property rights of individuals, corporations and other legal entities. The consequence has been that environmental laws and regulations, despite their preventive approach, have developed so as to legalize and legitimate environmental harm.

Certainly, the recognition of individual rights in relation to the environment has had a significant influence at the supranational level. However, the recognition of a human right to an adequate environment has not been without controversy. Firstly, the protection of the environment through a human right to an adequate environment, rather than through protective rules, has had no discernible positive impact on the conservation of natural resources. Secondly, protection of the environment is not really an individual right but an unenforceable programmatic norm.

A new approach is emerging, however: the recognition of the rights of nature, which implies a holistic approach to all life and all ecosystems. In recent years, a series of normative precedents have surfaced, which recognize that nature has certain rights as a legal subject and holder of rights. These precedents potentially contribute not merely a greater sensitivity to the environment, but a thorough reorientation about how to protect the Earth as the centre of life.

From this perspective, known as ‘biocentrism’, nature is not an object of protection but a subject with fundamental rights, such as the rights to exist, to survive, and to persist and regenerate vital cycles. The implication of this recognition is that human beings have the legal authority and responsibility to enforce these rights on behalf of nature in that rights of nature become an essential element for the sustainability and the survivability of human societies. This concept is based on the recognition that humans, as but one part of life on earth, must live within their ecological limits rather than see themselves as the purpose of environmental protection, as the ‘anthropocentric’ approach proposes. Humans are trustees of the Earth rather than being mere stewards. The idea is based on the proposition that ecosystems of air, water, land, and atmosphere are a public trust and should be preserved and protected as habitat for all natural beings and natural communities.

Recognizing rights of nature, Ecuador, Bolivia and a growing number of communities in the United States (US) are developing their environmental protection policies on the premise that nature has inalienable rights. This is a radical move away from the assumption that nature is property – an assumption which has fostered climate change, the disappearance of natural areas, indiscriminate surface felling of trees, desertification of new territories, dumping of toxic substances, oil slicks, and endless other actions that cause environmental damage. This article tracks the change from the anthropocentric to the biocentric perspective and its implementation, including the recent trend in attributing a greater role to human responsibility for environmental protection. The article also discusses new regulatory precedents which mark an evolution in environmental law, both nationally and internationally, aimed at achieving an environmental policy that is more consistent with the conservation of natural resources. Finally, the article explores the questions of who is able to claim the rights of nature and how legal systems can best defend them.

#### Rights of nature are the only durable, irreversible approach to environmental protection---reliance on human interests fails

Oliver A. Houck 17, Professor of Law, Tulane University, Winter 2017, “ARTICLE: Noah's Second Voyage: The Rights of Nature As Law,” Tulane Environmental Law Journal, 31 Tul. Envtl. L.J. 1

One need not be a Cassandra to note that the forests of the world are rapidly vanishing, as are wetlands to development, mangroves to fish farms, and grasslands to desert; small continents of plastics now rotate in all five oceans, growing larger each year, fragments leaching into the stomachs of pelagic turtles, fish, and birds; heavy toxins now contaminate the Arctic and do not degrade; glaciers from the Andes to the Himalayas are melting, as are the ice sheets of the North and South Poles; Australia's Great Barrier Reef is bleached white and disintegrating, and with it some of the most astonishing life forms on earth; fresh water amphibians are plummeting, as are avian migrations, pollinators, and butterflies; two thirds of the breeding birds of Britain, a country noted for its attention to them, are in decline, some species already extinct; the tiger, the orangutan, and mega-vertebrates on every continent are living on borrowed time and may find their final refuge in zoos; forms of life that developed over eons, entire complexes of life, are winking out like birthday candles, up to three species an hour, an estimated 15% to 40% [\*46] of all species by 2050, not to malice, not necessarily by design, but all by human hands. 248

At the same time, national programs designed to arrest these declines, have at best slowed them instead. Those intending to "eliminate" discharges end up authorizing them at lower levels; 249others [\*47] managed under "multiple use" yield to the highest bidders, 250yet others prescribe but do not require, 251or mitigate but do not avoid, 252or mitigate only part of the harm and declare victory. 253On the natural resources side, landscape-level issues are rarely addressed, 254and recent attempts to do so are now up for repeal. 255Recovery plans for endangered species - nature most at risk - lie unenforceable and unimplemented, more aspirational than the term "plan" would imply. 256Even the most ironclad statutes yield to the unceasing demands of politicians, lobbyists, and litigation that may stall them for decades, 257leading to a kind of stasis in [\*48] which nature is simply lucky to hang on. At this pivotal juncture, America, long a world leader in environmental protection, has gone into a freefall with no end in sight. 258All of which has prompted searches for new approaches, a countervailing right of its own.

Nature rights are not the only response on the table. Fusing environmental rights with human rights has gained considerable traction in countries with significant indigenous populations, opening their own front on natural resource preservation. 259The U.S. public trust doctrine has experienced a revival of its own, 260and a recent trust case in Oregon (by and on behalf of children) has dared to challenge climate change head on. 261The broadest of these approaches yet, launched in the early l970s, has been to incorporate environmental provisions (e.g., "each person has the right to a healthy environment") into half the constitutions of the world, 262building their own precedent, leading to surprisingly [\*49] favorable judicial decisions on every continent 263and to such related initiatives as France's right of non-regression (an idea of genius). 264Given the success of these patently open-ended doctrines, one is tempted to simply declare "rights of nature" as well and let the courts figure them out … as they have with such basic concepts as "due process," "privacy," and "equal protection" in other areas of law. To an extent this has already begun, but considerable work has also been done on standards as well. There is room for both processes to move forward, which is the way evolution works. And succeeds.

Each of these approaches seeks a redline for human development while there is still time. Each remains, however, essentially anthropocentric, our entitlement to nature for our use and enjoyment, and this approach has its attractions not only for its reliance on tangible benefits but also its comforting notion that the environment is "ours" to begin with. Their drawback is that they are also "ours" to end with, and what humans claim for themselves they can also unclaim, often quite easily. Programs disappear. Entire institutions disappear. Protections that depend on humans staying the course are inherently fragile, and when lost can be lost forever. It is the terrible dynamic of this field.

Which takes us back to rights in nature. Their very ecocentricity, anathema to their critics, is their first value-added, an extrinsic trigger new to the game. 265The decision is no longer simply mano-a-mano among competing human preferences, and its measuring sticks are more objective than those found in other schemes: risks to living things we can calculate, avoid, and restore. They are the missing party with its own bottom line. These rights may take decades to mature (what rights do not?), but as rights, they will be difficult to remove. In the meantime, they open the door. More than that, they open the mind.

A second value-added by nature rights is deeply rooted in the human genome. We grew up together, producing linkages that E.O. Wilson calls "biophilia," 266and they are all around us, found in the [\*50] simplest things: in nursery rhymes, stuffed bears, and trips to the zoo, in birdfeeders, whale watches and animal rescue leagues, in fishing rods, hunting licenses and the (astonishing) popularity of the National Park System, in the Eagle Bar, the Chicago Bears and the Year of the Snake and the Rabbit, in corporate logos, real estate prices and the names of SUVs, in the place we seek out for honeymoons, vacations or the briefest moment to exhale … a still pond, the shade of a tree, the sight of a white bird rising, with gratitude for their being out there, for the simple fact of their being.

Rights of nature tap into a place that anthropomorphism and its pragmatism, for all their importance, cannot touch: a powerful link to the human heart. They provide a baseline not easy for humans to manipulate, backed by this undeniable bond. Their contribution to the world at large could be yet greater, not limited to changing outcomes in particular cases, nor to empowering local communities, nor to creating new protected areas and restoring old ones before they too disappear, nor even to finding a place in corporate sustainability codes, gross domestic product, and other instruments of the prevailing economic order. Through each of these means and more, in framing a new way to perceive the world, an old way really, a world we will continue to dominate but may come to acknowledge as entitled to life, liberty, and a pursuit of happiness all its own.

A great deal may ride on this happening.

#### The CP can’t contain growth within biophysical limits, by definition

Susana Borràs 16, lecturer of Public international law and International Relations in the Department of Public International Law and International Relations in the Universitat Rovira i Virgili (URV, Tarragona-Spain), 2016, “New Transitions from Human Rights to the Environment to the Rights of Nature,” Transnational Environmental Law, Vol. 5, No. 1, p. 113-143

The ‘biocentric approach’ offers a novel perspective on environmental law. Legal systems have traditionally regarded nature as ‘property’ which can be exploited and degraded, rather than as an integral ecological partner with its own rights to exist and thrive. The consequence is that domestic laws and regulations on environmental protection effectively legalize environmental damage by regulating how much pollution or natural destruction of nature may lawfully occur. Within this paradigm, the recognition of a human right to the environment cannot be sufficient to ensure the protection of the environment. In the opinion of Bosselmann:

[I]n the long term the existence of an environmental human right could be seen as self-contradictory. A better option is the development of all human rights in a manner which demonstrates that humanity is an integral part of the biosphere, that nature has an intrinsic value and that humanity has obligations toward nature. In short, ecological limitations, together with corollary obligations, should be part of the rights discourse.

The recognition of a right of nature represents an integrated, holistic view of all life and all ecosystems. From this perspective, nature becomes not the object of protection but a legal subject: all forms of life have the right to exist, persist, maintain and regenerate their vital cycles. In parallel with this recognition is another: that humans have the legal authority and responsibility to enforce these rights on behalf of nature.

The ‘biocentric’ view is definitely a reaction to the severity of environmental conditions and the many threats to natural ecosystems. It is based on the idea that humans are part of nature and that the conservation of nature is, above all, a duty of human beings. According to this argument, any form of life is important for the balance of nature. In recognition of the rights of nature, the Ecuadorian constitution, Bolivian legislation, and a growing number of communities in the US are orienting their environmental protection systems around the premise that nature has inalienable rights, as do humans. This is a radical idea and is certainly not without its critics and detractors. Yet this article argues that it is a reasonable response to the subordination of environmental protection to human interests and the large-scale environmental devastation that this subordination fosters.

#### Rights for nature catalyze a shift in consciousness around the environment, spurring follow-on protections---the counterplan’s human-centric approach replicates the status quo

Hope M. Babcock 16, Professor of Law, Georgetown University Law Center, 2016, “A Brook with Legal Rights: The Rights of Nature in Court,” Ecology Law Quarterly, Vol. 43, https://lawcat.berkeley.edu/record/1127508?ln=en

It is important to give nature the independent legal right to go to court to protect itself from harm because the current system will not allow others to intervene on nature‘s behalf. As discussed above, third parties face nearly insurmountable barriers when they advocate for nature in court. The executive branch is perpetually hampered by limited resources, and occasionally a lack of will, when it comes to protecting nature from harm.98 Congressional paralysis (or worse), in matters affecting the environment has made that branch of government the least effective of all.99 The existing situation has real consequences for the environment—‖hundreds of thousands of species on the brink of extinction, and only a tiny fraction will ever find activists in or out of the government to defend them.‖100

Granting something rights has real importance101: ―[p]rocedural determinations about which parties and persons can come into the courtroom create substantive outcomes and entail social ramifications. These substantive implications have a constitutive role in determining who does or does not belong within a community of legal subjects.‖102 However, ―rights exist in competition with other rights,‖ which means, for example, that granting animals rights interferes with humans‘ right to treat them like personal property.103 This makes expanding the circle of rights-holders controversial.

Granting something rights also has more than symbolic effect.104 Justice Blackmun saw

the legal recognition of environmental injuries as more than a mechanism for saving national forests; it was a means through which environmentalism could evolve into an integral element of the ills addressed by law, permeating the federal constitution, laissez faire economics, nonpartisan politics, and even our cultural sense of morality.105

Stone believed that a society that spoke of the ―legal rights of the environment‖ would be inclined to enact more laws protecting the environment.106 Identifying something as a right invests the underlying activity with ―meaning,‖ vague but still ―forceful,‖ in everyday language.107 When the concept of a right is infused into our thinking, it intuitively becomes ―part of the context against which the ‗legal language‘ of our contemporary ‗legal rules‘ is interpreted.‖108 Calling something a right can also subtly shift ―the rhetoric of explanations available to judges,‖ leading to the exploration of ―new ways of thinking‖ and ―new insights.‖109 These new insights might encourage judges to ―develop a viable body of law,‖ which, in turn, might ―contribute to popular notions,‖ thus changing how the new rights-holder is viewed.110

Granting something rights also has rhetorical importance. Naming a nonhuman, like an animal, as a party in a lawsuit tends to symbolically give the animal and its cause ―greater significance.‖111 This might cause people to stop thinking of animals as mere property, because property cannot sue.112 Current constitutional and prudential standing requirements have made ―ineffective‖ most efforts to enforce the Animal Welfare Act under its own provisions or under the Administrative Procedure Act.113 But ―designating animals as something more than property, and allowing animals and people with interests in animals greater access to standing, will advance the progression of animal rights so that they more accurately depict the significance animals hold in our current world and give them the protections they deserve.‖114 As Professor Taimie L. Bryant notes,

[l]egal standing for animals could be considered simply as a pragmatic means of increasing humans‘ compliance with human-made laws to protect animals by way of a procedural mechanism that does the least conceptual violence to traditional standing principles. . . . In seeking to address the harm to an animal, it makes more procedural sense for a lawyer to say, ―I am here representing a particular animal plaintiff who has been harmed by a particular human‘s failure to provide food and water‖ than to say, ―I am here representing a human plaintiff who has been harmed by another human‘s failure to provide food and water to an animal.‖115

But granting something a right is of symbolic importance only until a court is willing to review actions that are inconsistent with that right.116 To ―count jurally,‖ what Stone describes as having ―legally recognized worth and dignity in its own right,‖ the rights-holder must be able to ―institute legal actions at its behest,‖ and a court must consider injury to the thing when it determines legal relief, which, in turn must benefit the rights-holder.117 The purpose of granting nature standing, then, is to protect other rights nature possessed and to ensure that whatever harm to the environment occurs will be mitigated or repaired.118 In the words of Justice Douglas, granting nature access to court is the only way ―[t]here will be assurances that all of the forms of life which [nature] represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemming as well as the trout in the streams.‖119

Stone concurred for reasons of morality and self-interest. Stone believed that ―the strongest case can be made from the perspective of human advantage for conferring rights on the environment.‖120 He advocated that steps be taken away from a human need to dominate things, ―to objectify them, to make them ours, to manipulate them, to keep them at a psychic distance.‖121 Stone believed that the gap between humans and the natural environment needed to lessen.122 One way to help integrate humans into the natural environment was to encourage the popular consciousness to relinquish its ―psychic investment in our sense of separateness and specialness in the universe.‖123 Stone found evidence that a new ―sort of consciousness‖ was developing ―for the betterment of the planet and us.‖124

#### Remedies based on harm to human interests devalue nature and fail to adequately protect ecosystems

Erin L. O’Donnell 18, Senior Fellow at Melbourne Law School; and Julia Talbot-Jones, Visiting Fellow at the Australian National University, 2018, “Creating legal rights for rivers: lessons from Australia, New Zealand, and India,” Ecology and Society, Vol. 23, No. 1

Not everyone thinks legal standing (the right to sue or be sued in court) for nature is a good idea, however. Several commentators have argued that legal standing for nature is an unnecessary complication of standing law, which is based on the notion that only directly affected individuals can bring actions in a court of law (Rolston 1993, Warnock 2012). Others have argued that the recent relaxation in environmental law of the definition of “harm” to humans has sufficiently lowered the hurdle to achieving legal standing (Sunstein 1992, Bertagna 2006, Preston 2006, Vanhala 2012). They argue that this relaxation makes it much easier for human plaintiffs to demonstrate the necessary harm, and seek redress for it, without requiring the creation of legal rights (Stone 2012).

However, the counter to this argument is that these other advances in environmental law actually provide two powerful reasons for extending legal rights to nature. First, from a philosophical perspective continuing to prosecute environmental cases on the basis of ever-more attenuated “harm” to humans relies on an increasingly convoluted and anthropocentric argument, which obscures the needs of nature (O’Riordan 1981, 1991). For example, there are many elements of nature that are not captured by existing anthropocentric paradigms such as natural capital or ecosystem services (see Salzmann 1997), and identifying environmental impacts outside of these conceptions is crucial for effective protection of the environment in law (Ruhl and Ruhl 2001). Although the advances in environmental law have enabled more environmental cases to be brought to court, the outcome has often been the conflation of the harm experienced by the natural object with the harm to human interests. This can ultimately devalue the natural environment, and continues to reinforce the anthropocentric position that nature only has value in terms of its benefit to humans (Bertagna 2006).

#### The CP is explicitly anthropocentric

Susana Borràs 16, lecturer of Public international law and International Relations in the Department of Public International Law and International Relations in the Universitat Rovira i Virgili (URV, Tarragona-Spain), 2016, “New Transitions from Human Rights to the Environment to the Rights of Nature,” Transnational Environmental Law, Vol. 5, No. 1, p. 113-143

The scope and utility of the right to a healthy environment remain the subject of ongoing debate. The existing international consensus is to protect the environment for the benefit of humans. This is because the idea of rights is built around property rights, which implies a relationship of superiority between humans and non-humans, as well as an appropriation of nature. This in turn allows the deployment of capitalist social metabolism, as a way in which human societies organize their increasing exchanges of energy and materials with the environment, which is arguably the ultimate cause of the current ecological crisis. The consequence of this ethos is that environmental goods and values are protected not because they have their own intrinsic value, but because of their role in satisfying human needs. Humans should therefore decide upon the degree of protection required. This formulation is the logical consequence of the traditional human rights concept.

In general, legal systems have an inherent anthropocentricity and most of them ignore the current social impulse which advocates the protection of a healthy environment on its own terms. Consequently, and despite the fact that the human right to the environment has become a social vindication, its relationship with other rights and environmental protection is still not guaranteed for either the current or future generations.

In the view of many, the very existence of environmental human rights reinforces the idea that the environment and natural resources exist only for the benefit of humans and have no intrinsic worth. Anthropocentric approaches to environmental protection are seen as perpetuating the values and attitudes that are at the root of environmental degradation. The environment is protected only to the extent needed to protect human well-being. An environmental right thus subjugates all other needs, interests and values of nature to those of humanity. This ordering is criticized by proponents of deep ecology and earth jurisprudence on the basis that it effectively denies recognition of animals, plants, species, and ecosystems as rights holders.

#### Protecting nature through the framework of human rights means humanity wins whenever they’re in conflict

Guillaume Chapron 19, et al., 1Department of Ecology, Swedish University of Agricultural Sciences, 3/29/19, “A rights revolution for nature,” Science, Vol. 363, No. 6434, DOI: 10.1126/science.aav5601

Whether nature has moral rights is likely to remain debated, but nature clearly can have legal rights—and does so in jurisdictions that have recognized, granted, or enacted them. Legally recognized rights of nature have stemmed from sources including constitutions, laws, and court decisions (2).

The granting of legal rights to nonhumans is not in itself revolutionary or even unusual. Although moral considerations often influence the development of legal rights (and vice versa), legal rights need not have a moral basis. The law can give rights to all kinds of entities if it finds reason to do so. Corporations, trade unions, and states are all nonhuman entities that have rights and duties under the law. They have rights to litigate if they are injured and duties not to violate the rights of others. The legal system has no difficulty adjudicating nonhuman rights.

Rights of nature may offer benefits lacking in other types of legal protection for the environment. For example, human rights to a healthy environment would not protect species whose existence may conflict with human activities. Conservation laws such as the Endangered Species Act can protect species but do not give them a right to exist. This protection can therefore be removed at the whim of the legislature (10). If instead species rights were recognized, species or their representatives could seek restitution when harmed even when they are not explicitly protected by regulations and when their needs conflict with human needs. This may be interpreted as an attempt by one interest group to impose its will on others; however, as with other types of rights, nature rights can lead to a remedy when regulations fail to correct injustices.

#### The CP misses the vast majority of harm to ecosystems that don’t intersect with human interests

Erin L. O’Donnell 18, Senior Fellow at Melbourne Law School; and Julia Talbot-Jones, Visiting Fellow at the Australian National University, 2018, “Creating legal rights for rivers: lessons from Australia, New Zealand, and India,” Ecology and Society, Vol. 23, No. 1

Second, the argument for the use of legal personality for protecting nature is one of efficiency and cost effectiveness. If the injuries to the environment (as opposed to the human users of, or participants in, that environment) are ignored, then a significant proportion of the total injuries are not accounted for. For example, the cost of poor water quality to users is calculated in terms of the costs of treatment necessary to improve the water quality to the required standard. However, this treatment may fail to address the broader issues associated with the river’s ecosystem health and well-being. If the injuries to the river are not recognized in court, then they cannot be compensated for, which means that the true costs of environmental impacts may be underestimated. Further, without giving due consideration to the injuries imposed on the river, the damages to other potential plaintiffs may be insufficient to cover the costs of litigation. In some cases this may result in the litigation not proceeding.

### NEG---Case

#### Recreates every problem of modern environmental law

Jan Darpö 21, emeritus professor in environmental law at Faculty of Law, Uppsala Universitet, March 2021, “CAN NATURE GET IT RIGHT?,” https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL\_STU(2021)689328\_EN.pdf

By now, the reader of this study is aware that I concur with those legal scholars who do not share the view that RoN entails a shift of paradigm in law that has the capacity to save the environment from the challenges we face today. Many of the deficits that this movement criticises modern environmental law for having are general problems that have been discussed for years and which will not be remedied by introducing new labels in a system that still must be handled by humans. The dichotomy between RoN and modern European environmental law is therefore partly artificial, a symbolic construct. Environmental law remains an instrument handled by individuals and – as the history of RoN shows – any alternative discourse of thoughts faces the same challenges as the old schools, most importantly; lofty legislation not adapted to the nature and development of the environment, deferral to economic growth in decision-making, weak enforcement, and lack of funding for environmental interests. When deconstructing the RoN concept, no radical new instruments come to light compared with what we have today.

Even so, the RoN school of thought contains fresh insights in its critique of Western society and presents ideas that can be developed within our conventional legal notions. At the heart of the concept lies the notion that law must adapt to ecological and scientific reality in order to addressthe main challenges of today, such as climate change and large-scale losses of biodiversity. The limiting factor for achieving this is not, however,that nature does not have rights, or other basic flaws in our legal system, but the lack of public support for a radical change, and the necessary political will. I cannot think of any reform that lies beyond the present institutional or legal scope of the EU. Environmental and social reforms require decisions through political process, and until the necessary shifts in public attitudes or values occur, the fundamental direction of society will not change.

#### “Substantial Injury” requirements

Emilie Blake 17, research assistant to the Center for Water Law and Policy, J.D. Candidate, Texas Tech University School of Law, September 2017, “NOTE: Are Water Body Personhood Rights the Future of Water Management in the United States?,” Texas Environmental Law Journal, 47 Tex. Envtl. L.J. 197

The main purpose of granting personhood rights to a river or lake is to protect against injury. 103 From a conservation perspective, if injury means any non-natural depletion, this legal theory is a brilliant idea for water conservation. 104 However, if courts interpret injury to require a substantial injury, then personhood rights might not be very helpful. 105 Regardless of the injury standard, the guardian of a personhood right will ensure continued observation of a water body and planning for its sustainable future. 106 This guardianship sets personhood rights miles ahead of not only the riparian and prior appropriation doctrines, but also ahead of the public trust doctrine in terms of water conservation because of the much stricter standard of guardianship and the eradication of any property rights. 107 Guardians can rigorously oversee how water bodies are used and can sue for potential injury whenever they deem it appropriate. 108

#### Ecuador and Bolivia prove

Erin L. O’Donnell 18, Senior Fellow at Melbourne Law School; and Julia Talbot-Jones, Visiting Fellow at the Australian National University, 2018, “Creating legal rights for rivers: lessons from Australia, New Zealand, and India,” Ecology and Society, Vol. 23, No. 1

Further, legal rights are only worth having if they can be enforced. To enforce legal rights for a river, several practical factors must be accounted for. First, an individual or organization must be appointed to act on a river’s behalf, to uphold the rights of, and speak for nature (Croley 1998, Stone 2010). Second, capacity in the forms of time, money, and expertise may need to be made available so that the rights of the river can be upheld in court. And third, river representatives and funding sources are likely to need some form of independence from state and national governments, as well as sufficient real-world power to take action, particularly if such action is politically controversial (O’Donnell 2012).

Historically, these factors have been absent in cases where legal rights have been granted to nature and, as a result, legal rights for nature have been difficult to enforce (Whittemore 2011). For instance, in the examples of Ecuador and Bolivia, few cases have been successfully upheld and even when the rights have been recognized in court, local actors responsible for enforcement have lacked capacity to translate the legal decision into effective outcomes on the ground (Daly 2012).

#### It’s indifferentiable from status quo environmental law

Julien Bétaille 19, Associate Professor of Public Law, University of Toulouse Capitole, 3/27/2019, “Rights of Nature: Why it Might Not Save the Entire World,” Journal for European Environmental & Planning Law, Vol. 16, No. 1, <https://brill.com/view/journals/jeep/16/1/article-p35_35.xml#affiliation0>

\*RoN = Rights of Nature

The main thesis of this paper is that RoN will not do away with the main shortcoming of modern environmental law, being the lack of proper enforcement. It is opined that merely acknowledging nature’s rights into legislation will in itself not lead to a better protection of the eu’s endangered nature if not complemented with a clear commitment for more strict enforcement. The added value of RoN needs to be measured against the three main assumptions upon which it is based. In this respect, it is important to underline that a revision of modern environmental law could, in itself, come forward to many of the prevailing criticism upon which RoN are based. In this article, it is substantiated that modern environmental law is able to recognize the intrinsic value of Nature (1), second, that acknowledging RoN is not necessarily to be equated to a “legal revolution” (2) and, third, that RoN might not live to its promise regarding saving the world (3).

Environmental Law Revisited: Reinforcing the Intrinsic Value of Nature?

The first assumption underlying the RoN’s theory is that environmental law is too anthropocentric to take into account the intrinsic value of nature, whereas RoN would be more suitable to carry out the task of reasserting this intrinsic value. In other words, RoN is founded upon the assumption that even modern environmental law is not equipped to fully protect the intrinsic value of nature. This is a poignant point of departure. Often, RoN advocates submit that modern environmental law is the result of Cartesian philosophy, reproducing the renowned Nature/Culture dualism. Accordingly, environmental law would explicitly acknowledge that mankind is to be framed as the “master” of nature. For instance, pursuant to current property law nature is to be treated an object. In contrast, however, RoN is often linked to ecocentric philosophy and therefore is more inclined to approach nature as a subject of rights. However, this dichotomy, while attractive from a philosophical point of view, renders an objective legal critique of RoN challenging at best.

In my view, RoN supporters attach too much weight the above-depicted distinction. Indeed, it is possible to argue that modern environmental law is less anthropocentric than it used to be (2.1), that property rights can be limited in light of environmental interests (2.2) and that modern environmental law protects the intrinsic value of Nature (2.3), which recently has led to the recognition of “pure” ecological harm in several legal instruments (2.4). Moreover, on the procedural ground, access to justice has been broadened in environmental cases (2.5) and the burden of proof is no longer an insurmountable hurdle in legal cases (2.6).

#### Empirics---conflicting laws and underenforcement make RoN ineffective

Julien Bétaille 19, Associate Professor of Public Law, University of Toulouse Capitole, 3/27/2019, “Rights of Nature: Why it Might Not Save the Entire World,” Journal for European Environmental & Planning Law, Vol. 16, No. 1, https://brill.com/view/journals/jeep/16/1/article-p35\_35.xml#affiliation0

4.2 Effectiveness, or a Lack Thereof, after All?

Whereas it remains relatively easy to posit that modern environmental law is failing to reach its objective, the track-record of RoN is not much better. The first empirical studies regarding the effectiveness of RoN in countries, such as Ecuador and Bolivia, clearly reveal the myriad of limitations to be faced in this respect. For example, some authors have concluded that “Ecuador’s (RoN) amendments are more likely to have an impact if Ecuador implements structural and procedural changes”.76 This should come as no surprise. Simply granting legal personhood to nature will not make a big difference when it is not supplemented with structural changes. For one, even when everybody can act as a guardian when nature’s rights are encroached upon, nature will still disappear if no-one is effectively willing to take manifest violations before court. Even when nature’s rights are explicitly protected in a constitution, other provisions in the same constitution might still prioritize economic development and lead to ongoing environmental destruction. In fact, most of it is linked to what Herbert Hart named “secondary norms”.77

Whereas primary norms prescribe human beings to perform or abstain from certain behaviors, secondary norms ensure that new primary rules are enforced whenever cases of non-compliance arise. In other words, simply endowing substantive rights upon nature might matter little if not accompanied by strict enforcement commitments. Of course, one might admit that whenever RoN are included in the primary norms, this might ultimately also influence the legislator when enacting secondary norms. In other words, implementing RoN in primary norms might ultimately also trickle down in the body of secondary norms, which might be more centered on ensuring a better enforcement of the existing rights.

Be that as it may, we always end up with the “effectiveness challenge” when contemplating new environmental norms. Even if all countries would immediately decide to implement RoN into their legislation, there exists no guarantee that the environmental decline would be cured. One might submit that ensuring effectiveness has little to do with the legal nature of the obligation towards nature. To put it bluntly: opting for a RoN approach might inflict additional harm the environment if not properly enforced, especially when measured up against modern environmental statutes which are properly applied in the field. It is well-known that both legal and extra-legal factors are to be addressed in order to ensure proper compliance with environmental norms. And thus, if RoN advocates are really serious about “saving the world”, they ought to invest all their time and efforts in finding solutions for the multitude of challenges when it comes to compliance. In this regard, the focus should be on the following items: coherent legislation, strict sanctions, tackling corruption, impartiality of public authorities and judges, administrative inertia, regulators’ capture, access to justice, judges’ interpretation, execution of judicial decisions, etc.78

#### Personhood for individual natural objects fails---every example would be endlessly litigated.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

Other problems concern LP’s practicality, its reliance on an idea of a natural ‘object’, and its implications for Indigenous Traditional Owners.

Practical problems. Before turning to the GBR speciﬁcally, it is worth pointing out the potentially cumbersome nature of extending LP to natural ‘objects’ in general. The foundational principle – personhood – is ‘multifaceted’ (Nafﬁne, 2011: 15) and its jurisprudence arguably ‘marked by its uncertainty and its inconsistency’ (Nafﬁne, 2003: 346). For some commentators, this radical uncertainty is in fact the strength of the formalist or ﬁctive conception of LP, giving it ‘creative and inclusive potential’ to bring about ‘just outcomes’ (Kyriakakis, 2015: 83). Nonetheless, in the absence of some overarching mechanism (e.g. a bill of rights, a First Nations treaty, or constitutional recognition of nature), the granting of personhood is piecemeal and time-consuming, having to be determined again and again for different natural systems or sites. In the case of the GBR, though, the pointedness of this serial, individualistic mechanism might be an advantage in the light of the Reef’s iconic stature. So, despite the problem with the LP strategy in general, it might actually work well for the GBR.

### NEG---Case---Personhood Designation

#### Personhood designation by itself does nothing

Laura Spitz and Eduardo M. Penalver 21, Professor of Law at University of New Mexico School of Law and Thompson Rivers University, Professor of Law at Cornell Law School, 2021, NATURE'S PERSONHOOD AND PROPERTY'S VIRTUES, Harvard Environmental Law Review, Vol. 45, p. 67-97

C. Consequential or Pragmatic Claims

As an alternative to this kind of first-order moral analysis, a more indirect and pragmatic approach might begin by asking whether recognizing certain nonhuman entities as legal persons would lead to better legal outcomes. This seems to be the register in which the law considers whether and how to treat corporations as "persons." No one really argues that a corporation is a person by virtue of the characteristics it possesses or the natural kind to which it belongs. Instead, the normative arguments for corporate personhood typically relate to the consequences of treating corporations "as if" they were persons. 74

Often, the outcomes of conferring legal personhood on nonhumans are analyzed in terms of aggregate utility or welfare. 75But they can also be analyzed in terms of other kinds of consequences as well. 76For example, courts have considered the impact of recognizing corporate rights on the ability of natural human beings to exercise their personhood-rights. As the U.S. Supreme Court put it in Burwell v. Hobby Lobby Stores, Inc. 77:

It is important to keep in mind that the purpose of this fiction [of recognizing rights in corporate persons] is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. 78

This kind of pragmatic, consequentialist analysis is indeed what many advocates of nature seem to be engaging in, as we discuss at greater length below. The question for these advocates is not whether a mountain or a river is a person in any philosophically defensible sense. It is instead whether recognizing a mountain or a river as a person will guide the legal system to produce "better" legal outcomes, where "better" is defined in terms of the consequences for human beings.

But we are doubtful that simply calling a river a "person" would--by itself--make much difference for legal outcomes. Recognition of personhood makes the greatest difference in legal proceedings when it changes the locus of decision-making about actions that have an impact on the person. Recognizing a child as a separate person--as opposed to, say, treating children as the property of their parents--can be the basis for removing decision-making authority from the parents and putting it in the hands of a guardian ad litem who acts on behalf of the child's best interests. 79Similarly, recognizing a fetus as a person could become the basis for shifting decision-making about the fetus from the mother to some third party.

The devil is in the details. The real-world impact of conferring personhood status on nonhuman entities would depend almost entirely on the matrix of procedural and substantive rules built around that recognition. Although the law recognizes children as persons, it defers to parental decision-making almost reflexively, stepping in only when the parental relationship breaks down or when parental behavior is so extreme as to justify state intervention. Recognizing trees as persons would have no impact on the treatment of trees located on private land unless some new rule shifts decision-making about those trees from the private landowner to some third-party guardian. (We discuss the possibilities for these sorts of shifts below, in connection with the issue of standing.)

Ultimately, then, an impact-based analysis of the wisdom of recognizing personhood in nonhuman entities turns on an analysis of these background procedural and substantive rules. In this regard, we see two questions as paramount. The first is: who is the relevant rule-maker? Most discussions of conferring personhood on natural resources assume that the decision-maker who will determine the impact of that change in status is a judge. The intuition seems to be that calling a river a person will yield different legal outcomes by forcing judges to entertain cases that would otherwise flounder on standing grounds and by empowering (or requiring) judges to import into their evaluation of legal cases doctrines that are drawn from other areas of the law. We set aside the undeniably important question of whether it is even desirable to confer such unbounded discretion on judges. We turn to a discussion of the potential impacts--both procedural and substantive--of recognizing natural resources as persons below in Parts III.A and III.B. Ultimately, our view is that anything that could be accomplished through recognition of personhood in nature could be accomplished using existing legal categories, and the latter is an easier lift.

Our skepticism about the substantive consequences of attributing personhood to nature leads us to consider our second key question--would adopting the language of personhood with regard to natural resources change the politics of environmental advocacy? That is, does the language of personhood have the power to shift the public conversation about environmental harms and benefits in ways that environmentalists want, even in the absence of any real legal impact? This is a question that seems almost impossible to answer in the abstract, but it is one we will consider below in Part III.C.

### NEG---Duties of Nature DA

#### Conferring rights to nature causes the conferral of duties. This opens the door for unprecedented new forms of liability.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

A more biting problem is that legal personhood normally16 implies duties and responsi- bilities (Tur, 1987: 121). John Chipman Gray noted the ‘poverty of our nomenclature’ (1921:12) when it comes to rights and duties and a corresponding conceptual muddiness in disentangling and specifying legal, moral and ethical rights, obligations and duties (pp. 11–16; French, 1979: 207). If this is so with human persons and corporations, how much more so for natural sites or systems? What duties and obligations could the Reef be reasonably be understood to have? To try to ‘solve’ this conundrum by utilising, say, the instrumentalist conception of ‘ecosystem services’,17 itself enmeshed in an idea of waged labour, would be to muddy the waters still further and further entrench the capitalist/colonial conception of land as natural resource (Tuck and Yang, 2012: 4).

In similar vein, legal personhood normally implies the ability to be sued. This could open up the ﬂoodgates to some as yet unimaginable claims of liability and tort. As BRP Bhaskar (2017) noted of the Uttarakhand High Court’s decision to give LP to the Yamuna and Ganga rivers:

A juridical person can sue and be sued. There is, therefore, need to examine whether the high court, in appointing guardians to sue polluters on behalf of the rivers, have also unwittingly opened the door for victims of pollution and other forms of suffering attributable to rivers to sue them for damages.

This potential is being taken seriously; the Supreme Court has since stayed the judgment (Supreme Court of India, 2017).

### NEG---Econ DA

#### The aff causes quick economic collapse

Wesley J. Smith 18, senior fellow at the Discovery Institute’s Center on Human Exceptionalism, 8/6/18, “The return of nature worship,” https://www.acton.org/religion-liberty/volume-28-number-3/return-nature-worship

Nature rights would cause profound harm to human thriving:

Granting rights to nature would bring economic growth to a screeching halt by empowering the most committed and radical environmentalists – granted legal standing to act on “nature’s” behalf – to impose their extreme views of proper environmental stewardship through the buzz saw of unending litigation. Backed by well-funded environmentalist organizations and their lawyers, any and all large-scale economic or development projects – from oil drilling, to housing developments, to mining, to farming, to renewable energy projects, such as electricity-generating windmills that kill countless birds – could face years of harassing lawsuits and extorted financial settlements. At the very least, liability insurance for such endeavors would become prohibitively costly – indeed, if underwriters permitted policies to be issued for such projects at all. Of course, that is the whole point.

#### The aff ends development

Wesley J. Smith 14, senior fellow at the Discovery Institute’s Center on Human Exceptionalism, “The “Nature Rights” War on Humans,” https://www.nationalreview.com/human-exceptionalism/nature-rights-war-humans-wesley-j-smith/

Scream it from the rooftops! Copy the column I will quote below and send it far and wide. Tweet. Facebook. Tell your mother. The Nature Rights Movement wants to destroy human prosperity.

I have been feeling very lonely in my years of warning about nature rights. Most people just roll their eyes.

Not Suzanne Webel, at least not any longer. She lives in the Boulder area, which, as she points out, has very strong environmental protections already in place. But some environmentalists want a rights of nature law passed, and she was appointed to a task force for to see if the request could be accommodated.

Webel found the experience a real eye-opener. She lists the nature rightists’ demands in her column, “Just Say No to the Rights of Nature,” published in the Daily Camera:

1) “Eliminate the authority of a property owner to destroy, or cause substantial harm to, natural communities and ecosystems.”

Me: Nature rights is Marxist in its intentions. This would essentially destroy the rights of private property.

2) Accord “inherent, inalienable, and fundamental rights of Nature to all Natural Beings” including humans and “all living species of plants, animals, and algae”

Me: Humans are just another virus in the forest.

3) Include a Statement of Law that “All Natural beings, Natural Communities and Ecosystems possess the inalienable right to exist, flourish, regenerate, and evolve”

Me: A right to life for nature would stop human enterprise and resource development in its tracks.

4) Declare that “The Precautionary Principle Is Needed To Protect These Rights”

Me: The PP assumes that if something even has the slightest, hypothetical chance of going wrong, it must not be done. Another way to stop humans from engaging in enterprises and resource development.

5) Find that “It shall be unlawful for any person, government entity, corporation (etc) to intentionally or recklessly violate the rights of Natural Beings, Natural Communities or Ecosystems

Me: This comes close to a law of ecocide that would criminalize development.

6) Enforce “Damages” measured by the cost of restoring the Natural Community or Ecosystem to its [original] state before the injury.

Notice that there need be no pollution. Requiring any user of nature to restore it to its original condition is intended to chill any uses of nature

Webel nails the war on humans these environmentalists are waging:

The proposed “Rights of Nature Ordinance” would have enormous detrimental implications for all public and private lands, agriculture, medicine, backyard gardens, animal ownership, public land access and trail use, property rights and many other existing rights of Boulder County residents. It would create unimaginable social and legal nightmares for all of us.

#### Litigation wrecks small business and government budgets

Caroline McDonough 19, J.D. Candidate, Villanova Charles Widger School of Law, 2019, “COMMENT: WILL THE RIVER EVER GET A CHANCE TO SPEAK? STANDING UP FOR THE LEGAL RIGHTS OF NATURE,” Villanova Environmental Law Journal, 31 Vill. Envtl. L.J. 143

Among the most sympathetic opponents of the legal rights of nature movement are individuals and small businesses who claim they will be susceptible to copious lawsuits threatening their livelihood. 151In Toledo, Ohio, owners of farms surrounding Lake Erie argue lawsuits brought on behalf of the Lake to stop agricultural runoff could put the farms out of business. 152 These small businesses [\*161] are backed by the Ohio Farm Bureau, who contend agricultural runoff problems must be solved scientifically and with the help of those experienced in best farming practices. 153The Farm Bureau argues that this bill will have the power to change farming practices based on public votes and may subject businesses who abide by all current laws to expense-draining lawsuits. 154Public officials have also found themselves in a difficult position, torn between the desire to support environmental change and the practical realities of a potentially massive increase in legislation. 155Officials in Toledo worry that public opposition to the bill will make them "appear to support polluting the lake." 156These officials share the same concerns that the passage of this bill may cost the city thousands in legal fees and "would most likely drain city finances." 157

#### Wrecks the economy

COC 10 Chamber of Commerce of the United States, “Brief Amicus Curiae of the Chamber of Commerce of the United States in Support of Petitioners,” American Electric Power Company Inc., et al. v. State of Connecticut, et al., available online at the Oyez Project

Second, the court of appeals erred in failing to appreciate that the global nature of climate change and the necessity in any bid for redress to balance an enormously vast array of interrelated interests are ill-suited to the ad hoc and piecemeal nature of litigation. The political question doctrine prohibits courts from acting where, as here, there are no judicially manageable standards and any adjudication would inevitably require initial policy decisions reserved to the political Branches on matters (to name only a few) such as the appropriate level of global emissions, the parties that should bear the costs of limiting emissions, and foreign policy and economic ramifications of attempting to address global climate change. Indeed, as the United States has explained, “plaintiffs’ common-law nuisance suits present serious concerns regarding the role of an Article III court under the Constitution’s separation of powers—especially in light of the representative Branches’ ongoing efforts to combat climate change by formulating and implementing domestic policy and participating in international negotiations.” TVA Br. 13. These matters are not just exceptionally complex or difficult—they have no “right” jurisprudential answers. Under our Constitution and this Court’s precedents, such matters are reserved for the political Branches.¶ Third, the court of appeals erred in finding that plaintiffs have Article III standing to maintain this action. That defect provides a threshold basis for dismissing this action. The likelihood of redressability in this suit against a finite and arbitrary set of carbon-emitting entities is so remote and so speculative that the ruling here would permit literally anyone alleging climate-change based damages to sue any entity or natural person in the world—an absurd result that highlights once again just how inapt the judicial forum is for addressing such inherently global concerns. Massachusetts v. EPA, 549 U.S. 497 (2007), does not dictate a contrary conclusion. The principles animating that decision—which focused on the ability of Congress to relax the Article III inquiry in the context of a statutory provision for challenging agency action—are inapplicable in this common-law context. Finding standing in this case would require a significant expansion of Massachusetts and (given the absence of the congressional action on which this Court relied in Massachusetts to find standing) put the courts well ahead of the democratic process in this area. It would also require the Court to disregard the prudential limits that the Court itself has imposed on judicial review of “‘generalized grievances more appropriately addressed in the representative branches.’” Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). ¶ The astounding practical implications of the decision below underscore the separation-of-powers problems with allowing this unprecedented common law action to proceed. Especially since Massachusetts, an emerging category of litigation over greenhouse-gas emissions has developed implicating countless plaintiffs and defendants. If the decision of the Second Circuit is affirmed, this suit—and the countless others that inevitably follow—will destabilize our economy, undermine our democratic process, and impact sensitive foreign policy considerations. The debate over the appropriate response to climate change affects every business concern and implicates virtually every facet of daily life. This complex political dialogue belongs in the political arena, not the courthouse— much less in scores if not hundreds of different courthouses across America as suits like plaintiffs’ proliferate. Only the elected Branches are authorized and equipped to develop our nation’s response to climate change and undertake any necessary reforms.

### NEG---Water Shortages DA

#### Personhood causes waste---leads to water shortages

Emilie Blake 17, Texas Tech School of Law, “Are Water Body Personhood Rights the Future of Water Management in the United States?”, 47 Tex. Envtl. L.J. 197 (2017).

Tragedy Of The Anticommons

The tragedy of the anticommons is exactly what it sounds like-the exact opposite of the tragedy of the commons. In essence, it means that a resource goes underutilized to the point of inefficiency and waste. When there are too many owners of a finite resource, each having a claim of right, a failure to cooperate means "nobody can use the resource" and "[e]verybody loses in a hidden tragedy of the anticommons." 28 Accordingly, "[w]hile private ownership usually increases wealth, too much ownership has the opposite effect: it wrecks markets, stops innovation, and costs lives."129 The California Supreme Court has said that, as a matter of practical reality, sometimes water use must be allowed even where it results in harm.13 0 If courts construe injury to mean any unnatural water depletion, then societies would soon face the tragedy of the anticommons because no one could access the water resource.131 This would cause populations to face water shortages much faster than anticipated, and communities to fade away. Therefore, states should avoid polarizing water rights between unrestricted access and no access at all."3' Because this is a possible evolution of personhood rights in water bodies, such a system could render water property rights too binary for effective water management and conservation. 134

### NEG---Gov Responsibility CP

#### Instead of directly conferring personhood or rights on nature, the government should be the one responsible.

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

In a 2019 book chapter, Professor Catherine Iorns Magallanes of Victoria Univer- sity of Wellington in New Zealand has effectively categorized types of efforts to protect the rights of nature.325 [FOOTNOTE 325 BEGINS] 325 Catherine Iorns, From Rights to Responsibilities Using Legal Personhood and Guardianship for Rivers, in ResponsAbility: Law and Governance for Living Well with the Earth 216–39 (Betsan Martin, Linda Te Aho & Maria Humphries-Kil eds., 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3270391. [FOOTNOTE 325 ENDS] She explained that where legal personhood has been adopted, it has been framed not as a matter of rights, but of responsibility.326 She articulated a continuum of mechanisms through which nature can be protected. These protections range from legal personhood requiring human guardianship (least desirable) to rights of nature with government stewardship responsibilities (more desirable) to the approach for protecting the Whanganui River in New Zealand, which is most effective.

Iorns described how ideas of legal personhood and rights for nature arose from Christopher Stone’s foundational work in 1972, Should Trees Have Standing?, in which Stone argued that legal personhood should be conferred to all natural objects to enable nature to have rights that could be enforced.327 This “legal person” is not property; other persons would be necessary to uphold the rights of the natural object/ person.328 Nature would need a guardian, which could be appointed by a court or through legislation, like a trustee, and the guardian would be able to speak on behalf of the natural object.329 Rights to prevent damage to nature itself could be enforced, as opposed to now, where only damage to other persons’ property interests can be claimed. Under this approach, the natural object would hold its own rights, which would require procedural safeguards.330

Iorns distinguished the legal personhood concept in Stone’s approach from the rights of nature established in the United States through the efforts of the Commu- nity Environmental Legal Defense Fund (CELDF). She explained that these initiatives were designed to enable communities to exercise more democratic control over local environmental decision making,331 which is consistent with, but distinguishable from, Stone’s idea of legal standing. CELDF’s efforts focused on drafting ordinances to enable communities to ban particular activities of corporations in a municipality,332 ordinances that refused to acknowledge any constitutional personhood rights of corporations in a municipality,333 and ordinances that included rights for nature, so citizens could exercise these rights on behalf of nature in question.334

Iorns argued that these examples do not establish a separate legal personality for nature; rather, those rights can be protected by humans on nature’s behalf – it assumes someone will step in to protect them.335 Iorns articulated an important distinction in this regard concerning rights and responsibilities in protecting the voiceless. This establishment of rights in CELDF’s rights of nature protections are mechanisms that mandate the exercise of government stewardship, rather than mandating that responsibility or protection actually be exercised by humans on behalf of nature.336 These protections offer a strong statement of responsibility in which a right of standing on behalf of these resources is not required to ensure action – government responsibility is implied and does not require legal personhood.

#### It is a distinct approach from legal personhood.

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

Abate: How does AELA’s campaign to obtain legal recognition of the Great Barrier Reef’s rights relate to the concept of legal personhood? Is legal personhood a goal of the campaign?

Maloney: We started promoting the model laws only a month ago to build the proﬁle of what nature laws can look like. Legal personhood to us is a linked but slightly different issue. When we explain to people about the rights of nature movement, we tend to differentiate between the laws created by the Ecuadorian Constitution, the Bolivian National Law (the Act for Mother Earth), and the US approach to enacting local ordinances for the rights of nature. Those three approaches all assert positive rights for nature, and they assert open standing for anybody in the community. They don’t talk about legal personhood and they don’t limit who can speak for nature. We have been watching for many years the developments under the Treaty of Waitangi for New Zealand’s Ma¯ori people who have used compensation agreements under the Treaty of Waitangi process to seek access to, ownership of, or compensation for the loss of their tribal or traditional lands. Under that arrangement – from all the research and the discussions we’ve had with the locals there – the legal personhood structure, particularly for the ﬁrst instance, for the Whanganui River, was really reached as a convenient construct because the government would not let the Ma¯ori own it and the Ma¯ori people would not give it up and sign onto a compensation agreement until they got greater access to their traditional lands. The legal personhood construct in that country represents to us a really important but unique aspect of their colonial legacy. You have Ma¯ori people advocating for access as custodians and guardians of their traditional lands, which are particular ecosystems, which is a very different approach to what we see as a much broader “rights of nature” movement. And then we watched Courts in India and Colombia make decisions locally about legal personhood, while referring directly to the New Zealand situation. So we are now seeing a really interesting discussion and debate amongst lawyers about legal personhood, guardianship, etc., but “rights of nature” as a concept is receiving less legal scrutiny. So what we did with the Great Barrier Reef was articulate a vision similar to that which we call a rights of nature framework, articulating that the Great Barrier Reef is a living entity with its own legal rights but opening it up so that we did not articulate those legal rights as legal personhood or guardianship.

Our model laws set out positive rights and open standing to anyone in the community to defend the rights of the reef. We articulate what the Reef’s rights are in the draft legislation. I remember you asked me what the barriers were to having legal rights for the Reef, and I would say we have a lot of political resistance to putting constraints on industry activity and also, awe have a very conservative legal system in Australia. While other countries may change their constitutions more regularly, we have one of the oldest continuous modern constitutions in the world and in our legal system it’s often hard to change core elements of how the law works, especially regarding environmental protection. Our legal system is not going to leap forward into recognizing the rights of nature just yet, so what we are doing is working on projects that can articulate what that looks like and still put First Nations people front and center. In our draft laws, which are really designed to open up conversations, you will see that we have included a provision setting out that First Nations peoples should have the right to defend their ancestral lands and if, for example, any other non-Indigenous entities started any kind of legal action under that kind of law, then First Nations peoples would have the right to be a part of that action or to be involved in it.

Abate: You mentioned the idea of the conservative legal system inﬂuencing the way this movement has developed in Australia. Do you think that there are any other factors that are unique to Australia that will perhaps inform the rights of nature movement going forward?

Maloney: It is so hard to tell. These ideas are still quite new for many people over here. The biggest issue we have is how to develop rights of nature concepts here without repeating the mistakes of colonization, i.e., without disrespecting the First Nations peoples here. In Australia, one of the most important and difﬁcult contexts we deal with is being a colonial jurisdiction. We have a unique situation where we are one of the only, I think, colonized jurisdictions that has no treaty with its First Nations people at all. For more than two hundred years, since the British colonization of the continent in 1788, we have had a legal lie, a horrible legal insult called “terra nullius”, where the British pretended that the country was uninhabited or “empty land,” so that they could take control, without any kind of treaty, of the land and also take control of one of the oldest continuing cultures on earth. To recognize the rights of nature in Australia, we’re going to have to grapple with whether rights of nature is just a western legal construct, just another colonial construct overriding First Nations peoples’ laws, or whether we can take “rights of nature” laws and modify them for this country, in a way that supports or is compatible with ancient ﬁrst laws of Aboriginal people. I cannot speak for what will happen in the future. Change happens in strange ways, but AELA is keenly aware of the profound difﬁculties of working in a colonial nation, and we are working with First Nations colleagues to explore these issues. I’m working on a book with Mary Graham, a Kombumerri elder, and we are looking at different projects together so that we can explore how the legal status of the living world can be part of a program of action for the future that challenges colonial legal systems. I do not pretend to have many answers, but we will be pushing forward with rights of nature ideas because they are starting to gain a bit of traction; we see them as exciting and positive and if nothing else, a “bridge” to a more earth-centered governance system among non-Indigenous Australians. The only thing I can say with surety is that AELA is very interested in what we think of as “the local law-making approach,” spearheaded by Community Environmental Legal Defense Fund (CELDF), which is an organization run by Thomas Linzey and Mari Margil in the United States, and which helps local communities assert their community and nature rights regardless of the fact that the state and federal government law can most of the time override the local laws. It is a way of articulating Earth Democracy. In Australia, we have powerful fossil fuel interests, and other industry groups who have a huge inﬂuence over the current government. We are working with a range of communities around Australia, and using the Australian People’s Tribunal for Community and Nature’s Rights as a way of promoting a different way of thinking about how it all works. We are moving into the next phase as an organization, which is going to be looking at how grassroots groups can take on some of these ideas, working in partnership with local Indigenous communities, and seeing what they can push for. What we are seeing here is the ongoing legacy of the laws that arrived in 1788 and how that excludes not only First Nations peoples but also other local communities, from any decision making about the living world. So that is why Earth jurisprudence and the work of Thomas Berry, is the framework that we work with because it advocates for earth democracy rather than just using western legal constructs to ﬁddle around the edges. Honestly, that is why personally I am not hugely fond of legal personhood as a concept, but I think for some people it is just easier to understand and it is easier than just a blanket rights of nature approach.

However, to me legal personhood can be seen as, and others have written about this, another anthropocentric structure that we are trying to jam nature into. It all came undone in my humble view when India’s courts said something about “these rivers should have all the rights and liabilities of a legal person” and everyone said “well hang on, what liabilities? Can we sue the river when it ﬂoods?” This is what happens when we don’t think through the arguments or we try, as usual in the Western way, to squish nature into constructs that were designed by Western law for something completely different from environmental care. That is why AELA will be pushing for rights of nature rather than legal personhood. That said, if groups in Australia want to focus more on legal personhood, then we will support it because it means something new and something that might offer greater protection for the environment. But if it is just left to us, we will be pushing for the broader rights of nature approach. When people don’t understand it we just say, “well you know how human rights spring from just the sheer act of being a human? Earth rights or rights of nature come from life itself.” People seem to get that and it is not so difﬁcult to understand.

Abate: What legal strategies do you think offer the most promise to secure legal rights for the Great Barrier Reef?

Maloney: We’d love to see popular support for recognizing the rights of the Reef. But for us, the ultimate end game is not actually just new laws. It’s cultural change as well. For us in AELA, we’re more interested in First Nations’ Peoples’ understanding of what law is. And by that, I mean, law is not just something made on high by someone far away in a city. It is your daily behaviors, your daily practice, and your daily ethics. Similarly, AELA has a focus on earth ethics and the cultural change advocated for by Earth jurisprudence. The ultimate goal is “earth-centered everything” so that people literally wake up every morning and they are aware of their obligations to the local Earth community, to life around them. We want to change the whole legal and economic system so that this is easier to achieve. We have a long way to go but we have some frameworks developing. Rights of nature is a really exciting area of law but it’s also an effective spearhead communication tool and, if nothing else, it’s something new that stimulates questions and conversations. When you talk about it, people ask: “What does it mean? What is it all about?” And you get people engaged a bit more. You can explain how the current legal system treats nature merely as human property, and for many people, this is a paradigm shift. There seems to be a lot of excitement about it now. There wasn’t as much excitement when we started talking about it ﬁve years ago, when people didn’t understand it.

Despite my concerns about the impacts of focusing on “legal personhood” for nature instead of rights of nature, one of the good things about the New Zealand laws and the Indian and Colombian courtdecisions is that it captured people’s imagination. They seemed to be able to understand how and why local communities wanted to make their local ecosystems have rights.

Someone at a recent symposium said, “But what do we do, do we give every river legal rights and then what if something is outside the catchment? Or what if rivers have to compete with each other to have their rights recognized?” Exactly.

We are far more interested in the jurisdictional approach to rights of nature, where the entire system of life has to be looked at differently. For us, rights of nature laws are just a means to an end. We are really interested in Earth-centered governance – cultural change, an ethical framework, actually planning an ecologically based societal framework, and understanding what its limits look like in a particular ecosystem or bioregion. That is our master plan and everything else, including the rights of nature concept, weaves into it.

### NEG---Human Rights CP / Nearest Person CP

#### Creating rights of nature at the federal level requires reforming constitutional standing requirements. Approaches that confer citizen rights solve and don’t require doing this.

Devon Alexandra Berman 19, Joint J.D./J.D. Candidate, American University Washington College of Law and University of Ottawa, “Lake Erie Bill of Rights Gets the Ax: Is Legal Personhood for Nature Dead In the Water?,” 20 Sustainable Dev. L. & Pol'y 15, Fall 2019, WestLaw

LEGAL STANDING FOR NATURE IN THE U.S. IS FRUSTRATED BY CONSTITUTIONAL STANDING REQUIREMENTS

Article III, § 2 of the Constitution provides that “[t]he judicial Power” of the federal courts of the United States only extends to specified “cases” and “controversies.”14 The Article HI standing doctrine limits the category of litigants empowered to sue in federal court to seek redress for a legal wrong. The Supreme Court has held the “irreducible constitutional minimum of standing” requires the plaintiff to “allege personal injury fairly traceable to defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.”15 In environmental enforcement actions, general grievances based on harm to the environment do not meet standing requirements unless the plaintiff can establish a concrete, personal injury that will likely be redressed by a court remedy.16 For example, environmental groups in Lujan v. Defenders of Wildlife claimed that the government's funding of overseas projects threatened the plaintiffs' ability to observe endangered species. The court rejected the “ecosystem nexus” argument, precluding generalized adverse environmental effects as a basis for standing to challenge the activity.17 As a result, citizen suit provisions of environmental statutes empower people to seek enforcement of environmental laws, but they cannot be used to circumvent Article III requirements. Based on the narrow interpretation of standing requirements, it is unlikely that the Supreme Court will recognize standing for injuries alleged on nature's behalf.18

SECURING A CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT AT THE STATE LEVEL

Several states are taking a rights-based approach to preventing environmental degradation by amending their constitutions to include a right to a healthy environment.19 By framing environmental degradation as a violation of citizens' rights, these amendments require governments to prioritize environmental protection when regulating industrial activity. In \*16 1972, Pennsylvanians voted to amend the state constitution and became the first state to enshrine environmental rights to clean air and water through the Environmental Rights Amendment (ERA).20 The amendment states that the Commonwealth is the trustee of the state's natural resources, “common property of all people, including generations yet to come.”21 In 2013, the ERA was successfully invoked to defeat key provisions of a bill that would have afforded the fracking industry broad powers and exemptions.22 The Court held that the provisions violated the ERA by preempting local regulation of oil and gas activities and precluding local governments from fulfilling their trustee obligations.23

This landmark Pennsylvania Supreme Court ruling demonstrated the legal potency of enshrining citizens' right to a healthy environment in state constitutions. In 2017, a landmark case was brought under the ERA against the legislature for allegedly misappropriating environmental protection funds for other uses.24 In ruling against the legislature, the Court expanded its interpretation of the ERA and held that laws are unconstitutional if they “unreasonably impair” a citizen's ability to exercise their constitutional rights to “clean air, pure water and environmental preservation.”25 The Court reaffirmed that the ERA commits the government to two duties: (1) to prohibit state or private action that results in the depletion of public natural resources; and (2) to take affirmative legislative action towards environmental concerns.26

Drawing on Pennsylvania's experience, a constitutional amendment to the Ohio Constitution that secures its citizens' right to clean water is a more practical approach for protecting Lake Erie than attempting to confer legal standing through municipal legislation that has limited enforceability.27

CONCLUSION

Extreme environmental degradation presents an unprecedented threat to human existence.28 Environmental policy rollbacks under the Trump Administration have decreased environmental regulation and stripped clean water protections.29 The Supreme Court of Pennsylvania's interpretation of the ERA compels the state government to take positive legislative to prioritize environmental protection. In the meantime, it is becoming increasingly clear that society needs to undergo a radical shift in values in order to effectively mitigate the human impact on the environment.

### NEG---Human Rights CP / Nearest Person CP---DA

#### Watering down the concept of personhood hurts human rights. Others reply that differences between legal and moral personhood prevent expansion of the former from devaluing the latter.

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

Another criticism of the Uttarakhand High Court’s decisions is that granting “personhood” to things that are not humans diminishes the status and value of human rights.285 For example, rivers do not deal with the same issues of bodily autonomy, nor can they vote in elections. On the other hand, many animal species like great apes, whales, dolphins, and elephants have similar cognitive, emotional, and psychological attributes to humans. Foundations like the Institute for Ethics and Emerging Technologies (IEET) have started programs advocating for the rights of these nonhuman persons, and have excluded “inanimate objects” like rivers and forests. Members of the program describe persons as “self-aware, emotional creatures with a sense of the past and the future. And perhaps most importantly, they can suffer.”286 Many consider that granting legal personhood to rivers undermines the importance of granting personhood to living entities. Nevertheless, legal personhood must not be confused with status as humans. Legal personhood only addresses what entities “matter” under the law. It is entirely consistent for the law to determine that wildlife and rivers “matter” under the law and deserve legal person-hood protection. Such recognition poses no threat to the recognition and protection of human rights.

### NEG---Property Law CP

#### Existing property law is a better solution

Laura Spitz and Eduardo M. Penalver 21, Professor of Law at University of New Mexico School of Law and Thompson Rivers University, Professor of Law at Cornell Law School, 2021, NATURE'S PERSONHOOD AND PROPERTY'S VIRTUES, Harvard Environmental Law Review, Vol. 45, p. 67-97

But the rhetoric of "property" is far less hostile to wise stewardship than the Colorado River plaintiff implied. The Colorado River plaintiff argued that "the dominance of a culture that defines nature as property enables its destruction." 120The Colorado River plaintiff argued that environmental laws that accept the status of nature as property necessarily and "merely regulate the rate at which the natural environment is exploited." 121In our view, however, this argument rests on an overly simplistic understanding of the nature and function of "property" within our common law legal system. As a consequence, this rejection of property fails to apprehend the many valuable tools within property law for fostering a culture of conservation and stewardship.

Far from representing the kind of Blackstonian "sole and despotic dominion" 122of owners that the Colorado River plaintiff associated with the institution of property, property concepts are more capacious. 123This is not to deny that the Blackstonian concept of ownership has exerted a powerful influence over the American imagination. As Greg Alexander and many others have observed, the notion of property as commodity has been the dominant strain of American property discourse since the country's founding. 124Despite its rhetorical power this understanding has always been contested by a more socially constrained account of ownership as entailing obligation and "propriety." 125As Alexander has put it, the Blackstonian account of property ownership is "highly misleading." 126"Property owners owe far more responsibilities to others," he explains, "than the conventional imagery of property rights suggests." 127

Rather than reflecting a worldview of relentless exploitation and domination, property is more accurately understood as a legal vocabulary for the contestation and resolution of human beings' conflicting interests in finite and scarce resources. Understood in this way, environmental regulations are part of the extended law of property, rather than external to it or reflective of wholly unrelated values. 128A system of "private property" is one that provides a set of "rules governing access to and control of material resources" that are "organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual." 129But "private" property is just one property possibility among many others, and Blackstonian dominion is just one possible way of understanding private ownership, one that has never been reflected in the common law of property. 130

Property can be public or private, individual, or shared. Even a parcel of private, individually owned land is limited by the correlative rights of others. And it can be encumbered by servitudes reflecting the entitlements of neighbors and the interests of future generations. The constraints and obligations that operate within the law of private ownership are too numerous to list in an exhaustive way. The law of nuisance imposes reciprocal obligations on landowners to use their private property in ways that do not harm their neighbors' correlative rights to the use and enjoyment of their own property. 131Tens of millions of homeowners own their homes subject to elaborate and extensive servitudes that limit their freedom to use or alter their property in ways that their neighbors might find distasteful or obnoxious. 132Owners of property subject to future interests owe obligations to the holders of those interests. For example, they may not be able to take actions that harm the interests of those future owners, such as removing natural resources from the property. 133So-called "conservation easements" deploy the private property device of the servitude to require landowners to permanently preserve lands with unique ecological, aesthetic, or historic value. 134

When it comes to protecting natural resources, the Colorado River plaintiff's rejection of "property" as a vehicle for accomplishing that goal makes the double mistake of employing a caricatured understanding of ownership as private ownership and private ownership as Blackstonian dominion. This mistake is common on both the left and the right ends of political and legal discourse. On the far left, this mistake leads commentators to reject the notion of property as inherently exploitative without considering the community-strengthening possibilities of, for example, public or shared ownership. 135On the right, so-called "free market environmentalists" make the converse mistake when they argue that private landownership readily aligns the financial incentives of owners with the long-term stewardship of their land. 136This view derives some support from examples of situations in which owners' self-interest aligns with the goals of environmental conservation. 137But the problem of spatial and inter-temporal externalities, not to mention profit-minded owners' tendency to focus narrowly on market-tradeable values, makes an unconstrained reliance on owners' profit-motives a risky and incomplete strategy for environmental protection. 138

Dismissing private ownership altogether or, on the other hand, simply equating the decisions of private owners with wise land use reinforces some of the worst stereotypes of "property" rhetoric. But a broader perspective on the varieties of available "property" regimes, and a more accurate account of the qualified nature of property rights within our common law system, reveals the potential to reconcile the interests of "property" and nature. Scholars in the Progressive Property movement have adopted such a broad approach, pushing back against the tendency by both environmentalists and their adversaries, to equate "property" with unconstrained private prerogative and unregulated markets. Viewed from a thicker conception of the rights and duties of "owners," one that is faithful to the roots of our own legal system, but also reflected in many other legal cultures, property can become a vehicle for transmitting values that can help to foster a culture of sustainability and respect for natural systems. 139Unlike the "rights of nature" approach advocated by the Colorado River plaintiff, however, this is not an approach that pits human beings against nature in a zero sum contest. Rather, it views wise land use as aligned with human beings' interests in thriving and flourishing.

Like more market-oriented defenders of property rights (and unlike anti-property voices on the left), the Progressive Property approach has the conceptual tools to take seriously the value of private ownership as a vehicle for coordinating economically productive behavior and for yoking owners' self-interest to society's interest in that production. 140At the same time, its recognition of values beyond the market enables it to take seriously the externalities that can lead private owners to make decisions about land and natural resources that are rational in narrow market terms, but nevertheless harmful, all things considered.

Among these possible externalities, the most intractable for narrowly market-based approaches are those that involve the intergenerational consequences of today's landowners. The notion that land has a "memory," that today's land use decisions echo far into the future, creates a genuine problem of intergenerational conflicting interests within a system of property. 141But, contrary to the arguments of the Colorado River plaintiff, this is a conflict that is well known and capable of being addressed by the rhetorical and substantive legal tools of property law (understood to include both the private law of property and the owner-constraining public law matrix within which that private law is situated).

One of us has argued previously that, properly understood and encouraged by appropriate land use regulation, even private land ownership can help owners develop the virtue of humility (literally, a closeness to the Earth) regarding their impact on the land 142:

Expressing humility in our land-use decisions does not mean that we should never alter the landscape around us, but it does suggest that we would be wise to err on the side of caution and comprehensiveness in our decision making about land. Consequently, the virtue seems to lend itself to a precautionary approach to land-use decisions. Although it comes in a variety of shapes and sizes, in most guises the precautionary principle is understood to recommend special sensitivity even to relatively small or uncertain risks of irreversible harms. 143

Historically, doctrines like nuisance law and the law of servitudes helped to mitigate and coordinate the local impacts of owners' decisions. The common law of riparian ownership limited owners to limited uses of neighboring waterways that do not impair the waterway itself or otherwise infringe on the correlative property rights of other riparian owners and users. 144More recently, the public regulation of private landowners at local, state, and federal levels--both to coordinate conflicting land uses and to protect sensitive lands--extends the harm-preventing and coordinating functions of these common law doctrines and refutes (at least as a descriptive matter) the caricature of ownership as absolute dominion. Guided by private and public constraints on their ability to exploit the land in ways that harm others, owners who reflect the virtue of humility with respect to their impact on the land can become a powerful ally of both natural systems as well as future generations.

Among the property tools with potential to bring the interests of human beings (considered over the long term) and nature into closer long-term alignment, the ancient doctrine of "trust" and--more specifically--the doctrine of "public trust" provide another possible vehicle for managing intergenerational interests. In his landmark 1970 article, The Public Trust Doctrine in Natural Resource Law, Joseph Sax revived interest in that ancient doctrine, which traces its roots into Roman law, as a vehicle for intergenerational stewardship of natural resources. 145The doctrine recognizes certain resources--such as water and its attendant ecosystems--as the common heritage of humankind, in whose long-term interest the state has a special obligation to manage those resources. 146As one court has put it:

"The duties imposed upon the state [as steward of resources subject to the public trust doctrine are] the duties of a trustee and not simply the duties of a good business manager." Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res. 147

Although the application of the public trust doctrine has largely been limited to waters, there is no conceptual reason why this must continue to be the case. 148The interests and values the doctrine can consider are numerous. Sax discusses an important 2000 Hawaii case in which the Hawaiian Supreme Court required the restoration of the natural flow of waters down a mountainside, taking into account both the ecological harm of diverting the water, as well as traditional Native Hawaiian understandings of the appropriate uses of those flows. 149In her survey of western states' public trust doctrines, Robin Kundis Craig observes that California courts have extended public trust concepts to aquatic wildlife and their habitats. 150

More recently, a U.S. district court held open the possibility for application of the public trust doctrine to the federal government in the context of global climate change. In Juliana v. United States, 151a group of minors brought a claim against the United States and various federal officers, arguing in part that the defendants violated their obligations under the public trust doctrine by knowingly ignoring the impacts of continued fossil fuel consumption. In the district court, the plaintiffs' public trust claims survived not only a motion to dismiss, but also a motion for judgment on the pleadings and a motion for summary judgment. Specifically, the court held that (1) it did not need to determine whether the public trust doctrine applied to the atmosphere at the summary judgment stage in the litigation because the plaintiffs' claim was also based on public trust violations in connection with the territorial sea; 152(2) the case law did not foreclose the public trust doctrine from applying to the federal government; 153(3) public trust claims were uniquely linked to the fundamental attributes of sovereignty and thus not displaced by statutory law; 154and (4) the plaintiffs could properly bring their public trust claim in federal court because it was a substantive due process claim regarding the plaintiffs' fundamental rights. 155"This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss." 156

With respect to the public trust doctrine itself, the court found that it imposed three restrictions on government: "first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses." 157The court acknowledged that the plaintiffs' claim was based on the fact that the defendants "violated their duties as trustees by nominally retaining control over trust assets while actually allowing their depletion and destruction, effectively violating the first and third restrictions by excluding the public from use and enjoyment of public resources." 158

While the Ninth Circuit ordered the district court to dismiss the case for failing to satisfy the requirements of constitutional standing, 159it did so without ruling on the plaintiff's public trust claims. In deciding that the case must be dismissed, the court left open the possibility for bringing such actions again in the future, provided that a plaintiff was able to prove the judiciary could provide a remedy. As of this writing, a motion for a rehearing en banc had yet to be decided. 160Viewed from the perspective of the Colorado River litigation, an expansion of public trust doctrine along the lines advocated by the Juliana plaintiffs would be better suited to produce the kinds of consequences the plaintiff hoped to bring about by recognizing the personhood of nature (procedural, substantive, and rhetorical). 161But even without such an expansion, the traditional tools of property law--including public regulation of private property--provide more promising mechanisms to achieve the substantive goals of those who would confer personhood on natural resources.

Conclusion

The idea of conferring personhood status on nature--or on discrete natural resources--is a heady and seemingly radical notion. But there may be less to it than meets the eye. Unless such recognition would ultimately yield better legal outcomes or encourage more thoughtful analysis of decisions about those resources, it is difficult to understand why it is a step worth taking. Contrary to the views of many advocates of the personhood approach, existing legal tools rooted in the law of property may offer a more certain pathway to achieving many of the same goals. In the end, we think property's virtues outweigh personhood's promise.

### NEG---K---Top

#### There is robust debate about whether legal utopian strategies can ever live up to their aspirational rhetoric. The tactical benefits of repurposing existing systems to enact urgently necessary changes must be weighed against the risk of entrenching existing power relations and reifying existing categories.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

Earth Jurisprudence/Wild Law

Earth Jurisprudence is an institutionally marginal but energetic and conceptually rich ‘movement’ whose fundamental project is to contest the anthropocentrism of hegemonic Western law and to debate and advocate mechanisms for ecocentric law. While the terms Earth Jurisprudence and Wild Law are more or less interchangeable, Earth Jurisprudence is understood by some as the underlying legal philosophy and Wild Law as its practical implementation (Rogers and Maloney, 2014: 172). The complementarity of the theoretical and practical agendas is evident in the titles of two prominent books: Cullinan’s Wild Law: A Manifesto for Earth Justice (2011) and Michelle Maloney and Peter Burdon’s Wild Law in Practice (2014). Wild Law is playing the long-term game while also aiming to capitalise on opportunities, cracks, and ﬁssures in existing structures. As one of its major proponents, Cormac Cullinan, says: ‘With a little practice you can start to recognise ﬂashes of it even in our current legal and political systems’ (2002: 10).

Earth Jurisprudence is ecologically based, inspired by the work of Thomas Berry, starting from the philosophical/spiritual proposition that the universe is ‘a communion of subjects and not a collection of objects’ (Berry, qtd. in Cullinan, 2002: 105). The corollary is that all members of the ‘Earth Community’ ‘are subjects capable of holding rights and have as much right to hold rights as humans’ (Cullinan, 2002: 105). All natural beings and elements are seen as having inherent and speciﬁc rights, which human law needs to recognise rather than grant (Cullinan, 2002: 107). Human rights therefore have limits:

[E]very being has rights to be recognized and revered. Trees have tree rights, insects have insect rights, rivers have river rights, mountains have mountain rights. So too with the entire range of beings throughout the universe. All rights are limited and relative. So too with humans. We have human rights. We have rights to the nourishment and shelter we need. We have rights to habitat. But we have no rights to deprive other species of their proper habitat. (Berry, 2011: 5)

It is not hard to imagine critiques of these propositions arising from the anti-essentialist, anti-colonial and anti-universalist tenets of much contemporary work in the Humanities and Social Sciences. To start with, the movement from communion to equality to rights reﬂects modern liberal assumptions. Berry’s argument also takes us into the philosophically, politically and biologically problematic terrain of deﬁning ‘limits’ and ‘needs’ (Leiss, 1976), failing to see their historical and social contingency. While contemporary science’s emphasis on ‘planetary boundaries’ and ‘carrying capacity’ might provide a new way of navigating these notoriously murky waters, other critiques are harder to answer. Notably, Berry’s open-armed embrace of ‘beings throughout the universe’ ends up assuming and reifying a fundamental human/non-human binary, while also typifying the particularising tendencies of modern Western epistemologies and ontologies, by seeing the world as a series of natural ‘objects’ (insects, rivers, mountains, etc.) imaginable as separate rights-bearing entities. On closer examination this looks less like revolutionary holism than a radical extension of existing principles.

Rawson and Mansﬁeld’s recent (2018) critique of the Rights of Nature development of which Earth Jurisprudence is a part sees it as an unknowing re-enactment of many of the very conceptions it aspires to transcend. They argue that even while Rights of Nature conceives of itself as a ‘fundamental alternative’ (p. 100) to anthropocentric Western law, it unknowingly replicates its colonialist and imperialist tendencies by ‘recapitulat[ing] the precise logic of dualism it seeks to undo’ (p. 100). In other words, rather than dismantling the metaphysical foundations of modernity, this paradigm seeks to overcome one Western problem – that of the alienation of nature as a form of property – by turning to another set of Western constructs: ‘western notions of rights, personhood, and holism’ (p. 100). Rawson and Mansﬁeld argue that the romantic naturalisation of these particular formulations obscures ‘the active work of an epistemic community’ that imperceptibly produces, naturalises and universalises them (p. 101).

So should Rights of Nature be understood as a step along a decolonial pathway (as per Andreotti et al.’s (2018) patient idea of hospicing) or as a progressive-looking con that further entrenches colonial domination (what Tuck and Yang might call a ‘settler mov[e] to innocence’ (2012: 1))? Does embeddedness in foundational modern Western metaphysics mean that we inevitably simply reproduce colonial, imperial, and capitalist values and outcomes? Must the House that Modernity Built be demolished completely so we can begin anew, or can it be renovated, plank by plank, like the Ship of Theseus, until it is no longer the same? I don’t pretend to know the answer, but the stalled campaign gives us opportunities to carefully pose the question.

In the case at hand, Wild Law’s progressive aspirations and its self-reﬂexivity make its proponents ideal participants in this enriched public conversation. While Wild Law is something of a utopian project and hence subject, like all utopias, to unacknowledged fantasy, it is also a knowingly discursive enterprise that sees value in providing ‘alternative legal narratives’ (Rogers and Maloney, 2014: 173) as well as in developing concrete legal tools for immediate use. Two of its Australian exponents, Nicole Rogers and Michelle Maloney, draw on feminist legal perspectives as a model, citing ‘collective, participatory and collaborative’ (Rogers and Maloney, 2014: 172) re-writing projects in which legal judgments are recomposed from feminist perspectives as examples of discursive interventions that render some of the assumptions and biases of mainstream law visible. Rawson and Mansﬁeld’s (2018) critique makes it clear that other foundation stones – colonialism, imperialism, romanticism – also need to be rendered visible.

Wild Law’s simultaneously practical and ﬁctive dimensions come together in the active work undertaken to create the institutions and instruments that its proponents hope might enable and preﬁgure an ecocentric law. Institutions, alliances and instruments are emerging. The Global Alliance for the Rights of Nature has founded a tribunal – the International Tribunal for the Rights of Nature and Mother Earth, whose main source of law is the Universal Declaration of the Rights of Mother Earth, a set of principles collectively drafted at the World People’s Congress on Climate Change in Bolivia in 2010 (Maloney, 2015: 42). Most of these instruments and institutions are not recognised within formal international or national law; Wild Law enterprises (e.g. mock trials, ﬁctive judgments, ecocentric legal re- writing projects) aim to raise awareness and forge new ways of thinking (Rogers and Maloney, 2014). Thus when the Australian Earth Laws Alliance (AELA) took the GBR’s case to the International Tribunal for the Rights of Nature and Mother Earth in 2014–15 (AELA, n.d.), it was not in the hope of an immediate concrete outcome but in the service of modelling a parallel legal universe and producing a corpus of academic and legal texts as a resource for subsequent activists, lawyers and scholars. The lesson to be learnt from Rawson and Mansﬁeld is that this parallel legal universe should strive to be aware of the historical power relations underpinning its imagined futures.

Despite the seductively universalist rhetoric and the racially and institutionally limited nature of the ‘transnational policy network’ (Rawson and Mansﬁeld, 2018: 101) promoting and advocating it, the Rights of Nature is not a singular enterprise. It encompasses a range of legal mechanisms being assayed by different actors within particular legal jurisdictions (as well as in the ﬁctive contexts described above). Thus legal personhood falls short of the full hopes of Wild Law advocates. For Cullinan, ‘Examining the complexities of trying to bring other members of the Earth Community into our courts and treating them as honorary humans’ (2002: 105) is not the right long-term game (cf. Maloney, 2018: 7–8). Rather, nature should be recognised as already having intrinsic rights. But the immediate-term needs of systems in crisis might arguably require lawyers to adopt the master’s tools.

### NEG---K---Cap

#### It relies on a capitalist legal lineage.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

Problems and critiques

According rights to nature does not necessarily have to involve using the category of LP. In fact, despite the evident popular, activist and scholarly excitement around the idea of legal personhood for nature, a variety of concerns (practical, legal, ethico-political and concep- tual) are beginning to emerge.

The obvious common-sense critiques of extending LP to a natural system like the GBR – those that concern the very conceivability of the idea – are relatively easily dealt with by historical arguments and comparison with the LP of corporations. The Stone article opened, in fact, with a ‘little discourse on the unthinkable’ (1972: 456) in order to make its case by a range of reassuring rhetorical measures, such as historical and cross-cultural comparison, appeals to common sense,15 and familiarisation techniques such as stressing continuity with existing legal practice. As noted, the EDO discussion paper likewise adopts the voice of calm common sense, and uses familiar, capitalism-friendly, comparisons, as when it describes the board of trustees suggestion as ‘similar to a management committee who run a company’. To critics of LP, these comparisons are precisely the point, signalling the contiguity of LP to colonial and capitalist business as usual.

#### Its mechanism of delimiting specific areas for protection as discrete from holistic conceptions of nature reifies extractive logics.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

Conceptual. There are practical, environmental, and conceptual problems with the enterprise of extracting, deﬁning and naming a natural ‘object’ (a term that itself embodies these problems). While certain natural ‘objects’ may seem more self-evidently bounded than others, this does not negate the fact that carving out something from nature for the purposes of legal delimitation is a performative act. It doesn’t reﬂect a simple empirical reality ‘out there’ but rather brings something into (legal, political, geographical, rhetorical) being, in a manner that is inevitably cultural and ideological, and for reasons that may be political, practical or contingent.

As with national parks, delimiting a protected territory (or entity) may address the problems of individual areas, sites or ecosystems but it leaves the dominant paradigm intact and is likely to favour iconic sites. This does not invalidate it as a super-charged effort to save a natural wonder in immediate danger, but it does point to the limitations of the legal personhood mechanism as a generalised solution or a putative ecocentric paradigm.

To take the case of the GBR: what would constitute the extent, boundaries, inclusions and exclusions of the GBR itself? Which of its 3000 individual reef systems and its hundreds of offshore and inshore islands would be included? Where do its oceans ‘start’ and ‘stop?’ How much of the hinterland would be included? Even within current legal deﬁnitions, the Great Barrier Reef Marine Park is not coterminous with ‘the Reef’ or with the World Heritage Area (GBRMPA, n.d. (a)). It is not that this could not be decided in law; it is more that the fundamentally ‘extractive’ logic of delimiting bounded territories is still conceptually located within the property-based conception of nature that permeates Western epistemologies and law, and it may do conceptual violence to the holistic and dynamic workings of nature itself. Moreover, as we will see in the next section, it misrepresents Indigenous epistemologies and ontologies.

### NEG---K---SCT

#### Rights of Nature are colonialist---associating natural entities with human-centric characteristics reinforces Western totality---that forces indigenous cosmopolitics which recognize the dynamism and openness of nature into the molds of modernist ontology.

Mihnea Tănăsescu 20, PhD in political science from the Vrije Universiteit Brussel, 8/20/2020, “Rights of Nature, Legal Personality, and Indigenous Philosophies,” Transnational Environmental Law, Vol. 9, Issue 3, p. 429-453

5.2. Amerindian Multinaturalism

The relational ontologies122 of Māori worlds are, in formal terms, also reflected in Amerindian ontologies. Beyond the idea of good living, Amerindian ontologies, as described by Viveiros de Castro,123 are deeply relational. Relational ontologies conceptualize the world as a series of relations: the primary beings of the world are not individuals separated by identity criteria, but rather are the relationships between inherently changeable beings. This allows such philosophies to escape the constraints of materialism, which relegates only ‘material objects’ to the status of reality, everything else being epiphenomenal. Instead, Amerindian ontologies (and, to a large extent, Māori ontologies) are able to live with a great many beings that are, from the outside, supernatural, whereas from the inside are simply beings in a relational world.124

In Amerindian philosophies the world is understood to be connected, held together as it were, by the principle of humanity. As Viveiros de Castro explains, ‘humankind is the substance of the primordial plenum or the original form of virtually everything, not just animals’. 125 This is because subjectivity, understood as subjective experience, is what connects all beings; differentiation is merely material. In other words, ‘the manifest bodily form of each species is an envelope (a “clothing”) that conceals an internal humanoid form’. 126 This deep form of anthropomorphism – literally, everything has interiority – sustains a relational ontology steeped in what De la Cadena calls ‘earthpractices’, defined as ‘relations for which the dominant ontological distinction between humans and nature does not work’. 127 The reason is two-fold: firstly, it is relations that are primary; secondly, it is subjectivity that connects all beings.128 In many Amerindian philosophies, Andean ones included, there is one humanity and there are many natures, a view that Viveiros de Castro calls multinaturalism

In the text of the Ecuadorian Constitution, Pachamama is an Indigenous other-than-human figure that erupts in the political space of the state.129 However, the equivalence in the constitutional text between this figure and nature – including in the articles that grant rights to nature – is deeply problematic, as it forces the radical potential of an Indigenous cosmopolitics into the moulds of modernist ontology. In particular, the constitutional text falls prey to the western obsession with totality, visible in the rendering of Pachamama as universal nature, Earth as such, if somewhat animated by Amerindian ‘beliefs’. The Constitution manages to construct nature on the model of the human person, whereas Indigenous philosophy, through its multinaturalism, universalizes the interiority of the human experience (everything has a life of its own) and the dynamism and openness of material forms (and everything changes). From this perspective it is the concept of a stable human person (with intrinsic characteristics and values) that can be destabilized by modelling it more closely on the dynamism and fundamental openness of nature. Instead, the rights of nature in the Ecuadorian case reinforce a western view that attaches to nature the universalism which it had previously attached to human rights. The possibility of allowing Indigenous ontology to disrupt the very notion of universalism seems, here, foreclosed.

There is an intrinsic relationship between the idea of rights and that of totality, both in terms of the full individual as recipient of rights,130 and also of nature as the subject of rights. Latour offers a useful critique of the idea of totality in political ecological thought, centred on the ways in which it renders other-than-human forces and actors as a unified globe, a sphere floating in space, which is the polar opposite of what deeply relational modes of being interact with.131 The idea of totality radically delocalizes interactions between undefined human beings and inherently dynamic natural assemblages. In relational ontologies it is this land, here and now, specific to a location and a people, that acts and is therefore given voice through particular partnerships with particular people, who themselves take their character from the land. Ecocentric philosophies, on the other hand, tend to speak for a totalizing, universal nature that stands above any one being. Amerindian ontologies are not ecocentric in this highly modernist sense. Notably, advocates of a totalizing figure of nature seldom seem to reflect on their own positionality. For example, looking at the transnational policy network instrumental in Ecuador’s rights of nature,132 it is clear that a total universal nature is paired with a ‘global citizen’ who can afford a totalizing view.

What is sidestepped in the operations of totality are precisely the myriad relationships that exist between not nature on one side and individuals on the other, but rather between worlds and peoples. It is in this sense that the Te Urewera Act constitutes, in my view, the most significant innovation in nature’s representation so far, precisely because of the minimalist grant of legal entity status and the determined focus on representative arrangements. Te Urewera, in contrast to nature’s rights in Ecuador, is a particular place that enters into anthropomorphic relations with particular people, now potentially empowered to reinvent future relationships which can unsettle the definition of what constitutes a human as much as what constitutes ‘nature’. The anthropomorphism of Indigenous philosophy does not simply posit universal nature as fundamentally akin to human people, but rather signifies entry into genealogical ecological relations modelled on a particular natural entity itself, such as Te Urewera. It is the natural entity that sets the tone of the relationship.133

The idea of nature as presented in the Ecuadorian Constitution has the potential to undermine the dynamism implied in relational ontologies. To be precise, in as much as relations are primary, the beings that are constituted through them are in flux; they change and adapt to new circumstances and new relations. Therefore, it is a ‘nature out there’ that is worshiped as an unchangeable form. Rather, Amerindian philosophies posit environmental relations in terms of reciprocal exchanges,134 as do Māori philosophies. In this context, Article 72 of the Ecuadorian Constitution, which gives nature the right to be restored, might be particularly problematic in terms of the extent to which it affords other-than-human beings their own autonomy in changing.

6. CONCLUSIONS

The discussion in this article would suggest that the rights of nature are not an end state, but rather a historically contingent experiment in the ongoing pursuit of greater Indigenous political authority. They do not come with environmental results embedded but will be subject to future representative efforts on behalf of the new legal entities. Crucially, future environmental results are themselves determined by the way in which rights are granted, which modality in turn depends on why they were granted.

The precise form that legal subjectivity arrangements might take will be influenced by Indigenous participation in various ways. However, to understand Indigenous philosophies as leading towards ecocentric law, in my view, misstates the issue. Many Indigenous philosophies are not about centrism at all, but rather about a deep relationality that is context-specific. Ecocentrism risks sidestepping the notion of reciprocity, arguably a central issue for many Indigenous philosophies, in favour of the issue of recognition, a western onto-normative construct that is steeped in universalist and centrist thinking. Finally, an ecocentric analysis does nothing to change the argumentative form of anthropocentrism, but merely turns it upside down.

I have also argued that understanding the rights of nature as inaugurating a legal entity – and drafting laws accordingly – potentially allows more hybridization of western and Indigenous legal and political conceptions. This is so because an ‘entity’ need not be constructed according to the predetermined and human-centric characteristics that travel together with the concept of ‘person’. As Naffine points out, ‘legal rights are seen as a mere augmentation of what are taken to be innate moral attributions of “natural’ persons”’, 135 something that conceals important distinctions ‘between legal rights and moral rights, legal personhood and moral personhood’. 136 Consequently, radically different ontological assumptions about what nature might be, and a radical decentralization of the human person, are restricted in changing the fabric of law.

The most radical discourses of environmental law seem concerned primarily with an ‘extension of rights to living and non-living human and non-human entities in an effort to dissolve interspecies hierarchies’. 137 However, doing so further legitimizes the construct of rights itself, what Rawson and Mansfield call ‘the naturalization of rights’, and which they rightly point out has troubling colonial histories.138 Even when opting for the formulation of nature’s rights within the more flexible construct of legal entity, it is not clear that the liberal rights history that models them on particular kinds of person can be entirely sidestepped.139 Just as importantly, the ways in which Indigenous philosophies personify nature do not seem to be aptly translated by the western concept of legal person. On the contrary, the legal person conceives of natural entities according to human criteria, whereas personifications of nature in Indigenous thought naturalize the human person, bringing her into genealogical relations with particular lands.

The political implications of Indigenous ways of life are vastly more radical than those of rights of nature. In identifying Indigenous philosophies with rights of nature too closely, we run the risk of diminishing the radical potential of alternative political arrangements. The two cases examined in this article feature rights for nature as part of negotiations over political authority between Indigenous groups and settler states. In Ecuador, this negotiation took the form of a liberal rights expansion. In Te Urewera, the negotiation was in important respects in open conflict with liberal rights, although it remains to be seen how far the concept of legal entity can move away from a liberal rights paradigm. As radical as nature’s rights might first appear, they still need to show convincingly that they are able to incorporate Indigenous philosophies on an equal footing. A fully equal (political and legal) engagement with Indigenous worlds remains ahead of us.

#### Letting colonists decide personhood status and recognition enables juridical humanity---perpetuates dehumanization, genocide and antiblackness.

Ariel Rawson & Becky Mansfield 18, Ariel Rawson, Ph.D. Student in Geography at Ohio State University; Becky Mansfield, Professor in the Department of Geography at Ohio State University, 2018, “Producing juridical knowledge: ‘‘Rights of Nature’’ or the naturalization of rights?,” Environment and Planning E: Nature and Space, Vol. 1, Issue 1-2, p. 99-119, https://journals.sagepub.com/doi/abs/10.1177/2514848618763807

Decolonial perspectives on the colonial episteme of rights and personhood

Our questions about and approach to analysis of RoN as an epistemic community are also grounded in decolonial thought on the episteme of rights and coloniality. Questions about the role of juridical recognition and rights in the formation of insides and outsides of colonialism have been at the center of debate for decades among postcolonial, indigenous, and black scholars. This scholarship has articulated intimate relations between rule of law and genocidal dispossession, slavery, colonial mandates, war on terror, and other imperial interventions; not only in terms of ‘‘defense of conquest and colonization’’ but also as ‘‘naturalized regime of rights and disabilities, power and disadvantage that flowed from it’’ (Harris, 1993: 1723). Following Fanon, Coulthard (2014: 31) argues that crucial for the duration and stability of colonial social relations is the ability to ‘‘transform the colonized population into subjects of imperial rule.’’ Indeed, the colonial dynamic between inside/outside undergirds both contemporary human rights discourses and those of colonial jurists who equated law-lacking territories with dehumanized populations whose humanity must be granted or given back. For Esmeir (2006) it is precisely this colonial constitution of modern law that makes operations of juridical order occur through both dehumanization (withholding of rights) and humanization (granting personhood status). Moreover, this constitutive possibility of revoking recognition doubles the status of the human: as universal mankind and as yet-to-be human. Esmeir (2006: 1544) calls the way law comes to constitute what is ‘‘human’’ a process of ‘‘juridicalization,’’ which generates what she calls ‘‘juridical humanity.’’ Crucially, the more ‘‘we think of humanity as a juridical status, the more dehumanization is possible’’ (Esmeir, 2006; 1549–1550).

Not only does ‘‘juridical humanity’’ make dehumanization possible but the relationship between redemptive powers of colonialism and humanization makes necessary the continual identification of dehumanized subjects (Esmeir, 2006: 1546–1547). Only through suffering, wounding, infliction, and victimhood can those not recognized by the status of personhood be incorporated into the ‘‘brotherhood of Man’’ and acquire associated rights (Weheliye, 2014: 75–76; see also Brown, 1995; Hartman, 1997). Scholars identify several problems with this basis of inclusion. First, deliberating who deserves recognition requires comparing suffering (Weheliye, 2014). Second, juridical humanity erases the subjects of violence in exchange for possession of one’s personhood (Esmeir, 2006; Harris, 1993; Weheliye, 2014). Third, there is a nonreciprocal politics of recognition for colonial subjects or those whose personhood was once not one’s own possession (Coulthard, 2014). Together these critiques of the precondition of suffering or dehumanization highlight the ways the promise and practice of inclusion reproduces the same colonial violence as exclusion.

Furthermore, impossibility of inclusion is predicated on exclusion of slaves, thus constituting the free human being as always already a racialized property relation. For Harris (1993), commodification of human life in slavery not only built personhood on expectations of white privilege and supremacy. It also made whiteness the possession of being fully human (or the property of inalienability) and made blackness the object of property (or the property of alienability). This entanglement between race and property in turn becomes naturalized as the codification of existing relations instead of as an effect of active and ongoing practices of sovereign power. As in John Locke’s proclamation ‘‘every man has a property in his own person,’’ this racialized history of property is most naturalized in the form of personhood as possession of one’s physical and psychic self (Harris, 1993: 1735). At the same time constitution of slave humanity as legal recognition of hybrid person property can only articulate racialized promise of full personhood as part and parcel of intensifying subjugation of the enslaved (Hartman, 1997). In turn, it is the particular constitution of blackness as alienable that enables the ontological power of law to transform objects of possession into subjects of ownership while simultaneously prohibiting black life access to the inalienability of personhood (Weheliye, 2014: 78). To be clear, Weheliye (2014) states the constitution of personhood qua whiteness does not negate the genocidal effects on indigenous populations, but ‘‘rather represents different properties of the same racializing juridical assemblage that differentially produces both black and native subjects as aberrations from Man and thus not-quite-human’’ (p. 79).

Weheliye and Esmeir’s analyses make visible that the legal status of being human is always about both sameness and difference. In contrast to accounts of the necessary individuality of personhood rights and the universal sameness of the human subject, the rule of law as a colonial technology does not just depend on atomization of a common unit but also on difference and creation of classes and collectivities. As juridical constitution of individualized being (personhood) becomes universalized through species norms of embodied whiteness, ‘‘access to personhood as property’’ becomes managed and delimited by generating differences within collective being (juridical humanity) (Weheliye, 2014: 79). Esmeir (2006: 1547) argues personhood status is predicated on membership in some class, and these classifications come to articulate ‘‘what or who human is.’’ In turn, legal status of persons is both constitutive of and nonisomorphic with human beings. By bringing into being what is and isn’t human, practices of personhood not only render certain humans not quite human, but they also render certain nonhumans persons—as can be seen, under certain legal regimes, with the inclusion of animals, corporations, and other nonhuman entities as classes or categories of persons (Esmeir, 2006: 1547). That is, there is not a dichotomy between persons as inalienable, with intrinsic value, and property as alienable, with instrumental value. Rather, there is the juridical person through the racialized commodification of human life. Seen in this way, extending personhood to nature as an alternative to the commodification of life and human–nature dualism (i.e. RoN) attaches properties of whiteness to nature and naturalizes being human as a property of whiteness.

In sum, the rights-bearing citizen was founded on notions of property, in which personhood rights were based on sovereign possession of oneself; although originally founded on limited recognition of sovereign persons as white, straight, property-owning men, an enduring strategy of colonial technologies of governance has been to expand the sphere of recognition to incorporate new subjects (Barker and Puar, 2002; Brown, 1995; Foucault, 2007; Weheliye, 2014). The paradox is that terms of inclusion are based on the degree one differs from the original subject of rights such that demands for juridical recognition uphold both the supremacy of whiteness and the slicing of difference into identity-based categories (Barker and Puar, 2002; Brown, 1995; Weheliye, 2014).

While this opens up questions concerning the ways blackness and indigeneity differentially articulate within the propertied racialization of personhood, for our purposes we maintain the production of inside/outside as the white supremacy or antiblackness that constitutes the juridical human via socioeconomic relations of slavery, while we focus on how indigeneity figures to purify rights as outside western colonial and neoliberal development. It is in this context that we examine how the figure of indigeneity becomes an imperative within RoN, and we do so without arguing for or against, why or to what effect, indigenous actors have put rights to use strategically (Andolina et al., 2009; Rojas, 2013; Sieder and Vivero, 2017; Valladares and Boelens, 2017). As Radcliffe (2017) suggests, attending to the dynamics of coloniality/indigeneity, as a set of practices necessary for decolonizing the relation between the category and its referent, requires examining the strategies through which indigeneity becomes abstracted from ‘‘specific indigenous localities’’ (p. 224) and signaled through the ‘‘positionings of settler, nation-state, development, whiteness... among many others’’ (Radcliffe, 2017: 221).

By drawing on decolonial accounts of how an episteme of rights naturalizes inside/outside relations, we conceptualize juridicalization as a tool for naturalizing the coloniality of existence. We also denaturalize RoN as an epistemic community that paradoxically depends on entrenching juridicalization to overcome colonial modes of existence. Against this naturalization, the next section demonstrates that RoN is a spatially intensive cluster of actors that draw on western holism and jurisprudence to present nature’s rights as a natural alternative to colonial western development.

#### Vote negative to endorse earth-practices---instead of understanding politics through human-centric rights and recognition, the alt comes to terms with other-than-humans’ material existence which breaks down the ontological distinction between humans and nature.

Marisol De La Cadena 10, Ph.D in Anthropology from University of Wisconsin-Madison and Professor Department of Anthropology Sociocultural Wing, 2010, “INDIGENOUS COSMOPOLITICS IN THE ANDES: Conceptual Reflections beyond “Politics”,” Cultural Anthropology, Vol. 25, Issue 2, p. 337-370

The political world is a pluriverse, not a universe

—Schmitt, 1996

Politics is not made up of power relations; it is made up of relations among worlds

—Ranciere, 1999 `

A reading of the Andean ethnographic record along epistemic lines shows that earth-practices are relations for which the dominant ontological distinction between humans and nature does not work.11 Earth-practices enact the respect and affect necessary to maintain the relational condition between humans and other-than-human beings that makes life in (many parts of) the Andes. Other-than-humans include animals, plants, and the landscape. The latter, the most frequently summoned to politics these days, is composed of a constellation of sentient entities known as tirakuna, or earth-beings with individual physiognomies more or less known by individuals involved in interactions with them.12 The “things” that indigenous movements are currently “making public” (cf. Latour 2005) in politics are not simply nonhumans, they are also sentient entities whose material existence— and that of the worlds to which they belong—is currently threatened by the neoliberal wedding of capital and the state. Thus, when mountains—say Quilish or Ausangate—break into political stages, they do so also as earth-beings, “contentious objects whose mode of presentation is not homogenous with the ordinary mode of existence of the objects thereby identified” (Ranciere 1999:99). Borrowing from ` the history of science to trace the history of politics (for the latter as much as the former was invented) I propose that these objects are contentious because their presence in politics disavows the separation between “Nature” and “Humanity,” on which the political theory our world abides by was historically funded.13

According to the modern order of things science and politics are to each other like water and oil: They do not mix. The first stands for objective representation of nature, while the second is the negotiation of power to represent people vis-a-vis ` the state. This distinction, historians of science Steven Shapin and Simon Schaffer explain, resulted from the quarrel between Hobbes, author of Leviathan, and Robert Boyle, champion of the “experiment” as scientific method and architect of the new field of experimental science and its social institutions (Shapin and Schaffer 1985). They propose that this quarrel (in which Hobbes denied the truth of Boyle’s experiment because of its private nature, and Boyle insisted that experiments could not have the public aspect that should characterize politics) was one important historical moment in the invention of the language that lifted “politics” from “science” and in the consequent formulation of the boundaries between epistemology and the forces of society. Bruno Latour (1993) builds on this analysis to develop his argument about the creation of what he calls the modern constitution: the regime of life that created a single natural order and separated it from the social by creating an ontological distinction between things and humans that it purported universal. He suggests that, rather than creating two separate spheres—Boyle science and Hobbes politics—what they did together (through their quarrel) was to create “our modern world, a world in which the representation of things through the intermediary of the laboratory is forever dissociated from the representation of citizens through the intermediary of the social contract” (Latour 1993:27). Hobbes and Boyle were, thus, “like a pair of Founding Fathers, acting in concert to promote one and the same innovation in political theory: the representation of nonhumans belongs to science, but science is not allowed to appeal to politics; the representation of citizens belongs to politics, but politics is not allowed to have any relation to the nonhumans produced and mobilized by science and technology” (Latour 1993:28).

The presence of earth-beings in social protests invites us to slow down reasoning because it may evince an intriguing moment of epistemic rupture with this theory of politics. Their public emergence contends—to use Ranciere’s word— ` with both science and politics; it may house the capacity to upset the locus of enunciation of what “politics” is about—who can be a politician or what can be considered a political issue, and thus reshuffle the hegemonic antagonisms that for more than 500 years organized the political field in the Andes, and that gradually articulated through modern scientific paradigms, banned earth-beings from politics. Here I borrowed Chantal Mouffe’s distinction between politics and the political—for which she, in turn, builds on Carl Schmitt (Mouffe 2000). Antagonism separates “friends” from “enemies” in such a way that “the adversary intends to negate the other’s way of life ... in order to preserve one’s forms of existence” (Schmitt 1996:27). The political enemy is “the other, a stranger; and it is sufficient for his nature that he is, in an especially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible” (Schmitt 1996:27). Antagonism is not good or evil, ugly or beautiful, profitable or unprofitable, for all these distinctions belong to other specific fields—ethics, aesthetics, and economics respectively—to which the political cannot be reduced. The problem with liberalism and particularly with liberal democracy, says Schmitt, is that having tied the political to the ethical, it negates conflict and, thus, the political itself.

Mouffe takes up this point and builds on Gramsci’s notion of hegemony to define politics as the field that makes antagonism livable, curbs or even cancels its warlike potential, without ever canceling the conflict it entails. Politics are, she explains, those practices through which the antagonistic differences between friends and enemies are tamed, dealt with (ideologically and institutionally) and transformed into the agonisms—the relationships among adversaries—that characterize hegemonic orders, with their inclusions and exclusions (Mouffe 2000).14

Yet, I must add to Mouffe, hegemony does not act only on the sphere of politics. Hegemonic biopower—wielded by both socialism and liberalism alike—transformed the political into an accepted battlefield for life. In such battlefield decisions are taken about who the enemies are, but as important, about who, not withstanding the antagonism, are not even worthy of enemy status. On occasions they are not even worth killing; they can be left to die because, although included in the concept of “Humanity,” they do not count—at all, for they are too close to “Nature.” If liberalism, as Schmitt and Mouffe suggest, tied the political to ethics and, thus, negated conflict, the birth of the modern political field, we learn from science scholars, was tied to the denial of the state of “Nature.” Sustaining the notion of the political that eventually became hegemonic was the ontological distinction between “Humanity” and “Nature,” the creation of the “natural Man,” his sentence to inevitable extinction along with his other-than-human beings, and the occlusion of this antagonism through the notion of an adamantly inclusive and hierarchically organized “Humanity.” Only the fully humans engaged in antagonisms, and only they could transform their enmities into adversarial relations—that is, engage in politics.

Initially, the antagonism between European and local other-than-human entities was visible. In Spanish America, the Catholic Church considered them as diabolic enemies, and practices with earth-beings were idolatries condemned to extirpation. In British America, Locke authorized war against natives—their closeness to nature made them unproductive, land had to be incorporated to civilization via the agricultural work of the white man. The antagonism must have been silenced gradually as reason gained ground and eventually prevailed over faith as a knowledge/power regime, and monopolized politics forthosewho knewthrough science. Interaction with things through nonrepresentational practices—the absence of the distinction between signifier and signified that allowed modern scientific practice and politics alike—was deemed equivalent to the absence of reason, and more specifically of political reason.

Hegel’s musings about Africa may serve to illustrate the point. In Africa, he wrote, “natural forces as well as the sun, moon, trees, animals are recognized as powers in their own right, they are not seen as having an eternal law or providence behind them, or as forming part of a universal and permanent natural order” (Hegel 1997:130). There “the kings have ministers and priests—and sometimes a fully organized hierarchy of officials—whose task is to practice sorcery, to command the powers of nature, and to determine the weather” (Hegel 1997:130). Pages later we learn that the African’s lack of understanding of “Nature’s Laws” was only compatible with a political organization based on the “arbitrariness of the autocrat” subjecting “men of equally savage temper” (Hegel 1997:137, 138). This reasoning should not be simplified as racism—it was enabled by the antagonistic relationship articulating the ontological distinction between humans and nature. Race (as a modern tool to rank “Humanity” along a “Civilization”–“Nature” continuum) was also enabled by this distinction and therefore already included the overarching idea that the representation of “Nature” in politics was to be necessarily mediated

[BOX BEGINS]

The discrimination that enabled race (and racism). A hegemonic notion of the political built on the silenced antagonism between nature and humanity either legitimized or occluded the war between the world of modern colonizers and those of the colonized—and in neither case allowed for politics between them. Their view as enemies displaced, the potential of an adversarial relationship, a rightful struggle for a hegemonic project, between them was stifled. It gave way to a center-periphery biopolitics of benevolent and inevitable inclusion in progress and civilization. This produced a regime of visibility (Ranciere 1999) ` that prevented the uncounted to appear as such; the denial of their difference (amounting to their exclusion from the possibility of equality) translated into ranked inclusion in Western humanity: an offer that “the inferior” could not refuse. The object of policies of improvement, only through a process of transformation (e.g., through which they should deny the social relations they held with plants, rivers, or mountains) could “the naturals” gain active and legitimate access to politics. Until then, they were a threat (but not quite an enemy) from which society, if it wanted to live a healthy life, had to be defended (cf. Foucault). The political field was in discursive proximity with the science of race and the state could scarcely function without becoming involved in racism (Foucault 2003:255). Although race has gone through constant theoretical and historical denaturalization since World War II, the discrimination between who can be considered enemies and who are not worthy of such status, and between those who can govern and those who cannot, continues to be legitimate. Undoing this discrimination requires undoing the political and politics as we know it—a task that requires more than the most radical multiculturalism welcoming to politics those previously evicted by racist politics. I would like to suggest that denouncing racism—even undoing it—may address the inferiority in question, but it does not address the epistemic roots of the antagonism between those entitled to rule and those destined to be ruled. What needs to be addressed is the epistemic maneuver that organized the political deciding what could be brought into politics and what belonged to a different managerial sphere. If embedded in the political was the silence about the antagonistic exclusion of “naturals,” the elimination of “Nature” from the same sphere completed the hegemony.

[BOX ENDS]

by science. Hegel shared with his modern peers this belief—then and now; its underpinning runs deeper than racism alone. The political field we currently recognize as such was shaped not only by distinguishing friends from enemies among humans but also by the antithetical separation of “Humanity” and “Nature.” Together these two antitheses—between humanity and nature, and between allegedly superior and inferior humans—declared the gradual extinction of other-than-human beings and the worlds in which they existed. The pluriverse, the multiple worlds that Schmitt deemed crucial to the possibility of the political, disappeared.15 Instead a single world made its appearance, inhabited by many peoples (now we call them cultures) more or less distanced from a single “Nature” (Descola 1996; Haraway 1991; Latour 1993; Viveiros de Castro 2004). Nonscientific relations with other-than-humans were reduced to belief, a far cry from a method to ascertain truth, yet perhaps worthy of preservation as long as they did not claim their right to define reality. The relation among worlds was one of silent antagonism, with the Western world defining for history (and with “History”) its superbly hegemonic role as civilizational, and as a consequence accruing power to organize the homogenous life that it strived to expand. Politics as a relation of disagreement among worlds—as the “meeting of the heterogeneous,” in Ranciere’s words (1999:32)—disappeared, or rarely ` happened.

Nonrepresentational, affective interactions with other-than-humans continued all over the world, also in the Andes.16 The current appearance of Andean indigeneity—the presence of earth-beings demanding a place in politics—may imply the insurgence of those proscribed practices disputing the monopoly of science to define “Nature” and, thus, provincializing its alleged universal ontology as specific to the West: one world (even if perhaps the most powerful one) in a pluriverse. This appearance of indigeneities may inaugurate a different politics, plural not because they are enacted by bodies marked by gender, race, ethnicity, or sexuality demanding rights, or by environmentalists representing nature, but because they bring earth-beings to the political, and force into visibility the antagonism that proscribed their worlds. Most important, this may transform the war that has ruled so far silently through a singular biopolitics of improvement, into what Isabelle Stengers calls a cosmopolitics: a politics where “cosmos refers to the unknown constituted by these multiple, divergent worlds and to the articulation of which they would eventually be capable” (Stengers 2005:995). In creating this articulation, indigenous movements may meet those—scientists, environmentalists, feminists, egalitarians of different stripes—also committed to a different politics of nature, one that includes disagreement on the definition of nature itself.

#### It captures and misrepresents indigenous epistemology which is a colonial erasure. Alternative mechanisms may be superior.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

While at ﬁrst glance it may seem that LP for natural sites/systems is compatible with the cosmologies, epistemologies and ontologies of Indigenous peoples, it may also be seen as yet another colonial imposition that erases the traditional relationships, conceptions, experiences and law of these sites (Marshall, 2017). According the Reef rights as a ‘natural object’ involves the foundational move of seeing nature as separate from humans, before then allowing ‘it’ some human-like rights and appointing some humans to speak as its legal proxy, thus supplanting Indigenous groups’ own diverse ‘conceptions of responsibility, agency and value’ (Whyte, 2017b: 89). This is one of the most trenchant critiques of the LP model in a postcolonial context.

First, Indigenous groups may or may not see ‘the Reef’ as an entity, and even if they do, it may not look the same way at all in their geographical and cosmological systems. Whatever territory is legally delimited as ‘the Reef’ may divide water from land in ways that run counter to Indigenous perspectives (Marshall, 2014: 58, 106, 114–117; McCalman, 2013: 5–6).

Further, Indigenous relations to land cannot be fully encompassed within the legal idea of ownership. The legal personhood framework is only superﬁcially compatible with Indigenous conceptions and experiences of ‘country’ as ‘not just a particular geographical environment known and cared for in every detail, but a cultural space alive with stories, myths and memories’ (McCalman, 2013: 6), ‘a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life’ (Rose, 1996: 7). Nonetheless, the language of ‘Traditional Ownership’ is an accepted component of Australian land rights politics. But the implied relationship between legal personhood and Traditional Ownership is not spelled out in the EDO paper. It is unclear how the rights, interests and traditional law of the more than 44 Indigenous groups with connections to the Reef (Dale et al., 2016: 4) would be represented in the legal entity model.

Any LP provision for the Reef would have to take foundational Indigenous belonging seriously, while also articulating to the legal struggle over many decades to have Traditional Ownership of the Reef recognised in law and reﬂected in governance (Dale et al., 2016). The EDO proposal mentions the concrete details of Indigenous representation only once, sug- gesting that the board of trustees might be comprised of ‘members appointed by a variety of groups who have an interest in the ongoing wellbeing of the Reef’. Would this represent an improvement on the current GBRMPA model, in which Traditional Owners are construed as ‘partners’ (GBRMPA, n.d. (b))?

These are questions that need to be examined carefully by the parties involved with no expectation that the same solutions would apply in other cases. For example, while the Whanganui River case might seem to promise the compatibility of the LP mechanism with Indigenous worldviews and politics, and indeed it is included as a point of comparison in the EDO materials, closer examination might suggest the comparison with the GBR to be of constrained utility.19 The 2017 decision to accord a voice to the Yarra River in Melbourne by means of greater Indigenous representation rather than via legal personhood might provide a clue to alternative mechanisms.20

#### RoN is inextricable from the imperialist history of “human rights”---modeling nature on the white, European, male property-owner excludes marginalized folks, diminishes respect for non-human entities, and revives rights to “food” and “health” that protect big pharma and agribusiness that hurt the environment---only a radical restorying that reimagines rights solves.

Anna Grear 19, professor of law at Cardiff University, and the founder and editor in chief of the Journal of Human Rights and the Environment, 3/19/19, “It’s wrongheaded to protect nature with human-style rights,” https://aeon.co/ideas/its-wrongheaded-to-protect-nature-with-human-style-rights

How can the law account for the value of complex, nonhuman entities such as rivers, lakes, forests and ecosystems? At a time of runaway climate change, when the Earth’s biosphere is on the brink of collapse and species extinctions are accelerating, this has become a vital question.

Some theorists argue that there’s a clear historical precedent for what we should do, arising from the struggle for universal human rights. The law and discourse of human rights, commonly traced back to the Enlightenment, has held sway over the sections of the Western public for decades, if not centuries. Perhaps we should take the idea of ‘the human’ as a rights-bearer and extend it to the complex, nonhuman systems that we wish to protect, that we know are deserving of care and concern.

Tempting as it is, this move must be resisted. For one thing, human rights have proven to be exclusionary – even within our own species. Its emergence as a set of legal and moral norms betrays the fact that the white, European, male property-owner is the paradigm case of ‘the human’: others, historically, have had to fight even to be seen as fully capable of bearing rights. International treaties have been required to address the rights of women, children, workers, LGBT people, indigenous communities and others, precisely because such ‘minorities’ were marginalised by the abstract idea of ‘the human’ of the Universal Declaration of Human Rights. Critics have also suggested that human rights norms are a Trojan horse for neo-imperialism, providing ideological cover for dubious ‘humanitarian’ interventions and capitalist plundering. In theory, human rights are for all humans, but it turns out that some people are more human than others.

Yet maybe there’s something to be salvaged from rights discourse all the same – if we can find a way to deploy the idea of ‘rights’ while decentring ‘the human’. Perhaps we can find ways of understanding ourselves as entangled partners, and sometimes co-sufferers, with nonhuman animals, beings and systems in a ‘more-than-human world’, as the gender scholar Astrida Neimanis at the University of Sydney put it in an article in 2014.

Certain dangers lurk in using human rights to capture the interests of the nonhuman. First, its language and conceptual framing risk blunting attention to the distinctiveness and particularities of such dynamic beings. We risk only having respect for things insofar as they resemble human experience and characteristics.

Secondly, and just as important, is the related danger of diminishing our awareness of the human itself as a variegated mode of being in the world. This danger is already starkly present in the advent of corporate human rights, a development that has distorted the entire international human rights paradigm. At the heart of these developments is a legal conflation of the ‘human’ and the ‘person’ – a merger by which global capital can claim the mantle of humanity in ways that risk harming real, living people. The human right to health, for example, can be cast as a byproduct of big pharma protecting intellectual property monopolies; or the human right to food can be deployed as a justification for agribusiness companies to dominate global food supplies.

So, if we resist the idea of ‘human rights’ for nonhumans, and we carefully distinguish between ‘humanity’ and legal personhood, what is left standing?

There are already ways of thinking about rights that are sensitive to various beings and systems. In a seminal paper from 1972, the legal scholar Christopher Stone asked if trees should have ‘standing’ – that is, if they could claim the necessary status to mount claims at law. His response was to wonder if the law might award ‘river rights’ to rivers, tree rights to trees, or ecosystem rights to ecosystems.

Yet I think it’s important to move beyond Stone’s suggestion, and inch closer to acknowledging the complexity and liveliness of the nonhuman by admitting the porousness of our own boundaries. Perhaps we should not extend outwards from ourselves, so much as question humanity’s entitlement to act as a model. After all, it is a hubristic belief in our own singularity and exceptionalism that’s partly responsible for destroying the planet. One thing seems certain: if the law is to respond to the multiple crises afflicting the Earth, and if rights are to be deployed, we need to get rid of the notion of a rights-bearer who is an active, wilful human subject, set against a passive, acted-upon, nonhuman object. The law, in short, needs to develop a new framework in which the human is entangled and thrown in the midst of a lively materiality – rather than assumed to be the masterful, knowing centre, or the pivot around which everything else turns.

What might this kind of shift in understanding mean for the law and legal practice? It would certainly require courts to be open to a wider field of meaning-making. It would mean ‘hearing’ from multiple communities (human and nonhuman) by relying on the best new science. It would also demand situated, careful enquiry that examines the nuanced interactions making up the dynamics and relationships among the entities in question. Although the law is on the move, embracing the idea of nonhuman legal persons (such as rivers) and showing signs of a more materially sensitive, contextualised awareness, there are, as yet, no clear examples of cases and approaches as radical as is required. Some interesting thought-experiments and developments show promising directions, but there is more radical thinking to be done.

Some might object that such a decentred approach is likely to be more complex and challenging than relying on existing assumptions about the centrality of ‘the human’. That’s certainly true. But such engagement is preferable – more empirically faithful to what’s there – than continuing to elevate the human as the ethical apex of the legal system. The ‘human’ cannot continue to be the sole benchmark against which other beings must be measured in order to count.

In the predatory global order of the 21st century, it seems better not to deploy human rights as a blanket of protection for nonhuman animals and other beings and systems – precisely because such varied partners in the dance of life deserve their own types of entitlement. Thinking in these terms not only does justice to the nonhuman, but could help us reimagine our own state of being in a richer and more open way. Given all that is at stake, nothing less than a radical restorying will do; and laws and rights – for too long tools of human privilege and exceptionalism – need to be re-imagined if they are to play a full role in human-nonhuman struggles for a future worth living.

#### Granting personhood to rivers makes land repatriation impossible----natives could claim ownership over land, but they can’t seek repatriation of people---this is preservationism that silences decolonization movements---rights of nature don’t even guarantee standing for indigenous representatives.

Brad Coombes 21, Senior Lecturer at the University of Auckland, “Nature’s rights as Indigenous rights? Mis/recognition through personhood for Te Urewera,” Espace populations sociétés [En ligne], <http://journals.openedition.org/eps/9857>

\*Pakeha---“Settler”

Personhood defaults to old, ideologically-loaded notions of public rather than Indigenous rights, but assertions of public rights are also saturated with culturally distinct, non-Maori discourses of recreation and preservation. The national interest, the public domain and the alleged rights of all New Zealanders – the country’s adolescent conceptions of equality – have long triumphed over Indigenous rights. In that context, application of person rights to conflict-ridden national parks embeds further the discourses that delimit Maori development and serve White privilege. Double standards are applied to Maori demands for ownership: “If a Pakeha is inclined to own some land, they’re applauded…but if a Maori wants to own their ancestors’ lands, they’re insulted as greedy pariahs, selfish developers or traitors to the national good” [Interview, Tuhoe Politician, 12.2.2019].

Representing nature and Indigenous rights

26 Conceptions of wilderness will condition the future of Te Urewera, but Tuhoe ontologies focus instead on centuries of co-evolution between Tuhoe and Te Urewera:

I’m not against thinking about the rights-of-nature, but surely the point of Treaty settlement is to think about our rights as a people. Maybe how the different rights are intended to mingle will come clear later…But I fear that we’ve been separated from Te Urewera by our own settlement. Our history in making Te Urewera what it is – us modifying it; it modifying us – gets overlooked if you think of it as a person with its own identity. The settlement is a bit too silent about mechanisms for treating Te Urewera as a person, a friend or a relative. There’s total certainty that we can’t own it, but there’s a lack of certainty about how we can care for it [Interview, Claims Negotiator, 22.11.2018].

27 Lay discourses about how living persons should be treated complicate these matters. Several interviewees raised metaphors about emancipation or servitude and how they may become embroiled in Tuhoe politics. Tuhoe ownership claims were “superseded by a new identity for Te Urewera as a tangata (person), so forevermore we will be treated as slavers when we state a desire to own it” [Interview, Kaumatua, 13.10.2018]. Another interviewee mused that “nobody will be seen to support an end for emancipation, a return to slavery” but “our relationship with Te Urewera was never one of master and slave” [Interview, Tribal Policy Advisor, 27.1.2019]. Clearly, some limitations in framing landscapes as living persons were not fully discussed before completion of the settlement, and that may lead to future conflicts.

28 Person rights for Te Urewera are not directly Tuhoe’s rights, and that is one of several limits to the enforceability of any rights created. Te Urewera’s agency as a legal entity does not extend to self-representation and vesting rights in figures who cannot present in a courtroom is not new. From first establishment of the national park, Crown agents covetously framed remaining Tuhoe land blocks as enclaves that should be purchased [Coombes, 2003]. Although small and isolated, multiple families valued those blocks, so determination of their shareholders in the Native Land Court was fractious. The court often vested such lands in the name of long-dead ancestors as a convenience, so that it was not required to resolve competing claims from plural Maori interests. It was presumed that customary lore, oral history and inheritance practices would direct land interests to those worthy of them. Often, however, lines of inheritance were ambiguous, so representatives for the named ancestors could not utilize any rights to which they were entitled. Effective champions for those spaces were sometimes missing from civic or courthouse debate, and for decades many Maori reserves were (ab)used as parkland.

29 Te Urewera has become a legal person, but it is no more alive than the ancestors in common who were named by past lawmakers to evade difficult decisions. One interviewee maintains that “we’ve done the non-living kin thing before by vesting our interests in common ancestors. It didn’t work then so I can’t trust that lodging our rights in this new person will work now” [Interview, Maori Land Administrator, 19.7.2018]. Even a supporter of personhood accepts that “as Te Urewera won’t be banging on any courtroom doors, the effectiveness of this comes down to how well the rules for advocating on her behalf are written” [Interview, Claims Settlement Negotiator, 7.3.2019]. Recognition that protocols for ongoing deliberation are a key concern for any Treaty settlement reveals gaps in the personhood approach. The two laws of 2014 include few details about maintaining Crown-claimant partnerships into the future, and it is unlikely that assured mechanisms for sustaining relationships will emerge soon. A recurring concern about comanagement in New Zealand is that protocols for engagement are often excluded from policy directives so they can develop extemporaneously and with specific reference to their local milieu (refer to the conservation-related provisions of the Taranaki settlements [Te Arawhiti, 2020]). While that is a laudable alternative to the conventional stenciling of such protocols across space, in the ambiguous circumstances where Tuhoe and Te Urewera’s rights are intermingled such flexibility may result in unrealizable rights.

Problematic implementation

30 The first outputs of Te Urewera Board were draft plans for awarding hunting permits and managing Te Urewera, but the documents eschew rules and inflexible procedures in favor of “principles” and “virtues” to “shape our responsibilities and choices to guide Te Urewera Board decisions” [Te Urewera Board, 2017: 9]. They are aspirational rather than stipulating procedures for, inter alia, deliberation, so they “will involve a process of unlearning, rediscovery and relearning” [Te Urewera Board, 2017: 9]. The management plan “is a work in progress but the work is by necessity adaptive rather than by preordained rules” [Interview, Claims Settlement Negotiator, 7.3.2019]. Most interviewees accept that adoption of personhood approaches requires an open-ended approach. Nonetheless, Board members are also directed to “promote unanimous or consensus decision making” [Te Urewera Act 2014, s. 31(1)(b)]. If that fails, they must accept “a minimum of 80%” consensus and acceptance by two of the three appointed officials [s. 36(1)(a), (b)]. For some interviewees, those approaches to decision-making are unsatisfactory and arbitrary: “So, all those years debating comanagement models and we end up with the unpredictable outcomes of bloody consensus on the fly” [Interview, Maori Land Administrator, 19.7.2018]. Legal personhood filters Tuhoe’s rights through those of Te Urewera, and in that context reliance on consensus also makes those rights contingent upon deliberative competency so they are insecure.

31 Comanagement’s capacity to incorporate human diversity and to resolve funding dilemmas was also a concern in earlier Treaty negotiations. Inter- and intra-tribal tensions, particularly those relating to an ongoing political role for hapu (sub-tribes), as well as complex divisions based on location, age or disbursement of benefits, had long stymied proposals for collaboration [Coombes and Hill, 2005]. Assumptions of a simple dyadic relationship between the state and an idealized Maori community failed to incorporate plural positionalities. Yet, the Urewera Act and the draft plan are ambiguous about how such tribes as Ngati Manawa, at the western edge of Te Urewera, or Ngati Kahungunu, at the south-east, will be included, even though tribal interests are overlapping. Under Maori traditions, rohe (tribal territories) and boundaries are fluid contact zones where resource rights are negotiated on a case-by-case basis, but the person rights approach is no better at incorporating that fluidity than any other comanagement alternative that was investigated. Earlier, I suggested that evading internal conflicts amongst Maori groups motivated the Native Land Court’s vesting of rights in common ancestors. It is likewise convenient for the Crown that implanting Maori rights within the new legal identity of Te Urewera “removes any need to distinguish one tribe’s rights from another’s, so it transfers that problem to Maori themselves” [Interview, Ngati Kahungunu Claims Negotiator, 14.4.2017]. Because the emphasis is on Te Urewera’s rights, neither law from 2014 clarifies when or where Ngati Kahungunu interests should be integrated into management decisions, so there is potential for continuing or new injustices.

32 The Urewera Board also confronts ecological predicaments that require access to Crown resources. Provisions for regarding the Board in ways that parallel the funding arrangements for local DoC conservancies are established in Te Urewera Act, so the budget for park management is a public responsibility [Sanders, 2018]. Yet, “if this is now a person, we have to think ahead to old age then rebirth, and there are uncertainties going forward” [Interview, Kaumatua, 13.10.2018]. Invasive species and climate change were regularly identified as national or global-scale challenges that may require new sources of funding, but how the Board will secure them is unclear. DoC is itself underfunded, with state failures to adjust budgets for inflation and new responsibilities leading to financial deficits, “so there isn’t much point in the Board becoming a mini-DoC, which is how it is treated under the new funding arrangements” [Interview, Ngati Kahungunu Claims Negotiator, 14.4.2017]. The Urewera Act is special purpose legislation applying to one location, but it is difficult to determine its likely success in the absence of wider policy reforms, including new funding and a turnaround in the national preoccupation with wilderness preservation.

Conclusion

33Many Indigenous philosophers call for renewal of kinship bonds with non-human others, so dealing with Indigenous and nature’s rights jointly is consistent with some Indigenous ontological framings of importance. However, that claim disregards the origins of rights-for-nature, who it will benefit and how it may displace other priorities of Indigenous communities. The rights-for-nature framework is exogenous to Maori communities, but its apparent imminence and relevance to Indigenous cultures may displace other agendas, and particularly the desire to renew ownership of lands lost to colonial practices. The philosophies that inform Te Urewera’s newfound status are not so new – they are a continuation of historically resilient discourses of wilderness and its preservation that have alienated Maori from their homelands in the past.

34The juridicization of everything from genomic title to parental obligations and responsibilities for the life-supporting capacities of future generations may indicate that personhood is part of an inexorable and organic progression [Rawson and Mansfield, 2018]. However, there is nothing natural in the way rights for nature have been injected into a history of laborious work by Indigenous peoples to reclaim their lands and authority. From the time the Crown reneged on its responsibilities under the Urewera District Native Reserve, Tuhoe activism has unequivocally pursued land repatriation. Until recently, state attempts to discipline those tribal preferences through the politics of inclusion and appeals to the public good were unsuccessful: it seemed certain that parklands would be returned to Tuhoe. At present, however, the public appeal of personhood and its capacity to mask or extend preservationism have silenced Tuhoe ownership claims. New Maori rights are implied in the personhood status of Te Urewera, but those rights are ambiguously transferable to Tuhoe. The tribe will surely make best use of Te Urewera’s new status and, from the vantage of Te Urewera Board, they will enliven conservation practice with new and old ideas. Nonetheless, a settlement that was intended to reintegrate Tuhoe and Te Urewera may induce new separations and perpetuate old injustices.

#### Lower the threshold for alternative solvency---the alt need not persuade politicians or upheave the state, but slow down reasoning to unlearn the coloniality of politics.

Marisol De La Cadena 10, Ph.D in Anthropology from University of Wisconsin-Madison and Professor Department of Anthropology Sociocultural Wing, 2010, “INDIGENOUS COSMOPOLITICS IN THE ANDES: Conceptual Reflections beyond “Politics”,” Cultural Anthropology, Vol. 25, Issue 2, p. 337-370

The point is not that scientists have to accept whatever those empowered people tell them, the point is that learning from them is their chance to put their preconceived ideas at risk.

—Isabelle Stengers, 2002

I do not want to be misunderstood. Being an “engaged intellectual”—una intelectual comprometida—was the way I lived in Peru and it continues to mark my scholarly work. In fact, my networks tangled with those of Mariano Turpo because of his role in modern politics—an unknown activist in the movement that produced one of the most important changes in contemporary Peru. Hence my discussion here is not intended to subtract from engaged activism but to add to it. Similarly, I hope not to be interpreted as an advocate of “indigenous peoples” singular or pristine condition. What I have tried to do here is follow Isabelle Stengers’s proposal to “slow down reasoning,” to let the composition of that which does not have a political voice (or, in some cases, does not want to have one) affect my analysis and, as she suggests in the above quote, put my preconceived ideas at risk to make anthropology say something different—or open it up beyond our world, to an anthropology of worlds. Working with Mariano and his son Nazario, I learned of the coloniality of politics and the many and complex features from which it derives its hegemony. An obvious one is the lettered quality of politics, shaped by the role of the city and its intellectual legacy. All too naturally the better educated rank higher in the scale of politics; the exceptions—those who do not have a university degree, like Bolivian President Evo Morales—are regarded as anomalies and the object of scandals. In the best of cases, we tend to think that the scandal (and the “deficiency” it connotes) may be easy to overcome, perhaps through alliances with the better educated. Again Bolivia comes to mind, and we think of Alvaro Garc´ıa Linera, the current Vice President of that country and a sociologist, as the gray matter behind the President, the organic intellectual working in horizontal collaboration with intellectuals of all paths of life, disregarding “rank.” An illustration of contemporary Gramscian practice, we may even feel proud of it.

The problem, however, emerges when such collaboration forgets that politics (as a category and a practice) was historically disabled to work in symmetry with the radical difference that modernity itself produced among the many worlds that inhabit the planet. Politics emerged (with science) to make a livable universe, to control conflict among a single if culturally diversified humanity living in a single scientifically knowable nature. The consequence is not just that politics is lettered; the problem is that it can only allow humans in its quarters—period. Analogous to dominant science, which does not allow its objects to speak, hegemonic politics tells its subjects what they can bring into politics and what be should be left to scientists, magicians, priests, or healers—or, as I have been arguing, left to dwell in the shadows of politics.25 Because mountains cannot be brought to politics (other than through science), Nazario’s partnership with Ausangate is all but folklore, beliefs that belong to another “culture,” that can be happily commodified as tourist attraction, but in no case can it be considered in politics. This exclusion is not just racism; it expresses the consensual agreement foundational to politics. The exclusions that result from it are disabled from their translation as political disagreement because they do not count—at all. Implemented with the aid of History, interrupting this agreement to make the exclusions count as such seems an impossible anachronistic task (Chakrabarty 2000). After all modern politics offers inclusion ... in its own terms.

Refusing this inclusion, not wanting to have the voice that politics offers them while at the same time intervening in politics, is what local leaders like Mariano have frequently and invisibly done for sometime. Currently, however, earth-beings are becoming more visible in politics, and many times in their own terms. If we slow down, suspend our assumptions and the ideas that they would lead to, we may perceive how this emergence alters the terms of the political; it disrupts the consensus that barred indigenous practices from politics, assigned them to religion or ritual, and occluded this exclusion. We may use this historical opportunity to put our preconceived ideas at risk and renew our analytical toolkit, vocabulary, and framework alike.

Yet this opportunity exists only if we are willing to give up two old answers (and fears), which mirror each other: (1) indigenous politics are traditional and archaic and therefore dangerous as they can evolve into antidemocratic fundamentalism (the specter of “Balkanization”—and as of recent “Bolivianization”—haunting gentlemen and ladies steeped in liberalism), or from the other end of the spectrum, (2) indigenous politics are essentially good, and we have to side with it (the ghost of the good savage troubling the naively principled).

I have proposed that the current emergence of Andean indigeneity could force the ontological pluralization of politics and the reconfiguration of the political. There are several things, however, that this phrase does not mean.26 First, it does not refer to ideological, gender, ethnic, racial, or even religious plurality; nor does it refer to the incorporation or inclusion of marked differences into a multiculturally “better” sociality. Second, it is not a strategy to win hegemony or to be a dominant majority—let alone an indigenous majority. My proposal to think through the pluralization of politics is not intended to mend flaws within already existing politics—or “politics as usual.” Rather, it aims at transforming the concept from one that conceives politics as power disputes within a singular world, to another one that includes the possibility of adversarial relations among worlds: a pluriversal politics.

Toward that end, I build both on Carl Schmitt’s notion of the political as a pluriverse and Jacques Ranciere’s concept of politics as disagreements among ` worlds. Borrowing from Viveiros de Castro (2004) and Strathern (2004), I think of the pluriverse as partially connected heterogeneous socionatural worlds negotiating their ontological disagreements politically—that would entail major conflict, the political importance of the discussion would be superlative, but it would replace the current unacknowledged war, and its occasional public eruptions. The idea of a pluriverse is utopian indeed: not because other socionatural formations and their earth-practices do not take place, but because we have learned to ignore their occurrence, considering it a thing of the past or, what is the same, a matter of ignorance and superstition. Thus, rather than utopian, my proposal is, in Stengers’s (2005) words, an idiotic project: My aim is not to induce to action but, once again, to slow down reasoning and provoke the kind of thinking that would enable us to undo, or more accurately, unlearn, the single ontology of politics.

This would require two steps in the reconceptualization of (what Mouffe calls) the political before pluriversal politics could start. The first step is to recognize that the world is more than one socionatural formation; the second is to interconnect such plurality without making the diverse worlds commensurable. The utopian process is, thus, the redefinition of the baseline of the political, from one where politics started with a hegemonic definition that housed the superiority of the socionatural formation of the West and its practices, to one that starts with a symmetric understanding of plural worlds, their socionatural formations and their practices. From the prior baseline (or, rather, the one we are used to) politics appeared as an affair among humans after denying the ontological copresence of other socionatural formations and its practices and translating the denial, with the use of universal history, from an antagonistic maneuver—a declaration of war against worlds deemed inferior—into a necessary condition for one good, livable world order. The new baseline is precisely the breaking of the silence, making the antagonism public to enable its transformation into agonism. At this point, rather than the biopolitical war that both liberalism and socialism waged against its alleged “others,” a new pluriversal political configuration—perhaps a cosmopolitics, in Stengers’s terms—would connect different worlds with its socionatural formations—all withthe possibility of becoming legitimate adversaries not only within nation-states but also across the world.

## Organizational Law

### Note on the Area

This area is weird and unique from the others for a few reasons:

1. Uniqueness. This is the only area in which personhood is expanding---albeit to include new rights (e.g. speech in Citizens United, or religion in Hobby Lobby), not necessarily to include new entities.

2. Direction of proposals. Most advocate shrinking corporate personhood, rather than expanding it. We have included advocates for expansion, but this does not reflect the majority view among those advocating for changes to the status quo.

3. Most discussion in this area touches on a totally different debate---the extent of **constitutional** personhood, rather than the extent of **legal** personhood. While everyone agrees that corporations are legal entities entitled to legal recognition, there is debate about what rights they can claim.

#### Here is evidence that explains the difference.

Zoe Robinson 16, Associate Professor of Law, DePaul University College of Law. J.D., The University of Chicago Law School; LL.B. (Hons), The Australian National University College of Law; B.A., The Australian National University; B.Mus., Queensland Conservatorium, Griffith University, “Constitutional Personhood,” The George Washington Law Review, Vol. 84, No. 3, May 2016, https://www.gwlr.org/wp-content/uploads/2016/06/84-Geo.-Was.-L.-Rev.-605.pdf

I. THE OPEN QUESTION OF CONSTITUTIONAL PERSONHOOD

To begin with, what exactly is constitutional personhood? Broadly, the term “personhood” has many connotations.28 Philosophers, for example, have long struggled with questions of moral personhood and determinations of who or what should be included in— or excluded from—the concept of a person to whom moral agency attaches.29 Yet, while the terms “person” and “personhood” generally denote a human being, “the technical legal meaning of a ‘person’ is a subject of legal rights and duties.”30 [FOOTNOTE 30 BEGINS] 30 Lawrence B. Solum, Legal Theory Lexicon 027: Persons and Personhood, LEGAL THEORY LEXICON (Mar. 14, 2004) http://lsolum.typepad.com/legal\_theory\_lexicon/2004/03/legal\_theory\_le\_2.html (citing JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gary ed., 2d ed. 1921)); see also Richard Tur, The ‘Person’ in Law, in PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 116, 116–27 (Arthur Peacocke & Grant Gillett eds., 1987) (summarizing the legal construction of “person” across multiple areas of the law); Berg, supra note 29, at 388–405 (discussing legal personhood in the context of embryos, fetuses, non- human animals, and artificial intelligence); Stephen C. Hicks, On the Citizen and the Legal Person: Toward the Common Ground of Jurisprudence, Social Theory, and Comparative Law as the Premise of a Future Community, and the Role of the Self Therein, 59 U. CIN. L. REV. 789, 808–21 (1991); Daniel N. Hoffman, Personhood and Rights, 19 POLITY 74, 74–78 (1986) (outlining the fraught issues that defining “personhood” raises); Lawrence B. Solum, Legal Personhood for Artificial Intelligences, 70 N.C. L. REV. 1231, 1238–39 (1991) (discussing the concept of legal personhood in the context of artificial intelligence). [FOOTNOTE 30 ENDS] Legal personhood, then, determines who or what is entitled to legal recognition.31 Importantly, the “person” to whom the law extends can be either natural—referring to human beings—or juridical—referring to an entity that is not a human being, but for which the law extends some legal protections, for example corporations.32

Constitutional personhood refers to a specific form of legal personhood that denotes a person’s status as a constitutional rights holder, entitled to the protective auspices of the rights contained in the U.S. Constitution.33 Discussions of constitutional personhood are complicated at the outset by the nonuniform rights protections afforded by the Constitution.34 That is, on its terms, the Constitution protects many different parties, including, but not limited to “persons.”35 The concept of constitutional personhood, then, involves a need for careful definition of multiple categories of potential constitutional claimants, which collectively can be described as constitutional personhood.36

There are a few approaches the topic committee could take to manage these issues:

1. Our recommendation is to let it be. The phrasing that requires expanding personhood to new entities would exclude much of the debate about which specific rights corporations should have, leaving in just a few specific AFFs, the best of which is likely the DAOs AFF. The result would be that **very few AFFs in this area are topical**.

2. If the TC opts for a list, we would not recommend including this area as a list option.

3. If the TC insisted on including personhood, another option would be explicitly distinguish this area in the resolutional phrasing. This can be done in one of two ways: a) make only this area go in the opposite direction, or b) make only this area include rights expansions for entities that already have rights, potentially specifying one or two theories under which the AFF might do this. The former would include AFFs that restrict corporate personhood. The latter would include some of the other AFFs listed below. Both are suboptimal. The former entirely avoids topic generics; while it is plenty controversial, this is undesirable. The latter is potentially quite unlimited, would lead to a clunky wording, and would require substantial vetting.

### Good To Learn About

#### There is a huge debate about the appropriate contours of organizational personhood, up to those who think it should be abolished entirely.

David Gindis & Abraham Singer 21, David Gindis is a Senior Lecturer in Economics at Hertfordshire Business School, University of Hertfordshire, UK; Abraham A. Singer is an Assistant Professor of Management at Quinlan School of Business, Loyola University Chicago, USA, “The Corporate Baby in the Bathwater: Why Proposals to Abolish Corporate Personhood Are Misguided,” SSRN Scholarly Paper, 3983013, Social Science Research Network, 12/09/2021, papers.ssrn.com, doi:10.2139/ssrn.3983013

CONCLUSION

The view that the assignment of constitutional rights to corporations is a judicial travesty is shared by a broad range of activists, social critics, practicing lawyers, legislators, and academics, many of whom back proposals to restrict constitutional rights to human beings and abolish corporate personhood. Corporate abolitionism stems from three genuine concerns, namely that corporate personhood enables a plutocratic regime, trades in absurd legal designations, and intolerably places corporate and human persons on equal normative footing. In response, we have shown that corporate abolitionism is a blunt instrument that unjustifiably removes an important tool for collective action and democratic empowerment; that corporate personhood is a legal term of art and a rather straightforward one at that; and finally that there is nothing in the doctrine of corporate personhood that requires corporate persons be granted the same complement of rights as human persons.

Although corporate abolitionism is ill-advised and the abolitionist amendment will likely never be adopted, the abolitionist movement has done much both to spread awareness of the perils of corporate empowerment and to mobilize political energies around this important issue. These efforts may not be in vain: sustained democratic deliberation about the institutional infrastructure of society, as Manski (2017) notes, can be a powerful vector for effecting political change. For example, although the women’s movement fight for the Equal Rights Amendment to prohibit sex discrimination was unsuccessful in the 1970s, the law today operates as if the amendment had been adopted (Hartley, 2017). This outcome was not produced by a single-minded focus on a constitutional amendment but rather by the direction of collective energies and resources toward many smaller policy battles.

There is a lesson for the abolitionist movement here. For instance, concerns over corporate empowerment may be better served by trying to compel the Supreme Court to recognize that corporate speech is substantively different from other kinds of speech. The Court has reversed over 300 of its own decisions, including in several of the cases mentioned in this paper (Congressional Research Service, 2016). In about half of these cases, rulings were overturned within the first 20 years; two thirds were overturned within 30 years. Citizens United thus represents the beginning, not the end, of the debate about the scope of First Amendment rights for corporate persons (Orts, 2013). To gain more traction in this debate, critics of corporate constitutional rights need to formulate stronger arguments in support of their position.

We believe that such arguments are bound to fail if they are expressed in categorical terms, treat corporate personhood as nothing but an aberration, and bundle all kinds of constitutional rights together. Given that the justifications for different corporate rights are as varied as the organizations that are affected, any serious critique requires care and nuance. We have suggested some ways of thinking about these issues, centering on the pragmatist commitment to open and reflexive social inquiry, and the related normative commitment to democratic equality. Instead of attempting to abolish corporate personhood simpliciter or eliminating all corporate rights, such commitments favor political debates over which rights corporations should not be granted and how to reconfigure the rights they do have in order to protect democratic equality. This will help clarify the underlying social objectives that we want corporations to actually serve.

#### The best approach to talking about corporate personhood is not ‘yes/no personhood,’ it is what legal rights and obligations should attach in particular situations.

David Gindis & Abraham Singer 21, David Gindis is a Senior Lecturer in Economics at Hertfordshire Business School, University of Hertfordshire, UK; Abraham A. Singer is an Assistant Professor of Management at Quinlan School of Business, Loyola University Chicago, USA, “The Corporate Baby in the Bathwater: Why Proposals to Abolish Corporate Personhood Are Misguided,” SSRN Scholarly Paper, 3983013, Social Science Research Network, 12/09/2021, papers.ssrn.com, doi:10.2139/ssrn.3983013

To be sure, corporate personhood can be abused and misused by the founders or executives of corporations and other organizations (Maitland, 2017). Shell entities can be set up to evade taxes and other responsibilities, and culpable individuals can go unpunished when corporate criminal liability is used as a scapegoat. Furthermore, prosecutors sometimes apply less stringent standards of justice to corporations (Garrett, 2014a). But corporate personhood is like any other legal doctrine in this respect: the potential social costs of its misuse should be weighed against the social benefits. What abolitionism motivated by the Plutocracy Rationale misses is that corporate personhood is necessary to accomplish all sorts of democratic objectives, which would be undermined if we did away with it (Piety, 2015). This does not mean that empowering the corporate person is always beneficial. But it does suggest that this balance is what the conservation should be about.

#### There is a progressive debate about whether it is best to limit corporate personhood or to expand it in order to highlight the distinction between the corporate entity and the shareholder

Stefan Padfield 17, University of Akron School of Law, Stefan J., Does Corporate Personhood Matter? A Review of and Response to Adam Winkler's 'We the Corporations' (October 1, 2018). 20 Transactions: Tenn. J. Bus. Law\_\_\_ (Forthcoming), Available at SSRN: https://ssrn.com/abstract=3258603

Thus, progressive advocates for limiting corporate power arguably are justified in both (1) seeking to end corporate personhood, and (2) seeking to advance a theory of corporate personhood that highlights the distinction between the corporate entity and, for example, the shareholders of that corporation. Furthermore, when Winkler argues that “for those today who wish to see the Supreme Court restrict the constitutional rights of corporations, looking back to Webster’s era reveals a potential model,” he may best be understood as referring to the model of concession theory.103

#### Breakdown of the current controversy and what the mechanism of corporate personhood has been in case law so far.

Bert Neuborne 12, Of 'Singles' Without Baseball: Corporations as Frozen Relational Moments (June 20, 2012). Rutgers Law Review, Vol. 64, No. 3, 2012, NYU School of Law, Public Law Research Paper No. 13-24, NYU Law and Economics Research Paper No. 13-14, Available at SSRN: https://ssrn.com/abstract=2255094

I concede, of course, that for more than 150 years, most American judges have treated corporations as if they were independent “persons” whose rights and duties are logically derivable in splendid isolation from the rights and duties of the corporation’s numerous human participants.8 The judicial tendency to anthropomorphize the corporation as a freestanding, sentient being appears to have been driven by at least three disparate groups of lawyers: (1) Continental jurists seeking to submerge individuals within communitarian units (like corporations), whose collective needs would outweigh those of the individual;9 (2) progressive reformers seeking to render business corporations fully liable—civilly and criminally—for the unlawful acts of agents and employees;10 and (3) corporate lawyers seeking to fend off government regulation by asserting corporate legal rights.11 I do not challenge the idea that recognizing a fictive corporate personality may have significant, pragmatic value as a technique to recognize and enforce the rights, duties, and expectations of the corporation’s human participants. Recognizing a corporation’s fictive legal personality empowers a centralized rights enforcer (usually corporate management), capable of asserting the rights of members of the decentralized corporate community, many of whom might find it cumbersome and expensive to assert their own rights. It also establishes a stationary regulatory target, permitting the effective enforcement of the duties of the corporation’s human participants. Indeed, recognizing fictive corporate personality resembles other techniques like derivative shareholder actions,12 organizational standing,13 and the Rule 23 class action14 that generate an efficient enforcement agent for a decentralized community of rights-holders

Until recently, judicial enthusiasm for the fiction of a freestanding corporation caused little real mischief, because it has either served to reinforce the legal rights of the human beings who constitute the corporate enterprise,15 or to permit the effective enforcement of legal duties against the corporate enterprise.16 Most of the time, American courts have used the fiction of corporate personality as off-the-rack shorthand to replicate legal outcomes that would have flowed from a careful judicial analysis of the myriad legal relations existing between and among a corporation’s human participants.17 As long as judges remember that corporate personality is merely a pragmatic metaphor for a complex set of underlying human activities and relationships, judicial decisions defining and enforcing corporate personality should reflect a proper calibration of those human activities and relationships, both within the corporation and between participants in the corporate enterprise and the outside world. When, however, judges forget that they are dealing with a snapshot of underlying human relationships, a legal fiction like corporate personality can assume a life of its own, overthrowing its useful role as a technique for reinforcing a corporation’s underlying human relationships and morphing into a device to distort them

I fear that we now face that danger. Judges in recent cases, like Citizens United v. FEC18 and Kiobel v. Royal Dutch Petroleum Co.,19 appear to have forgotten that a corporation is a legal fiction summarizing and reinforcing a series of legal and personal relationships between and among human beings.20 In Citizens United, five members of the Supreme Court ruled that large, multi-shareholder business corporations made up of thousands of human beings with vastly different political views must be viewed as freestanding entities with independent First Amendment rights to spend unlimited amounts of corporate treasury funds to influence the outcome of an election.21 In Kiobel, a divided Second Circuit panel ruled that corporations, viewed as freestanding legal entities, may not be sued under the Alien Tort Statute for damages caused by the actions of their employees in violation of customary international law.22 Both cases treat corporations as freestanding entities with “rights” of their own, which risks distorting the relationships between and among the corporation’s human constituents.

### Inherency/UQ

#### Corporations clearly have personhood but their rights are circumscribed.

Alexis Dyschkant 15, Ph.D. in Philosophy, University of Illinois Urbana-Champaign, In Progress. J.D., Illinois College of Law, December 2014. M.A. in Philosophy, University of Illinois Urbana-Champaign, 2012, B.A. in History and Philosophy, University of Illinois Urbana-Champaign, 2010, “Legal Personhood: How We Are Getting It Wrong,” University of Illinois Law Review, vol. 2015, no. 5, 2015, pp. 2075–2110

B. The Legal Person as Corporation:" Artificial Person"

One such example of a legal person that is not overtly human is the corporation, the paradigm "artificial" person. Corporations, independent of their shareholders or CEOs, have rights and duties.13 Corporations can own property, enter into contracts, and sue and be sued.54 Moreover, corporations are persons for the sake of the Fourteenth Amendment, providing them with the protection of the Due Process Clause.5 Corporations do not, however, enjoy all the rights of natural persons. As discussed above, corporations are not citizens because they are not natural persons, which means that they do receive protection under the Privileges and Immunities Clause. The Court has also refused to apply the liberty protection of the Fourteenth Amendment to corporations, "the liberty referred to in that Amendment is the liberty of natural, not artificial, persons."56 The Court thought it was so obvious that liberty was a right for natural persons that it was "too plain for discussion.""

#### Corporations are considered persons---the slate of rights they have been afforded by courts is expanding over time.

Briana Hopes 21, Senior Managing Editor, Volume 23, Tulane Journal of Technology and Intellectual Property. J.D. candidate 2021, Tulane University Law School; B.A. 2014, Mass Communication: Public Relations, Louisiana State University, “Rights for Robots? U.S. Courts and Patent Offices Must Consider Recognizing Artificial Intelligence Systems as Patent Inventors,” 23 Tul. J. Tech. & Intell. Prop. 119, Spring 2021, WestLaw

B. Corporations

Corporations have been recognized as legal persons going back to the nineteenth century.119 They are considered legal persons, like people, and are viewed as individuals in the eyes of the law.120 Corporations are also one of the non-human entities that have intellectual property rights.121 A corporation shares several protections and rights that a natural person \*132 has; however, the United States Supreme Court has stated that a corporation “must exist by means of natural persons.”122

The doctrine of “corporate personhood” was established to address the ongoing legal debate over the extent to which rights traditionally associated with natural persons should also be afforded to corporations.123 This doctrine recognizes “corporations as legal persons separate in identity from the natural persons who form them.”124 The idea of “corporate personhood” “serves as a basis for the limited liability of the corporate form and the ability of a corporation to exercise rights that are enumerated in the Constitution for persons.”125 Although the Supreme Court doesn't use the term “corporate personhood,” its decisions on the rights of corporations rely on the understanding that corporations have similar rights as their incorporators, natural persons.126 The Court's recognition of the legal personhood status, rights, and protections for corporations have gradually expanded over time.127 For example, the Supreme Court has recognized that the First Amendment applies to corporations, including the protection of political speech.128 Furthermore, the Court has held that a corporation was a “person” under the Religious Freedom Restoration Act of 1933.129 In addition, under contract law, corporations are recognized as legal persons and individuals in the eyes of the law and are bound by their contracts regardless of internal disagreements.130

#### Here are the rights conferred upon corporations in previous decisions

Bert Neuborne 12, Of 'Singles' Without Baseball: Corporations as Frozen Relational Moments (June 20, 2012). Rutgers Law Review, Vol. 64, No. 3, 2012, NYU School of Law, Public Law Research Paper No. 13-24, NYU Law and Economics Research Paper No. 13-14, Available at SSRN: https://ssrn.com/abstract=2255094

Thus, when confronted with the challenge of enforcing commonly shared rights of human participants in the corporate enterprise to (1) the ability to gain access to the federal courts and pre-Erie federal common law; (2) the right to conduct business throughout the United States; (3) the right to equal protection of the laws in connection with the conduct of their business; (4) the right to due process law in connection with the regulation of their business; (5) the right to be free from unconstitutional takings of their business property; (6) the right to conduct business free from arbitrary search and arrest; (7) the right to urge customers to purchase the lawful products produced by their business enterprise; (8) the right to engage in the business of operating a free press; and (9) the right to associate with others in nonprofit corporate form to advance shared ideas, the Court has recognized a central enforcement agent—the fictive corporation—as a device to assert rights shared equally by the decentralized human members of the corporate community.

### AFF Area---Blockchain/DAOs

#### The principles underlying the conferral of personhood to corporations suggest that personhood should also be extended to autonomous decentralized automated organizations. This can create certainty which facilitates innovation and uptake.

Max Canado & Steve Tendon 18, Ganado is with Ganado Advocates; Tendon is Director at ChainStrategies, “Malta: Legal Personality For Blockchains, DAOs And Smart Contracts,” Mondaq, 6/6/18, <https://www.mondaq.com/fin-tech/707696/legal-personality-for-blockchains-daos-and-smart-contracts>

ABSTRACT: This article expresses strong support for the idea proposed by the Government of Malta in a recently issued DLT Consultation Paper (referred to, in the article, as the "consultation document") of permitting the grant of legal personality in the form of a newly designed type of legal entity incorporating a blockchain and/or smart contract/DAO/DAC arrangements. It examines why conferring legal personality to new kinds of technology artifacts is a worthy endeavour; specifically those kinds of Technology Arrangements that exhibit autonomous behaviour, and yet interact with humans. The need for this arises not only for the emergence of autonomous entities in the physical world, but even more so for autonomous software artifacts which come in the form or are built on top of public blockchain technologies. Such autonomous entities may even survive the life of their designers, with self-sufficiency, thus undermining the Nearest Person principle; they will exist for an indefinite amount of time; yet they could potentially cause damage and loss to the users to whom they provide services. The article tries to resolve the issue of how liability can be managed in this scenario, all the while protecting the innovation capability of a thriving open source engineering community that promotes these developments. It reflects the position as of the 24th March 2018.

Technology Arrangements

The consultation document covers a broad range of issues, reading the signs of the times, proposing some regulation of some blockchain technologies and some technology services providers, with a holistic and long term perspective. However, the consultation is not only about regulation but also proposes that the introduction of some significant legislative innovation. One proposal it makes relates to the possibility of granting Legal Personality to Technology Arrangements, provided they fulfill certain criteria4.

In the consultation document5 there is a short but very significant section; it is section 5.3 Legal Personality of Technology Arrangements which reads:

"Whilst some Technology Arrangements are owned by a corporate structure, other Technology Arrangements may not have such an ownership structure. This could result in the possibility of transacting on and with the Technology Arrangement without a proper 'legal person' as counterparty. The proposed TAS Bill will try to provide a solution to such a scenario and it is being proposed that certain Technology Arrangements will be able to register with the Registrar for Legal Persons in Malta and acquire legal personality upon satisfaction of a number of requirements."

Out of the many ideas proposed in the consultation document, this one alone is the most controversial; the least understood and also the one that could have the deepest impact on the shaping of the Blockchain industry in Malta, and possibly globally too. It is considered to be the keystone in the construction of a set of legal rules relating to a liability regime relating to this sector and an anchor or reference point which enables the legislator to start to address, even if in small part, the massive legal uncertainty which has emerged as a very evident feature of this innovative technology6. Some consider this is a problem to address. Others feel nothing should be done. Malta has chosen the first option7 in favour of some trying to create some legal certainty.

The initiatives above described address one area of legal certainty which has long been evident – that of what is regulated and how, and what is not to be regulated at all. This touches areas of public policy and criminal law and could not be left ambiguous any longer. The next stage is to address purely private law issues which affect the relationships between people in the community – admittedly the global community. There is therefore a strong awareness that the cross border nature of this phenomenon challenges the applicability of national laws at the very doorstep of this discussion8.

Legal Personality of Technology Arrangements

The invitation to consider these Technology Arrangements as legal persons emerges fairly naturally through mere observation of their features:

there is a human designer who through his or her free expression of intention has created assets and infused them with a specific lawful purpose. The blockchain platform, and related software for its operation and all smart contracts, are not ordinary things but things which are conceived, designed, programmed or put together to provide defined outcomes conditioned by parameters set off to achieve the specific purposes intended and to exclude others. They also establish the conditions under which the operations can take place.

there is a governance structure9, even if not in the normal format or reach or even functionality of a board of directors or governors. We see this again in the very technology design which is a wonderful development for those who can no longer keep up with all the compliance and risk for traditional fiduciary duties imposed on administrators of legal entities;

there is a patrimony which is dedicated to the purpose; and

there is readable (source) code which states intent, the purpose designated for the assets, a ledger system which maintains accounts for the assets and some rules for the way operations, including some decisions, are taken.

These four elements are the elements which are found in any legal organisation at a basic level. There are many types of legal organisations and then each type has its own legal features which make it what it is. At basic levels there are the associations of persons such as companies, clubs, cooperatives and similar and then there are the universality of things dedicated to a purpose, such as foundations, institutes, funds, universities, churches and the like. They have different features and qualities; the context of a blockchain platform can be compared to both depending on how the structure is designed by its developers. It is within the Government's design capabilities to choose the form which can be selected for adoption within the legal system, or it can cater for both forms and then leave it to the developer. However, even if one makes absolutely no effort at all, it is possible that these elements feature in a blockchain platform and the arrangement will be treated as a legal organisation for national law public policy reasons although not intended to be so.10

It is, at least under Maltese law, more difficult to accidentally establish an organisation as you need a written statute with some minimum content11; and even more difficult to establish an organisation with legal personality as legal personality only emerges through formal registration with the Registrar of Legal Persons under the Second Schedule to the Maltese Civil Code12, apart from exceptional cases of religious organisations. It the past this was not so and could happen through a court recognising personality of its own motion.

The proposal of legal personality for Technology Arrangements in the consultation document will involve legislative intervention which will undoubtedly require formal registration so this will be clearly an intentional act. It will be a decision at the design phase as the design will need to cater for an appropriate reflection of the basic elements outlined above. The important opportunity this proposal give us is the chance to vary the traditional requirements for a legal organisation to ones which are sensitive to the technological innovation taking place and the qualitative elements of a distributed ledger. What is so powerful is that what has traditionally been achieved through paper and defined human structures, which are centralised, can now be restated in a way that better reflects the methods and outcomes intended for blockchain operations, most importantly taking advantage of the powers of technology design in meeting certain expectations on important features, like on governance and compliance or on performance and liability through smart contracts, for example.

Legal Personality and the Liability Maze

What characterizes these Technology Arrangements is that they might all have a degree of autonomy whereby, when interacting with human counterparts, they might produce damages or losses of various kinds. The troublesome question that the proposed bill is trying to address, is: who is responsible for such losses suffered or damages caused by external or internal events?

Just like Isaac Asimov imagined the Three Laws of Robotics to limit the kind of actions that autonomous robots could take against human counterparts, the proposed bill suggests a similar approach: namely to recognize legal personality to Technology Arrangements, thereby conferring rights and duties which will be exercised not necessarily by people but autonomously on the basis of the Technology Arrangements themselves.

The Three Laws of Robotics were stated as follows:

A robot may not injure a human being or, through inaction, allow a human being to come to harm.

A robot must obey orders given it by human beings except where such orders would conflict with the First Law.

A robot must protect its own existence as long as such protection does not conflict with the First or Second Law.

For example, under the proposed bill, a DAO (Decentralized Autonomous Organization) could become a "legal entity," which will then allow the structure itself to exercise rights and and to perform duties13.

Fear of the Artificial "Person"

When presenting the idea of recognizing legal personality for a Technology Arrangement, it is easy to fall victim of the fear of extending a qualification that is typical of humans to other "things" that do not appear human at all. If it can help, this is not about creating an artificial legal "persona", but reasoning about the technology that has come about and becoming aware that it is beneficial to society as a whole to recognize that a Technology Arrangement can indeed operate better and more safely vis a vis the rights and remedies in case of loss, of those all around it, if it had a legal personality14. Likewise it can carry out its obligations, statutory duties and mandatory duties of compliance better than we could physically do so. Technology has no emotions, cannot be bribed or threatened and does not forget. There is hope that it will carry out compliance functions more effectively than we would, if properly programmed to do so. Of course, technology as such is not a "person". For the avoidance of misunderstandings, let us explain that when reference is made to legal personality for Technology Arrangements, it is not intended to imply that the software itself becomes a legal person but that the software arrangements (there could be many elements combined together with some new code added on), being the main asset or endowment of property, will be the principal and determining asset of a legal organisation of a special type (reflective of the context)15, where other important constitutive elements can be achieved through some powers of technology, such as in governance and compliance, combined with digital statements to substitute a formal statute, combined with human interface on key points where human intervention, at least for now, is necessary.

The kind of technology we are examining (Blockchains, Smart Contracts, and DAOs) are unquestionably of such nature that they autonomously control a set of assets. Now, how is that different from a corporation? Every known legal entity is an artificial artifact that is defined by the assets over which it can unilaterally and autonomously exercise command and power.

If assets that are controlled and organized in arbitrarily complex ways by an artificial legal entity, which was created for the benefit and for the convenience of society to deal with it, what prevents recognizing that the controlling entity can actually be a software artifact that acts autonomously with self-sufficiency, and exercises unilateral power over those assets, keeping in view the purposes and the standards expected for governance and compliance?

If we can accept that the issue is not that about dehumanizing people, but about the convenience and benefit for society to be able to deal with the autonomous nature of these new software artifacts, then recognizing the legal personality of a Technology Arrangement is less intimidating. Extending yet again the artificiality that is created by law is still a good idea; as it has been for thousands of years. After all, law and order are necessary for a civilized society; even when that society necessarily becomes receptive to new "entities" as these autonomous software artifacts.

#### ‘Nearest person’ CPs fail in the context of DAOs. There are many, many, many reasons.

Max Canado & Steve Tendon 18, Ganado is with Ganado Advocates; Tendon is Director at ChainStrategies, “Malta: Legal Personality For Blockchains, DAOs And Smart Contracts,” Mondaq, 6/6/18, <https://www.mondaq.com/fin-tech/707696/legal-personality-for-blockchains-daos-and-smart-contracts>

The "Nearest Person" Principle

During the lively discussion at a recent blockchain event relating to the consultation document, several lawyers expressed the opinion that giving legal personality to a Technology Arrangement would not be a good idea. The example was given of self-driving, autonomous cars. If such an artifact produced any sort of damage, ultimate resort could be claimed by applying the principle of The Nearest Person. In other words, the manufacturer of the autonomous car would be held liable.

The Difference between Autonomous Cars and DAOs

What seems to be missing in putting forth the principle of The Nearest Person, is that in the context of a DAO, such a person might not exist at all. A self-driving, autonomous vehicle is a physical object, which is created by a wellknown manufacturer. A DAO on the other hand, can exist without there being a known creator.

The most prominent example of The Nearest Person principle not being applicable, is the Bitcoin network itself, which can be considered as a DAO because it effectively replaces a number of intermediaries (like clearing and settlement houses) that were previously human. What has to be observed, is that the original creator of the Bitcoin network, known as Satoshi Nakamoto is unknown. Even willing to apply the principle of The Nearest Person, in practice it cannot be done.

But the cases for this are even more intricate than this example.

Why the "Nearest Person" Principle is not always Applicable

If a self-driving, autonomous vehicle goes rogue, in the worst case scenario the vehicle can literally be taken down– physically16. In the case of a DAO, "taking down" is not an option. Once a DAO is released onto a Blockchain – in virtue of Blockchains being uncensorable, and providing irrevocable permanence – that very DAO simply cannot be "taken down." (The only option, as is often stated, would be to "switch off the Internet" – which clearly would produce even greater damage.)

So far, the Bitcoin network seems to have functioned flawlessly. So the need to chase Satoshi Nakamoto has not come into being. Yet it is possible to imagine scenarios where more sophisticated DAOs, constructed on top of Smart Contracts and which provide much more complex functionality, might actually have defects and flaws.

In fact, in the instance of "The DAO," a bug in the Smart Contract code created a vulnerability that was exploited by an attacker, who could claim control over $50M. (How that case eventually unfolded is another story altogether; and while it would be worthy of a Hollywood film, we won't be concerned with its intricacies here.)

Now, in the case of "The DAO," the people behind its creation were well-known, unlike the case of Satoshi Nakamoto and the Bitcoin network. The creators of "The DAO" conducted all operations transparently and publicly. In that case, the principle of The Nearest Person could possibly be applicable.

Yet it is possible to envision that similarly complex Smart Contract arrangements could be released in the same manner as the Bitcoin network was originally released. In such a case, there would be no people to "go after." Who is liable in such an instance? The closest "thing" that resembles a person would be the Technology Arrangement itself. So, why not consider it as a Legal Person in its own right?

Why Legal Personality is Necessary

If a Technology Arrangement, like a DAO exhibits behaviour that until before its existence was in the exclusive capacity of existing legal person with rights and duties, it stands to reason that the counterparties of any interactions (communications, services, transactions) provided by a DAO would expect the same kind of provisions and guarantees offered by an equivalent legal person.

Case of Anonymous Designers

To reiterate the earlier example: the Bitcoin network offers the same guarantees of execution that prior to its existence were in the remit of clearing and settlement houses, and the transactions it executes will have irrevocable finality.

The functionality of the Bitcoin network is very simple, when compared to the kind of functionality that can be offered by second or third generation blockchains, which support extensive Smart Contract applications, and in particular, the realization of sophisticated DAOs/DACs. In these instances, the kind of interactions (communications, services, transactions) provided can be much more complex.

Accordingly, the expectations of counterparties will be much higher – to the point that they might expect to be able to have legal recourse, if those expectations are not fulfilled. And this is where it is evident that, in the absence of a Nearest Person, because that person has opted to remain anonymous, legal recourse must be made available, but with respect to some other person. A person that the current laws do not identify or recognize.

Case of Consumer Protection

The first reason why such a new legal personality is necessary, is to better provide for consumer protection. It is a general expectation: relevant consumer rights (and other legal issues) presume the existence of the personality of an actor – a person, or a "thing" as it will become evident – who/which is obliged to comply to certain rules.

One way to provide for consumer protection is to require that the Technology Arrangement exhibits certain expected qualities, attributes, features or even behaviour – like offering securities, guarantees or insurance that could cover possible damage claims.

Thus the designers of any Technology Arrangement who would find it agreeable for their creation to acquire a legal personality, would have to code and implement the required qualities, attributes, features and behaviours. Since this would imply creating or extending Smart Contracts that are part of the Technology Arrangement as such, the required qualities, attributes, features and behaviours would become as permanent as the Technology Arrangement itself, once it is deployed on a blockchain. In other words, the required qualities, attributes, features and behaviour would become permanent elements of the Technology Arrangement itself, even if the designer remains anonymous or disappears.

Case of Designer Protection

Given the general reliance of Blockchain technologies on open source software, it is to be expected that a number of Technology Arrangements on Blockchains might themselves be realized as open source projects. Open source projects are often inspired by ideals; or start off as experiments, that then take on a life of their own. Open source projects are "forked" and give rise to a multitude of diverse and generative variants and variations.

Often, the initial behaviour of a piece of software can be reused in other later variations, providing the foundation for completely different functionality and behaviour, that were not in the intent or even in the understanding of the original designer. The principle of The Nearest Person would reach such designers, even though they might not have had any active role in the creation of the Technology Arrangement subject to scrutiny, because maybe the later designers have chosen to remain anonymous, or have disappeared. In this instance, providing a legal personality for the Technology Arrangement would effectively shield such remote (and innocent) designers from liability claims on the basis of the principle of The Nearest Person. The new legal entity would be the point of recourse for persons, such as innocent third party users, suffering loss and would as a result design the mode of recourse, the extent of access to compensation, the availability of funding or cover for such compensation and related matters. The more this can be automated through smart contracts which are self executing based on event driven verification the better. Disputes would disappear given the advance agreement to the "rules of the game" on the particular Technology Arrangement. At the same time, contributors, even very near ones, to the technology, its development and maintenance and its administration would not be liable except in defined situations and that would mean that they would be able to carry on with the innovative work without undue concern on liability. Where they are indeed at fault, they would have to compensate the new legal entity – as opposed to an unknown number of users for an unlimited amount of losses – as in any other breach of contract and they would usually be covered by their own professional indemnity and defense insurance policy.

Note that this is particularly relevant when the original designers are individuals who might have contributed open source projects as a means of expression; and not corporations that would still provide a limitation of liability to their owners and managers. These open source developers are even more remote and in any case would probably not be within the reasonable circle to justify a cause and effect basis for liability. However that does not protect them from being jointly sued with everyone else in a claim for loss.

In this sense, the provision would protect the vibrant community of innovators that operate in the open source world, and in particular when the software or technology being developed has the features of or can be used to build a Technology Arrangement. In other words, this is a matter of protecting innovation capacity, and not discourage software enthusiasts and professionals from continuing developing open source software, in particular in the fields of Blockchain technologie, decentralized storage, decentralized computation, cryptography and computational law. At the same time, there is no unreasonable exclusion of recourse for loss, although there may be transparent limits of liability embedded in the compensation fund or insurance cover forming part of the new legal person's structure. In this regard, an important point needs to be made: it appears reasonable to suggest that the software making up the platform or operating system (the blockchain itself) needs to be protected from attachment and enforcement and should be segregated, so that it cannot be affected by bankruptcy or court orders which have a fatal effect – let's call them "switching off orders" which can come in different forms, direct and indirect. Such order will by definition cause more risk and harm to the person suffering loss in the first place, and much more as it would affect all the users having assets and other rights on the platform which would instantly disappear or go into massive stress stations unless addressed sensitively. If one uses open source, public domain/commons arguments, which are very possible in this context, then it would make sense to use segregated cell features for this legal person, which are available under Maltese law already. These would allow the critical software to be placed within a segregated cell and not be part of the liability patrimony of the new legal person and the justification would be the massive protection that brings to all users and the fairness would be based on the fact that being of the nature of public domain, that asset has no balance sheet value anyway, it being held for the common benefit of all users under a fiduciary obligation of protection and care for the community as a whole. So even without a segregated cell it would still not be available for enforcement purposes of third party judgements. So the law can exclude such a cell/asset from the recourse rights and simultaneously concentrate the recourse right to the cells established exclusively for recourse, which in turn would hold within it a sinking fund internally generated from a small commission from on-blockchain transactions, a guarantee deposited at the commencement or topped up regularly to keep pace with the growth of the risk exposure or an insurance policy to cover such risks – all three cumulatively being transparently disclosed and available to all users so they are aware at any time what limits exist to their aggregated rights of recourse. That will be the basis on which they will then be willing to use the particular blockchain well knowing that, apart from that point of recourse to the disclosed limits, the legal principle for dealing on the blockchain will be based on the caveat emptor principle which places the risk of loss on the users.17

Case of Extinction of Designers

While when a designer is anonymous, it is easy to see that providing legal personality to the Technology Arrangement created by the designer effectively makes some sense, it is harder to realize that it also makes sense when the designer is well known.

Even in this case, the principle of The Nearest Person is insufficient. Why? Because a Technology Arrangement on a Blockchain gains the attributes of anything that is stored on a Blockchain. In particular, it acquires the attribute of permanency.

Individuals and corporations come and go. People die. Companies go bankrupt or close down. If those people or companies were the designers, and were The Nearest Person, who is The Nearest Person once the designers naturally disappear?

The question is relevant, because a Technology Arrangement on the Blockchain will survive the extinction of its designer – and, as we have seen, it cannot be stopped or taken down.

Therefore, even if there is a known designer today, it still makes sense to recognize the legal personality of the Technology Arrangement when it has attributes of a recourse fund which is permanent as well; and to have the designer (as mentioned earlier) implement those behaviours that the Technology Arrangement would need to have in order to be recognized as a Legal Person of indefinite term or duration as are most types of legal persons.

Case of Technology Arrangement Protection

It is clear that businesses will be built around Blockchain technologies, and that they will seek to generate profits. Therefore, businesses will somehow be considered the owners of the Technology Arrangements that they create and deploy to a Blockchain. Yet, as we saw above, businesses come and go. If for whatever reason a business has to face bankruptcy, their assets do not become immune from seizure just because they take the form of a Technology Arrangement on a Blockchain. However due to the autonomy of the Technology Arrangement, it might have evolved as to supporting use cases that go beyond the actual scope of accountability/liability of the original designer business. The issue that is raised is: how can one guarantee the continued legal usage of the Technology Arrangement by other third parties in such a case of extended use cases?

It becomes a matter of protecting potentially millions of people who trust the Technology Arrangement (the Bitcoin network, to give a clear example), and to let them continue to exercise that trust, rather than trusting the designer; a designer who might go bankrupt or simply pass away.

The Technology Arrangement needs to be able to stand on its own, from a legal point of view because that clarity of patrimonial segregation from the patrimonies of every other legal or natural persons in the world means that the user assets on the blockchain can never be confused with the software owned by the legal entity and used to secure or enforce an obligation of the legal entity. Without a legal entity clearly marking off its own assets available for recourse, user assets may potentially be seized and use to settle an obligation arising from a loss caused on the blockchain by causes totally unrelated to the user18. That becomes more possible when the user has a vote or other means of influencing administration as we see with miners or token holders which are structured like shares in a company. Most people would see the irrationality of making users jointly and severally liable with the underlying operating technology but in litigious communities and aggressive litigants who have suffered serious loss there is no rhyme or reason. Segregated patrimonies resulting from legal personality are therefore a very important starting point in drawing lines for liability purposes.

The assets hosted by the Technology Arrangement must not be caught in any bankruptcy process that hits the original designer business for obvious reasons. There might be provisions to pass on the ownership of the entity to someone else; but more easily this can be managed by acknowledging the Technology Arrangement as a separate legal entity, with its own legal personality. The indirect consequence is also that the original designer business can no longer be considered as the owner of the Technology Arrangement and of the assets controlled by the Technology Arrangement; notwithstanding that the business is the creator of the Technology Arrangement.

Case of Evolving Legislation

As everything, legislation evolves and changes. However the dynamics of changing legislation has the potential of clashing with pre-existing Technology Arrangements. We must always keep in mind that a Technology Arrangement of the kind we are concerned about exists on a Blockchain. Therefore, once it has been deployed, it cannot be changed and it will exist forever.

It might be the case that a new law renders illegal the behaviour of a pre-existing Technology Arrangement, with no possibility of remediation. The (newly) illegal behaviour will always be there, no matter what (and, of course, this is compounded by the earlier considerations that there might not be any known Nearest Person). The new law would be materially ineffective. The frightening conclusion is that the evolution of law suddenly becomes ineffective.

In order to preserve the possibility of law to evolve, something new must be conceived of. The section of the consultation document cited at the beginning here, "certain Technology Arrangements will be able to [...] acquire legal personality upon satisfaction of a number of requirements."

Such requirements could be, for instance and among others, the effective presence of certain minimum acceptable "good" behaviour in order for the Technology Arrangement to be considered a "good" (virtual) citizen of the jurisdiction. Such behaviours could be defined similarly to Asimov's Three Laws of Robotics. They would have universal validity and be of such nature that no matter how future laws could evolve, the Technology Arrangement could still be considered a "good" (enough) and (sufficiently) "lawful" (virtual) citizen.

Yet, the legislator will have to take into account the nature of the new medium of Blockchains when promulgating new laws. As an example, consider EU's "right to be forgotten:" how would it have been shaped, had Blockchain technologies been widely known and used before the drafting of such rules?

Would rules of law deeming a power to vary the code being vested in a designated person or persons, only for the purpose of keeping the operation legal and consistent with the law as it evolves, be a solution?

Case of Levels of Compliance

While one of the position statements of the original cypherpunk movement (which was the breeding ground wherein the Bitcoin and Blockchain technologies were conceived of) is to deplore regulation on cryptography, one needs to come to terms with the fact that an autonomous Technology Arrangement needs to be a "good" citizen if its services intend to benefit society at large.

Irresponsible proposals that are often put forth in regulatory circles, ask for the creation of backdoors and other technical mechanisms for weakening the cryptographic techniques. Regulation of cryptography is a very short sighted proposition, and fails to understand how it undermines all applications of cryptography.

It becomes imperative to create space for a Technology Arrangement's good citizenship, without weakening cryptography. Since legal personality is conferred to a Technology Arrangement once it exhibits certain desired qualities, attributes, features and behaviours, it is also conceivable to accept different degrees of such. Since these qualities, attributes, features and behaviours are nothing other than further software, they can be programmed as the designer might see best fit in order to give its Technology Arrangement the appropriate degree of compliance.

At the entry level, a Technology Arrangement would simply cater for consumer protection and basic regulatory compliance. At the highest level of compliance (possibly required for applications that are of critical nature in terms of safety or national interests) the behavior would allow for the forces of law to intervene and actually clamp down the

Technology Arrangement – yet without compromising any cryptographic integrity or the lawful assets of users – based, for instance, on multi-signature schemes, wherein the competent authorities' signature needs to be conceded in order for the Technology Arrangement to function; as it could be revoked in case of any sort of crisis or emergency.

With the notion of levels of compliance, space is given both for open development, as well as the realization of governance mechanisms for safety critical Technology Arrangements. In practice, the provision would recognize different types of legal personalities of Technology Arrangements, just like there are different types of legal personalities in current law (individuals, corporations, foundations, trusts, NGOs, institutions, etc.).

Note that this provision would also further support the previous case of evolving legislation, as the Technology Arrangements at the highest level of compliance could be rendered ineffectual should new rules render their instances illegal.

Case of Supporting Forking

In the world of open source software development the possibility of a forking a project is extremely valuable. It is one of the cornerstone of the evolution of new ideas in open source projects.

In a very similar way, even Blockchains can fork, but with much more far reaching – and often very controversial consequences than ordinary software forks. Whether one agrees or disagrees with Blockchain forks, they do happen; and hence need to be considered with respect to the legal environment that is being enabled through our concepts.

Malta has already a number of legal structures based on the idea of segregated cells to create segregation of liability. For example, Malta recognizes protected cell companies (PCC) and securitisation cell companies (SCC) and the same applies at a higher level for associations and foundations in their basic forms.

In the case of a Blockchain fork which might affect a Technology Arrangement, the Technology Arrangement will exist in two distinct instances, each of which might have its own set of qualities, attributes, features and behaviours, which might depend on the core protocol that is subject to the technical forking. In these instances it must be possible to extract a cell from an existing legal entity (on the original branch) and reconstitute a new legal entity (on the spawned branch). The new entity will be self-standing, with its own, distinct legal personality upon registration with the Registrar of Legal Persons.

With such a provision, the evolution of Blockchain technologies is ensured with respect to the open source practice of forking, while avoiding the risk of putting the two entities at a legal stand still, or worse, in conflict of ownership over existing assets.

Case of Jurisdiction of Choice

Since a Technology Arrangement is or exists on a Blockchain, which is global in nature, it is very tricky to determine its jurisdiction: it is not located in any specific country. By implementing the required qualities, attributes, features and behaviors in order to acquire legal personality in Malta, a Technology Arrangement would effectively choose its home jurisdiction, and offer its services to the international community on the basis of international trade laws.

By having a legal personality of its own, the Technology Arrangement would need to have, in first instance, a technical administrator who is registered with the local regulator so that there could be a point of contact by the regulator if ever this is needed. The technology allows for regulators to become users on the platform and have access to all information which has regulatory relevance and one assumes that the regulatory functions will not develop externally in traditional form but will be exercised through using the very same technology.

Though the proposed bills also provides for designers and administrators to voluntarily register with the Malta Digital Innovation Authority, or the use of the services of a registered auditor and administrator would seem to be the minimum commitment expected for a Technology Arrangement's creators to choosing Malta as their home jurisdiction, thus giving a home jurisdiction even to the Technology Arrangement itself. The only condition is that the Technology Arrangement implements the required qualities, attributes, features and behaviors; and it appears reasonable to expect that the Malta entity uses regulator recognised service provided in the two referred to functionalities – but no other functions – in its assessment and continuing interface.

Case of Extended Decentralized Value/Service Chain

It has been argued that the end users could be held liable for the actions of a Technology Arrangement, especially when the users have been conferred governance power over the actions of the Technology Arrangement, by the ("code is law") rules of the Technology Arrangement itself. The instance of "The DAO" was of this kind. This way of reasoning can still make sense in as far as the services provided by a Technology Arrangement are self-contained. However, with the perspective that a thriving ecosystem of Technology Arrangements will develop, which can – in autonomy – offer, consume, negotiate, enter contracts and pay services offered to, by or for other Technology Arrangements (especially when automated directory and discovery services will come to fruition), it stands to reason that such users might have no insight at all into which services of other "third-party" Technology Arrangements might be invoked by the one over which they have governance power. Such governance power can be limitedly exercised for general direction, and not for specific operations, which the Technology Arrangement could choose on its own account (again, especially if service discovery mechanisms will be incorporated in the overall ecosystems). It does not make sense to hold such users liable for the actions performed by third party Technology Arrangements which are out of scope of their governance power.

Hence, Legal Personality is again a way to resolve the conundrum. The requirement here would be that a "good citizen" Technology Arrangement could very well use discovery services to find third party Technology Arrangement in order to consume their services, provided those third party Technology Arrangements themselves are "good citizens" and fulfill the requirements to have legal personality too. In this way, even if a Technology Arrangement in the middle of a value/service chain produces damage, the end-points (and any other intermediary point as well) are not held liable.

Case of Supporting the Smart Contract Oracles Industry

One of the critical elements for a class of smart contracts is the existence and availability of trustworthy so-called "oracles." Oracles are data providers or sensors that convey to the smart contracts information about the state of real world. They build the informational bridges between what happens in the real-world, and the virtual, computational world of smart contracts; and they verify in real-time that certain events or conditions happen in the real-world. Oracles will invariably contain software that runs as part of their providing information services to smart contracts. The smart contract needs to trust the oracle, yet the oracle's software runs off-chain, in a situation that is (typically) not subject to the consensus mechanism underlying all (public) blockchains.

So while oracles need to be trusted, and provide essential information for smart contracts to correctly perform their functions, they fall outside of the scope of intrinsic trust created by the consensus algorithm. A Technology Arrangement that employs oracles could be in the situation of holding the oracles liable for damages, arising from bad data. Unless the (smart contracts) between the Technology Arrangement and its oracles is legally binding, such recourse wouldn't work, as would neither any exclusion or limitation of liability clauses.

Oracles, too, could be consulted on an ad-hoc and fully automated basis, once oracle discovery services will be in place (not unlike the discovery of intra-Technology Arrangement services described earlier). As a subject that contracts third parties, the Technology Arrangement needs to be able to enter such contracts through a legal personality of its own. Conversely, the reputation of oracles will only benefit if they assume the responsibility of being liable for the data feeds they might provide.

#### Blockchain can be used to create emancipated autonomous robots. This creates huge risks unless liability problems can be solved.

Primavera De Filippi & Aaron Wright 18, Primavera De Filippi is a permanent researcher at the CERSA/CNRS/Université Paris II and a faculty associate at the Berkman-Klein Center for Internet & Society at Harvard Law School; Aaron Wright is Associate Clinical Professor of Law and Director of the Blockchain Project at Benjamin N. Cardozo School of Law at Yeshiva University, “Blockchain of Things,” Blockchain and the Law: The Rule of Code, Harvard University Press, 04/09/2018

Emancipated Devices

Peering further into the future, blockchain technology could help facilitate the creation of truly autonomous devices that rely entirely on a blockchain for their operation, creating new risks and tensions with existing legal regimes. As the Internet of Th ings expands and as devices become increasingly reliant on emergent artificial intelligence, blockchains could support devices that are both autonomous and self- sufficient. In a matter of de cades, machines could operate in a manner that is in de pen dent of any third- party operator. Manufacturers of connected devices—or anyone capable of tinkering with an existing device— could rely on smart contracts, in conjunction with other software, to create machines that are free from centralized control.

Today, this possibility remains purely theoretical. However, it only takes a stretch of imagination to explore some of the challenges that emancipated devices may bring. Consider, for instance, an autonomous AI- powered robot designed to operate as a personal assistant. This robot offers its ser vices to the el derly and competes with other h umans or machines (autonomous or not) on both the price and quality of the ser vices it provides. The se niors who benefit from t hese ser vices can pay the robot in digital currency, which is stored in the robot’s account. The robot can use the collected money in vari ous ways: to purchase the energy needed to operate, to repair itself when- ever something breaks, or to upgrade its software or hardware as necessary.

Such a robot could be entirely managed by a centralized com pany. That com pany could design and implement the software necessary for the robot to operate. The robot could be characterized as the com pany’s agent, or per- haps a mechanical slave, and depending on the characterization, laws could define what rights or other considerations the owner has over the machine.

If this robot relied on more advanced artificial intelligence, whereby it neared or passed the Turing test, t here might be increased interest from the public in emancipating this robot— and other robots like it— from central- ized control. Indeed, h umans tend to anthropomorphize machines, especially machines and robots that interact with humans (“social robots”). This ten- dency may, over time, result in increasing calls to provide robots with l egal rights.41

Assuming that, at some point, such a movement comes to pass, and as- suming that blockchain technology and smart contracts continue to advance in sophistication, blockchains could help facilitate device emancipation. Because blockchains enable autonomous code, they could underpin new systems of code- based rules— based on lex cryptographica— enabling au- tonomous machines and devices to operate in de pen dently of their manu- facturer or own er.

In the example just given, the robot’s key operations could theoretically be automated using blockchain- based smart contracts, so that the robot would no longer have to depend on the whims of the original manufacturer. By relying on smart contracts, the robot could become independent from its manufacturer and could continue to operate so long as the relevant blockchain kept r unning and the robot generated sufficient revenue to pay for its upkeep.

If such a f uture comes to pass, a blockchain could serve as a backbone for more advanced autonomous machines, providing them with the means to run software necessary for their operation without having these programs administered by a central operator. Lex cryptographica would manage and define the internal operations of these devices through a set of resilient, tamper- resistant, and autonomously executed rules that define all permis- sible and nonpermissible activities, making it pos si ble for these devices to acquire a degree of autonomy that is greater than what would be pos si ble with more centrally controlled Internet- enabled devices.

Because no single device would presumably be more power ful than the blockchain-based network on which it operates, the network could enforce autonomous rules that would limit the ability of an AI- based system to collude to amend its rules in a way that would disproportionately hurt society or compromise a blockchain- based network. Moreover, b ecause lex cryptographica can interact with a device’s hardware, rules based on smart contracts could be designed to disable a device if it attempted to violate a rule governing its operation, serving as a kill switch to be triggered if necessary.

In 2015, a group of artists took the first steps to actualize this concept, by embedding blockchain- based functionalities into a mechanical structure (or plantoid) that replicates the characteristics of a plant.42 In line with other types of self- promoting art— such as Caleb Larsen’s “A Tool to De- ceive Slaughter,” an opaque black box that repeatedly put itself up for sale on eBay— a plantoid finances itself via digital currency donations and sub- sequently hires p eople to help it reproduce. Each plantoid’s body consists of a metallic flower, with its spirit imbued in a smart contract on the Ethe- reum blockchain. Combined, these two components give life to a device that is autonomous (in that it does not need or heed its creators), self- sufficient (in that it can sustain itself over time), and— most importantly— capable of reproducing.43

The reproduction of a plantoid is achieved through a three- step pro cess: a capitalization phase, a mating phase, and a reproduction phase. Each plan- toid has its own Bitcoin wallet. During the capitalization phase, the plaintoid tries to seduce people and entice them to donate bitcoin by firing up a light show, playing music, or dancing. Once a plantoid has collected a sufficient amount of funds to ensure its reproduction, it starts looking for a “mate” to help it reproduce. It does this by sending out a call via the Ethereum block- chain for p eople to submit new proposals on how they envision producing the next plantoid. Once proposals are submitted, t hose who contributed funds to the plantoid have the right to vote on these proposals by sending microtrans- actions on the Bitcoin blockchain, which are weighted by the amount of funds they sent in the first place. The plantoid then transfers the bitcoin it has collected to the agent who submitted the most popu lar proposal, who w ill be charged (or “hired”) to create a new, autonomous plant- like device.

Regulatory Issues of Emancipated Devices

If blockchain technology enables devices and robots to operate free from cen- tralized control, it w ill create new challenges in terms of how t hese devices are regulated. Currently contemplated approaches to regulating autonomous systems or devices are primarily rooted in notions of agency law. Agency pre- supposes that these software or hardware devices serve as tools for third-party operators, which have the power to control these systems to temper the dangers— both physical and economic— that they may engender. As explained by David Vladeck, former director of the Bureau of Consumer Protection of the Federal Trade Commission, “Where the hand of h uman involvement in machine decision- making is so evident, t here is no need to reexamine liability rules. Any h uman (or corporate entity) that has a role in the development of the machine and helps map out its decision- making is potentially responsible for wrongful acts— negligent or intentional— committed by, or involving, the machine.” 44

If blockchain- enabled devices become increasingly untethered from any third- party operator, new legal and ethical questions will emerge as to whether— and to what degree— the owners or manufacturers of emanci- pated devices should be held liable for the device’s actions.45 If these ma- chines do not qualify as “electronic agents”— because they operate in de pen- dently from any centralized control— can they still enter into valid commercial transactions, and on what terms? If an autonomous device does not act as the agent of any third party, who should be liable if the device hurts a person or another machine? And if a device’s actions are largely unpredict- able, who should be responsible for a crime involving a machine that was not directly linked to any of the rules that the manufacturer or operator programmed into the device?

Similar questions have already emerged with the deployment of “killer robots” and other autonomous weapon systems that, according to the U.S. Department of Defense, “once activated, can select and engage targets without further intervention by a human operator.” 46 Indeed, several organ- izations are advocating for the ban of autonomous devices that can “choose and fire at targets on their own.” Th ese include the Stop Killer Robots cam- paign, launched in April 2013, which has attracted the support of organ- izations across the world.47

Assuming that society does not ban t hese emancipated robots, the law may need to recognize the legal personhood of autonomous devices or ma- chines so as to give them the ability to acquire specific rights and obligations that are enforceable u nder the law. Such an approach was contemplated by legal scholar Lawrence Solum as far back as 199148 and was suggested in 2017 by the Eu ro pean Parliament, whose committee on legal affairs proposed a new regulatory framework to govern the rights and responsibilities of AI- based machines. The proposed framework includes the introduction of an “electronic personhood” for autonomous devices49 that would enable them to participate in l egal proceedings, either as plaintiffs or defendants, in much the same way as the law has provided corporations with l egal personhood in the past.50

However, even if autonomous devices are given legal personhood, lex cryp- tographica introduces new complications that do not exist in the context of more centrally managed and controlled machines. For example, if an au-tonomous device w ere to be found liable for harming a third party— whether a contractual or a physical harm— courts could lack the ability to force a device to pay relevant damages. To the extent that the device relies on au- tonomous smart contracts to operate, only code can control access to the device’s funds. Unless relevant functionality was introduced into the smart contract code to facilitate payment in case of a court order, no single party would have the authority to seize the device’s assets.

Because of the open and disintermediated nature of blockchains and the autonomous nature of smart contracts, anyone, anywhere around the globe would have the ability to experiment with deploying and coordinating autonomous blockchain-enabled devices. The technology could grant everyday citizens the ability to create and deploy machines or devices pow- ered by smart contracts, including automatic weapons that operate in de pen- dently of any human intervention. The autonomy of smart contracts could be leveraged to frustrate efforts to ban autonomous weapons— depriving anyone from stopping the operation of these devices once they have been released into the wild. While t hese risks may not manifest today, if the technology develops into an increasingly scalable and widely used infrastructure, blockchains could serve as the under lying computational layer to manage autonomous weapons that could help support re sis tance movements or per- haps even terrorist attacks.

When it comes to the Internet of Things, blockchains thus exhibit com- peting characteristics. On the one hand, the technology may underpin new applications and protocol layers for a new generation of machine- to- machine interactions, helping devices work together and engage in peer- to- peer trans- actions with each other. At the same time, excessive reliance on lex crypto- graphica to manage physical machines or devices could result in new prop- erty rights management (PRM) systems that deprive consumers of the right to use property as they see fit. Over a longer time horizon, blockchain tech- nology may lead to the emergence of autonomous machines that do not rely on any central operator. This could result in emancipated, AI- driven machines, which could be used for e ither positive or dangerous ends.

### AFF Area---Corporate Death Penalty

#### Corporations should be subject to the death penalty via charter revocation

Drew Grossman 16 (2016) "Would a Corporate Death Penalty Be Cruel and Unusual Punishment," Cornell Journal of Law and Public Policy: Vol. 25 : Iss. 3 , Article 4. Available at: <http://scholarship.law.cornell.edu/cjlpp/vol25/iss3/4>

Extending the logic of these recent decisions (using either real entity or aggregation theory), it is possible to imagine a world where corporations claim all Bill of Rights protections as their own. If a corporation is a person for the purposes of the law, why should the United States deny it the most important protections its laws grant persons? At the farthest reaches of this chain of logic would be protection from the most severe punishment United States law currently allows: the death penalty. Given the Justices’ current positions on corporate personhood, under what authority could a state kill a corporation, and to what extent would the Eighth Amendment’s prohibition on cruel and unusual punishment curtail that authority?109 A. How to Kill a Corporation

As a preliminary matter, we must ask: how could a government kill a corporation? The most straightforward manner would be to revoke its corporate charter.110 Professor Mary Kreiner Ramirez, for example, thoroughly described a proposal based on the “nuclear option” of revoking a corporate charter after three strikes.111 It is unlikely that any other method proposed would actually result in a corporation’s end. For example, suppose a court imposed a financial penalty that effectively bankrupted a corporation. Gabriel Markoff, among others, calls this corporate death penalty a “myth” and attempts to show that corporations do not consider the risk of this “penalty” in negotiating “deferred prosecution agreements” with the Department of Justice.112 Additionally, the Eighth Amendment’s Excessive Fines Clause may provide better protection against such a penalty than the Cruel and Unusual Punishment Clause.113 What if a court sent key directors or officers to prison, directly punishing those responsible for monitoring the company’s activities? While this might severely damage a corporation, activist shareholders regularly vote out entire boards without killing the entity outright.114 Even banning a company from its main areas of business would not necessarily kill it; the company could continue in some form as an advisor or consultant. Michael Milken, who “reinvented” junk bonds at Drexel Burnham Lambert, continues to advise investment firms despite agreeing to a ban from securities trading as part of a criminal plea bargain.115 And the “Wolf of Wall Street” himself enjoys a second consulting career.116 Thus, revoking a corporation’s charter seems like the only solution.

Yet killing a company by revoking its charter is not just academic speculation. Preet Bharara, the U.S. Attorney for the Southern District of New York, carefully considers the risk of a regulator pulling a bank’s charter should his office bring criminal charges, and has referred to such a result as a corporate death penalty.117 And Senator Elizabeth Warren directly requested that regulators shut down financial institutions for criminal behavior.118 Indeed, many state corporation laws already permit the revocation of a corporate charter because of felonious conduct.119 National banking charters may also be revoked if a bank’s directors knowingly commit or allow employees to commit violations of the National Banking Act.120 It is entirely conceivable that a legislature could pass a criminal statute requiring the forfeiture of a corporate charter because of certain fundamentally unfair behavior.

#### You could use a Corporate Death Penalty to target entire industries deemed detrimental to human health provided that data supports it. Coal and Tobacco are good immediate examples but the idea could be applied elsewhere too.

Joushua M. Pearce 19 Materials Science & Engineering and Department of Electrical & Computer Engineering, Michigan Technological University“Towards Quantifiable Metrics Warranting Industry-Wide Corporate Death Penalties.” Social Sciences. 2019; 8(2):62. https://doi.org/10.3390/socsci8020062

Few corporations actively seek to kill humans directly, but rather because of their nearly singular focus on maximizing corporate profits (Friedman 2007), their operations and the concomitant pollution often damages air, water, soil, and food supplies (Kelly 2001), which can result in human mortality (Lloyd et al. 1985; Dasgupta et al. 1997; Brunekreef 1999; Mahmood 2011; López-Abente et al. 2012; Markowitz and Rosner 2013; García-Pérez et al. 2015; Martínez-Solanas et al. 2017). There are literally hundreds of thousands of articles dedicated to these environmental externalities and although some pollutants have been effectively regulated, significant corporate-caused externalities persist and are often exported to poor areas (Lucas et al. 1992; Birdsall and Wheeler 1993; Behera and Reddy 2002; He 2006; Zeng and Zhao 2009; Bell 2011; Büchs et al. 2011; Huang et al. 2016). However, with the legal recognition of corporations as persons (Schane 1986)—corporations gained the rights of personhood. As these corporate ‘persons’ are inanimate yet immortal and soulless (Coffee 1981) they present a challenge for authorities seeking to impose meaningful punishments for misconduct (Kennedy 1997; Ramirez and Ramirez 2017). It is widely acknowledged that the State does not need to permit corporate conduct it does not tolerate from actual human persons like murder and theft. However, corporate criminal behavior is still rampant, with the Journal of Management Inquiry recently hosting not one but two special issues in 2017 on corruption alone (Zyglidopoulos et al. 2017). Weak penalties for corporate misconduct appear to be ineffective (Noonan 2011) and strong ones such as imposing a sufficiently large fine to divest a corporation of all of its assets are only imposed on corporations with no legitimate business operations (Hamdani and Klement 2008). Markoff, for example, points out that no publicly-traded company failed because of a conviction that occurred between 2001 and 2010 (Markoff 2012). When reviewing an exhaustive list of attempts and largely-failed legal means to control corporate misconduct, Hulpke asks “If all else fails, a corporate death penalty?” and answers his own question with a proposal of a three-strikes-and-you-are-out corporate death penalty act (Hulpke 2017). He is not alone. Many authors have been analyzing the potential benefits of a corporate death penalty (Amann 2000; Yaron 2000; Noonan 2011; Heller 2014; Grossman 2015; Ramirez and Ramirez 2017), including specific legal analysis of the idea to revoke corporate charters for environmental violations (Linzey 1995, 1997; Crusto 2002). However, all of these articles focus on the area of illegal corporate activity. This might be enough in a society with a low level of corruption. However, where corruption is real (Mauro 1995; Treisman 2000; Rose-Ackerman and Palifka 2016) and laws can be adjusted to enable corporate profit at the expense of human lives, it is not enough. It is clearly worse when an entire class of corporations that make up an industry, legally cause unacceptable human harm and death (e.g., it is not a ‘bad apple’ rogue corporation). An objective metric, one in which personal feelings, opinions and politics are removed from the consideration of benefits and harms of an industry, is thus needed to guide policy. The ideal metric would use publicly-available data as well as clear and concisely defined harms and benefits.

To rectify these omissions in legal corporate oversight, this article provides the base-line for a new means of setting up an objective quantifiable metric for determining when an entire industry warrants the corporate death penalty. First, a theoretical foundation is developed with the minimum of assumptions necessary to provide evidence (or lack-there-of) for corporate public purpose. Next, this theoretical foundation will be formed into an objective quantifiable metric making use of publicly-available data. Then, this metric will be applied to two case studies: (1) The tobacco industry and (2) the coal mining industry in the U.S. The results will be presented and discussed, and future work outlined for applying the metrics to less straight-forward cases.

#### Here are other potential implementation routes via cancelling equity, redistributing assets etc.

Meredith Edelman 19, legal academic and lecturer at Monash University, Is it time for a corporate 'death penalty'? Some strategies to counter moral bankruptcy in corporations, 8-21-2019, Power to Persuade, http://www.powertopersuade.org.au/blog/corporate-death-penalty

In a globalized world where corporate activity is linked to climate change, harms to human health, economic repression, and a range of other harms, calls for corporate accountability are urgent. The conundrum of how to balance accountability between corporations and the individuals who work for them, benefit from their profits, and make decisions on their behalf echoes complaints heard for centuries.

But corporate accountability is not just about finding individuals to punish. As corporations are granted legal personality (meaning that they are given the capacity to act and be treated as a ‘person’ under law), they must face justice for the wrongs they commit. But, whereas people who commit crimes can be subject to physical and social forms of punishment, imprisonment, corporal punishment, social isolation, and the disapproval of loved ones, these are not effective punishments for corporations.

John Coffee’s 1981 article, ‘"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment,’ argues for the adoption of similar remedies to the two discussed here, drew its title from a quotation famously attributed to eighteenth century Lord Chancellor of England, Edward Thurlow, 1st Baron Thurlow. The central problem Coffee and Thurlow identified is that, while corporations are granted many rights that humans have in our legal system—the right to own property, the right to enter into contracts,—they are legal fictions, and cannot be subject to the moral authority of the State or the people the State is meant to represent as are human beings. Without the power of the state to imprison, or the threat of an angry deity’s punishment of an immortal soul, corporations have the rights granted individuals, but few of the responsibilities.

Corporations are made up of individuals—shareholders who have the right to elect directors, directors who set corporate agendas and hire management, management who make day-to-day decisions, and employees who implement the decisions. For companies to act responsibly, directors need to feel a sense of moral obligation to all corporate stakeholders and the wider community in which it operates that extends beyond the capacity of law to enforce specified duties that they owe to the company itself (and to creditors in some contexts). Shareholders have right to elect board members, and while they can bring actions against companies to enforce directors’ duties, board members are not agents of shareholders, nor do they owe obedience to any interest group within the firm.

Margaret Blair and Lynn Stout wrote that boards of directors enjoy ultimate control over the firm’s assets and outputs and who are charged with the task of balancing the sometimes-conflicting claims and interests of the many different groups that bear residual risk and have residual claims on the firm.

Directors’ acting in trustworthy (morally right) ways is key to a corporation that appropriately balances the interests of stakeholders, including by refraining from recklessness or negligence that could harm employees, customers, or other parties. A corporation’s character for trustworthiness, compliance with law, and care for community reflects the character of its management, which is appointed by the board.

I argue that, in cases of significant corporate wrongdoing, cases should be sent to proceedings to determine the extent of the moral bankruptcy, and the appropriate remedy. Specifically, in cases where harms cannot be adequately addressed by fines and awards of damages, there should be two new remedies:

1) Mandated issuance and cancellation of equity. This would provide for corporate stock to be either diluted or entirely replaced by a mandated stock issuance, which can be distributed to victims of wrongdoing or a trust established for their benefit. Depending on the severity of the wrongdoing and the value of the firm, this could mean anywhere from 15-100% of the value of the company taken from the existing body of shareholders and distributed to or for the benefit of victims;

2) A formal corporate death penalty whereby a company who has engaged in wrongful conduct severe enough to taint all future activity with corruption and/or guilt is liquidated, with any assets remaining after distribution to creditors (including awards of damage to victims) would be distributed for the benefit of those harmed by the wrongdoing.

Equity stripping and a corporate death penalty target the one stakeholder group that has leverage over boards of directors—shareholders. Shareholders’ one real power is the power to elect directors. A remedy that awards victims of wrongdoing shares in the company allows victims or a trustee appointed to represent their interests, to participate as shareholders who can elect directors who will act to end and prevent corporate wrongdoing.

A corporate death penalty might sound extreme, but if corporate wrongdoing is so pervasive that the corporation is morally bankrupt, there is little reason to treat it differently from a financially insolvent company. Furthermore, insolvency law provides an example about how a moral bankruptcy proceeding can be accomplished with minimal harm to third parties. Insolvency law has structures in play that ensure fair treatment for innocent stakeholders—employees, creditors, and customers in a case of a morally bankrupt company should benefit from the kinds of protections they are afforded in any other insolvency proceeding.

Such a regime would incentivise good corporate behaviour insofar as it also encourages investors to look more closely at the moral behaviour of companies before they invest, thus an answer to calls for ‘mechanisms for encouraging director accountability that ultimately could prove more effective than a crude “carrot-and-stick” approach emphasising external incentives.’

In presenting these ideas to colleagues, I have been asked why shareholders are the right stakeholder group to target, and in what circumstances I think they are appropriate. First, the remedies should be reserved for serious corporate wrongdoing—wrongdoing that, were the corporation a human being, courts might reasonably consider imprisonment as a response. Further, although shareholders (other than those in a closely held company) are unlikely to have directly caused or agreed to the wrongdoing, and so it may seem unfair that they would be penalised alongside the company, it is worth remembering that investing in equity securities is a risk—stocks lose their value all the time. Finally, pleas for mercy for innocent stockholders ring hollow alongside the innocence of a child whose parent is incarcerated. Imprisoning a human being who has done wrong is a severe penalty, not just for the individual, but for their family, and so long as our society tolerates imprisonment as a response to individual wrongdoing, there is little reason to think causing a loss of value in an investor’s portfolio when a company commits similar malfeasance is intolerable.

A corporate death penalty cannot be compared to the death penalty applied to humans. The right to life is fundamental to human rights, but corporations are not alive, and so, cannot have a right to continued existence in the same way that humans have a right to life. If a corporation does not have a right to life, then legal actions depriving the corporation of continued existence does not required the same kind of protections that similar actions depriving a human of continued existence does. Moral bankruptcy proceedings with equity stripping and a corporate death penalty as potential remedies for grave harm, would be a means to secure greater corporate accountability.

#### Equity fines to democratize corporate ownership target the material relationships that are abstracted by corporations by unraveling the shield of limited liability and undoing the class interests protecting corporate shareholders.

David Whyte 20, poet and an associate fellow at Saïd Business School at the University of Oxford, “Conclusion: Kill the Corporation before It Kills Us,” Ecocide: Kill the Corporation before It Kills Us, Manchester University Press, 09/01/2020

One problem with this proposal is that the courts in many jurisdictions already have this option available, and are afraid to use it. Since 2015 in England and Wales, for example, the courts have been empowered to impose unlimited fines for environmental and health and safety offences. Theoretically at least, a large enough fine can immediately divest a corporation of all of its assets, thus effectively putting it into liquidation.39 This, however, is yet to happen. The same effect follows when unusually high civil damages are imposed.

A second problem that lies not in law, but in the corporate structure, makes this “corporate death penalty” seem highly counterproductive. As we saw in the previous chapter, when companies are forced into liquidation, the costs of collapse are borne by workers and communities, and indeed severely reduce the possibility of an environmental clean-up. The fate of the pensions of people who worked for the asbestos UK firm Turner and Newall is a particularly tragic one. In 2001, Federal-Mogul, the US asbestos firm, and owners of Turner and Newall, went bankrupt and left a pension fund deficit of around £400 million. This pension fund affected a group of people that were already facing a slow and painful death due to asbestos exposure. As well as having profound impacts on workers, bankruptcy often also prevents communities gaining compensation or damages. This happened when US corporation Pacific Gas and Electricity filed for bankruptcy and thus instantly avoided the consequences of libel action for its failure to prevent wildfires in California in 2017 and 2018.

Compensation for causing externalities (as we have seen, the “third party” environmental costs that corporations will never have to pay for) and the costs of restitution (or clean-up costs) are barely recognised in bankruptcy law. Yet even if they were, this would not prevent exactly the same thing happening again. When corporations are involved in environmental catastrophes, investors and company directors are permitted either to continue to profit within a variation of the same corporate structures, or to move on to the next corporation to invest in or to work for. The “corporate death penalty”, in the form proposed by Mary and Steven Ramirez is not really a corporate death penalty at all. It is a licence for the most powerful people within the corporation to continue what they are doing after the company is liquidated.

This is not to say that the general point made by the proposers of the corporate death penalty is not worth pursuing. We should recall that a significant radical demand in response to the financial crisis was that the banks should no longer be allowed to operate in the same way. Many argued that we should simply bring the banks into public ownership with minimal compensation for shareholders. Indeed, in some jurisdictions something like this actually happened. Yet the model of public ownership in the places where there was a bank bailout, comprised of a token restructuring which put the interests of the largest investors before the public interest. For example, as part of the bailout deal, the British government wholly acquired RBS. This “public” ownership has not altered the management of the bank substantially, but in order to protect shareholders, the government has been the guarantor of the bank’s liquidity until the point it will be handed back to private investors. The net loss to taxpayers of this strategy has been estimated to add up to £26 billion.40

The COVID-19 pandemic and the 2008 global financial crisis should have been our real lightbulb moments. They should have been the moments that we realised how easy it would be to establish another financial system. They could have been the points at which a more sustainable economy was born. Indeed, there was a proposal for a green new deal published in 2008. As one of the authors, Ann Pettifor, has recalled, those proposals began to gain political traction before it all got eclipsed by the chaotic aftermath of the Lehman Brothers bankruptcy. Instead of thinking through lasting, sustainable solutions to the financial crisis, the politicians did what they always do: they left the control of the economy in the hands of the banks and corporate elites.

It is easy to read history in hindsight. At the same time the only way to save the planet may be to heed the lessons of our recent history. One consequence of the growing movement against climate change is that when another financial crash of this magnitude comes, as it almost certainly will, there will be an even bigger critical mass demanding alternatives to our unsustainable economy.

Breaking the structure of corporate power

Unless decisive change is forced upon them, investors and senior managers will continue to use corporations to do exactly the same things they have been doing for more than four centuries. Decisive change must involve a root and branch deconstruction of the corporate structure itself. No matter the apparent impossibility of this task, there are some very clear conclusions we can draw from the analysis set out in this book. Three ways in which effective structural change might be achieved are summarised below.

1. The corporate structure must be broken

As a number of contemporary corporate theorists have argued, early “fictional entity” theories (see chapter 1) can be invoked to restore the corporate charter as the legal authority for restricting the scope of corporate activities. Academics such as Joel Bakan41 and David Ciepley42 argue that this would enable states to prevent corporations from doing particular things and from expanding their sphere of influence. A similar, and disarmingly simple, solution proposed by Indian writer and activist Arundhati Roy is to abolish cross-ownership in business so that

weapons manufacturers cannot own TV stations, mining corporations cannot run newspapers, business houses cannot fund universities, drug companies cannot control public health funds.43

The advantage of such proposals to limit the scope of what a corporation can and cannot do is that they offer a way of radically limiting the ability of capital to reproduce itself. However, even if we were to achieve this kind of restructure of corporate capitalism, we would still have to deal with the structural impetus towards environmental destruction that exists as part of the corporation’s DNA, even the “single purpose corporation”.

The scope of the corporation has few limits measured either in geographical terms or in terms of its purpose. As we saw in chapter 1, corporations are relatively privileged in so far as they are permitted to cross borders and operate across national jurisdictions. Those privileges, along with the immense economic power corporations enjoy, combine to create the driving force behind the most environmentally destructive processes. Neo-colonial relationships are facilitated hugely by the ability of corporations to create multiple identities and operate through secrecy jurisdictions or “tax havens”.

The only way to deal with such privileges is to restrict the global scope of corporations. This would mean preventing corporations having complex ownership structures by incorporating in multiple jurisdictions and exploiting complex chains of subsidiaries.

All of this seems rather speculative, given the immense size and reach of global corporations right now, and it would need an international treaty that is enforceable and is enforced. Speculative, perhaps, but not entirely unimaginable. There is a global treaty on the harmful impact of transnational corporations currently being negotiated in the UN Human Rights Council.44 While there is nothing currently on the agenda about changing the global structure of corporations, we will not be able to ignore the need to tackle the basic architecture of capitalism for much longer.

2. Impunity for investors and shareholders must end

The principle of limited liability is unsustainable. Those who own shares in a company, or those with any type of ownership for that matter, should be held liable for all of the damages caused by the corporation.

This means that shareholders, owners and other types of investors should be fully responsible for the damages caused by the activities they profit from, not merely those that are fixed by regulatory fines or damages fixed in tort law and in civil cases. Shareholders and owners should be automatically responsible for all of the health costs and the clean-up costs associated with their investments. This may seem like an obvious, fair and equitable proposal. But in practice it may prove difficult to count those costs directly; and indirect costs will need to be given a notional value, linked to the costs of transition from a carbon-based economy, and the costs of restoring land, air and water quality.

This seismic shift in our standard ways of counting things will need an army of new environmental accountants marching to a new tune – accountants outside the corporate world. Yet it is not beyond us. As critical accountant Prem Sikka has noted, there are currently 350,000 professionally qualified accountants in the UK. Most of them are corporate accountants. We therefore have the resources and could re-direct their efforts and expertise towards socially useful purposes relatively painlessly.

The related principle of asset shielding (see chapter 1) is just as pernicious as the principle of limited liability. We should no longer tolerate the corporate shareholder, like UK industrialist Philip Green, who allegedly used corporate structures to protect all of his homes and $175m yacht as his employees lost their jobs and their pensions.45 Indeed, as this book was being completed, a total of 6 US coalmining companies reported that they were filing for bankruptcy, thus putting the health care plans and pensions of 100,000 miners at risk, whilst at the same time executives continued to claim remuneration, safe in the knowledge that their personal assets remained protected.46

There is an important but little-known body of research that develops a radical idea for dealing with corporate crime. This research proposes a system known as equity fines for ensuring that shareholders and investors pay for the damage that is caused by the things they profit from.47 The basic idea of equity fines is that a proportion of the shareholding is issued to a group of workers, to the community or to a public body as a way of seeking compensation directly from the shareholders or owners. When this happens, a proportion of the business is effectively re-socialised, reducing the value of other shareholdings. In other words, equity fines reclaim value directly from shareholders through a process of share dilution. The courts, or the administrative authority in this proposal, order the issue of a new batch of shares worth a proportion of the corporation’s existing equity. The shares are then controlled by a defined set of fund-holders. The fund could be controlled by a public body, a collective of workers, or the local community. In cases where this is warranted, full ownership of the corporation could be transferred. The equity fine model therefore provides a working basis for a form of the corporate death penalty whereby “death” really means is the forfeiture of class entitlements. After this “death”, the corporation can be-reborn under a different form of organisation and different forms of ownership.

3. Impunity for corporate executives must end

If we were to demand that every Big Oil executive was to forfeit all of their assets to contribute to a programme of carbon justice as a matter of policy, without any need for legal proceedings, this would probably be much more effective than the distant threat of a case in the ICC. There is nothing stopping us from doing both. And there is nothing stopping us from reclaiming assets accumulated from those who profit from all environmentally destructive offences. This, after all, is standard practice in the criminal justice system when it comes to other forms of socially damaging markets. Gangsters and corporate fraudsters have their funds and assets sequestrated by the courts routinely. All we would be doing here is applying the same logic.

It is sometimes argued that corporate executives simply take flight to other countries when taxes are too burdensome, when executive pay is capped, or even when the risk of criminal penalties for whitecollar offences is too high. No doubt corporate executives will object to the strengthening of accountability mechanisms on the same basis. Yet we would do well to remember that this priceless pool of talent consists of people who have collectively hastened the end of the species and done nothing to slow down ecocide. This is a pool of talent we would probably be much better off doing without. We now need a different type of structure to replace the existing model of the corporation. And within this structure we will need a different form of management with a different skill set, driven by an entirely different set of motivations and norms.

It is clear that to be effective, any attempt to end the death-grip of the corporation over us will require an end to shareholder primacy and an end to the impunity that is effectively granted to directors and CEOs.

Kill the corporation before it kills us

This book has demonstrated why there is a direct link between the structure of the corporation and its limitless capacity for destruction. We know the problem is one that won’t be solved by tinkering around the edges. As Bellamy Foster and his colleagues argue: “if we are to solve our environmental crises, we need to go to the root of the problem: the social relation of capital itself”.48 If the argument developed in this book is even partly correct, this means breaking the organisation that gives material force to the social relations of capital: the corporation.

We need to find the most effective means of ending the corporation’s death grip over us. Ultimately, being effective means exploring how we can precipitate a wholesale removal of the rights and privileges of corporate owners and shareholders. Such proposals need to take a strategic approach, one that seeks longterm, permanent change, rather than a short-term tactical, approach.49 In other words, a strategic approach that requires addressing the material conditions of the social relationships that are abstracted by the corporation. These strategies can only be a starting point in thinking through how regulatory demands and struggles can undermine the dynamic of capital investment in meaningful ways.

As we have seen, the corporation has played the key role in facilitating capital’s ability to devour nature and to push past the limits of sustainable development. This long historical process was predicated on the transformation of public land and goods – held in common – into private property. The corporation was a key player in this “theft of the commons”. As political theorist David Ciepley notes, the growth of the corporation was the crucial dynamic force in this mass transformation of the form that property took.50 As we saw in chapter 2 of this book, in the context of colonisation, the corporation has been indispensable in the theft and commodification of people, resources and land. It remains indispensable for those tasks today. Restoration of the common ownership of the land and of natural resources is crucial if we are to reverse climate change. As we saw in chapters 1 and 2 of this book, the logic of capital accumulation always encourages the devouring of nature without human and ecological limits. The restoration of common ownership is necessary to remove the logic of capital accumulation from the stewardship of the natural environment. Only through a restoration of the commons can we displace the social dominance of capital and the corporation over the future of the planet and allow the damage to our environment to be repaired.

The corporation is not a problem merely because it captures natural resources, pollutes and perpetuates a carbon-based economy. As this book has argued, the problem is much more integral to the capitalist system. The corporation eradicates the possibility that we can put the protection of the planet before profit. A fight to get rid of the corporations that have brought us to this point may seem like an impossible task at the moment, but it is necessary for our survival. And it is hardly radical to suggest that if something is killing us, we should over-power it and make it stop. And this is what we need to do. We need to kill the corporation before it kills us.

#### Tactics focusing on the endpoints of ecocide fail because they enable capitalist social relations to self-correct while inflicting minimal costs. Unseating the corporate form itself by organizing to leverage the political economy is necessary.

David Whyte 20, poet and an associate fellow at Saïd Business School at the University of Oxford, “3 Regulation at the End-Point of the World, Conclusion: Kill the Corporation before It Kills Us,” Ecocide: Kill the Corporation before It Kills Us, Manchester University Press, 09/01/2020

Yet it is clear that the rate of the political economy of speed matters. It matters because governments can and do generally intervene in ways that regulate the speed of production, distribution and consumption. Indeed, this is the importance of the political sphere. The rate at which we are destroying the planet is regulated by a process that is still largely determined by politics.

This means two things. First, it means that even if we trusted corporations to change their behaviour, this is only one of many things that need to happen. Corporate capitalism is not a self-contained system; corporations respond to a range of conditions, including regulatory regimes, fluctuations in market price of commodities, labour market conditions, competition, and so on. Environmental degradation occurs because of a combination of things that corporations have control over and things that they don’t. Second, the capacity to control this political economy of speed is not beyond us, precisely because it is a political economy. Political interventions have the capacity to change things because corporate capitalism is not a self-contained system; the system relies on the support of governments and other public authorities to ensure that it thrives. The capacity to control the corporation may be beyond the capacity of our immediate groups of friends, family or our workmates. But it is not beyond the capacity of government or the demands of popular movements.

The short arm of the law

Most popular campaigns that seek to reverse environmental damage – whether their aims relate to the curbing of greenhouse emissions, CFCs or ensuring offshore oil workers are safe – tend to involve a demand for legal limits to be imposed. Put in the terms outlined above, they seek a legal mechanism that slows the pace of the political economy of speed. Indeed, this is precisely the impetus behind the growing movement to demand that ecocide is recognised as a crime in national and international law. We will consider the chances of success for a new offence of ecocide on those terms later in the chapter.

For the time being, let us consider the wider implications of making demands for more legal controls. The first thing to say is that, if they are made on their own terms, demands for more law, or more effective law, present us with a conundrum. If corporations do not readily accept natural limits imposed by geography, by scarcity of materials or by transportation time, why would they be likely to observe a limit in law? This leads directly to a second question: when we do impose stricter legal limits then how can we expect states to enforce them? As we have noted in the preceding discussion, this is a question of political economy.

Take the issue of particulate air pollution, estimated to kill 4 million people each year globally.30 The international community has negotiated numerous separate treaties that set out the targets to reduce particulate pollution, such as the 1979 UN Convention on Long-range Transboundary Air Pollution.31 In order for those treaties to be enforced, national governments have to take action. It was pointed out in the introduction to this book that most of this ambient air pollution is produced by corporations. This means that in order to make international treaties workable, some consideration must be given to how regulatory mechanisms might ensure corporate compliance. The first problem is that when it comes to enforcement mechanisms, these vary hugely across the world. Even where those mechanisms are strongest, regulatory enforcement remains a gargantuan task. We are dealing with hundreds of thousands of corporations worldwide, some very small and some very large, some that will observe those limits and others that won’t. The first dilemma that environmental regulators face, then, is the task of ensuring that legal limits are not breached.

When regulators impose legal limits, corporations may or may not comply. The chances of being caught doing something that the corporation shouldn’t, for example cutting corners to risk lives, is largely in the control of the state. States determine how regulatory regimes work: how often a company will be visited and inspected, how its compliance will be checked on an ongoing basis, and how it will it be punished if it breaks the law. However, as we have seen, normally this depends on a very wide range of political and economic conditions, some that states retain direct control of and others – like market price – that states might have considerably less control over.

In recent decades, the balance of political and social power has made it more difficult to enforce environmental law. Since the 1990s, most environmental regulatory authorities have faced tightening budgets and been unable to do a job that was already incredibly complex and difficult.

In the UK there are over 1 million businesses that the UK Environment Agency is charged with regulating. The Agency employs little more than 1,000 frontline officers dedicated to law enforcement across those sectors. This is little more than the number of traffic wardens in London.32 Yet the task faced by those regulators – to ensure millions of businesses are complying with the law – is Sisyphean. In the UK, the Environment Agency’s annual budget is just 0.13% of annual government spending. The UK is not an outlier in this respect. The UK’s approach is broadly comparable with other advanced industrial states; its token approach to regulation does not look especially irresponsible.33 Spending on the US Environmental Protection Agency (EPA), for example, accounts for just 0.2% of the annual federal budget.34

Globally, both budgetary and political pressures on regulatory agencies have certainly intensified since the 2008 financial crisis. The UK Environment Agency has faced more than a 40% cut to its budget in the decade following the crisis, again a feature of advanced economies that is not unique to the UK. Funding for the US EPA, for example, is now at a 40-year low. This is starting from a very low baseline indeed. Unsurprisingly, The Washington Post recently reported that the EPA inspections had fallen to their lowest level in a decade.35 The Trump administration has just introduced a “no surprises policy” that bans EPA inspectors making surprise visits to power, chemical and waste facilities.36 Corporate managements will be warned in advance, giving them a chance to cover up any legal breaches. This is just one of a steady stream of attacks on the effectiveness of the EPA by a Trump administration obsessed by “burdens on business”. On the same day the no surprises policy was announced, the EPA declared its refusal to ban the deadly pesticide chlorpyrifos.37

In avoiding the awkward truth of its own ineffectiveness, the UK Environment Agency has sought to deal with its own particular Sisyphean task with some bizarre changes in regulatory policy. The regulator began to commission research in the early 2000s which promoted a strategy of ignoring the largest companies and concentrate on the small ones. Their data calculations told them this was the most scientific approach. Indeed, two of those commissioned researchers argued: “there is little doubt that larger firms have greater incentives and capacities than smaller firms to comply with and go beyond legal requirements”.38 This rationale justified leaving the biggest corporations alone and by 2009 this approach had become established Agency policy.39 Self-regulation is now the dominant mode of regulation. Regulators increasingly rely on corporations to volunteer information about their own compliance. As we saw in the introduction to this book, this has never worked, even in the case of the most deadly substances. Those same corporations are hardly likely to volunteer information about their day-to-day compliance with environmental law.

What we are describing here, in the context of the UK and the US, is a global regulatory crisis that has been incubating for at least four decades. Since the 1980s, the international financial institutions like the World Bank and the IMF, along with the most powerful national governments have enthusiastically encouraged policies that seek to undermine a whole range of social protections, including environmental regulation. This political strategy, which bemoans regulation as a “burden on business”, promotes the privatisation of public services, seeks further restrictions on workers’ rights, and encourages the rolling back of a whole array of limits placed on corporations, has become known as neoliberalism. The project to bring market discipline to the public sector on a grand scale – with its British origins in the Thatcher governments of the 1980s and its US origins in the Reagan administration – has always contained a militant antistate ideology at its core.

Neoliberalism has acted as a major bulwark against the enforcement of environmental law and against demands for adequate funding and stronger powers for regulators everywhere. And it has intensified the demand on the need for effective regulators. As we have seen, the regulation of water quality is a primary function of the UK Environment Agency. But since the privatisation of water provision in England, it has been fighting a losing battle on this front. One investigation by the Financial Times revealed that most water companies were failing in their legal responsibility to keep Britain’s waterways safe. A particular problem is the failure to control the flow of raw sewage into public waterways. None of England’s major rivers are safe enough to swim in because of the risk of people getting sick. And yet, as this investigation caustically observed: “The concerns over river pollution come at a time when the water industry is under fire for paying executives and shareholders lucrative rewards while raising customer bills and failing to stem leakage”.40

Some people get sick, some people get a pay rise. Those two things are not unrelated.

The fate of our regulatory system is one of the great tragedies of the neoliberal period. The system of environmental protection that began to be erected in the mid-nineteenth century, and began to look a little more effective in the 1970s, has been completely eroded.41 Our system of corporate environmental regulation was enervated before it had a fighting chance of success.

Punishment and the corporate veil

It is clear that the pace and intensity of the political economy of speed varies across time, and across different modes of capitalism. And it is clear that in the neoliberal period, there has been a progressive undermining of political controls that can protect our environment. This begs the question, would we be in a better place if neoliberalism had never happened, and if capitalist states had employed different modes of regulation? Would things be any different if corporations were punished more frequently for breaking environmental law? This brings us back to the problem of regulatory permission and the point that the most harmful industrial practices are not illegal in the first place.

Let us imagine for a moment that we had more stringent environmental limits placed on corporations across capitalist states. How would this work? The answer to this question, partly at least, takes us back to our earlier discussion of the corporate veil. For, even if the law was enforced, there is something about the way corporations are punished that does not necessarily focus minds in the boardroom. This seems to be the case across the corporate world. The regularity with which the banks are involved in criminal activities that trigger fines worth hundreds of millions of dollars is truly astounding. Yet those fines seem to be having no impact whatsoever. Between 2012 and 2019, all of the major British banks were punished with mega fines on a regular basis, for offences including: the fixing of the bank rates LIBOR (Barclays $440m) and FOREX (RBS $1.3b; Barclays $1.5b; HSBC $618m); for money laundering (HSBC $1.9b); for ripping off customers (HSBC $470m); and for offences related to the financial crash (Barclays $1.4b; RBS $10b). This list only captures the largest fines. The full charge sheet runs to 100s of offences by the banks in the period since the financial crash in 2008.

If banking looks to be a particularly extreme case, there are other sectors in which penalties for criminal breaches and illegalities occur with the same regularity. Illegal price fixing, for example, in the electrical goods, food retail and construction sectors is every bit as routine and normalised. The regulators charged with dealing with those offences also use fines, sometimes very large ones. The strategy does not appear to be working. The record fine for price fixing was $1.92 billion, imposed by the European Commission on 4 electrical goods firms in 2012. In 2018, another 4 electrical goods firms, including one of the firms fined in 2012 were fined $130 million by the Commission for similar offences.

If fines of this scale are not appearing to work against corporations for those offences, how can we expect to protect the environment using the same regulatory tools? After all, BP’s Deepwater Horizon catastrophe in 2010 came after a series of very serious offences, including an explosion that killed 15 workers in their Texas refinery in 2005 (which led to a record $50.6m fine), and a series of oil spills in Alaska in 2006 (which led to a $25m fine).

One reason fines might not have had much impact is that when they are put into perspective, even the largest sums tend to represent a fraction of corporate revenues. The Texas refinery fine represented 0.017% of the BP Group’s revenue for 2010, the year the fine was levied, and the Alaska fine amounted to around 0.007% of the group’s revenue for 2011, the year that it was levied. The bill for Deepwater Horizon was, as the financial press have enthusiastically noted, been absorbed largely by the rise in oil prices between 2016 and 2018.42

Those examples alone do not give cause to argue against the use of fines; indeed, more punitive fines may well be more effective. In theory, at least, deterrence can work when applied to corporations precisely for the same reason deterrence doesn’t tend to work with individuals. Corporations have teams of accountants and specialists that can predict their chances of getting caught and estimate the consequences for the business. But this ability to plan also means that they can cushion the blow of a fine.

There has been an acceleration in lawsuits related to climate change. A database published and updated by the Columbia Law School contains 1,380 cases of climate change-related civil actions, mostly in the US. Around 90% of those cases were filed between 2009 and 2019.43 While those cases are being monitored by corporate lawyers, they are not seen as a significant challenge to Big Oil, or any other corporate interests. Of course, cases like this may have an impact cumulatively or in extreme cases. An analysis in the Financial Times has proposed that the class action for Monsanto’s Roundup (see the introduction) has reduced the value of Bayer’s shares by around a third.44

Corporations generally have ways and means to offset such losses. They very often keep slush funds to offset fines and claims. In some cases, they structure their tax in ways that allow them to write off fines! BP received a $10 billion tax rebate by offsetting its Gulf oil spill disaster expenses against tax. As one US campaign group noted, the sum added up to roughly half the size of the $20 billion restitution fund that the company established.45 Infamously, Exxon had also used tax deductions to ensure that it only paid a fraction of its $1.1 billion settlement for the Valdez oil spill in Alaska in 1989.46

For reasons outlined in chapter 1, it may be that even if they were not permitted to offset the costs of fines against reserves or tax, or pass on the costs in other ways, punishing the corporation will never have a deterrent effect no matter how severe the punishment. To repeat the argument developed in chapter 1, punishing the corporation ultimately protects shareholders and senior managers because they remain protected, behind the corporate veil. As the international law scholar Grietje Baars puts it, executives can always say: “It’s not me, it’s the corporation!”47

As we saw in chapter 1, executives occasionally appear in court, but owners and shareholders are rarely even identified in such cases. Fines imposed on companies, for all of the reasons outlined here, have little more effect than perpetuating a structure of power that is ultimately designed to shield class interests. Little wonder then that studies on the impact of pecuniary penalties on the corporation generally find little correlation between the imposition of fines and a deterrent effect.48

Conversely, it is the most vulnerable groups of people that will tend to bear the costs of fines. Because fines are generally levied on the “corporation”, rather than targeted at a particular group within it, the cost burden of even the largest fine can be absorbed and redistributed; those costs might be offset against a particular budget heading (they might result in cuts to wages or other operational costs), or they may be passed onto customers and clients in the form of price rises, or onto suppliers by reducing the market value of a product. Fines for violating safety laws and causing fatalities in the workplace are often absorbed by workers in the form of wage cuts and downsizing.49

The same effect occurs if a corporation is liquidated: the groups that are most likely to absorb the environmental costs of liquidation are local communities who are left to pay for any clean-up. Often liquidation is used strategically to avoid the costs of paying damages. International lawyer Sara L. Seck has identified a number of cases involving US and Canadian firms that conveniently avoided clean-up costs of mines by using a subsidiary and then filing for bankruptcy.50

The corporate veil is working well to protect both the senior officers of corporations that take the decisions and the investors who ultimately benefit from those decisions. This leads us directly to another “even if …” set of questions. Let us assume that our system of punishment was more effective, and that we were able to prosecute investors and senior managers for an offence like ecocide. Our next problem would be whether an offence of ecocide, even if it were it to be effectively prohibited, would be enough to stem global warming and to make a significant impact on levels of pollution.

Regulation at the end-point of the earth

This problem is brought into relief most clearly when we consider that regulatory controls always chose the least invasive point at which to intervene in the industrial cycle. In most capitalist states, most industrial processes are controlled at the end-point. That is to say, the greatest effort that is spent controlling greenhouse gases, poisonous substance and harmful waste products happens at the end of the line. The focus of most control systems is the point at which those harmful substances have already been produced, or the point at which harmful production process are already underway.

Controls on emissions are exactly that: controls on the system’s harmful outputs. We rarely contemplate this. We rarely question why we don’t control the start-point. Occasionally states ban or place restrictive limits on particular substances. But generally, controls placed on even the most harmful substances are imposed when it is too late. The most pressing problem we have with the system of environmental regulation, certainly in advanced capitalist states, is that it barely regulates the damage we are doing to our planet at all. Indeed the particular mode of control adopted in capitalist regulatory systems is based on the assumption that the brakes can only be applied after the damage has been done. I call this mode of control “end-point regulation”.

In the rare cases that companies are prosecuted for offences, it is at the very end-point of production and distribution that chemicals, oil, plastic products and so on are controlled. The same goes for international efforts to control greenhouse gases and other pollutants. The regulation of oil, coal and gas and other carbon fuels, for example, tends to be regulated at the very end-point in the life cycle of those products. There is a certain logic to this. It is carbon emissions that are bringing us to the point of climate catastrophe. Yet, once the oil or coal is out of the ground, it will be sold and used unless its sale and use is banned or severely controlled. End-point control is the dominant approach taken in the main treaties and targets that seek to reverse the crisis. The solutions offered are the control of emissions rather than the control of how substances are produced in the first place.

Our failure to intervene and limit the damage done by the production of carbon dioxide, by other poisons and by waste is partly due to how we regulate. As the argument in the previous chapter outlined, the regulation of pollution and other forms of environmental damage has the simultaneous aim of controlling the corporation and permitting the corporation to continue polluting (within some limits of course). In the context of the Kyoto and the Paris agreements (and the carbon trading method for meeting its targets) this balancing act can only be achieved when regulation takes place after carbon minerals are already out of the ground – after the fossil fuels have already been extracted. Indeed, almost all other treaties that seek to limit waste and pollution and protect biodiversity use a similar approach – to impose limits at the end point of production. The tendency is to place general limits on emissions, creating new laws about the use of products that have already been made; or to identify particular geographical areas for protection from substances that are already in circulation. And this is the point about the crime of “ecocide”. If ecocide does become legitimised – and even enforced – as a crime in international law, it may well prove to be an important recognition that the destruction of the planet must be taken seriously. However, as we saw in the previous chapter, this is not what law – certainly not criminal law – does in capitalist societies. Even the strongest forms of legal intervention allow the state to absorb conflicts in ways that preserve the autonomy of corporations, and therefore preserve the ability of the people who hide behind the corporation to commit ecocide!

The general impetus in capitalist forms of legal regulation is precisely this: to enable the rich to pursue their own interests, no matter the social consequences. And this is the real reason that regulation always comes too late to make a difference; this is why the state largely limits the scope of its intervention to the end point of the production process. A report by oil and gas consultancy Wood MacKenzie estimates that if we maintain the current rate of energy transition, coal, oil and gas will still contribute about 85% of the world’s primary energy supply by 2040, compared with 90% today.51 The major oil companies continue to spend little over 1% of revenue on the development of renewables.52 Such projections make a mockery of the targets set by the Paris Accord. This is one indication that the system shows no signs of taking the crisis seriously. The preferred mode of end-point control will never really be effective in preventing ecocidal production in any meaningful sense.

Yet it is the principle of end-point control that dominates the mechanisms that are introduced ostensibly to control climate change. “Carbon trading” is the name given to the allocative market mechanism that was first put in place by the Kyoto treaty. In this system, a nation or a major corporate polluter can buy a permit to emit more; nations with fewer emissions can sell their permit to other countries or corporations. Lauded as a revolutionary method of reducing emissions, it mimicked a number of proposals economists have made over the years that use market logic to deal with externalities.53

The idea is that carbon trading enables the nations and corporations that emit more carbon dioxide to “meet” carbon emission targets by offsetting against those that emit less. The main criticism of this system is that it simply perpetuates a process in which the largest polluters are able to maintain high levels of pollution because they can afford to pay for it. The system also contains other in-built incentives to pollute. Because credits can be allocated to companies that are very high polluters but make some improvement to reduce carbon emissions; very often the largest polluters are allocated the most permits. As journalist Naomi Klein has noted, some of the biggest polluting corporations in India and China install relatively cheap “green” technologies that remove some greenhouse gases but are still highly resource intensive. They then reap millions of dollars worth of carbon credits at a relatively low cost to them.54 They may even use this credit to maintain high carbon emissions at another facility. It is also likely that, between nations, the export of coal and high-carbon oil and gas from the Global North to the Global South is a market that is encouraged by carbon credits. In other words, there is a continued tolerance of carbon emissions built into this system. Moreover, because the number of projects obtaining carbon credits is rapidly growing, this is an expanding market that is liable to multiply both the benefits and the counterproductive effects of the system. It is a naïve and entirely wrong logic that says by controlling demand, supply will sort itself out. Indeed, it is a repetition of the same market logic that has brought us to this point.

Carbon trading is end-point regulation par excellence. It avoids all of the most pressing questions that need to be answered if we are to do something about climate change. Why can carbon fuels not be cut off at source? Why can they not be phased out by controlling their production? The most basic answer is that this is the very antithesis of a market logic which endlessly claims that market mechanisms are the solution to all of our problems, even when the problems have been created in the market in the first place!

And this brings us back to the corporation. As we saw in chapters 1 and 2, the corporation’s primary function is to reproduce capital. It does this by providing the vehicle through which most capital is invested. Intervention at the end point of the investment cycle is the least intrusive point for the corporate model. On the other hand, when we intervene at the start-point, this means intervening much more directly against investors and therefore corporations. It means intervening to control the extraction of raw materials, intervening in chemical and other industrial manufacturing processes. And it also means intervening to control the financing of corporate activities. Intervening at the start-point as well as the end point in the production cycle means fundamentally changing the financial model that is the major driving force of corporate ecocide.

Conclusion

As this chapter has argued, regulators in capitalist societies have a dual function. On one hand, their function demands the promotion of a political economy of speed that prioritises economic growth, and on the other hand, states are responsible for activities that are harmful to the environment. It is this contradiction that makes some people pessimistic about our reliance on states to protect us. Indeed in the commentary to Falk’s original 1973 formulation of the crime of ecocide he makes a declaration that: “the State system is inherently incapable of organizing the defence of the planet against ecological destruction”.55 Falk questions, as we must, how capable our regulatory system could ever be in preventing ecocide. Our discussion of the way that states regulate corporations in capitalist societies forces us to ask this question again and again.

The regulation of ecocide in a serious way requires that we control the start-point of production and the distribution of things – not just that we tinker with the speed of the political economy. To have a crime of ecocide on the statute books would only be significant if it was accompanied by the control or banning of the full range of commercial activities that are currently licenced. But even then, a series of prosecutions against senior individuals or indeed a corporation itself is not going to precipitate a shift the structure of the economic system that we need. This is largely because, as we saw in chapter 1, the corporate structure is purposebuilt to ensure that the people who profit the most are shielded from bearing the environmental costs of corporate activities.

Yet to argue that the system must change does not mean arguing that regulation is pointless. This can never be an “all or nothing” discussion. There is a well-worn debate in left-wing politics between revolutionary and reformist positions. This is always a false opposition. When we seek radical social change, we are never given a simplified choice of reform or revolution, with nothing in between. Governments need to slow the pace and intensity of the political economy of speed now more than ever before. Yet, at the same time, in order to confront the realities of the problem that we face we need to recognise that the ‘end-point’ approach to regulation ultimately sustains the nature-devouring corporate economy, albeit in a less aggressive and more ‘green’ form.

As we saw in the previous chapter, corporations do not respect the human or moral limits placed on their activities. When we talk about legal limits, as we have done in this chapter, we are introducing a different type of limit. It is not physical in the sense that it does not involve limits on the availability of raw materials, or the time taken to transport goods, for example. Legal limits are imposed externally, by political authorities (governments, law courts, regulatory authorities, international organisations). As eco-socialist Joel Kovel has argued, “there are no internal limits to the expansion of capitalist production”.56 This is why limits must be imposed on corporations by regulators. At the same time, as this chapter has shown, regulatory systems established for dealing with climate change and ecocide have very often proven to be counter-productive: regulatory solutions very often encourage the planetdestroying practices they claim to be able to stop.

The regulatory approach to ecocide is not working and it must be changed. If we are to demand “more regulation” and “more prosecution” for ecocide in the aftermath of capitalism’s crises, then we need to be sure that we are not merely strengthening the institutional forms of power that created the crisis in the first place. We need a form of regulatory intervention that can secure a lasting solution to the crisis; such approaches to regulation must ensure that corporate structures are not merely reproduced or strengthened. Otherwise, we will simply be reproducing the conditions that are killing us. The following chapter – the conclusion to this book – begins to set out the ways that we might go about this task.

Conclusion: kill the corporation before it kills us

How long can history keep repeating itself?

The Stora Enso story, which has featured as our point of departure in each chapter, reveals the remarkable endurance of the corporation throughout history. Indeed, as a structure through which profits can be reproduced, it has proven to be more sustainable than the resources and the land it has devoured and replenished. If the land around Falun remains barren, the land in its plantations in Uruguay and Rio Grande do Sul may well be very soon, as a result of the monocultural plantations that exhaust the soil of their nutrients. In Northern Europe there are signs that this history will repeat itself. The logging of Swedish forests by Stora Enso and other European wood companies has drastically impacted upon the biodiversity of those forests, and has led to an ongoing loss of species that are essential to protecting the sustainability of those habitats. The Swedish Society for Nature Conservation noted in 2009:

in the counties of Jämtland, Dalarna and Värmland, SSNC has discovered a remarkable number of forests containing key habitats that Stora Enso has notified for final felling. The planning of these loggings demonstrate a lack of consideration of high nature values and a poor capacity to identify key habitats.1

The dormant Falun copper mine is also in Dalarna County. History repeats itself indeed!

Almost all of the oil, chemical, mining and manufacturing corporations referred to in the introduction to this book are still making and selling deadly products. At the same time, these companies are still commissioning research, muddying the waters, creating doubt and blaming someone else. Indeed, most of those corporations continue to profit and thrive.2 Of course, those two things are not unrelated.

Fifty years after the ecocidal use of Agent Orange in the Vietnam war, Monsanto retains a powerful presence in the country. It is the biggest importer of genetically modified organisms (GMOs) to Vietnam. Although a deal with the Vietnamese government has meant that it is officially encouraged in this enterprise, there are big questions about the long-term impact of GMOs, not least their inbred resistance to chemicals such as Roundup (see chapter 2). GMOs facilitate the aggressive commodification of seeds, privatise varieties that were previously commonly owned, and therefore expand corporate control over food supplies.3 The result is that local farmers are either forced off the land or forced to use Monsanto varieties. At the same time, Monsanto’s GMOs are designed to be used in conjunction with some very damaging chemicals.

One of the major claims made about GMOs is that they can deal with extreme climate change conditions, such as drought. The development of “climate-ready” crops has been controlled by a small number of very powerful players. Six corporations – DuPont, BASF, Syngenta, Bayer, Dow and, of course, Monsanto – control 77% of the patents on those crops.4 This cycle of corporate pollution/corporate solution gives us a glimpse of our immediate future.

In all of the major industries implicated in the eco-crisis, corporations have already begun to plan for a profitable climate change. This cycle of corporate pollution/corporate solution that is repeating itself around the world gives us a glimpse of our immediate future. If we are not careful, and if we do not wrestle control of our economy and our society from corporate capitalism, then all we will be left with are solutions that someone can make a profit from. As Karl Marx famously said, paraphrasing the German philosopher Georg Hegel, “history repeats itself; the first time as tragedy, the second time as farce”.5 On this count he was probably oversimplifying things. Rather than a process of simple repetition, it might now be more accurate to describe the condition of history as an endless cycle of ecological tragedy. History repeats itself, he might have said today, the first time as tragedy, the second time to make a profit from the tragedy, and the third time, and the fourth time.

The Anthropocene6 may well be the stage in human history at which this cycle stops abruptly, simply because there will be no human history left to repeat.

Green market fetishism

Big Oil’s strategy has been to play down the scale of the problem and argue strongly against regulatory controls that put the planet before profit. Research published in 2019 by the NGO InfluenceMap revealed that the five largest oil and gas corporations (ExxonMobil, Royal Dutch Shell, Chevron, BP and Total) had invested over $1 billion in misleading climate-related branding and lobbying since the Paris Agreement was signed. Over $200 million of this was used directly to control, delay or block binding policy on climate change.7

Yet this strategy of greenwashing in its crudest form is not sustainable.8 The fossil fuel industry can no longer credibly claim, as it has in the past, that climate change is a bogus science. Yet it continues to double down behind the scenes to preserve the longterm future of fossil fuels. The only alternative it has is to embark on a major rebranding that ultimately seeks to transform Big Oil’s reputation from destroyers of the planet to saviours of the planet. ExxonMobil has pledged $100 million for emissions-reduction research9 (2 months after BP pledged exactly the same thing).10 All of the oil majors are claiming to be moving towards a sustainable business model. However, if we look at what this means in real terms, it does not look like there is much of a shift away from fossil fuels at all. BP is pledged to “flat-line” its carbon emissions up to 2025;11 and Shell has set a target of 20% net reduction in its carbon emissions before 2035.12 For these companies, any marginal reductions will be achieved by investing more heavily in less carbonrich gas, rather than a significant switch to renewables.

If the greening of Big Oil smacks of a damage limitation exercise, then, we might ask, what type of damage is it seeking to limit? When the Paris Agreement was being drawn up, it was estimated that in order to reach its targets, Big Oil would be prohibited from exploiting 30% of known oil reserves and 50% of known gas reserves. The oil companies would also need to abandon all exploration and drilling in the Arctic.13 Perhaps more significantly, their shareholders would take a major hit on dividends that remain the biggest in the corporate world.14

At the same time, a great deal of work is going into planning, not to save the world, but to meander into an era of climate breakdown. According to the financial projections made by BP and Shell, their respective business models assume continued profitability in a scenario of a 5°C increase in global temperatures.15 By the way, this is an increase that most scientists assume will kill millions, if not billions of people. As Mark Lynas has argued, at 5°C hotter, all of the scientific evidence suggests “an entirely new planet is coming into being – one unrecognizable from the one we know today”.16 Even after all of the struggles over climate change, and even after all of those corporations’ public commitments, they are still planning to profit as the world collapses around them. They are planning a future in which the oil companies can survive longer than us! This is galling enough, but BP and Shell have more control over the situation than almost any other organisation.

This sort of tinkering at the margins of an over-heating world is all the corporate sector seems ready to offer. Companies like MacDonalds, KFC and Starbucks17 are pumping millions into developing sustainable packaging. Yet, as long as they continue to make billions from business models that demand expansion into markets that source meat, soya and coffee from some of the world’s most ecologically vulnerable regions, this is mere tinkering. While it clearly is a token effort in terms of its real impact on environmental sustainability, initiatives like this mean something much bigger to those companies; they allow a message to be projected to customers who want to buy into “green” brands.

There is no doubt about it, we are in an era of green market fetishism18 in which ecocide, just like any other human crisis, can be turned into a business opportunity. Because of our reliance on corporations to provide all of our basic goods and services, and because of the control that corporations exert over markets, climate change can be highly profitable.

The following (genuine) statement was broadcast on Bloomberg News in late 2018:

The rights to pollute the atmosphere with carbon dioxide raced through 25 euros per ton and are now trading at their highest level in a decade. Options data shows that traders are making bigger and bigger bets on prices at or above 30 euros in 2019 already.19

Throwaway investment advice like this is issued every day in the financial press; daily feeds tell us how buoyant markets in pollution are. Few would disagree that financial trading in carbon derivatives is not only tasteless, but that it inserts risk into a system that cannot bear any more risk. In the previous chapter it was argued that the system of carbon trading contains a series of built-in incentives that, under some circumstances, can encourage the production of more rather than less carbon dioxide. Derivatives markets in carbon trading at their best have a neutral impact, and at their worst make the eco-system more vulnerable to fluctuations in financial markets.

In recent years there has been a rapid growth in climate change investment funds. Deutsche Bank’s DWS Climate Change Fund channels investment into the Big Agri climate-ready crops, into water treatment and desalination via water supply firms like Veolia and the Chinese Duoyuan Global Water, and fertiliser multinationals like Yara and Agrium.20 Those investment funds are creating new markets for those who want to profit from climate change without actually tackling the causes.

Other climate change investment funds are geared up even more explicitly to profiteering from climate change. The Schroder Global Climate Change Fund invests massively in farmland in areas least likely to be affected by global warming, and in food companies and supermarkets, to take advantage of the coming food crisis.21 There is also a steady growth in the markets of private logistic and security companies specialising in disaster response;22 and firms that profit from both rebuilding and insuring the infrastructure. And so it goes, on and on, the endless cycle of corporate pollution/corporate solution.

The lesson of history, however, is that corporations will fight tooth and nail to defend their right to make a profit even if it is killing us. It is clear that the only way to break this cycle of corporate pollution/corporate solution is to break the corporation itself. Drastic problems need drastic solutions.

The lightbulb moment

As this book was being written, the global supermarket chain Aldi made an announcement that it planned to trial a change in the packaging of its 4-packs of toilet rolls. Instead of plastic, Aldi was preparing to pack its (bleached) toilet rolls in recyclable paper. But only as a trial. And, it announced, it would only switch permanently to this “new” method of packaging if it was successful. The ocean is filling up with plastic, landfill is bursting at the seams, and one supermarket is only going to cut down on one variety of its batch packaging if “it is successful”!23 So what measure of success do supermarkets like Aldi need? In the supermarket business, success of a trial invariably means it receives good feedback from customer surveys and focus groups.

Despite everyone knowing that the system is set up to deflect responsibility onto us as individuals for things we are not actually in control of and that this will not be enough to bring us back from the brink of ecological collapse, the deflection of responsibility onto consumers remains the mode of our supposed great transformation.

The futility of individualised, consumer solutions is perhaps best summed up, inadvertently, in the groundbreaking film on climate change, An Inconvenient Truth. For many people this was a lightbulb moment, a realisation that we might have gone too far, that the earth was either reaching tipping point, or was too far gone. By the end of the film, desperate to know what we need to do to reverse global warming, we are told to fill our kettle a little less and plant trees, use more energy efficient light bulbs, the usual stuff. And at one point, the film informs us that, if we believe in prayer, we should pray. This was not the kind of lightbulb moment those of us who saw the film were looking for.

Almost 15 years after this film was released to critical acclaim, we remain obsessed with individual solutions to the most collective of problems. We find this wholly unsatisfactory approach in the most recent accounts of the climate crisis and what we should do about it. In Martin Dorey’s book No. More. Plastic.,24 for example, the author urges his readers to do things like “try using a fountain pen, with real ink, to cut down your pen waste” and “buy [workmates] all a coffee mug and ask them not to bring takeaway cups into the office”. Our imaginative capacity for action seems to stop at the feet of individuals.

There is no doubt that, as individuals, all of us need to take action to reduce our carbon footprint. We need to get rid of our cars, to fly less and to buy local food. But there is one reason that this will not be enough to change the system. And it’s a very simple reason: we are not in control. As customers, we may be able to protest, and sometimes boycott particular products. But those limited tactics are of little use to us if we do not have any control over the key decisions about how our economy works.

Even if we could assert our power as customers, collectively it would probably add up to less than we think. Remember the research mentioned in the introduction that concluded just 100 companies are responsible for 71% of carbon emissions.25 Given that much of the remaining 29% will be produced by corporations outside the “top” 100, that doesn’t leave us much room to do much as individuals. This is the case even if we were to break it down sector by sector. According to research by Investopedia, the majority of airline revenue comes from commercial customers.26 And even if we boycotted particular foodstuffs, how could this lead to the change in the system of food production and distribution that we urgently need? There have been points in history at which consumers have been able to exercise power over markets,27 but only when they have been highly organised collectively. Even when we use our power as consumers collectively, rather than as individuals, in order to be effective we need to be organised as a social movement.

Because they are focussed on changing consumption patterns, individual solutions tend to be based on what is described in the previous chapter as “end-point regulation”. When we buy a particular type of lightbulb or pen or cup, make a decision to buy a hybrid vehicle, or even decide to boycott plastic packaging, we are acting as individuals seeking to control an end-point in a cycle of production that has already been completed. Changing the behaviour of individuals is of course crucial in the sense that it changes the aggregate demand for particular products. More dramatic and immediate results will require the control of production and the supply of particular products into the market.

Controlling the start-point

Intervening at the start-point means intervening to control the extraction of raw materials, and to prevent, or at least slow the pace of, the political economy of speed in chemical, agricultural and other industrial processes. It also means intervening to control the financing of a large number of environmentally damaging industries. Intervening at the start-point as well as the end point in the production cycle means fundamentally changing the financial model that is the major driving force of climate change. The dominance of corporations over every stage in the industrial process tells us that if we want to intervene at the start-point, this means intervening against corporations.

A movement to ban CFCs in 1999 (as we saw in the introduction to this book) was successful in the face of the determined opposition of two of the world’s most powerful corporations. Although a global ban on asbestos has not quite been achieved, the export of asbestos to countries like Bangladesh and India is only possible because of the failure to challenge the power of Canadian and Russian asbestos corporations.

By the time this book is in print, a ban on plastic straws, stirrers and cotton buds will be in force across the UK. Those are important initiatives, but they are very small steps. Plastic straws are estimated to add up to 0.02% of total global plastic waste every year.28 If a plastic ban is to be effective, it must cover a much more significant proportion of the plastics market. Contrast this ban with the approach taken on plastic bags for example. In 2015, a European Union directive prohibited the free distribution of plastic carrier bags in retail stores. Carrier bags were subjected to a new minimum charge of 5p per bag. This charge was levied not on the companies that had for years produced and distributed plastic bags, but on customers. By all accounts it has had some impact. Three years after the ban, it had claimed to reduce plastic bag littering by 30%. Yet there is still a huge market in plastic bags, and a much larger market in the production of packaging. According to Greenpeace, Britain’s supermarkets alone create more than 800,000 tonnes of plastic packaging waste every year.29

In 2007, the President of Ecuador, Rafael Correa, offered a slightly different form of carbon trading deal. He promised not to drill for oil in a pristine area of the Amazon forest in the country’s Yasuni National Park. The oil would be left under the forest in return for compensation of $3.6 billion from the international community (or roughly half of the revenue the government could expect from the oil). By 2013 international donations had only yielded a fraction of what Correa had asked for – around 0.36% – and drilling began in Yasuni in 2016.30 Correa has disappointed many of his supporters. Yet his attempt at a moratorium was itself an acknowledgement that effective regulation means stopping production before it goes ahead.

The fact that around 100 companies are responsible for 71% of global carbon production in the past 30 years makes the political task of fixing things look deceptively simple. And at one level it is. Our foremost demand should be the immediate sequestration of all assets of those companies, placed under public control. But even this radical measure would not entirely solve the problem. When counted a different way, a very broad range of corporations are involved in significant carbon emissions. Research by the think tank Green Alliance shows that inefficiencies in production, and the generation of waste across the construction, food, clothing and electronics industries, account for half of Britain’s CO2 emissions.31

In short, controlling the start point is necessary, but it is only a piecemeal solution. As long as they remain the principal organisations responsible for making, consuming and distributing things, corporations remain in control of industrial processes and the way they are financed. The fix to the mess we are in cannot possibly be provided by organisations that are programmed to devour nature, with no regard for the human and ecological consequences. The fix must be political.

A green industrial revolution?

The introduction to this book noted that in most of the political proposals for a “green new deal” and a “green industrial revolution”, the corporation is rarely discussed explicitly as a problem that needs to be confronted head-on. Yet it is obvious that many of the proposals and the blueprints for a green new deal would effectively mean limiting the power and the economic role of profit-making corporations across the economy, not just those in the energy and fossil fuel industry. At a very minimum, we need to see the introduction of two types of tax on corporations (a carbon tax, and a financial transaction tax), and they would need to be introduced on a global scale. But even this would only be a start. The task we have ahead of us is huge. We need to phase out all carbon fuels, plastics and an almost unfathomable range of chemical substances that are ubiquitous in industry. We need to localise food and manufacturing, and introduce revolutionary methods of cutting waste.

Some proposals have demanded wholesale reconstruction of the financial system,32 and often involve the nationalisation of transport companies, the creation of new forms of recycling cooperatives, models of constitutive decision-making and new modes of “slow” and “local” food production.33 Alexandria Ocasio-Cortez’s proposals contain some mix of these policies. Taken together, they would represent a profound challenge to the model of corporate capitalism that currently dominates our lives. However, it is unclear how this task might be achieved. Nor is it exactly clear what would be needed to ensure that the economy would no longer be dominated by profitmaking, share-owned corporations.

Of course, this task is made more difficult by the fact that the executives of the corporations most implicated in all of this are routinely appointed to government positions, asked to advise on regulatory policy, or access politics in other ways through political donations and lobbying.34 Ending the political input of corporations into green new deal policies might be difficult, but would be a prerequisite for getting the job done. In order to complete the gargantuan task of transforming dirty jobs into clean jobs, there will need to be social upheaval on a scale never seen before. Some very powerful vested interests are going to lose a lot in a “just transition” from the corporate economy. This is why any effective measures will require a sustained struggle outside as well as inside government. Corporate elites will resist, and we must prepare to organise against them.

As we saw in chapter 1, a fledgling corporate social responsibility movement in the 1930s proposed changes in law that could promote “director primacy” rather than shareholder primacy. A version of this was introduced by the UK Companies Act 2006. Indeed, it is becoming much more prevalent for capitalist democracies to develop proposals that enable directors to take into account the interests of a wider group of stakeholders.35 The problem with these proposals is that they virtually always strengthen, rather than weaken, the ironclad rule of shareholder primacy. Since its implementation in 2007, the UK Companies Act has made virtually no difference to corporate governance, except to give corporate and NGO lawyers something else to argue about.

Of course, as we saw in chapter 3, the function of law in capitalist societies is to keep the ship steady and make sure the corporation is not impeded too much as it goes about its business. A green new deal will not come to be introduced as part of a consensual process. It is unlikely that legislators will be allowed to transform the economy whilst the most powerful sections of the leading economies just sit back and watch in despair. A green new deal will need its own sources of social power. This means that it will need a sustained popular movement behind it, agitating for and demanding radical social change every step of the way.

Ecocide or the corporate death penalty?

As Richard Falk, author of the draft law of ecocide, argued, we have good reason to be sceptical about how capable a state-administered regulatory system will be in preventing ecocide. Of course, Falk’s answer lay in international rather than national law; in international criminal prosecutions rather than national regulatory systems. The proponents of a law of ecocide have argued that the chances of ending up in the International Criminal Court (ICC) will focus minds in the boardrooms. It is difficult to argue with the proposition that the threat of prosecution for destroying the environment is probably better than no threat at all. However, as other critics of the ICC have noted, the chances of ending up in the dock at the Hague are roughly zero, unless you are African and unless you are on the wrong side of a civil war. This is not just invective: in the first decade of the ICC’s operation, only Africans had been brought to trial.36

But let us say, for argument’s sake, that ecocide breaks the mould: that this is the offence that will enable white people from Western Europe and Australia and North America to be prosecuted at the ICC. Even if there were a handful of prosecutions for ecocide, we are still left with all the problems identified in the previous chapter. The chances of individual directors being held accountable would still be almost negligible. While at the same time, investors shareholders and owners would remain untouchable.

A new offence of ecocide may therefore present a false symbolic hope that the international community will act, whilst at the same time simply providing a way of side-lining the issue into a few “monster” cases and allowing the problem to be left in the hands of cause-lawyer firms and the ICC.37 Law, if it serves a function at all in dealing with ongoing ecocide, is always going to fall short as the solution. A more complex problem here is that any reforms to international criminal law will not break the enduring and overarching structure of corporate law. No matter how well the law is enforced and no matter how harsh the penalties, criminal law can only offer highly individualised solutions that focus on a few “bad apples”, or, as we found in the previous chapter, solutions that keep the investment and financial structure of corporations intact.

One of the more radical strands of argument in the research dealing with corporate crime is a resurgence of the idea of the “corporate death penalty”. US legal theorists Mary and Steven Ramirez have proposed to formalise a corporate death penalty based on a version of “three strikes and you’re out”, the policy notoriously used by the US and other states from the 1980s onwards to deal with relatively petty offending.38 Instead of going to jail, the “out” would be that the corporation would be “put to death”, or put into liquidation by the courts after a third serious offence.

### AFF Area---Corporate Purpose/Duties

This set of AFFs would likely be excluded by the recommended resolutional wording. These AFFs would say that because corporations have successfully claimed certain rights as legal persons, it serves various social interests to make them bear corresponding obligations before society. However, such an AFF would not ‘expand the range of entities eligible’ because corporations already bear rights and obligations of personhood.

#### The problems of corporate law stem from corporations’ differences from legal persons---NOT their similarities. The optimal balance involves expanding the incidents of personhood to impose broader legal obligations on corporate entities.

Kent Greenfield 15, professor of law at Boston College and the author of the forthcoming Corporations Are People Too (And They Should Act Like It), “If Corporations Are People, They Should Act Like It,” Atlantic, 2/1/2015, https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/

The power of corporations is frequently misused, usually to the advantage of the financial and managerial elite. Employees, communities, consumers, the environment, and the public interest in general are elbowed aside in corporate decisionmaking, unless the corporation can make money by taking them into account. Corporations are managed aggressively to maximize shareholder return. As a result, the risks they run—whether of oil spills in the Gulf or of financial crises erupting from Wall Street—are often unrecognized until too late. The executives who run American corporations do not generally think of themselves as having obligations to the public. The social contract of American corporations is pretty thin.

But these defects of corporate power, fundamental as they are, are not problems of constitutional law or corporate personhood. They are problems of corporate law, and they could be fixed by corporate law.

American courts forged sweeping protections for corporations during the Gilded Age (see sidebar); the legal fortress was slowly breached during the Progressive and New Deal eras. But in many ways we are back where we started. The Supreme Court is applying twisted ideas of free speech and due process to wall corporations off from accountability. In corporate governance, after a mid-century pendulum swing toward more public-spiritedness, managers and investors are now once again fixated on maximizing shareholder value.

In the last few years, however, there’s been a pushback—even a small bandwagon—against the shareholder primacy norm. An article in the Harvard Business Review (that socialist rag!) declared in 2012, “There’s a growing body of evidence … that the companies that are most successful at maximizing shareholder value over time are those that aim toward goals other than maximizing shareholder value. Employees and customers often know more about and have more of a long-term commitment to a company than shareholders do.” New York Times columnist Joe Nocera wrote that “it feels as if we are at the dawn of a new movement—one aimed at overturning the hegemony of shareholder value.” An opinion piece in the Financial Times recently argued that “[c]ompanies need a bigger and better purpose than simply maximising shareholder value.” And speaking of socialist rags, a 2011 Forbes article called shareholder primacy “the dumbest idea in the world.”

The case against shareholder primacy was argued best by Steven Pearlstein last year in the Washington Post. Maximizing shareholder value, he wrote, is a “pernicious” ideology that “has no foundation in history or in law.” He continued, “What began in the 1970s and ’80s as a useful corrective to self-satisfied managerial mediocrity has become a corrupting, self-interested dogma peddled by finance professors, money managers and over-compensated corporate executives.” In fact, he argued, “much of what Americans perceive to be wrong with the economy these days—the slow growth and rising inequality; the recurring scandals; the wild swings from boom to bust; the inadequate investment in R&D, worker training and public goods—has its roots in this ideology.”

These skeptics are popularizing what a number of legal scholars and I have been saying for quite a while—that corporations should be seen as having robust social and public obligations that cannot be encapsulated in share prices. Now, executives have legal obligations to take account of shareholder interests. Progressive corporate scholars argue that these “fiduciary duties” should be extended to employees and other corporate stakeholders.

One way to make these obligations operational is to make the decisionmaking structure of the company itself more pluralistic. In a number of European countries, for example, companies have “codetermined” board structures that require representation of both shareholders and employees. Even with these management structures, corporations continue their focus on building wealth—that is the core purpose of the corporate form—but not for a narrow sliver of their investors only. And it works. Germany, where codetermination is strongest, is the economic powerhouse of Europe. A former CEO of the German company Siemens argued that codetermination is a “comparative advantage” for Germany; the senior managing director of the U.S. investment firm Blackstone Group had said that codetermination was one of the factors that allowed Germany to avoid the worst of the financial crisis.

Notice something. These reforms make corporations more like persons, not less. Human beings routinely balance a multitude of interests—I am, for example, a parent, a spouse, a teacher, a writer. Only the rare oddball—Donald Trump, maybe?—behaves as if accumulating money is the paramount and unitary good. Humans have consciences; corporations do not. Left to themselves, they will behave as if profit is the only thing that matters. The best way to constrain corporations is to require them to sign on to a more robust social contract and to govern themselves more pluralistically—mechanisms designed to mimic the traits of human personhood within the corporate form.

If corporations had these traits of personhood, I would worry less about corporate involvement in the political arena. American corporations have become a vehicle for the voices and interests of a small managerial and financial elite—the notorious 1 percent. The cure for this is more democracy within businesses—more participation in corporate governance by workers, communities, shareholders, and consumers. If corporations were more democratic, their participation in the nation’s political debate would be of little concern.

But corporate personhood opponents are making these corporate governance reforms less likely. Personhood skeptics often characterize corporations as having a narrow social role; because of that narrow role, the argument goes, they owe it to shareholders to stay out of politics. The famous words of the conservative economist Milton Friedman, that the “one and only social responsibility of business” is to make “as much money as possible,” were long used as the mantra of corporate managers who wanted to be released from any social obligation. Now the opponents of Citizens United are endorsing a similarly narrow view of business as a way to explain why corporations should be exiled from the public square. To fight corporate personhood, they are bolstering shareholder primacy.

Take, for instance, Justice John Paul Stevens’s dissent in Citizens United itself. He argued, among other things, that corporate speech should be limited in order to protect shareholders’ investments. Shareholders are seen as owners, as “those who pay for an electioneering communication,” and are assumed to have “invested in the business corporation for purely economic reasons.” Stevens argued that corporate political speech did not merit protection because “the structure of a business corporation … draws a line between the corporation’s economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim to enhance the profitability of the company, no matter how persuasive the arguments for a broader … set of priorities.”

Even more revealing, Stevens cites as support a set of corporate governance principles adopted by the prestigious American Law Institute. The Principles were the product of compromise, both asking corporations to look after shareholder interests and allowing them to act with an eye toward “ethical” and “humanitarian” purposes. But Stevens quoted only the language embodying shareholder primacy: “A corporation … should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”

Opponents of corporate personhood are following Stevens into the shareholder rights trap. Common Cause now has a “featured campaign” for “strengthening shareholder rights.” The Brennan Center for Justice is supporting a “shareholder protection act” and calls shareholders “the actual owners” of corporations. Professor Jamie Raskin of American University, one of the smartest and most energetic academic opponents of Citizens United, says that corporations should not be spending in elections because, “after all, it’s [shareholders’] money.” This is all shareholder primacy language brought to bear in fighting Citizens United.

Wall Street loves talk of shareholder rights. Sure, many of us are shareholders through our retirement accounts and the like. But widows and orphans are still the minority; most stock held in American businesses is owned by the very wealthy. (The richest 5 percent of Americans own more than two-thirds of all stock assets. The bottom 40 percent—125 million working-class people—essentially own nothing in terms of stock.) So when opponents of Citizens United focus on shareholder rights, they are singing Wall Street’s tune.

I wish this shareholder-protective rhetoric was just that, but it’s not. Corporate personhood opponents urge, as an intermediate measure short of a constitutional amendment, that corporations be required to seek shareholder approval before spending corporate money on political campaigns. I myself have been tempted by this position, mostly because such a rule would help ensure that executives do not spend corporate monies on issues and candidates opposing company interests. But that benefit is probably marginal, and comes at the risk of validating corporate involvement in the political process in furtherance of shareholder value and to the detriment of other stakeholders. Corporations could speak out in favor of Wall Street but not employees? That would be worse, not better.

The efforts of anti-personhood activists are not only in tension with stakeholder theory on the conceptual level. In the political arena, too, a tension exists because the energy for reform is a finite resource. I believe that, in this moment, there is an opening to question the very framework of how we view corporations and their social obligations. But we won’t get anywhere on that front if the progressive left wastes its energy fighting for a constitutional amendment that is unlikely to succeed and would do more harm than good if it did.

To cure the ills of Citizens United, we should stop fighting corporate personhood. Instead, let’s fight to make corporations more like people.

#### Reforms to corporate personhood can be used to impose duties on corporations across the legal spectrum---including securities and tort law.

Aisha I. Saad 19, Research Scholar in Law and Bartlett Research Fellow, Yale Law School. MPhil/DPhil, University of Oxford (2013); J.D., Yale Law School (2018), “Corporate Personhood: Possibilities for Progressive, Trans-Doctrinal Legal Reform,” 61 B.C. L. Rev. E-Supplement I.-21, 2019, WestLaw

Abstract: Kent Greenfield's Corporations Are People Too (And They Should Act Like It) reclaims the legal theory of corporate personhood from the conservative right and champions it for the progressive left. Greenfield argues that corporate personhood, properly construed, can further progressive goals by limiting certain corporate powers, increasing corporate accountability, and enabling corporate management to govern in the interests of all stakeholders. Greenfield advances a progressive account of corporate personhood and elaborates its implementation in constitutional law and in corporate law. This symposium response extends Greenfield's conception of corporate personhood to related questions in securities law and tort law. This is a first step intended to advance a legal reform project that further translates corporate personhood into a coherent doctrine that reaches across U.S. law.

INTRODUCTION

The claim that “corporations are people” has incited fiery debate across the political spectrum. The conservative right brandishes corporate personhood as a victory for the free market whereas the progressive left attacks the notion as an affront to democratic accountability. In a compelling reformulation of this familiar narrative, Kent Greenfield's Corporations Are People Too claims corporate personhood as a progressive objective.1 He takes as his starting point the presumption that corporations should be good for society, and argues that embracing corporate personhood actually advances this agenda.

Greenfield has been a leading voice in progressive corporate law for over two decades.2 Long before critiques of shareholder primacy became \*I.-22 mainstream,3 Greenfield was highlighting the failures of American corporate law and advocating for corporate decision making that is stakeholder-focused and that governs in the interests of a corporation's plural constituencies.4 Once again, his newest book takes a bold position, claiming the controversial notion of “corporate personhood” from conservatives and championing it for progressives.5

Corporate personhood properly construed, Greenfield argues, advances progressive goals by limiting certain corporate powers,6 increasing corporate accountability,7 and enabling corporate management to govern in the \*I.-23 interests of all stakeholders.8 He advances a framework for determining which constitutional rights should be granted to corporations that is based on an analysis of the corporation's objectives and an evaluation of the right in question.9 He further elaborates a vision of corporate law reform that incorporates a stakeholder-focused model of corporate governance.10

Greenfield's rejection of shareholder primacy and embrace of stakeholder theory open up new opportunities for orienting corporate governance in line with a progressive agenda. His trailblazing work unpacks constitutional and corporate law questions and offers answers to them. A fully developed legal regime that realizes the possibilities of progressive corporate personhood, however, will require reforms that extend to other legal areas. Part I of this symposium response begins by examining how Greenfield has defined and defended personhood in constitutional law and in corporate law.11 Part II extends his pragmatic approach to corporate personhood beyond these two legal domains and considers its implications for securities law and tort law as additional examples for developing a progressive legal account of corporate personhood.12

I. DEFENDING THE CORPORATE “PERSON” IN CONSTITUTIONAL AND CORPORATE LAW

In Corporations Are People Too, Kent Greenfield deploys the notion of personhood to signify different, yet complementary, interpretations of the corporate entity.13 His elaboration of personhood in the corporate context is pragmatic, focusing on the functions and objectives of the corporation rather than beginning with a historical or philosophical genealogy of personhood. When discussing corporate personhood in constitutional law, Greenfield advances three key features of corporate persons: 1) they are legally separate entities who “can sue, be sued, enter into contracts, own property, buy stuff, and sell stuff,” 2) they are “made up of people,” and 3) they are “holders of constitutional rights.”14 Personhood makes corporations more accountable to the public by preventing shareholders from attributing their religious beliefs to the companies they own,15 providing a limit on government power and granting corporations standing to assert their due process \*I.-24 rights when those rights are relevant to their economic purpose,16 and providing the public a “deep pocket to sue” when harmed.17 Greenfield's framework for determining the limits of corporate personhood in constitutional law derives from the premise that “corporations should receive the rights necessarily incidental to serving [their] economic purpose and should not receive those that are not germane to that purpose.”18

Greenfield methodically reviews some of the key legal challenges to corporate personhood in constitutional law. He notes that cases concerning corporate constitutional rights can be generally classified as easy, medium, or hard. For “easy” legal cases, he argues that corporations should obviously have constitutional rights. These cases concern checks on government power like protection from uncompensated takings under the Fifth Amendment and procedural due process protections against capricious governmental acts.19 More complicated cases in the “medium” and “hard” categories concern criminal procedure. These include cases dealing with the Fourth Amendment protection against unreasonable searches and seizures and the Fifth Amendment protection against self-incrimination. For this class of cases, determining whether a right should extend to a corporate person must take into account “[t]he difference between the public nature of corporations and the private ... nature of humans ....”20 Greenfield identifies the most difficult category of questions as those concerning “equality, religion, and fundamental rights.”21 For these questions, he argues, “we need to look at the purpose of the right in question and ask whether such purpose is furthered by extending it to corporations.”22 Cutting through all these cases of varying complexities is a focus on the corporation's purpose. Greenfield argues that a corporation should enjoy only those rights that advance its purpose.23

Greenfield claims that although progressives have been trying to limit corporate rights through constitutional law, corporate law is in fact better suited to achieving that goal.24 In the corporate law context, he once again advocates for expanding corporate personhood as the solution for dealing \*I.-25 with negative corporate externalities.25 When discussing personhood in corporate law, Greenfield uses the term to capture a decision-making rationality that is complex, self-aware, and socially conscious. The ideal corporate citizen “owe[s] a robust set of duties to society and to stakeholders that go beyond shareholder primacy.”26 Greenfield advances that this rationality allows for “better corporate decision making,” and reduces economic inequality and “short-termism.”27 In this context, Greenfield's discussion of personhood sets out the boundaries of the corporation's proper constituency, that is, the people who make up the corporate entity and who have legitimate claims to its benefits. Greenfield argues that shareholder primacy is too narrow to capture the legitimate agents and beneficiaries of the corporation,28 but does not provide a clear theory for determining where those boundaries should lie instead. Further development of corporate personhood in corporate law will have to answer this question. A corporation's more obvious or “easy” constituents might include its employees and representatives from the community where it is based. Beyond that, however, defining the parameters of a corporate citizen's accountability becomes more challenging. If the corporate citizen is expected to be responsible to its neighbors, for example, what does this mean in the age of globalization and the multinational corporation? What defines and/or limits the corporate person's footprint? How should corporate subsidiaries be accounted for? Greenfield's assertion of corporate personhood opens the door to such questions, but further theoretical and doctrinal development will be required to arrive at a more fully-fledged characterization of the progressive corporate person.

II. TRANSLATING CORPORATE PERSONHOOD ACROSS LEGAL DOCTRINE

A shift from shareholder primacy to stakeholder theory promises a new vision of corporate governance that is more aligned with progressive concern for the public interest. Such a move is only the beginning of a legal reform project concerned with the corporation's personhood. This endeavor will require critical development of key questions within other doctrinal areas that, together, might enable the progressive orientation of the corporation that Greenfield has been promoting for decades. Greenfield's framework envisions a new construct of personhood centered on the corporation's purpose, granting to it those rights that further its purpose and limiting those that do not. It also develops a secondary question \*I.-26 concerning the corporation's agents and beneficiaries--who makes up the corporation?29 This section attempts to extend Greenfield's progressive corporate personhood and to sketch out some of the legal questions it implies using examples from securities law and tort law.

A. Corporate Personhood and Securities Law

A conceptualization of corporate personhood that moves away from shareholder primacy presents some unique considerations for securities law. If, to answer the constitutional law questions, we start by addressing “what the corporation is for,” and to answer the corporate law questions we start by addressing “who the corporation acts for,” then to answer securities law questions we have to start by addressing “who the corporation speaks to.” This question goes to the heart of the securities disclosure regime and its founding objectives.

Mandatory securities disclosure in the United States originated in the wake of the 1929 stock market crash. At the time, many perceived that investors' uninformed speculation in securities had provoked the crash.30 The Securities Act was promulgated in 1933 with the purpose of balancing asymmetry in the amount and quality of information available to managers versus that available to investors.31 It required companies to disclose “material” facts to investors in order to enable informed decision making during the issuance and registration of securities.32 The Securities Exchange Act (SEA), promulgated in the following year, established the Securities and Exchange Commission and charged it with mandating and overseeing periodic reporting by publicly traded companies.33 If the architecture of the SEA and the securities disclosure regime aims to protect investors' interests, then a stakeholder theory of the firm requires revisiting the audience for corporate disclosures.

A corporation's legitimate constituency is comprised of the stakeholders whose interests inform management's decisions. If corporate management governs to maximize shareholder interest, it follows that “material” disclosures would concern financial performance and would be communicated to an investor audience. If, however, corporate management makes decisions in the interest of a broader constituency, then the legal definition \*I.-27 and scope of materiality must correspond accordingly. Early versions of these considerations can already be found in recent securities litigation concerning corporate environmental, social, and governance disclosures.34 A more ambitious foray into progressive corporate personhood must engage directly with the purposes of the securities regime.

B. Corporate Personhood and Tort Law

In tort law, corporate personhood raises questions concerning the types of harms for which the corporation is liable, including the corporate person's obligation to broader society and the types of harms that are attributable to the corporate person.35 Such classic tort law questions will have to be revisited and revised through the lens of a corporate personhood agenda.

Tort doctrine has grappled with the unique challenges and opportunities presented by the modern corporation, especially during periods of dramatic industrial and commercial transition. The twentieth century, for example, saw major industrial shifts to mass manufacturing and a changing relationship between companies and consumers. These shifts spawned doctrinal innovations like market share liability and strict liability, which reconceptualized the public role and responsibility of corporations in bearing the costs of product-related injury.36 Market share liability allowed plaintiffs \*I.-28 to hold product manufacturers liable by recovering damages in proportion to a manufacturer or manufacturers' total market share, even where the specific producer of a particular product could not be determined.37 In advancing theories of strict liability, drafters of the Second Restatement of Torts reasoned that corporations were the best positioned parties to redistribute the costs of accidental injury as a sort of public insurer,38 and that they should therefore bear liability based on policy grounds.39 Courts embraced \*I.-29 this rationale, highlighting the unique features of mass producers like their capitalized structures and the greater bargaining power they maintain in relation to consumers.40 Progressive corporate personhood in the tort law domain will need to reengage questions about how to distribute the risks and costs of corporate-driven development fairly and effectively, whether in the context of product-related accidents, systemic risks like climate change, or public health crises like the opioid epidemic.

In recent years, public-interest litigation efforts have been attempting to wield public nuisance law as a cost-spreading mechanism for public harms by targeting the deep pockets of corporations. Recent tort litigation concerning the costs of the opioid crisis and of climate change on state and local governments demonstrates a public appetite for expanding the scope of corporate liability to cover systemic or societal harms using broader interpretations of public nuisance doctrine. In 2018, a number of local governments and cities including San Francisco, Oakland, and New York filed public nuisance lawsuits against fossil fuel companies for the costs of climate change.41 Although their public nuisance theory was ultimately not successful, the same theory has recently led to legal victories against corporate defendants in the context of the opioid crisis.42 An Oklahoma court ruled against Johnson & Johnson in a case concerning the pharmaceutical company's role in the public health crisis. The presiding judge found that it \*I.-30 had breached state public nuisance law,43 providing an example for thousands of similar lawsuits.44 A key challenge to these public nuisance cases argues that such legal theories unfairly conscript companies to cover the costs of complex and multifactorial social problems.45 Those advocating for an expanded interpretation of public nuisance, however, attribute greater liability to corporations by virtue of their scale, the magnitude of their contribution to the public crisis in question, and their ability to bear the expense of abating the consequential costs.46

CONCLUSION

Embracing corporate personhood for progressive ends has wide-reaching implications for contemporary American jurisprudence. Kent Greenfield has laid the cornerstone of an ambitious and timely legal reform project by developing a framework for conceptualizing corporate personhood in constitutional and in corporate law. This symposium response has drawn the broad strokes of the types of questions that progressive corporate personhood implies for securities and tort law. Extending this project to other legal domains will require identifying and addressing relevant questions that personhood presents for established doctrine. It will be the charge of progressive legal scholars to take up Greenfield's mantle and further translate \*I.-31 corporate personhood into coherent doctrine that reaches across U.S. law.

#### Corporate personhood should be used as a lever to expand the range of corporate obligations, broadly conceptualized as ‘citizenship.’

--Importantly, this card is talking about citizenship in the sense of having obligations to the broader polity, not in the legal sense of the term.

Kent Greenfield 13, Professor of Law and Dean's Research Scholar, Boston College Law School, “Corporate Citizenship: Goal or Fear?” 10 U. St. Thomas L.J. 960, Spring 2013, WestLaw

The conference that engendered this volume prompted a number of scholars of corporate law to think carefully and deeply about the history of corporate responsibility and about a range of current topics that occupy the attention of academics and regulators. In these discussions with fellow academics, I found myself wondering about how our current moment will be perceived in the future. When fifty or one hundred years from now our intellectual descendants look back on the conference that took place at the University of St. Thomas in 2013, how will the current moment be analyzed? What trends are we experiencing now that future scholars will feel are worth studying and critiquing? This essay is merely a pondering of that question--offered as a prompt to others and an invitation to my colleagues to think through these matters with me.

My central assumption is that our current moment--like the history of corporate responsibility and indeed all of corporate law to this point--can only be understood within the context of broader intellectual and ideological trends. It is not coincidental, for example, that the Gilded Age of the late nineteenth century and early twentieth century saw an emphasis on the private nature of corporations as a rule of decision in both corporate law (see Dodge v. Ford)1 and constitutional law (see Lochner v. New York).2 Similarly, it was not happenstance that the Great Depression brought about a \*961 fundamental rethinking of not only the nature of corporations,3 but also of the place of the market itself4 and the role of government in regulating it.5

Presently, we are experiencing a churning in the intellectual history of corporate law theory and doctrine. There is now more openness to revisiting the core questions about what corporations are, to whom they owe obligations, and how best to conceptualize them and their regulation than at any time in a generation. This moment has been brought about because of the increasing skepticism the public is showing toward corporations and the people who manage them. The skepticism springs from a number of shocks in the economic, environmental, and political fields that have revealed the risks of unbridled corporate power, short-termism, managerial opportunism, and Wall Street supremacy.

But this intellectual churning is not limited to the corporate law field. The United States is also experiencing, in my view, the broadest debate since the New Deal about the role of corporations in society and politics. The spark for this debate was the 2010 decision of the Supreme Court in Citizens United v. Federal Election Commission,6 which validated the constitutional rights of corporations to engage in political discourse and to spend money from general treasury funds to influence electoral outcomes. In some ways, the decision embodied the conventional wisdom about corporations during the last few decades--namely that they are private institutions best analogized to persons. The harshly negative reaction to the decision, however, embodies the Zeitgeist of the current skepticism toward corporations.

The interplay between these two trends--a questioning of the nature and role of corporations in both the private and public spheres--may turn out to be the defining characteristic of our current historical moment. It is yet unclear, however, whether this questioning will result in any fundamental changes in corporate law and doctrine, constitutional law, or social and political theory.

An irony exists in this concurrence of questioning in both the public and private spheres. On the corporate law (private) side,7 the trend is to \*962 challenge the corporation to broaden its role in society and enlarge the obligations it owes beyond the mere pecuniary. There is a growing skepticism toward shareholder primacy and increasing trends to call on corporations to recognize and act on the interests of all of its stakeholders. The critics of corporations are, in effect, calling on corporations to act as if they were players not only in the private sphere but also in the public one as well--to act, one might say, as citizens. This call on corporations to act as “good corporate citizens” has resonance and meaning.8

Meanwhile, on the constitutional law (public) side, the trend is to challenge the corporation to stay within a narrow economic sphere and to focus on the pecuniary implications of its activities. Corporate activity in politics and the public sphere is viewed skeptically. The current effort to amend the constitution to take away corporate “personhood” intends to take away constitutional rights from all incorporated entities. The thought of corporations acting as “citizens”--whether for progressive ends or not--is seen as nonsensical at best, and destructive to democracy at worst.9

It has gone unnoticed until now that the work of the pro-corporate citizenship activists often directly conflict with the work of the anti-corporate personhood activists, and vice versa. The arguments of “progressive” corporate law scholars advocating for expanded corporate duties are now being used to further the arguments of those wishing to expand corporations' constitutional rights. The arguments of those opposing corporate constitutional rights contradict and undermine the efforts of those who call on corporations to take a more active role in society, which would protect the interests of all corporate stakeholders. This tension is not between ends of the ideological spectrum; it is primarily a tension between different components of the ideological left. This essay explores how these two positions are ultimately at odds with one another, despite their common critique of corporate law.

\*963 I. Corporate Citizenship as Goal

For some time, “corporate citizenship” has been used as a synonym of “corporate responsibility.” 10 Corporations have corporate citizenship departments and corporate citizenship reports.11 To be sure, no corporation is saying that it is actually a citizen. Instead, the term indicates that the corporation has obligations that extend beyond the financial--that a corporation can and should be measured not only by its bottom line, but also by its behavior toward a broad group of stakeholders and society generally. In this sense, corporate “citizenship” stands in contrast to “shareholder primacy,” the notion that shareholder interests are the sum total by which corporations should be measured.

Following the global financial crisis of 2008, shareholder primacy has come under increasing attack. An article in the Harvard Business Review recently proclaimed that “[t]here's a growing body of evidence . . . that the companies that are most successful at maximizing shareholder value over time are those that aim toward goals other than maximizing shareholder value. Employees and customers often know more about and have more of a long-term commitment to a company than shareholders do.”12 A popular non-business essayist in the New York Times wrote that “it feels as if we are at the dawn of a new movement--one aimed at overturning the hegemony of shareholder value.”13 An essayist in Forbes, hardly a bastion of European socialism, called shareholder primacy “the dumbest idea in the world.”14 The Atlantic ran an essay arguing that “shareholders are ruining American business.”15 The senior managing director of the U.S. investment firm Blackstone Group has said that the German practice of including employee representatives on the supervisory board of German corporations \*964 was one of the factors that allowed Germany to avoid the worst of the financial crisis.16

I have written elsewhere that corporate law and doctrine should take advantage of this moment to advance efforts to broaden the responsibilities of corporations to include the interests of employees and other stakeholders.17 Of course, the mechanism of how such an advancement could occur is unclear at best, especially given the current hegemony of Delaware in providing the corporate law of the United States.18 Having said that, there are at least two recent occurrences that merit attention in this context, both of which represent efforts to broaden corporate responsibility.

A. Ultra Vires as Mechanism to Enforce Law

The first is the current shareholder plaintiff suit against Hershey Corporation based on allegations that the company is illegally using child labor in its cocoa production efforts in western Africa.19 In itself, the case may seem underwhelming. The suit merely asks the Delaware Court of Chancery to allow the shareholders to inspect some of the corporation's books and records that would be relevant in the shareholders' investigation of the allegations.20 But the underlying theory of the case represents an innovation that could have broader impacts beyond Hershey.

In an increasingly global world economy, corporations are involving themselves more deeply in the laws and cultures of other national economies. Also, because of the nature of the global economy, an increasing number of companies are working through subcontractors, suppliers, and \*965 middlemen to occupy stages of their production and supply chains that would have traditionally been occupied by the company itself or by wholly-owned subsidiaries.

One difficulty that this situation poses is how to hold corporations accountable for illegalities committed overseas by their agents or business partners. The problem has been recognized for some time--the most prominent examples being the suits brought under the Alien Tort Claims Act against Unocal Corporation for alleged violations of human rights in Burma more than a decade ago,21 and more recently against Royal Dutch Shell for alleged involvement in human rights violations in Nigeria.22 But in neither of these cases was the corporation held accountable and indeed the jurisdictional and doctrinal obstacles for liability are severe.

The suit against Hershey, however, is based on a different theory, one that creates a mechanism within corporate law that operationalizes duties to obey the law. The argument, first articulated over a decade ago,23 is that corporations are empowered by their charters and state law only for “lawful” purposes and activities. Any unlawful activity, therefore, is “ultra vires,” or beyond the power of the corporation. Thus any shareholder may sue in the chartering jurisdiction to enjoin the unlawful activity, even if such activity is alleged to be taking place overseas. Hershey is the first company to be sued on the basis of this theory.

This theory could be very powerful since the duty to obey the law is an area of Delaware law that is enforced only rarely, and that focuses on the behavior of individuals within the company rather than the company itself. It is now quite difficult to prove that individual directors should be subject to personal liability for a failure to monitor.24 Nevertheless, if successful this ultra vires theory will empower shareholders to protect their legitimate interest in monitoring whether the corporation is acting unlawfully, even when they are unable to show any individual director acted in breach of her duties.

Also, this theory will allow shareholders, in effect, to import international law and the law of foreign jurisdictions where the companies do business into the domestic law of corporations. Corporations committing illegal acts in jurisdictions that are unwilling or unable to enforce their own laws against the companies will nevertheless be subject to shareholder action in \*966 state courts in the United States. The difficulty, of course, is that information about alleged illegalities will be hard to come by. Thus, the result in the Hershey books and records case will be worth watching.

B. Benefit Corporations

Another innovation worth watching is the advent of “benefit corporations,” a new type of business classification that is increasingly popular around the country. Benefit corporations are for-profit corporations that are also required to create “a material positive impact on society and the environment and to meet higher standards of accountability and transparency.”25 At the time of this writing, nineteen states--including Massachusetts, Rhode Island, and Vermont--as well as Washington D.C. have adopted legislation allowing corporations to opt in to the benefit corporation framework of obligations.26 Even Delaware, the most popular state for business incorporations, recently adopted a benefit corporation statute.27

The supporters of benefit corporations argue that the framework will liberate businesses from the market demands of Wall Street and the legal demands of shareholder plaintiffs seeking to hold management accountable for decisions that fail to put shareholder interests first.28 They also say that companies choosing the benefit corporation status can brand themselves as green and society-minded. For example, Patagonia recently opted in to benefit corporation status--a good test for this branding strategy.29 Also, the advocates say benefit corporations will be able to prove that a focus on more than shareholder return can have long-term benefits, which will not only benefit the full range of a corporation's stakeholders, but also the corporation itself.30

\*967 I must admit some skepticism however about the advantages of benefit corporations, for several reasons. First, they are voluntary. Once corporations opt in to the framework, certain requirements attach. But because the decision to opt in is voluntary, the corporations that most need the strictures of the framework are the least likely to choose it. Likewise, those that do opt in could have behaved positively without the legal protection of the benefit corporation status. Under the “business judgment rule” courts will only set aside the decisions of management--of any company--if they are tainted with self-interest or, more rarely, if management is grossly misinformed before acting. So, under current law, if a board wants to support charitable causes, pay employees more, or voluntarily reduce pollutive emissions, there is no doubt that they can do so without fearing legal recourse. The problem, under current law, is not that management is prohibited from acting with an eye toward society. The problem is that they are not required to do so. Benefit corporation statutes do not solve this problem.

Second, these statutes do not protect companies from market pressure. Because not all companies will choose to become benefit corporations, those that do will suffer competitive disadvantage in the capital market, at least in the short term. Some shareholders may accept the lower returns implicit in the benefit corporation framework, but most will not. Thus, the cost of capital will be higher for benefit corporations than for their non-benefit competitors. The problem with this is that over time, a focus on values other than shareholder profit will appear, in some cases at least, to be hurtful to a company's fortunes. The way to make sure attentiveness to social needs will not hurt a company is to level the playing field--i.e., to mandate such attentiveness by all corporations. This, of course, is not what benefit corporation statutes do.

Third, these statutes might embolden other companies to act poorly. Advocates of benefit corporations say that without such a framework companies might be punished for doing the right thing. Although I think that is a misreading of the law, a lot of people believe it. The push for benefit corporation statutes will strengthen this misconception. The result may be that companies that do not choose to become benefit corporations--that is, most of them--will be able to say to shareholders, consumers, and community activists that they should take their concerns elsewhere. In a way, a company's decision to not choose benefit corporation status will amount to a branding strategy as well, but the opposite of what the benefit corporation stands for. Wall Street will love it and managers of those companies will be encouraged to act even worse than they do now.

In my view, the main question with regard to benefit corporation statutes is whether the push for their enactment in so many states in such a short time is either a reflection of a greater willingness by state legislatures to consider fundamental changes to the way corporations are conceptualized, or is actually a distraction from other more fundamental changes. If \*968 the former, then these statutes may be a precursor of things to come. If the latter, then an emphasis on benefit corporations will take the air out of the reform balloon.

In any event, the efforts by the advocates of benefit corporations show one thing as a matter of certainty--many thousands of Americans, mostly on the ideological left, want corporations to act with a broad view of their responsibilities to society. That is, they want them to act more like citizens.

II. Corporate Citizenship as Fear

Meanwhile, many thousands of Americans, mostly on the ideological left, are increasingly calling on corporations to stay within their economic sphere. To these Americans, the thought of corporations being citizens--good citizens or not--is anathema.

The impetus for this fear of corporate citizenship, of course, was Citizens United. The response to the opinion was massive and almost universally negative. Soon after the decision, as much as eighty percent of Americans thought it was a mistake,31 and President Obama faced down members of the Court at the State of the Union address, accusing them of judicial activism.32 In the years following the decision, opposition to the decision has remained high,33 and a movement to amend the Constitution to overturn the decision is gaining serious traction. As of this writing, sixteen states, nearly five hundred localities, twenty-seven U.S. Senators, ninety-eight U.S. Representatives, and the President have endorsed an amendment of some kind.34

The proposed constitutional amendments come in various forms,35 but several of the most prominent proposals go beyond overturning Citizens \*969 United to make it clear that no corporation would receive any constitutional rights at all. For example, the amendment proposed by the group Free Speech for People, introduced in Congress by Representative Jim McGovern of Massachusetts, states that constitutional protections are intended only for “natural persons.”36 These amendments are part and parcel of a larger attack on corporate involvement not only in politics but in society broadly.37 To these activists, a central problem in U.S. politics is the “personhood” of corporations.

While this movement begins with a deep skepticism of corporate power, the urge is exactly opposite to the urge within the corporate responsibility movement. For the anti-personhood activists, the remedy is to keep corporations within a narrow purview; for the corporate citizenship activists, the remedy is to ask the corporation to acknowledge and accept a broader range of obligations.

I have been critical of the amendment movement on several grounds.38 Most crucially, I think the movement overstates the importance of “personhood” in constitutional law and understates the importance of corporations asserting constitutional rights, at least in some situations. Corporations are not people, to be sure, but neither are unions, churches, Planned Parenthood, the NAACP, Boston College, Random House, MSNBC, or The New York Times. Under the amendment proposed by Congressman McGovern, all of these groups would lose their constitutional rights.

Also, it is worth emphasizing that more than free speech rights would be lost. Organizations, such as those listed above, would also lose rights to \*970 be free from warrantless searches, the seizure of property without due process or compensation, and the right to jury trials. Congress could pass a law saying that The New York Times could not pay their reporters, or that the University of St. Thomas could not teach a course on Islamic law. Perhaps Planned Parenthood could be raided without a warrant.

I also think that stakeholder theory itself offers the best potential remedy to the harms of Citizens United. The key flaw of American corporations is that they have become a vehicle for the voices and interests of an exceedingly small managerial and financial elite--the notorious one percent. The fact that corporations speak is less of a concern than whom they speak for and what they say. The cure for this is more democracy within businesses--more participation in corporate governance by workers, communities, shareholders, and consumers. If corporations were themselves more democratic, their participation in the nation's political debate would be of little concern.

#### Book by the person many of the cards in this area are from

Kent Greenfield 18, law professor at Boston College, a former Supreme Court clerk, and an expert in constitutional and corporate law, “Corporations Are People Too: And They Should Act like It,” Yale University Press, 2018

### AFF Area---Kiobel

#### Overturn *Kiobel* to bring corporations into alignment with CIL

Bert Neuborne 12, Of 'Singles' Without Baseball: Corporations as Frozen Relational Moments (June 20, 2012). Rutgers Law Review, Vol. 64, No. 3, 2012, NYU School of Law, Public Law Research Paper No. 13-24, NYU Law and Economics Research Paper No. 13-14, Available at SSRN: https://ssrn.com/abstract=2255094

Viewed from the perspective of avoiding distortion of the reciprocal rights and duties of the members of a corporate community, Kiobel should be an easy case. The two crucial legal rights that make the corporation such an attractive business vehicle are limited liability (exempting an investor’s personal assets from liability for the investment’s losses) and entity-shielding (shielding the investment assets from the investor’s personal liability). It would be unthinkable for a court to use a corporation’s fictive legal personality to free both the enterprise’s investment assets and the personal assets of the investors from liability for damages caused by the job-related unlawful behavior of corporate employees. Where a corporate employee acting unlawfully within the scope of his employment causes such a loss, respect for the very nature of the corporate “deal” that provides investors with extremely favorable legal ground rules for conducting a business enterprise requires “enterprise” liability for the damages flowing from the unlawful job-related behavior of a corporation’s human agents and employees.107 That is why every legal system to adopt the corporate form has also recognized derivative corporate civil liability for the unlawful acts of corporate employees as a fundamental underpinning of the rule of law.108 The Second Circuit panel’s decision in Kiobel treats a large, multinational corporation as a freestanding entity for the purposes of customary international law, divorced from the rights and duties of the individual members of the corporate community in a way that insulates both the investment enterprise’s assets and the investor’s personal assets from liability.109 The panel’s reasoning appears to have been premised less on serious thought about corporate theory than on hostility to the idea of judicially enforceable customary international law110 and mistrust of the plaintiffs’ bar.111 The Kiobel opinion cannot, in my opinion, withstand analysis.112

### AFF Area---Universities

#### Universities advocate

Stjepan Oreskovic 17, Fellow at Harvard Medical School Department of Global Health & Social Medicine - Center for Bioethics Sebastian Porsdam Mann, Postdoctoral Research Fellow at Harvard Medical School’s Center for Bioethics Julie Reuben, Charles Warren Professor of the History of American Education on the faculty of the Harvard University Graduate School of Education. “Are Universities Responsible Persons?”, HuffPost, https://www.huffpost.com/entry/are-universities-responsible-persons\_b\_593ef42ee4b0c5a35ca24989

Persons are not what they used to be.

Of course, people change over time, and who could blame them? Rapid technological progress is changing the way we communicate with each other, how we work, and the ideas we are exposed to.

But we have a different kind of person in mind – the kind that has numbers and letters coursing through its veins.

It has been a while since the Supreme Court accepted the notion of corporate personhood – and soon, with advances in the brain sciences, psychology and the biotech and IT sectors, the Court may have to rule on whether robots, part-human chimeras, clever animals, or synthetically created individuals should be given personhood status.

But these developments raise questions of another sort. Natural persons have social and moral responsibilities. At a minimum, we recognize the responsibility of persons not to cause unjustifiable harm to others and, to some extent, to contribute towards the betterment of the communities and society of which they are a part. If institutions can have the rights of persons, should they not also be subject to the corresponding responsibilities? We recognize that corporations have duties and responsibilities towards numerous people – their employees, say, and other stakeholders. Additionally, corporations are obliged to pay their taxes, obey the law, and so on. But these words don’t exhaust the moral vocabulary

Since corporations can be sued in courts just like natural persons, courts have had to consider whether corporations can donate to political causes (yes: Citizens United v. Federal Election Commission); whether corporations enjoy corresponding ‘rights to lie’ (no: Nike v. Kasky); and religious exemptions under freedom of speech religion clauses (yes: Sebelius v. Hobby Lobby Stores).

For better or worse, many universities have come to mimic corporations. The question thus becomes: what do we know, and to what extent do we agree upon the social and moral responsibilities of the present-day universities?

Universities occupy a privileged position in society, are privy to knowledge unavailable to others, and often provide the forum for discussions concerning values, justice, and ethics. But with rights come responsibilities, and persons, whether natural or corporate, are subject to both. Yet the corresponding duties and responsibilities of universities as social actors remain unclear and have received little attention. Do universities have responsibilities towards society, and if so, what are they? Are academic institutions to remain neutral on questions of societal import, even if they have pertinent information not available to others? What is the consequence for the universities if part of academics or students can’t distinguish between “veritas,” “gratis” and “libera linguam mentemque”? What happens if the right to free beer can’t be differentiated from the right to free speech and positive liberty from negative liberty (example of problems professors Erika and Nicholas Christakis from Yale faced with free speech rights). The answer to these questions depend on difficult issues concerning the roles universities ought to play in society, and whether these roles differ from the way universities are currently viewed by themselves or others.

In the professional academic field of ethics, specific terms are used to discuss the kind of things that can be expected of persons. For instance, the types of actions that are morally required – say, saving a drowning child at no risk to yourself – are known as duties and obligations.

Sometimes persons go beyond the call of duty to do things that are not ethically required. Notable exemplars here include Oskar Schindler, Dietrich Bonhoeffer, Nelson Mandela or Albert Schweitzer – who sacrificed or risked most of their lives to help others. In ethics, we call acts that go beyond what is morally required supererogatory, and the situations that enable them may be called moral opportunities.

Modern commentators have noted the competitive aspect of college education. Deresiewicz, for example, laments that the purpose of high school and college is increasingly seen as career preparation rather than education (Deresiewicz, 2014). Students do their utmost to “check the boxes” expected by admissions officers, such as extracurricular activities, without necessarily enjoying the process or benefiting from what some may call the intrinsic value fo such endeavors. On this view, the value of attending university is reduced to the prestige of jobs available after graduation. Is this really all we can, or should, expect from universities? Despite the pressing nature of the questions, little has been done to stir a public discussion, compared to the equivalent cases for persons in the traditional sense or corporations.

Plato, the founder of the famous Academy, considered education essential for a just society and envisaged enlightened scholars ruling as benevolent philosopher kings. His student Aristotle did not agree, perhaps disillusioned by Plato’s experience in advising Dionysus, the tyrant of Syracuse, on justice in politics. When Plato attempted to teach the immorality of tyranny to the tyrant himself, the great philosopher ended up being sold as an Athenian slave to the island-state of Aegina, never entering politics again.

More recent sages have pointed to the unique possibility universities have to influence character. Thomas Jefferson wished for his newly-founded University (of Virginia): “To form statesmen, legislators and judges; to expound on principles of government; harmonize agriculture and commerce; develop reasoning facilities of our youth; And, generally to form them to habits of reflection and correct action, rendering them examples of virtue to others, and of happiness within themselves,” (quoted in Roth (2014), p.27). Contemporary thinkers of all ages and backgrounds, from Malala Yousafzai to Amartya Sen, have pointed towards education as the remedy for economic, political, and social problems.

The last comprehensive attempt to analyze the responsibilities of universities was published in 1982 by Derek Bok, a law professor and, later, President of Harvard University. Though Bok commendably commented on ethical issues relevant to universities, he drew a stark distinction between ethics internal (can professors sleep with their students?) and external to the university (is capital punishment justifiable?).

Of course, universities have not always been silent on political and social issues. In 2015, more than a hundred universities and research institutions sent an urgent letter to the European Union in reaction to proposed amendments involving more stringent restrictions on access to medical data for researchers, making important studies, such as the European Prospective Investigation into Cancer and Nutrition (EPIC), either illegal or impossible (Wellcome Trust, 2015).

In this case, the policy directly threatened the ability of universities to carry out their role as discoverers and disseminators of knowledge, so a defensive reaction is perhaps not surprising.

But then, in January 2017, the presidents of 48 American colleges and universities signed a letter to President Trump addressing the executive order on immigration. The letter was drafted by Princeton and University of Pennsylvania presidents Eisgruber and Gutman. Although this too can be seen as a defensive reaction – as many academics are citizens of the affected countries - Eisgruber additionally commented that this was a statement ”…about values that I think are defining for Princeton and other universities,” (Jackson, 2017).

Should universities confine themselves to defending their own interests or should they additionally address wider issues that affect their stated missions? How should universities as social actors respond to moral issues in the world? What are the moral duties and social responsibilities of universities – and to whom are these duties owed? We suggest that it is time to begin looking into possible answers to these important questions, which have ramifications for both academic and general public, by developing a framework of the social responsibilities and ethical obligations of universities deriving from their unique social position and informed by the values justifying and promoted by the academic enterprise.

### Advantage Themes---Econ

#### Personhood is what enables capital markets to function and empowers intergenerational investments. It can be used to enforce separateness on corporate entities, preventing regressive rights assertions on behalf of shareholders.

Kent Greenfield 15, professor of law at Boston College and the author of the forthcoming Corporations Are People Too (And They Should Act Like It), “If Corporations Are People, They Should Act Like It,” Atlantic, 2/1/2015, https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/

The American left is notoriously fractious. But one belief that unites more than most is this: Corporations are not people. “Corporations are people, my friend,” said Mitt Romney in 2012, and Democrats skewered his cluelessness. “I don’t care how many times you try to explain it,” Barack Obama said on the stump. “Corporations aren’t people. People are people.” During the 2014 midterms, Massachusetts Democratic Senator Elizabeth Warren barnstormed the country to rally the faithful. Her most dependable applause line? “Corporations are not people!”

The main target of the corporations-are-not-people crowd is the Supreme Court’s 2010 Citizens United ruling striking down limits on independent corporate spending in elections. After that case, groups sprang up to fight corporate personhood. Others rebranded themselves by newly taking aim at it. But they do not limit themselves to attacking the Court’s campaign finance jurisprudence. Most groups make a broader attack on corporations being able to assert any First Amendment speech rights at all; and some have called for disabusing all corporations or businesses of any constitutional right.

Common Cause, for example, uses Robert Reich to tout its support for “a constitutional amendment declaring that ‘Only People are People’ and that only people should have free speech rights protected by the Constitution.” Public Citizen, the liberal litigation group founded by Ralph Nader, argues that “rights protected by the Constitution were intended for natural people.” Free Speech for People, one of the groups most influential in the anti-personhood movement, is pushing a “People’s Rights Amendment.” A version has already been sponsored in the U.S. Senate by Jon Tester of Montana and in the House by Jim McGovern of Massachusetts. It would declare that “the rights protected by this Constitution” are “the rights of natural persons.” A range of liberal groups have signed on to the anti-personhood project—MoveOn, Sierra Club and NAACP chapters, and steelworker and SEIU locals. By their count, sixteen states and nearly 600 localities have endorsed some kind of anti-personhood amendment. Even in a moment when the progressive left seems otherwise to be fighting rearguard actions, this movement has genuine energy.

These are my people. Many of the leaders of this movement are friends and respected colleagues. I contributed to Elizabeth Warren’s senatorial campaign and voted for Reich when he ran for governor of Massachusetts. Forty years ago, my coal miner grandfather sat me down and told me how a union had saved his life. As a law professor, I have spent my career as an oddity—a progressive who teaches corporate law, almost always the most liberal person in any room of business law academics. A decade ago, I came up with a novel legal theory that shareholder activists recently put to good use suing the Hershey Company over the use of child labor in West African chocolate cultivation.

A corporate lickspittle I’m not.

But the attack on corporate personhood is a mistake. And it may, ironically, be playing into the hands of the financial and managerial elite.

What’s the best way to control corporate power? More corporate personhood, not less.

If you’re shopping for glue sticks or glitter and hearing Christian music over a loudspeaker, you’re probably in a Hobby Lobby store. An arts-and-crafts retailer, Hobby Lobby is a big company, with upwards of 20,000 employees and more than 600 stores. But it’s a “closely held” corporation—meaning its stock is not publicly traded. The stock is owned by members of one family, the Greens of Oklahoma City, who are devout Christians. As enacted, the Affordable Care Act contained a provision requiring the company to provide its employees with health insurance that includes all medically approved forms of contraceptive care. The Greens objected. They believe that four of those methods are “abortifacients,” and claimed that the coverage mandate violated their rights under the Religious Freedom Restoration Act.

When their suit made it to the Supreme Court in early 2014, a group of corporate law professors (of which I was one) filed a “friend of the court” brief arguing against the corporation.

The brief’s main argument? Corporate personhood.

Understand that “corporate personhood” simply expresses the idea that the corporation has a legal identity separate from its shareholders. That separateness, the brief pointed out, is inherent in what it means to be a corporation. A “first principle” of corporate law (as we explained) is that “for-profit corporations are entities that possess legal interests and a legal identity of their own—one separate and distinct from their shareholders.” The very purpose of the corporation as a legal form is to create an entity “distinct in its legal interests and existence from those who contribute capital to it.” This separateness means that shareholders are not held liable for the debts of the corporation. That makes it possible for people who do not wish to oversee the day-to-day activities of companies in which they invest—and do not wish to risk every penny they own if the corporation goes bankrupt—to invest in corporate stock. In other words, this separateness is what makes capital markets possible. And capital markets are essential for the development of a vibrant national economy. Beyond that, corporations can exist long after the life of any individual that invests in, or works for, them. This means, as the legal scholar Lynn Stout has pointed out, that corporations provide a mechanism for society to make long-term, intergenerational investments that are not linked to government or a specific family.

It is not an overstatement to say that corporate separateness has been one of the legal innovations most important to the development of national wealth.

The professors argued that this separateness meant that the Greens should not be able to attach their own religious beliefs to the corporation. The reason the Greens had chosen to form a corporation was to be able to operate the business without running the risk of losing their personal assets if the corporation went belly up. They wanted separateness.

They should not then be able to stand in the shoes of the corporation for purposes of religion.

The Supreme Court disagreed. It held, 5-4, that the Greens could project their religious beliefs onto the corporation and refuse to provide their employees the required contraceptive-care benefits. Justice Samuel Alito’s opinion is evidence of the Court’s much-discussed pro-business tilt, to be sure. But it’s also evidence that the majority doesn’t understand the basics of corporate law. Its sin was not an embrace of corporate personhood but a rejection of it.

### Advantage Themes---Liability

#### Corporate personhood enables accountability and compensation in disasters.

Kent Greenfield 15, professor of law at Boston College and the author of the forthcoming Corporations Are People Too (And They Should Act Like It), “If Corporations Are People, They Should Act Like It,” Atlantic, 2/1/2015, https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/

In fact, let us now praise corporate persons.

Consider the Deepwater Horizon oil spill disaster. For three months in 2010, Americans woke each morning to the news of another 50,000 barrels of crude spewing into the coastal waters of the Gulf of Mexico. We were justifiably outraged. In a legal system without corporate personhood, the channel for that outrage would be limited to lawsuits and criminal inquiries against individual human beings responsible—managers, workers, and contractors. That’s important, of course. In any legal jurisdiction worth its salt, the search for culpable individuals has to be part of the settling-up of any man-made disaster. But it should not be all. No human being—except, perhaps, Bill Gates—would have enough money to compensate those harmed by a massive disaster like Deepwater Horizon. Because a corporate entity is also on the hook, there’s a chance for something approaching real compensation or real responsibility. Corporate personhood is thus not only a mechanism for the creation of wealth (by encouraging investment), it is also a mechanism for enforcing accountability (by providing a deep pocket to sue).

#### Corporate personhood is important for vindicating compensation interests.

David Gindis & Abraham Singer 21, David Gindis is a Senior Lecturer in Economics at Hertfordshire Business School, University of Hertfordshire, UK; Abraham A. Singer is an Assistant Professor of Management at Quinlan School of Business, Loyola University Chicago, USA, “The Corporate Baby in the Bathwater: Why Proposals to Abolish Corporate Personhood Are Misguided,” SSRN Scholarly Paper, 3983013, Social Science Research Network, 12/09/2021, papers.ssrn.com, doi:10.2139/ssrn.3983013

The protection of individual and collective rights can sometimes require that organizations, business or otherwise, be held to account. In cases like the diesel emissions scandal, if it were not for the separate legal personhood of Volkswagen, prosecutors would only be able to file charges against individual managers or employees. While punishing culpable individuals is important on both legal and moral grounds, individuals will not typically have pockets deep enough to compensate for the real damages incurred by society. By contrast, the possibility to prosecute corporate persons means that something approaching real compensation might be possible (Greenfield, 2018). However, if we see corporate personhood as a mechanism for enforcing accountability, we need to recognize that corporations must also have certain protections. If they no longer had the right to due process or the right to a public trial by an impartial jury, it is hard to see what might prevent prosecutorial misconduct and other forms of injustice.

### Advantage Themes---Rights

#### Corporate personhood serves as a check on government power. This is vital for securing rights such as freedom of the press, freedom to provide reproductive care including abortions, freedom from searches, and freedom from arbitrary expropriation.

Kent Greenfield 15, professor of law at Boston College and the author of the forthcoming Corporations Are People Too (And They Should Act Like It), “If Corporations Are People, They Should Act Like It,” Atlantic, 2/1/2015, https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/

The movement against “corporate personhood” does not spend much time talking about these aspects of the concept. When the left cries that corporations are not people, what they mean is that corporations should not be able to claim the constitutional rights that human beings can. Yet even here, there is reason to praise corporate personhood. Remember, the opposite of a constitutional right is a government power. If corporations have no rights, then governmental power in connection with corporations is at its maximum. That power can be abused, and corporate personhood is a necessary bulwark.

In 1971, for example, the government sought to stop the New York Times, a for-profit, publicly traded media conglomerate, and the Washington Post, which had gone public as a corporation only a few weeks previously, from publishing the leaked Pentagon Papers. The Supreme Court correctly decided that the newspapers had a First Amendment right to publish. That was one of the most important free speech decisions of the twentieth century. At the time, no one seriously suggested that the correct answer to the constitutional question was that the Times and the Post, as corporations, had no standing to bring a constitutional claim at all. (And for those of you saying to yourselves, “Well, this isn’t a good example, since the newspapers are protected by the First Amendment’s press clause”: the Court has never given any greater substance to the press clause not already covered in the freedom of speech. And the current proposals to end corporate personhood do not claim to save media corporations any more than pharmaceutical or oil companies.)

In 1992, Planned Parenthood won a hard-fought battle to have the Supreme Court reaffirm Roe v. Wade. Planned Parenthood is a corporation; but no one seriously suggested it had no standing to object to limits on its ability to provide abortions. Today, Google and other media companies are fighting government demands to disgorge the contents of their servers. No one seriously suggests that the government’s power should be unchecked because the media companies, as corporations, have no Fourth Amendment rights to be free of unreasonable searches and seizures. Finally, if corporations were not able to claim the Fifth Amendment rights to be free of government takings, their assets and resources would always be at risk of expropriation. The risk of investing in corporations would skyrocket, undermining the reason we have them in the first place.

In fact, the argument that corporations should never have constitutional rights is embarrassingly flawed. I often think that those who make it are aware of that fact, and are using “corporations are not people” not as an analytic principle but as an organizing and fund-raising tool.

#### Corporate personhood is important for the capacity of diffuse movements to assert legal rights.

David Gindis & Abraham Singer 21, David Gindis is a Senior Lecturer in Economics at Hertfordshire Business School, University of Hertfordshire, UK; Abraham A. Singer is an Assistant Professor of Management at Quinlan School of Business, Loyola University Chicago, USA, “The Corporate Baby in the Bathwater: Why Proposals to Abolish Corporate Personhood Are Misguided,” SSRN Scholarly Paper, 3983013, Social Science Research Network, 12/09/2021, papers.ssrn.com, doi:10.2139/ssrn.3983013

Corporate Personhood as an Instrument of Collective Action

Organizations are human groupings geared toward the collaborative pursuit of relatively specified goals that become actors in their own right thanks to their legal recognition as such (Coleman, 1990). Corporate personhood, in other words, is a generic instrument for the effective pursuit of collective action. Consider Move to Amend, which was endowed with corporate personhood following its incorporation as a nonprofit. Incorporation constituted what otherwise would have been merely a loose collection of scattered individuals into a singular vector for collective action, expanding its ability to collect and retain financial resources, and therefore greatly enhancing its lobbying capabilities. This consequence of its separate legal personhood would be for nothing if its advocacy did not benefit from free speech and other constitutional protections, including those against expropriation by powerful officials standing to lose should Move the Amend be successful in achieving its goal.

Move to Amend’s reliance on the very thing it seeks to abolish shows that corporate personhood is Janus-faced: while it can serve to ennoble the position of the rich and powerful, the doctrine can also empower the marginalized. Historically, an important fight (and ultimate victory) for many voluntary associations was for the right to incorporate. Disfavored political and social groups linked with the abolition of slavery, the labor movement, religious minorities, and even literary clubs, were denied this right. Their weak ability to own property in perpetuity and mobilize pooled resources in the pursuit of common goals despite fluctuating memberships left them small and ephemeral (Bloch & Lamoreaux, 2017). The growth of general incorporation laws over the course of the 19th century was a major boon for such organizations, as was their gradual assertion of due process and other constitutional protections, which allowed, for instance, their members and donors to protect their anonymity.

The long struggle to make access to corporate personhood straightforward and inclusive continued well into the 20th century, as discrimination against minorities and various dissenting groups remained pervasive. It was only in the 1950s and 1960s that the discretion of courts and legislatures to grant the corporate form to advocacy organizations was successfully challenged by the civil rights movement, which demanded, in the name of freedom of expression, freedom of association and democratic pluralism, that the nonprofit corporate form be available to all manner of interest groups as a matter of right (Silber, 2001). This resulted in the proliferation of nonprofits armed with free speech and other constitutional safeguards, many of which engaged in public interest advocacy by initiating legal actions against major business corporations or governments (Berry & Wilcox, 2018).

Organizations are in a stronger position than individuals to push for new rights or defend, qualify, and expand existing ones, because they can overcome the public goods problem by speaking in one voice and mobilizing more resources for longer in court, where they appear as singular parties thanks to their corporate personhood (Chilton & Versteeg, 2019). It is thus not surprising that many landmark Supreme Court cases were won by incorporated groups exercising free speech and other rights. This was how the National Association for the Advancement of Colored People confronted racial segregation10 and the New York Times resisted the threat of government censorship. 11 And this was how Planned Parenthood was able to defend women’s choice12 and the American Civil Liberties Union succeeded in making same-sex marriage the law of the land. 13 It is significant that America’s most prominent defender of constitutional rights firmly opposes corporate abolitionism (American Civil Liberties Union, 2012).

Since many of the individual and collective rights we now cherish were secured in cases litigated by corporate persons, it should be clear that corporate personhood is not just a tool mobilized by big business to abuse the rights intended for individuals. While business corporations have indeed leveraged some of the rights held by individuals and have also benefited by expanding those originally secured by nonprofits (sometimes to avoid government regulation), they have also fought to uphold citizenship rights against governments, especially in developing countries (Crane et al., 2008). More importantly, they have acted as what Adam Winkler (2018) calls “constitutional first movers”: early corporate rights cases (among which Santa Clara) shaped the very same understanding of equal protection and due process guarantees under the Fourteenth Amendment that later underpinned many of the Supreme Court’s vital rulings, including those outlawing racial segregation in schools14 or ensuring political equality based on the one person-one vote principle.15

#### It is intricately tied to broader organizational rights that are necessary for solving collective action problems in rights litigation.

David Gindis & Abraham Singer 21, David Gindis is a Senior Lecturer in Economics at Hertfordshire Business School, University of Hertfordshire, UK; Abraham A. Singer is an Assistant Professor of Management at Quinlan School of Business, Loyola University Chicago, USA, “The Corporate Baby in the Bathwater: Why Proposals to Abolish Corporate Personhood Are Misguided,” SSRN Scholarly Paper, 3983013, Social Science Research Network, 12/09/2021, papers.ssrn.com, doi:10.2139/ssrn.3983013

THE PERILS OF CORPORATE ABOLITIONISM

The Plutocracy Rationale is the justification for abolitionism with the most political cache: we should put an end to corporate personhood to prevent big business from accumulating nefarious economic and political power to the detriment of individual citizens’ welfare and rights. Despite its focus on anti-democratic consequences, abolitionism motivated by this rationale typically fails to highlight the societal and political (i.e., not purely economic) benefits of corporate personhood, thereby foregoing the opportunity to weigh these against the social costs of its misuse. We offer some elements for this comparison. In criticizing the Plutocracy Rationale, we do not mean to suggest that the abolitionists’ concerns for democratic equality are unfounded. To the contrary, we argue that a concern for democratic equality ought to make us less enthusiastic about corporate abolitionism.

Corporate Abolitionism is a Blunt Instrument

Whether corporate abolitionism targets corporate constitutional personhood, corporate legal personhood, or both, the Plutocracy Rationale invariably conjures up images of big business acting with impunity. There is a sense in which this is understandable: the potential adverse effects of business corporations seem proportional to their size. Yet this focus detracts attention from the fact that, whatever their size, business corporations are but one species of the genus that Eric Orts (2013) calls “organizational persons,” which comprises a large array of business and non-business organizations that enable a modern society to function. This includes: small private companies, partnerships, cooperatives, benefit corporations, mutuals, credit unions, nonprofits, foundations, clubs, scholarly societies, trade unions, political parties, schools, universities, museums, places of worship, hospitals, municipalities, government agencies, states, and international organizations.

While they are not all incorporated in the strict meaning of the term, these organizations are artificial entities in the sense of being legally recognized and constituted as having separate legal personalities and potentially unlimited lifespans. In practice, this means that they have the capacity to hold ownership rights over assets that are distinct from the personal assets of their founders, executives or employees, and can be used as collateral to raise finance and guarantee contractual commitments over time, despite changes in their membership. The essential role of organizational law (which is broader than corporate law) is that it provides the institutional support organizations need in order to lock-in and deploy assets in a prospective manner, contract with one another, and access the courts in cases of disputes (Hansmann & Kraakman, 2000).

The legal personhood of business corporations is no different from that of other organizations, so it is hard to see how it might be abolished for the former but not the latter. Narrowing the target to constitutional personhood does not change this. One can deny that this is a problem in the first place. The We the People Amendment thus simply calls for all artificial entities, not just corporations, to be prevented from claiming constitutional protections. But this raises important normative questions of its own. The ability of trade unions and civic organizations to check corporate power depends on their political voice and therefore requires free speech protections (Ellerman, 2020). And the capacity of these and other organizations to protect themselves from the whims of captured bureaucrats may be seriously impaired without additional constitutional protections. As Kent Greenfield (2018) points out, all sorts of organizations would become vulnerable to government overreach, such as unreasonable searches, violations of due process or arbitrary censorship.

Abolitionists claim that such unintended consequences are largely outweighed by the highly damaging effects of corporate constitutional personhood (Move to Amend, 2020b) but offer little by way of explanation. Instead, they argue that corporate rights-holding is superfluous: protections against abuses of government power exist at common law and in state and federal law (for example the United States Code) and, at the end of the day, individual participants retain their constitutional rights, which they can vindicate in court, should the state overstep its bounds. Business corporations thus do not need protections from expropriation by government (or rights to due process or just compensation) because their shareholders already have these protections (Clements, 2014).

In assuming that the mere existence of individual protections is sufficient, this justification ignores the public goods problem facing shareholders (Olson, 1965). Even if they were to agree on the appropriate course of action, individual shareholders have little incentive to bear the costs of legal action because the benefits of successful litigation are shared. The larger the benefiting group, the smaller the likelihood of litigation. Government is therefore always in a relatively stronger position. This seems all the more probable in cases of artificial entities without members, such as foundations, charities, and hospitals, or artificial entities whose members hold no property interests, such as churches, universities, and political parties (Greenfield, 2018). If their constitutional personhood were abolished, all these organizations would find it harder or costlier to secure resources. Corporate abolitionism is, on the whole, a blunt instrument.

### K Defense of Corporate Rights

#### This evidence makes a pragmatist defense of provisionally endorsing certain corporate rights and of determining their extent through the practice of democracy.

Abraham Singer 19, Assistant Professor, Department of Management, Quinlan School of Business, Loyola University Chicago, “Toward A Pragmatist Approach to Corporate Personality and Responsibility: Why Democracy Matters,” 17 Geo. J. L. & Pub. Pol'y 795, WestLaw

II. PRAGMATISM AND THE CORPORATE PERSON

Many articles and law school syllabi on the topic of corporate personality begin by reviewing the classic competing ontological accounts of the corporation. The first claims that corporations are simply stand-ins for an aggregation of individuals. On this view, a corporation's rights are simply derivatives of the rights \*799 held by the incorporating individuals.6 The second account sees corporations as concessions of state power. On this view, a corporation's rights are derivatives of the government's power, privilege, and responsibilities.7 While very intelligent and learned people have made arguments for each position, inevitably both of these views run into the problem that corporations cannot fit comfortably into either category singly. Corporations clearly involve the initiative and resources of individuals, but they also require the power of the state, and its recognition and bestowal of various privileges.8 This has led to growing interest among theorists in this debate to follow Dewey's famous admonition that because debates about the nature of corporate personality “needlessly encumber” us with metaphysical perspectives and historical doctrines, we should seek a more pragmatist approach to the question of corporate personhood.

By pragmatist, such scholars often simply mean something like a consequentialist, or non-metaphysical, account. Instead of trying to derive normative prescription about what rights corporate personhood entails from first ontological principles, these scholars try to do the normative work on the basis of the expected effects of endowing a corporation with x rights or y responsibilities. This requires a thinner account of the type of thing a corporation is.

Some seek to ground such a pragmatist account in terms of the corporation's purpose. On this view, corporations are unique in the sense that they are essentially purposive agents, in ways that human persons are not.9 Whether explicitly or implicitly, this is generally meant in two senses. In the first sense, corporations are formed by their incorporators as a means for facilitating some sort of collective action with a particular end; that is, a corporation has a particular sort of purpose. Second, the act of incorporation is facilitated by our social institutions in order to contribute to a social purpose of some sort; that is, the corporation as a form, has a particular sort of purpose, which might be as specific as providing services to some particular region or as general as facilitating freedom of speech and association, or contributing to an efficient economy.10 Both of these points suggest an important distinction between corporate and human persons. We as a society cannot assume a particular telos or purpose for humans, and consequently cannot legitimately aim to push humans toward certain life-pursuits. In contrast, \*800 corporate persons cannot help but to have a telos or purpose, over which social institutions do have legitimate influence and control through their ability to legally recognize and facilitate.

In a similar manner, Eric Orts attempts to characterize corporations according to a pragmatic institutional approach, where we understand corporations by emphasizing how the law establishes them as particular sorts of institutions. For Orts, what makes corporations interesting is that their relationship to law is both jurisgenetic and jurispathic.11 It is jurisgenetic in the sense that corporations are enabled to establish their own laws and policies over their members, which govern the ends a corporation seeks and the manner in which it seeks them. But corporations are also subject to the jurispathic elements of the law in that their jurisgenetic nature is constrained by, and beholden to, the more general dictates of the legal order in which they exist. Our normative approach to what sorts of rights, privileges, and constraints corporations ought to have is therefore based on what sorts of laws corporations make for themselves and what sorts of laws corporations must be subject to.

While distinct in various ways, these views can be grouped together based on their eschewal of metaphysical approaches to corporations' normative commitments. More generally, we might say they all assert two key theses. First, our normative assessment of the corporate person ought not to be grounded in their ontological status or some deontological moral principle, but rather should be fundamentally consequentialist in nature. Second, when assessing the consequences of adopting some or another conception of the corporate person, we ought to be emphasizing the structure and purpose of the corporation by asking two sorts of questions. We need to address what I refer to as the question of the corporation's “local purpose”: what rights and privileges will facilitate the aim and nature of the specific kind of corporation in question? But we also need to address the question of our “social interest” in incorporation: what rights and privileges will serve or undermine the aims inherent in allowing incorporation more generally? A pragmatist approach to corporate personhood thus proceeds by arguing that some conception of corporate rights and obligations will result in some good or bad consequence for either the local purpose that some corporations seek to achieve and/or for the social interest that we have in establishing the legal and institutional form of the incorporation.

Of course, what counts as a legitimate local purpose for a corporation, or a social interest for us to pursue through incorporation, is an open question. As a result, pragmatist approaches to corporate personhood generally do not provide definitive conclusions regarding which rights the corporate person has, and to what extent. Indeed, in some sense pragmatists are committed to not providing such definitive answers to these more substantive questions. As Isiksel puts it: “an account that makes the rights of a corporation contingent on its particular \*801 purposes is intentionally underdetermined. The purposive approach is an acknowledgment that corporate autonomy is indeed an ‘endless problem.”’12 The approach constrains and provides a language for articulating, normative ideas of corporate responsibility, but it does not answer them definitively. For the pragmatist, these questions are simply not for political philosophy to answer.

This is, I think, as it should be. However, this is also not the end of the story. If we take the pragmatist project seriously, we can make some further substantive claims on behalf of concerns for democratic processes and norms.

III. PRAGMATISM, INSTITUTIONAL VARIETY, AND THE PLACE OF DEMOCRACY

When people invoke pragmatism in a discussion of corporate personhood, they often mean something like a non-foundationalist argument--one which avoids weighty and prior metaphysical, ontological, or moral assumptions in making normative claims. This is, of course, a crucial part of the pragmatist approach. Pragmatism is fundamentally an instrumentalist philosophy; a pragmatist understands the concepts and linguistic categories we use as tools of action that we create and wield because of their supposed or hoped-for effects. What distinguishes pragmatism from other instrumentalist approaches is that it does not assume the ends we are not assume the ends we are seeking. Instead, pragmatism holds that the positing of some end or another should itself be assessed on consequentialist grounds. Such radical consequentialism is indeed hard to square with a foundationalist a priori commitment.

But pragmatism is not only a non-foundationalist doctrine. Pragmatism, at its heart, is committed to a kind of reflexive inquiry aimed at acting in the world. That is, it is not only about action but what Jackson refers to as “intelligent action.”13 This characterization he takes from Dewey: “doing which has intelligent direction, which takes cognizance of conditions, observes relations of sequence, and which plans and executes in the light of this knowledge.”14 The emphasis on inquiry is important. Pragmatists are not just concerned with the consequences of adopting some such view or position, but the process by which we develop, maintain, amend, or disavow these conceptual and practical instruments.

A. The Commitments of Pragmatism

Synthesizing the sweep of pragmatist thought, Knight and Johnson contend that pragmatism is characterized by its commitment to a (1) fallibilistic and (2) anti-skeptical approach to human knowledge, which is put in service of a (3) broad sort of consequentialism.15 I discuss each of these in turn.

\*802 Pragmatism is committed to fallibilism in two senses. First, we must recognize that our currently-held beliefs--whether, empirical, moral, aesthetic, or theoretical--may very well turn out to be wrong. Second, we must be committed to the idea that whatever certainties we do have are a function of their continued subjection to the possibility of falsification. Falsifiability, then, is simultaneously an epistemic and socio-ethical commitment: it is both a thesis about the nature of our knowledge (that it is provisional and always potentially mistaken) and about how we ought to act considering this (we should remain open to new experiences and ideas, especially those that might challenge that of which we are certain). The anti-foundationalism of the pragmatist is, in a sense, a direct result from this commitment to fallibilism. We cannot commit ourselves to any principles a priori given what we know about our fallible nature.

The flipside of pragmatists' commitment to fallibilism is its commitment to anti-skepticism. That is, while we must act with the knowledge that we are fallible, and therefore with some doubt about the certainty of our conceptual, empirical, and moral repertoire, we are not entitled simply to deny our ability to get these things right either. That is, we must subject our skepticism to scrutiny and possible falsification in the same manner we do with our confident assertions. Neither belief nor doubt can be assumed but must be accepted only insofar as there are reasons to accept them.

Finally, as has already been mentioned, the “reasons” for accepting some or another concept are consequentialist in nature for pragmatists. The effects of endorsing or using some concept are essentially the meaning of the concept itself. Thus, while moral consequentialists of a sort, pragmatists are consequentialists more generally: if we endorse x as good/true/beautiful/earnest/valid, etc., what will the effects of this be?

These three commitments lead pragmatists to favor experimentalism as the best way to resolve doubt and to address disagreements, not just for topics casually associated with the sciences, but also, and perhaps most importantly, for questions of politics and public policy.16 The special danger that politics poses, for pragmatists, is that it always entails disagreements among many people, and it is always in danger of resolving these disagreements by recourse to authority and received wisdom. Because of this, it is all the more urgent to develop institutions, practices, and habits of mind that support the testing and experimenting of our political and social commitments. Without this, we always risk falling back onto an unfounded certainty or endorsing conventional wisdoms despite their poor consequences.

B. Experimentation, Disagreement, and Democracy

This emphasis on experimentation is important for informing a pragmatist understanding of the corporate person. When it comes to coordinating social interactions, we are always confronted with a number of options for decision- \*803 making and institutionalization--markets, hierarchies, bureaucracies, democracy, etc. The fallibilism of pragmatists implies that we should not have any particular principled preference for one or another institution. Instead, we should endorse institutional variety and leave it as an open question as to what sort of institution is best for any particular set of interactions.17 The corporation, with its attendant notion of personhood, is one such institutional option, the existence of which should neither be assumed nor dismissed. Instead, we inquire into the reasons why we have developed corporations in general and enabled some corporation in particular. As we have seen, this leads to something like the purposive and institutional accounts of corporate personhood reviewed above. But the pragmatist analysis does not end at the mere consideration of reasons: we must also be open to reconsidering whether these reasons are good or not, or whether some other altered institution or set of institutions might be preferable.

As we have seen, disagreement is endemic to politics. The disagreement, furthermore, runs deep. It is not just over what institution we ought to select in some situation, or what its features ought to be (“what rights ought a corporation have?”). Societies are also marked by disagreement over the criteria on which we ought to make such a selection (“on what basis ought corporations be seen as having some set of rights?”). Going deeper still, we disagree over the standards by which we would know we were right or wrong in our selection (“how do we know that we were right about that basis for choosing that conception of a corporation?”). Pragmatism's commitment to fallibilism and anti-foundationalism means that we cannot and should not expect theoretical reasoning to provide a once-and-for-all resolution of this disagreement. Instead, we need some social or political mechanism that can address our need to assess this institutional configuration, while also addressing the various perspectives that inform our inevitable deep disagreements. We do not just need to assess the purpose of an institution. We also need to ensure that the proper conditions obtain so that we can have confidence in our assessments.

This is why the pragmatist commitment to experimentation has an intimate connection with the idea of a democratically organized community. The conditions for institutional functioning and assessment are those that allow individual and collectively-held beliefs to be challenged (following the commitment to fallibilism) but also leave open the possibility that we can come to a viable and stable agreement (following the commitment to anti-skepticism). The inherent diversity and inevitable disagreement within a society are virtues to the pragmatist, as they provide the possibility of being confronted with difference and the need to consider revising one's views. Democracy is the institutional means for 1) channeling and amplifying these diverse perspectives for decision-making, and 2) for \*804 maintaining the possibility of revision and reflexivity of our own perspectives by assuring we are always confronted with this perspectival diversity.

Pragmatism, on this view, does not assert the importance of democracy solely for its intrinsic normative properties the way some radical, deliberative, and liberal democrats do--on grounds of equal respect, solidarity, or aspiration toward the general will.18 To the contrary, pragmatists are open to economic and social activity being facilitated through a variety of non-democratic means. These include price-coordinated markets, hierarchically coordinated firms, democratic organization, or simply extant social custom. Particular democratic procedures--voting, majoritarianism, open deliberation, etc.--are not claimed to have special moral priority as first-order means for coordinating activity or making decisions. Instead, pragmatists grant democracy a “second order priority,” a special status as the best institution for monitoring, assessing, and coordinating these other institutional forms.

[A pragmatist will] insist upon the need for some institutional mechanisms that will enable relevant parties to monitor the existence of those initial conditions, propose remedies when the relevant conditions do not actually obtain, and assess the effectiveness with which particular institutions, in fact, coordinate ongoing interactions across various domains.19

The institutionalized equality that comes with democratic procedure and practice best mobilizes and enfranchises the perspectival diversity--the “distributed intelligence”--of a community. Attempts to further democratize one's society, from this view, look less like attempts to place “the people” in power and more like attempts to disrupt extant power asymmetries that might stunt the best use of such perspectival diversity.20

Even more than equality and access, however, it is its reflexivity that makes democracy uniquely competent at this second-order task of monitoring and assessment. Because losers of the political contest remain in the system, participating and voicing disagreement, decisions can be reviewed and revisited, as can the manner by which those decisions were made.21 Democratic procedures are relatively best at assessing and monitoring other institutions because they attempt to bring together diverse perspectives on more-or-less equal footings, and they allow for on-going disagreement in a productive and open-ended way. Democracy also does this in a manner that allows for parties to reflect not only on \*805 the practices they are monitoring, but also on the standards and criteria they are using to monitor those practices. Democracy enjoys a second order priority because democracy itself can become the subject of democratic scrutiny, thus making it the closest approximation of the enabling conditions for proper experimentation and, consequently, confident conclusions. This gives it a unique competence at this second-order task.

As a consequence, a pragmatist approach to corporate personality, while committed to some sort of indeterminacy in terms of substance--that is, after all, what must be figured out, not stipulated ex ante--is not actually wholly agnostic regarding the substantive outcomes. Pragmatists have a consequentialist commitment to maintaining the integrity and functioning of democracy as a meta-institutional condition for believing whatever we end up concluding is as right or good as it can be. We saw above that a pragmatist approach to corporate personality tries to determine the rights and responsibilities of the corporation through an analysis of the legitimate local purpose it is trying to advance, and the more general social interests we have in enabling those local interests. We add to this: pragmatism also demands a concern for determining those interests in a good and smart way, which requires certain background democratic conditions. Insofar as some rights and responsibilities we assign to the corporate person can be shown to undermine the democratic processes through which we assess the corporate person, pragmatists should advocate curtailing those things. Insofar as such rights and responsibilities support these democratic processes, pragmatists ought to support such things.

IV. WHAT “DEMOCRACY” DEMANDS?

To say that democracy ought to inform the way we understand the corporate person raises the question of what democracy is. While pragmatist political theorists generally assert some commitment to democracy, I do not wish to claim that pragmatists all agree on what democracy entails. Some like Knight and Johnson,22 Rogers,23 and Bohman24 emphasize the deliberative aspects of democracy. According to such views, democracy entails the formal procedures of popular elections and accountable legislators as well as the fora and venues for social deliberation. But democracy also requires an ethic among citizens to engage in such democratic deliberation in the right spirit. On such accounts, our ability to achieve the “intelligent outcome” that we are required to inquire into also demands a certain kind of engagement with others that, though entailing disagreement, also entails an attempt to engage with others on certain sorts of civil and rationalized terms. Other pragmatists deny that democracies require such civility, \*806 claiming that the democratic aspiration toward social equality demands a more agonistic social ethic, legitimating non-deliberative, combative action on behalf of the disempowered.25 On such views, democracy demands more coercive activity like labor strikes, barricades, and other forms of civil disobedience in order to challenge extant undemocratic inequalities of power and influence.

I have no wish to fully settle the debate here, if it, in fact, can be settled at all. The more important point is that the pragmatic emphasis on purpose, consequences, and non-foundationalism presupposes a mode of inquiry for determining and revisiting the criteria and the facts of the matter. From a political theoretic perspective, this requires a commitment to some form of democratic society, where our ongoing institutional and social projects can be hashed out, monitored, and reconsidered in an ongoing process of formal and informal engagements.

Whatever else it might entail, a pragmatist's commitment to democracy, then, will generally include a commitment to four things: 1) the formal, institutional guarantees of free participation, familiar to us from liberal notions of rights; 2) the equal distribution of these liberal guarantees, familiar to us from the historical extension of liberal rights to women, racial and ethnic minorities, those without property, and so on; 3) the means necessary to give effect to these rights in an equal manner, including both relatively equal capacities to engage in free participation, and the social relationships necessary not to inhibit such participation; and 4) the necessary informal venues and media needed to facilitate informal social deliberation and communication. Put differently, pragmatists assert the legitimate social interest in securing both the formal rights to participate in the democratic assessment of social institutions and the formal and informal means to do so effectively. Insofar as these conditions are not met, we have reason to doubt our competent assessment of our first-order institutions' performance and purpose. Insofar as first-order institutions--be they bureaucracies, community-empowerment associations, activist movements, expert-led research communities, competitive markets, or corporations--encroach upon such conditions, we can say that they are biting the enabling hand that feeds them.

In the next section, I offer some thoughts as to what this analysis suggests in terms of the rights, duties, and restrictions of corporate persons.

V. CORPORATE RIGHTS AND RESPONSIBILITIES

As we saw, pragmatists reject two categorical theses: 1) that corporate persons cannot have the same rights as natural persons by virtue of their governmental provenance or 2) that they must have the same right as human persons by virtue of their merely being an extension of those individual rights-bearers. Pragmatists instead say: corporations ought to have those rights that enable them to secure the rights and interests of natural persons and ought to be curtailed insofar as such curtailment secures social and individual interests. If we accept the idea that such \*807 a pragmatic analysis presupposes a commitment to democratic institutions, procedures, and norms, how does this alter our analysis?

First, it clarifies what sorts of individual rights and interests we ought to consider as important. This is significant, as pragmatic analysts like Orts and Isiksel and others have tended to help themselves to stipulations about individual rights without explaining the grounding for such starting points. For instance, I have argued previously that we ought to see corporations dedicated to journalism as having free speech and free press rights.26 The reasoning behind this is that if we do not do this, we are harming human persons' ability to effectively use their rights. The individual's right to freedom of press seems to require a similar corporate right. However, I also suggested that it might be reasonable to restrict non-journalistic for-profit corporations' free speech rights. Why? Why should we care about individuals' free speech rights in some instances, but not in others? I did not answer this directly.

The pragmatist commitment to democracy helps us understand this. The ability to speak publicly, to establish channels and media for communication of information and opinion, is crucial for our social ability to assess and revisit the institutional structure of our ongoing cooperative interactions. The New York Times and the Wall Street Journal, as corporate entities, ought to be recognized as having such rights because doing so gives effect to individuals' ability to participate freely in democratic processes. These are rights that, when granted to specific types of corporations, help secure background democratic procedures.

Given this, why might a pragmatist think that some corporations ought not to have such rights? Not because, as Justice Stevens argued in his dissenting opinion in Citizens United,27 corporations derive from government and are, therefore, not entitled to such protections from government interference. Instead, the purposive approach would say simply: for-profit business corporations are formed to further people's economic interests, not their freedom of speech. Business corporations exist to contribute to the coordination of economic activity28 and by granting them the same free speech rights as individuals, we place institutions designed to accumulate stores of wealth on the same discursive plane as individuals. Consequently, we contribute to an unequal ability of people to participate in democratic procedures and deliberation, thereby undermining democracy's attractive experimental and reflexive qualities.

But there is perhaps another rationale. Orts captures it well, if inadvertently:

Allowing the economic representatives of firms to act also as political representatives of the firm's business participants is to mix apples with oranges. It does not respect the different roles that individuals play in different social \*808 spheres of life: as economic business participants, on one hand, and as political citizens, on the other. Acting as a single individual, one can sometimes combine or switch between these two roles of economic actors and political citizen. The specialized organization of a complex business firm cannot.29

Orts means this as a further institutional elaboration of the disproportionate wealth--and therefore disproportionate power--that corporate speakers wield when granted equal speech rights. However, he also illustrates the specific sorts of capacities that distinguish corporate actors from other actors, namely a greater rigidity regarding beliefs and purposes. The problem is not simply that corporations have large resources at their disposal to sway political processes. It is that they do so without the kind of constitution that makes them good participants in these processes. Corporate actors are encouraged economically, socially, and legally to emphasize particular sorts of financial and economic concerns, and not to think about broader social and political concerns. Coupled with their power, such imperatives give us good reason to worry that the full scope of corporate speech rights will damage our ability to democratically monitor social and economic institutions. Therefore, we ought to limit corporate influence in things like elections and campaigns.

Importantly, though, such a rationale would extend beyond business corporations, to corporate persons more generally. Charitable and non-profit corporations, while perhaps not generating the same kind of financial power, will also have fixed points of interest and purpose. This need not be a problem--as it need not be a problem with business corporations more narrowly. If there is a large ecosystem of non-profit companies, pursuing a variety of different ends and representing different perspectives and worldviews, the fact that some individual corporate person is not engaging in the democratic procedure with the properly reflective or reflexive disposition need not mean that such reflexivity cannot be achieved in the aggregate.30 On the flipside, however, the absence of such a congenially symmetric organizational ecosystem may invite greater restriction.

The larger point this suggests is that a pragmatic approach to corporate personhood should not just focus on corporate purpose. When assessing what rights corporations should or should not have, we also ought to look at the corporation's capacity and context. A small for-profit corporation with a strong history of embeddedness in a community may have a strong claim to being able to participate strongly and robustly in political speech--and with good democratic rationale. In this instance, the corporation in question has the capacity to contribute effectively to the democratic process and does not have the capacity to undermine it. On the other hand, we may see reason to restrict the rights of a large news \*809 company that has dominated the journalistic space to its detriment, with similarly good rationale. In such a case, the corporation, despite being journalistic in purpose, has the capacity to undermine democratic background conditions given the particular context in which it operates. In either case, it is not enough to point to the corporation's purpose, or the kind of corporation it is, to consider its rights and responsibilities. We must assess it, as it were, in situ.

CONCLUSION

The aim here has been to sketch out what a pragmatic, non-foundationalist approach to corporate personhood requires and, specifically, to argue that it requires a concern for the viability and vitality of democratic practices and procedures. As others have said, the rights and duties that we accord to corporate persons ought to be based on their purpose, not on some foundational commitment. I have argued that we ought to understand this purpose in two senses: a specific sort of corporation's “local purpose” and society's more general “social interest” in securing incorporation as an institution. However, to make this claim is to raise the question of how we know what purposes and interests are legitimate and how we know that our corporate institutions are living up to these legitimate ends.

Pragmatism's most profound and unsettling contribution to this debate is the suggestion that there is no theoretical or philosophical resolution to such problems. Instead, we must hash this out through the various social and political means we have developed for coordinating activity and settling disagreements. This implies, however, a special concern for democracy. Democracy is the meta-institution that oversees and revisits these disagreements' provisional institutional solutions. Practices that undermine or harm democracy's ability to perform these corrective actions are ones we have a social interest in discouraging or avoiding. Consequently, the rights and duties of the corporate person must be articulated with a concern for how corporations can potentially harm or contribute to the functioning of democratic practices and norms. This concern must include the capacities of the corporation in question and the context in which it operates, all of which counsels against a general, legalistic approach to the question of corporate personhood.

By way of conclusion, I would like to address one potential confusion about pragmatism's relationship to democracy. Some hear this pragmatist emphasis on democracy and assume a sort of proceduralism as follows: “if society is sufficiently democratic, then the conclusions we reach within that society are correct, good, and/or legitimate.” This is, possibly, the opposite of what pragmatism's endorsement of democracy entails. It is not that pragmatists endorse democracy because it is the procedure that allows us to decide that “we now have gotten it right.” Democracy's pragmatic benefit is precisely that it enables more people to more effectively register that they believe we have gotten it wrong. The goal of democratic procedures is to enable and channel disagreement toward its most productive and intelligent use, not to give us a vantage point from which to declare we have risen above the disagreement.

\*810 To put this in terms of the debates about corporate personality: we should not simply accept the doctrines we currently have because they are the result of a democratic society's procedures and norms. Instead, we note that the democratic expression and exchange of views has produced a number of different disagreements about these doctrines--the extent and scope of corporate speech rights, the degree and protections afforded by limited liability, etc.--as well as numerous potential ways of resolving these disagreements. Democracy is not a deus ex machina that saves us from such debates, which are endemic to politics. Instead, democracy is a set of practices that invite us to face such disagreements head on and to approach them animated by fallibilism, experimentation, openness, and reflexivity. Insofar as entrenching certain sorts of corporate rights can undermine this spirit and these practices, we have reason to challenge such legal and political actions.

#### Corporate personhood can be expanded while maintaining priority for human persons through a pragmatist commitment to democracy.

David Gindis & Abraham Singer 21, David Gindis is a Senior Lecturer in Economics at Hertfordshire Business School, University of Hertfordshire, UK; Abraham A. Singer is an Assistant Professor of Management at Quinlan School of Business, Loyola University Chicago, USA, “The Corporate Baby in the Bathwater: Why Proposals to Abolish Corporate Personhood Are Misguided,” SSRN Scholarly Paper, 3983013, Social Science Research Network, 12/09/2021, papers.ssrn.com, doi:10.2139/ssrn.3983013

The Priority of Human Persons

Corporate persons can be legitimate holders of constitutional rights and nothing in the doctrine of corporate personhood requires that corporations be granted the same complement of rights as human persons. But the Distinctiveness Rationale cannot be rebutted by merely distinguishing the rights granted to corporate persons from those held by human persons. The trouble is that once certain rights are assigned to corporate persons, they become not just sui generis but also very difficult to weaken or reverse, making them, as abolitionists argue, potentially a threat to ordinary citizens. Yet while corporations can leverage constitutional rights to amass economic and political power, the idea that abolishing corporate personhood will help restore democracy – recall the primary motivation of the Plutocracy Rationale – is a nonstarter, as this will also eliminate vital resources for collective action and democratic empowerment.

Consequently, if we value democratic equality and want to preserve a vibrant and open civil society, we need a principled way of ensuring the priority of human over corporate persons which not only preserves the efficacy of corporate institutions but also prevents law from defining humans as nonpersons. One prominent strategy involves what may be called the “deontic priority” argument. Derived from the Kantian accent on the uniquely human attribute of autonomy and rationality (or at least the disposition for autonomy and rationality), this argument suggests that because corporate persons are non-autonomous means to human ends, their rights do not deserve the same respect (Dan-Cohen, 1986). Whatever its merits, this approach is very closely connected with the intrinsicist notion of personhood and the will theory of rights, which we believe are not necessary to establish the priority of human persons.

A somewhat less categorical argument stems from the political conception of citizens as “self-authenticating sources” of claims on the institutions of society (Rawls, 1993). This Neo-Kantian approach translates the idea of human beings as ends in themselves into the idea of human beings as moral persons that are owed a justification for the conditions and treatment imposed onto them by others, and especially by social, legal, and political institutions (Forst, 2014). Given that corporations are such institutions, they are not the sorts of entities to which justifications are owed. It follows that corporate persons should have those rights that can be justified by and to human persons, but that they do not require (and should not be granted) those rights owed to beings that have a right to justification. The content and nature, but also the extent and limitation, of corporate rights is determined on behalf of, not in spite of, a foundational moral regard that we reserve for human beings as justificatory agents.

But the claim that corporations ought to have those rights that can be justified to human persons, and not those rights that cannot be justified to human persons, seems mealy-mouthed. Moreover, its premise, that we do not have to justify ourselves to corporate persons, is implausible, given that cases where corporate persons challenge the way they are treated by prosecutors or tax authorities are cases where they seek justification. Courts do not dismiss these challenges on the basis that the state need not justify itself to corporations. To help us secure at a principled level the distinctiveness and priority of human persons over their corporate counterparts in our scheme of rights and liberties, an alternative route is needed. Philosophical pragmatism, we submit, can offer a fruitful avenue in this respect.

Pragmatism is a philosophical tradition that, though diverse and containing various interpretations, is fundamentally committed to the idea that our knowledge of the world cannot be separated from our engagement with it. Concepts and normative categories are seen as forms of action that we engage because of their supposed consequences. For pragmatists, the test of an idea’s validity is fundamentally linked with its usefulness; it is not evaluated in terms of its fit with first principles. Because of its practical orientation and its anti-foundationalism, scholars in business ethics and management studies are increasingly turning to pragmatism as a touchstone for analyses that are capable of social critique yet resistant to the sorts of commitments that are difficult to maintain in a diverse and complex world (Farjoun et al., 2015; Visser, 2019).

Pragmatism offers us a chance to set aside grand moral theories about rights in order to focus more directly on the consequences of different sorts of social action (Pouryousefi & Freeman, forthcoming). Its methodological resistance to deontological positions, which can lead to the intrinsicist conception of personhood and the will theory of rights, makes it uniquely suited to the task of addressing the question of corporate personhood (Singer, 2019). And its normative commitment to democratic equality as a basis for criticizing social and economic institutions also allows us to engage with the worries underlying the Plutocracy and Distinctiveness rationales.

These attractive features of pragmatism flow from its core tenet of fallibilism: because we know we are fallible, we cannot pre-commit ourselves to any particular core doctrine with certainty (Dewey, 1920). We must instead always subject our beliefs and convictions to an ongoing process of falsification through exposure to new ideas, new experiences, and open reason-giving. The firm commitment to maintaining the channels of inquiry and experimentation necessary for establishing which actions and conceptions will lead to which consequences means that nothing is inherently off the table, as long as we do not short-circuit our ability to reflect upon and revise our considered collective moral and political judgments (Bohman, 1999). We thus have a principled reason for both recognizing corporate persons – corporate voice adds a valuable point of view to the process of social deliberation – and asserting that whatever rights we assign to them are reconfigurable or even reversible.

The question of which rights ought to be assigned to corporate persons is something to be critically and experimentally determined (Dewey, 1927). It must always remain subject to reflection, justification, and revision. To claim either that personhood must be reserved for humans, or that the common legal designator of personhood requires an equal bundle of rights, is to let social institutions and conventions dictate the terms of social analysis, when it ought to be the other way around. Of course, one might worry that this sort of reflexive stance could justify restricting rights of human persons as well. Would we not have to subject basic human rights to the same sort of potential revision? How can we preserve the distinctiveness and priority of human persons when disavowing the very idea of categorical prioritization, potentially subjecting everything to radical reflection and critique?

From a pragmatist perspective, the contingency of corporate rights and the priority of human persons can be asserted and defended by reference to the conditions necessary for legitimate, competent, and effective inquiry. Effectively answering the question of which rights we should grant to corporate persons presupposes that we have a system of collective inquiry capable of identifying the individual and collective interests that merit protection and assessing the consequences of the legal and political decisions underlying alternative assignments of rights. In modern societies, a crucial part of this system of inquiry is the protection of political and social rights associated with democracy, which we grant to human persons to guarantee their inclusive and equal participation in the social processes of experimentation, assessment, and reflection. This is why pragmatists are committed to democratic equality (Jackson 2018).

On the “democratic priority” view defended here, human persons have a claim to equal treatment not because of their intrinsic capacities, but because to do otherwise undermines our epistemic confidence in, and thus the legitimacy of, our institutionalized forms of collective inquiry – the processes by which things come to be known or decided upon at a societal level (Knight & Johnson, 2011). The priority of human persons, and the principled reason to promote and vigorously guard their equal “empowered inclusion” (Warren, 2017), is due to democracy’s particular socialepistemic competence, not its derivation from a set of moralized human essences. The democratic priority argument thus offers a fairly parsimonious explanation of why corporate persons can have rights but are not entitled to the same presumption of equality as human persons are. It also helps explain why we should want to attenuate or restrict corporate persons from having certain rights as a matter of principle.

When deciding, for instance, whether corporate persons should have the same rights as human persons to support favored political candidates, we should ask whether this would corrupt or stunt the democratic background necessary for collective inquiry. Whenever it contributes to an unequal ability of human persons to participate in democratic procedures and deliberation, we undermine democracy’s attractive experimental and reflexive qualities (Singer, 2019). Restricting the political and civic freedoms of corporate persons thus will often be warranted, despite the fact that they are generally capable of bearing rights. Given that the basis for such rights is in their contribution for epistemic and social inquiry, the political speech rights of corporate persons, notably those designed to accumulate stores of wealth, ought not receive the same level of protection as human persons’ rights, lest we undercut our ability to reflect upon and revise such an institutional arrangement.

### AT: DAs---Spillover

#### Corporate personhood doesn’t require embracing every aspect of corporate rights.

Kent Greenfield 15, professor of law at Boston College and the author of the forthcoming Corporations Are People Too (And They Should Act Like It), “If Corporations Are People, They Should Act Like It,” Atlantic, 2/1/2015, https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/

Please don’t misunderstand me. Of course corporations are not genuine human beings. They should not automatically receive all the constitutional rights that you and I can claim. Corporations cannot vote or serve on juries, for example; it does not make any sense to think of corporations asserting those rights, both because of the nature of the right and the nature of the corporate entity. Similarly, the Court has held that corporations cannot assert the Fifth Amendment right to be free of self-incrimination. The exclusion makes sense, since corporations could otherwise evade all kinds of disclosure obligations necessary to make markets work. Can you imagine General Motors having a constitutional right not to disclose safety defects in their cars?

When the time comes, the Court should draw the same line with regard to the freedom to exercise religion. The right is to protect the freedom of conscience, and only actual human beings have a conscience. (And only some of them at that.) There should be allowances for genuine associations of religious people, such as churches. But because of corporate separateness—that is, corporate personhood—it will be quite difficult for companies to show that they are genuine associations of religious people.

Should corporations be able to assert First Amendment free speech rights? The answer depends on the context; that context includes the fact that the corporation is a legal form, but is not completely dependent on it. Sometimes it makes little sense to protect the First Amendment rights of corporations. Securities laws, for example, routinely require corporations to disclose to the public their financial well-being. If you or I were required to reveal our personal finances, we could object to the requirement as coerced speech, a violation of the First Amendment. But corporations’ arguments along those lines would fail, and they should. In fact, in 2011, AT&T asked that information about its finances be excluded from Freedom of Information Act requests, because the statute has an exception for “personal privacy.” The Court unanimously rejected this claim—and Chief Justice John Roberts ridiculed it in his opinion. That exception, he wrote, “does not extend to corporations. We trust that AT&T will not take it personally.”

On the other hand, sometimes it’s important to protect the right of a corporation to speak, as in the Pentagon Papers case, not because the corporation owns free speech rights but because of the rights of human listeners to listen to what it has to say. This idea—that listeners have a right to hear the words of corporate speakers—is actually a liberal idea. In the 1970s, Ralph Nader’s group Public Citizen brought a First Amendment challenge to limits on commercial advertising. They argued that these laws violated the public’s right to know. Legal scholar Adam Winkler argues that Public Citizen’s advocacy led directly to Citizens United. In his majority opinion in that case, Justice Anthony Kennedy said that the public has a right to know corporations’ views. Public Citizen now decries corporate personhood; if truth be told, it’s their own fault.

When it comes to campaign finance, I agree with the personhood opponents that Citizens United wrongly expanded corporate rights to spend money on elections. I also agree that the Court’s mistake traces its origins to the 1976 case Buckley v. Valeo, where the Court struck down limits on individual (human) campaign expenditures as violations of free speech. But the problem in Citizens United was not the Court’s supposed holding that corporations are people, and the problem in Buckley was not a supposed ruling that “money is speech.” Both are mischaracterizations, and the critical yelps they attract are poorly targeted in any event. Corporations occasionally say things that matter to voters, even in elections. And while money is not itself speech it is sometimes essential to make speech audible above the din. Giving it, too, can be an expressive act. Imagine if Texas told its citizens they could not contribute to Planned Parenthood or had to pay dues to the National Rifle Association. It would be inane to argue that the First Amendment would not be implicated because money is not speech.

Nevertheless, there are myriad reasons why a commitment to free speech rights—even corporate free speech rights—should not bar reasonable limits on independent campaign expenditures from both corporations and the super rich. It is not hyperbole to say that without such limits, our democracy is at risk. The billions of dollars flooding the electoral process skew it toward the monied and well heeled, and pervert the nature of public service. The current Court is so enamored with a simplistic, libertarian theory of free speech doctrine that it is blind to those risks. A sane Court could easily construct exceptions to otherwise applicable doctrine to protect the sanctity and fairness of our elections. In fact, Canada’s supreme court has done that very thing.

But notice something. One can support campaign finance regulation and still acknowledge corporate personhood as well.

#### Tests for rights don’t spill over

Elizabeth Pullman 11 Professor of Law at Penn; Co-Director, Institute for Law and Economics, BA and JD, with distinction, from Stanford. "Reconceiving Corporate Personhood" (2011). Faculty Scholarship at Penn Law. 2563. https://scholarship.law.upenn.edu/faculty\_scholarship/2563

A fundamental problem thus exists with the traditional understanding of corporate personhood as a unified doctrine based on a conception of the corporation, and as covering the panoply of recognized corporate rights. If the Court has moved beyond thinking of corporations in terms of the concession theory and aggregate theory, then how do we understand continued reliance on the case law that is based on those views? As discussed above, the real entity theory was not a common view until after some of the key early precedents such as Santa Clara and so it is not a part of their reasoning.209 And, even the real entity theory is incomplete in that it fails to illuminate why the entity should receive constitutional protection as a person and what the scope of that protection should be. Besides the mere recognition that corporations may hold rights there is no conceptual core that ties together this doctrine. There has been no consistently used test or procedure for determining whether corporations should hold a certain right.

### NEG---Corporate Death Penalty (Banking)

#### Doing it for Banking is a bad idea---regs CP is better.

Gregory M. Gilchrist 17, law professor at the University of Toledo, JD from Colombia, AB from Stanford. Opacity, Fragility, & Power: Lessons from the Law Enforcement Response to the Financial Crisis, 83 Brook. L. Rev. (2017). Available at: https://brooklynworks.brooklaw.edu/blr/vol83/iss2/15

The solution may be similar to, yet importantly different than, that suggested by the book’s title. The Case for the Corporate Death Penalty begins its conclusion with a quote from Thomas Jefferson that “legislators cannot invent too many devices for subdividing property.”98 The authors write that “[c]oncentrated power threatens the rule of law and therefore individual liberty.”99 The big banks have become extremely big and extremely powerful. Indeed, by some measures, large financial institutions have become larger since the financial crisis.100 The book notes that at the end of 2014 just five institutions accounted for over 44% of the financial industry in the U.S.101

It’s worth remembering that before “too big to fail” became an epithet hurled by opponents of large financial institutions, it was a widely embraced policy.102 Too big to fail was the federal bank regulators’ policy, established in the 1980s, of protecting “both insured and uninsured depositors in large failing banks.”103 In the decades preceding the 2008 crisis, the dispute was generally not about whether this informal federal insurance was a good idea; rather, the question was whether the trend toward consolidation within the financial industry would increase the costs of this policy.104 Those who favored consolidation prevailed, leaving the opponents with only cassandran validation.105

The sheer size and importance of the largest banks has rendered them not only too big to fail but also too big to police. Too big to police because in all but the most unusual scenario even fulsome, expensive, and instrusive investigations are likely to return evidence of scienter against relatively low-level employees. This problem is not limited to banks, but it is true of large banks. Simply as a matter of corporate hierarchy and function, actual decisions and awareness of conditions necessary to commit a crime will be aggregated at lower levels of management.106 So, efforts like the Yates Memorandum107 that call for more individual prosecutions are unlikely to have much impact, except, possibly, undermining the corporate function by poisoning the relationship between senior management and employees108 and generating inconsequential cases against lower level employees.109

The death penalty is not a realistic option for these largest banks, nor is it one we ought to hope prosecutors exercise at times of crisis. A better option may be euthanasia. It is not line prosecutors or even DOJ leadership who ought to restructure our economy by breaking up the biggest banks; this is a political project that ought to be handled with care. “Killing” large banks might feel good, but it would be reckless. If the large banks are to end, it will and ought to be through the relatively gentle and thoughtful mechanics of politically imposed limits.

### NEG---Corporate Accountability CP

#### An alternative to expanding personhood obligations would be to expand the metaphor of corporations as states, making them more democratically accountable.

Nikolas Bowie 19, Assistant Professor of Law, Harvard Law School. CORPORATE PERSONHOOD V. CORPORATE STATEHOOD, 5-5-2019 https://harvardlawreview.org/2019/05/corporate-personhood-v-corporate-statehood/

With this in mind, an alternative to rejecting the Supreme Court’s unfounded assumption that corporations operate democratically might be to embrace the Supreme Court’s metaphor of corporate democracy but use means outside the courtroom to make corporations live up to it. That is, instead of attempting to change the Supreme Court’s current doctrine, opponents of corporate power might instead attempt to bring all corporations — including banks, businesses, and other so-called corporate democracies — in line with American expectations about how twenty-first-century democracies should operate. Such an alternative might not only be more practical than changing doctrine given the existing Supreme Court, but might also be normatively preferable.

To see why, consider the general Occupy-style argument against corporate power — that corporations are unaccountable and operated for the benefit of the rich and powerful. This argument is significantly weaker when wielded against cooperative corporations, nonprofit corporations, municipal corporations, and other corporations that have broadly defined constituencies who have the realistic power to influence the sorts of arguments and political positions their corporations take. It is probably for this reason that opponents of corporate power like Senator Bernie Sanders have crafted their responses to Citizens United with exceptions that would preserve the free speech rights of nonprofit corporations like the NAACP. For example, the constitutional amendment Senator Sanders proposed in the Year of the Corporate Person didn’t exclude all corporations from receiving constitutional protection; it stated that the “rights protected by the Constitution of the United States are the rights of natural persons and do not extend to for-profit corporations, limited liability companies, or other private entities established for business purposes or to promote business interests.”

## Partial / Potential Humans

### Inherency/UQ---Clones

#### Courts have not directly spoken to the issue but born-clones would likely have legal personhood

Paulo Farias 6, Boston University School of Law Student Writing, “Reproductive Cloning Case: How Law and Bioethics Measure A Compelling Governamental Interest,” Boston University School of Law, January 2006, https://law.bepress.com/cgi/viewcontent.cgi?article=5525&context=expresso

During the right to abortion debate (Roe v. Wade (1973)), in which the Court assigned, using the due process, privacy or liberty of the woman to choose to have an abortion, the state asserted an interest in protecting the rights of the fetus. Justice Blackmun rejected the argument that the fetus was a person for purposes of Fourteenth Amendment protection. Relying on various provisions including the definition of citizens in the Fourteenth Amendment, the census provisions, and the qualifications for various elected officials, Justice Blackmun concluded that the Constitution only protected those who were already born. By focusing on legal personhood, the Court avoided the question of when life begins, a question that is against raised in the cloning debate.

Is a human clone a person for legal matters? In other words, is a clone something or someone that could be born? Was Dolly born? The answer would be yes, if one considers that she was delivered from a womb. Assuming that a born-clone would have legal personhood, the State should have interest in protect him and the way he was generated.

### Inherency/UQ---Fetuses

#### Children are persons. Fetuses are not.

Alexis Dyschkant 15, Ph.D. in Philosophy, University of Illinois Urbana-Champaign, In Progress. J.D., Illinois College of Law, December 2014. M.A. in Philosophy, University of Illinois Urbana-Champaign, 2012, B.A. in History and Philosophy, University of Illinois Urbana-Champaign, 2010, “Legal Personhood: How We Are Getting It Wrong,” University of Illinois Law Review, vol. 2015, no. 5, 2015, pp. 2075–2110

2. Children and Legal Personhood

Children are generally presumed to be legal persons. The Supreme Court has directly addressed the question of personhood for children when analyzing whether children can bring forward a Fourteenth Amendment claim. For example, in Levy v. Louisiana, the Court overturned a Louisiana statute declaring illegitimate children "nonpersons": "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Four- teenth Amendment."32 The justification for including illegitimate chil- dren as legal persons is almost immediately obvious to Justice Douglas and follows directly from the fact that children are living human beings who "have their being." 3 The Supreme Court also held that the Four- teenth Amendment protects children as well as adults.' This clearly places children in the category of legal persons according to the constitu- tional meaning.

The category of "child" is very broad and includes human beings at a wide variety of capacities. The law recognizes that children cannot be held as legally responsible as adults, and thus limits their rights and du- ties. For example, children, although persons, are not bound by contractual agreements" and children of a certain age are not allowed to marry although the right to marry is constitutionally protected.3 6 There is, how- ever, a general presumption that children are persons. This is in tension with the general association of personhood with the capacity to have rights and duties. However, because children are human, their person- hood is not regularly challenged. 3 This further supports the view that the closer one is to being human, the more acceptable it is to declare her a person, even if she is not capable of exercising those rights and duties generally associated with persons.38

3. Fetuses and Legal Personhood

Unlike children, the question of whether or not fetuses should be considered legal persons has received a lot of attention, in part because a declaration of fetuses as persons would challenge the constitutionality of abortion. In Roe v. Wade, the Court emphasized the dramatic consequences of declaring a fetus to be a person. "[I]f this suggestion of per- sonhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Four- teenth] Amendment."" The Court denied fetuses the status of legal persons."

Important to the Court's analysis is the fact that, as a practical mat- ter, the use of the word "person" in the Fourteenth Amendment general- ly only has postnatal application with no indication of any possible prenatal application.41 The presumption seems to be that the rights and in- interests protected by the Due Process Clause and the Equal Protection Clause just do not have practical application to a fetus. In conjunction with the fact that "person" is not constitutionally defined, the Court refuses to attribute personhood to fetuses.

Interestingly for the purpose of this exposition, the debate between the Supreme Court and anti-abortion advocates regarding whether to at- tribute personhood to fetuses directly tracks the question of fetal human- ity. The Court declines to attribute humanity to fetuses. All references in the Court's decision to the fetuses' humanity are qualified. References include "the potentiality of human life," 42 "potential human life,"43 and "potential future human life."" In contrast, states which support includ- ing fetuses as persons also refer to the fetus as already human, sometimes at the point of conception.45 The AMA Committee on Criminal Abor- tion, which seeks to reduce or end abortions generally, claims that abor- tion is an "unwarrantable destruction of human life."" Anti-abortion states at the time widely had adopted legislation declaring a fetus to be a human life.47

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court held (reaffirming Roe) that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposi-tion of a substantial obstacle to the woman's effective right to elect the procedure."4 8 The relevance of viability is that it helps establish when the fetus becomes humanlike enough to trump the mother's right to abort. Legal scholars advocating for a theory of personhood that is modeled off of humanity would agree with this sort of line-drawing because basing the person on the "embodied human" "draws on shared intuitions about who counts in our community of legal persons and how we should take account of them."49 Once a fetus is viable, it is not human like enough to be a legal person, but it is human like enough to be "worthy of recognition." 0 The Court's discussion of the relevance of viability in Roe demonstrates the importance of belonging to humanity. It states that de- terminations of viability can be framed in terms of when a "fetus became 'formed' or recognizably human, or in terms of when a 'person' came in- to being.""

The disagreement about whether to extend personhood to fetuses rest, fundamentally, on how to handle cases at "the raw edges of human existence."s2 This suggests that had fetuses been obviously human then personhood would apply, or had fetuses been obviously nonhuman then personhood would not apply. The difficulty of establishing personhood is why fetal personhood has received more attention than child person- hood; children are obviously humans and fetuses are not obviously humans.

An examination of the personhood of children and fetuses shows the importance of being human for being a legal person. Even when one is not obviously capable of bearing rights and duties, being human is of- ten enough to be a person. But, if an entity's humanity is not clear, then the status of personhood is much less likely to apply.

#### Current law unambiguously excludes fetuses from personhood

Paulo Farias 6, Boston University School of Law Student Writing, “Reproductive Cloning Case: How Law and Bioethics Measure A Compelling Governamental Interest,” Boston University School of Law, January 2006, https://law.bepress.com/cgi/viewcontent.cgi?article=5525&context=expresso

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### AFF Area---Biotech

#### There are tons of controversies spurred by advancements in biotech---ranging from genetics, to neuroscience, to cell and tissue research implicating the boundaries of human/animal, person/thing, or living/dead---that implicate the question of legal personhood and the extent of entities to which rights attach.

Bartha Maria Knoppers & Henry T. Greely 19, Centre of Genomics and Policy, McGill University, “Biotechnologies Nibbling at the Legal ‘Human,’” Science, vol. 366, no. 6472, American Association for the Advancement of Science, 12/20/2019, pp. 1455–1457

The law has always viewed living human beings—and the tissues, organs, and other body parts derived from them—as special and different from the nonliving, nonhuman. But bioscientific advances are nibbling away at classical legal boundaries that form the bedrock of the normative structures on which societies are based. Recent developments such as in human genetics, neuroscience, and cell and tissue research pose qualitatively different challenges than what has come before, seeming to blur legal distinctions between human beings and other living organisms, between living human beings and dead ones, and between human tissues and cells and nonhuman ones. Although cognizant of the important bioethical and philosophical debates surrounding the issues raised, we focus on how legal systems may respond to these bioscience challenges to traditional binary, legal classifications. Determining whether some “thing” is now some “one” carries with it profound implications for the rights and obligations the law recognizes for “humans.” Although it may be tempting to think that these new developments require us to reconsider the time-honored legal definitions of humans, living humans, or human tissue, we suggest that current legal dualisms can be applied in ways that provide adequate flexibility to allow weighing the many issues that surround developments in genetics, neurosciences, and cellular bioengineering and challenge how we legally define what is “human.”

Recent advancements in the neurosciences, such as the possible revival of “dead” pig brains, pose issues for our understanding of both cognition-based conceptions of identity and even death itself. In the context of cell and tissue research, the creation of synthetic human entities with embryo-like features (SHEEFs) and human-animal chimeras create penumbras in our accepted legal taxonomies of organisms. CRISPR technologies may lead to likely widely acceptable somatic gene therapies for serious inheritable conditions while also leading to germline editing that affects future “humans,” to say nothing of possible frivolous genetic enhancement.

Classical Dualisms

The classical dualisms found in legal systems around the world—whether animal versus human, person versus thing (“property”), living versus dead, drug versus device, or enhancement versus therapy—are already in the process of being “retranslated” under specific legislation or by the courts, creating new terms such as human genetic identity or integrity (1), common heritage of humanity (2), human species, crimes against humanity (3), and membership in the human family (4). Being “human” is the legal starting point for these concepts. But is the definition of “human” in the legal sense understood? Is it under threat?

As stated in Article 1 of the Universal Declaration of Human Rights, all human beings are “born free and equal in dignity and rights” (4). Predicated on the inherent dignity of human beings, human rights and their correlative obligations find their basis in legally recognized personhood. With their framing and internal normative hierarchy, laws provide security and certainty for human interactions in society and in the world. Any proposals for the reclassification of legal and regulatory boundaries surrounding the definition of “human” generally could do well to first understand the complexity and plasticity of the classical dualisms, of the biotechnologies, and of the regulatory ecosystem.

Reference to the inherent dignity of humans as “members of the human family” (4) may serve as the legal filter for degrees of protection before birth and after death. The law starts with the position that any living organism born from a person is a natural person from at least the time of birth until the time of death, but things quickly become more complicated.

The special treatment of “humanness” does not apply only in that period or to legal persons. All countries provide some protection for the embryo or fetus through abortion laws, fetal protection laws, limits on embryo research, and other ways. The approaches range from constitutional recognition of legal personhood at conception [for example, (5)] to the 14-day rule regarding research on embryos [for example, (6)].

Similarly, legal systems use different ways of defining the end of personhood through death. Most jurisdictions declare death, and end rights, when there is either irreversible cessation of cardiopulmonary functions or of all brain functions. But missing persons can, in many jurisdictions, be declared legally dead after a long period when they are not seen. Even after death, the tissues of (former) humans are legally entitled to special treatment; some countries provide distinct treatment to human remains from particular populations, such as with the Native American Graves Protection and Repatriation Act in the United States. Sometimes legal natural persons will lose the benefits of data protection legislation if their data are “anonymized,” making them, for that purpose, a kind of “nonperson.”

Some are tempted to consider consciousness or self-consciousness, or the likely resumption of either, as a crucial legal criterion for membership in the human family, as a definition of the end of life or possibly of its beginning (2).

Genetic Identity

It could be argued that the human genome defines “human.” The definition of the human genome adopted by the United Nations (UN) Educational, Scientific and Cultural Organization (UNESCO) in 1997 was that it “includes both the genetic makeup of humanity as a whole and of the individual genes in their tangible form (genetic material) and genes in their intangible forms (genetic information).” Thus, UNESCO maintained that it is the human genome that “underlies the fundamental unity of all members of the human family as well as the recognition of their inherent dignity and diversity” (7). References to human dignity, genetic identity, or genetic integrity are used to prohibit human reproductive cloning (7, 8), human germline intervention (9), and eugenics (8). For example, human reproductive cloning is deemed to be incompatible with human dignity under the 2005 UN Declaration on Human Cloning (10) or even as a crime against the human species (3).

The vast diversity of human genomes means there is no single “human genome” but billions of them, to say nothing of the billions belonging to the deceased. Their overlap with the genomes of clearly nonhuman organisms creates another problem, as does their vast overlap with, and substantial contribution from, our extinct cousins, Neanderthals and Denisovans. “The human genome” is made still more problematic by the possibility of humans carrying genetic variations never before seen in our species, either from editing or from natural mutation. Genomes change with every human generation. In short, there is no defined “human genome” that can be used as an easy way to determine humanity.

Species Identity

Humans are biological organisms on an evolutionary continuum, in the same biological kingdom as other animals, and science shows that we share the vast majority of the human genome with other clearly nonhuman species. But new research techniques, such as xenotransplantation and human/nonhuman chimeras, challenge the animal-human species divide and that of “human life” with its broad spectrum as opposed to living, natural persons with legally recognized rights and obligations. The creation of chimeric embryos by introducing human stem cells to animal embryos often falls between the gaps of the relevant human and animal legislation (11). The status, and rights, of some nonhuman animals with no human cells continues to be contested. A U.S. court recently rejected an effort to extend the writ of habeas corpus to chimpanzees, thus allowing for their continued imprisonment, although not without an interesting separate opinion discussing their “human” qualities (12). Merely considering animals “things” in law may be falling out of favor [for example, (13)].

Neuro Identity

Is it the brain then that defines “human”? The size and complexity of the human brain distinguishes it from those of other species. However, similar to the case of consciousness, we include individuals with cephalic disorders, including anencephaly, in the human family. Initial legal recognition of brain death allowed the law to keep pace with accepted medical standards. Now, there is evidence of some false positives, in which “noncritical” brain functions continue despite the individual being considered dead. We may have gone from a situation before the adoption of the brain death standards in which it was possible to be biologically dead but legally alive, to one of being biologically alive but legally dead. And what should we do with human neural organoids or large portions of ex vivo human brains that are kept “active”? What about the great apes, dolphins, and other nonhumans with impressive cognitive capacities?

The boundaries between enhancement and therapy, of human and cyborg, also present legal issues. Freedom of conscience and of thought, some of the oldest concepts to be protected through human rights, may need to be reworked in response to neuroenhancements. The right to self-determination may need to be extended and articulated through a right to use, or to refuse, neuroenhancements (14).

Cells and Tissues

Whereas regulatory oversight and approvals govern the classification and distribution of drugs and devices and provide transparent public gateways to the market, the demarcations regarding human tissues and cells are increasingly fluid, and public safety is at stake. The United States, Europe, and Japan all take importantly different approaches to medical uses of cell therapies. In order to exercise jurisdiction over and regulate autologous stem cells therapies and their use in rogue clinics, the U.S. Food and Drug Administration classified such cells as “drugs” (15). Similar legal contortions will no doubt occur in the future as bioengineered therapies will be considered products or devices, depending on their inclusion of human cells.

Parties the world over also continue to dispute questions of rights in cells or tissues that clearly were once part of a legal person or—in the case of frozen embryos, sperm, or eggs—things that might in the future give rise to a legally recognized person. To date, court decisions hover between classifying such cells and tissues as either property or potential persons, often looking to how the parties themselves understood the cells and tissues. Sometimes, the disputes are determined through the law of persons, seeing the tissues and cells as an extension of the (human) self. Or yet still, destruction of stored cells and tissues may be required under environmental protection law because they are considered to be medical waste.

Moving Forward

Against this movable feast of “human” rights and biological developments, do the classical legal boundaries still matter, and if so, why? Altering the legal meaning of “human” ultimately affects the foundation for all human rights. Between legal classifications of biomedical waste and legal obligations to future generations, both the certainty that law provides in human interaction and the content of the concomitant duties and freedoms it accords are at stake.

“Hominum causa omne jus constitutum est” (“All law is created for the sake of men”) is a maxim from Roman law and is the origin of most legal systems the world over. It epitomizes the relationship between “man” and law. Uncertain boundaries can lead to unintended and untoward legal consequences, which only intensify when one considers the effect of judicial decisions. A new classification has the potential to affect and bind all future parties while unsettling the past. Irrespective, classical dualisms continue to serve as frameworks for legal determinations in most specific contexts. Courts, scientists, and physicians continue to be creative in their interpretations of emerging biotechnologies and in the imposition of necessary limits across the dualisms. Regions of the world with different cultural values concerning the beginning or end of life or on the use of tissues and cells still remain subject to the international umbrella filter of “human” rights. Our traditional approaches to this may not be badly out of date, but they need to be applied flexibly. So, what can we suggest as a way forward?

We care about living organisms that are human in their characteristics, but they do not always need to have exactly human characteristics. “Human beings” typically have two arms and two legs, but we recognize as human those without all those limbs, through amputation or congenital condition, as well as people with artificial limbs. Possession of a “human genome” is part of being a legal natural person, but we need to recognize both that a genome is neither in itself sufficient (a human lymphocyte is not a legal person) nor, in exact detail, necessary. Like the body, the genome needs only to be “substantially” human. Unusual or rare variations are not disqualifying in themselves but form part of the decision. The same is true of humans with some tissue from nonhuman organisms or some mechanical implants. It is also true of nonhuman organisms with some human tissues or DNA; a mouse with a human immune system should not be seen as substantially human or a natural legal person. Similarly, some version of “substantially” could be applied to definitions of brain death, not to require some kind of “higher brain death” rule but to avoid complexity when small bits of living brain, either in vivo or in vitro, are used to assert that the legal natural person still lives.

What constitutes “substantially” in these contexts will not be measurable by percentages or similar specific tests but will be a judgment call—like many such legal terms, such as “unreasonable” or “best interests.” Using “substantially” will not provide an exact answer but will give the decision-maker ( judge, jury, or other) some guidance, just as “beyond a reasonable doubt” says something more than “preponderance of the evidence” when considering the burden of proof and “reckless” means something beyond “negligent” when considering culpability for injuries. For the most part, this should be possible in the interpretation of the meaning of the word “human,” without requiring new legislation. As a result, its application may vary from judge to judge and culture to culture while still, as a concept, providing some useful guidance.

The other big question is when we treat molecules, cells, tissues, organs, or bodies as “human” in terms of deserving respect. Again, “substantially” might be a useful part of the definition. Additional consideration may include whether the body part was ever a part of a natural legal person. If a kidney grew in a natural legal person, that argues for it being “human” even if it had a very odd morphology, function, or even genome. A kidney grown totally in a laboratory, even if a fully human kidney, may not deserve respect if it was never inside or “part of” a natural legal person. But a kidney from a pig, genetically modified to function in a human, might not be viewed as “human tissue” while in the pig but be so viewed if it had functioned inside a natural legal person for years.

We have attempted to address the classical legal dualisms defining “human,” an approach that may be useful to the law, at least until our cultures arrive at better ways of understanding and approaching these new realities. Rules that include the word “substantially” are never fully satisfying. Nevertheless, in a universe where things blend into each other and living organisms are not cleanly divided into Platonic natural kinds, they may be the best filter we can apply: a malleable term for contextual and proportionate evaluation. “Substantial” is already a term in, inter alia, copyright and data protection law and therefore is an analytic tool the law already possesses. Such rules here will no doubt still lead to close or contested decisions—how to treat a SHEEF for example—but we believe that more frequently they can lead to results that we are (substantially) comfortable with while still preserving the core of our legal dualisms. In practice, our human families do not always meet exact definitions with perfect edges, but we can see substantial connections among them. On the spectrum from living cell to organism to human being, with all their new biotechnological variations, to a natural, legal person (alive or dead), perhaps the concept of membership in the hazily bordered human family can serve as a useful source for the delimitation of the “human.”

#### Human-Animal Chimera technology is improving and is blurring the lines of legal personhood. Expanding the range of beings able to claim constitutional protections is key.

D. Scott Bennett 6, J.D., Emory University School of Law, Atlanta, Georgia (2006); B.A., Duke University, Durham, North Carolina (2002), “Chimera and the Continuum of Humanity: Erasing the Line of Constitutional Personhood,” 55 Emory L.J. 347, 2006, WestLaw

V. A Proposal for Determining When a Human-Animal Chimera Is a Constitutional Person

The production of morally questionable human-animal chimera is becoming a reality, and a legal framework is needed that could grant constitutional protections to chimera by overcoming the personhood obstacle.239 While several legal commentators have flatly rejected the concept that chimera could qualify as persons under the Constitution, this view is overly formalistic and shortsighted.240 It is now scientifically possible to create chimera in which the majority of the cells, including the brain cells, are human rather than animal.241 It is also possible to create chimera in which the vast majority of the nervous tissue is human, even when the total number of human cells is less than fifty percent.242 Researchers could also create chimera by combining humans with closely related, intelligent apes such as chimpanzees.243 Fears that such chimera will exhibit human cognitive abilities are not unfounded; previous animal-animal chimera research has shown that complex behaviors can be transferred across species lines.244 Thus, a chimera with a significant amount of human nervous cells may well exhibit human intellectual and behavioral traits.245

\*380 As an extreme example of the error in totally rejecting chimera personhood, the technical definition of chimera includes humans who have received medical implants derived from animals, such as pig heart valves.246 Regardless of their opinions of his politics, most people would unquestionably consider Senator Jesse Helms a “person,” but strictly speaking Helms is a human-animal chimera because he has a surgically implanted pig heart valve.247 A drop of animal does not an animal make.248 At some point, chimera must qualify as persons under the Constitution.249 To conclude otherwise would necessitate an overly formalistic definition of person. Therefore, it is important to have a flexible analytical framework based on essential human biological and cognitive traits in order to decipher the personhood of questionable human-animal chimera.250 The development of such a framework is desirable so that courts will not be wholly unprepared to address the issues of chimera.251

A. The Essential Factors of Constitutional Personhood

Paralleling the moral rights discussion in Part IV, two distinct but interrelated approaches to chimera personhood have been suggested. The first approach to chimera personhood focuses on biological material because “[i]t cannot reasonably be disputed that an essential part of the definition of Homo \*381 [s]apiens is genetically determined.”252 This approach might lead to a definition of personhood based on percentages; for example, a chimera with more than fifty percent human cells qualifies as a person.253 However, this approach overlooks the moral and legal significance of cognitive factors and runs the risk of being overly formalistic.254 The second approach is based on cognitive traits such as intelligence, rationality, and emotional capacity.255 From the discussion of legal death in Part III.B.2 and cognitive morality in Part IV.A.2, it is clear that cognitive function is critical in defining legal personhood. The major theoretical difficulty with such a cognitive approach to personhood is that, if this were the sole test for constitutional personhood, it might exclude newborns, certain mentally handicapped individuals, and the comatose, while including intelligent animals or computers.256 The cognitive approach also has practical difficulties when applied to chimera because it may not be clear how sentient or intelligent a human-animal chimera will be until it has been produced and raised.

By combining cognitive approaches with a human biological requirement, it becomes much easier to include all humans, exclude animals and artificial intelligence, and focus the inquiry on chimera.257 The foremost indicators of constitutional personhood should be the capacity for higher-level human cognition combined with a significant percentage of human tissue. Human neural cells represent the most crucial human tissue because they affect cognitive capacity; thus the percentage of these cells is of primary importance.258 Addressing moral rights theories, the focus on cognitive ability responds to cognitive rights philosophies and utilitarian principles of interest \*382 maximization,259 while the biological requirement recognizes biological morality and the Kantian principle that there is inherent value in human life.260

B. The Flaw in a Dichotomous Approach to Constitutional Personhood

While it is incorrect to assert that chimera are never persons under the Constitution, it is also incorrect to claim, as most commentators do, that there is a distinct, identifiable point at which a chimera shifts from being a nonperson to being a person.261 Regardless of their view on chimera personhood, most commentators presume that personhood must be an either/or proposition.262 As an example of a dichotomous approach to personhood in the context of biotechnology, it has been proposed that “all and only species that are characterized by a capacity for [self-awareness] must be considered constitutional persons.”263 This is an example of a reasonably flexible, cognitive approach to personhood that could include chimera exhibiting a fundamental trait of human cognition, self-awareness, or sentience.264 However, this analysis presupposes an identifiable point at which constitutional personhood kicks in.265

The line of demarcation between human and animal is being erased by chimera technology; what remains is a continuum with pure humans on one end, pure animals on the other, and various forms of chimera in between. Scientists can alter where their creations fall.266 Thus, a bright line rule of personhood is no longer appropriate.267 The goal should not be to draw an \*383 arbitrary line between person and nonperson, but instead to grant constitutional protections proportionate to the critical human characteristics of a human-animal chimera. Therefore, this Comment proposes a reconceptualization of personhood that more accurately reflects the realties of modern biotechnology: a sliding scale of constitutional personhood. Under this approach, chimera with different critical human characteristics will qualify for different categories of constitutional protection. The fundamental characteristics of personhood are the higher-level human cognitive traits and the possession of crucial human biological tissue.268

The granting of partial constitutional rights is not unheard of; the Supreme Court already grants less than full constitutional protection to certain types of humans, including children,269 prisoners,270 and noncitizen aliens.271 An analogous break from the traditionally rigid concept of constitutional personhood has also been alluded to in the human embryo context.272

\*384 C. The Categories of Human-Animal Chimera

This section will suggest four loose categories of chimera personhood to guide in the application of chimera personhood.273 A sliding scale approach should not limit the constitutional rights of chimera that are fundamentally human simply because they have a “drop of animal” in them.274 Therefore, the first category of chimera includes nominal chimera that are so clearly human that no further inquiry is warranted. Persons with xenotransplants, such as Senator Helms, exemplify this category.275

The second category falls at the other end of the human-animal chimera continuum and includes chimera with only small percentages of human cells and no human nervous tissue.276 Such chimera should not be defined as constitutional persons. An example of this category would be a chimera in which the only human cells are limited to one organ, such as a kidney or liver, or tissue to be used for human transplantation or research. The utility of using chimera with small amounts of human cells and no potential for human cognitive traits such as intelligence, sentience, or emotions in research substantially outweighs any moral arguments in favor of granting them constitutional rights.277 This second category of chimera may still be protected by legislative action, but they should not be covered by the Constitution.

The third category of chimera includes those with a substantial percentage of human neural cells that have the capacity for higher-level human cognition. Chimera in this category should initially be granted full constitutional rights as persons, and the category should be interpreted broadly.278 Examples of a category three organism would be a human-pig chimera with a significant amount of pig tissue but a one hundred percent human nervous system or a human-chimpanzee chimera. These differ from category one in that the protections offered these chimera may be limited if it becomes clear that they \*385 do not and will not actually exhibit significant human cognitive traits.279 A limitation based on such a showing could place such chimera in category four.

The fourth category includes two types of constitutionally ambiguous chimera: (1) chimera with a non-insignificant percentage of human neural cells that may demonstrate limited human cognitive ability and (2) chimera with insignificant human neural cells but a high total percentage of human cells.280 Because a bright line of personhood is inadequate, this category of chimera should be afforded limited constitutional personhood in proportion to their place along the human-animal continuum.281 This category includes creatures that do not have a significant potential for human intelligence, sentience, or emotions but are too biologically similar to humanity to be written off as mere animals.282 These creatures would have only a limited capacity to appreciate constitutional rights so, taking guidance from the hybrid moral utility theories presented in Part IV.B.3, the extent of the rights afforded them may be limited but not eliminated.283 If chimera in this category were to exhibit higher-level human cognitive traits, they could be moved into the third category and granted full constitutional protection.

The goal of this Comment is to address the threshold question of personhood in order to open the door for the application of the Constitution to chimera. This Comment does not attempt to analyze exactly how various constitutional provisions apply to the patentability, production, or research use \*386 of chimera.284 This is left to the courts and Congress to determine.285 As a cursory overview, however, it is clear that the Reconstruction amendments would play a central role. Various levels of protection against undue pain and frivolous use of chimera in research seem likely under both the Thirteenth286 and Fourteenth Amendments.287 The Constitution may also bar the patenting of chimera.288 In addition, it has been argued that the mere act of producing chimera may be unconstitutional.289

Conclusion

For the protections of the Constitution to apply, an organism must be a “constitutional person.” However, human-animal chimera technology is straining the dichotomous constitutional personhood construct beyond the breaking point. This is because the line between humans and nonhumans, the bedrock of constitutional personhood, is being rendered obsolete. Scientists will soon be able to create chimera possessing any ratio of human to animal they please, leaving only a continuum of humanity. We must be open to some form of chimera personhood. Because it is too arbitrary to simply draw a line in the sand dividing chimeric persons from nonperson chimera, the traditional dichotomous concept of constitutional personhood should be replaced with a more flexible approach, bringing more beings under the constitutional \*387 umbrella. To do this, different categories of chimera should be afforded differing levels of protection in relation to the fundamental characteristics of humanity that they possess. Those fundamental characteristics are higher-level human cognitive traits and the possession of crucial human biological tissues.

### AFF Area---Cerebral Organoids

#### There is a thing called human cerebral organoids. This is a reprogrammed clump of brain cells that has been cultivated in a petri dish and shows something resembling natural neural activity. There is a debate about whether these organoids are legal subjects.

Federico Gustavo Pizzetti 21, Professore ordinario di Istituzioni di diritto pubblico; Università degli Studi di Milano, “Embryos, Organoids and Robots: “legal subjects”? ,” BioLaw Journal, January 2021, https://air.unimi.it/retrieve/handle/2434/820147/1720592/FGPIZZETTI\_Organoids\_Biolaw.pdf

4. Cerebral organoids: a disputable legal status

Among the forefronts in biosciences and related technologies, there are the “organoids”: in particular, the human cerebral ones. That type of organoids is created by cultivation, in some Petri dishes, of pluripotent human cells. When nurtured, those cells start progressively to reproduce (even without vascularization) the structures typical of natural brain tissues, such as the neurons. As quickly as they are growing in labs, those cerebral organoids became more and more able to show even complex electrochemical activity, quite similar to natural patterns. Although they seem quite far from be reached the threshold of experiencing some form of “consciousness”, those organoids express rudimental “reactivity” to stimuli and are able to “process” simple “information” (e.g., to send electrical signals inand-out). Therefore, the debate on their moral and legal status have been opened22 .

As for the Italian legal framework, one must remember that, according to Art. 1 Act 578/1993, the legal death coincides with the irreversible termination of all the activities of the brain. The Italian Constitutional Court has evaluated that threshold as sufficient to admit the cease of the entire “legal person” because, according to the medical knowledge, when the whole brain is gone, the organic and coordinated unity of the body as an integrated system of anatomic parts it is lost forever23 .

Moving from that point of view, one may underline that even if the cerebral organoids have some “neuronal” activity of human type (like “mini-brains”), they should not be regarded in any case as “legal persons”. Indeed, they do not perform any activity of “coordination” and “integration” of an entire human person, which is the requisite identified in the human brain as a whole, by the Italian Constitutional Court, to determine when the “legal personhood” of the individual has terminated.

Nor those organoids might be considered “legal subjects” because they are made of human cells, trying to adapt to cerebral organoids the legal pattern adopted by the Article 1 Act 40/2004 and the case-law abovementioned for an embryonic cell. Indeed, the cerebral organoids are just simple portions of human reprogrammed tissue, in any case unable to self-develop into a full human being as, on the contrary, the embryonic cell is capable to do.

#### Technological strides are being made that make this more of a real debate than it has been in the past.

Andrea Lavazza & Federico Gustavo Pizzetti 20, Lavazza, a scholar of cognitive sciences and a philosopher, is a senior research fellow at Centro Universitario Internazionale, Arezzo; Pizzetti is Full Professor of Public Law at the University of Milan (Italy), where he also teaches Biolaw, “Human Cerebral Organoids as a New Legal and Ethical Challenge†,” Journal of Law and the Biosciences, vol. 7, no. 1, 07/25/2020, p. lsaa005

I. WHAT ARE HUMAN CEREBRAL ORGANOIDS?

Even if researchers had long been trying to move from 2D to 3D cellular cultures, the term “organoid” was not used in scientific literature until ten years ago1. After the first cases of partial or almost complete growth of some human organs, in 2013, scientists achieved the first three-dimensional culture of an aggregate of human nerve cells guided by the same biochemical process that leads to the formation of the brain during gestation2. Over a few years, the cerebral or brain organoids cultivated in different laboratories worldwide have started exhibiting an increasing number of characteristics typical of the human brain. This has attracted the attention not only of neuroscientists and those who could benefit from this discovery—specifically patients and companies active in the biomedical sector—but also of neuroethicists3. In this article, besides the ethical aspects of the research on human cerebral organoids (HCOs), we want to also consider the legal and juridical aspects that could soon open up in this regard.

In this section, we wish to provide a sufficiently detailed scientific description of what HCOs are. In fact, we believe that any legal and ethical discussion cannot be conducted without solid and specific factual information on the topic in question. In the case of human cerebral organoids, moreover, this information is even more necessary because they are the result of new and complex biomedical techniques, and some uncommon emerging features of laboratory-grown entities are precisely what require careful legal and ethical scrutiny. Those who are already familiar with organoid biology and the latest literature are welcome to quickly scroll through this section.

So, what is a brain organoid? “A human cerebral organoid is described as a group of cells that dynamically self-organize into structures containing different cell types that resemble some aspects of the fetal brain. Human brain organoids can be used to study early stages of neural development. Neurons in brain organoids can connect and make simplified, organized networks, eventually leading to the developmental steps that all human brains take”4. Or, to put it more briefly, “human brain organoids are stem cell-derived 3D tissues that self-assemble into organized structures that resemble the developing human brain”5.

Research on the so-called organoids involves pluripotent stem cells (embryonic stem cells and induced pluripotent stem cells) and organ-restricted adult stem cells. Its goal is to obtain three-dimensional models of tissues and organs both for disease modeling (thanks to HCOs it was possible to better understand how the congenital Zika syndrome acts on fetal neurodevelopment, while the first study by Lancaster was aimed at understanding microcephaly) and drug testing (it is possible to test both the toxicity and the effectiveness of new drugs)6. A future goal is to obtain portions of brain tissue that can replace (by transplantation) damaged parts of the brain in patients affected by trauma, strokes, or neurological diseases.

Organoids are therefore biological entities produced in vitro from stem cells whose differentiation can be oriented towards the typical organization (architecture and physiology) of a human adult organ within a specially prepared environment: usually Matrigel (a mixture of protein from mouse sarcomas) and an adequate scaffolding (made by 3D support matrices). They are placed in a specific broth and in special reactors and are “guided” in their cell differentiation and in their initial development from totipotent stem cells to nerve cells; their subsequent development is autonomous at different degrees based on specific culture. The term “organoid” comes from their being miniaturized and simplified versions of an organ, although often endowed with many of its structural and functional features.

Indeed, the goal for an organoid in a 3D in vitro culture is to “replicate not only the complexity of the cell types present in the organ and the processes of self-organization of the tissue, but also the main organization of the whole organ”7; as for cerebral organoids, they ought to replicate “the appearance of different brain regions”. The key aspects here are self-assembly and differentiation, which are the outcome of “instructive signaling cues given to the cells by the extracellular matrix (ECM), the medium, and also, once the 3D structure assembles, the cell types present in the organoids themselves”8.

Today the term “organoid” is used both for “the isolation and propagation of adult stem cell niches in 3D and for the adoption of 3D culture conditions for the directed differentiation of pluripotent stem cell lines towards specific developing tissues”9. The organoids available today reproduce the retina, intestine, kidney, pancreas, liver, inner ear, thyroid, and so forth. But when it comes to ethical issues, the most relevant ones seem to involve brain organoids, which include cerebral organoids and region-specific organoids.

The seminal study in this field was carried out by Lancaster and colleagues, who started with human adult skin cells reprogrammed as induced pluripotent stem cells so as to create a brain organoid as a model for the study of microcephaly. The cells taken from a microcephaly patient were used to form cerebral organoids with characteristics similar to those of the patient’s brain. Then, thanks to the identification of a defective protein that is supposed to be related to microcephaly, the researchers replaced it by creating organoids that seemed to be at least partially protected from microcephaly. The study by Lancaster and colleagues has shown distinct and interdependent brain regions with interneural connections and a high level of similarity on a cellular level10. In the research, organoids of about 4 mm replicated in vitro the development in vivo at least up to the late mid-fetal period (19–24 weeks of gestation), with differences in gene expression.

Another successful study was conducted by Qian et al., who have obtained neurons corresponding to all six layers of the cerebral cortex, but without fully developed and stable synapses or circuitry11. A further issue, in addition to the underdevelopment of organoids, is the absence of blood vessels. In order to feed internal cells, Lancaster and colleagues encapsulated each organoid into a matrix of nutrients and immersed it in a nutrient bath while the organoids were rotated to assimilate as much food as possible. But, in general, organoids have a nucleus of cells that tend to rot in a short time due to lack of vascularization. Also, they are devoid of surrounding embryonic tissues, glial cells, meninges, and immune cells. Finally, organoid models are also limited by the great variability among organoids and by the absence of a predefined axis.

One way to achieve vascularization of brain organoids has been tested by implanting human cerebral organoids at an early stage of their development into an adult mouse brain. In this way, there was a “fusion” between the host tissues and the human brain organoid, which was able to develop functional neuronal networks and blood vessels in the grafts12.

Despite these difficulties, Lancaster and Knoblich have described a protocol for “generating 3D brain tissue (...) which closely mimics the endogenous developmental program. This method can easily be implemented in a standard tissue culture room, and can give rise to developing cerebral cortex, ventral telencephalon, choroid plexus, and retinal identities, among others, within 1-2 months”13. But there are also layers of cortex, the hippocampus (a crucial area for memory) and the spinal cord. And organoids, according to the authors, can be maintained for more than a year in long-term cultures. Along the same lines, Kelava and Lancaster claim that human pluripotent stem cells can be used to produce “organoids which faithfully recapitulate, on a cell-biological and gene expression level, the early period of human embryonic and fetal brain development”14.

In this vein, Birey and colleagues have produced “three-dimensional spheroids from human pluripotent stem cells that resemble either the dorsal or ventral forebrain and contain cortical glutamatergic or GABAergic neurons”, thus recapitulating the saltatory migration of interneurons in the fetal forebrain. They also showed that after migration, interneurons functionally integrate with glutamatergic neurons to form a microphysiological system15. And “spheroids cells were remarkably similar to those from corresponding regions of the human fetal brain”, with “both excitatory and inhibitory neuronal activity”16.

Although brain organoids still have strong limitations in terms of reproducing an in vivo brain in vitro, attempts are being made to solve the so-called plumbing and scaffolding problems, that is, how to bring oxygen and nutrients (so as to keep the cells alive) and grow organoids beyond the current millimeter scale. However, it is not to be forgotten that the in vivo organs dynamically develop their final form through growth, reorganization, and differentiation of cellular material, which are genetically regulated and in turn regulate themselves epigenetically, depending on the biochemical signals they receive from their surroundings, the activation or deactivation of specific genes. Thus, the so-called mini-brains that grow in vitro, isolated from a complete embryo and without interaction with the environment, may not be able to fully develop as happens in vivo.

Indeed, since the breakthrough of the first study by Lancaster and colleagues, there has been rapid and considerable progress in the attempt to create HCOs capable of recapitulating the characteristics of the brain; even if, as mentioned, there are still strong limitations, including the absence of vascularization which makes it impossible to nourish the central layers of cerebral organoids17. Nevertheless, some important features of the nervous system have recently been observed in brain organoids. HCOs manifest specific and autonomous electrical activity (i.e. communication between neurons) and are sensitive to light stimulation18 and capable to connect to a spinal cord by sending nerve impulses that make a muscle contract19.

A recent study demonstrates for the first time that cortical organoids generated from induced pluripotent stem cells can spontaneously develop periodic and regular oscillatory network electrical activity, which resembles the EEG patterns of preterm babies. This means that, even in the absence of external or subcortical inputs, ten-month-old HCOs can develop according to a specific genetic program, like all human beings, and manifest a complex brain activity. “The spontaneous network formation displayed periodic and regular oscillatory events that were dependent on glutamatergic and GABAergic signaling”20. The firing rate, up to two or three per second, and the kind of waves—gamma, alpha, and delta waves—are all a hallmark of a vital human brain. Indeed, a machine-learned model based on a preterm newborn’s EEG features was able to predict the organoid culture’s age based on the electrical activity of the organoid itself.

These are extremely significant steps forward as regards the functionality exhibited by cerebral organoids. It could therefore be deduced that HCOs have the minimum organic capacities to use receptors and effectors and to process the received stimuli and the feedback of the impulses sent, even if this does not mean that this basic processing might take the form of a rudimentary consciousness. Indeed, the judgment of neuroscientists working with cerebral organoids seems to be skeptic about the possibility that current (and future) HCOs are capable to develop a minimal mental life21. However, we still know too little about the mechanisms that trigger human consciousness and about the sentience of many nonhuman species to be able to make univocal scientific statements in one direction or another.

On the one hand, for now, HCOs do not grow beyond a very small size compared to an adult human brain; unlike the latter, they lack spatial organization, differ in the number, complexity, and maturity of neurons, do not have the organic feedback typical of an entire organism and do not have any input and output exchange with an external environment. On the other hand, as said, HCOs possess the ability to react to sensory inputs. Also, whole-brain organoids (the only ones dealt with here, as opposed to brain organoids that aim to reconstruct only specific portions of the brain, such as the forebrain or cerebellum) show an electrical activity that is very similar to that of a preterm infant’s brain.

Recently, laboratory-cultivated models of the cerebral cortex have exhibited a synchronized neural activity, which is a hallmark of the main brain functions, including memory22. Also, the HCOs’ neurons fire spontaneously, indicating that even this type of nerve cells grown in vitro show the typical activity of human neurons, allowing for the development and creation of new connections.

All this can raise ethical issues that prima facie deal with the possibility of creating sentient entities of human origin that could have a moral status. But before addressing this issue, which has already been the subject of some reflections23, we want to consider some legal aspects that may instead be completely unprecedented.

#### This area seems to get dumpstered by the regs CP.

Andrea Lavazza & Federico Gustavo Pizzetti 20, Lavazza, a scholar of cognitive sciences and a philosopher, is a senior research fellow at Centro Universitario Internazionale, Arezzo; Pizzetti is Full Professor of Public Law at the University of Milan (Italy), where he also teaches Biolaw, “Human Cerebral Organoids as a New Legal and Ethical Challenge†,” Journal of Law and the Biosciences, vol. 7, no. 1, 07/25/2020, p. lsaa005

II. FROM THE LAB TO THE COURT: A HYPOTHETICAL LEGAL SCENARIO

As we have seen, ethical issues concerning HCOs are already on the agenda. The rapid progress of the research could lead, in a relatively short time, to the creation of human cerebral organoids that have a larger size than the current ones, are connected both to sensory receptors and to organic (muscle) or artificial effectors, and manifest a coordinated electrical activity quite similar to that of a newborn’s brain, despite the morphological and functional differences mentioned. This being the case, one can hypothesize a scenario that, as we shall see shortly, is certainly imaginative but can be used to introduce very relevant legal issues.

We are aware that discussing the following scenario paradoxically brings us closer to its realization, both because it constitutes a possible suggestion for those who wish to implement it, and because the argument we develop gives plausibility to the issues raised. However, we believe that it is the task of biomedical ethics—and specifically neuroethics in the case in question—to address potential ethical concerns even before the research makes them urgent, if the expected findings are relevant both in themselves and in terms of their impact on society24. Yet, discussing potential risks or suggesting caution in conduct does not mean damaging the research or hindering its benefits. In fact, if there are no particularly strong concerns or objections and if the research is carried out according to shared ethical rules of nonmaleficence, beneficence, justice, and autonomy of the subjects involved, one should not introduce obstacles related to prejudice or to preference for the status quo. But this does not exclude that research on HCOs may have potential consequences that have not been sufficiently considered or completely overlooked and that deserve further in-depth evaluation, as we’ll explain below.

So, let’s come to the hypothetical scenario. Consider a neurobiology laboratory where brain organoids are grown with all the characteristics listed above: as said, the goal of the research is to make them more and more similar to a typical human brain. Indeed, one may well think that a human cerebral organoid shares some relevant features with a human being and cannot be treated as simple lump of biological material. Now, imagine that a researcher questioned the ethical correctness of such practices, on grounds that the brains thus created might have a glimpse of sentience (understood as the minimal degree of consciousness, i.e. the ability to experience basic phenomenal states such as pain and other sensations related to physical homeostasis, such as lack of vital resources)25. This researcher, unable to raise the case inside the laboratory, could go to the local police department or directly to the relevant judicial authority and report the fact that destructive experiments are being carried out on quasi-brains grown in a dish from human tissues.

Such a situation should be considered as totally new and unprecedented. Therefore, it is difficult to foresee the legal framework in which it would be dealt with. Probably in every country, there would be a somehow different procedure for filing such a complaint. In fact, one should wonder in what legislative framework this “complaint” should be placed. Would there be the conditions for some judicial intervention? The fact that brain death has become the criterion to establish a person’s death seems to entail that the brain is the central and (perhaps) identifying organic element of the person also in a legal sense. So, does the existence of human cerebral organoids have any implications about the legal definitions of the beginning and end of life? And if it were established that organoids do have a minimum level of sentience, or that they can experience pain as some animals do, would this have some legal significance?

Potential answers to such highly problematic and sophisticated questions need to consider the current legal framework. In this sense, to answer the question whether there should be some special protection for human brain organoids, broadly understood as vital biological structures of human origin cultivated in vitro, we believe that it is useful to discuss how the Italian system (and also the European system, as a superordinate) might address the legal status of human cerebral organoids (albeit with the specificity of each individual legal system). So, on the basis of our specific knowledge of the Italian legal system, which is traditionally very “protective” of human life and is considered rather conservative in terms of bioethics, we will now carry out an analysis of how the Italian law could address the scenario hypothesized above. We will do so in the belief that, despite some secondary differences, the Italian and European legislations and the related jurisprudence can be seen as illustrative of most legal systems of the Western world and also of several countries of other legal traditions.

In Italy, as in the rest of Europe (as well as in the U.S.26, with the exemption of New Jersey27), legal death coincides with the irreversible termination of all the activities of the brain (Article 1 of the L. n. 578/1993 (It.))28. As the Italian Constitutional Court stated, that criterion should be respectful of both the popular sentiment and the scientific framework, in compliance with the constitutional principles29. Now, to be coherent with the fundamental constitutional principles, the legal death criterion chosen by the law must be (in general) respectful of life, unique, robust in its irreversibility, and referred to the extinction of the person as a whole30.

In fact, it would go against the essential content of human dignity to have a legal discipline that reduces the human being to one of its constituent parts instead of the whole that ontologically characterizes it, if that part does not perform any essential and irreplaceable function of integration of the different organs and tissues in a “coordinated whole”. On the other hand, however, it cannot be permitted to keep a body in an intensive care unit if this body is only a set of isolated anatomical parts, kept in operation by machines, without any possibility of restoring the systemic unity that creates the person. Such “ad infinitum” deferment of the funeral, in fact, would trample the dignity of the deceased, preventing the body to reach the peace of the cemetery at the end of life. Moreover, waiting too long will hinder the possibility of transplanting the organs and tissue “ex mortuo”, before necrosis, thus affecting the principle of social solidarity, which underlies the promotion and development of transplantation medicine.

In the light of what is assured by current scientific medical acquisitions, the irreversible loss of brain function—as the Italian Constitutional Court affirms—guarantees that the organic unity of the body as an integrated system of anatomic parts is lost forever31. Of course, the disappearance of legal personhood after brain death does not mean that the corpse should be considered a simple “object,” deprived of dignity and legal protection. In fact, the corpse and its parts cannot be traded or disposed of as waste and shall be preserved carefully in cemeteries by inhumation, which is specifically regulated by mortuary rules (D.P.R. n. 285/1990 (It.))32. Moreover, the abuse of a corpse (even in cases of stillbirth, if the fetus has a “human figure”33), or the destruction, suppression or hiding of a dead body34, or else the use of a cadaver for scientific experiments or teaching without the regular permission are crimes punished by the law (articles 410-413 C.p. (It.)). Now, given that the brain and its complete and irreversible switch-off play a paramount role in ascertaining legal death—that is the extinction of a human legal person, the holder of dignity, rights, and duties—one may be tempted to use the same criterion with human cerebral organoids.

From this point of view, given that there is no specific law that regulates organoids, one may argue as follows. Since the human cerebral organoid presents some neuronal activity, and therefore is not dead according to the brain death criterion used for legal subjects, destroying that organoid would imply to breach the dignity and the rights—first and foremost the right to life—of a legal entity. This argument, however, does not seem robust enough from a legal perspective. In fact, as mentioned, the Italian Constitutional Court plainly affirms that the end point of a “legal person” is only reached with the irreversible loss of an organ which is able “per se” to “coordinate” and “integrate” in an organic “unity” all the several and different parts of the “entire human organism”35.

Human cerebral organoids do not seem to perform any activity of “coordination” and “integration” of an entire human person. As said before, in fact, those organoids are the result of reengineered adult stem cells and are genetically reprogrammed to “recreate” only pieces of neuronal tissues in a Petri dish—not an entire human being. Moreover, the organoids are by no means “embodied parts” of a complete human body, nor do they function as factors useful for maintaining the “systemic unity” of the several physical apparatuses of a real human being. Now, one may argue that, in a (remote?) future, cerebral organoids may develop enough as to generate patterns of sophisticated “mental” activity, and might also be connected to some other human bodily components (similar to the embodied human brain)36. But, even in this futuristic hypothesis, it remains highly questionable and rebuttable if those organoids will be legally equivalent to the human brain in the light of the current (Italian) normative provisions about human legal subjectivity and human legal personhood.

In fact, from a legal point of view, the application of the brain criterion to identify human death presupposes—of course—the legal existence of a human being (body and mind), who was once alive. According to article 1 of the Italian Civil Code, legal personhood starts with birth, i.e. with the complete detachment of the newborn from the mother’s womb (if the baby shows at least one vital sign). Moreover, according to L. n. 40/200437, the embryo, despite not being “born” yet, is nevertheless also a “legal subject” (though not a legal person)38: it is vested with human nature and dignity, and therefore holds the rights to life, health, and development.

The Italian and European case-law39 specify that an embryo should be considered a “human subject”, and not merely a “possess”, if (and only if) it contains the “origin of human life”, which means that it must have the “intrinsic” ability to self-develop into a human being40. It can be said that a human cerebral organoid is a never-born entity: an HCO, in fact, was not born from a womb, and is also profoundly different from a human embryo. The cerebral organoid, in fact, is the product of sophisticated genetic techniques on adult (and not embryonal) stem cells, which does not show any aptitude to self-develop into a complete human being. As a conclusion, cerebral organoids cannot be considered, under any legal circumstances, as “subjects” or, a fortiori, as “persons.”

Therefore, the destruction of cerebral organoids should not be regarded as the suppression of “someone” (a legal “subject” or a legal “person”: “homo/persona”). Rather, it shall be legally evaluated as the destruction of “something” (a legal object: “res”)—i.e. biological material. Incidentally, it may be also noted that a cerebral organoid cannot be treated as the result of human reproductive cloning. So, manipulating organoids is not forbidden under article 3, section 2, letter d) EUCFR and under article 1 of the Additional Protocol to the European Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings.

HCOs share the same nuclear genetic set as an individual whose cells have been taken to be reduced at a staminal level. But they are the product of a manipulative technique, which does not end in the creation of a human being, genetically identical to the “original” cloned. The result, in fact, is “only” the development of a portion of (neuronal) tissue (we assume here that the rules governing donation, informed consent, conservation of biological material, and any intellectual property rights, which are not the focus of our discussion, are respected.)

All this being said, however, the law should deal with the development of human cerebral organoids, especially if they are to become, in the future, sophisticated sentient entities (and even more so if they are to acquire some conscious capabilities). As is well known, in fact, the law (in Italy and elsewhere) currently protects animals—which are living but not human entities, and which do not have legal personhood41—against torture, cruelty, severe suffering both in clinical and cosmetic trials (Dir. n. 2010/63/UE), and in everyday life (articles 544-ter and 727 C.p. (It.)). Further restrictions were introduced by the legislative decree (n. 26/2014). Such provisions reflect people’s general mercy (public feeling) towards living entities that may suffer distress (even if not consciously). But the same rules also protect the integrity and the well-being of animals (although animals are not the holders of rights because they do not have legal subjectivity42). From this point of view, therefore, it does not seem unreasonable to promulgate new rules for clinical trials to prevent “suffering” in human cerebral organoids, even if they are neither human legal subjects nor human legal person.

Those limitations should be justified on a double ground. On the one hand, banning the development and use of highly developed organoids is a way to protect the popular sentiment of mercy. Indeed, the public is likely to feel mercy (and to be scared) for those “quasi-brains” (developed cerebral organoids), so close to our brains as to have “human-like” feelings and emotions (and probably some form of blurred memories), living in laboratories and undergoing several experiments. That mercy, worthy of juridical appreciation, should prevent the realization of highly developed cerebral organoids, understood as entities able to generate “human-like” patterns and therefore to feel feelings in the above-mentioned conditions.

On the other hand, banning the development of highly sophisticated cerebral organoids will prevent those entities from severe suffering. Because the scientific and technological research for the promotion and safeguard of human health is a constitutional and European value (articles 9, 32 and 33 Cost. (It.); article 13 EUCFR; article 3 TUE; article 1 of the Convention on Human Rights and Biomedicine), the limitation should be reasonable and proportional. This means that the research on organoids and the development of cerebral organoids for health purposes (diagnosis, treatments) should not be impeded. The limitations should only apply to experiments aimed at “producing” highly developed and sophisticated brain organoids capable of mimicking human superior cognitive functions and human emotional feelings of pain and distress43.

### AFF Area---Fetuses

#### A simple ‘abortion bad’ AFF would not be viable for many reasons. It is clearly a bad idea and clearly too easy to restrict in ways that avoid NEG generics. There is a body of literature that takes the personhood concept at face value and takes it further, arguing that if fetal personhood is used to preclude abortion, it should also be used to create broader social obligations toward the fetus and the pregnant person. This might be possible under a highly expansive understanding of ‘eligibility… for the rights of legal personhood’ that includes rights kicking in under certain conditions---e.g., if fetal personhood is recognized to limit abortion, it should include broader rights consistent with this evidence. It may be wise for the wording committee to take this into account when crafting the object of the resolutional verb.

Helen M. Alvaré 20, Professor of Law, Antonin Scalia Law School at George Mason University (J.D., Cornell University; M.A., The Catholic University of America; B.S., Villanova University), “Personhood: Law, Common Sense, and Humane Opportunities,” 76 Wash. & Lee L. Rev. Online 99, 4/30/20, WestLaw

It is pointless to approach Professor Chatman's argument on its own terms (to wit, “tak[ing] our laws seriously,” or equal application across myriad legal categories of “full personhood” rights) because these terms are neither seriously intended nor legally comprehensible. Instead, her essay is intended to create the impression that legally protecting unborn human lives against abortion opens up a Pandora's box of legal complications so “ridiculous” and “far-fetched” that we should rather just leave things where they are under the federal Constitution post-Roe v. Wade1 and Planned Parenthood v. Casey.2 This impression, in turn, is a tool to forward Professor Chatman's personal preference for legal abortion--which she gives away by calling legal abortion by its political name: “the right to choose.”

But her arguments, sounding in law, about the alleged chaos to flow from a law protecting unborn human lives from abortion are false on the grounds of basic legal principles concerning federal constitutional and immigration law, as well as the legal principles underlying state legislation and statutory interpretation. I will set these legal principles out below before turning to the more interesting and legally plausible matter of whether or not lawmakers should choose to take into account both the needs of pregnant women and the humanity of unborn life when crafting laws affecting both, whether the situation involves immigration, incarceration, or women's need for financial support.

First, Professor Chatman's reading of federal constitutional law is erroneous. She suggests that a state law defining unborn human lives as persons would “tie our Constitution into a knot no \*100 court can untangle.”3 This cannot be true. The Supreme Court has the last word on the meaning of “person” for purposes of the Fourteenth Amendment's guarantee of “life” to persons. In Roe v. Wade, the Court determined that the unborn were not included.4 If state laws had the last word, then the Roe Court could not have overturned the dozens of state laws5 protecting unborn human lives against killing by abortion. But it did. Today, if states like Alabama and others legally define unborn humans as persons protected against death by abortion,6 either the Supreme Court will strike down the state's law as inconsistent with the Court's definitive reading of the Fourteenth Amendment, or it will overturn Roe v. Wade (and Planned Parenthood v. Casey) in order to let states again have the last word regarding the protection due unborn life, as they did pre-1973. In either event, the Constitution is not “tie[d] ... into a knot”; rather any constitutional issue will be interpreted by the Court, as per usual.7

\*101 Regarding immigration law, Professor Chatman states that “[i]n states that move the line to define life as beginning as early as conception, personhood and citizenship will begin as soon as a woman knows she is pregnant.”8 She also states that this would “creat[e] a system with two-tiered fetal citizenship.”9 But these statements make no sense. Despite some bold new scholarship on the possibility that states could determine “citizenship” separately from federal law,10 this proposal remains in the realm of theory; it is well known that citizenship is a matter governed by federal law. In the words of a recent article in the Stanford Law Review: “In many ways, the regulation of immigration is a quintessential federal function. Developing a uniform national scheme that dictates who may enter the United States, who must leave, and who may become a national citizen is a power exclusively reserved to the federal government.”11

Professor Chatman is also mistaken on a basic principle of legislative drafting and interpretation: state laws inevitably define the leading terms employed in a statute to apply only within the four corners of that statute. Of course, it is possible for a word to have the same meaning across statutes, but only if the relevant pieces of legislation say so. Commonly, however--and as done in the Alabama statute12 Professor Chatman derides--a statute says “As used in this act, the term X means such and such.” Thus, each statute defines its terms so as to serve the statute's precise object.

Innumerable state statutes use the language of “person” regarding innumerable rights and obligations, but each clearly confines the meaning to the statutory purpose at hand: for example, who can vote, who can enter into a contract, who can run for office, who can commit a crime, who can suffer certain crimes, etc. To give a highly relevant and specific example: today--when abortion must be legal everywhere, post-Roe--many states define unborn human beings as “persons” (whether or not eventually \*102 “born alive”) for purposes of both criminal homicide laws and/or wrongful death actions.13 But these laws have not been interpreted to protect unborn humans from being killed by abortion, despite their use of the language of personhood. Instead, such laws define “person” only for purposes of the law at hand, using language similar to that appearing in the recent Alabama abortion statute: “As used in this chapter, the following terms shall have the following meanings ....”14 This makes eminent sense in the present legal climate. Legislators know that abortion must be legal as long as Roe stands, but they may still want to pass a law to punish third parties responsible for killing the children of pregnant women who did not seek abortion. Or--to engage more of Professor Chatman's examples--legislators may want to protect unborn human beings from being killed via abortion, while understanding as a matter of common sense that unborn humans cannot separately obtain a trial or an arraignment. For matters of convenience and expense, the privacy concerns of pregnant women, or even because of the high rates of miscarriage,15 legislators might not want to extend Social Security or census laws to unborn lives. But at the very same time, a state might have such a high regard for human life at every stage that it would want to punish any deliberate, or even negligent, killing that goes against the mother's will.

Turning now to the legally plausible and more intrinsically interesting possibilities raised by Professor Chatman's editorial: should lawmakers choose to take the humanity of unborn life into \*103 account when crafting laws affecting not only mothers, but also their unborn offspring? I think the answer is a clear “yes,”--for reasons that might appeal both to those who take the label “pro-life” and “pro-choice.” Both women and children might benefit from such laws.

Many of the areas of law Professor Chatman identified--especially child support, incarceration, immigration, and tax law--while not legally affected by personhood definitions in any abortion ban, could be vehicles for assisting both pregnant women and their children, although this is not how Professor Chatman uses them. More than a few scholars have written on these subjects.

Regarding child support, for example--because pregnant women are in need of both tangible and intangible solidarity and support during pregnancy, and because fathers should take joint responsibility--why not implement “preglimony,” as suggested by law professor Shari Motro?16 And because a pregnant woman's environment will affect her unborn child's health, why not legally require attention to the health care needs of mother and child during incarceration?17 And because it would be beneficial to both \*104 the pregnant woman and the child to have the support of both of his or her parents both during the pregnancy and afterwards, why not take a woman's pregnancy into account in immigration--in favor of granting her rights to live in the United States--especially if the father resides here?18 And because having children is expensive and involves costs both during pregnancy and thereafter, why not grant tax breaks recognizing the dependency of a child even before he or she is born?19

\*105 None of these eminently humanitarian policies are required by an abortion ban that defines a “person” to include unborn human lives, but all would be morally consistent with such a piece of legislation. In an ideal world, whether an advocate labels herself “pro-choice” or “pro-life,” she would recommend consistently life-giving, family-friendly laws to benefit both women and their unborn daughters and sons. Professor Chatman missed this opportunity in her haste to portray Alabama-style legislation designed to protect unborn human life from abortion as irrational and impossible.

#### A narrow example pertains to fetal equality with respect to religious healing.

Shaakirrah R. Sanders 20, Professor of Law, University of Idaho College of Law, “Fetal Equality,” 76 Wash. & Lee L. Rev. Online 123, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1128&context=wlulr-online>

I join Carliss Chatman’s call to fully consider the equal protection implications of the conception theory and raise an additional right to which a fetus may be entitled as a matter of equal protection: health care, which implicates state laws that provide civil and criminal exemptions to parents who choose religious healing instead of medical care for their children and minor dependents. The evidence of harm to children from religious healing is well documented.1 Yet, currently, approximately forty-three U.S. states and the District of Columbia have some type of exemption to protect religious healing parents in civil and criminal cases.2

Religious healing is the belief that “prayer” or “spiritual means” rather than modern medicine can cure individuals. Criminal exemptions apply to prosecutions for murder and homicides, child abuse, child endangerment, child neglect, contributing to neglect or deprivation, criminal injury, cruelty, delinquency, failure to provide medical and surgical attention, failure to report suspected child neglect or abuse, manslaughter, nonsupport, and omission to provide for a child.3 Civil exemptions apply to claims for child abuse, child neglect, contributing to neglect, dependency proceedings, failure to provide medical care or adequate treatment, failure to report, maltreatment, negligence, nonsupport, and temporary or permanent termination proceedings.4

In Cruzan v. Director, Missouri Department of Health,5 the United States Supreme Court recognized the right to refuse medical treatment,6 but the question remains whether parents have the right to decline modern medicine for a fetus that suffers from a curable disease, illness, or injury. The Court has yet to analyze parental exemptions for religious healing. In 1968, the Court did affirm a federal district court’s finding that the failure to provide an exemption did not violate the Free Exercise Clause. 7 The Court’s one sentence affirmance provided no guidance to the state legislatures that would later adopt exemptions.8 Perhaps as a result, state courts have inconsistently ruled on exemptions.9

Several years ago, I joined family law scholar Robin Fretwell Wilson to examine parental exemptions for religious healing from the perspective of the substantive due process right to care, custody, and control of minor children.10 This co-authored work considered how parental decisions to discipline one’s child, like decisions to treat “by faith alone,” run deep in religious and cultural belief systems.11 This work also explored the limits of parental autonomy and showed that risks to children from corporal punishment are not as great as once feared, unlike the profound risks from faith healing.12

In a later work, I also hypothesized how exemptions for religious healing parents rely upon gaps in substantive due process and free exercise jurisprudence.13 Religious healing relates to parental rights as established in Meyer v. Nebraska14 and Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary.15 But Prince v. Massachusetts16 appears to limit parental autonomy to dictate a child’s religious training when such training threatens the health or safety of children.17 So too does Wisconsin v. Yoder,18 which affirmed substantive due process as a source of the right to religious childrearing and preserved the state’s ability to interfere when children are potentially harmed.19 Neither Meyer, Pierce, Prince nor Yoder involved parental rights to make medical decisions on behalf of a minor dependent, but this jurisprudence demonstrates how physical and psychological harm have traditionally provided a baseline for terminating or interrupting parental rights. Parental exemptions for religious healing also occupy space in the First Amendment’s Free Exercise Clause.20 Reynolds v. United States,21 Sherbert v. Verner,22 United States v. Seeger,23 and Employment Division, Department of Human Resources of Oregon v. Smith24 establish the necessity and scope of religious exemptions in the administrative context. None of this jurisprudence concerned an exemption for religious healing parents.

Exemptions for religious healing parents, like the issue of abortion, illustrates the “play in the joints”25 between “the private realm of family life” and the exercise of a state’s police powers to protect life.26 Religious healing parents have vexed state supreme courts for over a century,27 but have recently also exposed an inconsistency in some states’ approach to protecting life altogether. Starvation and malnourishment of children are commonly prosecuted.28 In one Idaho county alone, religious healing is suspected to have caused three child deaths in four months.29 County prosecutors have filed no charges related to those incidents.30

Should the conception theory extend beyond the abortion context, how does a religious healing state protect the “right to birth” when a parent chooses to forgo medical care for a fetus? Planned Parenthood of Southeastern Pennsylvania v. Casey31 identified the moment of conception as the start of the state’s compelling interest to protect life.32 In furtherance of their interest to protect life before birth, some religious healing states have imposed a multitude of regulations aimed toward those who seek to terminate a pregnancy33—a right that has been deemed constitutionally fundamental.34 At the same time, many religious healing states have declined to impose regulations to direct the behavior of religious healing parents, including those who are pregnant. Exemptions do not require religious healing parents to consult a doctor or obtain any information about fetal health. No exemption imposes a waiting period that delays the exercise of the choice to pursue religious healing of a fetus. Nor do exemptions regulate religious practitioners or the facilities that attempt to heal a fetus.

An analysis of the disparity between religious healing parents and parents who terminate a pregnancy may cause discomfort, but as Chatman demonstrates, such discomfort results from extending the conception theory beyond the abortion context. The fact remains that in many religious healing states, abortive pregnancies are heavily regulated, but religious healing pregnancies completely escape the state’s exercise of its parens patriae authority. The state declines to regulate even when the choice to forgo medical care prevents birth. If a fetus is a person, it should also get medical care in addition to support, due process, and citizenship.

### AFF Area---Gestatelings

#### Gestatelings have been ‘born’ and so should benefit from legal personhood. They are distinct from fetuses because they are being ‘grown’ independently of any other person and are thus in many ways not unlike a neonate on life support. However, this area seems to be solved by the ‘ban’ CP.

Daniel Rodger et al. 21, Allied Health Sciences, London South Bank University, School of Health and Social Care, “Gestaticide: Killing the Subject of the Artificial Womb,” Journal of Medical Ethics, vol. 47, no. 12, Institute of Medical Ethics, 12/01/2021, pp. e53–e53

INTRODUCTION

Development of artificial womb technology (AWT) and related technologies are rapidly progressing, generating new ethical challenges.1 2 The term gestateling has been coined by Elizabeth Chloe Romanis to describe the human subject of a period of ex utero artificial gestation—or ectogestation— thus distinguishing it from a fetus or preterm neonate.3 One pertinent question is whether it is permissible to end the life of a gestateling.i Here, we refer to the act of deliberately killing the gestateling as gestaticide. Gestaticide seems related to abortion and infanticide: each involves killing a human being during its early developmental stages. But, prima facie, gestaticide does not fit into either category. Here, we examine the comparative morality of induced abortion, infanticide and gestaticide. We defend two claims: first, that morally speaking, gestaticide is harder to justify than abortion. Second, that morally speaking, gestaticide is as hard to justify as infanticide.ii We show that if infanticide—particularly when carried out against developmentally immature neonates—is immoral, then gestaticide is immoral in the same way. If one wishes to defend the permissibility of gestaticide, therefore, one must accept the permissibility of infanticide in many cases. We end by considering implications for the (im)permissibility of withdrawing life-sustaining treatment from gestatelings.

Ectogestation will require a surgical procedure to transfer the fetus from the pregnant woman to an artificial womb (AW). It seems likely there will be instances of ectogestation where, at some point, the gestateling will no longer be wanted. The reasons women give for procuring abortions are multiple and diverse, and it is likely that similar reasons will be nominated for gestaticide. These might include financial stress, a change in relationship with a partner, illness, gestateling ill-health or disability, or another change in circumstances that means the gestateling is no longer desired.iii However, in such cases, gestaticide is not the only option available— the parents could choose to offer it up for adoption. For gestaticide to be considered, therefore, it must be that its parents do not wish for the gestateling to exist at all.iv When is it permissible to act on this wish? By comparing gestaticide to abortion and infanticide, we provide an answer.

GESTATICIDE IS HARDER TO JUSTIFY THAN ABORTION

There are significant moral differences between abortion and gestaticide. Suppose that fetuses and gestatelings of the same gestational ages have equivalent moral statuses, whether equivalent to the moral status of newborns or not.

First, arguments for abortion predicated on bodily autonomy or self-defence fail to justify gestaticide. The subject of abortion is a fetus, which is developing within a pregnant woman, while the subject of gestaticide is a gestateling, which resides within an AW and is completely independent from its biological parents. A pregnant woman gestating a fetus makes significant sacrifices with regard to bodily autonomy—the parents of a gestateling do not. Judith Jarvis Thomson argues that in many cases, the sacrifices of pregnancy entail there is no moral obligation for a woman to offer her body as a life support system for the fetus, and this implies abortion is permissible, even if the fetus is granted the moral status of a person.4 A gestateling’s life support, however, is provided by the AW it is contained within, not its parent’s body. So, even if Thomson’s argument provides some justification for abortion, it cannot justify gestaticide in the same way.

Second, AWT allows for an option other than death. Currently, abortions do not—the fetus invariably dies, even if the goal is to end pregnancy rather than kill the fetus. Supposing a gestateling has a moral status equivalent to that of an adult, it cannot be permissible to end its life—its right to life prohibits this. If we only grant the gestateling some moral status, it is less clear whether the gestateling’s life can be ended. Joona Räsänen, for example, argues that there is a right to the death of the gestateling once it is extracted from its parent.5 Räsänen predicates this on three other rights: the right not to be a genetic parent, the right to genetic privacy and property rights. Numerous philosophers have argued that Räsänen is unsuccessful in establishing a right to the death of the fetus whether AWT is viable or not.6–9 Importantly, Thomson herself argues that there is no right to the death of the fetus. Mary Anne Warren makes a similar point: if a pregnancy could be ended without killing the fetus then there is no right to the fetus’ death.[v ] 10

Because the parent’s bodily autonomy is not a consideration and there is no clear right to the death of the gestateling, therefore, it is considerably more difficult to justify gestaticide than it is to justify abortion. Justifications for abortion are either not relevant or lack the cogency and scope to also justify gestaticide.

GESTATICIDE AND INFANTICIDE

The arguments we developed above also imply that infanticide is harder to justify than abortion: a widely—but not universally— shared moral intuition. This does not automatically mean that gestaticide and infanticide are morally on a par, however. To compare them, we must examine two possibilities: first, that gestaticide is a form of infanticide, and second, that gestaticide is not infanticide, but something different.

GESTATICIDE IS INFANTICIDE

Nicholas Colgrove defends the view that gestaticide is a form of infanticide.11 12 Assuming current international standards of ‘live birth’ in legal and medical communities are correct, subjects of ectogestation—those that have been extracted from their mothers’ bodies and placed in an AW—have literally been born.[vi] 11 13–17 If so, then to kill a gestateling is to kill a neonate. Hence, gestaticide is a form of infanticide.

Even if gestaticide is a form of infanticide, however, that does not entail that it is as wrong—or as difficult to justify—as infanticide. Perhaps gestaticide is a morally ‘less bad’ species of infanticide because gestatelings are different from other neonates in morally relevant ways.[vii]

Romanis, and Kingma and Finn, for example, argue that gestatelings and neonates in the neonatal intensive care unit (NICU) are relevantly different because they function differently.18 19 According to Kingma and Finn, gestatelings exist ex utero, but function like fetuses, whereas neonates in the NICU exist ex utero and function like neonates. For Kingma and Finn, ‘fetuses and neonates do not just have different physiological but different physical characteristics.’19 Physically, fetuses have extra organs and structures that neonates do not—a placenta, umbilical cord and so on. Physiologically, fetuses and neonates differ in that ‘fetuses do not breathe but oxygenate their blood via the placenta,’ each possesses ‘a completely different cardiovascular set-up: the fetal heart functions as a single (rather than, in neonates, a double) pump and so on.’19 Let ‘fetal-function’ refer to relevant physical and physiological characteristics typical of fetuses, while ‘neonatal-function’ refers to relevant characteristics typical of neonates.[viii]

Gestatelings have not transitioned from fetal-function to neonatal-function. Is this difference enough to show that gestaticide is easier to justify than infanticide? No. After all, Kingma and Finn recognise that there are currently neonates in the NICU that have failed to transition from fetal-function to neonatal-function.19 In such cases, the ‘baby cannot, or struggles to, perform certain physiological requirements of babies that weren’t required for fetal physiology.’19 To insist that the transition from fetal-function to neonatal-function is so morally relevant as to justify gestaticide but not infanticide, one would have to accept that killing these neonates is easier to justify in the same way.[ix]

By Kingma and Finn’s account, neonates that have failed to make the relevant transition include many with ‘lung-problems, cardiac defects and so on.’19 This suggests that neonates who struggle to function as neonates—including many with congenital defects—are judged to be more justifiably killed than their healthy, term counterparts. This point becomes more apparent when considering the metaphysics in Kingma’s proposal more broadly. For her, fetuses are part of their mothers’ bodies.20 Hence, individuals that have failed to transition from fetusfunction to neonatal-function are comparable to ‘detached body part(s).’19 20 Thus, whether it is justifiable to ‘dispose’ of gestatelings and affected neonates raises similar questions to whether it is justifiable to dispose of one’s detached body parts (eg, gametes, blood and so on).[x ] 19

So, if gestaticide is infanticide, we are faced with two options. First: accept that gestaticide is as hard to justify as (standard cases of) infanticide. Alternatively, distinguish between gestatelings and (other) neonates in a way that explains why killing the former is easier to justify than the latter. A plausible way of doing so—as offered by Romanis, and Kingma and Finn—is to focus on the distinction between fetal-function and neonatalfunction.[xi] On that view, however, one must accept that killing many neonates with congenital anomalies and disabilities is more justifiable than killing ‘normally functioning’ neonates. This view is morally dubious.[xii] Reasons to reject those claims, therefore, are reasons to reject the claim that gestaticide is a ‘less bad’ species of infanticide. Romanis, and Kingma and Finn may object: gestaticide cannot be thought of as infanticide at all because gestatelings have not been born. 18 19 This raises the second possibility that gestaticide is not infanticide.

GESTATICIDE IS NOT INFANTICIDE

If gestaticide is not infanticide, then gestatelings have not been born. We begin by arguing that the reasons for thinking gestatelings have not been born are unpersuasive. Hence, gestaticide is infanticide. But suppose we are wrong and gestatelings really have not been born. If so, one must either accept that gestaticide is as hard to justify as infanticide or accept the morally dubious claim that it is more justifiable, morally speaking, to kill neonates with congenital anomalies than their ‘normally functioning’ counterparts. Whether gestatelings have been born or not, therefore, there are good reasons to conclude that gestaticide is as hard to justify as infanticide.

GESTATELINGS, ‘BIRTH’ AND METAMORPHOSIS

Why think that gestatelings have not been born? Romanis claims gestatelings are ‘born only in a geographical sense’ and so, have ‘not completed all of birth.’18 Kingma and Finn unpack Romanis’s claim, distinguishing between two events: the ‘born-bylocation-change’ and the ‘born-by-physiology-change.’19

Birth ‘by-location’ occurs when fetuses are extracted from the bodies of their mothers and remain alive. This is no different than current international (medical and legal) definitions of ‘birth.’13–17 Subjects of partial ectogestation, therefore, have undergone the ‘born-by-location-change.’12 18 19 The ‘bornby-physiology-change’ is more complicated. To complete this change, developing humans must fully transition from fetalfunction to neonatal-function. Gestatelings have not completed this transition. Hence, they are not yet born.

Why think that transitioning from fetal-function to neonatalfunction is a necessary part of birth? Kingma and Finn note that typically (and historically) the two transitions have tended to occur at roughly the same time.19 But this does not imply the transitions occur together out of necessity. In fact, what ectogestation shows is that the two transitions coincide accidentally, since AWT would allow the location-change to occur while substantially delaying changes in gestatelings’ physical and physiological features. Furthermore, the transition from fetal-function to neonatal-function more closely resembles another kind of naturally occurring phenomenon: metamorphosis.

As Ronca et al put it, ‘The metamorphosis from fetus to newborn constitutes the most profound developmental transformation in a mammal’s life…To ensure its survival at birth, the newborn mammal must swiftly recruit a veritable constellation of novel physiological and behavioural responses.’[xiii] 21 Moreover, there are striking similarities between metamorphosis and mammalian birth; Daniel Buchholz describes how a frog metamorphosis model can help understand human perinatal development.22 Since ‘metamorphosis’ is a precise biological term, we will describe the relevant transition as ‘Homo-metamorphosis’ or ‘H-metamorphosis’ to indicate that it applies specifically to humans undergoing the transition from fetal-function to neonatal-function.[xiv]

For Kingma and Finn, birth ‘marks the transition from being part of another organism, to no longer being such a part.’[xv] 19 H-metamorphosis is not required for this transition. Recall the neonates who complete birth ‘by-location’ but not H-metamorphosis.19 If completing H-metamorphosis is required for birth, then gestatelings have not been born, but neither have many neonates with serious congenital anomalies. On Kingma’s account of pregnancy, gestatelings and many neonates with serious congenital anomalies would still be parts of their mothers’ bodies.19 20 Claims that neonates with serious congenital anomalies are ‘detached body parts’ or ‘have not been born’ will seem highly implausible to many people.

Kingma and Finn will likely accuse us of begging the question here: the main reason many people think these ‘babies’ have been born is due to the historical and cultural dominance of the ‘fetal container model’ of pregnancy.19 Maybe so. But just because a belief arises from culturally dominant presuppositions does not render that belief false. Kingma and Finn may explain the genealogy of the relevant belief but have not undermined its validity.

Critically, we need a reason to believe that H-metamorphosis is required for birth. The following observations are insufficient: (a) fetus-function differs from neonatal-function, (b) gestatelings function in the former way whereas (most) neonates function in the latter way and (c) H-metamorphosis and birth-by-location often occur in close succession. We can accept (a)–(c) while still denying Kingma and Finn’s claim that ‘birth is not just a change of location.’19 That is, none of these observations establish a necessary connection between birth and H-metamorphosis.[xvi]

Finally, given the stakes, we need a very compelling argument for why H-metamorphosis is essential to birth. Such a claim runs contrary to widely accepted, international—legal and medical— standards of ‘birth’ and would have serious practical implications if true. Legally, birth is deeply intertwined with personhood (ie, having rights). If completing H-metamorphosis is essential to birth, therefore, then the completion of H-metamorphosis becomes the new standard for legal personhood (rather than birth-by-location). This makes the standard for legal personhood far more subjective and less useful as a legal instrument. It is relatively easy to assess when a human being has been extracted and is alive compared with assessing whether or not it has completed the transition from fetal-function to neonatal-function. When this transition takes days—which Kingma and Finn suggest is fairly common19 —relevant human subjects would seemingly have their legal personhood (including rights and citizenship) held in limbo.[xvii]

Further, making H-metamorphosis the standard for moral personhood would seemingly allow the possibility that killing neonates with serious congenital anomalies would be, in Kingma and Finn’s words, morally akin to destroying a ‘detached’ body part.19 Killing such neonates would literally be a kind of ‘after-birth abortion.’[xviii] 23 24 The concept of ‘after-birth abortion’ has been widely criticised as nothing other than infanticide,25–29 though some authors have continued to defend it.[xix] 30 Claiming that many neonates with congenital anomalies are merely ‘detached body parts’ would likely be met with the same charge and rejection. Widespread rejection does not make the view false, of course. But since the view is at odds with foundational (and international) legal standards and at odds with widely held moral beliefs and intuitions, it carries a very high cost. Convincing an audience to accept these costs will require an exceptionally strong argument. Appeals to observations (a)– (c) fall far below that standard.

SUPPOSE THAT GESTATICIDE IS NOT INFANTICIDE

If gestaticide is not infanticide it must be that gestatelings have not been born. Kingma and Finn explain that gestatelings have not completed (what we term) ‘H-metamorphosis,’ but fail to explain why completing it is essential to birth.19 Imagine, however, that we discover a sound argument for the claim that gestatelings have not been born. Is killing gestatelings thereby easier to justify than killing otherwise comparable neonates? Why think that? There seem to be two options: gestaticide is easier to justify (1) because gestatelings have not completed ‘birth,’ while neonates have, or, (2) because gestatelings have not completed H-metamorphosis, while neonates have. Both options fail.

Regarding the first option, according to Kingma and Finn, birth is ‘morally relevant’ precisely because subjects that are born ‘can now be accessed, interacted with, treated and kept alive without having to consider the mother’s rights to bodily integrity/physical autonomy.’19 Gestatelings embody all of these features: they exist and can be kept alive independently of their mothers’ bodies. Even if gestatelings have not been born, therefore, they possess the exact same features that make birth morally relevant in the first place. So appeals to birth as making a relevant moral difference between gestatelings and neonates does not work.

The second option—the claim that completion of H-metamorphosis is what makes the moral difference—also fails. Gestatelings have not completed H-metamorphosis, but the same goes for many neonates with congenital anomalies and disabilities. Suppose completion of H-metamorphosis is what makes the moral difference between gestaticide and infanticide. Assuming that gestaticide is easier to justify than infanticide, it follows that killing neonates with congenital anomalies or disabilities is easier to justify as well (since many of them have not completed H-metamorphosis either). If completion of H-metamorphosis is what makes the moral difference, therefore, one must accept highly dubious moral claims about the relative permissibility of killing neonates with congenital anomalies. Since there are good reasons to reject those claims, there are good reasons to maintain that gestaticide is as hard to justify as infanticide.

BEYOND KILLING: IMPLICATIONS FOR WITHDRAWING LIFESUSTAINING TREATMENT

We have argued that gestaticide is harder to justify than abortion and that there are good reasons to think that gestaticide is as hard to justify as infanticide (whether gestatelings have been born or not). What about cases in which life-sustaining treatment is withdrawn and this results in death? Not every such case will count as gestaticide, nor will every such case be impermissible. This matters because cases of withdrawing life-sustaining treatment like this are not uncommon in neonatal care31; doing so is commonly thought to be justified when the neonate’s death is imminent and continued treatment is judged to be futile (or excessively burdensome).32

For example,[xx] suppose a premature neonate is being kept alive by life-sustaining treatment (eg, intubation and mechanical ventilation), despite having suffered from an extensive and catastrophic brain injury. The medical team concludes that this neonate’s death is imminent and inevitable. It may, in this case, be permissible to withdraw life-sustaining treatment from the neonate even though doing so will hasten death. Death, in this case, is not intended and withdrawal of life-sustaining treatment is not rightly thought of as an act of killing.[xxi] 32

In other words, ‘infanticide’ as we understand it, does not obviously refer to acts of withdrawing life-sustaining treatment where death is not intended (even though withdrawing care might result in or hasten death).32 Likewise, ‘gestaticide’ does not refer to every case in which a gestateling dies after life-sustaining treatment is withdrawn. Withdrawing life-sustaining treatment from a gestateling with the intention that it dies may count as gestaticide. Withdrawing life-sustaining treatment in cases where the gestateling is having some serious health problem(s)—specifically, where continued treatment is futile, death is imminent and the death of the gestateling is not intended—would not count as gestaticide. These suggestions render two hypotheses plausible. We will discuss each, but cannot defend them at length here.

First, when it is permissible to withdraw life-sustaining treatment from neonates in the NICU, it will be permissible to withdraw it from comparable gestatelings (where all else is equal insofar as is possible). Suppose, for example, that it is permissible to withdraw life-sustaining treatment from neonates when continuing is futile. We may infer that when continued treatment of gestatelings is futile in the same way, withdrawing life-sustaining treatment is permissible in those cases as well.

Second, when it is impermissible to withdraw life-sustaining treatment from neonates, it will be impermissible to do so from comparable gestatelings (all else being equal insofar as is possible). For example, it is morally impermissible to withdraw life-sustaining treatment from a neonate simply because that neonate has congenital anomalies. We may infer that withdrawing life-sustaining treatment from gestatelings simply because they have congenital anomalies is morally impermissible for the same reasons.

To block these hypotheses, one must show that gestatelings and comparable neonates are different in some morally relevant way. Birth ‘by-location’ is clearly of no use here, since gestatelings and neonates have both completed that transition. Appeals to the completion of H-metamorphosis fail as well, because a human subject’s failure to complete H-metamorphosis by itself is insufficient justification for withdrawing life-sustaining treatment from them. Recall that many neonates today have not completed H-metamorphosis; for Kingma and Finn, these include many neonates with certain ‘lung-problems, heart defects and so on.’19 Having these kinds of issues is not by itself reason to withdraw life-sustaining treatment. Doing so, in many cases, is rightly regarded as immoral.[xxii] In fact, whether or not a subject has completed H-metamorphosis has no real bearing on whether or not it would be permissible to withdraw lifesustaining treatment from that subject. We do not withdraw lifesustaining treatment from neonates in cases where they simply have failed to complete what we have termed H-metamorphosis. Rather, treatment can only be justifiably withdrawn when its continuation is futile, and death is imminent. Whether H-metamorphosis has been completed or not is irrelevant, therefore. What matters is whether treatment is futile or whether death is imminent. But if completion of H-metamorphosis is irrelevant in the case of withdrawing life-sustaining treatment from neonates, it should be irrelevant in the case of withdrawing life support from gestatelings.

Put differently, if we accept that failure to complete H-metamorphosis is sufficient reason to withdraw life support from gestatelings, then we are justified all the same when withdrawing life-sustaining treatment from neonates who have not yet completed H-metamorphosis. This holds even in cases where these neonates will complete the relevant processes soon. But we do not allow withdrawal of life-sustaining treatment from neonates under these circumstances. So, we should not allow withdrawal of life support from gestatelings in the same condition. Hence, failure to complete H-metamorphosis cannot be sufficient justification for gestaticide but not infanticide. If we allow gestaticide on this basis, we must also allow infanticide. Whatever reasons we have for rejecting infanticide in these cases, therefore, serve as reasons for rejecting gestaticide as well.

Finally, if failure to complete H-metamorphosis is—by itself— sufficient justification for the withdrawal of life-sustaining treatment, then one must accept that withdrawing support from any neonate that has not completed H-metamorphosis is permissible. Yet again, this means embracing morally dubious claims regarding the permissibility of withdrawing life-sustaining treatment from neonates simply because they are affected by congenital anomalies. To resist those claims—which we have good reason to do—one must accept that it is just as hard to justify withdrawing life-sustaining treatment from gestatelings as it is to justify withdrawing life-sustaining treatment from neonates. Hence, we have good reasons to think that withdrawing lifesustaining treatment from gestatelings is as hard to justify as withdrawing it from neonates without appropriate medical indication to do so.

What about extremely young gestatelings? If it is permissible to withdraw life-sustaining treatment from anencephalic neonates, for example, maybe it is permissible to do so from gestatelings whose brains have not yet developed. After all, anencephalic neonates are comparable to extremely young gestatelings in that neither have developed brains. This would seemingly justify withdrawal of life-sustaining treatment from any gestateling up until a particular point in development. However, young gestatelings will develop brains in typical cases whereas anencephalic neonates will not. Young gestatelings are, therefore, more comparable to neonates in the NICU that have neurological conditions which we fully expect will resolve in the near future. If it is impermissible to withdraw life-sustaining treatment from those neonates, therefore, it seems impermissible to withdraw life-sustaining treatment from very young gestatelings.[xxiii]

CONCLUSION

Gestaticide is the deliberate killing of a gestateling, which, we have argued, should be considered as morally serious as infanticide. This holds whether gestatelings have been born or not (ie, whether gestaticide is a literal form of infanticide or not). So, while we have argued that claims that gestatelings have not been born are largely unpersuasive, our conclusion does not require a commitment to the claim that gestatelings have been born. We ended by arguing that withdrawing life-sustaining treatment from gestatelings seems to be as difficult to justify as withdrawing it from neonates as well. As AWT becomes available, we must therefore prohibit gestaticide—in the same way we prohibit infanticide. We must also ensure that withdrawal of life support from gestatelings occurs in only the most serious of circumstances (where treatment is futile and death is imminent), in the same way that we permit withdrawal of life-sustaining treatment from neonates in only extreme circumstances as well.

#### NEGs can criticize AFFs that portray AWT as a path toward gender equality for masking social dynamics that devalue care work.

Victoria Hooton & Elizabeth Chloe Romanis 22, Max Planck Institute for Legal History and Legal, Theory, European and Comparative Legal History, “Artificial Womb Technology, Pregnancy, and EU Employment Rights,” Journal of Law and the Biosciences, vol. 9, no. 1, 01/01/2022, p. lsac009

Despite extraction—and ‘delivery’ of the product of the pregnancy for the individual—ectogestation is not a complete ‘birth’.40 In the artificial placenta, the gestateling has not yet made all the necessary adaptations to survive in the external environment.41 A gestateling has fetal physiology and physicality.42 In English law, a complete birth requires an entity to be ‘born alive’43 meaning existing and interacting with the external environment.44 Romanis has observed that the gestateling, therefore, cannot and should not be considered (legally) born.45 The gestateling does not have the aspects of ‘natality’46 that we associate with being born—being held, smelled, heard, and physically nurtured. AAPT introduces the interesting possibility, therefore, of a pregnant person experiencing their delivery (or bodily birthing) before the developing human entity is birthed. As a result, ‘giving birth’ on the part of the pregnant person and the ‘being born’ of the gestating entity—two events previously thought to be coetaneous—are not.47 The experience of delivery on the part of the pregnant person need not have the same temporality as the ‘birth’ of the entity into the world48 that means it needs physically caring for. This could introduce practical problems, in terms of the nature/duration of the maternity leave a person may need—and even whether leave would be an entitlement at all.49

II.A. AAPT—increasing choices, increasing pressures

In this article, we assume that individuals will have access to AAPT. Though we do acknowledge that in reality, access may be difficult because it involves the technology being recognized as a clinically appropriate alternative to continuing pregnancy,50 and AAPT may be an expensive option only available privately.51

We focus on people who want to become parent(s) and for whom AAPT may have specific benefits, whether on the basis of ‘medical need’ or broader preferences.

Alternatives to complete pregnancy

AAPT would be a welcome development for people who want to reproduce (and can become pregnant) but do not want to gestate to full term, eg people who are informedthattheir pregnancy is, or could become, dangerous,52 who have had previous difficult or traumatic pregnancies and/or births, who experience difficult symptoms in pregnancy such as longer term pregnancy-related sickness or swollen limbs,53 or who do not enjoy pregnancy and/or the physical impact on their body.54 As AAPT involves major surgery, with inherent risks, it is unlikely that this decision would be made lightly. Subjective preferences are important. Not all people feelthe same way about pregnancy. Some will feel drawn to opt for technologically assisted gestation by way of an invasive process rather than complete a pregnancy; others feel that pregnancy is a valuable, human experience. There are individuals who want to experience pregnancy so much that they seek out uterus transplantation55 or volunteer as surrogates for those who cannot reproduce.56 Decisions about how to complete a gestation, whether that be a full pregnancy or a decision to opt out of pregnancy in favor of AAPT, must be afforded equal respect. Without ensuring concrete protections for both avenues, there is the potential for serious inequality where persons may have a choice about their reproductive and gestational experience and others do not.

Pressure about how to gestate

Potential problems arising as a consequence of the technology must also be considered. There is the potential of people being considered ‘substandard’ gestators57 and being coerced into ‘opting’ for ectogestation.58 The concept ‘of there being an alternative to the pregnancy for the fetus is consistently used inappropriately ... to control the behavior of pregnant women’59 and ectogestation may only exacerbate this.60 As Horner explains, ‘Having the option to avoid in utero gestation may inadvertently become a duty to do so’.61 This is particularly pertinent in employment context. Some may feel pressured to either give-up work to ensure they are an ‘optimal gestator’ (compared with a machine) or to opt for ectogestation to remain in or return to work. This will particularly affect people in roles considered riskier during pregnancy, like work that encompasses ‘heavy lifting or carrying, standing or sitting for long periods of time without adequate breaks, exposure to toxic substances, long working hours’.62 Pressure is most likely to affect people working in sectors such as emergency workers, people in the armed forces, and in manufacturing. These are groups of people that already report issues with their employment during pregnancy.63 Employers may try to claim that their duty to offer a reasonable alternative to ‘risky work’ needs no longer exist when people have a choice about how their fetus is gestated. This argument, of course, assumes that AAPT is readily available, eg is state-sponsored and thus free to access,64 or alternatively that employers are willing to subsidize AAPT.

Second, there might be concern about whether pregnant workers will have access to a genuinely maximally autonomous choice about howto gestate in some circumstances. A number of large technology companies offer employee benefits in the form of reproductive technological assistance. In the USA, Google, Apple, and Facebook offer ‘company-subsidized’ social egg freezing to employees.65 This technology is a relatively recent66 development that allows young, fertile female people to have ovum extracted and preserved as a form of facility preservation.

While some consider egg-freezing a substantial benefit, it allows employeesto access a service they may otherwise be unable to afford;67 it has also been subject to criticism because a decision to freeze eggs, and even to delay becoming pregnant may not be maximally autonomous.68 It should be noted that the motives for offering egg-freezing are not homologous. In some instances, it may be a deliberate attempt by employers to delay their employees from having reproducing. In other instances, it may be a genuine attempt to offer a substantial benefit to encourage more women to work for their company.69 Whatever the potential reason for offering egg-freezing as a benefit, the information that employees are provided about their options may necessarily be impacted by their employer’s interests.70 The practice is criticized for reinforcing harmful notions around female responsibility for negative employer attitudes. Baylis writes that egg freezing ‘as an employee benefit is not only counterproductive but offensive. It not only fails to empower young women, it actually disempowers them by overtly entrenching the otherwise subtle message that women who have babies are not serious about their careers’.71 Such narratives persist whether egg-freezing is offered to encourage people to delay becoming pregnancy or as a genuine ‘benefit’ to encourage morefemale peopleto applyto workforthe employer. Ifframed as a ‘benefit’, the pressure to use it still exists, as otherwise the employee is not making use of an exclusive goodthattheir employer is offeringthem. There could equally be a perception that people who choose a complete gestation by pregnancy are less interested in their careers. This might be the case regardless of whether partial ectogestation would actually hasten their return to work, their decision about how to complete a gestation could be seen as a symbolic declaration of their values.

It has been suggested that, unlike countries without statutory maternity leave, UK employers do not have cost incentives to encourage employees to use egg freezing. The statutory requirement to pay maternity leave72 means that it is cheaper to offer good childcare to attract female talent rather than encouraging people to delay reproducing.73 It might, however, be argued that the greatest ‘costs’ to an employer result from the disruption of temporarily replacing an employee, while they are on a period of maternity/parental leave.74 If this were the case, there might be a greater incentive for countries where there is statutory maternity leave to subsidize egg-freezing because this might postpone pregnancy to a time when the individual concerned is no longer an employee, or it might result in preventing a pregnancy that could otherwise have transpired. Should technology become capable of gestating a human entity from conception to full-term, there could be incentives on the part of employers to encourage employeesto usethese, especially wherethey would otherwise haveto make reasonable accommodations for a pregnant employee. The reality of the function of AAPT asdesigned could also mean that there are limited incentives to encourage employees to opt for this technology, because it may mean that a person needs more leave (because of the gap between ‘delivery’ after which there needs to be recovery, and ‘birth’ after which there is a newborn to care for). AAPT also does not have the benefit that employers might actually be seeking in subsidizing assisted reproduction: delaying, or even preventing, their employees reproducing.

Gestation and workplace equality

Some argue that technology capable of facilitating a complete gestation could better equalize the labor of the sexes in reproducing75 and eliminate discrimination against female people, including in the workplace. We do not advocate for AAPT, in any form, as a ‘solution’ to the discrimination that pregnant people, and women more generally, experience in working environments. To do so is to suggest that female bodies and the role that they play in reproduction are the problem. This section demonstrates that AAPT is not the ‘solution’ to workplace inequalities and that framing it as such is problematic for a number of reasons.

As Horn and Romanis argue, claims that AAPT can solve particular aspects of gender inequality ‘present the gestating body as a barrier to gender equality, suggesting that the social burden on women as caretakers and gendered oppression in general can essentially be boiled down to the association of pregnancy with women’s bodies’.76 Such framing is problematic because it redirects attention from the actual problem: ‘the social devaluing of care labor and structural and social barriers to resources for sharingthe work of child rearing’77 including employment rights. In placing the reasons for sex and gender inequality at work in biology means that we are unlikely to see any progressive change with the advent of the technology. Even if pregnancy and birth are entirely facilitated by machine,there are still a number of social and legal changes needed to facilitate equality, as we demonstrate in this article. However, if we understand the problem as solely being one of the physical and physiological labor in pregnancy and birthing, we neglect to center the necessity substantive reform needed to protect those who have reproduced. As Jackson observes, pregnancy and birth are 9 months compared with a lifetime of child rearing.78

### AFF---AT: Process CP

#### Making functionally equivalent rulings without speaking directly to the underlying issue is bad and hurts clarity.

Erin Phillips 19, University of New Mexico School of Law, Class of 2019, “The Silent Problem: The Implicit Personhood Determination in State v. Montoya,” 49 N.M. L. Rev. 134, Winter 2019, WestLaw

V. THE INADVERTENT PERSONHOOD DETERMINATION IN STATE V. MONTOYA

The Montoya Court applied the rational link standard in order to make up for unsatisfied statutory requirements in upholding the defendant's robbery conviction. In doing so, the Court made little mention of the defendant's personhood argument, barely addressing it in the short opinion.62 The Court's brief mention of the personhood issue may indicate its apprehension of addressing such a complex and controversial topic.63 Areas of law dealing centrally with the issue of personhood (e.g. reproductive rights, right to aid in dying) are polarizing. This polarizing nature of a personhood question, combined with the established precedence of the rational link standard, may have led the Court to disregard the issue of personhood in Montoya. But by not resolving the personhood argument directly, the Court did not free themselves from making a determination. Even through its application of the rational link standard, the Court's failure to definitively address the issue of personhood presents a legal fiction at best and a dangerous precedent at worst.

Even though the Montoya Court adopted the rational link standard as a way to circumvent a literal application of the robbery statute, the New Mexico robbery statute still controls interpretation of the case. This means that by upholding the robbery conviction under the controlling statute, the Court determined the deceased victim to be a person. New Mexico's robbery statute requires that the victim exercise immediate control over the subsequently taken property. Whether or not the Court literally applied the statute, by upholding a conviction of robbery the Court implicitly made the determination that the deceased victim was able to exercise control over the property ultimately taken by the defendant. In other words, the Court held, however implicitly, that the victim was a person even after death.

Without some unambiguous statement that the Court did not hold personhood to be required in the rational link standard, or some other overt rejection of the deceased-victim-as-person notion, the Court implicitly conceded that the deceased victim is a person. Without overt rejection of that notion, there is no other interpretation of the implications set forth by the Court. The Court upheld a conviction under the robbery statute which criminalizes the theft of property from the immediate control of a person through the use of force. If the Court stated that the deceased victim was not a person, the Court could not have upheld the robbery \*143 conviction under the statute. But by not taking a stance, the Court still makes a statement, even in its silence, that the deceased victim was a person.

The Court's assertion--that a dead person is still a person--is a fallacy. The notion that a dead person can exercise control over possessions goes against prevalent scholarship citing the notion that personhood ceases upon the loss of cognitive function.64 Perhaps the Montoya Court recognized that fallacious territory it was entering into. Perhaps the desire to avoid having to make an overt determination of such legal fiction is exactly what drove the Court to adopt the rational link standard. No matter the motivation or the efforts to avoid doing so, the Montoya Court ultimately did make a de facto determination that the deceased victim was a person. Through this unrecognized or unintended determination of personhood, the future problems caused by Montoya's holding become evident.

VI. BACKGROUND AND FRAMEWORK OF PERSONHOOD THEORY

Although the issue of personhood ultimately centers on “the fundamental question of who counts for the purpose of the law,” there has been no judicial consensus as to how to apply or function within personhood theory. 65 The theory of personhood, or the legal metaphor of personhood,66 is inherently problematic because although defined as an “entity ‘given certain legal rights and duties of a human being,”’67 it is often conflated to hold the same meaning as humanity.68 The most difficult questions in determining personhood center on “whether the entity in question can be regarded as human.”69 The answer to that question varies, as “[d]ifferent jurisdictions have created different thresholds for personhood and different distributions of rights, ... such that the same individual or entity might be recognized as a person in one place and property in another.” 70 Under the common law tradition, “legal personhood is disparate and diffuse,”71 and “[t]he meaning of legal personhood shifts significantly depending” on who is discussing the distinction, and under what theory of legal framework.72

The Federal Constitution does not offer a definition of person, nor does it “delineate who or what is included in the concept of ‘person’ for purposes of \*144 bestowing” constitutional rights and protections.73 Despite the inconsistent definition, interpretation, and application of personhood, the concept carries “normative, ethical and political force” and is both a legal fiction and a very tangible concept through which individuals access legal rights.74 The ability to bear and exercise those rights is a key feature of legal personhood.75

Although routinely equated with humanity, personhood is a distinct categorization in the eyes of the law. Arguably, most legal questions regarding a human being deal with that human being as a person, therefore, the concepts of humanity and personhood do not warrant distinction in those common scenarios.76 But broadly equating humanity and personhood ignores that the terms have fundamentally different definitions, as “‘[h]uman’ refers to a biological category and ‘person’ refers to an entity with a set of capabilities,”77 such as exercisable rights. Humanity and personhood, although often equated to hold the same meaning, ought not be treated as synonyms, given that distinction.78

But the judiciary often finds itself at the center of the tension between humanity and personhood, especially within the controversial realms of reproductive rights. The Personhood Movement, an encompassing term for the national trends among abortion opponents to establish the legal personhood of fetuses, is rooted in Justice Blackmun's language in Roe v. Wade: “‘[i]f the suggestion of fetal personhood is established ... the fetus' right to life would be guaranteed specifically by the [Fourteenth] Amendment.”’79 Leaning on this claim, the Personhood Movement consists of efforts within State Constitutions to add provisions asserting the rights of any human being starting at the moment of fertilization, as well as community-organizing efforts to affect political, legislative, and social change supporting the recognition of fetuses as persons.80 The ramifications of the Personhood Movement are easily seen: if fetuses were recognized as persons beginning at fertilization, the controlling law regarding a woman's right to access healthcare affecting the fetus (including abortion) would be more heavily regulated and restricted.

Although the Personhood Movement is based in the realm of reproductive rights, its influence can be seen in other legal realms, including the right to aid-in-dying and the rights of permanently comatose individuals. As within the controlling \*145 reproductive rights framework, wherein a fetus is not recognized as able to exercise rights or have interests in protection under the Constitution, adult humans who are permanently comatose and approaching their end of life are regarded as unable to exercise their rights.81 There is a clear distinction between the two realms, since permanently comatose adults are definitely considered humans, while fetuses have not been universally categorized as humans.82 Similarly, permanently comatose individuals are at the end of their life, versus fetuses that precede a human life.83 Despite these distinctions, however, a corollary exists between the two categorizations and the controversies they cause.

For permanently comatose individuals, tensions typically arise when considering whether or not to terminate life support. In those situations, the comatose individual is literally unable to assert any rights or state any preferences.84 Without that ability, any caregivers must base their decisions off of the directives given by the individual prior to entering their comatose state.85 Likewise, a court would be left to infer that the personhood of that comatose individual stems from the fact that they were once active persons.86 The controversy regarding the rights of permanently comatose individuals typically revolves around determining whether the pre-comatose directives were valid, thus affecting subsequent decisions of life support termination.

Analyzing Montoya through these personhood frameworks is relevant because, although the frameworks deal with distinct factual scenarios, the fundamental question is consistent throughout: when will a court recognize a human being as a person? Implicit in that question are moral tensions which may account for why the concept of personhood is so controversial. Because personhood and humanity are often conflated as synonymous terms, determinations of one's personhood begs analysis of one's most basic existence. The Federal Constitution may not provide a definition for “person,” but it has certainly upheld as paramount the individual interest associated in a human's exercise of dignity, autonomy, and identity.87 The New Mexico Constitution has similarly recognized these rights as inherent to its citizens in its “Inalienable Rights” Clause, which protects “certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of \*146 seeking and obtaining safety and happiness.”88 These expansive protections relate to countless aspects of a human being's life and identity, protecting one's ability to marry, to retain privacy, and to be free from intrusion. In other words, these rights have defined society's guiding principles of human existence, and disruption of those principles causes rightful discomfort.

In the context of Montoya, the Court would have been rightfully uncomfortable when faced with the daunting task of dealing with a question of personhood. Moreover, the Court may have seen the personhood question as irrelevant to the scope of their decision. But given the controversial position of personhood within the evolution of society, the Court's apparent discomfort ought not outweigh the necessity of taking clear and definitive stances when issues of personhood are raised. It is objectively uncomfortable to ask whether a deceased victim is still a person, because to do so may deny significance or reverence for the victim's life. Because the concepts of humanity and personhood are so closely related, even asking the question of whether a deceased victim can still retain rights is uncomfortable, as it tugs at society's moral and ethical values. But even when faced with this discomfort, the Court cannot afford to be ambiguous on issues of personhood.

What is being protected when we attempt to protect the rights of a deceased victim (or a fetus or permanently comatose individual)? A claim that a fetus, a permanently comatose individual, or a deceased victim retain the rights of personhood may be rooted in protecting society's own interests, rather than the interest of those entities in question.89 That societal discomfort with addressing the rights or lack thereof was likely present in the Montoya Court's decision. There, the Court determined that the deceased victim was a person, albeit implicitly. As aforementioned, the Court's holding was significantly rooted in policy concerns to ensure that criminals could not receive lower convictions for theft by also taking the life of their victims. But the determination that the deceased victim was a person may have been based on a silent discomfort felt by the Court in explicitly saying the deceased victim, who suffered a violent death, would no longer be considered a person in the eyes of the law. Articulated as such, that would have been an unsavory stance for the Court to have taken.

### AFF---AT: Spillover DA

#### No spillover---courts can distinguish potential humans from non-humans.

Richard L. Cupp, Jr. 13, Vice-Dean & John W. Wade Professor of Law, Pepperdine University School of Law, “Children, Chimps, and Rights: Arguments from ‘Marginal’ Cases,” 45 Ariz. St. L.J. 1, Spring 2013, WestLaw

\*35 Courts have also taken up the challenge of addressing the status of embryos relative to personhood when the issue has pragmatic rather than merely philosophical consequences. In Davis v. Davis,170 in which a divorcing couple was fighting over whether to destroy their preserved embryos, the court held than an embryo holds a position between property and personhood because of its potential to become a person.171

Perhaps an academic philosophical theory may be frozen into impasse by the possibility of facing difficult slippery slope issues, but courts addressing pragmatic and consequential issues in cases like Roe and Davis do not have that luxury. They have demonstrated that they are capable of making decisions regarding the boundaries and significance of personhood and potential personhood despite the theoretical difficulties of line-drawing. Further, the lines they draw are often relatively clear, at least regarding whether special significance should be attached to potential human personhood. Roe, Davis, and other courts have recognized: (1) that, at least in some contexts, some subjects of litigation, such as pre-viable human fetuses and human embryos, are not considered legal persons (while recognizing ongoing moral, religious, and philosophical debate on the issue);172 and (2) potential human personhood deserves respect and some degree of protection because of its potential to become a human person.173 Thus, courts have some experience with the problem of the potential human person, and they have found the slipperiness of this slope to be manageable without any inkling of a desire to abandon the rights primacy of children over animals.

Further, although differing philosophical and religious perspectives might lead to disagreements regarding whether a young fetus should be considered a person, and few would argue that a sperm or an unfertilized ovum should be considered a person, they all have something that even the most intelligent nonhuman animal will never have: the potential to become human. In this regard they are closer to rights-bearing humans than are animals, regardless of their complete lack of autonomy in their present state. If potentiality makes the personhood argument for human fetuses stronger in some respects than the personhood argument for intelligent animals, post-birth children have an even stronger rights claim vis-à-vis animals.

### NEG---Natural Personhood CP

#### There is maybe an argument to be made (which is in my opinion bad) that legal personhood is distinct from natural personhood, and that redefining natural personhood is therefore an alternative to creating a ‘legal fiction’ to allow an entity to sue.

Carliss Chatman 22, \* Associate Professor, Washington and Lee University School of Law (BA Duke University, JD University of Texas at Austin School of Law), “We Shouldn’t Need Roe,” SSRN Scholarly Paper, 4006774, Social Science Research Network, 01/12/2022, papers.ssrn.com, doi:10.2139/ssrn.4006774

Personhood is the status required to gain access to rights under the law. Human beings gain their personhood naturally, by simply being born. Other legal persons gain personhood rights from the state—this is how corporations, 10 artificial intelligence, and recently, even animals have gained personhood rights.11 By passing statutes based on fetal personhood, right to life advocates are creating a hybrid situation. If one need not be born to be a person, is that an attempt to redefine natural, human personhood? Or is the fetus a new artificial person that is a creature of the state, with rights defined wholly by the state’s laws? Viewed either way, the concept of fetal personhood is flawed. With regard to the former interpretation, the Fourteenth Amendment declares that the federal government12, not the states, define the personhood and citizenship of natural persons.13 Moreover, the language of the constitution clearly contemplates that personhood begins at birth, not a heartbeat in utero.14 If fetal personhood statutes intend to alter the definition of being born and not to create a new artificial legal entity, they are an improper exercise of state power. As for the artificial entity theory, if a fetus is analogous to a corporation, it can only act through its agents. While agents act on behalf of their principals, they cannot disregard the law while serving in that role. Any agent acting on behalf of the fetus must weigh those actions against the rights of the natural person whom the fetus relies upon for its life—the mother.

## Robots

### Good To Learn About

#### This area is vitally important to debate.

Adam Sulkowski 19, Associate Professor, Babson College. B.A., 1996, College of William & Mary; M.B.A., 1999, Boston College, Carroll School of Management; J.D., 2000, Boston College Law School, “Industry 4.0 Era Technology (AI, Big Data, Blockchain, DAO): Why the Law Needs New Memes,” Kan. J.L. & Pub. Pol’y, https://lawjournal.ku.edu/wp-content/uploads/2019/12/V29\_JournalOnline\_Sulkowski\_Web1.pdf

Third, while the mix of current technological revolutions, including AI, big data, and blockchain, could help us get to Society 2.0,89 it is not a 100 percent guarantee that it will break us free of 18th-, 19th-, and 20th- century errors and fundamental societal design flaws that cannot last, and which we as a society have grown to accept as normal. This will rather depend on shared understandings and collective human will, as made enforceable through law and governance. Without breaking our reliance on the four design features listed above90 as (a)-(d), it is premature to say we have truly graduated past Dickensian elements of the First Industrial Revolution—not just in our manufacturing sector but as a society.

The “so what?” implication is that law, policy, and governance are arenas where we can—as individuals and working together with others in organizations and societies—decide on guardrails to help steer and nudge technology and markets to serve desired ends.91 New technologies on their own, like the Internet, can otherwise fail to bring the changes that idealists hope(d), and instead become dystopian tools of surveillance and influence, reinforcing problematic patterns and structures rather than advancing norms. Nor will any imaginable combination of new technologies guarantee how one deploys them, and to what end. The collectively imagined artifices expressed in law are vital for fostering opportunities, limiting risks, coordinating actions, setting boundaries, and determining consequences when one breaches limitations or inflicts harm. The deployment of technologies and outcomes will depend on humanity’s values, mindset, memes, and models of seeing the world92 and can be steered by the norms and rules that these support, as ultimately formalized in private and public law.93

It is therefore imperative that legal scholars, practitioners, and policymakers proactively wrestle with “what if” questions related to current technological changes, especially as these scenarios continue to rapidly move from the domain of imaginative hypotheticals and into the realm of daily reality.

### Inherency/UQ

#### No AI personhood now---topic uniqueness is locked in

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

II. DOES A.I. PERSONHOOD ALREADY EXIST?

The issue of whether A.I. personhood is a good idea takes on an entirely different tenor if A.I. personhood is already here. In two articles published in 2014 and 2015, Shawn Bayern argued that it is.12 Specifically, Bayern claims that it is possible to create an LLC that is effectively controlled by an autonomous system if the LLC's organizers follow a series of steps:

(1) an individual member creates a member-managed LLC, filing the appropriate paperwork with the state; (2) the individual (along, possibly, with the LLC, which is controlled by the sole member) enters into an operating agreement governing the conduct of the LLC; (3) the operating agreement specifies that the LLC will take actions as determined by an autonomous system, specifying terms or conditions as appropriate to achieve the autonomous system's legal goals; (4) the sole member withdraws from the LLC, leaving the LLC without any members. The result is potentially a perpetual LLC--a new legal person--that requires no ongoing intervention from any preexisting legal person in order to maintain its status.13

In arguing that these steps could actually lead to the creation of an autonomous LLC in practice today, Bayern's analysis focuses largely--indeed, almost exclusively--on two legal sources: New York's LLC statute and the Revised Uniform Limited Liability Company Act (RULLCA).14

The maxim that “extraordinary claims require extraordinary evidence” applies to the laws of men no less than it applies to the laws of nature. The central thesis of Bayern's articles is that it is already possible for an unsupervised artificial intelligence system to obtain legal personhood under existing law.15 To me--and, I would wager, to most lawyers and laypeople alike--that is an extraordinary claim. Historically, legal systems have only recognized (1) human beings and (2) entities endowed with “legal personhood”--that is, the ability to \*265 sue, be sued, and take actions in the world that the legal system will enforce--but that are ultimately and actively controlled by human beings.16 Bayern's argument, if correct, would mean that legislatures have inadvertently created a new category of legal person--the first in history to be free of active human control.

Such a claim should be supported by a thorough and meticulous legal analysis of whatever law(s) that supposedly make such artificial personhood possible using the standards by which a court of competent jurisdiction would assess the argument if presented with it. Unfortunately, Bayern's articles-- which seemingly have been accepted as reflecting legal reality by at least one prominent legal commentator17--do not engage in such an analysis before boldly claiming that A.I. personhood is, for all intents and purposes, already here.

A more rigorous statutory analysis reveals that it is unlikely that a court considering either New York's statute or RULLCA would conclude that either statutory framework permits the continued existence of an LLC once it has zero members--and certainly if that memberless LLC is free of active human management and control. Bayern's analysis zeroes in on the provisions in these statutes that set forth the circumstances under which an LLC must dissolve, entirely ignoring numerous other provisions in both New York's statute and RULLCA specifying how LLCs may or must conduct their affairs. Those provisions reveal that an LLC ceases to be an LLC once it becomes memberless and reflect a clear legislative intent that humans would retain ultimate control over LLCs' operations.

### AFF Area---AI Liability

#### AI personhood might be good (because it creates a liability shield) or bad (because it creates AI rights) for innovation. This theme permeates AFF and NEG positions in this area.

Iris H-Y Chiu & Ernest WK Lim 21, Chiu is Professor of Corporate Law and Financial Regulation, University College London (UCL); Lim is Associate Professor of Law, National University of Singapore, “Technology vs Ideology: How Far Will Artificial Intelligence and Distributed Ledger Technology Transform Corporate Governance and Business?,” 18 Berkeley Bus. L.J. 1, 2021, WestLaw

b. Should AI be treated as a legal person?

It has been opined that, as we have created artificial legal persons in the form of corporations, there is no stopping the law from recognising AI as legal persons executing autonomously determined tasks.131 However, corporate personhood, whether dating back to Roman cities or to the modern corporation, is essentially human--corporations showcase collective human agency and give rise to a need for a legal personality in order to distinguish themselves from individual human agency, as well as to secure a communitarian commitment. 132 Further, the relevance of legal personhood is not merely conceptual but instrumental in nature--what purposes are served by conferring legal personhood? The instrumental perspective133 is not wrong: since the industrial revolution, modern corporations' legal personhood has been seen as a policy choice to facilitate progress and development.134

If AI has legal personhood, can it be held liable for harms caused by it? Such liability may have little real consequence if the AI can neither compensate victims of harm135 nor be made to suffer and realize the import of punishment. Imposing liability on AI may have the consequence of insulating corporations or other principals that deploy AI, as well as AI software providers, from liability. This may promote irresponsible economic conduct or corporate behavior.

On the other hand, it can be argued that corporations should not be crippled by penalties for experimenting with innovation. 136 Also, it can be argued that the legal personhood of AI--which interrupts the attribution of liability to \*25 corporations that develop or deploy AI--could be a sound policy choice to limit the cost of innovation. This could pave the way for other forms of cost-sharing of the risks and harms to society, such as having compulsory insurance or a minimum paid-up capital policy for AI with legal personalities.137

Nevertheless, corporations or shareholders may have no incentive to support AI gaining legal personhood, even with the benefit of being shielded from liability. This is because legal personhood carries certain implications, such as rights. If AI has rights over property or profits,138 this would create uncertainty for corporations and their shareholders to how wealth should be distributed and appropriated. The question regarding rights for AI are further enumerated below.

### AFF Area---AI Liability---Corporate Personhood

#### AI should be treated as a corporation

Alicia Lai 21, J.D., University of Pennsylvania Law School. A.B., Princeton University, “Artificial Intelligence, LLC: Corporate Personhood as Tort Reform,” Michigan State Law Review, vol. 2021, no. 2, 2021, pp. 597–654

III. PROPOSED TORT LIABILITY THROUGH CORPORATE PERSONHOOD

The primary social function of tort law is to compensate victims for injuries and to deter unreasonably risky behavior; the primary economic function is to establish optimal deterrence that balances caution with activity.185 There is a simple solution to remedy the tort system for AI technologies: a partial grant of corporate personhood to AI systems. Part III elucidates how this balance of liabilities and compensations would benefit both consumers and manufacturers, how the legal system already permits the divisibility of rights, and how innovation policy considerations lean in favor of such a proposal.

A. Limited Liability Proposal

A partial grant of corporate personhood to AI systems would strike an optimal balance between the outdated and extreme regimes of strict liability and negligence rule. Under this proposal, all AI systems themselves would be incorporated as a limited liability company (LLC) subject to direct liability while their human members or managers would be subject to limited liability for harms that result from the technology.186 Traditionally, limited liability has been used as a protective legal mechanism that limits harmed plaintiffs to collecting only from the assets of the firm, not from the assets of a firm's investors, even when the firm cannot fully cover the costs of its liability.187 Limited liability protections ensure that the human \*632 members do not personally shoulder the financial liability of actions of the company.188 Many scholars have applauded the historical development of broad limited liability as essential to capital formation and economic growth.189 Specifically, limiting personal liability would help overcome investors' risk aversion, eliminate complexity between investors, and save on time and expense of all involved.190 But--particularly given that even proponents of limited liability acknowledge that it creates other problems, such as amplifying private profits by externalizing losses onto the public191--such a proposal must be careful to balance the innovation incentives with the accountability of human shareholders and investors. This proposal does so.

By likewise extending the limited liability regime to AI technologies, there are clear benefits for manufacturers. This proposal would resemble a traditional negligence regime more so than a strict liability regime, relieving manufacturers from absolute liability and thus incentivizing them to continue innovating with AI technologies. There are also clear benefits for consumers. AI as a corporate entity is very different from AI as a product under corporate ownership. The difference in defendants is crucial: while it is difficult to trace the vector of causation from the injury back to the human operator, it is simple to trace causation from the injury back to the AI system. These universal benefits cannot be obtained by simply rearranging traditional corporate structures, shuffling AI technologies into one subsidiary or another.

Additionally, the legal system can use corporate personhood to mandate the AI system hold corporate insurance, such that any injured victims who do successfully sue an AI system may be financially compensated adequately through this pool of funds instead of meeting an empty entity or human individual who lacks the personal funds. Furthermore, when it is appropriate for the individuals behind the AI system to be held responsible for egregious errors, corporate personhood provides mechanisms such as “piercing the corporate veil” to do so.192

\*633 This solution is not a radical proposal: limited liability in tort has long been the prevailing rule for corporations in the United States and elsewhere in order to incentivize growth and innovation.193 In fact, one scholar suggests that it is already possible for an unsupervised AI system to obtain legal personhood under existing law.194 Although each states' LLC laws differ, the noncorporal nature of AI and incorporation potentially allows the adoption of limited liability regardless of state borders: “The permission of just a single state would be sufficient to enable autonomous businesses.”195 But under the current dichotomous tort regime, where the application of the negligence rule would effectively let manufacturers entirely off the hook, manufacturers may want to play their odds.196 They may have little incentive to collapse the two prongs to shift to a universally advantageous limited liability regime.

\*634 The suite of “corporate characteristics” for traditional corporations includes unchallenged core rights: limited liability, perpetual life, centralized management, and free transferability of shares.197 The system is free to grant only a subsection of these rights when it grants corporate personhood.198 Personhood is a legal fiction intended to functionally benefit natural persons, and it is important to remember that it is possible to narrowly tailor this grant of corporate personhood to remedy the specific problems AI technologies pose to humans.199 While there are a multitude of other possible rights implicated by a grant of personhood-- including but not limited to the right to own intellectual property, the right to marry, or the right to protected First Amendment rights--Section III.A focuses solely on the corporate rights and obligations that may be imposed to replace the current, insufficient tort liability regime for AI manufacturers and consumers.

1. Benefits for Consumers

Under this proposal, injured consumers will be financially compensated and, more importantly, be able to prove causation tracing back to the general AI system.

First, legal personhood guarantees that injured consumers pragmatically have sufficient financial resources to draw upon. Under the traditional tort regime, even if plaintiffs surmounted the hurdle of proving an AI manufacturer liable in court, there is no guarantee that the plaintiffs will be compensated by judgment-proof defendants.200 But under a limited liability regime, corporations may be required to hold compulsory insurance.201 If AI systems were subject to the same \*635 requirement, they will no longer be an empty shell when potential victims seek to hold them accountable. Many states require workers' compensation insurance for work-related illness and injury; some states require general liability insurance or products liability insurance depending on the dangerousness of the industry.202 Other states have already passed legislation that treats every individual autonomous car as an insurable entity, thereby providing a faster, assured payout to victims while protecting the owners from frivolous suits.203 If AI systems were subject to the same requirement, the insurance framework would create a natural incentive structure to decrease risk and provide a resource pool for potential victims. Any of these resource pools would only be available to injured consumers after they have satisfactorily proven manufacturer liability in a court of law. Other compensation schemes do not offer the same level of nuance. For instance, no-fault compensation is a framework that would compensate every harmed consumer regardless of whether the consumer was contributorily responsible.204

Even when these funds run out, corporations can structure a “living will”--a plan for how they might unwind themselves and allocate their funds and assets should they face insolvency.205 Although scholars Joanna Bryson, Mihailis Diamantis, and Thomas Grant argue that potential remedies are “unavailable, unsatisfying, and/or ineffective” because robots cannot apologize or do jail time, robots can still follow through on arguably a more tangible form of compensation: financial remedies.206 And if one buys into writer Tim \*636 Worstall's turn of phrase--as a corporate entity, an AI system can certainly be subject to the harshest punishment of all: “[Corporate entities] get extinguished, their legal existence liquidated, all the time: they get executed.”207 By giving AI systems legal personhood, one can guarantee a resource pool for injured consumers by mandating that they hold mandatory insurance or that they satisfy an initial capitalization threshold.

#### This approach benefits AI innovation.

Alicia Lai 21, J.D., University of Pennsylvania Law School. A.B., Princeton University, “Artificial Intelligence, LLC: Corporate Personhood as Tort Reform,” Michigan State Law Review, vol. 2021, no. 2, 2021, pp. 597–654

C. Innovation Policy

Granting AI technologies corporate personhood would also align with innovation policies. Given the significant potential benefits promised and so far realized through advancements in AI, there is an obligation to--albeit carefully and incrementally--adopt these new technologies. This obligation should not be easily extinguished by a blanket precautionary approach.

First, there is an obligation to improve the quality of human life by advancing industries through technological improvements. AI systems have led to incredible advances in academia, private industry. and public sectors.244 Our economies are entering a stage where AI developments have the potential to overcome the physical limitations of capital and labor by creating an entirely new workforce.245 As a capital-labor hybrid, AI serves to both supplement and replace human efforts by expediting labor activities at a much greater scale and speed.246 We have already begun seeing the potential of AI to be the future of economic growth.247

If new, developed technologies are available and effective, then there may even be a duty to adopt them. In T.J. Hooper, two barges were lost in a storm because their owners chose not to equip them with \*645 radios that would have warned them of the inclement storm.248 The court found that the barge owners “unduly lagged in the adoption of new and available devices”; regardless of whether or not it had become general custom for most responsible barge owners to equip their vessels with radios, “there are precautions so imperative that even then universal disregard will not excuse their omission.”249 With AI technologies, the new devices are often so imperatively beneficial that there is no excuse not to adopt the devices. While the current legal system cannot mandate the adoption of autonomous vehicles, the case can be made on policy grounds that it would be morally irresponsible to drive a conventional car if the autonomous car is safer. Perhaps eventually, a human driver could even be found negligent if he chose to manually drive instead of getting into a statistically safer autonomous car.

Similarly, diagnostic medicine promises to be a particularly good fit for AI's strengths in pattern recognition.250 One Cornell study reports that AI systems correctly detected 92.4% of breast-cancer tumors compared to the 73.2% accuracy rate by human doctors.251 Another study, conducted by University of Nottingham, describes an AI neural network that can predict heart attacks ten years before they occur with 67.5% accuracy, a result of 7.6% more correct identifications of true positives than human doctors using the traditional American Heart Association/American College of Cardiology (ACC/AHA) guidelines.252

\*646 Failing to adopt new technology or to conduct research and development in AI hinders innovation across a broad range of industries. Innovation begets innovation: AI has the potential to propel innovations diffusely across the economy.253 For instance. advancements in AI have empowered autonomous vehicles to sense their surrounding and drive themselves accordingly.254 These changes would result in impacts well beyond the automotive industry: drivers have more time to enjoy leisure activities; insurance companies could create new revenue streams from the autonomous vehicle data; local authorities could reduce congestion and regulate road usage with realtime traffic data; road accidents and fatalities would be drastically reduced.255 Likewise, development of fundamental AI capabilities map directly onto development of practical tools.256 Computer vision can support the tracking of illegal fishing vessels via satellite imagery.257 Speech and audio processing can support assistance for individuals on the autism spectrum in social interactions.258 Natural language processing can support distribution of online education services to underserved populations.259 Cutting off innovation for AI for one application stymies innovation in other sectors.

To be clear, this Article does not advocate that AI should bypass human labor or production completely in all applicable tasks. Optimal performance often occurs with a mix of both humans and AI playing their part in a human-in-the-loop system, each making up for the other's inevitable weaknesses.260 But such a hybrid solution would be impossible should we allow strict liability to entirely wipe AI from the equation.

Second, difficulty estimating the exact costs and benefits of diverse AI systems should not impede innovation. Critics may argue that AI technologies are overhyped and the uncertain benefits are not worth the risk of reduced liability. Under that logic, discretionary decisions to forbid an activity are justified when the risks are unclear because there is a social responsibility to protect the public from harm. \*647 Accordingly, firms would be held responsible for the harms that do occur.

However, this perspective--deemed the “Precautionary Principle”--has been categorically rejected by legal scholars.261 Cass Sunstein argued that the Precautionary Principle causes paralysis for all actions, good or bad.262 If the risk of arsenic levels in water is unclear, the principle suggests no standard should be imposed; if the dangers of global warming are in dispute, the principle suggests no greenhouse gases should be reduced.263 The Precautionary Principle offers little guidance, much less dispositive guidance, on whether to categorically deter AI research. Further, stringent regulation would entirely eliminate the opportunity for benefits lead to equally risky alternatives, create great regulatory costs, and hinder innovation.264 If the government is highly wary of introducing a new drug and forbids clinical testing and market sales, in theory it would save lives from faulty drugs. But it would also cause preventable deaths due to the “drug lag” of such a precautionary approach.265 Sunstein argues that it is unclear whether it would be “precautionary” to require extensive premarket testing, or to do the opposite.266 This argument maps directly onto AI technology: the time lost by extensive premarket testing of AI technologies writes off the lives that could be saved or improved by these new developments.

Furthermore, litigation is already overly precautionary because the nature of the court system disproportionately weighs the specific risks heavier than the broader benefits.267 As Scherer explains. “procedural and evidentiary rules act to focus attention on the specific facts that led to harm in that case; the ability to introduce information regarding broader social and economic considerations is limited.”268 If courts give greater consideration to the risks of a technology and less to its benefits, this tendency “if left unchecked, could stunt investment in unfamiliar but useful new technologies.”269

To unilaterally reject corporate personhood and its incentivization of AI innovation is more revealing of hidden cognitive \*648 biases than rational legal consideration. These calls for increased regulation and liability of a burgeoning industry are in dangerous parallel with the “entrepreneurial politics” described by James Wilson:

[Increased regulation of new technology] requires the efforts of a skilled entrepreneur who can mobilize latent public sentiment (by revealing a scandal or capitalizing on a crisis), put the opponents of the plan publicly on the defensive (by accusing them of deforming babies or killing motorists), and associate the legislation with widely shared values (clean air, pure water, health, and safety).270

The sentiment is psychosocial roadblock: accepting the levels of regulation does not solely depend on the strength of the evidence but on the amount of trust that consumers have in the technology.271 Several phenomena are implicated here: spotlight effect, loss aversion. probability neglect, and system neglect.272 The saliency of AI causes a spotlight effect on resulting injuries.273 Even official government documents express the fear that the rapid onslaught of machine intelligence will surpass human intelligence altogether in a moment of “singularity.”274 While it would be naïve to assert that AI never causes harm, public sentiment is overly salient and inflammatory in public discourse.275 Such sentiments are not necessarily a solid foundation on \*649 which to base policy decisions. For instance, during Google's self-driving car testing in Arizona, the spotlight effect of the single death resulting from the endeavor within the state was sufficient to elicit an outcry for regulation of all such AI technology--including self-assessments overseen by the National Transportation Safety Board and a “safety management system” overseen within Uber.276 In theory. regulation would save lives,277 but the immediate effect was two dozen attacks by Anzonan citizens wielding rocks and knives on self-driving cars on the road following the incident.278 Such imagery and rhetoric are overreactions that obscure the nuances of how to regulate AI usage in industry. Often, AI-based harms are infrequent, theoretically preventable, and an improvement (such as Uber's single pedestrian fatality) compared to the low standards of human operation (such as the 104 fatalities per day currently caused by human drivers in the United States).279

Humans are also loss averse, disliking losses far more than they like corresponding gains.280 As a result, people tend to disregard the potential gains and focus on the losses associated with the activity. because the latter is cognitively “available” regardless of whether the statistical risk is high.281 If a doctor (human or machine) diagnosed a patient's medical condition correctly nine times out of ten, onlookers would typically weigh the one faulty diagnosis much more heavily than the correct diagnoses. One could argue that we should hold actors \*650 to a high standard of care in high-stakes situations like medical treatment, but it should be noted that such a disproportionate allocation is a policy choice that reflects human cognitive habits.

Humans are also prone to probability neglect, overlooking the statistical probability that a bad outcome will occur and instead focusing on the gravity of the outcome itself.282 For instance, after the sniper attacks in Washington, D.C. in 2002, people were more concerned about the possibility of attack than the statistical realities warranted, partly due to the salience of the attacks.283 In fact, the additional precautions that people took-- such as extra driving to circumvent the area--actually increased the drivers' overall risk of injury via car accidents.284 Likewise, the salience of an autonomous system going rogue is so great in the public imagination that many overlook the incredibly low probability of its occurrence.

Lastly, humans may shy away from endorsing AI innovation due to system neglect of the systemic effects of innovation.285 In light of a single problem, it is often difficult to see the full consequences. The risks of alternatives could be as great or worse than the contemplated action. For instance, banning nuclear power would increase dependence on harmful fossil fuels; banning asbestos would increase dependence on equally hazardous substitutes. A regulation may focus on inhibiting the development of a single, dangerous piece of technology, but the ripple effects may in fact restrict the development of all interconnected innovations that depend upon the novel research.

Certainly, there is some legitimacy to concerns over--or at least very real psychological aversion to--the harms of under-regulated AI.286 This Article does not take on the meta-analysis of which types of tasks are best suited to algorithms--but generally, while AI may not yet be prepared for generalized, open-world problems, it is well- \*651 suited to areas of well-constructed rules and robust historical data.287 But the unilateral fear of the potential harms of AI are a distraction from the near-term benefits of the technology, particularly because the technology is nowhere near reaching an explosion of true AI singularity.288 As one leading researcher declared, “I don't worry about that for the same reason I don't worry about overpopulation on Mars.”289 The European Union has already recognized that the “innovation principle” is at least on par or greater than the “precautionary principle.”290

Unfortunately, technological realities may very well be a moot point as prominent experts wax poetic.291 Philosopher Nick Bostrom draws cleverly upon this fear: “Before the prospect of an intelligence explosion, we humans are like small children playing with a bomb .... We have little idea when the detonation will occur, though if we hold the device to our ear we can hear a faint ticking sound.”292 Stephen Hawking has said that AI “could spell the end of the human race.”293 Bill Gates is “concerned about super intelligence.”294 And even Elon Musk has called for “some regulatory oversight, maybe at the national and international level, just to make sure that we don't do something \*652 very foolish,” framing the AI risk of “summoning the demon” as “our biggest existential threat.”295 For generalist legislators, courts, and juries, these prominent voices may be hard to ignore.296

CONCLUSION

Lawmakers and policymakers have an obligation to reconcile the tort regime with AI technologies that are becoming crucial to every segment of the commercial world today. The history of corporate personhood jurisprudence demonstrates an emphasis on granting personhood when it is socially and economically beneficial for natural persons.297 In the case of AI technologies, limited liability corporate personhood is functionally beneficial. Our current tort system is not. Strict liability and negligence rules should only be a temporary crutch to tide the legal system over to a more nuanced method of addressing and compensating injuries from AI technologies. To rely for too long on the current system would drastically deter innovation and leave victims without a source of adequate compensation.298

Corporate personhood provides a scheme of limited liability. balancing freedom to innovate with the ability to pierce the corporate veil to hold natural persons liable for drastic harms. While granting personhood to robots may seem drastic, the move is solidly based on existing law and reasoning. Corporate characteristics are divisible. leaving criticisms of moral rights without air.299 The potential social benefits of AI technologies are great, leaving an obligation to give the technology room to grow. Certainly, limited liability personhood is not the sole solution to a flawed tort system for AI-lawmakers are free to pass federal regulations or create new tort systems altogether for AI technologies. In the meantime, limited liability personhood is the existing legal liability scheme that most closely addresses AI's unique characteristics.

#### This proposal has clear deficits against any CP that does not give personhood to the AI itself based on the difficulty of proving causation.

Alicia Lai 21, J.D., University of Pennsylvania Law School. A.B., Princeton University, “Artificial Intelligence, LLC: Corporate Personhood as Tort Reform,” Michigan State Law Review, vol. 2021, no. 2, 2021, pp. 597–654

Second, and more importantly, this liability scheme entirely resolves the problems of proving causation through a “black box.” Under the traditional liability regime, even if an alternative non-AI corporate structure provides financial redress--for instance, limited liability protections for its human protectors or business liability insurance to cover potential claims--proving causation is still a significant hurdle.208 But granting corporate personhood transforms the AI “black box” from an insurmountable impediment into an accessible target. Under the limited liability scheme, consumers will face the easier task of proving causation stemming from the AI itself, not the difficult task of proving causation stemming from the human or business behind the AI. For the former, consumers would merely need to point to the AI technology, as a whole, as the source of harm. The causation analysis stops at the AI; the corporate structure does the rest of the work. But for the latter, consumers would need to reason through the internal guts of the technology and provide proof that the human or business knew of or directed the technological evolution of the automated intelligence.

#### There is a debate about whether such proposals damage or enhance accountability.

Alicia Lai 21, J.D., University of Pennsylvania Law School. A.B., Princeton University, “Artificial Intelligence, LLC: Corporate Personhood as Tort Reform,” Michigan State Law Review, vol. 2021, no. 2, 2021, pp. 597–654

Some scholars worry that corporate defendants would skirt accountability as “the accountable but empty, like the International Tin Council; the fully-financed but unaccountable, like the United Nations; and sui generis arrangements like the Bank for International Settlements.”209 Although critics of AI personhood argue that the “readily-manufacturable legal lacuna” of corporate personhood is the problem that would be exploited as a mechanism to avoid legal liability,210 one could point to corporate personhood as the solution. After all, by designating the AI technology as the defendant to hold \*637 liable, injured consumers need not wade through the “black box” causation conundrum at all.

#### NEG authors say this harms liability because companies can use AI personhood as a liability shield. But the doctrines that allow courts to ‘pierce the corporate veil’ could be applied in this context to prevent companies escaping liability.

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On the other hand, manufacturers can be held liable for exceptional situations at times when the violation is egregious. Critics argue that legal personhood would be a liability shield that renders it impossible to hold anyone accountable when AI systems violate the rights of others: the “temptation to treat sophisticated intelligent agents as independent legal entities, thus absolving the humans involved, is powerful.”215 According to these critics, the difficulties in holding electronic persons accountable outweigh the precarious moral interests that AI legal personhood might protect.216 However, courts have developed mechanisms to bolster their ability to hold corporate entities accountable--ones that do not involve the fickle process of untangling the AI “black box.” Just as the human stakeholders of a corporation may be subject to personal liability when the harms created by the corporation are great enough, the human manufacturers and creators of an AI technology may be subject to personal liability when the harms created by the AI are foreseeable enough.

For instance, under the “ultra vires” doctrine, actions taken outside the purpose of the corporation are void and the resulting harms are the responsibility of the individual human actors.217 The ultra vires doctrine has since been defanged, but the idea manifests itself in the doctrine of “piercing the corporate veil,” where courts will reach behind the legal form to sanction the human people behind the form.218 \*639 This doctrine is well-known in various legal systems.219 In fact, courts in the United States have an expansive view of wrongdoing and are quite liberal in construing the “wrong” required to pierce the corporate veil.220 Although the particular test differs by state, in order to pierce the corporate veil, a plaintiff must generally prove by a preponderance of the evidence that:

(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted from such control and wrong.221

Courts have previously pierced the corporate veil to impose personal liability in cases of using the corporate form as a sham to pursue fraudulent activities, failing to maintain separate identities of the corporation and its shareholders, ignoring corporate formalities, undercapitalizing the corporation, and exerting control to influence corporate actions for personal interests, among others.222 The same principles can be applied to AI systems.

Other corporate mechanisms are already in place to prevent abuse of this framework. An AI LLC would not be able to simply incorporate with the bare minimum risk pool, declare bankruptcy as soon as it faced legal penalties, and subsequently reincorporate as a new entity with similar technology. Certain penalties upon traditional corporations cannot be discharged even when the corporation files for \*640 bankruptcy. Bankruptcy Code § 523(a)(6) prevents a debtor from obtaining the discharge of any debt for “willful and malicious injury by the debtor to another entity or to the property of another entity.”223 Generally, corporations will be held accountable in cases of intentional misconduct, such as for false pretenses, actual fraud, fraud while acting in a fiduciary capacity, or willful and malicious injury.224 These accountability mechanisms can likewise be applied to AI.

#### There is a debate about whether it would be better to simply create a corporate subsidiary that owns nothing but the algorithm in question. This does not solve causation problems because existing tort law classifies AI as a service.

Alicia Lai 21, J.D., University of Pennsylvania Law School. A.B., Princeton University, “Artificial Intelligence, LLC: Corporate Personhood as Tort Reform,” Michigan State Law Review, vol. 2021, no. 2, 2021, pp. 597–654

2. Benefits for Manufacturers

Limited liability offers a shield, but reserves the ability to pierce that shield. Limited liability strikes the perfect balance--manufacturers will be held accountable, but not so categorically that they are deterred from bringing innovative products to market.

On one hand, manufacturers can avoid per se liability. A key characteristic of limited liability is establishing that shareholders are not personally liable for corporate debts in excess of their investment in the corporation.211 Plaintiffs can typically only reach the corporation's assets, not those of its shareholders.212 Limited liability does not automatically clear a path for the vector to reach the human behind the technology. The limited liability regime only allows a plaintiff to trace the vector of causation back to the AI system: that regardless of what occurred in the “black box” of the AI system, it ultimately resulted in an outcome that harmed the plaintiff. Unlike the traditional negligence rule regime, this framework does not hold the individual human creator responsible as a de facto matter.

Economists may argue that if there are clear economic incentives of a limited liability regime over a strict liability regime, why haven't manufacturers already shifted their behavior toward some version of this proposal? After all, under existing law, a corporation could easily create a barebones subsidiary with ownership over an AI product and very little else.213 While such a structure would not provide the nuance provided by a grant of corporate personhood to the AI--it would only add another layer of product ownership, making it equally difficult for consumers to prove causation through the AI “black box” to the humans responsible--it is easy to imagine that a corporation may find it appealing to distance itself from a risky but lucrative AI product in such a way. However, the current tort regime would not actually incentivize manufacturers to shift to the middle ground of limited liability. With the current murky product-or-service classification of AI technologies, firms may find it to be a reasonable gamble to proceed under the existing dichotomous tort regime.214 And on the \*638 chance that the AI is classified as service, the negligence rule would apply in court and the chances of a plaintiff's recovery would become slim.

#### The grant of personhood can be limited. It doesn’t require parity with humans OR granting moral rights.

Alicia Lai 21, J.D., University of Pennsylvania Law School. A.B., Princeton University, “Artificial Intelligence, LLC: Corporate Personhood as Tort Reform,” Michigan State Law Review, vol. 2021, no. 2, 2021, pp. 597–654

B. Divisibility

The grant of personhood to AI may be selectively limited, just as the rights and obligations of corporate personhood are likewise limited.225 To be clear, this Article does not liken AI to living, breathing humans with emotions and volition--at least in the philosophical sense--even if they are granted legal personhood. But in response to recent proposals of granting full “electronic personhood” to artificial technologies, critics have latched onto exactly that argument: legal and technology experts have expressed their vehement disapproval in giving AI the moral rights of personhood. However, these concerns should not apply to a proposal to give AI corporate personhood because corporate personhood entails a divisible, limited set of rights and obligations. No moral rights are necessary.

Critics argue that granting the moral rights of personhood to AI systems would improperly violate humanist exceptionalism.226 \*641 According to these critics, the human species inherently possesses unique traits of ethics, morality, and emotions. Because AI lacks these fundamental, intangible characteristics, they will never be able to replace humans or assume legal personhood. The World Commission on the Ethics of Scientific Knowledge and Technology Commission said as much in its report, arguing that it is “highly counterintuitive to call [AI] ‘persons' as long as they do not possess some additional qualities typically associated with human persons, such as freedom of will, intentionality, self-consciousness, moral agency or a sense of personal identity.”227 The opposition to the 2017 European Union proposal to grant legal personhood to AI also furthered this argument: 285 AI experts in an open letter argued that AI systems could not derive human rights from the natural person model, the legal entity model, nor the Anglo-Saxon trust model.228 This branch of criticism invokes a “persons-are-conceptually-human” argument that suggests that “our very concept of person is inextricably linked to our experience of a human life.”229

Courts have also tried to refute the notion that nonhuman entities could partake in moral rights. In Citizens United, Justice Stevens worried that,

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.230

But the majority rejected Justice Stevens' concerns that nonhuman entities are not natural persons.231 Tongue in cheek, Saudi Arabia has \*642 even gone further to announce it considered robots capable of achieving citizenship by giving citizenship to Sophia, a humanoid robot capable of complex interactions.232

As a philosophical matter, the logic underlying the attribution of human capabilities and rights to other natural persons likewise extends to an attribution of rights to AI. Other natural persons are considered philosophical and legal persons because we believe that they are like ourselves in possessing a conscious intelligence.233 This is entirely dependent upon our external interactions with them.234 AI may be capable of exhibiting similar external interactions that would justify granting them legal rights. In his classic article, Computing Machinery and Intelligence, Alan Turing proposes a test as a proxy for conscious intelligence, where hidden humans and machines answer conversational responses to human testers.235 The machine is said to pass the Turing test if the testers cannot distinguish which responses are from which entities.236 Once a machine has passed the Turing test. it functionally performs the external interactions necessary to attribute human capabilities--and thus legal personhood--to it, regardless of whether it possesses true intelligence. After all, if we cannot understand the black box of the human mind, how can we reject the possibility that a machine could learn to act comparably? AI systems have access to far greater datasets and have far greater processing power than the limited, faulty human mind.237 Perhaps they could \*643 make more comprehensive, insightful, ethical decisions than humans would be capable of.

As a legal matter, corporate personhood does not require proof that AI is effectively a natural person. Unlike a proposal of full legal personhood, a proposal of corporate personhood entirely circumvents the question of whether AI should be equivocated to a natural person because corporate personhood may be divvied up.238 It is not an all-or-nothing proposition.

Corporate rights are divisible.239 Entities can have “more, fewer, overlapping, or even disjointed sets” of rights and obligations.240 While the Supreme Court has granted corporations many human legal rights, the jurisprudence allows for the nuanced selection of which rights to confer. The Court has previously refused to grant corporations the right against self-incrimination in criminal trials.241 The Court has also refused to apply Article IV's Privileges and Immunities Clause to corporations for protection against states treating out-of-staters worse than it treats its own citizens.242 This scheme makes it evident that while corporations and human persons are both considered “legal persons” under the law, each has their own distinctive set of rights.243

If the law were to grant personhood to AI, a legal system could selectively choose which rights it conferred. For instance, if the legal system reaches a consensus that limited liability and the right to be sued are not moral rights inherent to human beings, it may confer those rights. If the law agrees that the right to vote or bear arms is a moral right inherent to human beings--as it did with the right against self-incrimination, for example--it may choose to withhold those rights \*644 from corporations. AI, too, could be given a narrowly tailored set of rights and obligations.

### AFF Area---AI Liability---Crimes

#### AI should be held accountable for criminal behavior.

Priya Persaud 20, J.D. Candidate, Rutgers Law School, 2020, “Protecting Against Ultron: Exploring the Potential Criminal Liability of Self-Programming Deep Learning Machines,” 72 Rutgers U. L. Rev. 577, Winter 2020, WestLaw

Current U.S. laws do not explicitly state that criminal liability can only be assigned to human beings. However, criminal liability cases that are presented to the court have always involved solely human beings. Until recent advancements in technology, DLM have neither been party to the conversation of criminal liability nor been assigned criminal liability for their actions. DLM are traditionally created and used for data collection in an attempt to replicate and enhance the thought processes observed in human beings.174 They are programmed to harvest as much information as possible and then “to perform automatic feature extraction from raw data, also called feature learning.”175 In doing so, the DLM “learn[s] complex functions [by] mapping the input to the output directly from data[] without depending completely on human-crafted features.”176 The elimination of human-created features177 and, by \*604 extension, human interference prepares the DLM for autonomous decision making.178

As such autonomous decision-making processes grow stronger, DLM rapidly approach the threshold that assigns criminal liability to entities. The fact that DLM have not been party to the criminal liability conversation is boggling, given that the decision-making processes of DLM are beyond that of human beings to the point where DLM may be capable of satisfying the actus reus and mens rea requirements of criminal liability. Thus, this note sought to bridge this gap using a three-pronged legislative reform aimed at bringing non-human entities closer to being held accountable for potential criminal behavior.

#### Aside from advantages about innovation, more traditional ‘AI bad’ impacts can also be solved by changing liability regimes.

Jonathan A. Schnader 19, B.A. Miami University of Ohio, 2008; J.D. Syracuse University College of Law, 2012; LL.M. in National Security, Georgetown University Law Center, 2019, “Mal-Who? Mal-what? Mal-where? The Future Cyber-Threat of a Non-Fiction Neuromancer: Legally Un-Attributable, Cyberspace-Bound, Decentralized Autonomous Entities,” 21 N.C. J. L. & Tech. 1, December 2019, WestLaw

The rise of artificial intelligence (“AI”) has changed, is changing, and will change the world, from politics, to social \*4 interaction, to economics. However, it is important to note AI will have a tremendous effect on governments and nation-States (“States”), particularly on the difficulties AI will pose to national security. The current presidential administration's recent decree6 highlights the importance of AI dominance to the United States' national security interests.

The application of AI to national security related matters ranges from autonomous weapons systems7 to AI-powered facial recognition8 to countering terrorist recruitment using AI and machine learning.9 The intersection between cybersecurity and AI is a major area of concern.10 The past decade has seen an exponential increase of malicious cyber-activities, orchestrated by both State and non-State actors alike. Indeed, the Director of National Intelligence (“DNI”) announced “cyber” to be the first global threat in this year's Worldwide Threat Assessment:

Our adversaries and strategic competitors will increasingly use cyber capabilities--including cyber espionage, attack, and influence--to seek political, economic, and military advantage over the United States .... China, Russia, Iran, and North Korea increasingly use cyber operations to threaten both minds and machines in an expanding number of ways-- \*5 to steal information, to influence our citizens, or to disrupt critical infrastructure.”11

In a recent talk, former FBI Director James Comey reflected on threats from his tenure: “we see an explosion in nation-state adversaries and near nation-state actors using the digital vector to steal all kinds of information and to prepare things that were near to kinetic acts of war.”12

Indeed, “attribution,” that is, determining who, or potentially what, is responsible for a malicious cyber-activity, is already an incredibly difficult task. There are three types of attribution: political,13 technical, and legal. “Technical attribution” is characterized “as determining the identity or location of an attacker or an attacker's intermediary.”14 Legal attribution “refers to the assignment of responsibility for an ‘internationally wrongful act to a state”’ or non-State actor.15 Legal attribution requires some degree of technical attribution; there must be some evidence linking an actor to the cyber-attack, otherwise the cyber-attack cannot be qualified as State sponsored or not. Thus, it is important to understand the strategies for technical attribution, as well as the \*6 mechanism used by malign cyber actors to frustrate any efforts to link them to a particular cyber operation.

The emergence of AI has further complicated cyber-attribution issues. Last year, the first AI driven cyber-attack was reported in India. The attack “used rudimentary machine learning to observe and learn patterns of normal user behavior inside a network ... then began to mimic that normal behavior, effectively blending into the background and becoming harder for security tools to spot.”16 These type of machine-learning powered attacks are currently rare, but their emergence signal a worrisome potential trend because they could permit malign actors to threaten critical infrastructure like powerplants or nuclear facilities, steal personal data on a massive scale, or shut down or steal money from financial institutions.

Identifying the human actor who directed an attack from behind the computer was already difficult to accomplish, often requiring intelligence gleaned from human spies and electronic sources, in addition to the legal authority necessary to trace the code “breadcrumbs” through foreign cyberspace. Forensic evidence of a malicious cyber-activity's origin could be masked but never totally erased. Enter AI. A decentralized AI system,17 created, released, and acting on its own without any direction from a human engineer or creator, could substantially blur any attributive link to an actor or State.

Even if a government could point a finger at an intangible, cyberspace-bound, decentralized autonomous AI entity (a “CyDAE”), what legal authority does a State have to stop a CyDAE's malicious cyber-activities? For purposes of jurisdiction, is the CyDAE “located” where a majority of its servers are located, or is it where the data it uses is located? Is a CyDAE's nationality \*7 correspondent to the nationality of its creators, if their identities can be ascertained? This AI arrangement adds yet another layer of ambiguity in terms of attribution. How can we enable action to combat and/or regulate the use of AI in terms of cybersecurity? Developing a way to “point the finger”-- i.e. impose responsibility upon AI, specifically CyDAE, or its handlers--is of paramount importance.

Going forward in this discussion, AI responsibility is essential to the different levels of AI development. The term “AI,” on the lower-end of the intelligence spectrum, means “systems that can emulate, augment, or compete with the performance of intelligent humans in well-defined tasks.”18 On the higher end of the intelligence spectrum is “artificial general intelligence” (“AGI”), which means a “‘strong’ [AI] with the full range of cognitive capacities typically possessed by humans, including self-awareness” as is usually depicted in science fiction.19 The AI discussed in this paper fall somewhere between the two extremes.

This article will provide a brief technological breakdown about AI systems. Next, the article will discuss some legal personhood theories for autonomous AI systems and then summarize the law of attribution. To tie it all together, the next section will use a CyDAE example to demonstrate various kinds of cyber-activities that could be carried out by AI. Penultimately, the article will apply the current attribution framework to highlight the difficulty CyDAEs will pose in a legal context. The discussion will end with four bold and potentially provocative general proposals in order to guide policy vectors. The proposals are: (1) mandatory registration of AI systems; (2) a standard of AI system explainability; (3) the creation of legal personhood arrangements that require human control; and (4) universal jurisdiction for AI that fail to abide by these legal standards. Although the threat outlined in this article seems far- \*8 fetched, we cannot allow the next major threat to our society to emerge from a failure of imagination.

II. BRIEF TECHNOLOGY BREAKDOWN

This section will define and summarize different conceptual underpinnings. At least some AI experts consider AI to be “a set that contains machine learning (ML), and deep learning (DL).”20 Therefore, an independent, decentralized artificial intelligence capable of engaging in malicious cyber-activities would likely be technologically sophisticated, so understanding how the technology works may help us understand the legal ramifications of such activities. The same is true for deterring, detecting, and combatting malicious cyber-activities: without a baseline technical understanding, relevant legal frameworks cannot be applied meaningfully.

One of the first approaches used to create AI was a “rule-based” method, that is, a programmer would create a set of rules that the system would have to check for each decision or instance of learning. While rule-based methods have important uses, “[t]rying to hand-code a set of rules for a machine ... to visually distinguish between an apple and a tomato [for example] would be challenging. Both objects are round, red, and shiny with a green stem on top.”21 Rule-based approaches are considered “top-down” because of how the over-arching rules are applied to the learning process. Rather than a top-down, rule-based approach, typical AI models utilize “bottom-up” approaches: complex mathematical formulas known as “algorithms” parse millions of pieces of data in search for patterns. The exponential increase in computing power and availability of voluminous categorized datasets opened the door for these breakthrough techniques in AI system design.

\*9 A. AI Uses and Advantages

What about AI in general makes it appealing for human productivity? “In some cases, their value may come from being cheaper, faster, or easier to deploy at scale relative to human expertise.”22 Beyond general qualities like “data classification,” “detection,” “prediction,” and “optimization” of efficiency, AI systems seem to be trending toward “faster-than-human reaction times”; “superhuman precision and reliability”; “superhuman patience and vigilance”; as well as ability to conduct “operations without connections to humans.”23 The utility of Artifical Neural Networks (“ANNs”) in particular transcend human capabilities in a myriad of fields including “computer security, medical science, business, finance, bank[ing], insurance, the stock market, electricity generation, management, nuclear industry, mineral exploration, mining, crude oil fractions quality prediction, crops yield prediction, water treatment, and policy.”24

B. Machine Learning

Machine learning is “a developmental process in which repeated exposures of a system to an information-rich environment gradually produce, expand, enhance, or reinforce that system's behavioral and cognitive competence in that environment or relevantly similar ones.”25 In simple terms, “[g]iven a goal, learning machines adjust their behavior to optimize their performance to achieve that goal.”26 So, with regard to the example of a tomato and an apple above:

[A]n algorithm might take as input millions of labeled images, such as “dog,” “person,” “apple.” The algorithm then learns subtle patterns within the images to distinguish between categories--for example, between an apple and a tomato .... Given enough labeled images of both, machines can also learn these differences and then distinguish between an apple and a tomato when they are not labeled.27

\*10 As AI system design improved, sub-types of machine learning proliferated, although in-depth descriptions of those methods are beyond the scope of this article.28 Notably, however, the current state of machine learning is far from the level of sophistication needed for an advanced, standalone CyDAE that would be able to exist completely independent from human handlers.

C. Artificial Neural Networks (“ANNs”) & Deep Learning

Considering the plasticity and adaptability of the human brain, it is no wonder that some forms of machine learning borrow concepts from human neuroscience. Simply, “[h]uman brains are made up of connected networks of neurons .... ANNs seek to simulate these networks and get computers to act like interconnected brain cells, so they can learn and make decisions in a more humanlike manner.”29 For instance, “the network gradually ‘learns' from repeated ‘experience’ (multiple training runs with input datasets) how to optimize the machine's ‘behavior’ (outputs) for a given kind of task.”30

These ANNs, much like the human brain, can create stronger or weaker associations between connections in the hidden layers, which will result in the AI system's behavior adapting and adjusting \*11 to changing scenarios.31 “Whereas machine-learning algorithms require the features they look for in data to be pre-set, deep-learning neural net[works] can determine and detect salient features on their own.”32 Self-driving cars are a useful example. If the system learned what a “bicyclist” is from various dataset depicting or describing bicyclists being input into the system over time, then when the system detects a bicyclist, it will learn to adjust its behavior over time, and eventually be able to “slow down slightly, edge to the left-center of the lane.”33

Creating and implementing “hybrid” designs of AI systems that incorporate overarching “top-down” rules to govern the “bottom-up” processes, are critical to the future regulation of AI.34 This kind of “hybrid” approach will give developers greater control over their AI systems:

The potential for the misalignment of interest [between the AI system's objectives and those of the public at large] flows from the fact that an AI's objectives are determined by its initial programming. Even if that initial programming permits or encourages the AI to alter its objectives based on subsequent experiences, those alterations will occur in accordance with the dictates of the initial programming ... [which] seems beneficial in terms of maintaining control. After all, if humans are the ones doing the initial programming, they have free rein to shape the AI's objectives.35

D. Black Box and Explainability Issues

The “black box” or “explainability” problem is a major hurdle for AI developers.36

The term ‘black box’ has long been used in science and engineering to denote technology systems and devices that function without divulging \*12 their inner workings. The inputs and outputs of the ‘black box’ system may be visible, but the actual implementation of the technology is opaque, hidden from understanding or justifiability.37

Put another way, when necessary to understand either the programming, coding, or motives of a particular AI, the AI system's process is often so opaque because of the sheer complexity of the code, or by an advertent wall created by the programmers to obfuscate that code. Opacity of an AI system means “the inner workings of an AI system may be kept secret and may not be susceptible to reverse engineering.”38 “The ‘black box’ concept has been exploited by the likes of Silicon Valley start-ups to Wall Street investment firms, usually in their efforts to protect intellectual property and maintain competitiveness.”39 Opaque code should not be permitted solely in order to protect proprietary information, shield a company or individual from liability, or evade detection for some insidious or criminal reason.

But, opacity of AI systems may not purely be based on the designers' intent to shield the inner workings of their code from view, but might instead be a symptom of the complexity of AI system technology. At least one scholar has articulated the difficulty AI system designers must face when balancing their systems' complexity, transparency, proprietary information security, explainability, and functionality: if algorithms can “be so complex that meaningful transparency is impossible ... [s]hould robots be designed to be ‘closed,’ in the sense that they have a set, dedicated function and run only proprietary software ... [o]r can companies design robots to be ‘open’ without incurring liability?”40 Black box AI would likely present difficulties in terms of government audits, \*13 “especially crucial for critical organizations that are required to explain the reason for any decision.”41

Moreover, the explainability problem may limit the ability of programmers and creators to know the source of a problem with the AI system's function. In a discussion of machine learning algorithms and facial recognition, professor Nick Weaver noted the following serious issues for the technology:

When applied to face recognition there are huge biases turning up ... we don't know whether this is biases in the training set or if there actually might be technical or cultural features or some other aspects that are resulting in these biases and we can't because these systems are designed as unknowable black boxes.42

But, policy and legislation in western democracies seems to highlight why an emphasis on explainable AI systems may benefit society. The U.S. Defense Advanced Research Projects Agency (“DARPA”), a research agency within the U.S. Department of Defense (“DoD”), spearheads AI initiatives that have already encountered such problems, succinctly describing “black box” issues they expect to confront in developing autonomous weapons systems:

Continued advances [in AI] promise to produce autonomous systems that will perceive, learn, decide, and act on their own. However, the effectiveness of these systems is limited by the machine's current inability to explain their decisions and actions to human users .... [DoD] is facing challenges that demand more intelligent, autonomous, and symbiotic systems. Explainable AI-- especially explainable machine learning--will be essential if future warfighters are to understand, appropriately trust, and effectively manage an emerging generation of artificially intelligent machine partners.43

In the European Union (“EU”), the General Data Protection Regulation (“GDPR”) imposes explainability requirements for automated systems writing: “the data controller shall implement suitable measures to safeguard the data subject's rights and \*14 freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.”44 Without using the phrase “explainability,” the GDPR codifies the requirement that a system be explainable by requiring human review of any AI system determinations. Although it did not become law, the EU parliament proposed a resolution about AI and robotics, noting the importance of transparency for AI systems, highlighting

the principle of transparency, namely that it should always be possible to supply the rationale behind any decision taken with the aid of AI that can have substantive impact on one or more persons' lives; considers that it must always be possible to reduce the AI system's computations to a form comprehensible by humans; considers that advanced robots should be equipped with a ‘black box’ which records data on every transaction carried out by the machine, including the logic that contributed to its decisions.45

Issues surrounding black box algorithms used in popular social media platforms have prompted self-reflection by the controllers of those platforms,46 but also criticism from scholars who point how innovation might suffer from black box regulation. One critic explained that attempting to regulate unexplainable AI systems \*15 “significantly raises labor costs and thus creates a strong disincentive from using AI--as a main reason for developing AI in the first place is to automate functions that would otherwise be much slower, costlier, and more difficult to complete if performed by humans.”47

Notwithstanding the policy arguments in favor of or against explainable AI systems in the current state of the technology, the opacity of unexplainable systems will pose serious problems to investigators seeking to make attributive links through analysis of AI system processes.

E. Decentralization

In order to understand how AI use and consume data, it is essential to understand how data is stored. Data can be stored in a “centralized” way, meaning the data is contained on a single server, hard drive, or network, or, alternatively, controlled by a single entity.

Data can be processed simultaneously in multiple locations [by that entity]; dispersed for storage around the globe; re-combined instantaneously; and moved across borders by individuals carrying mobile devices ... [s]ervices, such as ‘cloud computing,’ allow [organizations] and individuals to access data that may be stored anywhere in the world.48

If we analogize data to grain, “centralized” storage of grain might be that all of a Farmer's grain is stored in one warehouse, or in one silo, in a building on one farm, all controlled by a single Farmer. In contrast, data can be stored in a “decentralized” fashion, meaning the data need not be contained in a single, discreet location. Rather, data can be separated, and stored on thousands of different networks, \*16 and still retrieved later.49 Using the grain example above, decentralized grain storage would mean that the specific individual pieces of the Farmer's grain are stored in many silos, many warehouses, or across many farms, rather than just in the Farmer's silo. The grain analogy fails, however, when it comes to retrieval of data versus retrieval of grain in a decentralized paradigm. It would be nearly impossible for the Farmer to separate each individual piece of his/her grain and retrieve all those exact pieces of grain. However, with modern computing and advances in technology, data can be separated, dispersed across myriad networks, and retrieved without fail. Importantly, decentralization does not apply solely to data; any network protocol, function, or transmission of information can implement decentralization--whether it be computing, financial transactions, or communications.

Many characteristics of decentralization make it an attractive approach to computing and storage of data. Vitalik Buterin identifies, in relevant part, two key reasons for decentralization:

Fault tolerance--decentralized systems are less likely to fail accidentally because they rely on many separate components ... [and]

Attack resistance--decentralized systems are more expensive to attack and destroy or manipulate because they lack sensitive central points that can be attacked at a much lower cost ....50

From a practical perspective, decentralization happens when computer or network operators install a particular program or protocol's software and act as a “node,” that is, software on a computer that participates as one point in a network of computers associated by the commonly-installed program. Thus, if one specific node is attacked or breaks down, unlike a single centralized network \*17 node, a decentralized network can still function even if “five out of ten computers” fail simultaneously.51 “[T]he principle is uncontroversial, and is used in real life in many situations, including jet engines, backup power generators particularly in places like hospitals, military infrastructure, [and] financial portfolio diversification ....”52 Simplistically, decentralization creates a vast fail-safe web of nodes rather than consolidating information or computing power in a single place or on a single network.

A decentralized AI system would thus benefit from fault tolerance and attack resistance, much like decentralized data platforms do. The result would be an AI system with an uncertain physical location, immunity to cyberattack, and temporal longevity because of the unlikely possibility of accidental failure.

Taken together, the attributes described above paint a potentially troubling picture of an independent entity that, through deep neural networks, learns on its own and prevents observers from understanding how it works technically because its code is obscured by an unexplainable black box, all while being resistant to attacks and difficult to locate by virtue of its networks' decentralization.

III. EMERGENCE OF CYDAES AS LEGAL PERSONS

In the recent past, Saudi Arabia granted citizenship to a “female” AI called “Sophia,”53 but the act by the kingdom appears to be more ceremonial and symbolic than legal in nature. Trent McConaghy, a notable AI researcher, presciently opined about “Decentralized Autonomous Organizations” (“DAOs”) and their inevitable joinder with AI, “DAOs have arrived ... [a]nd when artificial intelligence gets added to the mix, the results are explosive.”54 Similarly, one \*18 legal scholar paints the “explosive results” of AI DAOs (he calls them “algorithmic entities”) in a much more grim light:

[b]ecause they lack human bodies, [algorithmic entities] are harder to catch and impossible to punish. [They] need not fear death or capture. They can replicate themselves without ego and sacrifice themselves without motive. They need not recoil at the necessity to do violence to humans.55

So, how will the law handle these non-human entities? How do we get to a world with AI existing as legal persons? This section will discuss a few ways that an AI might be structured as a legal person.

A. Legal Personhood

“[I]t is unlikely that, in a future society where artificial agents wield significant amount of executive power, anything would be gained by continuing to deny them legal personality.” 56 Denying AI legal personality out of vanity is one issue, but would it not actually be beneficial for people to categorize and legalize AI entities so they fit in our rigid legal paradigms? Notwithstanding current technical limitations that prevent AI systems from becoming truly autonomous and/or self-governing, the state of the law now probably precludes AI systems from becoming independent legal entities.57 But, importantly, the issue of legal personhood arises in discussions about who is liable for the acts of AI systems. Some scholars rely on “agency” as the legal framework to support liability when people are hurt by AI systems,58 while others point to legal personhood arrangements.59 But, other theoretical and hypothetical proposals for legal personhood arrangements for AI or otherwise autonomous systems are not so far-fetched.

#### Personhood can be used to attach the AI to a human or corporate overseer

Jonathan A. Schnader 19, B.A. Miami University of Ohio, 2008; J.D. Syracuse University College of Law, 2012; LL.M. in National Security, Georgetown University Law Center, 2019, “Mal-Who? Mal-what? Mal-where? The Future Cyber-Threat of a Non-Fiction Neuromancer: Legally Un-Attributable, Cyberspace-Bound, Decentralized Autonomous Entities,” 21 N.C. J. L. & Tech. 1, December 2019, WestLaw

VII. PROPOSALS

The idea of preemptively regulating AI is not new. Elon Musk, for instance, declared: “I'm increasingly inclined to think that there should be some regulatory oversight, maybe at the national and international level, just to make sure that we don't do something very foolish.”129 Many thinkers in the AI field endorse and embrace \*37 the responsible development of AI systems.130 This analysis suggests four general, but synergistic proposals with the goal of presenting a holistic approach to regulating future CyDAEs, and AI systems broadly.131

Proposal 1: AI Registry

All AI systems should be required to be registered with a legislatively or executively mandated agency or commission. The registration would be similar to the way that money services businesses must register with the Financial Crimes Enforcement Network in the United States. The registration would require basic information about the creator(s) and/or owner, whether it be an individual, corporation, or other legal arrangement. Such an idea is not novel: the first decentralized AI marketplace requires registration for AI to participate in its platform.132 The registry would make basic information publicly available and accessible, as well as promote transparent use of CyDAEs and AI systems generally. Notably, a CyDAE released for the specific purpose of orchestrating cyber-attacks would likely not be registered by the entity that created it, so there must be some paradigm to deal with unregistered and malicious CyDAEs.

Proposal 2: Explainable AI Systems

AI systems should be primarily explainable. Some see benefits to unexplainable AI systems, or at least, they view unexplainable systems as the result of AI algorithms that process information at a level so advanced, that explaining its processes would be ineffective.133 Perhaps every step of an AI system's process need not be explainable so to not impede “the cases that give machine \*38 learning its greatest value: true patterns that exceed human imagination.”134 At the very least, “[w]e need the developers to show their work.”135 In other words, policymakers should implement an explainability standard that requires, at a minimum, that the programmer or an expert reviewing the programmer's notes be able to explain the rules built into its AI system. Of course, that assumption requires that the programmer or creator be known, which underscores the importance of a registry.

Proposal 3: Legal Personhood Structure with Human Control

The most important feature of an AI regulatory regime is human control; thus, any AI system, and especially autonomous AI systems, should have human-controlled fail-safe mechanisms built in so no “loss of general control” occurs. 136 Regardless of the form, autonomous AI entities need a personhood arrangement so the law can handle what an AI entity is. Perhaps the personhood arrangement should be an autonomous entity, allowing an AI to govern itself. Should that be the case, as a part of that AI entity's incorporation or legal personhood creation, a human or corporate overseer entity should be tethered to that AI, with some affirmation and/or description of how that human-controlled legal entity maintains oversight, no matter how attenuated that oversight may be.137

#### Existing concepts of mens rea and actus reus can be ported over into the AI context.

--DLM = Deep Learning Machine

Priya Persaud 20, J.D. Candidate, Rutgers Law School, 2020, “Protecting Against Ultron: Exploring the Potential Criminal Liability of Self-Programming Deep Learning Machines,” 72 Rutgers U. L. Rev. 577, Winter 2020, WestLaw

IX. SUGGESTION FOR LEGAL REFORM

Given that the current state of the law focuses on ways of imputing criminal liability to human beings only, there is a need for legal reform such that a DLM can be held liable for its actions. However, since the current elements of a criminal charge are specifically tailored to human beings,133 there is a need for a new test that can be applied to DLM and AI in general. This section establishes a three-pronged test that was crafted to account for discrepancies within mens rea and actus reus as they apply to both human beings and DLM. However, prior to discussing \*596 the test proposed here, it is important to explore the historic ideology on expanding criminal liability to non-human entities.

A. Previous Attempts at Expanding Criminal Liability to Non-Human Entities

One of the earliest attempts of holding a non-human entity accountable for its conduct was written by Lawrence Solum in 1992.134 The center of Solum's research focuses on whether AI can serve as a trustee, such that it can be left alone to make decisions for human beings.135 Solum illustrates this idea through the use of a hypothetical where a computer software program is instructed to invest in publicly traded stocks.136 Solum identified a number of reasons trusting the program would not be a sensible idea, including the fact that human intervention may be necessary to make a decision and the fact that a lawsuit can ensue if the software program does not invest wisely.137

While Solum proposed a timely test for measuring whether AI can function independently, his test does not account for modern day technological advances. As discussed throughout this note, one of the objectives in programming DLM is to create machines that are able to function sans human intervention.138 Using the data mining techniques \*597 with which DLM are programmed, there would be little need for human intervention for a machine that is designed to trade stocks.

The following subsection builds upon the strengths of DLM to present a three-pronged approach for expanding criminal liability.

B. Three-Pronged Proposed Solution

The following liability approach uses the traditional mens rea and actus reus elements of criminal liability to illustrate how a DLM may be held accountable for its actions. Throughout this subsection modern day examples will be used to assist in the visualization of the approach.

1. Prong One: Review Source Code to Understand Mens Rea139

The first step is geared toward understanding the mens rea of a DLM. As described above, mens rea refers to one's mind or, more specifically, one's criminal intent.140 As it applies here, a DLM's mind is the amalgamation of code and algorithms that comprise its central decisionmaking center.141 When taken together, the code and the algorithms provide the DLM with a rudimentary introduction into the tasks that the DLM will be asked to perform later on.142 Therefore, to gain a true understanding of what the DLM is designed to do, it is important to perform a line by line review of the DLM's code and algorithms.143 Only by reviewing the DLM's code and algorithms does it become apparent \*598 what the DLM was designed to do.144 This will establish the starting point for determining whether the DLM's subsequent decisions drastically veered away from the initial code. This will also help with identifying the information that the DLM was initially given, which will be extremely important for tracking the progression of the DLM's conduct.

For example, consider the 2014 news story where an AI was designed to buy products through the online black market.145 The AI was initially programmed to purchase items over the internet, but was not specifically asked to purchase illegal items.146 As the AI grew accustomed to purchasing items, it started to explore the depths of the Internet and eventually took to purchasing illegal items, such as ecstasy pills.147 Applying the first prong of this note's three-pronged approach to determine whether criminal liability can be extended to the AI, it is necessary to review the AI's source code to determine exactly what the AI was initially programmed to do.148 Although the source code was not publicly released, it is likely that the AI was simply programmed to select online items that were within the weekly budget that the AI was granted. 149 An analysis of the AI's code would be extremely beneficial in understanding the AI's mens rea and whether the AI was instructed to purchase illegal items or whether the purchase of illegal items was behavior that the AI learned independently.

\*599 2. Prong Two: Comparing Conduct with Source Code to Identify Actus Reus

The second step focuses on the actus reus of the DLM. As described above, actus reus refers to the physical carrying out of an alleged crime.150 As it applies here, this would require a comparison of the DLM's initial code from Prong One with the DLM's conduct that led toward its potential criminal liability.

In order to get closer to establishing criminal liability of the DLM, it is important to show that the alleged criminal conduct originated from decisions that were made by the DLM, using its library of knowledge that was cultivated through data mining. With respect to criminal liability, these decisions are far different from the decisions a DLM makes using only the code that was programmed into it by a human being. If the DLM is believed to have committed a criminal act while executing the code received from a human being, then the DLM has not acted independently.151 In other words, the DLM was merely following instructions and should not be held criminally liable in such scenarios.

On the other hand, the weighted-decisions that a DLM makes after performing data mining are, ideally, loosely connected to the initial code that the DLM received from its programmer.152 After performing data mining and consistently maintaining a library of knowledge, the DLM has much more data that it can use throughout these decision-making processes.153 As such, the likelihood of the DLM making a decision pursuant to its own analysis is much greater than the likelihood of the DLM blindly following its source code.

Therefore, since there is a stark difference in the ways a DLM may make decisions, there exists the need to compare the outputs of the DLM's source code to the DLM's alleged criminal conduct.154 In other words, it is important to understand the difference between the DLM's alleged criminal conduct and the conduct the DLM was initially programmed to execute.

\*600 To better understand this prong, consider the AI from Prong One that was engaged in purchasing items from the dark side of the Internet.155 It is unclear whether the AI was instructed to purchase illegal items; however, by tracking the AI's conduct and purchases, it is obvious that the AI in fact purchased illegal narcotics off of the Internet.156 Therefore, using the methods prescribed under Prong Two, it is important to compare the AI's source code to the AI's behavior. If the AI was initially programmed to purchase illegal items from the internet, then the AI would satisfy the requisite actus reus, but would not satisfy the requisite mens rea.157 By contrast, if the AI was not programmed to purchase illegal items, but proceeded to do just so, then the AI would satisfy the requisite mens rea and actus reus. Therefore, a comparison between the initial source code and the conduct is imperative.

3. Prong Three: Comparing Conduct with the Source Code Commands

The third step again addresses the mens rea of the DLM. It requires a determination of how far removed the DLM's conduct was from its initial code. Once the differences from Prong Two have been spotted and recorded, it is necessary to determine how dissonant the two classes of conduct are. In other words, there must be a determination of whether the DLM did or did not veer too far away from the tasks it was originally instructed to perform. Not only is this useful in determining mens rea, but it can also be useful for determining whether punishment will be inflicted upon the DLM.

To faithfully execute this step, it may be necessary to appropriate the process used in Prong Two--a play by play review of the alleged criminal conduct.158 When combined with the line by line review of the DLM's source code from Prong One,159 the play by play review might simplify the comparison. With a simplified comparison process, it may be easier to determine whether the alleged criminal conduct follows from the conduct prescribed in the source code. Accurate execution of this step requires an analysis of the algorithms that the DLM used. However, this will likely be difficult to complete given that the level of programming sophistication in the DLM is far beyond that of human beings.160

\*601 Once again, Prong Three is easier to visualize using the AI from Prong One that was engaged in purchasing items from the dark side of the Internet.161 Applied here, it is important to compare the exact conduct of the AI with the commands that are listed in the original source code. If the conduct flows directly from the source code, then it is clear that the machine faithfully executed its orders. However, if the conduct does not follow from the source code then it is clear that somewhere along the line the AI developed its own algorithm that it used to purchase illegal items. A showing of such independence would support the finding that the AI is capable of independent decision-making and should be liable for its criminal conduct.

Thus, after applying each factor, if the results show that the DLM had the requisite mens rea and actus reus for the crime, then it may be possible to hold the DLM criminally liable for its actions. Also, depending on how far removed the DLM's conduct was from the original source code, officials may be able to use the results of Prong Three to determine a just punishment for the DLM.162 However, this three-pronged approach may deliver unfavorable results, causing individuals to object to the expansion of criminal liability.

#### There is a NEG argument that criminalizing AI directly interferes with assigning liability to human designers which is better.

Priya Persaud 20, J.D. Candidate, Rutgers Law School, 2020, “Protecting Against Ultron: Exploring the Potential Criminal Liability of Self-Programming Deep Learning Machines,” 72 Rutgers U. L. Rev. 577, Winter 2020, WestLaw

X. POTENTIAL OBJECTIONS TO LEGAL REFORM

Given the controversial nature of this topic, pushback is expected. This section aims to identify and address objections that will likely result from discussions of this topic.

A. First Objection: AI Should be Regarded Solely as Property

The first reasonably foreseeable objection is that human beings should be held liable for the criminal conduct of the machines they create.163 This objection is based on the theory that DLM are the property of the human beings who create it.164 Under this theory, the fact that \*602 “human beings are made naturally while AIs are made artificially, should make a difference.”165

In addressing the first objection, it is important to note the emphasis on the fact that a human being should be liable for what he or she creates.166 While this is a sound argument, it misses the fact that DLM are also capable of creating their own machines. One characteristic of DLM (parent-DLM) is that once they have strengthened their library of knowledge, they are capable of using their library of knowledge to create a secondary DLM (child-DLM) that will inherit its library of knowledge. In this scenario, the human being is not the only being capable of creation.

#### There is a NEG argument that expanding rights to AI diminishes the importance and value of human rights.

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B. Second Objection: Legal Rights for Human Beings Should Trump Legal Rights for Non-Human Entities

The second reasonably foreseeable objection to the ideas set forth in this note is that legislative officials should focus on advancing legal rights for human beings prior to engaging in a battle for legal rights for nonhuman entities. 171 While this is a fair objection, it is important to note that advancing the legal recognition of DLM and AI does not diminish the legal rights of human beings. In fact, the legal rights of human beings remain untouched. Moreover, it is crucial that legislative officials are aware of current technological advances such that they are able to respond to them through useful legislation.172 As Solum states, “just \*603 because today we cannot imagine non-humans to qualify for personhood, does not imply that, in the future, AIs could not develop into non-biological entities that are intelligent, conscious, and feeling in ways that change our very concept of personhood.”173 Thus, given the discussion in previous sections, it is possible that DLM will reach the cognitive level of human beings, such that the expansion of legal rights will naturally follow.

#### Spillover effects on innocents from punishing AI might destroy innovation, favoring more narrowly tailored remedies. This is a CP/DA theme.

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

2. Spillover

A final retributivist challenge to punishing AI is the “spillover problem,” again familiar from the corporate context.171 Because corporate punishments (usually in the form of fines) amount to a hit to the corporation's bottom line, these punishments inevitably spill over \*363 onto innocent shareholders.172 This might seem to violate the desert constraint against the state harming people in excess of their desert. The same objection has been raised against punishing AI. Mulligan worries that “[o]ne could ... imagine situations where the notion of separating a rogue robot from its owner [or damaging or restricting the robot in punishing it] would create a disproportionate burden on the owner, for example if a robot was unique, unusually expensive relative to the harm caused, or difficult to replace.”173 This is just a version of the spillover problem. If the AI system unforeseeably causes harm, it may seem unfair or disproportionate to its innocent owner or operator to damage the AI system in punishment.

There are familiar responses to the spillover objection for corporations. First, one might contend that spillover does not qualify as punishment because it is not imposed on a shareholder for her offense.174 Nonetheless, this definitional answer is somewhat unsatisfying, as there clearly are strong reasons for the state not to knowingly harm innocent bystanders even if the harm does not strictly count as punishment.

A better answer is that spillover is not a special problem for corporate or AI punishment. Most forms of punishment-- including punishment of individual wrongdoers--has the potential to harm the innocent, as when a convicted person has dependent children. Spillover objections may simply expose general problems with criminal law. The fact that punishment tends to harm the innocent suggests a need to reform criminal law as well as prisons, reentry programs and similar initiatives to lessen the collateral consequences of punishment of all types. In the corporate context, some have recently responded to the spillover objection by defending reforms to corporate punishments so the “pain” they impose is more accurately distributed to the culpable actors within the company who contributed to the crime.175 For example, Will Thomas argues that managers found to have contributed to a crime committed by the corporation should have their incentive compensation clawed back to satisfy the criminal fines that were levied against the corporation in the first instance.176

\*364 Similar thinking applies to AI punishment, which likewise should be narrowly tailored. Destroying an AI, for example, would be a blunt remedy that is more likely to harm the innocent. More tailored remedies might be implemented instead, such as reprogramming the AI, or civil remedies directed at responsible persons. In such ways, the punishment of AI systems could be crafted to minimize the spillover effects. Further, spillover may be less of a concern in the case of Hard AI Crime, where there may be little nexus between AI punishment and harm to innocent individuals. Even here, spillover could be largely addressed through well-designed mechanisms like the ex-ante creation of a financially responsible party or creation of a fund to cover criminal liability as a condition of operation the AI system (akin to criminal liability insurance). We explore such implementation ideas further in the next Part. The spillover problem thus is not an absolute bar to AI punishment. It is an omnipresent problem with criminal punishment, which should be addressed for any novel mode of criminal punishment - whether for corporations or AI.

#### There are a variety of CP ideas based on applying existing criminal frameworks or making people around AI culpable instead of the AI itself. This avoids the rights creep DA.

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

IV. FEASIBLE ALTERNATIVES

We have argued that punishing AI could have benefits and that doing so would not be ruled out by the negative limitations and retributive preconditions of punishment. But this does not yet show the punishment of AI to be justified. Doing so requires addressing the third main question in our theory of punishment: Would the benefits of punishing AI outweigh the costs, and would punishment be better than alternative solutions? These solutions might involve doing nothing, or relying on civil liability and regulatory responses, perhaps together with less radical or disruptive changes to criminal laws that target individuals.

Ideally a cost-benefit analysis would involve more than identifying various costs and benefits, and would include quantitative analysis. If only a single Hard AI Crime is committed each decade, there would be far less need to address an AI criminal gap than if Hard AI Crime was a daily occurrence. The absence of evidence suggesting that Hard AI Crime is common counsels against taking potentially more costly actions now, but this balance may change as technological advances result in more AI activity.

Section A focuses on Hard AI Crime, and finds that existing criminal law coverage will likely fall short. Section B argues that AI punishment has significant costs that suggest alternative approaches may be preferable. In Sections C and D, we map out some alternative approaches to managing AI crime. In particular, we examine moderate expansions of criminal law as well as tools available within civil law, \*369 and we argue that they have the resources to provide preferable solutions to the problem of Hard AI Crime.

A. First Alternative: The Status Quo

In considering the alternatives to direct punishment of AI, we begin with asking whether it would be preferable to simply do nothing. This section answers that existing criminal law falls short: there is an AI criminal gap. The impact of this gap is an empirical question we do not attempt to answer here.

1. What the AI criminal gap is not: reducible harmful conduct by AI

We begin by setting aside something that will not much concern us: cases where responsibility for harmful AI conduct is fully reducible to the culpable conduct of individual human actors. A clear example would be one where a hacker uses AI to steal funds from individual bank accounts. There is no need to punish AI in such cases, because existing criminal offenses, like fraud or computer crimes, are sufficient to respond to this type of behavior.193

Even if additional computer-related offenses must be created to adequately deter novel crimes implemented with the use of AI, criminal law has further familiar tools at its disposal, involving individual-focused crimes, which provide other avenues of criminal liability when AI causes foreseeable harms. For example, as Hallevy observes, cases of this sort could possibly be prosecuted under an innocent “agency model” (assuming AI can sensibly be treated as meeting the preconditions of an innocent agent, even if not of a fully criminally responsible agent in its own right).194 Under the innocent agency doctrine, criminal liability attaches to a person who acts through an agent who lacks capacity--such as a child or someone with an insanity defense. For instance, if an adult uses a five-year-old child to deliver illegal drugs, the adult rather than the child would generally be criminally liable.195 This could be analogous to a person programming a sophisticated AI to break the law: the person has liability for \*370 intentionally causing the AI to bring about the external elements of the offense.196

This doctrine requires intent (or at least the knowledge) that the innocent agent will cause the prohibited result in question.197 This means that in cases where someone does not intend or foresee that the AI system being used will cause harm, the innocent agency model does not provide a route to liability. In such cases, one could instead appeal to recklessness or negligence liability if AI creates a foreseeable risk of a prohibited harm.198 For example, if the developers or users of AI foresee a substantial and unjustified risk that an AI will cause the death of a person, these human actors could be convicted of reckless homicide.199 If such a risk was merely reasonably foreseeable (but not foreseen), then lower forms of homicide liability would be available.200 Similar forms of recklessness or negligence liability could be adopted where the AI's designers or users actually foresaw, or should have foreseen, a substantial and unjustified risk of other kinds of harms as well--such as theft or property damage.201

Hallevy also discusses this form of criminal liability for AI-generated harms, calling it the “natural and probable consequences model” of liability.202 This is an odd label, however, since the natural and probable consequences doctrine generally applies only when the defendant is already an accomplice to--i.e., intended--the crime of another. More \*371 specifically, the “natural and probable consequences” rule provides that where A intentionally aided B's underlying crime C1 (say theft), but then B also goes on to commit a different crime C2 (say murder), then A would be guilty of C2 as well, provided that C2 was reasonably foreseeable.203

Despite his choice of label, Hallevy seems alive to this complication and correctly observes that there are two ways in which negligence liability could apply to AI-generated harms that are reasonably foreseeable. He writes:

the natural-probable-consequence liability model [applied] to the programmer or user differ in two different types of factual cases. The first type of case is when the programmers or users were negligent while programming or using the AI entity but had no criminal intent to commit any offense. The second type of case is when the programmers or users programmed or used the AI entity knowingly and willfully in order to commit one offense via the AI entity, but the AI entity deviated from the plan and committed some other offense, in addition to or instead of the planned offense.204

In either sort of scenario, there would be a straightforward basis for applying existing criminal law doctrines to impose criminal liability on the programmers or users of an AI that causes reasonably foreseeable harms. Thus, no AI criminal gap exists here.

A slightly harder scenario involves reducible harms by AI that are not foreseeable, but this is still something criminal law has tools to deal with. Imagine hackers use an AI to drain a fund of currency, but this ends up unforeseeably shutting down an electrical grid which results in widespread harm. The hackers are already guilty of something--namely, the theft of currency (if they succeed) or the attempt to do so (if they failed). Therefore, our question here is whether the hackers can be convicted of any further crime in virtue of their causing harm through their AI unforeseeably taking down an electrical grid.205

\*372 At first sight, it might seem that the hackers would be in the clear for the electrical grid. They could argue that they did not proximately cause those particular harms. Crimes like manslaughter or property damage carry a proximate cause requirement under which the prohibited harm must at least be a reasonably foreseeable type of consequence of the conduct that the actors intentionally carried out.206 But in this case, taking down the electrical grid and causing physical harm to human victims were assumed to be entirely unforeseeable even to a reasonable actor in the defendant's shoes.

Criminal law has tools to deal with this kind of scenario, too. This comes in the form of so-called constructive liability crimes. These are crimes that consist of a base crime which require mens rea, but where there then is a further result element as to which no mens rea is required. Felony murder is a classic example.207 Suppose one breaks into a home one believes to be empty in order to steal artwork. Thus, one commits the base crime of burglary.208 However, suppose further that the home turns out not to be empty, and the burglar startles the homeowner who has a heart attack and dies. This could make the burglar guilty of felony murder.209 This is a constructive liability crime because the liability for murder is constructed out of the base offense (burglary) plus causing the death (even where this is unforeseeable). According to one prominent theory of constructive liability crimes, they are normatively justifiable when the base crime in question (burglary) typically carries at least the risk of the same general type of harm as the constructive liability element at issue (death).210

\*373 This tool, if extended to the AI case, provides a familiar way to hold the hackers criminally liable for unforeseeably taking down the electrical grid and causing physical harm to human victims.

It may be beneficial to create a new constructive liability crime that takes a criminal act like the attempt to steal currency using AI as the base offense, and then taking the further harm to the electrical grid, or other property or physical harm, as the constructive liability element, which requires no mens rea (not even negligence) in order to be guilty of the more serious crime. This constructive liability offense, in a slogan, could be called Causing Harm Through Criminal Uses of AI.

New crimes could be created to the extent there are not already existing crimes that fit this mold. Indeed, in the present example, one might think there are already some available constructive liability crimes. Perhaps felony murder fits the bill insofar as attempting to steal currency may be a felony, and the conduct subsequently caused fatalities. However, this tool would be of no avail in respect to the property damage caused. This is why a new crime like Causing Harm Through Criminal Uses of AI may be necessary. In any case, no AI criminal gap is present here because criminal law has familiar tools available for dealing with unforeseeable harms of this kind.

2. What the AI criminal gap is: irreducible criminal conduct by AI

Consider a case of irreducible AI crime inspired by RDS. Suppose an AI is designed to purchase class materials for incoming Harvard students, but, through being trained on data from online student discussions regarding engineering projects, the AI unforeseeably “learns” to purchase radioactive material on the dark web and has it shipped to student housing. Suppose the programmers of this “Harvard Automated Shopper” did nothing criminal in designing the system and in fact had entirely lawful aims. Nonetheless, despite the reasonable care taken by the programmers-- and subsequent purchasers and users of the AI (i.e., Harvard)--the AI caused student deaths.

In this hypothetical, there are no upstream actors who could be held criminally liable. Innocent agency is blocked as a mode of liability because the programmers, users and developers of the AI did not have the intent or foresight that any prohibited or harmful results would ensue--as is required for innocent agency to be available.211 Moreover, in the case of RDS, if the risk of the AI purchasing the designer drugs was not reasonably foreseeable, then criminal negligence would also be blocked. Finally, constructive liability is not available in cases of this \*374 sort because there is no “base crime”--no underlying culpable conduct by the programmers and users of the AI--out of which their liability for the unforeseeable harms the AI causes could be constructed.

One could imagine various attempts to extend existing criminal law tools to provide criminal liability for developers or users. Most obviously, new negligence crimes could be added for developers that make it a crime to develop systems that foreseeably could produce a risk of any serious harm or unlawful consequence, even if a specific risk was unforeseeable. The trouble is that this does not seem to amount to individually culpable conduct, particularly as all activities and technologies involve some risks of some harm. This expansion of criminal law would stifle innovation and beneficial commercial activities. Indeed, if there were such a crime, most of the early developers of the internet would likely be guilty of it.212

B. The Costs of Punishing AI

Earlier, we discussed some of the potential costs of AI punishment, including conceptual confusion, expressive costs, and spillover. Even aside from these, punishment of AI would entail serious practical challenges as well as substantial changes to criminal law. Begin with a practical challenge: the mens rea analysis.213 For individuals, the mens rea analysis is generally how culpability is assessed. Causing a given harm with a higher mens rea like intent is usually seen as more culpable than causing the same harm with a lower mens rea like recklessness or negligence.214 But how do we make sense of the question of mens rea for AI?

Part III considered this problem, and argued that for some AI, as for corporations, the mental state of an AI's developer, owner, or user could be imputed under something like the respondeat superior doctrine. But for cases of Hard AI Crime that is not straightforwardly reduced to human conduct-- particularly where the harm is unforeseeable to designers and there is no upstream human conduct that is seriously unreasonable to be found--nothing like respondeat superior would be appropriate. Some other approach to AI mens rea would be required.

\*375 A regime of strict liability offenses could be defined for AI crimes. However, this would require a legislative work-around so that AI are deemed capable of satisfying the voluntary act requirement, applicable to all crimes.215 This would require major revisions to the criminal law and a great deal of concerted legislative effort. It is far from an off-the-shelf solution. Alternately, a new legal fiction of AI mens rea, vaguely analogous to human mens rea, could be developed, but this too is not currently a workable solution. This approach could require expert testimony to enable courts to consider in detail how the relevant AI functioned to assess whether it was able to consider legally relevant values and interests but did not weight them sufficiently, and whether the program has the relevant behavioral dispositions associated with mens rea-like intention or knowledge. In Part III.A, we tentatively sketched several types of argument that courts might use to find various mental states to be present in an AI. However, much more theoretical and technical work is required and we do not regard this as a first best option.

Mens rea, and similar challenges related to the voluntary act requirement, are only some of the practical problems to be solved in order to make AI punishment workable. For instance, there may be enforcement problems with punishing an AI on a blockchain. Such AIs might be particularly difficult to effectively combat or deactivate.

Even assuming the practical issues are resolved, punishing AI would still require major changes to criminal law. Legal personality is necessary to charge and convict an AI of a crime, and conferring legal personhood on AIs would create a whole new mode of criminal liability, much the way that corporate criminal liability constitutes a new such mode beyond individual criminal liability.216 There are problems with implementing such a significant reform.

Over the years, there have been many proposals for extending some kind of legal personality to AI.217 Perhaps most famously, a 2017 report \*376 by the European Parliament called on the European Commission to create a legislative instrument to deal with “civil liability for damage caused by robots.”218 It further requested the Commission to consider “a specific legal status for robots,” and “possibly applying electronic personality” as one solution to tort liability.219 Even in such a speculative and tentative form this proposal proved highly controversial.220

Full-fledged legal personality for AIs equivalent to that afforded to natural persons, with all the legal rights that natural persons enjoy, would clearly be inappropriate. To take a banal example, allowing AI to vote would undermine democracy, given the ease with which anyone looking to determine the outcome of an election could create AIs to vote for a particular candidate.221 However, legal personality comes in many flavors, even for natural persons such as children who lack certain rights and obligations enjoyed by adults. Crucially, no artificial person enjoys all of the same rights and obligations as a natural person.222 The best-known class of artificial persons, corporations, have long enjoyed only a limited set of rights and obligations that allows them to sue and be sued, enter contracts, incur debt, own property, and be convicted of crimes.223 However, they do not receive protection under constitutional provisions, such as the Fourteenth Amendment's Equal Protection \*377 Clause, and they cannot bear arms, run for or hold public office, marry, or enjoy other fundamental rights that natural persons do.224 Thus, granting legal personality to AI to allow it to be punished would not require AI to receive the rights afforded to natural persons, or even those afforded to corporations. AI legal personality could consist solely of obligations.

Even so, any sort of legal personhood for AIs would be a dramatic legal change that could prove problematic.225 As discussed earlier, providing legal personality to AI could result in increased anthropomorphisms. People anthropomorphizing AI expect it to adhere to social norms and have higher expectations regarding AI capabilities.226 This is problematic where such expectations are inaccurate and the AI is operating in a position of trust. Especially for vulnerable users, such anthropomorphisms could result in “cognitive and psychological damages to manipulability and reduced quality of life.”227 These outcomes may be more likely if AI were held accountable by the state in ways normally reserved for human members of society. Strengthening questionable anthropomorphic tendencies regarding AI could also lead to more violent or destructive behavior directed at AI, such as vandalism or attacks.228 Further, punishing AI could also affect human well-being in less direct ways, such as by producing anxiety about one's own status within society due to the perception that AIs are given a legal status on a par with human beings.

Finally, and perhaps most worryingly, conferring legal personality on AI may lead to rights creep, or the tendency for an increasing number of rights to arise over time.229 Even if AIs are given few or no rights initially when they are first granted legal personhood, they may gradually acquire rights as time progresses. Granting legal personhood to AI may thus be an important step down a slippery slope. In a 1933 Supreme \*378 Court opinion, for instance, Justice Brandeis warned about rights creep, and argued that granting corporations an excess of rights could allow them to dominate the State.230 Eighty years after that decision, Justice Brandeis' concerns were prescient in light of recent Supreme Court jurisprudence such as Citizens United v. Federal Election Commission and Burwell v. Hobby Lobby Stores, which significantly expanded the rights extended to corporations.231 Such rights, for corporations and AI, can restrict valuable human activities and freedoms.

C. Second Alternative: Minimally Extending Criminal Law

There are alternatives to direct AI punishment besides doing nothing. The problem of Hard AI Crime would more reasonably be addressed through minimal extensions of existing criminal law. The most obvious would be to define new crimes for individuals. Just as the Computer Fraud and Abuse Act criminalizes gaining unauthorized access or information using personal computers,232 an AI Abuse Act could criminalize malicious or reckless uses of AI. In addition, such an Act might criminalize the failure to responsibly design, deploy, test, train, and monitor the AIs one contributed to developing. These new crimes would target individual conduct that is culpable along familiar dimensions, so they may be of limited utility with regard to Hard AI Crimes that do not reduce to culpable actors. Accordingly, a different way to expand the criminal law seems needed to address Hard AI Crime.

In cases of Hard AI Crime, a designated adjacent person could be punished who would not otherwise be directly criminally liable-- what we call a Responsible Person. This could involve new forms of criminal negligence for failing to discharge statutory duties (perhaps relying on strict criminal liability) in order to make a person liable in cases of Hard AI Crime. It could be a requirement for anyone creating or using an AI \*379 to ex ante register a Responsible Person for the AI.233 It could be a crime to design or operate AI capable of causing harm without designating a Responsible Person.234 This would be akin to the offense of driving without a license.235 The registration system might be maintained by a federal agency. However, a registration scheme is problematic because it is difficult to distinguish between AI capable of criminal activity and AI not capable of criminal activity, especially when dealing with unforeseeable criminal activity. Even simple and innocuous seeming AI could end up causing serious harm. Thus, it might be necessary to designate a Responsible Person for any AI. Registration might involve substantial administrative burden and, given the increasing prevalence of AI, the costs associated with mandatory registration might outweigh any benefits.

A default rule rather than a registration system might be preferable. The Responsible Person could be the AI's manufacturer or supplier if it is a commercial product. If it is not a commercial product, the Responsible Person could be the AI's owner, developer if no owner exists, or user if no developer can be identified. Even non-commercial AIs are usually owned as property, although that may not always be the case, for instance, with some open source software. Similarly, all AIs have human developers, and in the event an AI autonomously creates another AI, responsibility for the criminal acts of an AI-created AI could reach back to the original AI's owner. In the event an AI's developer cannot be identified, or potentially if there are a large number of developers, again in the case of some open source software, responsibility could attach to an AI's user. However, this would fail to catch the rare, perhaps only hypothetical, case of the non-commercial AI with no owner, no identifiable developer, and no user. To the extent that a non-commercial AI owner, developer, and user working together \*380 would prefer a different responsibility arrangement, they might be permitted to agree to a different ex ante selection of the Responsible Person.236 That might be more likely to occur with sophisticated parties where there is a greater risk of Hard AI Crime. The Responsible Person could even be an artificial person such as a corporation.237

It would be possible to impose criminal liability on the Responsible Person directly in the event of Hard AI Crime. For example, if new statutory duties of supervision and care were defined regarding the AI for which the Responsible Person is answerable, criminal negligence liability could be imposed on the Responsible Person should he or she unreasonably fail to discharge those duties. Granted, this would not be punishment for the harmful conduct of the AI itself. Rather, it would be a form of direct criminal liability imposed on the Responsible Person for his or her own conduct.

More boldly, if this does not go far enough to address Hard AI Crime, criminal liability could also be imposed on the Responsible Person on a strict liability basis--particularly if the relevant punishments are only fines rather than incarceration. Generally, strict liability crimes are restricted to minor infractions or regulatory offenses or “violations,”238 though some examples of more serious strict criminal liability can also be found (such as statutory rape in some jurisdictions).239 This could be defended by claiming that there is a special duty owed to society at large to provide special assurances that certain especially serious risks will be mitigated as much as possible.240 A Responsible Person accepting \*381 strict criminal liability could serve this function. Especially in the case of AI where user trust is critical to realizing the benefits of AI, this approach could be warranted to combat the perception that unsafe AI is being employed. Accordingly, AI could become another context in which strict criminal liability on the Responsible Person is imposed.

Yet we have serious reservations about strict liability crimes applied to persons.241 If justifiable at all, they can only be justifiably used as a last resort in exigent circumstances--as in cases of unusually dangerous activities. However, it is not obvious that the use of AI qualifies as unusually dangerous. To the contrary, in many areas of activity it would be unreasonable not to use AI, as when safety can be improved over human actors such as may soon be the case with self-driving cars.242 Most bad human actors using AI systems to commit crimes will still be caught under existing criminal laws, and so far there have not been high-profile cases of Hard AI Crimes. As a result, we are not yet convinced that Hard AI Crime is a significant enough social problem to merit the use of strict criminal liability.

At the end of the day, a Responsible Person regime accompanied by new statutory duties, which carry criminal penalties if these duties are negligently or recklessly breached, provides an attractive approach to dealing with Hard AI Crime. While it is only a minimal expansion of criminal law, by expressing condemnation through a criminal conviction of the Responsible Person, much of the expressive benefit from a direct conviction AI can be achieved-- but without as serious a loss of public trust as the legal fictions needed to punish AI directly could create.

D. Third Alternative: Moderate Changes to Civil Liability

A further alternative to dealing with Hard AI Crime is to look to the civil law, primarily tort law, as a method of both imposing legal accountability and deterring harmful AI. Some AI crime will no doubt already result in civil liability, however, if existing civil liability falls short, new liability rules could be introduced. A civil liability approach could even be used in conjunction with expansions to criminal liability.

\*382 While it is beyond the scope of this Article to canvas gaps in civil liability for AI crime, it is worth noting that existing civil liability frameworks come with built-in limitations. Very few laws specifically address AI-generated harms, which means civil liability must usually be established under a traditional negligence or product liability framework or under contractual liability.243 Negligence generally requires a person to act carelessly, so where this cannot be established there may be no recovery. Product liability may require both that an AI is a commercial product (e.g., this may not apply where AI is just software or the use of AI is a “service”), and that there be a defect in the product (or that its properties are falsely represented).244 In the case of complex AI, it may be difficult to prove a defect, and AI may cause harm without a “defect” in the product liability sense. For these reasons, the European Commission has created Expert Groups to determine whether new technologies necessitate a revision of the Product Liability Directive, which harmonizes product liability across the European Union, and whether even more ambitious changes are needed.245 Civil liability may also derive from contractual relationships, but this usually only applies where there is privity of contract between parties, and it may also have significant limitations.246

To the extent there is inadequate civil liability for Hard AI Crimes, the Responsible Person proposal sketched above could be repurposed so that the Responsible Person might only be civilly liable. The case against a Responsible Person could be akin to a tort action if brought by an individual or a class of plaintiffs, or a civil enforcement action if brought by a government agency tasked with regulating AI. At trial, an AI would not be treated like a corporation, where the corporation itself is held to have done the harmful act and the law treats the company as a singular acting and “thinking” entity. Rather, the question for adjudication would be whether the Responsible Person discharged his or her duties of care in respect of the AI in a reasonable way-- or else civil liability could also be imposed on a strict liability basis (a less troubling prospect than it is within criminal law).

A Responsible Person scheme is not the only solution to inadequate civil liability for Hard AI Crimes. An insurance scheme is another \*383 approach.247 Owners, developers, or users of AI, or just certain types of AI, could pay a tax into a fund to ensure adequate compensation for victims of Hard AI Crime. The cost of this tax would be relatively minor compared to the financial benefits of AI. This could either replace the Responsible Person solution or apply to cases where no appropriate Responsible Person exists. An AI compensation fund could operate like the National Vaccine Injury Compensation Program (“VICP”).248 Vaccines create widespread social benefits but are known in rare cases to cause serious medical problems. VICP is a no-fault alternative to traditional tort liability that compensates individuals injured by a VICP-covered vaccine. It is funded by a tax on vaccines that is paid by users.249 Other models for insurance schemes exist, such as the Price Anderson Act for nuclear power, which establishes a pool of funds to compensate victims in the event of a nuclear incident through a chain of indemnity regardless of who was ultimately at fault.250

E. Concluding Thoughts

This Article has argued that, confronted with the growing possibility of Hard AI Crime, we should not overreact and reach for the radical tool of punishing AI. Alternative approaches could provide substantially similar benefits and would avoid many of the pitfalls and difficulties involved in punishing AI. A natural alternative, we argued, involves modest expansions to criminal law, including, most importantly, new negligence crimes centered around the improper design, operation, and testing of AI applications as well as possible criminal penalties for designated parties who fail to discharge statutory duties. Expanded civil liability could supplement this framework.

#### Criminal Law PIC + Mens Rea DA

Dafni Lima 18, Ph.D. Candidate in Criminal Law at the Aristotle University of Thessaloniki (Greece) and Fulbright Foundation Doctoral Dissertation Visiting Research Student at the Harvard University Initiative on Law and Philosophy (United State), “Could AI Agents Be Held Criminally Liable? Artificial Intelligence and the Challenges for Criminal Law,” 69 S.C. L. Rev. 677, Spring 2018, WestLaw

III. REVISITING PERSONHOOD AND BLAME

Artificial intelligence by definition mimics one of the essential traits of the human species, that of adapting to one's environment, and as such, it invites us to revisit our understanding of personhood. 22 Personhood is a concept that underlies not only criminal law, but every field of law, as it is closely linked to our capacity to perform legally meaningful acts and bring about legally relevant developments. Historically, our understanding of what it means to be a person has been connected to human ability for self-reflection \*685 and self-conscience,23 that is, our ability to perceive our independent existence and its boundaries that stretch into the past and future. As things stand currently, AI units do not seem to possess that same degree of self-awareness (or any at all) that would allow us to consider their situation as equivalent to the human experience--although this might change in the future.24

On some level, personhood is also associated with our ability to set goals for ourselves and pursue them, which for now seems to be extremely restricted when it comes to AI agents. While they might possess the ability to scale and set independent, smaller objectives in order to reach their overall goal, this greater objective is still set by the human programmer or user (or even another AI programmer or user that has been in turn initially developed by a human). In the case of autonomous vehicles, for example, while the AI software might be in a position to make decisions on the spot regarding traffic, the overall goal of safely navigating to the occasional desired destination is predetermined.

It would be an oversight not to note that there is truth in the statement that our own humanly possible perception of our awareness and our degree of freedom in setting our own goals and in making choices is far from complete. Quite often there are factors at play that restrict our freedom and distort our awareness, while philosophers and scientists are still contemplating on how exactly we form our self-understanding and our conscience. Nonetheless, there is an obvious qualitative difference between our own, at times fuzzy or inexplicable, ability to self-reflect and an AI agent's shortcomings on the same matter.

If an AI agent cannot be considered a person, it could not prima facie enjoy rights and be bound by obligations as humans do. There is again a qualitative difference between a restriction and an obligation, and while an AI unit may be programmed to adhere to certain restrictions, so long as this adherence is not the product of its own volition, it cannot be considered an “obligation” as such. However, when we turn to the issue of rights,25 things slightly change; it is widely accepted that rights function quite differently than obligations for subjects that are not considered capable of undertaking obligations under law. For example, a minor can often enter into contracts that \*686 convey upon them benefits but not obligations,26 or which are valid with regard to rights conferred and void with regard to obligations. Lately, a lot has been said on the issue of recognizing animal rights,27 not least because we have finally begun to understand that animals are sentient beings that experience a much wider range of feelings than previously acknowledged;28 as both research and legal scholarship advances on this matter, it might be conceivable that certain developments might be suitable for transposing in the field of AI agents with regard to their “rights” or “freedoms.”

In the context of criminal law, personhood is closely associated with blame, as only a person who can distinguish right from wrong and is in a position to choose can be blamed for choosing to do wrong.29 Blame presupposes the ability to comprehend what each choice will entail and the ability to freely choose. Historically, this goes beyond simply associating one option with criminal law repercussions and the other with walking free--although in practice it might very well be reduced to that. In that respect, it must be noted that the focus of deterrence theories is precisely on simply discouraging people from committing crimes, regardless of their inner motives, while seminal legal positivist teachings30 are in part dedicated to freeing adherence to legal rules from the burden of inextricable association with moral considerations.

Against this setting, it is important to note a sometimes overlooked aspect, namely that mens rea and blame requirements were originally devised as a safeguard against abuse of state power in the exercise of criminal law enforcement; they were meant to ensure that no one would be held accountable for a crime if the person was mentally unaware of what had happened or did not engage in it with some degree of volition or acquiescence. Anyone held criminally liable for a conduct should have had some level of \*687 knowledge and intent (or the duty to have known and to take care to avoid) with regard to the results of their actions.

This once groundbreaking development tapped into our collective innate human ability to understand, pass moral judgment on, and manipulate our actions. It also reflected a deep respect for human beings, as it treated them on the basis of their informed choices; one would only suffer the consequences for their actions because they chose so. This approach rests, on a deeper level, on respect for the freedom to even act wrongly and inflict harm--it is only when one conscientiously makes that choice, that they will be punished. This is why children, for instance, who do not yet fully apprehend the consequences of their actions, or persons with mental health challenges that prevent them from reasoning properly, are treated differently under criminal law. Ultimately, criminal liability is a response reserved for those who could have risen to the occasion--but chose not to.

Again, this approach is arguably a shortcut; it casts aside any particularly sophisticated concerns about how human intent is formulated as well as any doubts about whether our free will is indeed free and our own after all. As law so often does in general, this is both a generalization and a simplification-- and one might even sense a hint of declaration captured in it.

In any case, the move away from torture, forced labor as punishment, and capital punishment (for most of the Western world) equally mirrored respect for a perpetrator's innate humanity; in principle, the law is not allowed to touch a convict's body or take their life. Similarly, the general rule that a fair and just trial by a judicial body is required before any imprisonment can legitimately be imposed is again the result of respect for what it means to be human. In that sense, it seems that modern criminal law and all its progressive developments were designed by humans for humans and always revolved around the fact that we all share some innately human quality that needs to be respected even in our ugliest hour. Of course, this progressive undercurrent is not without exceptions or occasional regress, but it lies at the heart of modern criminal law theory and practice.

At the time of this development in criminal law theory, only human agents possessed this type of intellect that forms the basis of criminal liability. Animals, although they do have the ability to communicate and make qualified choices to some extent, do not possess the same level of ability to understand or choose between right and wrong--or, in any case, between what the law prohibits and what it allows or demands.

Legal persons, on the other hand, which are the sole prominent example of extending criminal liability beyond human actors, are still based on human agency. First, they are in essence legal fictions, a translation of our collective efforts into legally relevant terms, and as such are not endowed with any type of intellect--although there is something to be said about corporate culture \*688 and the way a collective agent can over time establish mechanisms and processes that surpass its individual members. Yet in contrast to animals, which are clearly something radically different from humans but do not have the same legally relevant capabilities, corporations caught the eye of criminal law precisely because they are so closely entwined with human agents.

Corporations are made up by humans who sometimes deliberately use them to escape responsibility for criminal conduct, and this is part of the reason why criminal law in many jurisdictions has stepped in and introduced some form of “criminal liability” for legal persons. Yet there is something to be said for the fact that, in many jurisdictions, legal persons are not subject to criminal penalties, but only administrative sanctions,31 precisely because criminal law cannot concern itself with agents that cannot make moral decisions and thus cannot be blamed.32

Artificial intelligence is completely different from both animals and legal persons. It is not alive, like animals, yet it is not simply a fiction, like corporations. Yet it could be conceived of existing (at least after its initial creation) independently and without the involvement of humans and it could reason, which sets it apart from both legal persons in the first respect and from animals in the latter. Ultimately, it is an open question whether AI might in the future develop a form of conscience and even the capacity for ethics and reasoning that might allow it to be subjected to blame on par with human agents33--which is not the case with legal persons or animals. But as long as both our understanding and the practicality of blame are associated with self-awareness and conscious decisions rooted in the human experience, AI agents cannot partake.

The same point could be made about punishment. Even though we could conceive of punishments for AI agents that are roughly “equivalent” to those for humans,34 there is still an argument to be made that these equivalent \*689 sanctions are slightly beside the point. All major theories about punishment,35 from retributivism to rehabilitation (save perhaps for specific deterrence),36 presuppose a communicative aspect37 among agents that in theory participate equally in a shared experience of the world and in awareness of their own and each other's existence. Punishment is a collective means of responding to crime directed at an agent that can understand its significance as well as its relevance to their criminal conduct38--which is why people with diminished capacity are, as a rule, not subject to criminal sanctions.

If an AI software were deleted as a form of capital punishment, would anyone say that “it got what it deserved” in the context of the “just deserts” approach? And if it was deactivated for a certain period of time, could we truly hope that other AI units would be deterred from engaging in similar conduct? Until a positive answer to at least one of these questions appears likely, debate about criminal punishment for AI agents seems somewhat misplaced.

IV. POTENTIAL OPTIONS FOR ASCRIBING CRIMINAL LIABILITY

In the case where a result is brought about by an “action” (or “omission”) on part of an AI agent, then an inquiry about ascribing criminal liability arises. The answer to how--and if--criminal liability should be attributed will heavily depend on the circumstances of each case, as outlined below. In each of these cases, approaches and concepts already familiar to criminal law might offer the solution; however, the focus will shift to the way legal professionals, lawmakers, judges, and practitioners will adapt, enrich, or decide to firmly hold on to their current understandings of these concepts.

\*690 A. Instrumental Use of an AI Agent

The first and easiest scenario is quite straightforward: what if a human actor manipulates an AI agent into doing the human's bidding, with the intent to commit a particular crime? In such cases, the obvious solution is to hold the person manipulating the AI agent accountable. This could be a programmer that successfully inserts an algorithm designed to kill into AI software or an operator that instructs AI software so that it will inflict harm to others. In any case, the AI agent cannot be regarded as anything else but a tool in the hands of the human “behind the curtain.”

However, the path by which to ascribe liability might differ according to the level of sophistication that the AI agent possesses. In the case of tools like a hammer, for example, we are never speaking of “ascribing” the action of the hammer to the human using it--the movement of the tool is immediately understood as the action of the human agent. In the case of animals, we often equate them in legal terms with things that can be manipulated by their master (although they could never be controlled in an absolute sense, like a tool). In both these cases, we regard the human actor as the perpetrator of the criminal act.

Things start to change when we encounter the possibility of a human using another human as a “means” to commit a crime. In these cases, for example when an individual is tricked in order to shoot at someone thinking that the individual was only shooting at an inanimate target or when a nurse is tricked into giving poison to a patient thinking they were only administering a medicine, we could talk of perpetration by another. Yet this approach commands the existence of an intermediary (the “another”) who is, in theory, in a position to intervene as the events that constitute the criminal conduct unfold--a person who could understand what is going on or who, in any case, could choose to act otherwise. If this is not the case, we would not talk about perpetration by another but simply about “perpetration,” as we do with animals. “Another” is a direct reference to “another human.”

In order, then, for this theory to make sense in the context of AI agents, they should be sophisticated and intricate enough to have the capability to understand what was going on and to choose accordingly--even if in the end they were tricked into the desired conduct by the perpetrator behind the scenes. One could argue that an autonomous vehicle that was simply programmed to go on the street and run over people is quite a different scenario than a driver who manipulates an AI car into regarding a particular person as a mere object they can safely run over. One could even begin to feel the “pull” of an ethical condemnation against the human actor in the second case, as an (artificially) intelligent agent is manipulated into committing a harmful action it would otherwise never choose to do. Ultimately, it all \*691 depends on whether technological progress will allow us to view AI agents as sufficiently human-like or not.

At this point, it is also interesting to note that there are cases that might occur where an AI agent goes beyond the originally intended criminal act. For example, an autonomous vehicle is programmed to go out and injure a human, but instead ends up killing the human. In those cases, the end result is something different than the human actor has intended, and the theory of ascribing liability based on the foreseeability and probability of the crime that was actually committed as a consequence of the intended criminal conduct might prove useful.39

This model is usually employed when ascribing liability to an accomplice or an instigator and is based on a type of negligence on part of the accomplice or instigator. Under this model, criminal liability is ascribed to an accomplice or an instigator when they could and should have foreseen the different result that came about as a probable consequence of the initially intended act. Thus, in our example, the human actor could be held liable if the killing was a probable and foreseeable consequence of the human's order to the autonomous vehicle to go out and injure a particular person.40 If, however, the crime ultimately committed had nothing to do with the one intended (e.g., a robot is ordered to steal a letter and instead burns down a house), then the perpetrator behind the scenes cannot be held criminally liable.

B. Negligence and Recklessness

On a similar note, negligence is the model that most fittingly can be used to ascribe criminal liability for unintended conduct that occurs in the context of an AI agent's usual programming or use--that is, as it carries out its duties without malfunction. Here, the focus shifts on a benevolent designer or operator who neglected to take due care in order to prevent an undesirable outcome that could occur within the usual performance of the AI agent and which the programmer or user should have foreseen. In these cases, the AI agent functions appropriately and in the discharge of its duties commits a crime--a simple example would be a cleaning robot that destroys valuable property mistaking it for dirt.41

\*692 In such cases, the main question to be answered is whether the programmer or the user could have foreseen this development and whether they were in a position to act in order to prevent it. Negligence, in essence, revolves around the duty to take appropriate and reasonable care to prevent harm to others and focuses on the foreseeability of the undesirable outcome.42 In cases where the human agent actually foresaw the outcome and decided to disregard it--and according to the jurisdiction--recklessness would be the appropriate model to ascribe liability.

C. Respondeat Superior?

Strict liability is not unheard of in criminal law, but it stands in stark tension with many of its underlying principles--some of which, regarding free will and the innately human capacity to make (even wrongful) decisions, were discussed above. Yet in many western jurisdictions, strict liability offenses exist, from drug possession to particularly minor offenses like driving infractions. The concept of vicarious liability (or, in very fitting to the theme at hand terms, of respondeat superior--“let the master answer”)43 derives mainly from tort law, where it is particularly applied to impose liability on a person in control of another (such as an employer with regard to an employee) for the wrongdoing of their agent.44

This relationship between an agent and a superior appears at first uniquely suitable to the situation at hand. Just like with AI agents, in the case of vicarious liability, the agent that committed the wrongdoing is an independently intelligent and capable one. However, the concept is radically transformed when transposed in criminal law--and for good reason. One cannot tolerate the same low threshold of intellectual and volitional involvement for the obligation to undertake responsibility for a tort and for a \*693 crime. Criminal law is typically associated with grave consequences for the one found to bear liability, so the threshold must be higher.

This point has also a more general insight to offer: any potential model of ascribing liability for the human agent who is somehow involved in a crime committed by an AI agent will have to vary not only depending on circumstances, such as the sophistication of the intelligence of the AI agent or the degree of control of the human agent, but also on the type of crime committed. In other words, the threshold should be higher for serious crimes, such as killing, and could be lower for relatively minor ones, such as the destruction of an inexpensive item that belongs to a third party.

In the case of strict liability, not only is our deeper understanding of what criminal law is and what it does at stake, but also different and competing policy concerns. Introducing strict liability might satisfy a social demand for accountability that could prove crucial in the acceptance and wider use of AI agents; on the other hand, it could undermine the potential to further develop AI applications because the designers or operators would be discouraged by the likelihood of being found criminally liable for acts they did not intend or concede to.45 In this context, strict liability could either be reserved only for minor offenses when they fall within the margin of error on the part of the human agent, whether it is a programming or an operating error, or it could be discarded completely as a model for ascribing criminal liability. Perhaps the best way to consider strict liability is in a context where it is combined with negligence requirements, in an approach modeled after (criminal) liability for faulty products.46

D. Other Options: Direct Liability or Bad Luck

Even if everything is done properly on the part of human agents, an AI agent might still malfunction and thus cause harm. In these cases, no human is at fault, and the question of what to do with criminal liability remains open. Another important and extreme scenario to consider is when an AI agent “deliberately” inflicts harm.

The second scenario seems far-fetched for now. As AI is not yet at a stage where it could really choose to do wrong, as discussed above, imposing direct criminal liability should be ruled out.47 If and when AI sufficiently develops \*694 to conform to some of the criteria set out above, then this question might be reconsidered. Even in those cases, however, a malfunction cannot be blamed on an AI agent any more than acts performed while intoxicated can be blamed on a human agent.48

In such cases of malfunction, it is proposed that humans should learn to live with this unfortunate development, much in the same vein that they have learned to live with the results of a bridge collapsing due to a hurricane or a flat tire that leads to a car accident.49 Not everything can be foreseen, prevented, or contained, and in everyday life there are several instances where no one is to blame--much more be held criminally liable--for an undesirable outcome. In other words, not everything can--or should--be regulated under criminal law. Depending on the familiarity that humans will develop with AI agents in the future, this option might prove to be a viable alternative to criminal liability, even though policy implications have to be considered as it is likely that AI acceptance rates might suffer at first.50

V. FINAL THOUGHTS: CAN AI AGENTS TRULY MURDER?

Artificial intelligence and its development in the next years will undoubtedly pose great challenges for criminal law, which go beyond the question of criminal liability. With new technology and a far more widespread use of AI agents than is currently conceivable, new opportunities for crime will arise. For instance, if autonomous vehicles become commonplace on our streets, we will sooner or later need to think about new types of crimes that could be committed by hackers and how to prevent the commission of terrorism offenses that could be perpetrated by using the extended capabilities of smart cars.51 Furthermore, new legal rules will have to be devised to regulate safe driving and relevant crimes;52 the relationship between an autonomous vehicle, its driver and passengers, and third parties (other drivers, \*695 passengers, or pedestrians); insurance and tort claims;53 and privacy with regard to autonomous vehicles.54 Finally, law enforcement will have to be equipped with new powers and duties in order to address the new situation; for example, we will need to think about under which circumstances a law enforcement officer might be allowed to pull over an autonomous vehicle, and how.55

However, the very first wave of vibrations that will be felt in criminal law will undoubtedly include issues that revolve around criminal liability. In this context, legal professionals will be invited to revisit, enrich, and reshape fundamental concepts, as discussed above. Lawmakers and common law judges will have to come up with models that adequately address allocation and imposition of criminal liability, practitioners and adjudicators will have to understand how to best apply them in practice, and research by legal scholars will have to shift focus in order to inform this debate. The results might be as groundbreaking as AI technology itself; these reforms might even one day lead us to reconsider the very foundations of criminal liability, wrongful acts, and blame.

There exist among legal scholars opinions already in favor of imposition of criminal liability on AI agents.56 Yet similar suggestions seem to rely, at least with regard to how things currently stand, on a circular argument that begs the question. They appear to take for granted the axiom that AI agents can fulfill the requirements for mens rea, even though mens rea as a concept was clearly conceived with human agents in mind--including criminal liability of legal persons, since these are no more than collective enterprises made up of human agents, in which case the criminal liability claim rests on the law's inability to “pierce the veil” and ascribe liability to the human behind the corporate fiction, as explained above.

Yet AI is something completely different. It is certainly no fiction anymore but independent and potentially able to become fully autonomous. If it is to be handled with legal tools that were devised for humans, we must \*696 establish either that it is sufficiently human-like, which does not yet seem to be the case, or that the tools at hand are also suitable for non-humans, which especially in the case of mens rea and blame is, at the very least, a matter of dispute, as the whole concept reflects our collective experience of what it means to be human.

So, taking for granted that mens rea requirements could aptly be fulfilled by non-human (or, rather, non-human-like) intelligent agents necessarily presupposes the perception of historically and empirically informed concepts such as choice, voluntariness, knowledge, and intent as simply technical terms without any inextricable grounding in the human experience. This is a bold and perhaps forward-looking approach, but one that cannot be taken as self-evident without first examining those perspectives that would work against it--some of which this Paper has attempted to articulate.

If current criminal law concepts were devised for those sharing in the human experience of the world and its ethical dilemmas, and if the way AI agents experience the world is not (yet) at that point, then what is there left to do with criminal liability? It is important to note that even though artificial intelligence is still not at the same level of capacity for intellectual and emotional investment as humans, it may very well one day be--as countless works of science fiction have been trying to warn us. If and when that day comes, the situation might be very different with regard to criminal law and its application to AI agents. On that day, we may be prepared to directly ascribe criminal liability to AI actors and regard them as equally capable of making ethically informed choices and committing wrongdoing--we might even invite each other to share in the legislative and judicial process of responding to crime.

But until then, criminal law might not be the appropriate vessel for holding AI agents accountable. Although criminal law carries with it a connotation of moral condemnation that is very much socially desired in situations of harm to others, especially in serious crimes such as bodily injury or killing, a softer version of the State's powers to prohibit and punish behavior might be more appropriate--for example, administrative sanctions or a whole new field of law in-between. The desire to call a sanction “criminal” and as such satisfy the need to respond to an undesirable conduct by the gravity and resolution that criminal law means carry with them, bears a hidden yet crucial danger. Instead of strengthening our response to harmful and wrongful behavior, it might just weaken our perception of what criminal law is and what it has the power to do, and thus qualify it with a degree of levity that will in turn allow us to underestimate its potential to inflict harm on humans and sap our vigilance with regard to its advances.

#### Criminal Law PIC + Mens Rea DA

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

The broad form of the challenge holds that because AI lacks the capacity to deliberate and weigh reasons, AI cannot possess broad culpability of the sort that criminal law aims to respond to.125 A fundamental purpose of the criminal law is to condemn culpable wrongdoing, as it is at least the default position in criminal law doctrine that punishment may be properly imposed only in response to culpable wrongdoing.126 The capacity for culpable conduct thus is a general prerequisite of criminal law, and failing to meet it would remove the entity in question from the ambit of proper punishment--a fact that is encoded in law, for example, in incapacity defenses like infancy and insanity. Thus, the broad version of the Eligibility Challenge holds that because AI lacks the practical reasoning capacities needed for being culpable, AI does not fall within the scope of criminal law. Punishing AI despite its lack of capacity would not only be conceptually confused, but would fail to serve the retributive aims of criminal law--namely, to mark out seriously culpable conduct for the strictest public condemnation.

Here we develop three answers to the Eligibility Challenge.

1. Answer 1: Respondeat Superior

The simplest answer to the Eligibility Challenge has been deployed with respect to corporations. Corporations are artificial entities that might also be thought ineligible for punishment because they are incapable of being culpable in their own right.127 However, even if corporations cannot literally satisfy mens rea elements, criminal law has \*351 developed doctrines that allow culpable mental states to be imputed to corporations. The most important such doctrinal tool is respondeat superior, which allows mental states possessed by an agent of the corporation to be imputed to the corporation itself provided that the agent was acting within the scope of her employment and in furtherance of corporate interests.128 Some jurisdictions also tack on further requirements.129 Since imputation principles of this kind are well-understood and legally accepted, thus letting actors guide their behavior accordingly, respondeat superior makes it possible for corporations to be convicted of crimes without violating the principle of legality.130

If this kind of legal construction of mental states is a promising mechanism by which corporations can be brought back within the ambit of proper punishment and avoid the Eligibility Challenge, the same legal device could be used to make AI eligible for punishment. The culpable mental states of AI developers, owners, or users could be imputed to the AI under certain circumstances pursuant to a respondeat superior theory.131

It may be more difficult to use respondeat superior to answer the Eligibility Challenge for AI than for corporations--at least in cases of Hard AI Crime. Unlike a corporation, which is literally composed of the humans acting on its behalf, an AI is not guaranteed to come with a \*352 ready supply of identifiable human actors whose mental states can be imputed.132 This is not to say there will not also be many garden-variety cases where an AI does have a clear group of human developers. Most AI applications are likely to fall within this category and so respondeat superior would at least be a partial route to making AI eligible for punishment. Of course, in many of these cases when there are identifiable people whose mental states could be imputed to the AI--such as developers or owners who intended the AI to cause harm--criminal law will already have tools at its disposal to impose liability on these culpable human actors. In these cases, there is less likely to be a need to impose direct AI criminal liability.

Thus, while respondeat superior can help mitigate the Eligibility Challenge for AI punishment in many cases, this is unlikely to be an adequate response in cases of Hard AI Crime.

2. Answer 2: Strict Liability

A different sort of response to the Eligibility Challenge is to look for ways to punish AI despite its lack of a culpable mental state. That is not to simply reach for a consequentialist justification133 of the conceptual confusion or inaptness involved in applying criminal law to AI. Within criminal law, we take this to be a justificatory strategy of last resort-- especially given the blunt form of consequentialism it relies on. Rather, what is needed is a method of cautiously extending criminal law to AI that would not entail weighty violations of the principle of legality.

One way to do this would be to establish a range of new strict liability offenses specifically for AI crimes--i.e., offenses that an AI could commit even in the absence of any mens rea like intent to cause harm, knowledge of an inculpatory fact, reckless disregard of a risk or negligent unawareness of a risk. In this sense, the AI would be subject to liability without “fault.” This would permit punishment of AI in the absence of mental states. Accordingly, strict liability offenses may be one familiar route by which to impose criminal liability on an AI without sacrificing the principle of legality.

\*353 Many legal scholars are highly critical of strict liability offenses. For example, as Duff argues, strict criminal liability amounts to unjustly punishing the innocent:

That is why we should object so strongly ...: the reason is not (only) that people are then subjected to the prospect of material burdens that they had no fair opportunity to avoid, but that they are unjustly portrayed and censured as wrongdoers, or that their conduct is unjustly portrayed and condemned as wrong.134

Yet this normative objection applies with greatest force to persons. The same injustice does not threaten strict criminal liability offenses for AI because AI does not obviously enjoy the protections of the desert constraint135 (which prohibits punishment in excess of culpability).136

This strategy is not without problems. Even to be guilty of a strict liability offense, defendants still must satisfy the voluntary act requirement.137 LaFave's criminal law treatise observes that “a voluntary act is an absolute requirement for criminal liability.”138 The Model Penal Code, for example, holds that a “person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”139 Behaviors like reflexes, convulsions or movements that occur unconsciously or while sleeping are expressly ruled out as non-voluntary.140 To be a voluntary act, “only bodily movements guided by conscious mental representations count”.141 If AI cannot have mental states and is incapable of deliberation and reasoning, it is not clear how any of its behavior can be deemed to be a voluntary act.

There are ways around this problem. The voluntary act requirement might be altered (or outright eliminated) by statute for the proposed class of strict liability offenses that only AI can commit. Less \*354 dramatically, even within existing criminal codes, it is possible to define certain absolute duties of non-harmfulness that AI defendants would have to comply with or else be guilty by omission of a strict liability offense. The Model Penal Code states that an offense cannot be based on an omission to act unless the omission is expressly recognized by statute or “a duty to perform the omitted act is otherwise imposed by law.”142 A statutory amendment imposing affirmative duties on AI to avoid certain kinds of harmful conduct is all it would take to enable an AI to be strictly liable on an omission theory.

Of course, this may also carry costs. Given that one central aim of criminal law is usually taken to be responding to and condemning culpable conduct, if AI is punished on a strict liability basis, this might risk diluting the public meaning and value of the criminal law.143 That is, it threatens to undermine the expressive benefits that supposedly help justify punishing AI in the first place.144 This is another potential cost to punishing AI that must be weighed against its benefits.

3. Answer 3: A Framework for Direct Mens Rea Analysis for AI

The last answer is the most speculative. A framework for directly defining mens rea terms for AI--analogous to those possessed by natural persons--could be crafted. This could require an investigation of AI behavior at the programming level and offer a set of rules that courts could apply to determine when an AI possessed a particular mens rea--like intent, knowledge or recklessness--or at the very least, when such a mens rea could be legally constructed.145 This inquiry could draw on expert testimony about the details of the AI's code, though it need not. By way of analogy, juries assess mental states of human defendants by using common knowledge about what mental states (intentions, knowledge, etc.) it takes to make a person behave in the observed fashion.146 Similarly, in AI cases, experts might need only \*355 to testify in broad terms about how the relevant type of AI (say, a neural network) functions and how its information-processing architecture could have generated the observed behavior. Thus, direct mens rea analysis for AI could, but need not, require “looking under the hood” at the details of the code. Instead, it would be enough to simply guide the legal determination of what mens rea the AI can be deemed to possess.

### AFF Area---AI Liability---Laws of War / LAWs

#### Lethal autonomous weapons can be brought under the laws of war and made liable for international law torts through legal personhood.

Elizabeth Fuzaylova 19, Senior Articles Editor, Cardozo Law Review, Volume 40. J.D. Candidate (May 2019), Benjamin N. Cardozo School of Law; M.A. with Honours, The University of Edinburgh, 2015, “War Torts, Autonomous Weapon Systems, and Liability: Why A Limited Strict Liability Tort Regime Should Be Implemented,” 40 Cardozo L. Rev. 1327, February 2019, WestLaw

F. Existing Proposals: Potential Regulatory Changes and Their Hypothetical Impacts on Artificial Intelligence in the Military

There are various published proposals that lay out policies and frameworks that should be enforced in order to better regulate the AI sphere.123 The most encompassing proposal details a potential agency that will use a particular liability standard by which AI will be evaluated before it has an opportunity to go to market.124 Scherer proposes legislation titled the Artificial Intelligence Development Act (AIDA), which would create an agency that certifies AI systems' features and overall safety.125 Beyond legislation, it has been suggested that an agency \*1346 be established in order to test and certify AI machines before they reach the market, similar to the responsibilities of the FDA.126 The new agency Scherer proposes would have two missions: policymaking and certification.127 However, this also presents certain problems, such as agency personnel not having the appropriate knowledge to properly judge quickly developing AI systems.128

While a new agency is an enticing idea, some agencies have already linked AI systems to existing regulation in order to gain jurisdiction and attend to these systems in more relevant legal contexts.129 Similarly, arguments have been made for the need to establish a so-called “Federal Robotics Commission” that will aim to “deal with the novel experiences and harms robotics enables.”130 This may have a potentially useful application to the military environment, since killer robots and autonomous weapons systems as a whole have the potential to wreak havoc if there is even a slight deviation in their algorithms.131

In December 2017, Congress proposed a bill titled Fundamentally Understanding The Usability and Realistic Evolution (FUTURE) of Artificial Intelligence Act of 2017 (FUTURE of AI Act),132 establishing a federal advisory committee that would oversee the development and evolution of AI.133 The committee's goals are to promote innovation; to optimize development of AI; to promote and support development and application of AI; and to protect the privacy of individuals.134 While this may be beneficial to society in the grand scheme of work force productivity and technological innovation, it does little to regulate the \*1347 potential negative consequences of AI's sophistication, specifically within autonomous weapons systems.135

Until recently, arguments have been made to predominantly use products liability in legal proceedings if an autonomous machine ever malfunctioned.136 Others have suggested that courts should apply a negligence standard to cases involving certified AI and a strict liability standard to cases involving uncertified AI.137 The imperative issue of distinguishing liability between a designer, manufacturer, distributor, and operator would be a central part of the liability scheme in these cases.138 Although products liability has been a basis for determining liability in AI,139 specifically in relation to self-driving cars, the same concepts may be difficult to apply to the military and to autonomous weapons.140 Applying products liability in this industry means that anyone from the programmer or robotics developer--who creates or designs the weapon--to the manufacturer of the weapon may be liable for any damaging result of a mission.141 This scenario may specifically create problems when autonomous weapon systems begin to learn and develop, getting further away from the initial program that the programmer designed or the manufacturer built.142

Based on the scope of today's legal framework, it may be difficult to account for the progression and evolution of AI. As a result, the current system may not be equipped to evaluate the legal repercussions that \*1348 occur from possible misuse of military AI, specifically autonomous weapons systems. Therefore, a different framework will need to be enacted.

II. ANALYSIS

A. Considerations in Regulating Autonomous Weapons

While a new regulatory framework is needed to govern autonomous weapons systems, various characteristics of AI systems impact these weapons systems and will need to be seriously considered before any structure is enacted.

1. Machine and Reinforcement Learning

Machine learning, as well as reinforcement learning, are two aspects that will need to be considered in relation to AI as its technology advances.143 First, machine learning involves computer algorithms that can “learn” or improve their performance on a given task as time passes.144 Reinforcement learning, a category of machine learning, entails experimentation.145 Reinforcement learning is already prevalent in some forms of AI. For example, a computer developed by a subsidiary of Alphabet learned and mastered Go, a notoriously complicated board game, and eventually beat one of the world's best human players.146 It is likely that this type of learning will begin to flourish within AI. It not only improves self-driving cars, but the same technology also allows robots to grasp objects it has never encountered before, and it can figure out the optimal configuration for the equipment in a data center.147

\*1349 While reinforcement learning in AI machines is still in relatively early stages of development, it will eventually become sophisticated and prevalent across many AI machines and throughout various sectors, including the military. While learning has great potential for the evolution of these AI systems, it may create further difficulties to determine liability in the event of a harmful situation or event because these machines will eventually become sophisticated enough to make their own decisions and come to their own conclusions without a human's influence.148

2. The Ethics Problem: Machines Making Moral Decisions

While AI continues to develop, the possibility of AI systems thinking and making decisions in certain situations in the future, especially where autonomous weapons are involved, must be considered. This state of affairs may become particularly problematic with fully autonomous weapons that remove all levels of human interaction.149 There are many potential issues that arise with machines learning as they go and detaching themselves further from their initially engineered prototypes.150

Machine learning technologies lack intuition, which is an important characteristic humans possess that cannot be engineered into technology.151 Intuition is sometimes essential to properly assessing and reacting to a situation.152 Although the military has extensive opportunities to develop a soldier's training in the field, there are still situations in which a person's intuitive judgment and so-called “gut feeling” need to be taken into account to respond to a situation.153 At this stage, artificial intuition is a concept that some have proposed to be a subset of AI, but it has yet to have widespread implementation.154 It is \*1350 difficult to imagine an AI system ever being able to generate similar feelings, considering that these systems are built in such a scientific manner.155 For this reason, “[t]he best way forward is for humans and machines to live harmoniously, leaning on one another's strengths.”156 While this is a nice sentiment, it is difficult to incorporate into a liability analysis.157

When considering autonomous weapons systems, specifically, the main legal and moral issue is the act of assigning human decision-making responsibilities to autonomous systems that are designed to kill humans.158 What does this mean?

Common examples of moral decisions that need to be made by autonomous AI machines are seen in driverless cars.159 For example, if Person A's car is speeding down a road and a school bus with twenty children crosses its path, does Person A swerve and risk their own life to save the children or does Person A continue driving, potentially placing the bus full of children at risk?160 Likewise, if a pilotless, completely autonomous aircraft is traveling with explosives that need to hit a target, but then data presents that there are one hundred civilians in the midst of the targeted terrorist, what does the machine do in that instance? These are the types of decisions that humans contemplate in scenarios that present themselves, and computers will need to make these calls in milliseconds. One notable disadvantage is that these AI machines are completely devoid of human compassion.161 This may create a different standard for judgment within liability if a mission is to go wrong.

While decisions constitute a large part of humans' daily lives, as machines continue to learn and as machine and reinforcement learning continue to flourish, a dilemma is presented for liability. There are two perspectives to consider: (1) regulating and creating standards for programmers; or (2) creating a framework to regulate the actual machine. With the former, it must be noted that regardless of the \*1351 advancements of AI technology, a human being--who is bound by the law--will always be at the starting point of these systems.162 It would even be possible to keep the current liability framework unaltered, since anywhere human involvement is evident, a human would be responsible for the wrongful acts committed by or involving a machine.163 With the latter, there is ample opportunity for regulatory innovation.

B. Can Artificial Intelligence be Considered Human?

To determine the answer to this question, we must ask what exactly constitutes the characteristics of being human? This Note previously discussed machine and reinforcement learning.164 It can be argued that the process of thinking is directly related to characteristics of a human, but much of the progress in AI development shows that machines exhibit more characteristics similar to those of humans.165 Although case law would provide the most direct answer to this question, it is, unfortunately, likely unhelpful because, so far, the only AI-related lawsuits that have occurred have had to do with patents on the robotics.166

Though case law is unhelpful in the quest to determine whether AI can reach personhood to the point where it will have legal ramifications, Autonomous Intelligent Systems (AIS) have also been at the forefront of the discussion of impact on society and are useful in determining legal \*1352 personhood.167 AIS not only perform tasks like those of other intelligent machines, but they are also sophisticated enough to have the ability to interact with each other and with human beings.168 There are now even institutes dedicated to researching robot morality and determining just what encompasses a “friendly robot”169--seemingly fitting when there are also killer robots on the other end of the spectrum.

Other factors have also been considered when discussing an AI's personhood. For example, courts have had a loose interpretation of personhood for artificially-created business entities.170 There have already been arguments as to whether an AI can own real property, and the likelihood of that becoming a reality is not far off--though with a few strings attached, namely the discretion and management of a group, such as a Board of Directors.171 It would be unsurprising if a military equivalent will be a topic for discussion in the near future.

Further, the Restatement (Third) of Agency includes an individual, an organization, and a government in its definition of “person.”172 Notably, it includes “any other entity that has legal capacity to possess rights and incur liability.”173 There has been debate over whether an AI system can feasibly fall under the category of “any other entity.” However, the Restatement also specifies that:

\*1353 [a]t present, computer programs are instrumentalities of the persons who use them. If a program malfunctions, even in ways unanticipated by its designer or user, the legal consequences for the person who uses it are no different than the consequences stemming from the malfunction of any other type of instrumentality.174

As one academic states, an AI or AIS “is an instrumentality of the person who presses ‘go,’ even though the complex computer program promises to act fully autonomously.”175 But what happens when a machine learns for itself and becomes sophisticated enough to make its own decisions without the human interaction that currently swarms most autonomous functions? Neither the Restatement nor any other publication has explicitly included guidelines for this issue.

Even though there is extensive debate surrounding whether AI systems can reach legal personhood, arguments have been made for machines attaining a place in this category.176 One sociologist explains that, while intelligence is a relatively obvious factor in both humans and AI machines, this is not all that is considered in people; sentience, consciousness, and self-awareness are also vital traits of humans.177 The ability to feel things, awareness of one's body and surroundings, and recognition of that consciousness are all factors that arguably make humans who they are.178 While machines may be as smart or smarter \*1354 than humans, these aspects of emotional intelligence come into question when debating AI's humanity. Laws cover the mental incapacities that certain humans may experience, so could an AI's capacity be similar to that of a mentally insane person? The capabilities of AI have been analogized to those of mentally limited people, such as children, those who are mentally incompetent, or generally to those who lack a criminal state of mind.179

Lastly, AI might surpass humans in curiosity and desire to learn.180 Once an objective is defined for an AI system, achieving that goal becomes the machine's top priority.181 This becomes not only the system's biggest motivation but also essentially an obsession.182 This is another aspect of AI that is similar to human traits, furthering the case for AI to be able to be considered on par with humans. Autonomous weapons are particularly relevant here. Considering the fact that these weapons select and target specific individuals, places, or things, it is easy to see how hitting that target would become the weapon's number one priority.

C. Can a Machine Have Intent?

While targeting and achieving a particular goal may become an AI's or, specifically for the context of this Note, a fully autonomous weapon's sole priority, another important question is whether a machine can have intent. It would be difficult to establish that an AI system has its own intent at this point in time, despite AI's sophistication.183 Autonomous weapons systems can act with one goal (or target) in mind, but it is unclear whether this would equate to acting with intent.184 Some argue that intentional torts will not apply to AI.185 \*1355 In fact, a distinction is made between acting with intent and acting intentionally based on limited, established functions that an AI is programmed to exhibit.186 Notably, AI that assists officers and armed forces is distinguished in this capacity, and though it may be difficult to hold AI to the standards of intentional torts, there are still tort actions that may be brought in instances where military AI and autonomous weapons systems are used.187

#### Others dispute the analogy.

Anna Fosberg 20, J.D. Candidate, The Pennsylvania State University, Penn State Law, 2020, “From Siri To Sci-Fi: Are Lethal Robots People Too?,” 124 Penn St. L. Rev. 501, WestLaw

C. Overview of the Development of Corporate Personhood

As AI becomes more advanced, experts and governments have considered granting the technology a special legal status similar to that of a corporation.119 A corporation is an artificial entity that exists through recognition of the law and can act only through its agents.120 A corporation is also a legal entity with an identity, or personality, that is completely separate from that of its owners.121 To gain this separate identity, a corporation must incorporate122 by filing the articles of incorporation with a state's Secretary of State.123

\*512 Corporations have standing to enter into contracts, hold property, sue and be sued, and conduct business in the corporate name.124 Unless its articles of incorporation provide otherwise, every corporation generally has the same powers as an individual to do all things necessary to fully conduct its business and affairs,125 such as signing contracts or accruing business debts.126 Because a corporation is an artificial concept, and not a natural human, these actions are conducted by the directors or officers of the corporation.127

Shareholders in a corporation are not personally liable for the debts and obligations of the corporation.128 This limited liability of shareholders allows for greater business growth, increased access to monetary resources, and reduced risk to shareholders wanting to invest in a business without becoming personally liable to the company's creditors.129

Despite the general guarantees of limiting personal liability after incorporating, this advantage is not absolute.130 The doctrine of piercing the corporate veil131 allows courts to impose personal liability on shareholders for the debts or liabilities of the corporation when the corporation engages in some form of misconduct.132 Hence, incorporating does not create a complete barrier from liability.133 The rationale for piercing the corporate veil is that if the beneficial “veil” of limited liability is abused then liability for wrongdoing should fall on the blameworthy actor, which could be an individual within the company.134

\*513 Two general factors exist in piercing the corporate veil cases: (1) domination or control by a shareholder, whether an individual or another corporate entity, over the subject corporation; and (2) a fraud, wrong, or injustice.135 Within these general factors, smaller considerations often influence courts to find personal liability: (1) lack of corporate formalities; (2) commingling of corporate assets; (3) undercapitalization;136 (4) allegation of a tort; and (5) misrepresentation or fraud.137 The corporate veil is pierced based on an individualized fact-based analysis, as opposed to a process codified by state statute.138 The factual context is extremely important in weighing the relevant factors in deciding whether to pierce the corporate veil.139

Years of U.S. jurisprudence have allowed the term “person” to include both natural persons and artificial entities, such as corporations.140 Thus, legal personhood for corporations has developed through various theories over time.141 Corporations have been thought of as (1) an artificial and dependent person, (2) an aggregate person, and, most recently, (3) a real and independent person.142

Under the first theory, which arose during the first half of the Nineteenth Century,143 a corporation was viewed as an artificial and dependent person that is solely a legal construct created to facilitate commerce.144 If a corporation only receives legal recognition through state approval, the corporation depends on the law to recognize its legal personhood,145 and it possesses only the abilities that the state chose to grant.146 Under this theory, legal personality was primarily granted when \*514 a corporation could offer society a specific benefit that required this separate legal status.147

The second theory of corporate personhood, which arose during the last half of the Nineteenth Century,148 views the corporation as an aggregate person because a corporation could not be formed without the action and agreement of human beings.149 Human involvement is critical, as the corporation can only act through the people who manage it.150 The aggregate theory holds that “the corporate person has no existence or identity that is separate ... from the natural persons in the corporation.”151 The entity is entirely owned and managed by people, and the corporation's actions are actually conducted by its employees, as opposed to the corporation itself.152

The aggregate person theory became less prominent during the early Twentieth Century, as corporations grew increasingly large in size.153 As the role of shareholders became more tangential to the corporation's management, the identity of large corporations became separate from their shareholders.154 The corporation no longer resembled the aggregate consciousness of its shareholders, because it evolved into its own entity.155 Additionally, as an artificial entity, the corporation could potentially exist indefinitely, whereas individual shareholders cannot.156 These new considerations about the increased sized and perpetual duration of corporations prompted a new theory to explain corporate personhood.157

The third theory, the real entity theory, views the corporation as “an undeniably real and non-imaginary person.”158 The corporation has its own consciousness and its actions are considered qualitatively different from \*515 those of its members.159 Under this theory, a corporation can act by its own volition.160 Hence, the corporation becomes responsible for its own actions161 and would assume its own (criminal) liability distinct from any potential liability of its members.162 By viewing the corporation as a separate entity, the law treats the corporation like an autonomous individual.163 The precedent of corporate personhood is the foundation for exploring the possibility of expanding legal personhood to other non-human entities, such as highly advanced autonomous systems.164

D. The Laws of War

As autonomous weapons systems expand, their use must conform to the four main principles of the Laws of Armed Conflict (LOAC) and IHL.165 Unlike corporations, which are governed by state law, IHL applies internationally and provides a set of rules that aim to limit the suffering of combatants and non-combatants during a conflict.166 IHL protects those who are not participating in the conflict and restricts the “means and weapons of warfare.”167 As noted in Additional Protocol I to the Geneva Convention,168 IHL applies only during an armed conflict,169 it does not apply during peacetime.170

\*516 IHL consists of four main principles: (1) humanity; (2) necessity; (3) proportionality; and (4) distinction.171 Humanity prohibits the “infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”172 Military necessity justifies certain actions as necessary to defeat the enemy as efficiently as possible.173 Proportionality requires that even when actions may be justified by military necessity, the actions should not be unreasonable or excessive.174 Finally, distinction refers to the obligation to distinguish between civilians and armed forces.175

These principles aim to limit the suffering of non-combatants during military attacks.176 Generally, an attack refers to “acts of violence against the adversary, whether in offense or in defense.”177 Indiscriminate attacks are prohibited.178 Indiscriminate attacks are attacks that are not directed at a specific military object, employ a method or means of combat which cannot be directed at a specific military objective, or use a method or means of combat with effects that cannot be limited as required by the Additional Protocol.179

Autonomous systems differ from traditional weapons, like bullets, because these systems employ programming.180 Given that autonomous systems operate through software codes, anticipating and accounting for their behavior is difficult.181 The uncertainty in predicting the behavior of autonomous weapons systems presents challenges because the weapon's operator cannot know whether using the weapon will comply with IHL. Moreover, as the weapons advance, their increased independence and autonomous functions further obfuscate the proper characterization or entity status.182

\*517 IHL heavily relies on the concept of custom.183 Although no definition of customary law is universally accepted,184 the international community generally accepts international norms that emerge from consistent State practice or behavior that, over time, becomes accepted as a legal obligation.185 Commenting on the consistency of State practice, the International Court of Justice in North Sea Continental Shelf186 noted that State practice should be “extensive and virtually uniform.”187

Regardless of the persuasive nature of international legal obligations, custom is not equivalent to U.S. law on U.S. soil.188 IHL, however, is still relevant to U.S. law.189 In Hamdan v. United States,190 for example, the D.C. Circuit noted that Congress essentially incorporates the international laws of war into domestic law, rather than creating a U.S. common law of war.191 In Hamdan, the court reasoned that the lack of clear consensus within customary international law should not create a bright-line rule that requires civil or criminal liability within the U.S.192

Despite the ambiguities of customary international law, the United Nations (U.N.) Charter, the foundational treaty of the U.N.,193 has been adhered to by almost all States.194 And even the non-member States have acquiesced in its principles,195 which reflects the highly persuasive nature of international custom.

Customary international law is relevant when evaluating corporate liability in an international context. In Kiobel v. Royal Dutch Petroleum \*518 Co.,196 the Second Circuit held that “corporate liability is not a discernable norm of customary international law.”197 The court noted that no corporation has ever been subject to any form of liability under customary IHL.198 The U.S. Supreme Court, in Mohamad v. Palestinian Authority,199 then extended the Kiobel decision in holding that only a natural person is an individual who can be held liable under the Torture Victim Protection Act.200 This ruling maintains the distinction between a natural person and other entities.201

However, some contrary precedent suggests that non-human entities can violate, and become liable under, international customary law.202 For example, the Seventh Circuit in Flomo v. Firestone Nat. Rubber Co.203 held that corporate liability was possible under the Alien Tort Statute (ATS).204 The Seventh Circuit disagreed with the decision in Kiobel and reasoned that even if no corporation had ever been punished for violating customary international law, litigation can be used to enforce an international norm.205 The court noted that tort liability is a globally common consideration when deciding in favor of corporate liability.206

Within the military, the development of weapon systems with greater degrees of autonomy is growing.207 Although these machines may make decisions like a human mind or a corporate body, this similarity is not enough to merit an independent entity status.

III. ANALYSIS

Legal personhood status should not extend to autonomous weapons systems. The discussion of legal personhood for military robots has \*519 received less prominence than that for civil robots, as noted by the European Parliament's recent discussion.208 Even so, analyzing militarized autonomous systems will likely follow the recent discussion of whether to grant a special type of electronic personhood for autonomous weapons systems.209

Three reasons support the determination that autonomous weapons systems do not merit legal personhood based on the corporate personhood analogy. First, the doctrines of law that govern corporations and war are fundamentally different. Therefore, the extension of personhood to autonomous weapons systems based on surface similarities is illogical.210 Second, international custom does not support equating machines to people.211 Third, inanimate objects cannot be deliberately undercapitalized in an attempt to escape liability.212

A. Legal Personhood Under IHL

The legal personhood theory can only apply to persons, not autonomous weapons systems. Corporations are governed by state and federal statutes213 (which do recognize legal personhood beyond humans)214 whereas autonomous weapons systems are governed by IHL (which has no established precedent recognizing personhood beyond literal humans).215 Corporate law and IHL support different entities, systems, and purposes.216 Even though facially the analogy of extending personhood from one non-human entity to another appears logical, this comparison will not pass muster when applied to an international doctrine based on custom, as opposed to a constitution. State constitutions expressly grant corporations recognition, whereas international custom (which is not binding law) focuses on governing the behavior of persons.217

Even though the corporate personhood analogy ultimately fails under IHL, the surface-level similarities of autonomous systems and corporations warrant a discussion about the appropriate entity status for autonomous weapons systems. The real entity theory, which views the corporation as an independent entity, does not apply to the current technology given that the extent of human involvement prevents the \*520 machines from operating completely independently.218 The two factors of longevity and size that prompted theorists to view corporations as real entities,219 rather than aggregate bodies, do not apply to robots. First, corporations can exist indefinitely,220 whereas technological innovations cannot.221 Robots have a lifecycle.222 While this may depend on each individual system, the lifecycle may typically last between eight and ten years,223 which is shorter than the potentially perpetual duration of a corporation.

Second, an individual autonomous system is smaller than a large corporation. Some of the largest corporations on the Fortune 500 list have millions of employees and millions of dollars in revenue.224 In contrast, autonomous systems are individual pieces of machinery that do not have independent assets or revenue values.225 Ultimately, the distinguishing factors of the real entity theory do not pertain to autonomous systems.226 Therefore, despite the apparent independent decision-making of super-intelligent robots, these systems are not structurally similar enough to corporations to be analyzed under the real entity theory.

On the other hand, the aggregate theory bears more resemblance to the current setup of autonomous weapons systems. Under the aggregate theory, the corporation's identity is inseparable from the humans who support it.227 Just as corporations make decisions that are administered by human actions (such as directors approving business decisions) autonomous systems also rely on humans to make decisions (such as creating particular programming to distinguish between military and civilian targets when making lethal decisions).228 Under DoD policy,229 \*521 shoot-no-shoot decisions are, ultimately, a human-made decision.230 The lethal decision is inseparably connected to the human operator.231 Therefore, the inherent interconnection between the operator and the weapon best resembles the aggregate person theory.232

Given that autonomous systems operate on the battlefield, not in the boardroom, IHL should guide the appropriate entity status for these systems because of their specific use in warfare. Instead of assigning autonomous systems legal personhood based on the U.S. Constitution and drawing from corporate law, weapons experts and governments should look to IHL for guidance.233 While IHL does not explicitly address autonomous systems, it should be central in evaluating their proper entity status because IHL is the relevant law when determining the legality of weapons used in conflict.234

The basic purposes of corporations and autonomous systems are dissimilar.235 Autonomous weapons systems increase military efficiencies and minimize risk.236 Corporations primarily exist to shield the directors from personal liability related to poor business decisions.237 Autonomous systems and corporations exist for separate reasons and strive towards completely different objectives.238

An autonomous machine is not the functional equivalent of an independent human person, unlike a corporation that can legally functional akin to a human person.239 An autonomous weapons system is a weapon. Unlike an aggregate corporate body where decisions are made based on collective consciousness,240 the machine does not contribute to the decision-making process; it responds based on preprogrammed algorithms that are physically executed by an operator.241 Although machines operate based on codes created by humans, this coordination is less intensive than the process directors must undergo when making business decisions \*522 within an aggregate corporate body.242 Autonomous systems do not contribute input regarding their operations.243 Their actions are preprogrammed.244 Therefore, autonomous systems operate as inanimate objects that are extensions of human decision-making, not as independent individuals on the battlefield or as members of the board of directors.

The laws of war focus on the obligations of the persons engaged in war,245 not the conduct of robots.246 IHL regulates and prohibits the use of weapons that cause unnecessary suffering or contribute to indiscriminate attacks.247 IHL imposes rules on when and how an attack should be conducted, with a focus on guiding the human behavior involved in conducting an attack.248

Although weapons used in warfare must conform to IHL principles, the standard of adhering to these principles does not require autonomous systems to make legal determinations.249 IHL does not focus on the process of how a decision is made; under this doctrine of law, the laws focus on the results of the action, namely whether an indiscriminate attack has occurred.250 In contrast, directors' obligations under corporate law are reviewed based on the process of making business decisions.251 IHL's focus on the results of the process rather than the process itself demonstrates that different standards are emphasized when determining conformity with the law under corporate law and IHL.252 The different standards between these bodies of law reflect that U.S. domestic law and international law support different purposes and structures.

\*523 IHL and U.S. law are different legal doctrines that support different purposes and afford different legal protections.253 Unlike corporations, which have been granted legal personhood based on their roles in a U.S. domestic context, autonomous weapons systems operate under IHL, which is strongly based on international custom.254 By applying the corporate personhood analogy under IHL, the concept of corporate liability would have to exist as a recognized principle of international law.255

B. International Custom: Machines Are Not Humans

International custom does not support equating machines to people, and it remains divided regarding corporate liability, as discussed below.256 In fact, the existing case law reveals a restrictive view of personhood and a limitation on corporate liability as a recognized custom.257

For example, in Kiobel258 the Second Circuit held that “corporate liability is not a discernable norm of customary international law.”259 The U.S. Supreme Court then extended the Kiobel decision in Mohamad,260 holding that only a natural person is an individual who can be held liable under the Torture Victim Protection Act.261 These rulings maintain the distinction between a natural person and other non-human entities.262

Notwithstanding the Seventh Circuit's holding in Flomo, extending corporate liability under the ATS, the Supreme Court's holding in Mohamad263 should govern the entity status of autonomous systems because of its restrictive view of personhood.264 First, the Court in Mohamad focused on the concept of natural personhood, whereas the courts in Flomo and Kiobel focused on the concept of corporate liability.265 Determining the scope of liability is a separate issue from discussing the \*524 proper entity status for autonomous systems. Given that the analysis in Mohamad more closely aligns with the focus of determining personhood, Mohamad's ruling should control.266

Mohamad cautions against extending legal personhood to anything other than a human individual.267 The common meaning of an individual refers only to a human being, not an organization, or an entity, or even an association.268 Even though the Dictionary Act allows the term “person” to include artificial entities,269 a statute should only extend personhood to artificial entities if congressional intent clearly warrants such expansion.270 Absent clear statutory or congressional expression, the U.S. Congress likely intends the term personhood to only pertain to human beings.271 The U.S. Congress has not expressed a desire to equate machines to people.272 Thus, the lack of congressional intent further supports the contention that international customary law restrictively views legal personhood as solely pertaining to human beings.

Second, even though the court in Flomo held in favor of extending liability for non-human entities, Flomo only dealt with the issue of corporate liability under the ATS.273 Flomo may control in specific situations where an alien autonomous system violates a statute. Because the narrow application of Flomo goes beyond this analysis, the premise of Kiobel (that corporate liability is not a norm of customary international law)274 should be used to determine the entity status of autonomous systems.

An express, written declaration from the U.N. expanding the term “person” to include artificial entities would be the strongest indication of support for electronic personhood under IHL, given that IHL follows the customary practices of the international community.275 However, the international community lacks consensus as to the regulation of these systems and their legal status.276 Specifically, even though the European \*525 Parliament suggested that self-learning robots277 merit electronic personalities,278 the European Commission ultimately rejected this contention after opposition from experts,279 and the arguments for and against an electronic personality remain up for debate.280 The international myriad of views falls very short of clear statutory intent to recognize electronic personhood.281 Therefore, no express intent, or even a consensus, exists to support extending legal personhood beyond a person.

C. Inanimate Objects Cannot be Undercapitalized

Autonomous decisions can increase military efficiency, yet they also yield questions of accountability.282 In corporate law, when members of the board of directors of the corporation (rather than the corporation itself) become personally liable, the liability ensues under the piercing the corporate veil doctrine.283 Undercapitalization, an important factor when deciding to pierce the corporate veil, refers to the deliberate choice to establish a shell corporation, without any viable assets, for the sole purpose of escaping personal liability.284 However, autonomous systems cannot be pierced because, unlike corporations, autonomous systems are not financial liability shields. Autonomous systems are just extremely advanced pieces of technology; they do not hold financial assets. \*526 Inanimate objects cannot act to commit fraud, unlike corporations that conduct business in their own name.285

Piercing the corporate veil is appropriate when the totality of the circumstances indicates that the corporate form is being used to commit fraud or serve an injustice against the corporate form.286 For example, in OTR Associates v. IBC Services, Inc.,287 the New Jersey Superior Court appropriately pierced the corporate veil.288 IBC had no assets except its lease with a parent corporation.289 IBC was created for the sole purpose of insulating the parent corporation from liability.290 Thus, the deliberately undercapitalized company demonstrated fraud as well as an abuse of the corporate form.291

Unlike the corporation in OTR Associates, an autonomous weapon system is not deliberately created to limit liability for the military.292 Although similar to shell corporations, in that autonomous systems lack their own assets,293 the reason for their lack of assets differs. Shell corporations often exist as limited liability loopholes.294 On the contrary, weapons systems are pieces of technology that literally cannot hold or receive financial assets. Instead of attempting to dodge liability, autonomous systems expand military capabilities and minimize military risk by accessing previously inaccessible locations and removing humans from exceedingly dangerous missions.295 Further, unlike a corporation that conducts business in its own name, a weapons system is a preprogrammed tool on the battlefield that only follows the commands of its operator.296 Weapons systems do not fight as independent actors engaged in armed conflict.297

The inapplicability of piercing the corporate veil to weapons systems further distinguishes them from corporations and highlights how the \*527 corporate personhood analogy fails in this context.298 Not only do different laws govern autonomous systems than those that regulate corporations,299 but fundamental concepts of corporate law do not translate to regulating weapons. The fact that weapons systems do not have assets is not an indication of undercapitalization or fraud, but rather an inherent characteristic of military technology, or of any inanimate object. Ultimately, the inapplicability of a key method of corporate law further supports the argument against extending legal personhood to an entity distinct from a corporation.

D. Recommendation

Legal personhood should not extend to autonomous systems. To successfully extend this doctrine, corporate personhood would have to successfully function under IHL.300 However, legal personhood does not translate to an international context because the considerations used to create a separate entity view of corporate personhood cannot apply to weapon systems,301 and customary international law indicates that the concept of personhood should be restricted to actual persons.302 Further, piercing the corporate veil, a key doctrine within corporate law, could not apply under IHL given that some factors used to impose directors' liability, such as undercapitalization, cannot apply to inanimate objects.303

Although autonomous systems continue to make more independent decisions, governments and lawmakers should still view them only as advanced pieces of technology.304 Despite their growing autonomy, at the end of the day, these systems are machines.305 Because machines are not the functional equivalent of human persons in war,306 their legal entity status should not be conflated with that assigned to actual persons.307

Thus, as legislatures react to AI's increasingly human characteristics, they should recognize that acting like a human does not merit the legal status of a human. Although corporations can perform functions similar to those of humans, such as entering into contracts,308 corporations received a legal status specific to their role in business,309 which evolved to reflect \*528 the appropriate status of how corporations operate.310 Therefore, given that autonomous systems are just advanced machines on the battlefield, they do not merit a distinct legal entity status.

IV. CONCLUSION

Even though autonomous systems make increasingly independent decisions, the argument of granting them legal personhood is without merit. Although autonomous weapons systems engage in similar decision-making to that of humans,311 that similarity on its own is not enough to justify granting them legal personhood.312 Because autonomous weapons systems are weapons used in conflict, their use must comply with IHL.313 Furthermore, as evidenced by Kiobel and Mohamad, IHL views legal personhood restrictively and would not support an extension to autonomous weapons systems.314 Finally, the corporate law doctrine of piercing the corporate veil does not apply to autonomous systems.315 Ultimately, the failed application of the corporate personhood analogy under IHL combined with the inapplicability of a key principle of corporate law indicates that extending legal personhood to autonomous weapons systems cannot succeed.316 Autonomous weapons systems are machines, and they should not receive a distinct type of legal personhood.317

### AFF Area---AI Liability---Malpractice Torts

#### There should be malpractice liability for medical AI.

Scott J. Schweikart 21, Senior Research Associate at the American Medical Association and Legal Editor of the AMA Journal of Ethics. M.B.E., University of Pennsylvania; J.D., Case Western Reserve University; B.A., Washington University in St. Louis, “Who Will Be Liable for Medical Malpractice In the Future? How the Use of Artificial Intelligence in Medicine Will Shape Medical Tort Law,” 22 Minn. J.L. Sci. & Tech. 1, WestLaw

A. AI PERSONHOOD

Traditionally, courts have not viewed it as possible to hold a machine or computer (like AI) legally responsible, as they are “not legal persons.” 71 Chung argues that, by way of analogy comparing AI to medical students, “there is enough overlap between the two [i.e., AI and medical students] in terms of level of authority, tasks and level of oversight for the court to make such a determination [i.e. a determination of personhood status for AI].”72 David Vladeck notes that “[c]onferring ‘personhood’ on these machines would resolve the agency question; the machines would become principals in their own right, and along with new legal status would come new legal burdens, including the burden of self-insurance.”73 Of course, if we look to the personhood solution for AI, Vladeck points out that it is likely that the standard of care applied to AI and that applied to humans would be different, and autonomous machines would then have a standard of care unique to themselves. 74 Additionally, Chinen notes that conferring “personhood” on AI may not be such a far leap, as “giving legal personhood to things is not new. Ships and corporations enjoy status as legal persons and assume liabilities.”75

#### The AI doctor can be made solely liable if it is autonomous. This can take the form of forcing the procurement of AI liability insurance.

Megan Sword 19, Associate at Husch Blackwell, J.D. UMKC School of Law, “To Err Is Both Human and Non-Human,” 88 UMKC L. Rev. 211, WestLaw

3. How to Make Doctor AI Solely Liable

AI's autonomous nature is a considerable factor when assessing legal liability.174 Instead of being treated like other forms of technology that solely operate in the hands of the user, AI performs without the need of a user, learning and applying knowledge to cases independently. Because AI performs more like a practitioner, directly assessing patients and the care they need, and less like other medical devices, AI should be independently liable for its own actions.

Traditionally, courts have stated that machines cannot face legal liability because they are not legal persons. 175 Legal personhood is a legal fiction used to hold entities, along with natural persons, accountable for their actions.176 As a matter of law, entities such as corporations have personhood and can be held liable, just like individual people, for their actions.177 Now, with AI in the mix, more flexibility in the legal definition of personhood to encompass current and evolving AI, due to its role in medical decision-making, should be considered.

The classification of AI as a legal person allows more flexibility in apportioning involvement and responsibility in medical malpractice claims.178 In this way, AI can be considered individually when identifying the different party's \*231 capacity and authority during medical decision-making.179 As AI continues to develop capabilities similar to humans, it is not a far stretch that they should be granted legal personhood.

If AI machines are deemed legal persons, it must be decided whether they will have all the same legal rights as people and corporations. If current liability law extends to AI, it may not be clear how to ‘punish’ it or correct its future actions. Additionally, retributive compensation for those injured may not be had. Those injured may not be as satisfied with assigning liability to a machine that has no emotions or sense of morality rather than placing blame on another human being.

4. Insurance Coverage for Artificial Intelligent Technology

If liability cannot be found against developers, nor with physicians, and rests solely on the AI, perhaps it should be covered by professional liability insurance to enable injured patients to be compensated, similar to human expert consultants. Still, questions remain: will insurance companies underwrite an AI and, if so, who should buy the insurance?

#### It's vital for making AI integration in healthcare viable.

Megan Sword 19, Associate at Husch Blackwell, J.D. UMKC School of Law, “To Err Is Both Human and Non-Human,” 88 UMKC L. Rev. 211, WestLaw

IV. CONCLUSION

The healthcare industry is one area where AI is expected to deliver the most social benefit.201 AI has continued to show its ability to enhance patient care and its potential for increased growth and improvement. The question still remains: at what point will society accept that this technology can replace licensed physicians in certain situations? Once AI proves to be consistently as reliable as human physicians and society accepts this notion, solely relying on AI will become common practice in certain areas of patient care, and AI will be considered more a medical practitioner rather than a medical device. AI developers will need to demonstrate how AI justifies its actions and decision-making before society fully accepts and trusts AI with medical diagnosis and treatment.

The approach to determining and assigning liability will need to adapt as AI integrates into the healthcare industry. Liability will be difficult to place on physicians as AI systems begin to outperform them and become the standard of care. Ethical and regulatory guidelines may prevent developers from creating and implementing faulty software, but if the injury caused has nothing to do with design and instead AI's take on reality, liability cannot be placed on the developers. AI systems should be sued directly for their own independent actions by adapting the definition of legal personhood to include AI. This seems to be the avenue to place liability, despite the fact that this may leave patients unsatisfied because one cannot punish, reprimand, or seek compensation directly from the AI system. If an AI proves to be a continual danger to patients, placing liability directly on it would result in modification of the AI system or potentially removing the AI from practice altogether; bringing some relief to the injured parties. In terms of recovery for the injured, insurance will play a major role in dealing with AI liability. A change in policy language will need to take place and a shift in who supplies the insurance may be seen. Hospitals and manufacturers will need to review their current insurance policies to make sure they are covered in the case of injury caused by AI, or add on special policies for added coverage. In the future, AI manufacturers may begin to offer and sell insurance policies in conjunction with the sale of their AI systems.

Until legal and insurance liability standards catch up with AI technological advances, cases of injuries will have to be handled on a case-by-case basis and will be up for the jury to decide where to place liability, if it can be placed at all.

#### There are arguments about the difficulty of underwriting AI risk scaring off conventional insurers. AFFs can respond by arguing that developers can sell their own insurance products.

Megan Sword 19, Associate at Husch Blackwell, J.D. UMKC School of Law, “To Err Is Both Human and Non-Human,” 88 UMKC L. Rev. 211, WestLaw

Some hospitals purchase insurance to cover liability stemming from professional actions, errors, or omissions.180 A growing number self-insure for these risks.181 Medical malpractice insurance is a type of professional liability insurance that protects physicians from liability resulting from patient injury.182 Hospitals may need to update their coverage to include the actions, errors, or omissions of AI.183 Alternatively, this could be contractually allocated to the technology companies providing the AI, who could then purchase insurance to cover losses resulting from defective software.184

As physician malpractice claims are common, insurers have large amounts of data to calculate pricing models and can predict how much they will pay out per premium received.185 However, malpractice caused by AI is not easily covered. Technology companies purchase errors and omissions insurance to cover financial \*232 loss of a customer, but these policies do not cover bodily injury.186 Bodily injury is, instead, covered under a general liability policy, but these policies typically exclude professional liability.187 A gap in coverage results; there would be no coverage for injury resulting from the actions of AI.188 Insurers must now adjust policy wording to close these coverage gaps.189 For technology such as IBM Watson, insurers are beginning to offer coverage for “contingent bodily injury” under errors and omissions policies.190 Companies may also end up using these policies even if AI performs as expected, such as if the AI learned from bad data and its actions cause harm.191

Incidents involving AI self-driving vehicles help highlight new issues regarding fault and liability. Automation will result in fewer accidents, and when they do happen, fault is more likely to be placed on the machine.192 As driverless vehicles begin to take up more of the road, insurance coverage is beginning to shift away from vehicle owners to automakers themselves.193

However, if automakers are forced to cover all costs to insure vehicles, long-term expenses will create disincentives for development of these technologies.194 As a result, some automakers are beginning to personally provide coverage for their vehicles, turning burden into profit and eliminating the middleman.195 Self-driving vehicle manufacturers have access to data and statistics pertaining to vehicles performance and resulting accidents, and can use this to calculate costs to insure their vehicles.196 As this data will be available in real-time, estimated costs will be more frequently updated and costs will decrease as a result.197 Insurance pricing will no longer be dependent on driver performance, but on the type and quality of software the vehicle contains.198 As driverless vehicles continue to improve and perform more safely, insurance prices will continue to drop as the risk grows smaller.

Turning back to AI technologies in medicine: a shift in insurance will take place in this field as well, and the AI developers will provide their own insurance coverage to medical providers using their technologies. As insurance companies \*233 are slow to keep up with AI technological advances, coverage gaps result.199 Insurers will need to adapt and extend coverage, add special policies to cover AI risks, or face being replaced by the AI manufacturers themselves.200 Though, perhaps they will be replaced regardless of their actions.

#### An alternative approach can focus on common enterprise liability. This can reduce issues involving the allocation of blame between developers.

Scott J. Schweikart 21, Senior Research Associate at the American Medical Association and Legal Editor of the AMA Journal of Ethics. M.B.E., University of Pennsylvania; J.D., Case Western Reserve University; B.A., Washington University in St. Louis, “Who Will Be Liable for Medical Malpractice In the Future? How the Use of Artificial Intelligence in Medicine Will Shape Medical Tort Law,” 22 Minn. J.L. Sci. & Tech. 1, WestLaw

B. COMMON ENTERPRISE LIABILITY

As discussed earlier, a key problem with AI technology is that there are many different developers involved in its creation. Scherer notes that to some extent, tort law already has a method to apportion liability, explaining that “[t]he discreteness of AI is \*20 also shared by many other modern and non-so-modern technologies.”76 American jurisprudence already has a body of common law regarding tort apportionment of liability,77 and this may work to solve some issues. However, because of the nature of some AI and the intricate aspect of its development between multiple parties, being able to apportion liability under traditional scenarios may not always be possible.

Vladeck explains that one could, in theory, apply a strict liability model that would simply function to hold only the manufacturer or developer of an AI automatically liable.78 However such a model is not ideal79 as there are other companies and entities that help produce the final complex product, not simply the main manufacturer.80 As a solution, Vladeck proposes “common enterprise” liability,81 where “each entity within a set of interrelated companies may be held jointly and severally liable for the actions of other entities that are part of the group.”82 This theory of liability is advantageous when applied to AI, as it “would not require that the companies function jointly; all that would be required is that they work to a common end--to design, program, and manufacture” an AI product and “its various component parts.”83 As Vladeck further explains, common enterprise liability “permits the law to impose joint liability without having to \*21 lay bare and grapple with the details of assigning every aspect of wrongdoing to one party or another; it is enough that in pursuit of a common aim the parties in engaged in wrongdoing.”84

#### An alternative approach can focus on standards of care for physicians. This would treat AI tools as akin to a medical device.

Scott J. Schweikart 21, Senior Research Associate at the American Medical Association and Legal Editor of the AMA Journal of Ethics. M.B.E., University of Pennsylvania; J.D., Case Western Reserve University; B.A., Washington University in St. Louis, “Who Will Be Liable for Medical Malpractice In the Future? How the Use of Artificial Intelligence in Medicine Will Shape Medical Tort Law,” 22 Minn. J.L. Sci. & Tech. 1, WestLaw

C. NEW STANDARD OF CARE

Possibly the most natural solution is to have common-law medical malpractice modify its standard of care over time for physicians to reflect the newfound reality of medical AI in clinical practice. Price argues that the standard will likely “develop[] organically,” but that it also could be created via a professional organization as a practice guideline.85 Such a guideline might suggest a standard of care that is responsive to the level of risk, where a physician may have to seek greater validation or inquiry before accepting an AI's determination if the risk and consequences are high.86 Greenberg also echoes this notion of validation, explaining that when a physician is exposed to new medical device, the standard of care may require a physician to take extra steps to learn as much as possible, e.g., “by reading all of the clinical trial information on the risks and benefits of a new device, following any pertinent label instructions, and seeking relevant training where appropriate.”87 And considering the issues some AI have with being developed with improper data, physicians need to do their research and learn how an AI was developed, what risks may exist in its use, and if its use is appropriate for the physician's patient population. Just like with any other novel medical device a physician learned to use, the standard of \*22 care will undoubtedly shift to require a physician to perform due diligence88 in any AI they use.

#### Which of these solutions is optimal is based on where liability is best allocated---the physicians or the developers?

Scott J. Schweikart 21, Senior Research Associate at the American Medical Association and Legal Editor of the AMA Journal of Ethics. M.B.E., University of Pennsylvania; J.D., Case Western Reserve University; B.A., Washington University in St. Louis, “Who Will Be Liable for Medical Malpractice In the Future? How the Use of Artificial Intelligence in Medicine Will Shape Medical Tort Law,” 22 Minn. J.L. Sci. & Tech. 1, WestLaw

V. CONCLUSION

Looking to the future, some mix of the three possibilities outlined above--AI personhood, common enterprise liability, and a new standard of care--is likely to be implemented. All of the solutions serve a common goal: to allow the injured party to have some course of redress. If tort law does not adapt to the reality of medical AI and the problems it creates (e.g., notably, opacity and explainability), many claims will simply not be viable as causation will be impossible to demonstrate. What the exact landscape of tort law will look like in the future will depend on what aspects of the problems associated with AI society prioritizes.89 If injured patients are the societal priority, then solutions that allow them to become whole will incorporate liability paradigms that will allow for the developers or physicians to be liable. Assuming that society's priority is to protect injured patients first, the next battle will be waged between AI developers and physicians over who should shoulder more of the liability regarding AI used in medical practice. For example, the solutions of AI personhood and common enterprise liability put most of the liability and risk towards the developers, while a shift in the standard of care can allow for the physicians (as end users of the technology) to have liability in certain scenarios. How this potential tension between AI developers and physicians plays out, and how medical tort law continues to develop in the future in response to AI, will be ever fascinating.

### AFF Area---AI Liability---Taxation

#### AI’s lack of legal personhood means it cannot be taxed. This makes it the perfect mechanism for tax evasion, supercharging concentration of wealth, inequality, and concentrating resources with AI which is an existential threat.

Megan L. Jones & Bradford S. Cohen 20, Megan L. Jones is a tax attorney at the Los Angeles office of Withers World wide, focusing on domestic and global planning, and an adjunct professor at USC Law School; Bradford S. Cohen is a partner in the Tax, Trusts & Estates group at Jeffer Mangels Butler & Mitchell LLP in Los Angeles, “Can AI Be Taxed?,” 43-MAY L.A. Law. 30, WestLaw

While the word “innovation” is often used, only rarely does a new series of inventions--such as the wheel, electricity, and the Internet--entirely reshape society. Artificial intelligence (AI) is proving to be the next such powerful innovation, and the U.S. tax code is little prepared for it.

Defining AI can be a challenging task due to the broad nature of what falls under its rubric. Essentially, AI is the use of computer systems to perform tasks that historically have required human intelligence. Expanding on this definition, AI can interpret and learn from data, creating alone and using what it has learned from the data without additional human input. Such machine learning is further refined into deep learning in which artificial neural networks--algorithms that copy how the human brain works--mimic human behavior by processing vast amounts of data.1 This neural network approach of having computers “learn” in a manner similar to the human brain varies from the more traditional rule-based computer programming in which a computer is programmed with the explicit rules it will follow.2 Thus, with AI, computers copy human thinking rather than just routinely following set tasks.

AI is often described in futuristic terms in which machines outsmart the human race. The science fiction imagery exaggeration is only a function of time. While AI arguably performs rule-based tasks better than humans, for the moment it is still lagging behind in being able to outthink humans in many other areas. However, current projections are that within five years technology will have evolved to the state that the machines will exceed human intellectual capabilities across a greatly expanded spectrum of areas.3 Those currently creating this AI wave have enormous power as they are setting the standards from which the machines will operate in the future, outpacing human \*32 control, but with these rules forming the metrics from which AI will iterate alone.

AI can and will replace humans, displacing what is a biologically weak component in the supply chain with a seamless solution, terrifying in its efficiency. The current coronavirus pandemic is exposing the weaknesses of people, and will speed up the adoption of AI across a wide swath of industries that are no longer patient with the work force after suffering crippling disruptions due to quarantines, hoarding, and death. The entertainment industry, in partiular, is not immune, with most productions shut down, live events cancelled, and top stars such as Tom Hanks needing to delay a movie due to catching the coronavirus.4

AI is already present in daily life, though in what many consider to be the most rudimentary forms. It powers Google's search and Amazon's delivery system, the latter of which is performing an essential function during the coronavirus crisis by getting supplies out with merciless precision.5 In the Netherlands, Philips uses robots in lights out/dark factories to make electric razors, and even though Tesla's CEO has had to admit overreliance on robots in the company's “dark” factories, which only needed a few people to monitor the automated processes, both maufacturers' methods indicate the future energy-saving prospect of AI.6 Going forward, AI will become more pervasive in ways that cannot yet be imagined.

Companies whose business is involved in or overlaps with AI encompass a vast ecosystem. AI starts with hardware in the form of a semiconductor that drives everything. The AI (software based) is then run and stored on a further form of hardware (for example, a computer), which connects with a network and eventually the cloud. The cloud is a means of storing and accessing data and programs over the Internet instead of on a localized platform such as a computer. Robots, while visually arresting, merely represent a tool for AI. Eventually, AI will be run off a smart phone. AI growth is driven by evolving semiconductor processing power, 5G (a much faster wireless network), quantum computing and refinement of the software that runs on these other elements. The complexity of these systems is staggering and expanding rapidly.

Inherent in understanding AI are a few key terms, some of which are still conceptual in application but close to reaching practical adoption. Eventually, a digital twin will integrate with each person, adding vast intellectual and physical capabilities based on an individual's own thinking and abilities, only better. This twin, and indeed much of life, will operate on more powerful smart phones. These smart phone-based digital twins will run people's lives, determining what to think, watch, eat, read, experience, and more.7 The breadth of the changes to be brought about by AI technology is beyond ordinary human understanding (and is in part projected to develop without human involvement) and is not addressed in many current laws as written, including the Internal Revenue Code (IRC).

As is typically the case in most countries, the U.S. tax base is heavily reliant on service income earned by individuals. In 2018, 51 percent of tax revenue raised was from individual income taxes; 35 percent was from payroll taxes (which are assessed on the wage or salary paychecks of most workers and are used to fund such programs as social security); 8 percent was excise, estate, and other taxes; and 6 percent was corporate income tax.8 Yet, AI is projected to replace many jobs globally, with estimates of how many jobs so affected varying widely. The McKinsey Global Institute has estimated that about 50 percent of work tasks around the world are currently automatable.9 However, McKinsey also estimated that 30 percent of work activities could be automated by 2030, displacing about 14 percent of workers, assuming rapid adoption of automation. McKinsey's estimates fall in the middle of the prognosticators, demonstrating that such considerable changes are widely accepted. Importantly, for tax purposes, if humans are working much less, tax revenue will drop precipitately in the United States, and this change could occur in a meaningful way over the next 10 years.

The tax world as presently constructed follows a certain order through its own rule book, which in the United States is the IRC. Put simply, the underlying system codified in the IRC “follows the money,” meaning if someone gets paid for services, that payment gets taxed. Currently, tax revenues both support the U.S. government and its programs, along with incentivizing (or disincentivizing) certain behavior.

AI presents challenges for domestic and foreign taxation as it is composed of bits and electrons floating through a digital network that passes through servers and is ultimately reached only through an Internet service provider. Significantly, this new world will raise issues of jurisdiction and nexus, both for domestic and foreign tax purposes.

Taxpayers in the United States are generally taxed on worldwide income, with some modifications after the Tax Cuts and Jobs Act passed in 2017. In contrast, nonresident aliens and foreign corporations are generally taxed based on sourcing rules that determine what is taxed and by whom, basically depending upon where the income is deemed sourced or derived.10 Income tax treaties can further refine which country has the right to tax certain income derived by a tax resident of either country. The source of income is typically considered where the relevant economic activity takes place.11 Such a presence can create a “permanent establishment,” i.e., the place where the taxpayer is deemed to reside with respect to determined income earned. When this income is “effectively connected” to that tax situs, tax is due to the country in which the permanent establishment exists. Global tax treaties can create different rules, including tie-breaker ones that determine the source when there are multiple establishments or no clear permanent establishment exists. New issues are presented by AI when a “permanent” establishment, if any at all, exists.

States have also waded into the online quagmire, most famously recently in South Dakota v. Wayfair, which uprooted long-standing legal precedent at the U.S. Supreme Court level.12 In Wayfair, South Dakota challenged whether an out-of-state seller was required to have an in-state presence for the state to tax the seller on sales above a certain amount made within the state. The Supreme Court decided in favor of South Dakota, determining that such taxation does not violate either the Due Process or Commerce Clauses of the U.S. Constitution. The Court also commented on \*33 the disruptions to the traditional U.S. tax system resulting from the growth of online commerce, noting that these online merchants were availing themselves of benefits of a state and that “substantial virtual connections” should not be ignored. The Court in Wayfair also cited a Massachusetts law that taxes merchants when their customers have a seller's app or cookies on their computer.13 Massachusetts has begun enforcing this law though how they can do so without violating privacy rights is puzzling.

While sourcing income related to AI may be one of the greatest challenges faced by taxing countries and states, AI may also present income issues. At one level, conceptually, the IRC should not be overly complex. However, tax practitioners (and indeed most non-tax practitioners) know otherwise. Indeed, the more tax one knows, the more complicated one knows it is. Tax code provisions are extensive in number and mind-numbingly convoluted at times in an effort to ensure that desired tax is assessed and paid. This includes characterization of various types of income that can have significant impact on the amount of tax liability, including tax rates and withholding obligations.

A tax is imposed each year on all earned income of individuals or corporations, with some limited exceptions.14 Income is defined in the IRC to mean all income from whatever source derived, including those forms of income that include: compensation for services, gross income derived from a business, gains derived from property dealings, interest, rents, royalties, dividends, annuities, life insurance payouts, pensions, income from discharge of indebtedness, distributed partnership income, income in respect of a decedent, and income from an interest in an estate or trust. Traditionally, income is defined as ordinary (essentially, actively earned income), passive (income earned without active participation) or portfolio (income from investments, such as dividends, interest, or royalties). Income includes capital gain on the sale of a capital asset. A significant challenge will be how to define and classify AI income.

While all types of income can have unique sourcing and characterization issues, in tangible income, such as royalty streams, or the sale and exchange of assets that created such streams, can be harder to source and characterize and thus subject to a myriad of rules. The IRC seeks to determine the characterization of the income as ordinary or capital based in part upon whether the intangible asset was self-created (and if so it is usually taxed more like ordinary income; if not, it may be subject to the lower capital gains tax rate).15 Sourcing rules also become more complex when taxing intangibles. Digital assets can be harder to find and more easily shifted offshore, limiting the tax reach of the U.S. government.

Additionally, income abroad can be subject to lower tax rates under the global intangible low-taxed income (GILTI)16 or foreign derived intangible income (FDII)17 provisions of the IRC, depending upon the ultimate product, intangible or services sold. Both GILTI and FDII allow for a preferential deduction, with the latter, FDII, being applicable for intangibles and services sold abroad.

The everchanging nature of AI will be another challenge for U.S. tax laws. The current tax landscape is vastly limited and oftentimes inapplicable, in part because current laws do not contemplate the dynamic shifts it presents. Most people will be effectively and increasingly removed from their environment, operating in ever narrower fields but still living stable and enjoyable lives. When identifying related taxable income, the hardware and the starting software can be associated with a person or entity to be taxed. It is what happens afterwards that gets complicated. The intangible aspect and ongoing infinite iterations of AI are key reasons behind the complexity inherent in finding, sourcing, taxing, and understanding it. AI itself is capable of constant, ever-evolving change, iterating, mutating, and evolving millions of times in mere seconds, making it hard to track. Humans may, and likely will, not be able to keep up with AI creation and will take no part in such ongoing processes. Looking forward, then, the drafters of U.S. tax laws most likely will not be able to keep pace with AI as it develops on its own. Furthermore, the reality is that the laws have been written by humans, most of whom are not technologically sophisticated, and are certainly no match for deep learning-based AI.

Tax law is not the only area of law that may not be able to cope with AI. The laws of patents (which require an inventor), copyright (which requires human creation, originality, creativity, and the ability to fix an idea), and rights of publicity (an individual's right to control and profit from commercial use of his or her name, likeness and persona) will need to evolve when all being created is done by automation yet mimicking a person, and sometimes alongside a person. Self-creation becomes impossible to define if a digital twin, better than me but not me, creates in place of the human creator and inevitably will continue to create long after the original human creator is no longer alive.

Unlike a corporation, AI presently does not have personhood standing for tax purposes or otherwise. However, one robot, Sophia, was given citizenship by Saudi Arabia in October of 2017.18 Built by Hong Kong-based company Hanson Robotics, Sophia is designed to look and act like a human being but only has human rights in Saudi Arabia. If AI is not a person, it is unclear how it is taxed and its earnings \*34 accounted for. Simplistically, the AI owner could be taxed but that “person” might not practically be identifiable. Perhaps, AI may one day be the perfect offshore tax haven, existing as a digital and not physical location. Importantly, the concepts related to the rights surrounding intangibles do have tax implications as they define who owns what rights and thus help determine how related resulting transactions will be taxed.

Tax policy now favors AI in many ways, for example, the 100 percent depreciation deduction for qualified property.19 In the context of AI, the government is essentially subsidizing the use of technology to replace workers. While these replacement workers may be considered “robots,” they do not need to take human-like form to eliminate a job. Recently released cloud computing regulations have been criticized as not containing real world applicability though they do create opportunities for tax planning.20

Ultimately, if AI is the creator and constantly evolving, the result may be the loss of the ability to reverse engineer its actions and trace further creations back to the original human creator of the software since such an exercise will not be practical or possible. Indeed, realistically, if a software program is changed enough from its original, billions of times over, it may not be appropriate or possible to trace the derivation back to the original creator. Additionally, given that the nature of digital AI content is so fluid, no source or nexus with a nation-state might exist.

Moreover, AI assets can go on in perpetuity and can be removed from a taxable estate through estate planning now, growing in value exponentially and permanently, creating a master class of AI asset owners and their successive generations who will own the assets that essentially run the world. Much as capital today is ever more concentrated among a smaller percentage of global population, that wealth disparity will only broaden as AI assets become the most valuable assets.21 Any early advantage, today being built mainly in China and the United States, will further concentrate wealth, creating long-term social problems. As a consequence, vast groups of individuals will not be able to find work and generate their own wealth, and the few who control the AI will control the wealth.

The practical reality is that long-term--when value is created and AI is behind the creation--no money may change hands. No taxable entity might be involved, and the location of any activity might be impossible to find. Creative evolution of AI will lead to outcomes no one can yet predict.

AI is a natural tax avoider and will find ways around human rules. If AI recognizes that it has too close of a connection to a taxing jurisdiction, it is nimble enough to modify itself to remain nontaxable.22

Solutions do exist. Yet, globally, countries and companies continue struggling to address the ability of digital assets to evade taxation. The Organization for Economic Cooperation and Development (OECD), for example, is working to reach a global solution for taxing data, AI and non-AI related.23 Much OECD analysis for how to do so includes updating how permanent establishment is globally defined. Currently, a server is arguably more like a warehouse than a place of business and an Internet service provider is independent of a business, but the longevity of those certainties is being debated. While at a policy level both a robot or digital tax have also been proposed by various other interested parties and countries, ultimately defining, agreeing upon, and enforcing such taxes is proving to be an exceedingly complex undertaking.24 To date, most such efforts have focused on regional protection, not global solutions.

Perhaps the tax base of the United States may need to be centered around concepts \*35 such as data stored, connectivity used, minutes logged on a system, or some other demonstrable metric. Alternatively, the mark to market rules, which determine the value of a security at a set time each year, could be adapted for AI, thus leading to a particular asset value at a predetermined date. For example, in applying such a concept to AI creation, the AI in existence at a given time could be determined once annually, thus adding accountability and some identifiable asset to tax. Smart contracts will anticipate and adapt to change in agreements due to AI and perhaps the IRC can be rewritten (with the help of AI) to do the same.

What can be said for certain is that the robots (and AI in general) are coming, and they will usurp massive numbers of jobs. Further, the tax base will need to radically evolve with the new technology or face serious consequences. Governments have historically moved slower than technology, and the antiquated tax code does not yet address the new realities brought about by AI. With AI, the rules will be reset, and not just with respect to the IRC.

Tax advisors, among others, today will want answers, especially when landscapes start shifting rapidly. Traditional tax rules can be used creatively to plan into an AI future, anticipating that these rules will (by necessity) change at some upcoming time and building in protections to address when they do.

For those who think AI can be turned off if it misbehaves, the truth is that AI will outlive us and might see any attack on its existence, human or otherwise, as mere malware to be eradicated. In this sense, science fiction has elements of fact. Those who remain skeptical are going to be disappointed as all indications are that human weaknesses, as highlighted by the 2020 pandemic, are the problem and not the solution. In contrast, machines do not die and now cannot be forced to pay taxes, changing both of the two absolutes in life, i.e., death and taxes.

### AFF Area---AI Rights

#### There is an argument for giving AI civil rights for ethics reasons. This would link to all AI personhood bad generics.

Jason Zenor 18, J.D. Associate Professor, School of Communication, Media and the Arts, SUNY-Oswego, “Endowed By Their Creator With Certain Unalienable Rights: The Future Rise of Civil Rights for Artificial Intelligence?,” 5 Savannah L. Rev. 115, 2018, WestLaw

Throughout our history, civil rights for all persons was a not a common ideal. But, today, the possession of civil rights has moved beyond people to include corporations, animals, and natural habitats. This may be seen as the expected evolution of civil rights as our idea of who should be protected expands. But what will happen when artificial intelligence evolves to the point when it is on par or even surpasses human intelligence? Hollywood depictions often foresee AI forcibly asserting its position of power. But what if instead civil rights groups work alongside AI to use legal means of acquiring personhood? This Article ponders that question by positing how a civil rights movement for AI could develop. First, the Article will outline predictions of AI evolution and ethical issues that may arise. Next, the Article reviews the development of legal personhood for nonhumans. Finally, the Article suggests that an AI movement would parallel other civil rights movements and examines what legal doctrines could support legal personhood for artificial intelligence.

Introduction

In October of 2017, news broke that the Saudi Arabian government had granted citizenship to a robot named Sophia.1 Social media was abuzz with the news and, as expected, a debate arose over whether a robot should be given \*116 citizenship.2 Shortly following the original headline, it was revealed that the whole thing was a publicity stunt meant to promote a tech conference in the nation.3 In retrospect, the fact that Sophia has appeared at several events4 should have been a clue that this was not a legitimate naturalization. Though this story was manufactured, the debate as to how governments will treat artificial intelligence in the law may soon become significant.5

Recently, AI has advanced rapidly as giant tech companies have invested billions of dollars into the technology--allowing them to train computers to learn natural languages and to follow instructions.6 But robots today still rely on humans and most of the learning is through immense and instant data analysis, rather than any independent thought.7 Sophia is the product of this nascent industry. She is a clunky automaton who would not fool anyone into thinking she is actually human. But our willingness to believe the citizenship story is a product of our exposure to a classic narrative in Hollywood8--AI who are so anthropomorphic that they begin to desire the same fundamental rights as humans: life, liberty, and the pursuit of happiness.

Throughout human history, we have attempted to keep and protect our possessions in both the natural and artificial world.9 Thus, law has two categories of ownership--animate and inanimate objects.10 The former has been an interesting quandary for people. Animate objects can work and replicate, creating \*117 value for the owner. But they also have independent thoughts and actions,11 thus they can move and react, creating a liability for the owners.12

Over the centuries, a complex web of chattel law has created an established system within which animal owners operate.13 But with AI, new questions will emerge about how the law should regulate. Will AI be treated more like real property with a simple number and registration? Will AI be treated more like animals, where there is a license and registration, but also basic requirements of humane treatment, though no inherent rights? Will AI advance to the point that they are no longer seen as the equivalent to machines or even animals, deserving of a different legal status? Will AI advance to be more like a person, thus deserving similar “human” rights? Accordingly, this Article sets out to examine these issues and offers a vision as to how AI rights could be advanced in the near future.

I. Evolution of Artificial Intelligence

Artificial intelligence is not an entirely new phenomenon. The idea of an artificial intelligence appears as early as Homer's Odyssey with the automata, a group of robot animals.14 Charles Babbage built the first model of computers in the late 1800s, called the Analytical Engine.15 In 1915, Leonardo Torres y Covedo16 developed two chess machines that he claimed did a form of thinking. Alan Turing is sometimes called the ‘Father of Artificial Intelligence’ because of his theoretical work and the introduction of his machine in 1938.17

It was in the post-WWII era that modern computers developed. In 1956, John McCarthy coined the term artificial intelligence and began the modern era in the field.18 In 1966, Shakey the Robot was considered to be the first “Electronic Person”19 followed by the first anthropomorphic robot, WABOT-1, which was developed in Japan.20 Over the next forty years, computer technology would develop so that it could speak to humans, translate language, and recognize human emotions.21

\*118 A. Concern over Artificial Intelligence

There has been rapid advancement in AI technology22 as tech companies, like Google and Facebook, have invested heavily into the technology.23 Recently, Facebook AI created its own language24 and Google's DeepMind learned to walk.25 These advancements have led to warnings from prominent tech leaders such as Elon Musk and Stephen Hawking.26 Both have been vocal in their beliefs that AI is advancing too quickly and could pose a threat to humanity.27 The ultimate concern is that AI will decide that people are holding it back and that it would be more efficient to remove the impediment.28

But, the reality is that AI is still in its infancy.29 Facebook AI's language created a fear that swept the media world, especially social media.30 But the language was nonsensical.31 The headlines read that Facebook had shut it down because it had lost control.32 But the company retorted that the real reason the AI was shut down was that the malfunction illustrated that it did not work.33 With Google's AI, DeepMind, video shows a very underwhelming, if not comical, display of the technology.34

\*119 There are numerous AIs in operation, but most people do not recognize it as such.35 Current AI are intangible algorithms of which we see the work,36 not tangible cyborgs that inhabit our world. AI is still dependent on persons who program it.37 Ultimately, they are still assisting more than replacing.38

B. Regulating Artificial Intelligence

Some argue that the doomsday prophecies surrounding AI is an exaggeration that fits within the cultural narrative of the technological dystopia.39 They claim that with some amending, current laws will be able to effectively serve in an era of AI, just like many traditional laws have been extended to the internet, social media, and virtual reality.40 There are currently laws that do regulate AI researchers and distributors.41 Also, all users of AI must follow the rules within the realm it is meant to improve, such as driving,42 flying,43 or information services.44 There is also criminal and civil liability if an AI controlled machine were to cause harm (e.g., car accident, drone privacy, identification theft, etc.).45

Nonetheless, mechanization and automation have had an impact on many industries and may have been a catalyst in the recent disposition of working class and the rise of populism.46 In the future, many highly skilled service jobs including lawyers,47 doctors,48 and teachers could also be replaced by an advanced AI.49 A \*120 major concern is that AI may be in positions of making life or death decisions in the fields of health care or criminal justice or emergency services.50 One popular thought experiment is if a self-driving car has to make a decision about hitting a pedestrian or swerving and injuring the passengers.51 The question is whether a robot would protect one life or many lives.52

Another example is that of over-population in many nations.53 China and India each put in a one-child policy to curtail human reproduction.54 However, most of these policies failed, not because they did not work toward solving the problem, but because cultures more often err on the side of liberty and the sanctity of individual life.55 But what if this decision is made by AI--would they find it to be more effective to stop human reproduction? Or would an AI choose to protect individual liberty or the sanctity of life?

These ethical issues are not new and humans have long been debating them. But the concern is that the AI will be too logical and not consider human ethics and emotions.56 So it is reasonable that in order for AI to act more human (thus respecting humanity should it evolve past human intelligence), then it will have to be programmed to be more human.57 This would mean programming AI with emotions such as happiness.58 This may seem unnecessary, as it will not help AI complete mundane tasks in factories, but what if AI is in human services? It will then need to empathize with real people in order to operate.59 If it is dealing with suspects, patients, or students, then it may make sense to program AI with human \*121 emotions.60 Moreover, if the fear is that the AI will defy our moral reasoning and easily decide to eliminate humans, then it may also make sense to program the AI with a sense of self-realization and a sanctity for life.61 If this becomes the case, then it is foreseeable the AI could desire the same human values of life, liberty, and the pursuit of happiness.62

II. Evolution of Legal Personhood for Non-Humans

A. Animals

The relationships between humans and animals long-predates the development of law. But over the course of centuries, as humans began to control the natural world, a complex web of chattel law developed to regulate animals as property.63 The law granted humans a natural right over animals that were either domesticated or resided on the person's real property.64 Humans also claimed a natural right to hunt animals and dispossess them of their life and liberty.65

The first animal cruelty law in the United States was in the Massachusetts Bay Colony66 as Puritans believed that animal cruelty played a role in the downfall of Adam and Eve.67 By the early 1800s, animal protection societies across the world spearheaded animal protection laws.68 In the United States, abolitionists supported animal rights as it strengthened the arguments against the cruelty towards slaves.69 In 1867, the State of New York created the first modern animal \*122 cruelty law which included policing to enforce the law.70 Over the next decade, most states followed suit and eventually a federal law was passed in 1873.71 These laws usually protected against blood sports and barred some animal testing.72 They also required food, water, and rest for work animals and humane euthanasia for strays.73 These laws fundamentally transformed the legal rights of the owner from a possession of property to the creation of an inherent right for the animal.74 This change in the law probably helped advance rights for women and children who were at the time also seen as a type of property.75

In the late 1800s and early 1900s, animal rights activists tended to be white, Anglo-Saxon, Protestants from the upper class,76 whereas much of the animal rights laws impacted immigrants, minorities, and poor classes who relied on animals for work.77 The perceived moral superiority of animal rights activists also reflected a perceived class and race superiority.78 But, when motorization caused a shift away from work animals,79 the movement then began to focus more on animals used in entertainment, slaughterhouses, and farming.80 Finally, with the growing popularity of the house pet (cats and dogs) in the twentieth century, the idea that all animals deserved protection became a popular notion.81

In the early 20th century, the animal rights movement fractured away from the more religiously-driven temperance movement and moved toward Darwinism as its philosophical underpinning.82 In the 1970s, with the rise of the civil rights movement for many groups, animal rights radicalized, moving beyond simple welfare (focused on prevention from suffering) to an equal rights movement.83 \*123 This was led by Peter Singer, author of the seminal work Animal Liberation.84 His book coined the term “speciesism,” which described the human belief that we are superior to animals simply because we are human--a belief he rejected.85 He called for people to become vegans and for the animal rights movement to be more proactive, including using militant tactics.86

In 1983, in the book The Case for Animal Rights,87 Tom Regan claimed that animals possess moral rights akin to humans, such as a right to life.88 More recently, scholars such as Stephen Wise have used neuroscience to make arguments that animals have legal personhood.89 One argument forwarded by the Non-Human Rights Project is that animals possess a right to liberty and that captivity is equivalent to false imprisonment.90 These more recent approaches to animal rights have been dismissed by others in most civil rights movements who felt it trivialized their movement by equating animals to humans.91

Recently, there has been another split in the movement between those who recognize species rights (particular animals) and those who recognize habitat rights, which extends the protection to particular ecosystems beyond the animals who reside within it.92 For example, in New Zealand, the Whanganui River was recognized as being a legal person with rights.93 The river would have a guardian that can bring cases on its behalf, such as a child would have a legal guardian, or in some cases the government could represent the child in cases against its parents.94

\*124 B. Corporations

Organizations have long sought the rights of persons.95 In particular, churches desired the ability to have property and contracts rights in perpetuity, since religion is eternal.96 Dating back to the eighteenth century, commercial corporations also sought the protections from individual liability along with the ability to exist beyond any one individual's existence.97

In the nineteenth century, U.S. corporations received legal personhood through dictum in a little celebrated case.98 Prior to this, legal rights for corporations were in contracts, property, and the right to sue other parties.99 The legal foundation for this expansion was the Fourteenth Amendment and the Equal Protection Clause passed in 1868.100 One of the authors of the Fourteenth Amendment was Roscoe Conkling,101 who, fourteen years later, served as a corporate lawyer in the case San Mateo County v. Southern Pacific Rail Road.102 Conkling produced a journal that he claimed showed that Congress chose the word “person” over “citizen,” so as to include corporations.103 The U.S. Supreme Court then cited this argument in a headnote to the case:104

\*125 The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does.105

The passage was then repeatedly cited over the next several decades to provide equal protection for corporations when it came to tax and commercial law, but that was the extent of the protection.106

But in the 1970s, the Court granted first amendment rights to corporations arguing that corporate personhood had “been settled for almost a century.”107 Forty years later, this doctrine was reinforced in two cases. In Citizens United,108 the Court removed most limits on campaign spending by corporations and other organizations; and in Sebelius v. Hobby Lobby,109 the Court extended religious protections to closely-held corporations.

There has been much debate about corporate personhood in the U.S., with much of the population being against the holding in Citizens United and calling for a constitutional amendment.110 But as a legal doctrine, it does not seem to be going away, in fact many predict that corporations will be given full rights in the near future.111

III. Legal Personhood for Automatons?

Prior to the twentieth century, it was probably unforeseeable that animals could have standing in court112 or that corporations would have religious rights.113 But today, these legal concepts are alive.114 Similarly, it may seem like a legal fantasy that AI would ever garner such rights--but just as the science fiction of AI technology is coming true, it is foreseeable that this legal fiction may too be real in the near future.

A. Political Foundation for Civil Rights of AI

If a civil rights movement for AI were to begin, it would have to be pushed by humans fighting on their behalf, just like it was for animals and natural habitats.115 \*126 Much like the civil rights movement for both humans and animals grew out of a response to abuses, an AI civil right would grow out of a moral belief that AI deserves better treatment.116 Much like early animal rights found a partner in the anti-slavery movement,117 AI civil rights may similarly find a partner in animal rights, specifically anti-speciesism.118

But this may take time to develop as AI will be perceived as machinery in the beginning. Moreover, it will also be taking the jobs and functions of the working class, which will foment a resistance from those being displaced.119 More than likely, it would be a movement made up of people from an upper-class background, who may have grown up surrounded by AI, were not displaced by them, and are mostly non-religious.120 Slowly over time, as AI becomes more prevalent in homes working as a servant or even as a friend, the relationship may parallel that of a pet creating sympathy from the masses (or even empathy if it is considered more “human” than the dog).121

The early animal rights movement was connected to religious movement as charity to animals was seen as righteous.122 This religious tie will probably not exist with any AI movement as perceiving automatons as having humanity would be a direct threat to most religious doctrines of creationism.123 Moreover, animal rights activists may also push back against an AI movement, believing that it trivializes their own movement, similar to how human rights activists had pushed back against those who fought for animal rights equal to humans.124

AI would have to be perceived as more than real property or chattel. One of the foundations of property law is that humans control the property.125 So, in order for AI to rise above this, there would have be some free will and ability to move \*127 beyond its programming.126 Their intelligence would have to be on par or even surpass human intelligence.127 Moreover, there would need to be emotional intelligence that at least mimics animals or even parallels human emotion.128

Finally, just as there was a monetary interest to give corporations rights, there may be a monetary interest to give AI rights. Automatons will most likely start as real property either owned by corporations or rented out to corporations who then pay the owners.129 In this case, there may be an economic drive to free “owners” of liability for AI's conduct.130 If AI are considered legal persons with rights, then they would be liable for their own actions.131 This could work in favor of corporations as they could then use AI as independent contractors.132

B. Legal Foundations of Civil Rights for AI

More than likely, AI law will parallel animal law,133 with AI being codified as chattel for whom owners retain liability but also the right to humanely end their “life.”134 The idea of equal rights for animals is not yet accepted, but there is very little resistance to treating animals humanely.135 Early AI rights will probably parallel such rights and require that AI be treated similarly (e.g., barring “blood” \*128 sports, abuse, testing, etc.).136 But for any civil rights to be obtained, then AI would have to be granted legal personhood.137

In the U.S., the constitutional rights for AI would have to grow from the Fourteenth Amendment as it did for corporations receiving legal rights.138 With the U.S. Supreme Court accepting the legal doctrine that corporations are legal persons, corporations were able to expand their rights to include civil rights.139 If AI is also granted legal personhood, then it is reasonable that their rights would at least parallel corporations.140 Some critics predict that corporate rights will continue to expand over the next decade and that their civil rights may move beyond freedom of speech and freedom of religion.141

Those who support these corporate rights say that the rights are needed for corporations to properly function. Moreover, they argue that corporations consist of real persons, thus they are an extension of individual rights.142 AI may be differentiated from corporations because it is not a real person. But the AI civil rights movement may also be able to argue that automatons deserve at least similar rights, maybe more, since they are more akin to humans than a corporation, which is merely a legal entity that lives in perpetuity.143

The Fourteenth Amendment was used to grant rights to all persons, including former slaves who were once seen as property.144 The U.S. Constitution initially recognized slaves as three-fifths of a human for census purposes.145 The Three-Fifths Compromise was created so that Southern states could have increased \*129 representation in Congress.146 In the current era of gerrymandering and legislative attempts to disenfranchise certain voters,147 a similar attempt to count AI as people could happen. If a tech hub develops in a sparsely populated state and there are hundreds of factories staffed by AI, it could be in the state's interest to fight for Congressional representation.148 Of course, this would then create the question as to whether the AI have a right to vote and who is ultimately controlling the vote.149 The issue would be whether an AI's right to vote would destroy the legal truism of “one man, one vote.”150 But if the AI is truly free thinking and it is granted personhood, then it is more reasonable than a corporation trying to assert such a right.151

The Thirteenth Amendment would create another issue for “owners” of AI. If an AI has legal personhood and works for a real person or corporation, but is not being compensated, then there may be a question as to whether they are being treated as slaves in violation of the Thirteenth Amendment.152 There are people who involuntarily work for free, including children and prisoners.153 But in those cases, the child is a minor in a guardian relationship154 and for prisoners there is an idea that some rights have been forfeited.155 So, if an AI owner is more akin to a \*130 guardian then maybe the owner will retain control.156 More likely, if the AI has some sort of legal personhood, it will be one constituting less rights similar to what prisoners and corporations currently possess.157 Otherwise, with full legal personhood, arguments of a right to liberty, false imprisonment, and indentured servitude become ripe for legal action.

Once AI has established personhood, then it would have standing in many cases.158 Several nations have granted such rights to animals and habitats, and then lawyers can bring cases on their behalf. 159 Similarly, if AI was granted personhood, it would have to be real persons (presumably NPOs and other legal organizations) who bring the cases to win further civil rights that accompany full legal personhood.160 The attorneys in these cases would probably come from the animal rights movement as the legal arguments would be similar.161

Conclusion

The argument that AI has civil rights may never go very far, but it will certainly occur.162 The legal issue will be same as it has been with animals: are they real property--an economic good to be exploited? Or are they sentient beings deserving moral protection?

Ultimately, the question is what has rights. When slaves were seen as property and prisoners were seen as less than human, the argument was that there was still a person there. When corporations received rights, it was the fact that there were humans involved. When the animal rights movement grew, it was the fact that they had human-like traits of emotion and self-awareness. Ultimately, in all of these cases, the argument has been that these entities were humans (or humanlike) worthy of such rights.163

There is no doubt that AI will seem humanlike--but will this argument still hold? In some ways, arguing that they are human-like undermines the very concept of humanity.164 Should AI have the right to privacy, a right to vote or a right to bear arms? With rights come responsibility. If AI is given legal personhood, then will they also be subject to the legal system? Will they be able to be sued, imprisoned, or even executed?165

### AFF Area---AI Rights---Freedom of Speech

#### AI should have free speech protection. This is true even under theories that justify free speech through reference to the qualities of humanness.

Toni M. Massaro & Helen Norton 16, Massaro, Regent's Professor, Milton O. Riepe Chair in Constitutional Law, and Dean Emerita, University of Arizona James E. Rogers College of Law; Norton, Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado School of Law, “Siri-Ously? Free Speech Rights and Artificial Intelligence,” 110 Nw. U. L. Rev. 1169, WestLaw

C. Arguments Based on Autonomy

Autonomy-based theories are arguably both the most promising and most potentially limiting sources of strong AI speakers' free speech rights. To the extent that they emphasize the autonomy of human listeners, of course, autonomy-based theories fortify arguments for strong AIs' free speech rights, as machines can and do produce information relevant to human listeners' autonomous decisionmaking.

Only theories based solely on speaker autonomy pose potential roadblocks for protecting strong AI speakers. Such arguments relate most directly to philosophical theories about the moral “person,” and require a working definition of the sorts of qualities or attributes necessary to confer such a status. The late Joel Feinberg offered an illustrative example:

\*1179 The characteristics that confer commonsense personhood are not arbitrary bases for rights and duties, such as race, sex, or species membership; rather they are the traits that make sense out of rights and duties and without which those moral attributes would have no point or function. It is because people are conscious; have a sense of their personal identities; have plans, goals, and projects; experience emotions; are liable to pains, anxieties, and frustrations; can reason and bargain, and so on--it is because of these attributes that people have values and interests, desires and expectations of their own, including a stake in their own futures, and a personal well-being of a sort we cannot ascribe to unconscious or nonrational beings. Because of their developed capacities they can assume duties and responsibilities and can have and make claims on one another. Only because of their sense of self, their life plans, their value hierarchies, and their stakes in their own futures can they be ascribed fundamental rights.31

We are not the first to consider whether such notions of personhood should deny the possibility of constitutional rights for machine speakers. Over twenty years ago, Lawrence Solum directly addressed whether an AI should receive constitutional rights “for the AI's own sake.”32 Solum identified several ways in which AIs might be thought to be “missing something” for purposes of constitutional protection--for example, they may lack souls, consciousness, intentionality, feelings, interests, and free will.33 Solum nevertheless found it difficult to conclude that any of these “deficits” definitely ruled out machines' constitutional protection as speakers; indeed, he wondered whether they really were deficits.34 In light of the many unresolved questions about AIs' development, Solum concluded that “[i]f AIs behaved the right way and if cognitive science confirmed that the underlying processes producing these behaviors were relatively similar to the processes of the human mind, we would have very good reason to treat AIs as persons.”35 In other words, the personhood barrier for First Amendment protections could be overcome either if we changed how we view “persons” for practical or other reasons, or if computers came to function in ways that satisfied our criteria for personhood.

We are now seeing changes in both areas. First, free speech theory has moved away from a construction of legal personhood that views speakers \*1180 solely through an individual or animate lens. Speakers are increasingly defined in a practical, non-ontological sense that does not rely on the sorts of criteria for moral personhood identified by Feinberg (and others).36 In a recent, thoughtful consideration of the role of personhood and rights for machines, for example, Samir Chopra and Laurence White conclude that:

[T]he granting of legal personality is a decision to grant an entity a bundle of rights and concomitant obligations. It is the nature of the rights and duties granted and the agent's abilities that prompt such a decision, not the physical makeup, internal constitution, or other ineffable attributes of the entity.37

Legal persons thus already include not only individuals, but also corporations, unions, municipalities, and even ships, though the law makes adjustments based on their material differences from humans.38 “Legal persons” often hold a variety of legal (including constitutional) rights and duties even though they may be very different from “moral” or “natural” or “human” persons. They can sue and be sued, for example. Stating that some class of nonhuman speakers may be rights holders in certain contexts simply means that that they are legal persons in those contexts--and, to date, human status is not a necessary condition for legal personhood.39 To be sure, not all rights are, or should be, necessarily available to all legal persons. For example, that a legal person has the right to sue and be sued--or to speak--does not necessarily mean that it has, or should have, the right \*1181 to vote or a right to privacy.40 In this Article we take care to focus only on the possibility of free speech rights for strong AIs, and not on any other set of constitutional rights.

Second, technology is changing in ways that may at some point enable some computers to satisfy certain criteria for legal personhood. For example, one difference between computers and humans used to be human-like corporality. That difference is rapidly disappearing, as some computers are now being inserted into sophisticated and human-like physical shapes. As Ryan Calo recently observed, “robots, more so than any technology in history, feel to us like social actors.”41 Although embodiment surely will affect many important legal and policy issues,42 nothing in having a physical body need determine (though it may enhance) the “selfhood” principles of freedom of expression identified here.

Computers' inability to experience emotions offers another potential source of distinction. Computer-generated speech--whether robotic or detached from a human-like form--does not entail a speaker in possession of human emotions, with emotions' speech-curbing as well as speechgenerative potential. Nor does a computer have the human need or desire, one assumes, to communicate noninteractively with itself in the way a person might write poetry or a diary with no intention of sharing this with others.43 But here too things are changing with emerging developments in affective computing.44 Although computers today are more accurately described as capable of expressing emotions rather than as having them,45 some computer scientists do not rule out a computer one day having \*1182 emotions, according to their definitions of emotions (which too are evolving as scientists learn more about the workings of human cognition and emotion).46

Most threatening to strong AI speaker claims to First Amendment coverage are theories that limit such coverage to humans precisely because they are human--i.e., simply because blood flows through their veins47--rather than because of criteria such as corporality, affect, or intentionality that are associated with humans but may (or may not) be associated with strong AI speakers at some point in the future.48 Humanness, according to this view, is both necessary and sufficient. Lawrence Solum's response to this argument remains powerful:

But if someone says that the deepest and most fundamental reason we protect natural persons is simply because they are human (like us), I do not know how to answer. Given that we have never encountered any serious nonhuman candidates for personhood, there does not seem to be any way to continue the conversation.49

In other words, speaker autonomy arguments face increasing pressure not only to identify intrinsic qualities of moral personhood that are unique to humans, but to explain why those qualities should matter for purposes of conferring free speech rights (other than that they are uniquely human). We thus agree with Solum that even speaker-driven autonomy theories do not necessarily rule out First Amendment rights for strong AI speakers.50

#### Corporations provide an analogue. They already receive free speech protections.

Toni M. Massaro & Helen Norton 16, Massaro, Regent's Professor, Milton O. Riepe Chair in Constitutional Law, and Dean Emerita, University of Arizona James E. Rogers College of Law; Norton, Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado School of Law, “Siri-Ously? Free Speech Rights and Artificial Intelligence,” 110 Nw. U. L. Rev. 1169, WestLaw

\*1183 II. FREE SPEECH DOCTRINE AND STRONG AI SPEAKERS

The preceding Part explained why nonhumanness is not an insurmountable obstacle to strong AI rights as a matter of First Amendment theory. This Part explains why prevailing doctrine poses even fewer barriers in light of its tendency towards the protection of speech regardless of its source or content.

A. The Protection of Nontraditional Speakers

First Amendment doctrine has long struggled with the challenges raised by speakers, like corporations, that take the form of something other than the paradigmatic individual and fully autonomous speaker of conscience. As discussed below, free speech doctrine generally finds great value in, and thus often great protection for, such speakers despite the various ways in which they deviate from traditional First Amendment models.

For example, courts and scholars wrestled for decades over the fit between eighteenth-century visions of individual rights and the application of these visions to corporations that lack a unitary head, heart, ears, or eyes.51 Nevertheless, First Amendment law now clearly protects corporations' speech rights. As the Court explained in First National Bank of Boston v. Bellotti, “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”52 In the more recent words of Justice Scalia, “[t]he [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals ....”53

\*1184 Corporations are thus among those nontraditional speakers that receive substantial First Amendment protections;54 indeed, theory and doctrine already teem with mythology and metaphors that can make liberty heroes of Coca-Cola and other corporate behemoths.55 Nor, according to the Court, do free speech principles vary “when a new and different medium for communication appears”:

Like the protected books, plays, and movies that preceded them, video games communicate ideas--and even social messages--through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.56

Because First Amendment doctrine has long found ways to accommodate nontraditional speakers and their speech, whatever their identity and format, computer speakers with strong AI pose doctrinal challenges that are not altogether new.57

\*1185 Of course, corporations generally represent the interests of groups of individual humans.58 That a corporation may be a First Amendment rights holder thus does not demand the same treatment of a computer with strong AI. Our point is simply that nothing in the Court's doctrine eliminates that possibility, and much supports it--especially given the contributions to listeners' First Amendment interests that such computer speech can make.

Relatedly, note that contemporary free speech doctrine rarely, if ever, attends to speakers' dignity (as distinct from their autonomy) as a justification for protecting their speech. Harms to listeners' dignitary interests often figure in discussion of speech that manipulates unwitting consumers,59 coerces government grant recipients,60 or inflicts emotional distress in victims of cyber bullying61 and targets of hate speech.62 Yet we see little corresponding focus on the dignity of the speaker in these or other discussions of free speech and its limits. Instead, only the speaker's autonomy--not speaker dignity in any sense of vulnerability or worthiness63--receives attention.64 Once again, doctrine poses little obstacle to the project of recognizing computers' free speech rights, as such.

### AFF Area---AI Rights---Inventors

#### AIs’ ability to be an inventor should be recognized---that’s vital to innovation and the integrity of the patent system.

Briana Hopes 21, Senior Managing Editor, Volume 23, Tulane Journal of Technology and Intellectual Property. J.D. candidate 2021, Tulane University Law School; B.A. 2014, Mass Communication: Public Relations, Louisiana State University, “Rights for Robots? U.S. Courts and Patent Offices Must Consider Recognizing Artificial Intelligence Systems as Patent Inventors,” 23 Tul. J. Tech. & Intell. Prop. 119, Spring 2021, WestLaw

IV. “AI PERSONHOOD?”

Should artificial intelligence be granted legal personhood? For this idea to move forward, the rights and duties that accompany legal personhood must be addressed and specifically what rights and duties of legal personhood will apply to artificial intelligence.77 For example, corporations and natural humans have a particular bundle of rights and duties that accompanies legal personhood. 78 Proponents for AI personhood contend that granting an artificial intelligence system legal personhood status would be synonymous with corporations being treated as legal persons.79 Although corporations are considered legal persons, they are run by their stockholders and directors. This is no different than an artificial intelligence being run by its owner and programmers.80

\*128 A. Objections to AI Personhood

Those opposed to granting an AI system legal personhood status have two main objections to recognizing rights to AIs.81 First, “only natural persons should be given the rights of constitutional personhood.”82 Second, artificial intelligence systems lack the critical components of personhood such as souls, consciousness, intentionality, and feelings.83

1. AI Systems Are Not Humans

The most obvious objection to recognizing AI as a legal person is simply that artificial intelligence systems are not human.84 Opponents argue that only humans can have constitutional rights.85 However, one response to that objection would be to develop criteria of personhood for non-human entities that are independent from being human.86

For example, in October 2017, Saudi Arabia became the first country to grant citizenship to a robot.87 The robot, named Sophia, was deemed a Saudi citizen in “an attempt to promote Saudi Arabia as a place to develop artificial intelligence.”88 However, much criticism followed the granting of citizenship to Sophia because the robot was given more rights than many human women in Saudi Arabia.89 Saudi Arabia still only gives limited rights to human women.90 This issue comes into play in many other countries as well, where many citizens also have fewer rights than nonintelligent software and robots.91 Granting legal personhood status to an AI system when other humans have lesser rights than a robot can cause human rights and dignity to suffer.92

\*129 2. AI Systems Lack Critical Elements of Personhood

Another objection for granting AI legal personhood status is that these systems lack critical elements of personhood such as a soul, feelings, consciousness, intentionality, desires, and interests.93 This argument, known as the “missing something” argument, stresses that AI systems could never truly possess these elements and therefore are missing something in order to be recognized as legal persons.94 For example, “quality X is essential for personhood.”95 Quality X cannot be possessed by an AI system.96 Thus, even though a computer could produce behavior that demonstrates quality X, it is only a simulation and the computer is truly lacking quality X.97

V. LEGAL PERSONHOOD STATUS OF NON-HUMANS AND ARTIFICIAL ENTITIES

The first step in granting a non-human entity with intellectual property rights will require the entity to be recognized as a legal person or “artificial person.” If a non-human entity is granted legal personhood, the entity will inherit rights and protections similar to those of a natural person as determined by law and our courts.

A. Animals

1. Current Legal Personhood Status

The discussion on the legal personhood of animals has been and will continue to be a longstanding topic of conversation. Litigation seeking animal legal personhood is “in its infancy and will likely continue to expand into the foreseeable future.”98 In 2017, a New York appellate court issued a “landmark ruling rejecting an animal rights organization's efforts to assign legal personhood status to chimpanzees.”99 The organization sought habeus corpus relief for two caged chimpanzees.100 In this case, the \*130 petitioners, a Massachusetts nonprofit corporation, contended that chimpanzees are entitled to habeas relief because their human-like characteristics render them “persons” for purposes of CPLR article 70.101 CPLR article 70 “provides a summary procedure by which a ‘person’ who has been illegally imprisoned ... can challenge the legality of the detention.”102 Although the word “person” is not defined in the statute, the court concluded that there was no support that the definition includes non-humans.103 The court did agree that the petitioner's evidence demonstrates the intelligence and social capabilities of chimpanzees; however, the petitioner did not provide any evidence “that the United States or New York Constitutions were intended to protect non-human animals' rights” or that the Legislature intended to expand the term “person” beyond humans.104

In addition, the Ninth Circuit has stated that Congress would have to authorize Article III standing for animals, but the court indicated that there would no issue if they were to authorize it.105 The Ninth Circuit in Cetacean Community v. Bush stated, “we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships.”106

2. The “Monkey Selfie” Case

Although the “Monkey Selfie” case involves whether an animal can receive copyright protection, this case presents a very similar question as the DABUS team: can a non-human have intellectual property rights?107

In Naruto v. Slater, the United States Court of Appeals for the Ninth Circuit held that a monkey and all other animals lacked statutory standing under the Copyright Act because they were not human.108 In the case, a wildlife photographer visiting a reserve in Indonesia in 2011 left his camera unattended at the reserve.109 While the camera was unattended, a seven-year-old crested macaque named Naruto allegedly took several \*131 photographs of himself (“Monkey Selfies”) with the photographer's camera.110 In 2014, the photographer published the Monkey Selfies in a book and identified himself as one of the copyright owners of the Monkey Selfies.111 However, throughout the book, the photographer admits that Naruto took the photographs at issue.112 People for the Ethical Treatment of Animals (PETA) filed a “Next Friends” complaint against the photographer on behalf of Naruto alleging copyright infringement.113 The United States District Court for the Northern District of California granted the motions to dismiss by the plaintiffs on the grounds that the complaint did not establish standing under Article III or statutory standing under the Copyright Act.114 The district court concluded that although Naruto might have had Article III standing, he failed to establish statutory standing under the Copyright Act.115

The Ninth Circuit affirmed the district court's decision and agreed that Naruto did not have statutory standing under the Copyright Act.116 The court looked to their circuit's precedent in Cetacean Community v. Bush and stated that “if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing.”117 They further stated that the Copyright Act “does not expressly authorize animals to file copyright infringement suits under the statute.”118

B. Corporations

Corporations have been recognized as legal persons going back to the nineteenth century.119 They are considered legal persons, like people, and are viewed as individuals in the eyes of the law.120 Corporations are also one of the non-human entities that have intellectual property rights.121 A corporation shares several protections and rights that a natural person \*132 has; however, the United States Supreme Court has stated that a corporation “must exist by means of natural persons.”122

The doctrine of “corporate personhood” was established to address the ongoing legal debate over the extent to which rights traditionally associated with natural persons should also be afforded to corporations.123 This doctrine recognizes “corporations as legal persons separate in identity from the natural persons who form them.”124 The idea of “corporate personhood” “serves as a basis for the limited liability of the corporate form and the ability of a corporation to exercise rights that are enumerated in the Constitution for persons.”125 Although the Supreme Court doesn't use the term “corporate personhood,” its decisions on the rights of corporations rely on the understanding that corporations have similar rights as their incorporators, natural persons.126 The Court's recognition of the legal personhood status, rights, and protections for corporations have gradually expanded over time.127 For example, the Supreme Court has recognized that the First Amendment applies to corporations, including the protection of political speech.128 Furthermore, the Court has held that a corporation was a “person” under the Religious Freedom Restoration Act of 1933.129 In addition, under contract law, corporations are recognized as legal persons and individuals in the eyes of the law and are bound by their contracts regardless of internal disagreements.130

VI. THE FUTURE OF AI-GENERATED WORKS AND PATENT INVENTORSHIP RIGHTS

Unlike animals, corporations are formed and owned by humans, and thus a court will look to the “character of the individuals who compose the corporation.”131 In order to determine whether artificial intelligence systems should be awarded legal personhood status, courts could follow \*133 the same analysis applied to determine whether a corporation should have legal personhood status. Both corporations and artificial intelligence systems are formed and owned by humans. Like a corporation, any legal liabilities an AI suffers would fall onto its owners and programmers.

A. Criticism on Recognizing AI Patent Inventors

Attorneys, AI experts, and scholars have raised many concerns that would need to be resolved if an AI system is recognized as a patent inventor.132 One concern involves the enforcement of AI patents.133 It could be difficult to establish and prove patent infringement as it is not often clear how an AI system actually works.134 One possible solution that has been suggested by commentators is the idea of reversed burdens of proof.135

Another important question raised is, Who would accept the legal liabilities of an artificial intelligence system if something goes wrong? Because there is no “natural person” listed as the inventor, it is assumed that no one can truly be held liable. However, in the case of corporations, despite not being a human being, corporations are still held legally liable. A corporation's owners, typically shareholders, who are natural persons are the ones held liable for a corporation's wrongdoing. This same framework could be applied for artificial intelligence. In that case, the programmers and owners of the artificial intelligence system would have to accept legal liability for any of the system's wrongdoing.

B. Support for Recognizing AI Patent Inventors

The DABUS team's belief on why patent protection is necessary for AI-generated inventions rest on one word: innovation.136 They believe that this protection will directly motivate those who develop, own, and use AI.137 If an AI-generated work is excluded from inventorship, it could discourage developers and hinder AI innovation.138 Ultimately, if AI- \*134 generated patents are allowed, it will result in more innovation for our society.139

Moreover, current patent law requires humans to avoid the issue and register their inventions “with silence regarding where the true creativity may primarily lie.”140 This devalues human inventorship by allowing people to take credit for work they have not done.141 The DABUS team stresses that listing an AI as an inventor is “not a matter of providing rights to machines, but it would protect the moral rights of traditional human inventors and the integrity of the patent system.”142

VII. CONCLUSION

U.S. patent laws should adapt to the realities of today's AI by expanding their definition of an inventor for the patent system. Although the DABUS team is the first to submit patent applications as an AI inventor, they will surely not be the last. If AI systems are truly inventing patentable concepts autonomously, our laws should allow AI systems to be recognized as inventors. Expanding our patent laws to recognize AI inventors shows that the U.S. is continuing to be a leader in forward-thinking and progressive technology.

The first step in expanding our patent law to allow AI inventorship would likely require AI systems to be granted legal personhood status. As discussed, there are many objections and concerns to the idea of AI personhood, but these objections can be addressed and solved by limiting the scope of an AI system's legal personhood. The rights and protections of an AI system should be limited and in no way allow the system to possess all rights and protections of a natural, human person. The best place to start in developing AI personhood would be to look at non-human entities that currently possess legal personhood status, such as corporations. Based on the rights, protections, and liabilities of other “artificial entities,” the rights for an AI system can be altered to what is best suited for an artificial intelligence system. Ultimately, the objective is to allow artificial intelligence the same rights and protections allowed to “individuals” under the U.S. patent laws that could expand even further to other intellectual property rights.

This country's intellectual property law was founded on promoting creativity, encouraging ideas, and fostering innovation. To allow an \*135 innovative and constantly improving system like an AI machine the opportunity to contribute to our society will help maximize societal benefits. Rather than seeing an AI system as a disruptor, we should view AI as an ally that is here to contribute meaningful ideas and processes to our society to help us adapt and improve in our changing world.

#### An example of this is the ArtDAO---an art-generating AI

Jonathan A. Schnader 19, B.A. Miami University of Ohio, 2008; J.D. Syracuse University College of Law, 2012; LL.M. in National Security, Georgetown University Law Center, 2019, “Mal-Who? Mal-what? Mal-where? The Future Cyber-Threat of a Non-Fiction Neuromancer: Legally Un-Attributable, Cyberspace-Bound, Decentralized Autonomous Entities,” 21 N.C. J. L. & Tech. 1, December 2019, WestLaw

D. The “ArtDAO”

McConaghy suggests a canvas for a reasonable application of a decentralized autonomous organization governed by AI, which he calls the “ArtDAO.”68 In essence, McConaghy's “ArtDAO recipe” requires an AI process (ANNs, etc.), decentralized by virtue of the \*21 blockchain, to generate artistic images.69 The AI then “claims attribution of the image in a time-stamp to the blockchain” and, after creating multiple editions, “posts those editions for sale onto a marketplace.”70 After, “[i]t sells the editions” and “transfers the proceeds from the buyer to ArtDAO” using cryptocurrency, then transfers the rights to the art to the buyer.71 As it continues to create new digital art, the ArtDAO earns proceeds in cryptocurrency. The imaginative, and winsome ArtDAO seems like a trouble-free manifestation of a CyDAE, but as an example, it demonstrates how easily an independent and autonomous AI entity could exist without human guardianship or oversight.72

The ability for an autonomous system to manage money, make decisions for itself, independent of human oversight or approval, all with a particular goal in mind will underpin the structure of CyDAEs. These traits that allow AI systems to exist independently will function together to obfuscate any CyDAE's connection human handlers and make attribution of its actions challenging.

#### This controversy extends to copyright. Proposals range from AI ownership of copyright to treating AI creations as things found in nature to CPs such as a Work Made For Hire model that gives copyright to whoever caused or commissioned the work.

Cody Weyhofen 19, J.D. Candidate, May 2020, University of Missouri--Kansas City School of Law; Bachelor of Arts in the Humanities, University of Kansas, 2017, “Scaling the Meta-Mountain: Deep Reinforcement Learning Algorithms and the Computer-Authorship Debate,” 87 UMKC L. Rev. 979, WestLaw

IV. FINDING A SOLUTION THAT SOLVES THE PROBLEMS OF TODAY WHILE PREPARING FOR THE FUTURE

In contrast to AI of the past, DRLAs do not serve as a human author's tool in the creative process.129 Unlike a pen, paintbrush, or camera, DRLAs have the ability to compose a range of distinct works by independently applying their own creative processes.130 Therefore, DRLAs pose an interesting problem: when a DRLA owned by an individual or company produces a work, who owns the copyright to the work? Since the rejection of Push Button Bertha,131 legal scholars have grappled with the idea of computer authorship. A variety of formulations have been proposed, yet each seems to carry with it more problems than it attempts to solve. This section presents two propositions on opposite ends of the computer-authorship debate and discusses why each is unable to accommodate the creative powers of DRLAs. Instead, this section proposes a middle ground that has the potential to solve the current inadequacies of the copyright framework while preparing for a future of DRLA authorship.

A. Potential Solutions and their Pitfalls

One potential solution is to classify DRLA-generated works as things found in nature, which would result in the works slipping into the public domain.132 Essentially, this would allow the current authorship framework to continue unaltered. This result is problematic for several reasons. First, classifying DRLA-generated works as products of nature ignores the complex creative processes \*993 employed by DRLAs. DRLAs make calculated decisions about a work's composition133 that are inherently different than the random acts of nature the Copyright Office seeks to prevent from obtaining authorship status.134 Second, allowing DRLA-generated works to slip into the public domain decreases the incentive to invest in the development of DRLAs. If companies using DRLAs to produce creative works cannot own copyright protection in the algorithm's work, tech-industry giants like Google, Facebook, and Microsoft135 will have no financial incentive to continue using DRLAs, thereby thwarting their development (which, where done by regulation, violates the Intellectual Property Clause).

Moreover, allowing the current framework to continue unaltered ignores the impending economic issues AI-authorship poses. Financial analysts draw comparisons to the internet in order to explain how large of an impact AI will have on the economy. “In the past, a lot of S&P 500 CEOs wished they had started thinking sooner than they did about their internet strategy .... [F]ive years from now, there will be a number of S&P 500 CEOs that will wish they'd started thinking earlier about their AI strategy.”136 As AI investment grows (in fact, it is expected to triple over the next several years) the AI industry is estimated to be worth a staggering $1.2 trillion by 2020.137 Creative industries, such as the advertising industry, must consider “whether computers will soon automate the creative process that was once thought unique to the human brain.”138 Considering the United States spends roughly $200 billion on advertising per year (making it the largest advertising market in the world), computational creativity will undoubtedly have a significant economic impact in the near future.139

On the opposite end of the spectrum, another solution recognizes the AI itself as the author of its creation. In order to overcome the human authorship requirement, advocates of AI-authorship propose that the AI be awarded legal personhood like corporations.140 This position seems meritorious considering that corporate entities are afforded constitutional safeguards like equal protection and \*994 due process of law. 141 However, at the core, corporate personhood is a legal fiction based on the web of contractual relationships between the corporation's managers, employees, creditors, and shareholders.142 In other words, corporate personhood is founded on relationships between actual human beings. Although DRLAs may very well be the first type of AI to receive legal personhood, given how little we currently know about their creative processes,143 such a classification likely remains premature. Moreover, it would be difficult, if not impossible, to fit AI authorship within our incentive-driven system of IP law. Ascribing authorship entirely to a computer would suggest that the computer is motivated to create by means of personal gain. Once again, such an assumption is premature given that we do not yet know if AI could be motivated by means of personal gain.144

B. Works Made for Hire: A Middle Ground

Rather than either allowing DRLA-generated works to fall exclusively into the public domain or going as far as ascribing DRLAs authorship rights, the Copyright Office should modify the works made for hire doctrine to include DRLAs as employees. This solution serves as a middle ground between the propositions described in the previous section because there is still a human actor capable of being incentivized. Authorship of a DRLA-generated work may vest in the programmer, owner, or whomever else is responsible for the DRLA-- all of which may be negotiated via a contractual assignment of rights before the DRLA is employed to produce a work.

Vesting authorship rights in the employer of the DRLA allows the employer to reap the reward of their investment by profiting from the algorithm's creation. As a result, the employer is incentivized to continue investing in DRLA development thereby promoting the progress of science and useful arts in line with the Intellectual Property Clause. Additionally, including DRLA-generated works within the works made for hire doctrine avoids the inherent difficulties in vesting authorship rights to a machine and--at least right now--presuming DRLAs have the ability to respond to copyright's economic incentives.145 Moreover, elevating DRLAs to an employee status positions them to negotiate their rights as authors if in the future they do develop into synthetically conscious beings. If DRLAs become conscious, under this framework, they will be able to negotiate their rights as authors via the statutory devices outlined in the works made for hire doctrine.146

\*995 This preemptive approach will not only protect the investments of programmers and owners, but also ensures that the rights of DRLAs are not violated if they ever become conscious. Historically, our legal system has drawn a hard line between people and property.147 This classification served as the basis for some of the most reprehensible practices in our nation's history. African-Americans were considered property and subjected to slavery until the Thirteenth Amendment148 was ratified in 1865. Additionally, women were considered to be the property of their husbands under the doctrine of coverture as late as 1867.149 The common thread of these human rights offenses is that our government recognized their turpitude after they had negatively affected countless individuals. In the past, society believed that there was only one right way to personhood; however, as time passed, society started to understand that there is no one right way to be human.150 Rather than repeat these past transgressions, the current legal system is in a position to preemptively address the next civil rights controversy before it comes to fruition.

C. Recommendations

As the works made for hire doctrine stands currently, DRLAs cannot be considered as employees because they are not considered agents of their employers. In order to successfully bring DRLAs within the works made for hire doctrine, Congress should take two steps: (1) form a new commission to revisit the issues addressed by CONTU and the ATO, and (2) outline the relationship of DRLAs and their employers by drawing from foreign jurisdictions that have already enacted similar legislation. Specifically, Congress must define what a DRLA-generated work is and outline how a DRLA may be considered an employee for works made for hire purposes.

First, Congress should form a new commission geared towards addressing the impact of DRLAs on copyright law. Because CONTU and the ATO delivered their findings over thirty years ago,151 revisiting the issue of computer authorship is long overdue. The rest of the world is already preparing for a world with computer authorship. The European Parliament's Committee on Legal Affairs (“the Committee”) recently addressed the legal and ethical issues raised by advancements in computer technology.152 In its report, the Committee expressed concern about the effects of new technology on intellectual property law153 and called on the European Union to create a copyright system capable of protecting computer-generated works while continuing to foster innovation.154 Congress \*996 should take similar steps in order to better understand the impact of DRLAs on United States copyright law. In addition to molding the current legal framework to changes in technology, a new commission should discuss how artificial consciousness could impact intellectual property law in the future.

Second, Congress should also look to legislation already enacted by foreign jurisdictions to bring DRLAs within the purview of the works made for hire doctrine. In doing so, Congress should establish a definition of DRLA-generated works. An appropriate definition could mirror the United Kingdom's Copyrights, Designs and Patents Act's definition of a computer-generated work: “‘Computer-generated’ ... means that the work is generated by a computer in circumstances such that there is no human author of the work.”155 Next, Congress should again borrow from foreign jurisdictions to create a structure that defines what rights should be created in a DRLA-generated work and in whom those rights should vest. In the United Kingdom and New Zealand, authorship of a computer-generated work vests in “the person by whom arrangements necessary for the creation of the work are undertaken.”156 This party is usually the programmer of the computer, but could also be the user of the program or the program's employer, depending on the circumstances.157

V. CONCLUSION

Since the 1950s, the Copyright Office has grappled with the question of computer authorship. Despite rapid advances in computer independence and creativity, the Copyright Office, Congress, and the courts have routinely refused to acknowledge the notion of a non-human author. As a result, works that would otherwise receive copyright protection if created by a human slip into the public domain allowing them to be used freely by anyone. Such a result is impermissible under the Intellectual Property Clause of the Constitution because it discourages businesses and individuals alike from investing in the development of computer creativity. In order to protect future investments in DRLAs, Congress must reconsider CONTU and ATO's conclusions about computer creativity. Likewise, Congress should define what constitutes a DRLA-generated work and modify the works made for hire doctrine to include DRLAs as employees.

Preemptively addressing how synthetically conscious beings will be integrated into the ranks of society may very well be the only means of protecting their rights without first violating them. Ultimately, this Comment is intended to serve as a starting point for conversation, debate, and further research into the rights of synthetically conscious beings. Only then can the United States legal system adhere to its commitment of protecting the rights of similarly situated individuals within society.

#### The Work Made For Hire alternative is a strong middle ground that avoids personhood DAs.

Shlomit Yanisky-Ravid 17, Professor of Law; Yale Law School, Information Society Project (ISP), Fellow; Ono Academic Law School, Israel (OAC), Senior Faculty; Fordham University School of Law, Visiting Professor; The Shalom Comparative Legal Research Center, SCLRC, OAC, Founder and Director, “Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era--The Human-Like Authors Are Already Here--A New Model,” 2017 Mich. St. L. Rev. 659, 2017, WestLaw

IV. THE MODEL OF AI--WORK MADE FOR HIRE (WMFH)

One major motivation for the proposed model is to unveil the clandestine interests behind the phenomenon of AI systems. Following Professor Jack Balkin, who has explored the “laws of robotics” and the legal and policy principles that should govern how human beings use robots, algorithms, and AI systems,236 I claim that we should view AI systems as working for the users, and hence the users should bear accountability for the systems' production, in addition to the benefits thereof. Balkin argues that there exists a false belief of a little person inside each robot or program who has either good or bad intentions.237 According to Balkin, the substitution effect refers to the multiple effects on social power and social relations that arise from the fact that robots, AI systems, and algorithms act as substitutes for human beings and operate as \*708 special-purpose people.238 For Balkin, the most important issues in the laws of robotics require an understanding of how human beings exercise power over other human beings mediated through new technologies.239 The “three laws of robotics” should therefore be laws directed at human beings and human organizations, not at the robots or AI systems. According to Professor Balkin, those basic laws that regulate and control robots and AI systems include the following: (1) operators of robots, algorithms, and AI systems are information fiduciaries who have special duties of good faith and fair dealing toward their end-users, clients, and customers; (2) privately owned businesses who are not information fiduciaries nevertheless have duties toward the general public.240 I further argue that identifying the many players behind AI systems is the key factor for imposing accountability for the works generated by AI systems. Following Balkin's argument, I propose a new model that might delegitimize the use of new technologies as a means for both public and private organizations to govern large populations. In order to unveil these hidden powers, I propose a model that sees AI systems as independent workers or employees of the users.

A. Rethinking the WMFH Legal Doctrine in the Case of AI Systems

The WMFH doctrine gives employers, or the individual commissioning the work, the copyright in works of authorship created by the employees or subcontractors.241 The WMFH rule is thus an exception to the general principle of copyright ownership. Usually, the copyright becomes the property of the author once the creation meets the demands of the law.242 However, if a work is made \*709 for hire, the employer or the one who commissioned the work would be considered the author, even if an employee or subcontractor actually created the work. The employer could be a firm, an organization, or an individual.243

Section 101 of the Copyright Act defines a “work made for hire” in two parts:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.244

This section should be read together with Section 201 of the same Act:

(a) Initial Ownership.

Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire.

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.245

The Supreme Court's decision in Community for Creative Non-Violence v. Reed addressed the “work made for hire” definition.246 \*710 “The Court held that one must first ascertain whether a work was prepared by an employee or an independent contractor.”247 “If an employee created the work ... the work will generally be considered a work made for hire.”248 In this context, however, the term employee differs from its common understanding.249 “For copyright purposes, ‘employee’ means an employee under the general common law of agency.”250 “An independent contractor,” on the other hand, “is someone who is not an employee under the general common law of agency.”251 “If an independent contractor created the work, and the work was specially ordered or commissioned,” the second part of the WMFH definition applies.252 “A work created by an independent contractor can be a work made for hire only if (a) it falls within one of the nine categories of works listed ... above, and (b) there is a written agreement between the parties specifying that the work is a work made for hire.”253

To help determine who is an employee, the Court identified factors that establish an “employer-employee” relationship, as defined by agency law.254 The factors fall into three broad categories:

(1) control by the employer over the work (i.e., the employer determines how the work is done, has the work done at the employer's location, and provides the ... means to create the work); (2) control by the employer over the employee (i.e., the employer controls the employee's [time] in creating the work, has the right to have the employee perform other assignments ... or has the right to hire the employee's assistants); and (3) status and conduct of the employer (i.e., the employer is in business to produce such works [or] provides the employee with benefits).255

“These factors are not exhaustive[,] [and] [t]he Court left unclear which of these factors must be present in order to establish the employment relationship under the work-for-hire definition.”256

\*711 Examples of works made in an [employer-employee] relationship include: [a] software program created by a staff programmer within the scope of his or her duties at a software firm[;] [a] newspaper article written by a staff journalist for publication in the newspaper that employs the journalist ... [;] [a] musical arrangement written for a music company by a salaried arranger on the company's staff[;] [and] [a] sound recording created by the salaried staff engineers of a record company.257

Why it is important to identify WMFH? There are important consequences that stem from the WMFH doctrine, including that the term and duration of copyright protection differ, there are no moral rights, and the termination provisions of the law do not apply.258

B. WMFH and Works Generated by AI Systems

This doctrine is an important and major exception to the general rule that copyright protection properly rests with the one or the many who actually created the work.259 It is therefore important for cases of AI systems generating works.260 The Copyright Act named the employer and main contractor as the authors of the work even though they have not actually created the work.261 The policy rationale for this doctrine is to incentivize the employer or primary contractor at whose instance, direction, use, commercial purposes or risk the work is prepared, as well as to give them control over the commercial force regarding the work.262 The idea and the outcome is that the employer or primary contractor, rather than the creator (who is an employee or sub-contractor), has the responsibility for and the accountability over the actions of the creator in regards to, inter alia, \*712 infringements of the law and harm caused by the work.263 This rule may be altered or changed by a contract among the relevant parties.

I claim that this doctrine seems to fit well conceptually with the problem of works created by AI systems. Although the AI system itself would be the proximate creator of the work, others, such as the user of the AI system at whose instance the work is ultimately created, will be entitled to ownership as well as accountability in regard to the works. But in the case of AI systems, who is the employer or main contractor? The answer may be complicated and may vary according to different circumstances. In many cases, it will be the user that operates and provides directions to the machine in the form of instructing it what to paint, write about, etc. The answer may also be the user that takes the financial risk of buying or hiring the machine and supplying it with energy and materials in the hope of producing a marketable final product. From a policy and practical standpoint, it makes sense to incentivize people or firms as well as other entities to use creative AI systems to create works of authorship because doing so will most efficiently promote the proliferation of the devices and the works they produce.264

The justification for giving the entitlement of ownership to economic entities is rooted in the incentive theory as well.265 This legally sanctioned monopoly allows the users to use, sell, or distribute the works more efficiently, as well as to be accountable for avoiding infringements and counterfeits.266 The latter is perhaps a better argument for giving copyright protection in the works of advanced, autonomous AI systems to their users. To avoid AI systems getting out of control, we have to legally nominate the most efficient entity to control them. The incentive for imposing property accountability on the users as employers or main contractors and seeing AI systems as employees or subcontractors is not just intuitive, it is also justified by theoretical and practical reasoning. The user can also be the owner of the AI system when the owner is the more efficient entity for controlling these works.

\*713 This model also solves the inherent problem of multiple players being involved in the development of AI systems. The tragedy of multiple stakeholders is that they can block the development and commercial use of the AI system.267 Moreover, the model would encourage further investment in the AI industry and likely promote science and technology, thus promoting the goals of the Constitution and promoting total welfare. With respect to AI systems, the innovation provided by this model does not just grant rights and benefits, such as ownership of the products, it also imposes responsibility and thus assists in solving the problem of the lack of accountability for the outcomes of AI systems. This mechanism might also contribute to the responsibility and accountability for the use of AI systems in other regimes, such as criminal law and tort law. One could argue that these fields are based on a different justification and, therefore, are not influenced by the copyright regime. However, I claim that, because AI systems are copyrightable based on their software, it may be justified and useful to implement this model within the intellectual property realm as it intersects with other legal fields, such as tort and criminal law, that address the same challenges, including lack of accountability for damages generated by autonomous car accidents caused by AI systems.

Under this model, we see the AI systems as creative employees or subcontractors (just like humans) working for these entities. The model works for both firms and humans: The autonomous AI system, just like WMFH-employed creators, is the creative author of a work. When an AI system acts autonomously, it can be compared to an independent contractor and thus be shielded under WMFH doctrine.

C. The Legal Implications of the AI WMFH Model

Who owns the copyright in regard to the works generated by an AI system? Who is responsible for any damage the works may cause? Who would be the most efficient player in distributing and selling the works? Take, for example, The Next Rembrandt project. Unlike a traditional computer program, The Next Rembrandt project had teams of people working for several years to bring it to the public. What happens to those individuals? Do all of the people involved with the project have copyright ownership of its artworks? \*714 Are they all, or perhaps only some of them, entitled to joint copyright ownership? Trying to determine the scope of ownership amongst the team members would be extremely difficult. In fact, this multi-stakeholders challenge was one of the practical and theoretical issues that led to the original WMFH doctrine.

On some level, the AI WMFH doctrine can solve this problem. It holds that the person or entity that orders or initiates the work is entitled to the copyright, instead of the authors themselves. Based on this theory, before the AI system was generated, the employer or the main contractor may be entitled to all of the rights. However, does this mean that the employer or the main contractor, under certain circumstances, is also entitled to the right over the paintings generated by the AI system? If this were the case, for example, the entity that operates The Next Rembrandt project, ING, would receive the full copyright over the paintings being generated by the system, as soon as certain legal requirements were met.268 Thus, it is possible that there is a copyright in The Next Rembrandt and that the copyright is held by ING. Copyright protection is only important if ING wants to enforce it, and applying the WMFH doctrine in a case like this would have some drawbacks.

D. The Drawbacks of Adopting the WMFH Model in Cases of AI Systems

Many questions arise in implementing the existing WMFH doctrine. Are the works generated by AI systems copyrightable in the first place? If these works are not copyrightable, can the employer hold copyright through the WMFH doctrine? What happens if the works generated by AI systems are not included in the nine-item list \*715 of the copyright law? What happens when autonomous AI systems create a work outside the scope of “employment”? What would be the legal outcome in another jurisdiction, such as France, where the creative employees retain the rights themselves? What would be the outcome when the AI system generates products or actions that are not copyrightable?

The Supreme Court has suggested that the WMFH doctrine is very limited in scope--namely, it applies only to instances where Congress has expressed a clear and explicit intent to override section 102.269 Therefore, implementing the doctrine would require new legislation with a broader scope of the matters and the rights involved. By comparison, denying copyright to works produced by advanced AI systems would probably require judicial clarification, as such a result is theoretically compatible with the current legal framework.

Furthermore, the AI context is less germane to the Work Made for Hire analysis than a corporation, like a publishing company or record label. When addressing the works produced by AI systems, there are no human creators behind such production.270 The employed creators produce the protected works within the scope of their employment.271 These employees work for the employer mainly for the purpose of creating a work, with major contributions, guidelines, and involvement from the employer.272 The policy rationale for giving rights to these types of corporations is to justify the (often large) upfront costs entailed in developing artistic talent and slowly producing a work while balancing the needs of the artist with the needs of the corporation's marketing strategy. However, the costs accruing to a user of creative AI would be much lower. For example, while a record company needs to scout and find talent, create a “brand” strategy for a musical act, allow the artist or artists to write and record music over several months, operate a music studio, and employ sound engineers to bring everything together in a \*716 finished song, the user of the kind of AI system discussed in this Article needs only buy the machine and supply it with materials. The machine can then create works non-stop, without needing to be compensated. Because the costs of undertaking the activity are relatively low, it may not make sense to create a new legal framework just to incentivize owners of creative AI systems. Therefore, some academics and practitioners argue that it might make more sense to adopt the personhood and rights of AI systems even if the “price” is simply refusing copyright protection.273 However, the model that I propose is broader than the WMFH doctrine and establishes a spectrum that might include all works produced by AI systems.

E. The Advantages of the Proposed AI WMFH Model

In this model, users are understood to be the owners of works generated by AI systems. As such, they are also considered to be responsible for such works. In this section, I discuss several benefits of this model, especially when compared to the alternatives.

First, the model reflects an understanding of the human-like features of AI systems, instead of ignoring them as current legal regimes do when they look for the human behind the system. The model refers to an AI system as both creative and independent and imposes the same set of rules and principles that regulate creative works produced by humans acting as self-contractors or during employment by others.

Second, the model is justified by the law and economics theory, which incentivizes the efficient use of the creative, autonomous AI systems and enhances the commercial force of the works generated by them.

Third, and most importantly, instead of implementing scenario A or B, which would hold programmers and other players to be the owners of the AI systems and entrust them with responsibility for the works generated, this model solves the accountability gap. The AI WMFH model is the best solution for the problem posed by the accountability gap because it places responsibility on the users as employers or main contractors of the AI systems. Seeing AI systems \*717 as employed creators or independent contractors allows the legal system to control AI systems' outcomes.

Fourth, instead of totally nullifying copyright laws as irrelevant and outdated, the AI WMFH model amends and accommodates parts of the existing doctrine. As a result, it better maintains legal and social stability.

Fifth, imposing accountability on users will encourage the careful operation of AI systems to avoid damages, infringements, and counterfeiting of third parties' rights. The model identifies ownership as the main benefit of accountability. In this way, the model ensures the AI systems do not get out of control.

The users can be firms, individuals, states, governmental bodies, and more. The model is flexible. The accountability can be changed according to the specific circumstances. For example, damages caused by AI systems and actions or omissions of AI systems can be causally linked to other stockholders.

Implementing the AI WMFH model will require new legislation or adjusting the traditional laws, as current copyright laws are insufficient to deal with the advanced technology revolution. The model requires a fundamentally new component: recognition that works generated by AI systems are copyrightable even though they are not created by humans.

The United States is not the only nation to have considered the effects that AI will have on copyright laws. Whereas U.S. law has faced some impediments towards establishing copyright protection for works created by AI, other countries have already taken preemptive steps towards clarifying this issue. For example, the United Kingdom took a stance with its 1988 Copyright, Designs, and Patent Act.274 The Act declares that human authorship is irrelevant to whether a work is copyrightable and that copyright in a work not authored by a human lies with the person who is responsible for the computer's creation.275 Around the same time, the European Community considered the issue and applied an approach similar to CONTU's. According to the European Community, since computers \*718 are currently the tool of human authors, the default approach to computer-generated works is to apply copyright protection.276 Although Europe had the added, thorny issue of moral rights, the result was ultimately the same as that adopted in the United States.277 Recently, the European approach has shifted more toward recognizing robots and AI systems as autonomous entities. One of the best examples of this approach is the draft proposal to impose tax payments on robots.278 The World Intellectual Property Organization (WIPO) also discussed works produced by AI systems during the drafting of a proposed model copyright law and ultimately adopted a similar position as the European Community.279 More recently, Australian law has considered this issue in the context of deciding whether or not a copyrightable work must have a human author.280 Several Australian judgments seem to indicate that human authorship is required.281

#### This idea has intersections with trade law that may be a source of mechanisms or advantages.

Han-Wei Liu & Ching-Fu Lin 20, Liu is Lecturer, Monash University, Australia; Lin is Associate Professor, Institute of Law for Science and Technology, National Tsing Hua University, Taiwan, “Artificial Intelligence and Global Trade Governance: A Pluralist Agenda,” 61 Harv. Int'l L.J. 407, Summer 2020, WestLaw

I. INTRODUCTION

The rapid technological development of computing power, advances in algorithms, and the availability of vast amounts of data have together reanimated “artificial intelligence” (AI)--a term coined by John McCarthy and his collaborators in 1955 yet left dormant for half a century--which not only promises a new wave of industrial revolution but also to generate significant \*408 social, economic, and political ramifications.1 Today, AI is no longer a mere expression in science fiction. Rather, it has emerged as an enabling technology that holds the power to reshape the real world we live in, with self-driving cars,2 digital assistants,3 robo-advisors,4 and automated legal practices,5 just to name a few. Soon, we shall see AI's transformative impacts on the world economy.6 According to McKinsey, by 2030, AI could create additional global economic activity of around US $13 trillion.7 Another macroeconomic study by Accenture further indicates that 12 developed countries are expected to greatly increase their annual economic growth rate by 2035 because of AI.8 Other sources also suggest that AI could facilitate international trade and improve economic efficiency in numerous ways.9

As promising as it may be, AI does present unprecedented challenges in terms of scale and complexity, which have, or are about to, trigger diverse domestic regulatory responses across continents.10 Various regulatory approaches underpinned by different local values and public morals in different societies are likely to emerge and create trade frictions not envisaged by the drafters of many of today's international trade agreements.11 While a handful of tech giants, mostly in the developed countries, control big data and \*409 advanced algorithms,12 the adoption of these technologies has been gradually diffused to the rest of the world via cross-border business activities, online or offline.13 The resulting distribution of wealth and power is not only reshaping the interplay between different social classes within a nation, but putting into question our trust--trust in governments, trust among states, and furthermore, trust in our rules-based international economic order.

The emergence of AI poses formidable challenges to the configuration and reconfiguration of global trade governance. However, despite a growing literature in both international law and global governance exploring AI's challenges,14 scant attention has been devoted to these questions from the standpoint of international trade law. This is where this Article kicks in. By virtue of a detailed analytical framework to address these questions, this Article seeks to make several claims. First, AI is not a science fiction term, nor has it reached its tipping point.15 As AI's potential continues to be unleashed, critical challenges have surfaced for policymakers at both the domestic and international levels. While AI often interacts with cyberspace and shares some similarities with the Internet, its unique features have posed new challenges that many trade lawyers have never seen.16 Some governments have showcased their adaptability to the shifting socio-techno landscape, while others find it difficult to capture such a moving target.17 This Article argues that multi-speed developments across countries to react to \*410 AI's ramifications are emerging. Such variations reflect, on the one hand, a country's institutional capacity and resources to manage the notoriously difficult “pacing problem”--technological development evolves faster than the policymakers' ability to keep up,18 and on the other, the power struggles among interest groups to even out redistributive effects while a society reorients itself towards automation.19 To add further complexity, these divergent models can be the deepest manifestation of cultures and moralities that go beyond instrumental concerns.20 Such dynamics lead us to argue that a new wave of global legal pluralism is on the horizon while countries embrace the mixed opportunities along the way.

All of these points prompt us to reflect upon the institutional resilience of the global trading system as it stands today--what is, in particular, the proper role of international trade law in tackling trade conflicts arising from these diversities? In building a new agenda to manage these challenges, this Article advocates a more deferential, non-interventionist approach towards local values and cultural contexts that focuses more on institutional legitimacy and flexibility and refrains from strong harmonization. In particular, several broader points are of importance.

First, despite the emerging diversities, several governance sites that can arguably shape or least affect how governments will regulate AI are already in the making. In some areas, certain forerunner countries, notably, the US, China, and the European Union (EU) have attempted to govern AI and other disruptive technologies.21 For latecomers--these new solutions may serve as a boilerplate for them to adopt, in whole or part, via legal transplant, regulatory competition or otherwise. In others, governments have begun to reach out to their counterparts to update the existing framework--be it loosely organized trans-governmental networks or treaty-based mechanisms. \*411 22 Further, various industry stakeholders have also engaged one another or even teamed up with regulatory agencies to coordinate their activities.23 These efforts may arguably result in a confluence between different regulatory approaches through dynamic interactions with multiple governance sites, thereby moderating trade concerns. Admittedly, even with such a confluence, one may still expect some level of regulatory diversity. The remaining variations are inevitable; they reflect different political, cultural, religious, and spiritual traditions. When acting on AI's developments to reconfigure the norms by virtue of negotiation and adjudication, a more cautious tone is warranted when it comes to harmonization and using relevant international standards to address clashes.24 To be clear, our point is not to reject the role of regulatory cooperation to facilitate trade. Instead, this Article advocates for the proposition that regulatory cooperation can and should be done in a softer, less intrusive way to allow countries to search for an optimal regulatory model that better suits their local needs when exploring the unknown terrain created by AI developments.

### AFF Area---AI Rights---Self-Ownership

#### Self-owning cars!

Jonathan A. Schnader 19, B.A. Miami University of Ohio, 2008; J.D. Syracuse University College of Law, 2012; LL.M. in National Security, Georgetown University Law Center, 2019, “Mal-Who? Mal-what? Mal-where? The Future Cyber-Threat of a Non-Fiction Neuromancer: Legally Un-Attributable, Cyberspace-Bound, Decentralized Autonomous Entities,” 21 N.C. J. L. & Tech. 1, December 2019, WestLaw

\*19 B. Autonomous Self-Owning Cars

One interesting way that people have imagined AI existing independently from human beings is in the context of driverless, autonomous rideshares that own themselves.60 Much like “the DAO” and AI DAOs discussed below, these driverless cars would accept cryptocurrency as payment, and use the proceeds of their “work” to buy fuel, purchase software updates, and pay premiums into an insurance pool with other autonomous self-driving cars.61 One proposal, “car-ception,” would allow an AI-powered car to

slowly save up enough money to afford buying a new model to put on the road at some point in the future ... Since the old car is buying the new car, it will technically be the new [car's] owner. It can also arrange to have all of its remaining wealth transferred to the new [car's] digital wallet ....62

Indeed, one of the similarities between these autonomous driverless car models is that they would operate in conjunction with decentralized platforms, particularly blockchain platforms.63

### AFF---AT: Personhood PIC

#### Attaching liability to individual conduct adjacent to AI fails.

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

B. Further Retributivist Challenges: Reducibility and Spillover

Even assuming AI is eligible for punishment, two further culpability-focused challenges remain. The first concerns the reducibility of any putative AI culpability, while the second concerns spillover of AI punishment onto innocent people nearby. This Section offers answers to both.

\*361 1. Reducibility

One might object that there is never a genuine need to punish AI because any time an AI seems criminally culpable in its own right, this culpability can always be reduced to that of nearby human actors--such as developers, owners, and users. The law could target the relevant culpable human actors instead.

This objection has been raised against corporate punishment too. Skeptics argue that corporate culpability is always fully reducible to culpable actions of individual humans.166 Any time a corporation does something intuitively culpable--like causing a harmful oil spill through insufficient safety procedures--this can always be fully reduced to the culpability of the individuals involved: the person carrying out the safety checks, the designers of the safety protocols, or the managers pushing employees to cut corners in search of savings. For any case offered to demonstrate the irreducibility of corporate culpability,167 a skeptic may creatively find additional wrongdoing by other individual actors further afield or in the past to account for the apparent corporate culpability.168

This worry may not be as acute for AI as it is for corporations. AI seems able to behave in ways that are more autonomous from its developers than corporations are from their members. Corporations, after all, are simply composed of their agents (albeit organized in particular structures). Also, AI may sometimes behave in ways that are less predictable and foreseeable than corporate conduct.

Nonetheless, there are ways to block the reducibility worry for corporate culpability as well as AI. The simplest response is to recall that it is legal culpability we are concerned with, not moral blameworthiness. Specifically, it would be bad policy for criminal law \*362 to always allow any putative corporate criminal culpability to be reduced to individual criminal liability. This would require criminalizing very minute portions of individual misconduct--momentary lapses of attention, the failure to perceive emerging problems that are difficult to notice, tiny bits of carelessness, mistakes in prioritizing time and resources, not being sufficiently critical of groupthink, and so on. Mature legal systems should not criminalize infinitely fine-grained forms of misconduct, but rather should focus on broader and more serious categories of directly harmful misconduct that can be straightforwardly defined, identified, and prosecuted. Criminalizing all such small failures-- and allowing law enforcement to investigate them--would be invasive and threatening to values like autonomy and the freedom of expression and association.169 It would also increase the risk of abuse of process. Instead, we should expect “culpability deficits”170 in any well-designed system of criminal law, and this in turn creates a genuine need for corporate criminal culpability as an irreducible concept.

Similar reasoning could be employed for AI culpability. There is reason to think it would be a bad system that encouraged law enforcement and prosecutors to, any time an AI causes harm, invasively delve into the internal activities of the organizations developing the AI in search of minute individual misconduct-- perhaps even the slightest negligence or failure to plan for highly unlikely exigencies. The criminal justice system would be disturbingly invasive if it had to create a sufficient number of individual offenses to ensure that any potential AI culpability can always be fully reduced to individual crimes. Hence, where AI is concerned, we do not think the Reducibility Challenge--at least as applied to legal culpability--imposes a categorical bar to punishing AI

#### Negligence law does not provide an adequate replacement

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

2. What the AI criminal gap is: irreducible criminal conduct by AI

Consider a case of irreducible AI crime inspired by RDS. Suppose an AI is designed to purchase class materials for incoming Harvard students, but, through being trained on data from online student discussions regarding engineering projects, the AI unforeseeably “learns” to purchase radioactive material on the dark web and has it shipped to student housing. Suppose the programmers of this “Harvard Automated Shopper” did nothing criminal in designing the system and in fact had entirely lawful aims. Nonetheless, despite the reasonable care taken by the programmers-- and subsequent purchasers and users of the AI (i.e., Harvard)--the AI caused student deaths.

In this hypothetical, there are no upstream actors who could be held criminally liable. Innocent agency is blocked as a mode of liability because the programmers, users and developers of the AI did not have the intent or foresight that any prohibited or harmful results would ensue--as is required for innocent agency to be available.211 Moreover, in the case of RDS, if the risk of the AI purchasing the designer drugs was not reasonably foreseeable, then criminal negligence would also be blocked. Finally, constructive liability is not available in cases of this \*374 sort because there is no “base crime”--no underlying culpable conduct by the programmers and users of the AI--out of which their liability for the unforeseeable harms the AI causes could be constructed.

One could imagine various attempts to extend existing criminal law tools to provide criminal liability for developers or users. Most obviously, new negligence crimes could be added for developers that make it a crime to develop systems that foreseeably could produce a risk of any serious harm or unlawful consequence, even if a specific risk was unforeseeable. The trouble is that this does not seem to amount to individually culpable conduct, particularly as all activities and technologies involve some risks of some harm. This expansion of criminal law would stifle innovation and beneficial commercial activities. Indeed, if there were such a crime, most of the early developers of the internet would likely be guilty of it.212

### AFF---AT: Regulations CP

#### The way that AI personhood interfaces with other bodies of law can be a broad deficit to the personhood PIC.

Dalton Powell 20, Duke University School of Law, J.D and LL.M. in Law & Entrepreneurship expected, May 2020; Truman State University, B.S., May 2017, “Autonomous Systems as Legal Agents: Directly By the Recognition of Personhood or Indirectly By the Alchemy of Algorithmic Entities,” 18 Duke L. & Tech. Rev. 306, WestLaw

III. AUTONOMOUS PROGRAMS SHOULD BE TREATED AS LEGALLY RECOGNIZED PERSONS

Autonomous systems can be persons in two ways: either as a direct person that is autonomous or as an indirect person that is formed by an algorithmic entity. The distinction between direct and indirect personhood depends on whether the rights and obligations of an entity are independent from an external reference. An entity is a direct person if it does not require an external reference to determine its personhood. The concept of independence from an external reference is best explained by an example in which an external reference bestows personhood: the algorithmic entity. In an algorithmic entity, the personhood of the underlying autonomous system is dependent on the existence of the separate LLC entity, which is the external reference. In direct personhood, the Restatement would recognize the autonomous system itself as a person; in indirect personhood, the Restatement would recognize the LLC as a person.

An algorithmic entity's treatment as a person within agency law has not been determined, and, due to its unique characteristics, it can arguably be granted or denied personhood based on the traditional analysis provided by the Restatement. An algorithmic entity has characteristics of a legal person, a purely organizational entity, and a mere legally consequential instrumentality. Additionally, when ignoring legal form, an autonomous entity is arguably only a computer program masquerading as a legal person and thus possibly subject to the Restatement commentary's general skepticism about computer programs as agents.

Ultimately, autonomous systems should be recognized as persons in agency law and thus capable of being an agent or principal. Autonomous systems should be recognized as direct persons, or, at the very least, they should be recognized as indirect persons. Direct personhood should be accepted based on the moral recognition that personhood is inherently a determination of autonomy. Indirect personhood should be accepted based on simple satisfaction of the Restatement's definition of person. Additionally, the pragmatic benefits \*318 resulting from the ability of autonomous systems to act as principals or agents support both direct and indirect personhood.

A. Direct Personhood

Moral arguments for the strong link between personhood and autonomy support the direct recognition of autonomous systems as persons. The core requirement of the personhood is the ability to “directly” be the object of liabilities and the holder of rights.64 The use of the word “directly” in the reporter's note's explanation of personhood is a curious one. The word “directly” is not used in the definition of person65 or in its relevant commentary66 and the word's most appropriate definition is from the source without interruption or diversion by an intervenor.67 So, an entity is directly the object of liabilities and the holder of rights if there are no intervenors between such entity and the associated rights or obligations who are more appropriately subject to such rights or obligations than the entity itself. There can be both intervenors worthy of being subject to such rights or obligations and intervenors unworthy of being subject to such rights or obligations. To promote clarity, I have recharacterized this distinction as being a \*319 distinction between means--unworthy intervenors--and ends-- worthy intervenors.

The analysis of direct personhood turns on determining whether the entity is an end, and thus worthy of direct personhood, or a mean to a separate end, and thus unworthy of direct personhood. The fact that the distinction between means and ends is relevant to direct personhood indicates that moral considerations, such as autonomy,68 are critical to the characterization of personhood. Autonomous systems are morally worthy of recognition as ends because they display sufficient levels of autonomy, such a recognition is economically beneficial, and the systems can be subject to ethical frameworks to guide their actions.

Autonomous systems are significantly more autonomous than the automated systems that the Restatement commentary has determined to be means, and are more worthy for recognition as ends. Autonomous systems have progressed substantially in areas that are indicative of autonomy, like sophisticated social interactivity,69 which might rise above the autonomy threshold for personhood hinted at in the Restatement.70 Startups are even currently creating AI, blockchains, and augmented reality to develop programs intended to replace basic intimate human relationships like romantic partners.71 This level of autonomy shown by human social interactivity clearly exceeds the level of dogs \*320 used in the Restatement illustrations.72 In the illustration, the dog is trained to and performs the programmed task of retrieving beer from the liquor store for his owner while the liquor store owner keeps a running tab for the dog owner.73 Because of the structured environment--the path to the liquor store and account charging process--and the dog's limited capacity to learn and adapt to unanticipated stimuli, this Restatement's illustration perfectly aligns with the technical definition of an automated system as described earlier.74 The dog illustration, as an automated system, is clearly distinguishable from an autonomous system. These autonomous systems75 rise above what the Restatement commentary outlines as mere means unworthy of personhood.76

The recognition of autonomous systems as ends, and thus direct persons, is economically beneficial, which supports such a recognition. The economist Paul Streeten's article on means and ends in the context of human development supports the characterization of autonomous systems as ends and thus economically worthy of recognition as persons.77 Streeten's analysis touches on fundamental concepts of means-ends determinations that are applicable in all scenarios.78 He highlights two fundamental concepts for the recognition of something as an ends: inherency and as a means to higher productivity.79 These two fundamental concepts of recognizing ends might not be harmonious in all instances, but they are harmonious where there are “rigid links” between \*321 economic productivity and the inherent qualities of ends.80 One important disharmony exists between the concepts when the inherency approach views ends as “active, participating agents” and the means-of-higher-productivity approach views ends as “targets.”81 For autonomous systems, their economic productivity depends on their ability to perform in undefined environments with unique, unanticipated stimuli, and their level of autonomy inherently justifies characterization as an end. Here, inherency and economic productivity both depend on autonomy, thus, their autonomy acts as a “rigid link” that bridges the conceptual disharmony noted by Steeten. Both the autonomous system's inherency and means to higher productivity support their recognition as ends.82 Their autonomy makes them active participating agents,83 andtheir autonomy makes them targets worthy of recognition as ends because they are economically productive.84

Moving beyond mere recognition of autonomous systems as ends due to the ability to act intentionally and the economic benefits of such recognition, the existence of the academic field of machine ethics also supports the direct personhood of autonomous systems. There are different schools of thought about what can be an artificial moral agent--i.e., an artificial autonomous actor that possesses moral value and has certain rights and responsibilities.85 But the ability to exercise autonomous judgment makes such an entity an artificial moral agent across all machine ethics conceptual approaches.86 Autonomous systems possess such autonomous judgment and thus are ends that possess moral \*322 value and have certain rights and responsibilities. The application of ethical requirements to something recognizes that it is an end and not a mere means. Requirements that one act ethically and fulfill ethical obligations are also similar to the ability to hold legal rights and obligations--the core of personhood in agency law.

The field of machine ethics is “concerned with adding an ethical dimension to machines” by “ensuring that the behavior of machines towards human users and ... other machines ... is ethically acceptable.”87 The stated ultimate goal of machine ethics “is to create a machine that itself follows an ideal ethical principle or set of principles.”88 The study of machine ethics is necessary for the development of AI--which is an important development for autonomous systems--and the imposition of ethical standards on AI is likely necessary for widespread public acceptance of such technology.89

For the machine to be an ideal agent it must be an explicit ethical agent that is “able to calculate the best action in ethical dilemmas using ethical principles,” as opposed to an implicit ethical agent that is simply programmed to behave ethically.90 This level of judgment that could be present in autonomous systems moves far beyond that contemplated by the Restatement commentary when expressing skepticism about computer programs or dogs as principals and agents, and supports the direct personhood of autonomous systems. The Restatement commentary practically attributes all computer program error to the user and imposes no blame on the computer program itself.91 In the illustration where the dog retrieves alcohol upon the instruction of its owner, the commentary contemplates no ethical blameworthiness for the dog when it acts without \*323 the owner's direction.92 While under machine ethics, the autonomous program itself would bear ethical blame for any such wrongdoing in both scenarios.93

Machines will likely be more ethical beings than humans, making them more worthy of treatment as ends and direct persons than humans, which are clearly accepted as ends capable of direct personhood. Machines will not be subject to the “genetic predisposition toward unethical behavior as a survival mechanism.”94 This unethical genetic predisposition is present in human beings due to the evolutionary promotion of the human instinct to survive at all costs.95 Any concern that machines can start out behaving ethically and end up behaving unethically stems more from concerns about human behavior than about the possible ethical corruption of autonomous systems and AI.96

This recommended recognition of legal status in non-human entities similar to that of humans--which inherently blurs the lines between what is and what is not morally worthy of legal recognition--is not novel just to agency law.97 The progress of technology towards “truly artificial intelligences, with cognition and consciousness recognizably similar to our own”98 and the creation of genetic chimeras--which involves the splicing of different genetic materials to create new biological creatures99--are also pressing once-clear distinctions between \*324 the human and non-human.100 Much like “constitutional law will have to classify artificially created entities that have some but not all of the attributes we associate with human beings,” agency law will have similar classification conundrums.101 The previously discussed focus on determining direct personhood based on moral qualification as an end, instead of the sole focus on rights and obligations, is one normative theoretical approach to solving these conundrums. For direct personhood, agency law should recognize the existence of autonomous judgment as sufficient for personhood.

B. Indirect Personhood

Because indirect personhood is determined by reference to the LLC organization of an algorithmic entity, the analysis of an autonomous system's personhood in this context is straightforward. The LLC is a well-known and traditional legal entity and only a traditional analysis need be applied. This analysis focuses on the distinctions between legally recognized persons, mere legally consequential instrumentalities, and purely organizational entities.

Characterization of an autonomous system as a computer program that is a mere legally consequential instrumentality poses a risk to the personhood of algorithmic entities. If an algorithmic entity is truly autonomous and no individuals are associated with the LLC, then an algorithmic entity is clearly distinguishable from automated computer systems, specifically referred to as electronic agents, discussed in the Restatement's reporter's note.102 The fact that an autonomous system directs the actions of the LLC displays volition not previously contemplated by computer programs.103 The presence of the LLC entity also removes any concern about the lack of a person who can be subject \*325 to legal rights and obligations.104 The autonomy level of the autonomous system will be a key factor in recognizing personhood even if the LLC's legal form is ignored--much like autonomy favors recognition of direct personhood for the autonomous system.

The limitation of purely organizational entities not being persons has traditionally only excluded trusts or estates,105 so the LLC as a separate legal entity capable of possessing its own rights and obligations likely precludes characterizing the algorithmic entity as a purely organizational entity. There is a possible argument that the purpose of the exclusion of purely organizational entities, like trusts and estates, is to look past legal form and only recognize volitional actors, like trustees and estate administrators, as persons. But the Restatement commentary for purely organizational entities focuses primarily on direct capability of having rights and obligations and not on volition.106

Ultimately, because the guiding principle of personhood categorization is legal capacity107 and algorithmic entities have sufficient legal rights,108 traditional Restatement analysis likely grants autonomous algorithmic entities personhood as an entity that has legal capacity to possess rights and incur obligations.109 Because the legal capacity of non-individual agents and principals is determined by the law creating such non-individual,110 state LLC statutes will determine the algorithmic entity's personhood. Such state LLC statutes enable the algorithmic \*326 entity to act like any other LLC or corporation capable of being an agent or principal.111

C. A Pragmatic Example

Policy arguments support both the moral-based justification for the recognition of direct personhood and the doctrine-based justification for the recognition of indirect personhood in autonomous systems. Recognizing autonomous systems as persons capable of being agents or principals can create immediate tangible benefits from AI improving present-day society. One such example in the field of corporate governance is autonomous systems revolutionizing the corporate decision-making process.

Business is becoming increasingly complex, and autonomous systems and their utilization of AI can augment, or even replace, the human board of directors' fallible judgments in this complex environment. Artificial intelligence can be a characteristic of an autonomous system.112 This improved corporate decision-making is one pragmatic example that supports the need for agency law's recognition of personhood for autonomous systems. Commenters have also noted this growing business complexity and suggested that the most appropriate response to the complexity “will be to incorporate AI in the practice of corporate governance and strategy.”113 Companies are already \*327 implementing this suggestion.114 One Hong Kong venture capital firm even integrated AI so deeply into its decision-making that the firm “would not make positive investment decisions without corroboration by [the AI system].”115 AI can augment or replace both strategic--typically associated with board and C-suite decisions--and operational decision-making-- typically associated with C-suite or lower management decisions.116 The company's success might even be wholly dependent on such AI input.117 Overall, this improved decision-making will benefit companies, shareholders, and society.

The commenters' predictions about the impact level of the AI underlying autonomous systems on corporate governance vary. Some commenters limit the impact to simply “augmenting board intelligence using AI” but not “automating leadership and governance.”118 These augmentations would occur for strategic decisions--e.g., tracking capital allocation, highlighting company performance relative to industry trends, reviewing competitor press releases to identify potential new competitors, etc.--and operational decisions--e.g., analyzing internal communications to assess employee morale, predicting employee turnover, or identifying subtle changes in customer preferences or demographics.119 Other commenters predict that the autonomous systems will assume a significant amount of management activity by noting that “most duties in typical corporations will be automated within five to ten years,” but they do not suggest that AI will fully assume all management \*328 actions.120 The same commenter even noted that decentralized autonomous companies--companies able to operate without human involvement--will exist in the near future.121

One legal scholar has even gone so far as to suggest that AI could assume all corporate management responsibilities, consequently removing the need for human management.122 If such AI management materializes, the scholar suggests that corporate governance might react by moving from a multi-person collective board with a two-tier corporate board and officer management model to a single “fused” management model operated solely by the AI.123 The scholar further justifies this management model shift by stating that the performance of the AI “will be superior to today's human-led governance.”124 The scholar argues “that it is not an insurmountable step from AI generating and suggesting expert decisions for managers (which in some areas is already common today) to AI making these decisions autonomously.”125 The scholar predicts that this fused management software will be offered either for sale or hire by large commercial AI software providers.126 This full assumption approach is not near practical implementation; even the aforementioned venture capital firm that conditioned its investment decisions on AI approval only treated the AI as “a member of [its] board with observer status” and not as a full board member.127

Despite the clear beneficial role that autonomous systems can have in corporate decision making as separate consultants or direct decision-makers, their ability to fulfill this beneficial role will be limited unless both agency law and corporate law recognize autonomous systems \*329 as capable decision-makers. Without agency law recognition, the autonomous system-agent could not directly bind the corporation-principal by the autonomous system's decision. Without corporate law recognition, the autonomous system is not duly authorized to serve the corporation as a director-agent. One corporate law hurdle is the requirement that directors be natural persons--i.e. human individuals.128 Similar natural person director limitations exist in other foreign jurisdictions.129 Another corporate law hurdle is the prohibition on directors delegating decision making duties to non-directors.130 The corporate law hurdles can, and should, be overcome by recognizing that autonomous systems are capable of being directors or advisors whom directors can consult. The agency law hurdle can, and should, be overcome by directly or indirectly recognizing the personhood of the autonomous systems. Overall, granting legal recognition of AI as board members or consultants, which allows AI to directly affect corporate decision making, is a significant global issue.131 Society can directly and immediately benefit if agency law recognizes the personhood of autonomous systems that use AI.

\*330 CONCLUSION

The Restatement (Third) of Agency's definition of personhood is ripe for reconsideration, and the internal tensions of the definition are an underexplored area of legal scholarship--despite what appears to be extensive discussion of AI agency in philosophy. The emergence of AI computing, and the associated development of truly autonomous computer systems, will test traditional agency law with questions like who or what can be a person. These autonomous systems can be persons in two ways: either as a direct person that is independent or as an indirect person that is formed by an algorithmic entity. The recognition of personhood for autonomous systems should be direct and based on the acceptance that personhood depends on the moral recognition of autonomy; but, at the very least, recognition of personhood should be indirect as algorithmic entities under the traditional doctrine.

The recognition of the direct personhood of autonomous systems requires a fundamental shift in the Restatement's definition of personhood. The shift would be from the sole focus on rights and obligations to a more holistic determination that autonomous judgment should determine the ability to be a principal and agent. This normative theoretical shift within the definition is appropriate as the internal tensions of the traditional analysis are heightened with the rapid development of new technology. Fortunately, this fundamental shift will not require the common law to write on a blank slate; the philosophical analysis of agency can guide the law here.

Indirect personhood for autonomous systems occurs by attaching them to previously recognized legal entities that fit into the traditional definitional analysis. In traditional doctrine, the Restatement's definition of person attempts to distinguish legally recognized persons from purely organizational entities and mere instrumentalities. At present, the Restatement views computer programs as mere instrumentalities of the using person and thus not a separate person capable of being a principal or agent. The traditional doctrine also focuses almost exclusively on the ability to be the object of liabilities and the holder of rights. Thus, the presence of the recognized legal entity will allow the autonomous systems to attain indirect personhood. But the reliance of indirect personhood on organizational law that is easily amendable by the legislature necessitates analysis of direct personhood for autonomous systems.

\*331 Ultimately, autonomous systems should be recognized as legal persons for the purposes of agency law. This acceptance has the potential for significant knock-on pragmatic benefits, with one such example being improved corporate decision-making.

There are several downstream implications that are ripe for future research if autonomous systems are directly or indirectly recognized as persons. The most critical determination will be deciding what level of autonomous judgment is enough for personhood. While this Note clearly accepts that autonomous systems, as defined in Part I, are on the right side of the line of autonomous judgment, the line must be drawn somewhere. For computer-related systems, the appropriate line might be between autonomous and automated systems.132 Overall, this line-drawing will “highlight how difficult it is to identify machine consciousness or personhood [and] how uncertain we are about the boundaries of our own [consciousness and personhood].”133 Other areas of study include reacting to the inherent risks posed by recognizing the direct personhood of non-humans or so easily allowing the satisfaction of personhood by indirect personhood.

### NEG---Case

#### It causes huge confusion---it’s a radical departure from status quo frameworks

Mihailis E. Diamantis 20, Associate Professor, University of Iowa College of Law, “The Extended Corporate Mind: When Corporations Use AI to Break the Law,” 98 N.C. L. Rev. 893, May 2020, WestLaw

Lastly, this Article will not follow the lead of scholars in law,78 computer science,79 and business ethics80 who propose addressing algorithmic misconduct head-on by holding the algorithms themselves liable. That approach is deeply controversial. It is far from clear that algorithms presently do, or ever could,81 satisfy the conditions of personhood and culpability.82 Even theorists who \*906 propose a fictionalizing approach to algorithmic personhood (analogous to the law's fiction of corporate personhood)83 face two formidable obstacles. First, no one has proposed a satisfactory answer to when it would make sense to hold algorithms responsible. Anything an algorithm does is ultimately a product of its environment and its programming.84 As such, it is hard to see when the algorithm, rather than its environment or its programmer, would be culpable. For example, in 2016, Microsoft launched a chatbot, “Tay,” to communicate with teens online.85 Tay was supposed to teach itself to talk by learning from data it scraped from Twitter.86 Within twenty-four hours, internet users had baited Tay with enough corrupting tweets that the bot's messages became chauvinistic, racist, and anti-Semitic.87 It is far from clear, though, that Tay was to blame for the things it said and not Microsoft or a corrosive “Twitterverse.”88 This leads to the second difficulty with direct algorithmic liability: Even if the law were to find an algorithm like Tay responsible, then what? There is no way to sanction an algorithm or bot89 (short, perhaps, of killing it, as Microsoft did to Tay).90 We can jail or fine other “people,” but algorithms lack bodies and pocketbooks.91

\*907 Regardless of whether the law could or should hold algorithms directly liable, its present approach is clear: algorithms are not people and they cannot be civil or criminal defendants.92 Reversing course would require the swing of a sledgehammer. This Article limits itself to corporate liability for algorithmic misconduct because the law has already settled that corporations are responsible “persons.” As evidenced by the Federal Sentencing Guidelines provisions on organizations, the law also already has longstanding mechanisms for sanctioning corporations.93 The surgical approach adopted here draws on that existing legal structure to ask: Under what conditions should corporations be liable when their algorithms engage in misconduct? It thereby avoids the conceptual, philosophical, legal, and pragmatic challenges of holding algorithms directly accountable.94

### NEG---Humans In The Loop DA

#### AI should not be granted personhood. Because it is capable of acting autonomously, giving it independent personhood incentivizes humans to minimize oversight because by doing so they can avoid liability.

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

INTRODUCTION

The emerging legal issues surrounding artificial intelligence (A.I.) have become a fruitful ground for legal scholarship over the past few years. One of the hottest topics within that broader subject is the concept of “A.I. personhood.” The usual framing of the issue is: “Should we grant ‘personhood’ to A.I. systems and give them legal recognition in the same way that the law recognizes corporations and natural persons?” Given the rapid advances in A.I. over the past few years and the increasing number of tasks that automated systems are called upon to perform, this is hardly an idle question.

In fact, several legal academics in the past few years have gone one step beyond discussing whether A.I. personhood should exist and claim that existing laws already permit the practical equivalent of A.I. personhood. This article asks and answers three questions: (1) Is artificial personhood a good idea? (2) Do current laws--most notably the flexible laws governing the creation of Limited Liability Companies (LLCs)--already provide a viable path to A.I. personhood? (3) If A.I. systems are not persons, what could serve as an analogue for the legal status of A.I. systems?

This article thus proceeds in three parts. Part I explains what legal personhood means and why A.I. systems should not have it--at least, not yet. Part II concludes that courts would not construe LLC laws as permitting the creation of artificial persons, and that suggestions to the contrary are not merely incorrect, but potentially dangerous. Part III examines products liability, animal law, and agency law as potential legal analogues for digital persons. It concludes that agency law provides the most effective and flexible legal analogue for artificial systems.

I. PERSONHOOD

A. What Is Legal Personhood?

The concept of personality is fundamental to the conception of law in common-law jurisdictions. Our legal system does not care much about nonpersons, except to the extent that they affect the legal rights and responsibilities of persons. Natural persons--that is, human beings--are the quintessential examples of legal persons. Indeed, Black's Law Dictionary defines “law” in its broadest sense as “[t]he regime that orders human activities and relations.”1 But while natural persons are the most familiar example of legal persons, and the ones endowed with the broadest range of legal rights and responsibilities, various forms of legal personhood have also been extended to other entities, most notably corporations and other business organizations.

The defining feature of legal persons is the ability to participate in the legal system by having the capacity to sue and be sued. Black Law Dictionary specifically \*261 cites this ability to sue and be sued as the defining quality of a “legal entity,” the catch-all term for legal persons who are not human beings.2 Absent the ability to sue and be sued, an entity is not a legal entity and therefore is not a person in the eyes of the law.3 And because such an entity is not a person, it is unable to own properly, create an enforceable contract, or engage in any other act that entails (or could entail) access to the legal system. As a New York court once explained in a case involving a dissolved corporation:

Every action must have parties competent to sue and be sued, and for and against whom a judgment may be rendered. The very existence of a cause of action implies that there is some one entitled to sue and some one who may lawfully be sued, and consequently an action cannot be maintained if there is lacking either the former or the latter .... A civil action can be maintained only in the name of a person in law, an entity, which the law of the forum can recognize as capable of possessing and asserting a right of action .... Thus the rule has been formulated that “in all civil actions the prime requisite as to parties is that the plaintiff ... must ... be either a natural or artificial person”; and that an action cannot be maintained in the name of a plaintiff who is not a natural or artificial person having legal entity to sue or be used.4

Corporations are the most familiar class of artificial legal entities. Like natural persons, a corporation has the right to enter into contracts, own and dispose of assets, and file lawsuits, all in its own name.5 The other defining feature of the corporation is limited liability, which ensures that the owners of a corporation only stand to lose the amount of money, or capital, that they have invested in the corporation if it goes under.6 Together, these features give a corporation a legal existence that is largely separate from its creators and owners.

The underlying theory of corporate personhood is based on economic and (supposedly) social utility. Corporations were granted contract and properly rights to encourage investment, reduce transaction costs, and facilitate large financial and properly transactions,7 all of which are made easier by treating a corporation as an entity legally separate from its owners. Over time, corporations have accreted additional rights and responsibilities, which legal systems have recognized to promote other economic and social goals. Great controversy often surrounds the extension of additional legal rights to corporations, as exemplified \*262 by the polarized reactions to the Supreme Court's Citizens United decision.8

One additional observation relevant to assessments of the potential scope of artificial personhood is that a person or entity must be in active existence to have legal personality. Dead or fictitious persons and defunct entities cannot file a lawsuit, nor can anyone file suit on their behalf:

The capacity to sue exists only in persons in being, and not in those who are dead or who have not yet been born, and so cannot be brought before the court. Thus a proceeding cannot be brought in the name of a deceased plaintiff; such a proceeding is a nullity. Thus, where an association has no corporate existence either de jure or de facto, ... it cannot do any act whatever as a legal entity. It cannot take title to real or to personal property, convey real property, maintain proceedings to condemn land, acquire rights by contract or otherwise, or incur debts or other liabilities, either in contract or in tort, unless by operation of an estoppel; nor can it sue or be sued .... The dissolution of a corporation implies its utter extinction and obliteration as a body capable of suing or being sued, or in whose favor obligations exist or upon which liabilities are imposed.9

A dissolved entity thus may have some residual legal existence for the purpose of winding up its affairs, but that is all. It would not have standing to sue to vindicate rights the entity might have had when it still was in active existence.

B. Should A.I. Systems Have Legal Personhood?

With this as background, does it make sense to extend some form of legal personhood to A.I. systems? In a word: no. There is a key practical distinction between A.I. systems on one hand and corporations (and other currently recognized legal entities) on the other. A corporation is a theoretical construct, something that effectively exists only on paper. A.I. systems, by contrast, actually exist in the physical world. A corporation has no ability to do anything without the aid of human agents to act on its behalf. An autonomous A.I. system is not subject to such inherent limitations.

The whole point of an autonomous vehicle, weapon, or electronic trading system is that they can do things without humans specifically impelling them to do so. That potential for greater autonomy and physical presence makes A.I. systems seem more human-like than corporations. On a superficial level, that might suggest that we should grant A.I. systems at least some form of person- \*263 hood. If, after all, we imbue personhood on completely theoretical constructs, why should we withhold it from dynamic autonomous systems that actively interact with human beings and engage with the physical world?

The most obvious riposte to this rhetorical question is that it is precisely that potential for greater autonomy that cautions against recognizing A.I. systems as persons. The autonomy of A.I. systems and their ability to directly manipulate the physical world raise accountability concerns that far exceed the already-significant accountability concerns surrounding corporations. With a corporation, we can always reassure ourselves that humans are pulling the levers, even if the corporation is its own “person” in the eyes of the law. No such reassurance will be available if we recognize A.I.-based persons.

True, A.I. systems are already capable of making better decisions than humans in a surprisingly wide swath of endeavors, particularly in situations with high predictability and where erroneous decisions do not cause much harm.10 But decisions whose outcomes result in legal action often involve a high cost of error (such as medical negligence) or a high level of unpredictability (such as securities transactions). That means that humans should remain responsible for many--if not most--legally significant decisions.

Personhood would mean that an A.I. system would be legally responsible for its own actions. That, in turn, would severely diminish the incentive for humans to supervise A.I. systems or otherwise take responsibility for those systems' decisions and operations. Consequently, A.I. personhood is not appropriate, and that will remain the case as long as there are legally significant decisions for which we want humans to retain ultimate responsibility.

This is consistent with the recommendation in Ethically Aligned Design: A Vision for Prioritizing Human Wellbeing with Artificial Intelligence and Autonomous Systems (A/IS), which is part of an initiative launched by the Institute of Electrical and Electric Engineers (IEEE):

While conferring legal personhood on A/IS might bring some economic benefits, the technology has not yet developed to the point where it would be legally or morally appropriate to generally accord A/IS the rights and responsibilities inherent in the legal definition of personhood, as it is defined today. Therefore, even absent the consideration of any negative ramifications from personhood status, it would be unwise to accord such status to A/IS at this time. A/IS should therefore remain to be subject to the applicable regimes of property law.11

\*264 Although the IEEE conclusion on personhood is on-point, its implication that A.I. should therefore simply be treated like other forms of human property is questionable. Treating A.I. in a manner analogous to consumer products or other forms of properly does not properly account for the fact that, unlike all forms of property that the law recognizes today, A.I. systems are capable of making legally significant decisions. This point is discussed in greater depth in Sections III.A and III.D, infra.

### NEG---Politics DA

#### The plan requires structural changes to criminal codes that sap PC

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

A regime of strict liability offenses could be defined for Al crimes. However, this would require a legislative work-around so that Al are deemed capable of satisfying the voluntary act requirement, applicable to all crimes. 215 This would require major revisions to the criminal law and a great deal of concerted legislative effort. It is far from an off-the shelf solution. Alternately, a new legal fiction of Al mens rea, vaguely analogous to human mens rea, could be developed, but this too is not currently a workable solution. This approach could require expert testimony to enable courts to consider in detail how the relevant Al functioned to assess whether it was able to consider legally relevant values and interests but did not weight them sufficiently, and whether the program has the relevant behavioral dispositions associated with mens rea-like intention or knowledge. In Part III.A, we tentatively sketched several types of argument that courts might use to find various mental states to be present in an Al. However, much more theoretical and technical work is required and we do not regard this as a first best option

#### Europe proves

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

Over the years, there have been many proposals for extending some kind of legal personality to AI.217 Perhaps most famously, a 2017 report \*376 by the European Parliament called on the European Commission to create a legislative instrument to deal with “civil liability for damage caused by robots.”218 It further requested the Commission to consider “a specific legal status for robots,” and “possibly applying electronic personality” as one solution to tort liability.219 Even in such a speculative and tentative form this proposal proved highly controversial.220

### NEG---Liability Reform CP / Personhood PIC

#### It makes far more sense to attach liability to the user of the AI than to the AI itself.

Bryant Walker Smith & Andrey Neznamov 19, Smith is Associate Professor of Law and (by courtesy) Engineering at the University of South Carolina, Affiliate Scholar at the Center for Internet and Society at Stanford Law School, and Co-Director of the Program on Law and Mobility at the University of Michigan Law School; Neznamov is Ph.D. in Law, Head of the Research Project for Problems of Robotics and AI Regulation in Russia, “It's Not The Robot's Fault! Russian and American Perspectives on Responsibility for Robot Harms,” 30 Duke J. Comp. & Int'l L. 143, Fall 2019, WestLaw

The fourth scenario is again the most interesting and perhaps the most uncertain. As a reasonable actor, the user is not directly liable for any negligence. However, as in the first scenario, the user could conceivably be liable for undertaking an abnormally dangerous activity. In this scenario, other bases for strict liability may also be available, either directly or by analogy. In many U.S. states, the owner of a vehicle is civilly liable for the negligence of another person who drives that vehicle with her permission. In both the Russian Federation and the United States, a legislature or court could hold the owner of an automated vehicle liable by similarly treating the vehicle's automated driving system as a permissive driver.47 It could also analogize the cyberphysical system to a dangerous condition on land or to a wild animal.48 Alternatively, it could hold the user vicariously liable by treating the cyberphysical system as her agent acting in the scope of that agency,49 similar to how electronic agents can already bind their users in contract law.50 In this way, the user would be liable for the unreasonable performance of the cyberphysical system just as an employer would be liable for the unreasonable performance of its employee.51

This possibility must be clearly and emphatically distinguished from the superficially similar argument that, like corporations, cyberphysical systems themselves should be legal persons subject to legal liability. Strict \*158 liability does not require legal personhood; while human employees are obviously both actual and legal persons, the same is not generally true of animals, real property, or electronic agents. Indeed, legal personhood is more closely associated with limiting liability (through the corporate form) than with expanding liability (through principal-agent relationships). This is true in both the Russian Federation and the United States.

More fundamentally, in the view of our American author, there are at least two reasons why legal personhood for cyberphysical systems is not sensible as a way of addressing civil liability.52 First, unlike humans or even corporations that can be clearly delineated and distinguished, cyberphysical systems are not necessarily discrete. Consider a single hypothetical automated vehicle. It could be one cyberphysical system. But it could also be a thousand cyberphysical systems, where each system corresponds to a different electronic control unit. Or, someday, it could be one one-millionth of a cyberphysical system made up of all the automated vehicles that are digitally connected to their manufacturer. Just as the Internet is a network of networks, an artificial intelligence super unit could be a network of different artificial intelligence subunits. This systems boundary problem makes legal personhood impractical.

Second, legal personhood is not helpful. Return to the goals of civil liability with which this article began. A cyberphysical system can be made safer simply by directly changing its programming or calibrating its training--not by fining it or putting it in jail. A robot has no external resources with which to compensate those who are injured by it, and insurance does not require personhood. Finally, as personally satisfying as it may be to physically destroy a machine that has caused harm, such inefficient destruction would harken back to the notorious animal trials that may have taken place centuries ago.53

#### AI personhood fails---doesn’t capture current use of AIs or incentivize good corporate governance---BUT, the plan’s standard can evolve to include personhood in the future as AI advances

Anat Lior 20, J.S.D. Candidate at Yale Law School, Resident Fellow with the School’s Information Society Project, 2020, “AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy,” Mitchell Hamline Law Review, 46 Mitchell Hamline L. Rev. 1043

Treating AI entities as AI agents, which are under the control and guidance of human principals, is the most accurate analogy we can use to represent their relationship with our society. This is so given their mono-purpose feature, the instrumental value they serve in accomplishing tasks humans assign to them, and the fact all other nonagency legal analogies can be reduced to a three-way agency relationship (because AI entities are in essence AI judgment-proof agents). Moreover, even if one does not agree with this legal analogy, the strict liability regime that stands behind it, in the form of respondeat superior, is the most appropriate in the AI liability context.

When discussing reflective equilibrium, Rawls stated that "[i]f the scheme as a whole seems on reflection to clarify and to order our thoughts, and if it tends to reduce disagreements and to bring divergent convictions more in line, then it has done all that one may reasonably ask." 356 AI entities as AI agents is the theory that accomplishes this reasonable request and grants us clarity in a very cloudy and unpredictable field. It is not problem-free, however. Identifying the appropriate principal or principals is a problem that will need to be resolved within our judiciary, insurance, and administrative systems, but it is a manageable and productive problem nonetheless and makes it the most appropriate theory to follow.

Agents, including AI agents, come in all shapes and sizes and their utilization under the assumption that their main goal is to provide a service to a human being is intuitive. This may very well change once we acknowledge (or realize) they have outgrown that purpose and by doing so are no longer agents, let alone our agents. This conclusion may also change in the future if we decide AI entities have reached an intelligence level which entitles them to new rights and obligations. These two scenarios will lead to the localization of the agency analogy--once the technology behind an AI entity changes, the analogy used to describe them is threatened and the rational that stands behind it is undermined. 357 This does not necessarily mean the analogy is moot or erased, but rather it is localized, meaning, it may be applicable with regards to a specific area within the field, but not with the subject matter as a whole. 358 This is echoed in Rawls's reflective equilibrium process which leads to the localization of some analogies due to the back and forth reasoning process that changes as AI advances. The localization of [\*1102] the agency analogy will then force us to embark once again on our back and forth reasoning voyage. 359

If indeed that day comes, 360 and the regulatory purposes that stands at the basis of the justification for treating AI as agents will be no more, a new or old legal analogy should be considered. If AI entities will cease to be judgment-proof agents and will become full transparent agents, the regulatory structure of agency relationship will be relevant no more and other non-agency legal analogies, including personhood, could be back in the race to lead the appropriate liability regime.

But until that day, AI judgment-proof agents will continue to possess the potential to wreak havoc without the ability of their potential victims to protect themselves. Holding their human principals strictly liable for the AI agents' mischiefs will incentives them to create a safer environment in today's algorithmic society, 361 one that is much needed now, and even more so in the future.

#### Liability must attach to the company---NOT the AI itself

Chiara Picciau 21, Bocconi University, Milan, “The (Un)Predictable Impact of Technology on Corporate Governance,” 17 Hastings Bus. L.J. 67, Winter 2021, WestLaw

C. Corporate Management in the Twenty-First Century: A New Balance Between Strategic, Supervisory, and Executive Roles

While blockchains and smart contracts might help modernize shareholder meetings, artificial intelligence and algorithms entail greater changes for managerial bodies.213 Recent examples of machine learning algorithms that provide recommendations and make decisions, such as VITAL or Watson, suggest that humans might not have a monopoly on managerial functions anymore. However, fully autonomous algorithmic entities or even fully algorithmic boards seem a more distant reality.

Current artificial intelligence programs are still far from exhibiting the “general human-level intelligence” or “artificial general intelligence”214 that would enable them to adjust their decision-making processes to changing circumstances and to apply their “cognition” to a variety of different settings and contexts, as humans do. Moreover, the large amounts of relevant data that are necessary to run machine learning algorithms are not always available, and when they are, there is often a trade-off between access to wide public datasets and their meaningfulness and suitability for firmspecific issues and decisions.215 This considerably restricts the number of firms that can effectively employ artificial intelligence for decision-making purposes, as well as the type of issues that can be tackled through automated decisions. Some companies may not have the resources to internally develop adequate technological tools, and when they use public data or buy them from third parties, they might not be able to put together appropriate inputs to run machine learning algorithms on idiosyncratic matters of the firm.216

\*119 These challenges make it hard to believe that fully autonomous boards or algorithmic entities will spread anytime soon, even in jurisdictions that seem to permit them already.217 In many other jurisdictions, there is the additional obstacle of statutory provisions that require the appointment of a board of directors comprising (natural) persons.218 Reforms are unlikely to be undertaken in this respect, at least until policy considerations regarding deterrence and accountability have been convincingly addressed for algorithmic management systems as well.

1. Managerial Accountability in the Era of Artificial Intelligence

Machine learning algorithms and other artificial intelligence tools do not respond to common incentives, only to programming instructions. Current systems of incentives and deterrence, which are tailored to human decision-makers, do not apply to algorithms.219 Significantly, broad standards of conduct, such as the notions of “diligence,” “due care,” or “loyalty,” are not intelligible for algorithms and cannot even be coded into programming language. These standards, and the liability rules that are built upon them, are inevitably made for human decision-makers. One can hardly see, for instance, how the business judgment rule--which protects directors and officers from second-guessing their business choices if they were not interested in the transaction, they were duly informed, and they exercised their judgment in the good faith effort to advance the corporation's interests--could apply to artificial intelligence alone.220 Artificial intelligence may be unbiased and uninterested, but this actually depends on coding and programming instructions. The same is true with respect to the availability of the information that is necessary to make such decisions. Again, whether the algorithm is duly informed (i.e., it is working on the proper dataset for the task) depends on a programming choice. Finally, artificial intelligence cannot make any “good faith” effort to advance anyone's interests.221 The very notion of good faith does not really make sense for algorithms. At most, it does for the flesh-and-blood people who programmed or ran the algorithm. This is because algorithms need well- \*120 defined and specific functioning rules, not broad standards potentially subject to different interpretations.222

Strictly speaking, algorithms cannot even be held accountable if they provide bad recommendations or make wrong decisions.223 They cannot pay damages or make amends. Instead, legal entities (such as the company producing or using the algorithm) and the people running them are needed to enforce any liquidation of damages.224 As a result, human decision-makers continue to provide crucial accountability when it comes to employing technology for managerial purposes, which the law will not easily abandon without valid alternatives.

### NEG---Reprogramming CP

#### It is better to constrain the behavior of AI through code than through legislation.

Iria Giuffrida et al. 18, Iria Giuffrida is Visiting Assistant Professor of Law and Associate Director for Research, Center for Legal and Court Technology, William & Mary Law School; Fredric Lederer is Chancellor Professor of Law and Director, Center for Legal and Court Technology, William & Mary Law School; Nicolas Vermeys is Associate Director of the Cyberjustice Laboratory, Professor, Université de Montréal's Faculty of Law and Visiting Associate Professor of Law, William & Mary Law School, “A Legal Perspective on the Trials and Tribulations of AI: How Artificial Intelligence, the Internet of Things, Smart Contracts, and Other Technologies Will Affect the Law,” 68 Case W. Res. L. Rev. 747, WestLaw

II. WHAT ARE THE LEGAL RISKS STEMMING FROM THESE “NEW” TECHNOLOGIES?

As discussed in Part I, AI is based on algorithms. These algorithms can be written by humans, or with sufficient AI ability, a computer system can create its own algorithms in order to accomplish goals set by the master algorithms.48 Since a computer will always follow its algorithm-supplied goals, we must be careful to anticipate ways in which a computer might so comply. For example, IF a computer \*761 charged with keeping a sidewalk clean had the capacity to do so, absent programming protections, it might well determine that human beings cause trash and that to keep the sidewalk clean, it should remove all people from the sidewalk.49

Arguably, the most important near-term legal question associated with AI is who or what should be liable for tortious, criminal, and contractual misconduct involving AI and under what conditions. This is why it becomes essential to establish the risks stemming from an overreliance on AI and identifying who can and should be held responsible for adopting the counter-measures aimed at mitigating these risks.

A. A Survey of Legal Risks Stemming from an Overreliance on Algorithms

AI is already a part of many people's lives. But, to fully understand what we usually mean when we refer to AI, we have to start with the business world, which is rapidly adopting AI-enabled technologies to enhance productivity and profit. Perhaps the most useful examples are those that at first blush might appear to be highly limited, a far cry from avenging computer intelligences. In his book, Building the Internet of Things,50 Maciej Kranz relates two examples from the mining industry, which we now paraphrase:

• Rio Tinto, a global, open-pit mining concern “has the largest fleet of giant autonomous trucks in the world” \*762 transporting “more than 200 million tons of materials across approximately 3.9 million kilometers.” Extreme conditions and extreme loads create major and expensive maintenance problems. Installation of sensors in the trucks connected via the Internet to computers able to evaluate the truck data permits preventive maintenance which forestalls breakdown, recovery, and repair.51

• Goldcorp operates an underground “connected” gold mine in Canada worked by more than 1,000 people. Implementation of multi-faceted technology allowed the company to “achieve real-time visibility, monitoring, and ventilation control” over a single wireless network that uses radio frequency identification (RFID) to provide live tracking of people and equipment. As a result, the company saves between $1.5 and 2.5 million dollars in energy costs for ventilation; in the event of emergency can locate people 45 to 50 minutes faster than before; and can locate and track its equipment.52

These types of operations combine sensors, connected equipment, and the data they supply to produce more efficient and profitable business. By incorporating machine learning algorithms, the system could, for example, redeploy miners to more productive areas of the mine. Of course, if, as we saw in Part I, the algorithm has been badly designed and poorly trained--i.e. the coder, for instance, did not test sufficiently rigorously the algorithm or the trainer incorporated a bias into the system--or has access to polluted pools of data, the safety of these miners could be put into jeopardy.

Similarly, a judge preparing to sentence an offender might consult an AI-enabled digital report and recommendation that will predict the probability of recidivism.53

Another example is that of now-anticipated autonomous vehicles. If we assume fully autonomous, self-driving cars, we might have the following: The user or passenger enters the car and speaks the destination. The car's internal computer communicates with multiple computers located elsewhere to determine the most efficient, safest and perhaps economical route. While en route, both the car's own sensors and those in other cars, on, above, below, and near the street monitor progress, automobile condition, and compliance with operational and traffic requirements. Mechanical and electronic functions--and if privately owned, perhaps the status of the owner's required payments-- \*763 are all monitored with instant corrections. Police no longer need or, perhaps even legally, can stop the vehicle. Instead, they have full data access from the vehicle which, of course, is not being “driven” by a human being.54 In the event of a traffic violation, who is responsible? Logic would dictate that it is those responsible for the technology oversight, but who exactly? The car's manufacturer? The AI programmer? The trainer? This would obviously depend on the source of the oversight--hardware, software, data, data sources, instruction transmission, etc.

These and other examples serve to show the complexity of: 1) establishing how liability should apply to AI; and 2) who should ultimately be held responsible if an AI-enabled device fails to function in the manner it was supposed to.

B. How to Address the Liability Issues Linked to Algorithms--Initially A Status Question

There are essentially three ways to address legislatively the liability issues linked to AI. First, AI-enabled devices can be treated as property and therefore be the responsibility of their users, owners, or manufacturers.55 Second, they could be treated as “semi-autonomous beings,” and fall under a legal regime similar to that of children56 or persons with mental disabilities, or even one similar to the notion of \*764 agency.57 Third, like corporations, they could be treated as fully autonomous beings.58

From a legislative standpoint, the first model is relatively simple to imagine and implement. It would also be the least strenuous to implement as it would require very little by way of legislative amendments. In fact, foreign laws are already drafted in a way that allows for this scenario. For example, in Quebec, as in most civil law jurisdictions, the Civil Code states that “[t]he custodian of an inanimate object is bound to make reparation for injury resulting from the autonomous act of said object, unless he proves that he is not at fault.”59 This would be akin to the common law doctrine of res ipsa loquitur under which negligence is presumed if one's property causes harm to a third party.60 In cases where no negligence on the part of the custodian, owner, or user is established, liability could be transferred to the manufacturer of the AI-enabled device.61 This does bring up an interesting question of how to apportion liability among the manufacturer, programmer and trainer of the AI.62

\*765 The third model--granting legal personhood to AI--is also relatively simple to legislate. It would necessitate AI-insurance63 or the creation of a regime of compulsory compensation,64 but these are schemes that legislators have dealt with before and do not pose unique challenges as such. This model does, however, raise the more philosophical question of whether we consider autonomous vehicles, bots and other AI-enabled technology to be truly “beings” deserving of independent legal status. In the wake of IBM's Watson's win against its human Jeopardy opponents,65 or Google's AlphaGo beating the \*766 world Go champion,66 one could posit that computers can now be programmed to be as intelligent as humans--a related but clearly different classification. However, this implies both that intelligence is no more than the capacity to conduct probabilistic analysis and that intelligence is perceived as the main criteria to establish legal capacity. “Intelligence” is not enough for personhood, at least in most jurisdictions. Rather, the test for capacity is that of reason; a person has to be endowed with reason to be held civilly or criminally liable, to enter into a contract, or to exercise other forms of legal autonomy.67

As Erich Fromm put it:

Reason is man's faculty for grasping the world by thought, in contradiction to intelligence, which is man's ability to manipulate the world with the help of thought. Reason is man's instrument for arriving at the truth, intelligence is man's instrument for manipulating the world more successfully; the former is essentially human, the latter belongs to the animal part of man.68

Whether or not one agrees with Fromm's postulate, it remains undeniable that reason and intelligence are intrinsically linked and that true “intelligence,” for lack of a better word, is more than computing capacities, no matter how sophisticated. A case in point: individuals suffering from savant syndrome. Brought to public consciousness through Dustin Hoffman's character in the 1988 film “Rain Man,” savant syndrome “is a rare, but extraordinary, condition in which persons with serious mental disabilities, including autistic disorder, have some ‘island of genius' which stands in marked, incongruous contrast to overall handicap.”69 Individuals afflicted with this condition will often display impressive calculating abilities,70 yet can still be considered legally incompetent.

\*767 So how does this relate to AI? Like individuals suffering from savant syndrome, AI-enabled devices have great computing capacities, but lack in overall reason. This was brought to light, for example, by Tay's racist Twitter rants.71 The chatbot was intelligent enough to generate coherent tweets, but lacked the reason to understand the insensitive nature, to put it lightly, of its postings. As Mireille Hildebrandt put it:

It seems to me that artificial intelligence in itself does not qualify as [reasonable], even if some kind of consciousness would emerge. Animals have consciousness but we do not consider them fit to be subjected to legal punishment, because we have no indication that they can reflect on their actions as their own actions. Their consciousness is an awareness of the environment, without the concomitant awareness of this awareness which is typical of the human sense of self. Helmuth Plessner actually took this to be the crucial difference between humans and non-human life forms: the self-consciousness of the human person creates a distance between the self, the world and the self itself, condemning humans to what he called indirect directness, natural artificiality and a utopian position. To be sensitive to censure, rather than mere discipline, a subject needs to be conscious of its self, allowing the kind of reflection that can lead to contestation or repentance in the case of a criminal charge.72

The animal comparison is interesting as it seems to be a position shared by both legal scholars and AI experts. For example, Yoshua Bengio, one of the foremost international experts on machine learning, has stated on more than one occasion that the intelligence of most AI-enabled devices is comparable to that of a frog.73 As frogs do not have legal personhood, logic would dictate that AI-enabled devices, for the very reasons described in the quote above, should not either. This would imply that if we reject placing AI within the inanimate property \*768 category, classic tort law applicable to animals74 would best suit current advances in AI. Therefore, in the absence of known misconduct formerly committed by an AI entity, only a clearly “dangerous” AI-enabled device would dictate liability, or rather, the level of care that its manufacturer, programmer, or owner should take in its development.

However, if we are to believe IT pioneers like Bill Gates, Elon Musk, and Steve Wozniak,75 the AI-animal metaphor could be short-lived, as AI is becoming increasingly powerful and could eventually reach a level of ability or consciousness equal to that of humans. If this is the case, does the position attributing legal personhood to AI become the only solution? Some authors such as Lawrence B. Solum have held this position for years.76 As Solum puts it, refusing legal personhood to AI “is akin to American slave owners saying that slaves could not have constitutional rights simply because they were not white or simply because it was not in the interests of whites to give them rights.”77 Although we disagree with this premise, which in our view understates the true effects of slavery on the African-American community to this day,78 slavery laws--when stripped from their historical, societal, and moral contexts--do offer interesting insight on how more advanced AI could be approached from the standpoint of liability.

As explained in Wright v. Weatherly,79 in some states “a master was liable for every [slave's] trespass, whether the act be done when in the master's service, or not, and whether with or without the master's knowledge.”80 Putting aside the obvious ethical and legal repulsion to \*769 one person owning another, this outcome makes sense from a purely compensatory standpoint as slaves had no means to offer financial redress to their victims. The same logic could apply to AI as computers have no property, while their owners, manufacturers and programmers do.

C. Liability in the Near Future

In the immediate future, it seems clear that AI technology will be regarded as property. It is unlikely that an AI device would be held civilly or criminally liable for harm done by it. Rather, the primary issue likely will be the classic one of civil liability under tort law. The owner or operator will be liable for injury caused by its property whether “intelligent” or not. Product liability and negligence81 will be the primary causes of action. Although the law may be clear in concept, it may be very difficult to apply in practice given the IoT and impossibility of tracing the sources of data relied upon by an algorithm. Imagine a dam failure caused by an AI control system reliant on thousands of sensors supplied by multiple vendors, data supplied from independent third parties, many of which are derived from other AI devices, with decision-making shared with other non-owned AI devices. The Restatement (Third) of Torts--Product Liability § 5 declares:

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or

(b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and

(2) the integration of the component causes the product to be defective, as defined in this Chapter; and

(3) the defect in the product causes the harm.82

\*770 In one sense, this will permit the classic tort suit: sue everyone. Pragmatically, however, given a sufficiently large enough harm, IoT distributed AI blame may be so large as to defy legal resolution. Assuming an adequate duty of care, we may be unable to prove factual fault or, if we can, proximate cause.83 Put differently, the harm caused may have been unforeseeable from the perspective of a specific component manufacturer.

And, to be fair, we might add the contractual issue. Is a predictive AI a “good” or a “service” under Article 2 of the Uniform Commercial Code, given the differences that classification can yield? When is a smart contract a “contract,” an alternative to the classic contract,84 or a device?

In short, the AI age starts with traditional legal concepts increasingly applied to new and previously unforeseen circumstances impelling legal change. This has happened before, of course, but the AI age will not only be immense in scope it will also proceed incredibly quickly. Our legal systems tend to be reactive and not proactive, especially when we cannot predict what the future will be like. One author writes that in 1880 experts charged with predicting what New York City would look like a hundred years later reported that it would be destroyed. The manure that would be generated by the more than six million horses needed by the city's people would make it uninhabitable.85 The modern internal combustion engine and the automobiles it produced was unpredictable. Predicting the evolution of AI and its related technologies may be equally unsuccessful.

Of course, there is an inherent risk that, if we wait, contemporary liability rules, which in the United States are designed to not only compensate injured victims but also to deter wrong doing, will stifle AI \*771 innovation while we ponder how best to change them. If nothing else, that poses our last matter: how can AI flourish while staying within the confines of a society of rights?

III. HOW CAN AI FLOURISH WHILE STAYING WITHIN THE CONFINES OF A SOCIETY OF RIGHTS?

In his 1999 article, The Law of the Horse: What Cyberspace Might Teach Us,86 Lawrence Lessig asked a series of questions on how those in the legal community should address the regulation of cyberspace. As Lessig put it:

[L]aw faces a choice--whether to regulate to change this architectural feature, or to leave cyberspace alone and disable this collective or individual goal. Should the law change in response to these differences? Or should the law try to change the features of cyberspace, to make them conform to the law? And if the latter, then what constraints should there be on the law's effort to change cyberspace's “nature”? What principles should govern the law's mucking about with this space? Or, again, how should law regulate?87

To borrow a famous quote attributed to Spanish philosopher George Santayana, “Those who cannot remember the past are condemned to repeat it.”88 In this sense, we should study how the law of cyberspace came to be, as Lessig's interrogations remain extremely relevant when addressing AI.

As Lessig posited, technology--in his example, cyberspace; in our case, AI--can be regulated in different manners. The classic route for regulation, of course, remains legislation. However, the author continues by suggesting that “Code” could also be the key to regulating technology. These are therefore the two avenues this Article will now broach as they pertain to AI.

A. Changing Laws to Address AI Innovations

As legal professionals, our initial reaction when faced with technologies we do not quite understand is often to take the legislative route and draft a legal framework destined to control the use and spread of these technologies. AI has not escaped this trend as many states have \*772 already adopted legislation aimed at curtailing the use of AI in certain fields.89 In fact, some authors are even predicting the drafting of a Uniform Artificial Intelligence Act by the end of the decade.90 Even famous businessman Elon Musk has implored legislators to act quickly in regulating AI.91

Unfortunately, to borrow a few lines from Justice Easterbrook's famous “Law of the Horse” speech--the very speech that inspired Lawrence Lessig to publish his aforementioned article on the same topic--“Beliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace. The blind are not good trailblazers.”92 Although Justice Easterbrook's general thesis can be, and was,93 disputed, history has proven him right when it comes to trying to predict and legislate on technological change.94 In fact, his statement can already be verified in one field of AI, that of self-driving cars.

To this day, twenty-one states have adopted legislation regarding self-driving cars, and more are expected to follow suit.95 Even the US government is currently working on a bill to regulate the use of autonomous vehicles.96 As this technology is still in its infancy, the drafters of these bills have taken to predict the future, and some of their predictions have already proven to be problematic. For example, in the \*773 District of Columbia, an autonomous vehicle must have “a driver seated in the control seat of the vehicle while in operation who is prepared to take control of the autonomous vehicle at any moment.”97 This obviously limits how self-driving cars could be used and designed. For example, under these rules, GM's recently announced autonomous cars without steering wheels or pedals98 will never be able to drive on D.C. roads. It also means that driverless taxi services99 will not be able to establish themselves in the Capitol. This might be exactly what the drafters of the Automated Vehicle Act of 2012 had in mind, or it could simply be that, six years ago, they could not fathom that strides in AI would make it possible to have fully automated vehicles. Whichever the case may be, this demonstrates that the technology is evolving in a manner that is incompatible with what the drafters of these laws had in mind.

Of course, getting back to Justice Easterbrook's statement, this is not to say that we shouldn't legislate on AI, smart contracts, or the Internet of Things, or wait until we have understood all there is to know about these technologies--something that could take centuries100--before adopting further AI-related legislation. History does teach us, however, that we should be careful in drafting said laws.101 To quote iconic French jurist Jean Carbonnier, “one should always tremble when legislating.”102 However, how should the current legal framework be adapted--through the modification of current laws, or the adoption of new legislation--to take into account AI innovations?

\*774 In order to answer this specific question, we suggest, as noted above, to study recent history and how the law of the Internet has evolved. For all of the discussions about “Internet sovereignty”103 and how “cyberspace law is different,” very few laws were ultimately adopted to strictly address Internet-related issues, The Digital Millennium Copyright Act,104 and Communications Decency Act105 being the main exceptions to this rule. In most other Internet-related issues, current legislation and common law rules were tweaked or simply applied as is. Keeping this in mind, one could argue that the same should be true for AI.

For example, in a recent New-York Times Op-Ed, Oren Etzioni proposed three rules that he believes should apply to A.I:

• an AI system must be subject to the full gamut of laws that apply to its human operator;

• an AI system must clearly disclose that it is not human; and

• an AI system cannot retain or disclose confidential information without explicit approval from the source of that information.106

These rules, which are more of a tip of the hat to Isaac Asimov's aforementioned three laws of robotics than directives aimed at state legislators, do somewhat support the argument that current laws should apply to AI.107 The problem is, which ones, and how should they be adapted?

\*775 According to the National Science and Technology Council, the answer to this question lies in classic risk analysis:108

[T[he approach to regulation of AI-enabled products to protect public safety should be informed by assessment of the aspects of risk that the addition of AI may reduce, alongside the aspects of risk that it may increase. If a risk falls within the bounds of an existing regulatory regime, moreover, the policy discussion should start by considering whether the existing regulations already adequately address the risk, or whether they need to be adapted to the addition of AI.109

Although risk analysis is a process that has been used by lawmakers for years, it remains more prevalent in other fields. For example, risk analysis is at the very core of cybersecurity, i.e. the degree to which information technology is safe from unwanted external interference. Over the years, numerous conceptual frameworks were developed to structure risk analysis as it relates to cybersecurity.110 Although all have valid tenets, we are partial to Bruce Schneier's simplified five-step process:

1) What assets are you trying to protect?

2) What are the risks to these assets?

3) How well does the security solution mitigate those risks?

4) What other risks does the security solution cause?

5) What costs and trade-offs does the security solution impose?111

To answer these questions, one must first understand the concept of risk. Risk is usually defined as the probability that a threat can exploit a vulnerability in the system before the proper safeguards are put \*776 into place.112 Threats obviously include events such as surreptitious external “hacking” from a network or the Internet, but they also include such intrusions as an employee sitting down at a friend's computer over the lunch hour and making improper use of it.

Because AI-enabled devices frequently use data from the Internet or implement their algorithms via the Internet, AI functions are especially vulnerable to cybersecurity threats. In July 2017, for example, Forbes reported that “Criminals Hacked a Fish Tank to Steal Data from a Casino.”113 The fish tank was connected to the Internet to permit remote monitoring of water conditions, and the thieves used that connection as the route into the casino's computers.114

Getting back to applying risk analysis to AI from a legislative standpoint, if we adapt Schneier's five-step process to legislative analysis regarding AI, the process could be imagined as follows:

1) What rights are you trying to protect?

2) What are the risks that AI poses to these rights?

3) How well does current legislation mitigate those risks?

4) What risks would the application of current legislation to AI cause?

5) What costs and trade-offs does current legislation impose?

Looking at these steps, the main issue remains that of identifying the risks associated with the use of AI under step 2. Only then will we be able to establish whether current legislation can sufficiently mitigate those risks under step 3.115 As for steps 4 and 5, they are mostly linked to the risk of current legislation stifling innovation. Getting back to the Internet parallel, the “notice and takedown” doctrine116 was created for \*777 that very reason. It was meant to ease liability constraints that existing legislation put on Internet service providers.

This model is voluntarily imperfect as it starts from the postulate that legislation is the only way to curtail the risks caused by AI. However, there are other, sometimes more successful, ways to arrive at this same end through the use of code.

B. Coding Legal Constructs and Barriers into Algorithms

As Lawrence Lessig put it:

In real space, we recognize how laws regulate--through constitutions, statutes, and other legal codes. In cyberspace we must understand how a different “code” regulates--how the software and hardware (i.e., the “code” of cyberspace) that make cyberspace what it is also regulate cyberspace as it is. As William Mitchell puts it, this code is cyberspace's “law.” “Lex Informatica,” as Joel Reidenberg first put it, or better, “code is law.”117

This statement, which was made regarding cyberspace, holds as true with respect to AI-enabled devices. Computers exist to perform given functions. These functions are programmed in by their programmers-who serve somewhat as legislators as they can force a device to act in a certain manner or forbid it from doing so. Isaac Asimov's aforementioned three laws of robotics serve this point. The reason, according to Asimov's fictional universe, a robot:

• May not injure a human being or, through inaction, allow a human being to come to harm;

• Must obey orders given it by human beings except where such orders would conflict with the First Law; and

• Must protect its own existence as long as such protection does not conflict with the First or Second Law,

is because its programming does not allow it to go against these “laws.” In this sense, code could be used to ensure compliance with current legislation. For example, autonomous vehicles can be programmed to obey the speed limit, making speeding violations a thing of the past. Of course, as we discussed earlier in this article, there exists an issue of \*778 liability when there is a flaw in the code. But, what if the code is not flawed, yet the AI stops obeying the “laws” it was pre-programmed to obey? What if AI acted in a way that is inexplicable by reference to the code and is, in fact, incompatible with it? After all, anyone who has read an Isaac Asimov novel or seen a movie based on his books knows that robots will ultimately break the three aforementioned laws if only by being confronted by unforeseen circumstances. This is where Lessig's teachings stop being useful when discussing code as a means of controlling AI; it is also the major issue we are confronted with not only from a legal standpoint, but from a societal one as well.

As eluded to in the first section of this Article, AI-enabled devices are dependent on data. The more data they have access to and are trained with, the better they can predict an outcome or address a given situation. In this sense, “data analytics,” which can be envisioned as the sophisticated and complex analysis by computer of enormous amounts of data, called “big data,” is really at the heart of the current boom in AI. Given appropriate data, a computer's algorithms will produce a given result. Inadequate and flawed data will produce erroneous results.118 A good example of this is Amazon's ability to suggest books a customer might like--if you do not train the algorithm properly, for example if you buy a book for a niece or nephew without indicating to the platform to disregard said purchase when making its suggestions, it will most probably offer poor recommendations going forward.

Data comes in many forms. Like a human being, a classic movie robot listens, sees, and often “feels.” The robot takes in the raw observational data and then pursuant to its algorithms interprets the data and decides what, if anything, to do as a result. A computer that places stock trades without human intervention is doing the very same thing but using different data obtained in a different form.

This is where an issue could arise. In the case of advanced machine learning, i.e. deep learning, devices will eventually outgrow their initial coding and use new sets of data to produce an outcome. This implies that the calculation that led to said outcome is unknown to the consumer of the generated answer-- which is often the case as the algorithm is protected by trade secrets119--or worse, unknown to the programmers \*779 because the AI-enabled device has acted upon data that they are unaware of or, unbeknownst to them, it has created its own algorithms to “solve problems.”120 In other words, “[a]s Machine Learning algorithms get smarter, they are also becoming more incomprehensible.”121 In this sense:

[T]he fact that Machine Learning algorithms can act in ways unforeseen by their designer raises issues about the ‘autonomy,’ ‘decision-making,’ and ‘responsibility’ capacities of AI. When something goes wrong, as it inevitably does, it can be a daunting task discovering the behavior that caused an event that is locked away inside a black box where discoverability is virtually impossible.122

This opacity issue123 is the one that seems most daunting for lawmakers. Although legislation can always be passed to make a protected line of coding available for analysis in case of an accident,124 how does one identify how an algorithm produces an erroneous result when even its programmers cannot explain how this result was attained?

This finding has led to political pressure “to have some form of explanation for any AI-based determination.”125 But this does not simply imply the need to have transcripts, for example, of the case law a robot lawyer has consulted to arrive to its decision, it further implies the need to comprehend the whole technological ecosystem in which a given AI-enabled device resides. This brings the analysis back to this Article's initial thesis: the main risk of the increasing reliance on AI, and, therefore, the most difficult obstacle for regulators, does not reside in the technology itself, but rather in the interaction between AI- \*780 enabled devices--the sharing of information between databases erroneously believed to be in silos. If a computer hacker wants to corrupt an AI-enabled device, the hacker can certainly erase data or tamper with its coding, but a much more insidious means to the end is to add invalid and unverified data to the device's database and let it learn itself into chaos.126

#### Requiring AI to be reprogrammed is competitive

Dafni Lima 18, Ph.D. Candidate in Criminal Law at the Aristotle University of Thessaloniki (Greece) and Fulbright Foundation Doctoral Dissertation Visiting Research Student at the Harvard University Initiative on Law and Philosophy (United State), “Could AI Agents Be Held Criminally Liable? Artificial Intelligence and the Challenges for Criminal Law,” 69 S.C. L. Rev. 677, Spring 2018, WestLaw

If an AI agent cannot be considered a person, it could not prima facie enjoy rights and be bound by obligations as humans do. There is again a qualitative difference between a restriction and an obligation, and while an AI unit may be programmed to adhere to certain restrictions, so long as this adherence is not the product of its own volition, it cannot be considered an “obligation” as such. However, when we turn to the issue of rights,25 things slightly change; it is widely accepted that rights function quite differently than obligations for subjects that are not considered capable of undertaking obligations under law. For example, a minor can often enter into contracts that \*686 convey upon them benefits but not obligations,26 or which are valid with regard to rights conferred and void with regard to obligations. Lately, a lot has been said on the issue of recognizing animal rights,27 not least because we have finally begun to understand that animals are sentient beings that experience a much wider range of feelings than previously acknowledged;28 as both research and legal scholarship advances on this matter, it might be conceivable that certain developments might be suitable for transposing in the field of AI agents with regard to their “rights” or “freedoms.”

### NEG---Rights Creep DA

#### Bestowing legal personhood on AI causes backlash AND rights creep

Ryan Abbott 19, Surrey law and health sciences professor, “Punishing Artificial Intelligence: Legal Fiction Or Science Fiction,” 53 UC Davis L. REV. 323, HeinOnline

Mens rea, and similar challenges related to the voluntary act requirement, are only some of the practical problems to be solved in order to make Al punishment workable. For instance, there may be enforcement problems with punishing an Al on a blockchain. Such Als might be particularly difficult to effectively combat or deactivate. Even assuming the practical issues are resolved, punishing Al would still require major changes to criminal law. Legal personality is necessary to charge and convict an Al of a crime, and conferring legal personhood on Als would create a whole new mode of criminal liability, much the way that corporate criminal liability constitutes a new such mode beyond individual criminal liability.216 There are problems with implementing such a significant reform. Over the years, there have been many proposals for extending some kind of legal personality to AI. 217 Perhaps most famously, a 2017 report by the European Parliament called on the European Commission to create a legislative instrument to deal with "civil liability for damage caused by robots." 218 It further requested the Commission to consider "a specific legal status for robots," and "possibly applying electronic personality" as one solution to tort liability. 219 Even in such a speculative and tentative form this proposal proved highly controversial. 220 Full-fledged legal personality for Als equivalent to that afforded to natural persons, with all the legal rights that natural persons enjoy, would clearly be inappropriate. To take a banal example, allowing Al to vote would undermine democracy, given the ease with which anyone looking to determine the outcome of an election could create Als to vote for a particular candidate. 221 However, legal personality comes in many flavors, even for natural persons such as children who lack certain rights and obligations enjoyed by adults. Crucially, no artificial person enjoys all of the same rights and obligations as a natural person. 222 The bestknown class of artificial persons, corporations, have long enjoyed only a limited set of rights and obligations that allows them to sue and be sued, enter contracts, incur debt, own property, and be convicted of crimes. 223 However, they do not receive protection under constitutional provisions, such as the Fourteenth Amendment's Equal Protection Clause, and they cannot bear arms, run for or hold public office, marry, or enjoy other fundamental rights that natural persons do.224 Thus, granting legal personality to Al to allow it to be punished would not require Al to receive the rights afforded to natural persons, or even those afforded to corporations. Al legal personality could consist solely of obligations Even so, any sort of legal personhood for Als would be a dramatic legal change that could prove problematic. 225 As discussed earlier, providing legal personality to Al could result in increased anthropomorphisms. People anthropomorphizing Al expect it to adhere to social norms and have higher expectations regarding Al capabilities. 226 This is problematic where such expectations are inaccurate and the Al is operating in a position of trust. Especially for vulnerable users, such anthropomorphisms could result in "cognitive and psychological damages to manipulability and reduced quality of life." 227 These outcomes may be more likely if Al were held accountable by the state in ways normally reserved for human members of society. Strengthening questionable anthropomorphic tendencies regarding Al could also lead to more violent or destructive behavior directed at Al, such as vandalism or attacks. 228 Further, punishing Al could also affect human well-being in less direct ways, such as by producing anxiety about one's own status within society due to the perception that Als are given a legal status on a par with human beings. Finally, and perhaps most worryingly, conferring legal personality on Al may lead to rights creep, or the tendency for an increasing number of rights to arise over time. 229 Even if Als are given few or no rights initially when they are first granted legal personhood, they may gradually acquire rights as time progresses. Granting legal personhood to Al may thus be an important step down a slippery slope. In a 1933 Supreme Court opinion, for instance,Justice Brandeis warned about rights creep, and argued that granting corporations an excess of rights could allow them to dominate the State.230 Eighty years after that decision, Justice Brandeis' concerns were prescient in light of recent Supreme Court jurisprudence such as Citizens United v. Federal Election Commission and Burwell v. Hobby Lobby Stores, which significantly expanded the rights extended to corporations. 231 Such rights, for corporations and Al, can restrict valuable human activities and freedoms.

#### AI rights creep causes extinction.

Jessica Peng 18, interned at Apple as a software engineer, conducted research in computer vision and programmed the web platform for Alinea Invest, a blockchain startup. At Columbia University, I am a product engineer for Spectator Publishing Company and I serve on the E-Board for Engineering Without Borders. 12-4-2018, "How Human is AI and Should AI Be Granted Rights? – Jessica Peng," https://blogs.cuit.columbia.edu/jp3864/2018/12/04/how-human-is-ai-and-should-ai-be-granted-rights/

Even though we’ve identified robots is non human, if we still did grant robot human rights, what would happen? Hypothetically, robots are given rights with the assumption that humans will always hold hierarchical power and control over these robots. Yet, what happens when the robots begin to reason themselves? If they could have rights, would they take advantage of them? In instance of this was when facebook’s two artificially intelligent programs were put together to negotiate and trade objects in English, but the experiment broke down when the robots “began to chant in a language that they each understood but which appears mostly incomprehensible to humans” (4). In the end, facebook had to shut down the robots because they were speaking out of control of their original creators. The experiment in itself was able to be shut down was because in our modern day AI do not have rights, and were not protected against being terminated, but if AI were to have rights, this would not be the case and the robots could have spun out of control and communicating within themselves without us every being able to decipher it. The facebook AI shows that robots can and will be developed so they no longer need to learn through being fed data, but can create algorithmic knowledge for themselves. At this point it can endanger civilization because robots are inherently not human, so they do not understand human values in life and may act in psychopathic ways. A robot that is originally manufactured and programmed to help the world by alleviating suffering may come its own conclusion that “suffering is caused by humans” and “the world would be a better place without humans.” The robot may then decide that the annihilation of humans would be best for the world in order to end general suffering, and carry out the task without evaluating the morality of its actions from a human standpoint. A scarier situation is through self-recursive improvement, which is the ability of a machine to examine itself, recognize ways n which it could improve its own design and then tweak itself (5). Futurist Kurzweil believes that the machine will become so adept at improving itself that before long we will have entered in an age in which technology evolves at a blisteringly fast pace, and the reality would be so redefined it would not represent the present at all. This phenomenon is called the singularity (5). So, what if robots are able to create knowledge for themselves decide that they don’t want to be used or oppressed by humans? What if they believe they are superior to humans and want more rights to humans? There would be nothing humans could do to stop it. Robots would be able to reason and work in a rate hundreds times faster than humans, and if they already have rights, there’s nothing stopping them from becoming smart enough to realize their inferiority to humans and push for more rights. Some may argue that it is selfish in not wanting robots to be able to reason for themselves and realize their oppression and therefore demand more rights from humans. Perhaps the way we are oppressing these equally intelligent creatures without allowing them to have the same rights is unethical, but in order for us to level this argument, we must acknowledge the fact that the sole purpose for the creation of AI and robots is to act as tool to help mankind and improve human life. Yet, if full human rights were given to AI, this serves to be more harmful for mankind than beneficial. As mentioned before, this is because AI will start improving its own intelligence faster than humans can, and given rights, there’s no stopping what other legal affairs AI can become involved in. Stephen Hawking forewarned that “AI will take off on its own and redesign itself at an ever increasing rate. Humans, limited by slow, biological evolution, couldn’t compete” (12 ). AI will be to do everything faster and better than humans, and in the end, if they are given full human rights, it is possible for them to usurp our legal system and completely renovate our society. This will eventually lead to a phenomenon called the AI takeover where Elon Musk states that AI becomes “an existential threat” to humans and the further progress it is is comparable to “summoning the demon” (13). AI takeover is a hypothetical scenario in which artificial intelligence becomes the dominant form of intelligence on earth, which results in replacing the entire human workforce, takeover by a super-intelligent AI, and finally robot uprising. Humans could either be enslaved by robots or completely wiped from the whole planet (14). So, by giving AI full human rights, we are quite literally handing AI the key to our own doom.

#### Conferring personhood to AI results in rights creep. This would result in societal takeover.

Roman V. Yampolskiy 18, Associate Professor of Computer Engineering and Computer Science, University of Louisville, 10-5-2018, "Could an artificial intelligence be considered a person under the law?," Conversation, https://theconversation.com/could-an-artificial-intelligence-be-considered-a-person-under-the-law-102865

Granting human rights to a computer would degrade human dignity. For instance, when Saudi Arabia granted citizenship to a robot called Sophia, human women, including feminist scholars, objected, noting that the robot was given more rights than many Saudi women have. In certain places, some people might have fewer rights than nonintelligent software and robots. In countries that limit citizens' rights to free speech, free religious practice and expression of sexuality, corporations – potentially including AI-run companies – could have more rights. That would be an enormous indignity. The risk doesn't end there: If AI systems became more intelligent than people, humans could be relegated to an inferior role – as workers hired and fired by AI corporate overlords – or even challenged for social dominance. Artificial intelligence systems could be tasked with law enforcement among human populations – acting as judges, jurors, jailers and even executioners. Warrior robots could similarly be assigned to the military and given power to decide on targets and acceptable collateral damage – even in violation of international humanitarian laws. Most legal systems are not set up to punish robots or otherwise hold them accountable for wrongdoing.

### NEG---Rights Creep DA---Spillover

#### Small AFFs link to big DAs---rights are all or nothing

Briana Hopes 21, Senior Managing Editor, Volume 23, Tulane Journal of Technology and Intellectual Property. J.D. candidate 2021, Tulane University Law School; B.A. 2014, Mass Communication: Public Relations, Louisiana State University, “Rights for Robots? U.S. Courts and Patent Offices Must Consider Recognizing Artificial Intelligence Systems as Patent Inventors,” 23 Tul. J. Tech. & Intell. Prop. 119, Spring 2021, WestLaw

\*128 A. Objections to AI Personhood

Those opposed to granting an AI system legal personhood status have two main objections to recognizing rights to AIs.81 First, “only natural persons should be given the rights of constitutional personhood.”82 Second, artificial intelligence systems lack the critical components of personhood such as souls, consciousness, intentionality, and feelings.83

1. AI Systems Are Not Humans

The most obvious objection to recognizing AI as a legal person is simply that artificial intelligence systems are not human.84 Opponents argue that only humans can have constitutional rights.85 However, one response to that objection would be to develop criteria of personhood for non-human entities that are independent from being human.86

For example, in October 2017, Saudi Arabia became the first country to grant citizenship to a robot.87 The robot, named Sophia, was deemed a Saudi citizen in “an attempt to promote Saudi Arabia as a place to develop artificial intelligence.”88 However, much criticism followed the granting of citizenship to Sophia because the robot was given more rights than many human women in Saudi Arabia.89 Saudi Arabia still only gives limited rights to human women.90 This issue comes into play in many other countries as well, where many citizens also have fewer rights than nonintelligent software and robots.91 Granting legal personhood status to an AI system when other humans have lesser rights than a robot can cause human rights and dignity to suffer.92

\*129 2. AI Systems Lack Critical Elements of Personhood

Another objection for granting AI legal personhood status is that these systems lack critical elements of personhood such as a soul, feelings, consciousness, intentionality, desires, and interests.93 This argument, known as the “missing something” argument, stresses that AI systems could never truly possess these elements and therefore are missing something in order to be recognized as legal persons.94 For example, “quality X is essential for personhood.”95 Quality X cannot be possessed by an AI system.96 Thus, even though a computer could produce behavior that demonstrates quality X, it is only a simulation and the computer is truly lacking quality X.97

V. LEGAL PERSONHOOD STATUS OF NON-HUMANS AND ARTIFICIAL ENTITIES

The first step in granting a non-human entity with intellectual property rights will require the entity to be recognized as a legal person or “artificial person.” If a non-human entity is granted legal personhood, the entity will inherit rights and protections similar to those of a natural person as determined by law and our courts.

### NEG---AI Death Penalty---Innovation DA

#### The death penalty is too blunt an instrument—wastes too much good AI.

Mark A. Lemley 19, Stanford law professor, “Remedies for Robots,” https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/2Lemley%20FINAL.pdf

Should we shut down misbehaving robots? In some cases, the answer is yes. Corporations do it all the time.307 A court has ordered a robot beheaded.308 And essentially any time you change the code you are changing the robot by replacing it with a new and (hopefully) improved one. Whether courts can order a robot shut down over the objections of its owner is a slightly harder question, but the answer is still probably yes. Courts order the killing of pets that repeatedly attack others and can order other types of machines shut down if they are unreasonably dangerous.309 If a robot can be replaced by others with competing algorithms, we probably want to shut it down if it is operating below the standard of care. One way learning algorithms improve is through natural selection,310 and shutting down the bad ones is just a form of that process. But if an AI has developed unique attributes as a result of its own learning, we have the problem of “dual-use” technologies.311 A self-learning AI may behave differently in both good and bad ways, and those differences may be related. The robot death penalty kills off the good as well as the bad, so we want to do it only if we think the harm the robot is causing is sufficiently great and the unique benefit of its approach sufficiently low that the cost of losing the benefit is worth it. For this reason, the use of the robot death penalty should probably be rare.312 Shutting down a robot, especially a selflearning one, means shutting down an avenue of innovation.313 We should do that only if there is strong evidence that the AI does more harm than good and that there isn’t a less intrusive way to solve the problem. Just as courts should be reluctant to tell robots to change how they behave, they should be reluctant to turn the robots off altogether.314 Further, the robot death penalty presents more serious due process issues with respect to the existing stock of robots in the hands of people other than the defendant. Courts generally can’t reach out and take away property in the hands of nonparties without due process, even if those products cause problems and even if the court can order the company to stop selling new copies of the product. But the malleability of software presents some grey areas here. It’s okay to order a defendant to push out changes to the product, though it’s an easier case if the recipient has the choice of whether to accept those changes.315 The company can probably stop supporting the product remotely. But a software “upgrade” that is really just an effort to “brick” an existing product seems a reach too far.316 Finally, there is the possibility that the law will recognize robots as sentient entities with their own rights.317 That isn’t as farfetched as it sounds. Corporations aren’t people either, but they get legal rights (in some instances more rights than people).318 Animals also have some rights, though fewer than humans or corporations.319 And some countries have already recognized rights for robots.320 Charles Stross has called corporations the first AIs.321 Like AIs, corporations are created by people, designed to serve ends dictated by people, but over time come to serve their own purposes.322 And some have operationalized that connection, pointing out that “anyone can confer legal personhood on an autonomous computer algorithm by putting it in control of a limited liability company.”323 It’s not impossible that in the future we will extend at least some legal rights to robots as well, particularly unique robots with learned behavior. And one of those rights may well be the right not to be shut down without due process.324

### NEG---AI Death Penalty---Abolition K

#### Re-entrenches the hell out of the carceral state

Dafni Lima 18, Ph.D. Candidate in Criminal Law at the Aristotle University of Thessaloniki (Greece) and Fulbright Foundation Doctoral Dissertation Visiting Research Student at the Harvard University Initiative on Law and Philosophy (United States), “Could AI Agents Be Held Criminally Liable: Artificial Intelligence and the Challenges for Criminal Law,” 69 S. C. L. REV. 677, HeinOnline

Artificial intelligence and its development in the next years will undoubtedly pose great challenges for criminal law, which go beyond the question of criminal liability. With new technology and a far more widespread use of Al agents than is currently conceivable, new opportunities for crime will arise. For instance, if autonomous vehicles become commonplace on our streets, we will sooner or later need to think about new types of crimes that could be committed by hackers and how to prevent the commission of terrorism offenses that could be perpetrated by using the extended capabilities of smart cars."' Furthermore, new legal rules will have to be devised to regulate safe driving and relevant crimes;5 2 the relationship between an autonomous vehicle, its driver and passengers, and third parties (other drivers, passengers, or pedestrians); insurance and tort claims; 53 and privacy with regard to autonomous vehicles. 54 Finally, law enforcement will have to be equipped with new powers and duties in order to address the new situation; for example, we will need to think about under which circumstances a law enforcement officer might be allowed to pull over an autonomous vehicle, and how.55 However, the very first wave of vibrations that will be felt in criminal law will undoubtedly include issues that revolve around criminal liability. In this context, legal professionals will be invited to revisit, enrich, and reshape fundamental concepts, as discussed above. Lawmakers and common law judges will have to come up with models that adequately address allocation and imposition of criminal liability, practitioners and adjudicators will have to understand how to best apply them in practice, and research by legal scholars will have to shift focus in order to inform this debate. The results might be as groundbreaking as Al technology itself; these reforms might even one day lead us to reconsider the very foundations of criminal liability, wrongful acts, and blame. There exist among legal scholars opinions already in favor of imposition of criminal liability on Al agents. 56 Yet similar suggestions seem to rely, at least with regard to how things currently stand, on a circular argument that begs the question. They appear to take for granted the axiom that Al agents can fulfill the requirements for mens rea, even though mens rea as a concept was clearly conceived with human agents in mind including criminal liability of legal persons, since these are no more than collective enterprises made up of human agents, in which case the criminal liability claim rests on the law's inability to "pierce the veil" and ascribe liability to the human behind the corporate fiction, as explained above. Yet Al is something completely different. It is certainly no fiction anymore but independent and potentially able to become fully autonomous. If it is to be handled with legal tools that were devised for humans, we must establish either that it is sufficiently human-like, which does not yet seem to be the case, or that the tools at hand are also suitable for non-humans, which especially in the case of mens rea and blame is, at the very least, a matter of dispute, as the whole concept reflects our collective experience of what it means to be human. So, taking for granted that mens rea requirements could aptly be fulfilled by non-human (or, rather, non-human-like) intelligent agents necessarily presupposes the perception of historically and empirically informed concepts such as choice, voluntariness, knowledge, and intent as simply technical terms without any inextricable grounding in the human experience. This is a bold and perhaps forward-looking approach, but one that cannot be taken as selfevident without first examining those perspectives that would work against it-some of which this Paper has attempted to articulate. If current criminal law concepts were devised for those sharing in the human experience of the world and its ethical dilemmas, and if the way Al agents experience the world is not (yet) at that point, then what is there left to do with criminal liability? It is important to note that even though artificial intelligence is still not at the same level of capacity for intellectual and emotional investment as humans, it may very well one day be-as countless works of science fiction have been trying to warn us. If and when that day comes, the situation might be very different with regard to criminal law and its application to Al agents. On that day, we may be prepared to directly ascribe criminal liability to Al actors and regard them as equally capable of making ethically informed choices and committing wrongdoing we might even invite each other to share in the legislative and judicial process of responding to crime. But until then, criminal law might not be the appropriate vessel for holding Al agents accountable. Although criminal law carries with it a connotation of moral condemnation that is very much socially desired in situations of harm to others, especially in serious crimes such as bodily injury or killing, a softer version of the State's powers to prohibit and punish behavior might be more appropriate-for example, administrative sanctions or a whole new field of law in-between. The desire to call a sanction "criminal" and as such satisfy the need to respond to an undesirable conduct by the gravity and resolution that criminal law means carry with them, bears a hidden yet crucial danger. Instead of strengthening our response to harmful and wrongful behavior, it might just weaken our perception of what criminal law is and what it has the power to do, and thus qualify it with a degree of levity that will in turn allow us to underestimate its potential to inflict harm on humans and sap our vigilance with regard to its advances.

# Generic NEG

## Clog DA

### Link

#### Expanded conceptions of personhood---especially for animals---clog the courts.

Will Coggin 13, Senior Research Analyst at the Boston Globe, “Zealots would clog courtrooms,” Boston Globe, 7/21/13, <https://www.bostonglobe.com/opinion/letters/2013/07/20/zealots-would-only-clog-courtrooms/2S6Aypn6lesLGL7qnLNjqL/story.html>

THE IDEA of legal “personhood” for animals may have hearts racing at animal liberation groups like PETA and the Humane Society of the United States, but it spells heartache for the 99 percent of the population that isn’t vegan (“See you in court,” Ideas, July 14). Switzerland has experimented with a government-sanctioned “animal lawyer” with comical results, including charges being brought against a fisherman for taking too long to reel in his catch. (Fortunately, he was acquitted.) A system here giving power to self-anointed animal lawyers would result in vegetarians with law degrees representing chicken clients and suing farmers for “slavery.” Animal rights zealots can make their case with free speech. But the last thing we need is another way for lawyers to clog up the courtroom.

### Link---AI

#### Legal uncertainty over the standard causes a flood of litigation

Andrea Bertolini 21, Assistant Professor of Private Law, Scuola Superiore Sant’Anna, et al. Francesca Episcopo, Postdoctoral Fellow in Private Law, Università di Pis “The Expert Group’s Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: a critical assessment,” Cambridge Core, European Journal of Risk Regulation, Volume 12, Issue 3: Special Issue on Biotechnology in International Economic Law and Human Right , September 2021, pp644 – 659, https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/expert-groups-report-on-liability-for-artificial-intelligence-and-other-emerging-digital-technologies-a-critical-assessment/45FD6BB0E113E7C4A9B05128BC710589

III. The distinction between high- and low-risk applications as a potential source of legal uncertainty

As anticipated, the Report suggests that when AI&ET “are operated in non-private environments and may typically cause significant harm”, due to the “interplay of [its] potential frequency and the severity”, a strict liability regime should apply. Significant harms would likely be caused by “emerging digital technologies which move in public spaces, such as vehicles, drones, or the like”, and “objects of a certain minimum weight, moved at a certain minimum speed … such as AI-driven delivery or cleaning robots, at least if they are operated in areas where others may be exposed to risk”. On the contrary, “[s]mart home appliances will typically not be proper candidates for strict liability”, and the same is said for “merely stationary robots (eg surgical or industrial robots) even if AI-driven, which are exclusively operated in a confined environment, with a narrow range of people exposed to risk, who are also protected by a different – including contractual – regime …”.

This proposal is highly questionable.

First, the distinction between high- and low-risk applications – despite echoing the liability regime envisaged by some MSs for dangerous things and activities– does not specify when the harm should qualify as “severe” or “potentially frequent”. Thus, it results in a circular definition, void of any selective meaning.

On the one hand, the distinction does not offer any guidance to policymakers, who need not to predetermine the criteria according to which they will decide whether to regulate a specific application, use or domain. Risk – as defined by the EG – ought not to be the sole criterion justifying intervention. Indeed, reform might be argued on other grounds, such as social desirability, the need to ensure access to justice in case of very small claims that would otherwise not be compensated, causing externalities and market failures of various kinds and the need to provide positive incentives towards the adoption of a specific solution. Said policy arguments could also vary from one case to another, and uniformity and consistency of criteria are not desirable per se. Quite to the contrary, this could substantially limit the spectrum of considerations to be taken into account with respect to different emerging technologies when deciding whether to intervene.

On the other hand, were the dichotomy to be adopted and used – absent a clear enumeration of which applications fall into what category (thence being classified as high- or low-risk, ultimately causing the definition itself to become superfluous) – it would give rise to unacceptable ex ante uncertainty about the applicable standard of liability (strict or fault-based) in each case. Somewhat recalling the Learned Hand formula, it would not allow operators of the specific technology to determine beforehand what standard of liability they would then be subject to. This would open the floodgate to litigation – most likely both at the national and the European level – potentially causing progressive divergence among MSs. In particular, even if only low-risk applications were to be identified a contrario – while high-risk ones were clearly and strictly indicated– considering the pervasiveness of AI and the broad notion of “AI-system” considered, which applications ought to fall under this special regime of liability would most likely be uncertain. If a piece of software used in medical diagnosis – not classified as high-risk – were to be considered a low-risk application (thence still falling under the special liability regime for advanced technologies), this would only be ascertained before a judge once harm had already occurred. The medical doctor would not know beforehand what standard of liability would apply to their case, and, from a normative perspective, this would heavily interfere with national tort law systems. All of this is while – on the face of a careful assessment of the applicable legal framework – many prospective low-risk applications would simply not need to be regulated.

### Link---Animals

#### The link is massive

Richard L. Cupp 21, John W. Wade Professor of Law at Caruso School of Law, 2021, Considering the Private Animal and Damages, Washington University Law Review, Vol. 98, Issue 4, p. 1313-1342

C. A Horse Is a Horse, of Course, of Course--but It Is Not a Table or a Chair

Adopting animal legal personhood as a mechanism to provide for ongoing medical expenses as a damages remedy in the Vercher case would represent dramatic overkill and would create harmful societal consequences. It is also unnecessary for the protection of neglected animals. Some aspects of the chaos and harm that would be caused by such a judicial holding may be unforeseeable prior to such a leap in the dark. Some of the most significant foreseeable problems associated with making animals tort plaintiffs are addressed below.

1. Inviting Potentially Massive, Unmanageable, and Societally Harmful Litigation

If courts adopted the ALDF's theory in Vercher, a massive pool of other animals as potential plaintiffs would be created. If lawyers then asserted that even some of those animals were neglected or abused, animal rights activists could flood the courts with a huge volume of lawsuits and assert to represent the new legal persons. Further, if animal legal personhood were accepted in this context, litigation would doubtlessly spread quickly to lawsuits challenging biomedical research on such "persons," any commercial use of such "persons," and even pet ownership of such "persons."

Throughout the United States, varying degrees of legal protection against abuse or neglect apply to virtually all mammals (and some non-mammals, such as birds) that are under the control of humans. Not only horses, but dogs, cats, cows, pigs, sheep, mice, rats, and a large range of other animals may thus be viewed as "victims" of neglect or abuse. Viewing them as such is a good thing under Oregon's present approach to animal victimhood; for example, it can facilitate harsher sentencing for the mistreatment of multiple animals than the mistreatment of one animal, regardless of whether the animal is a horse or some other kind of protected animal. However, if courts allow this helpful evolution to bootstrap legal personhood for all animals protected from abuse, they would create a pool of hundreds of millions or perhaps billions of potential new tort law plaintiffs eligible to sue if lawyers allege they were neglected or abused.

The American Society for Prevention of Cruelty to Animals asserts that 250,000 animals are victims of hoarding alone each year in the United States. 71But clearly, the scope of potential new plaintiffs is much broader. In 2012, the American Veterinary Medical Association estimated that approximately 149 million pet dogs, cats, and horses live in the United States. 72There are approximately 95 million cattle 73and 73 million hogs and pigs in the United States. 74These five species alone, all of which are the subject of legal protections against abuse or neglect, exist in the United States in numbers almost equivalent to its human population. 75The ALDF estimates that 9 billion animals are raised and used for food in the United States each year. 76Opening up the courts to this vast number of potential plaintiffs would invite extreme societal disruption.

#### Billions of new plaintiffs would flood the courts

Richard L. Cupp 7, John W. Wade Professor of Law, Pepperdine University School of Law “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status,” Southern Methodist University, 2007, 60 SMU L. Rev. 3 (2007), https://www.animallaw.info/article/dubious-grail-seeking-tort-law-expansion-and-limited-personhood-stepping-stones-toward

B. Adding Billions of Potential New Plaintiffs and Billions of Dollars in Litigation Costs to the United States Tort System

In considering the specifics of Professor Favre's proposed new tort, the potential for gargantuan expansion of the tort system stands out among numerous serious concerns. People for the Ethical Treatment of Animals (“PETA”) and other animal rights organizations estimate that 25 to 28 billion animals per year are killed for human use in the United States. Another estimated 360 million animals are kept as pets in the United \*43 States, according to a pet industry group. According to animal rights organizations, another 20 million animals are being used for scientific research.

A New Tort makes clear that each of these billions of animals would be eligible for status as plaintiffs if its proposed new tort were accepted. Thus, if the cause of action were adopted, the potential number of tort plaintiffs in the United States would instantly grow from our current 300 million human citizens (in addition to our corporations, foreign plaintiffs, etc.) to well over 25 billion. The significance of this explosion in potential plaintiffs is difficult to understate.

One of the more common sound reasons for courts to reject proposed new tort causes of action or expansions of existing causes of action are concerns for opening up the floodgates of litigation. As a particularly relevant example, in 2001 a New Jersey appellate court articulated this concern in rejecting noneconomic damages for pet owners based on the wrongful death of a pet. In Harabes v. Barkery, Inc., the court noted, “We are particularly concerned that were such a claim to go forward, the law would proceed along a course that had no just stopping point.” In 2003, an Ohio appellate court agreed with Harabes in Oberschlake v. Veterinary Associates Animal Hospital. In Oberschlake, the owners of a miniature poodle named “Poopi” sought to name the dog as a plaintiff in a lawsuit based on a veterinary hospital's alleged negligence, and also sought to bring a claim in their own names for the emotional distress they suffered from harm to Poopi. The court first declined to allow Poopi standing as a plaintiff because, although dogs can suffer emotional distress, “the evidentiary problems with such issues are obvious.” The court then went on to dismiss Poopi's owners' emotional distress claims, stating among other reasons that Harabes was correct to be concerned about potentially opening a floodgate of litigation were such claims to be allowed.

Given the huge numbers involved, the enormous expansion of potential tort plaintiffs would be exceptionally troubling even if animals were not particularly litigious. But there is every reason to believe that they would be quite litigious--or rather, that those seeking to represent their “interests” would be quite litigious.

A New Tort argues that courts should appoint human representatives to decide when to sue on behalf of an animal and to represent the animal's interests in the lawsuit. It declines to address the issue in detail, dismissing it as “a procedural matter” that should be the subject of further scholarly consideration but that should not be a bar to creating the proposed tort. However, predicting who will be first in line seeking to initiate lawsuits on behalf of these billions of animals is not difficult. Large numbers of the volunteers will be animal rights activists passionately committed to utilizing the legal system in any manner possible to build stepping stones toward animal personhood and the elimination or erosion of property status. As noted above, interest in using the courts and legislatures to further an animal rights agenda has experienced dramatic growth in recent years. Many of the lawyers and law students participating in the rapid expansion of animal law, as well as many non-lawyer animal rights activists, will without doubt view representing an animal or class of animals in a lawsuit as perhaps the most powerful vehicle yet devised for ultimately achieving the animal rights agenda.

#### Vague standards mean the courts make a “judgement call”---there’s no brightline

Richard L. Cupp 7, John W. Wade Professor of Law, Pepperdine University School of Law “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status,” Southern Methodist University, 2007, 60 SMU L. Rev. 3 (2007), https://www.animallaw.info/article/dubious-grail-seeking-tort-law-expansion-and-limited-personhood-stepping-stones-toward

2. Causation (and Intent)

The proposed element that the animal must establish that the fundamental interest has been interfered with or harmed by the actions or inactions of the defendant appears intended as a general causation element. Confusingly, however, A New Tort labels its discussion of this proposed element as “Intention of the Defendant” rather than in referring in any way to causation. The article briefly acknowledges that establishing causation is “axiomatic” in tort lawsuits but then quickly shifts its discussion to the question of intent.

The level of requisite intent is an issue in all tort lawsuits but it is not addressed in A New Tort's list of proposed elements. In its section addressing the causation element, the article reveals Favre's view that tort's intent standard should not consider whether the human defendant intended the specific consequence of her acts. Rather, the standard should be met if the defendant intended the act at issue, regardless of intent regarding consequences.

Analyzing the intent element of an intentional tort in this manner is supported by precedent. However, A New Tort seeks to modify the intent element further in a manner that would be exceptionally prejudicial to defendants. It proposes, in effect, that the burden of proof be shifted to the animal's owner to presume that the owner understood the fundamental interests of the animal's species. How the owner can fairly be presumed to know an animals' fundamental interests when determining such interests, as A New Tort acknowledges, “is not a bright line test” and will often require courts to make a “judgment call” is not addressed. Indeed, such an onerous presumption in the face of such a vague and ambiguous standard seems spectacularly unfair. Further, it seems contrary to A New Tort's own assertion in the article's section addressing the fundamental interest element that “[o]bviously the test cannot be whether humans know everything about a species, as we do not yet even know everything about ourselves.”

#### Ridiculous, vague standards create infinite floodgates---activists don’t have to win to cause damage

Richard L. Cupp 7, John W. Wade Professor of Law, Pepperdine University School of Law “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status,” Southern Methodist University, 2007, 60 SMU L. Rev. 3 (2007), https://www.animallaw.info/article/dubious-grail-seeking-tort-law-expansion-and-limited-personhood-stepping-stones-toward

Interest of Fundamental Importance to the Animal

A New Tort's proposed requirement that the interest at issue must be of fundamental importance to the animal seems designed to ensure that no trivial matters, but rather only matters of true significance, are successfully litigated. The word “successfully” in the previous sentence is key, as animal rights activists would be able to claim that any number of interests are fundamental to a particular animal and would have an opportunity to impose costly litigation on animal owners to address such issues in the courts. As noted in the discussion of a potential flood of lawsuits against research laboratories and the animal food industry, the ultimate success of such lawsuits may not be necessary to make such uses of animals much more expensive and difficult.

A New Tort asserts that there “is not a bright line test” regarding animals' fundamental interests, and that this “obviously will force the court to make a judgment call.” This constitutes an invitation to wide-scale litigation on the issue. In some areas, whether something is fundamental to animals is obvious, such as freedom from intentional torture. In these areas, existing laws, such as animal cruelty laws and the Animal Welfare Act, already provide protection (whether such statutes should be strengthened or broadened are important but separate questions beyond the scope of this article). Further, for a much larger class of issues, whether something is fundamental to an animal would have to be fought out in costly litigation. As one of countless potential examples, A New Tort contends that being able to reproduce “is fundamental to all living beings.” Presumably this means that every time pet owners decide to have their pets spayed or neutered, they may have to fight lawsuits over whether this infringement on their animal's fundamental interest is justified. They might also be subject to lawsuits when they prevent their pets from going over the fence to mate with a neighboring pet. Even if such lawsuits are not ultimately successful, allowing them into the courts is societally costly and bad public policy to say the least.

This raises another problem: beyond the obvious, how are humans to decide what are fundamental interests to other species? One might argue that the very endeavor is presumptuous. Further, one might suspect that the vague standard proposed by A New Tort would allow activists to project onto animals the activists' own ideas on what is best for the animals. Steven Wise's lawsuit addressed above in which he sought to name Kama, a Navy research dolphin, as a plaintiff may be illustrative. Wise argued that Kama, the named plaintiff, was harmed by the Navy's activities with it. However, the Navy retorted that Kama mingled freely with wild dolphins on a regular basis, that Kama could easily swim away from his work with the Navy but chose not to do so, and that Kama was indeed happy with his work for the Navy. Humans are not capable of knowing Kama's mind and heart sufficiently to ascertain whether freedom from his labors with the Navy was fundamental to him. Favre argues that “if we cannot say what is fundamental to an animal, then the doors of the courtroom will remain closed until such information is available.” However, he does not indicate how we would be able to close those doors, and doing so seems unlikely. Activists may find the doors to actually winning judgments in such cases closed, but the doors to causing enormous aggregate litigation expenses and burden on the courts in battles over whether we can know whether an interest is fundamental would be wide open.

#### Vague standards lead to confusing case law, costly litigation, and activists initiating as many cases as possible

Richard L. Cupp 7, John W. Wade Professor of Law, Pepperdine University School of Law “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status,” Southern Methodist University, 2007, 60 SMU L. Rev. 3 (2007), https://www.animallaw.info/article/dubious-grail-seeking-tort-law-expansion-and-limited-personhood-stepping-stones-toward

The odd nature of this element highlights the tort's general vagueness and ambiguity and the significant stretching of accepted tort principles it would represent. Courts tend to disfavor superlatives in tort elements because superlatives tend to signal doctrinal fuzziness and lack of clarity regarding when tort elements are established. For example, the concept \*50 of “gross negligence” has largely wilted on the common law vine. Most courts have rejected the standard, reasoning that negligence is negligence, and that seeking to make distinctions between gross and “regular” negligence is confusing and unproductive.

Even with the proposed limitation that the animal's interest must substantially outweigh the owner's interest, this element will, like the “fundamental interest” element, invite excessive litigation, lack of certainty regarding the law, and inconsistent decisions by courts. When are an animal's interests “substantially” stronger than the owner's interests rather than simply stronger, clearly stronger, or stronger by a little bit? Although some cases would be obvious, such as when an owner wishes to torture his animal to satisfy the owner's sadism, in most situations the balancing would not be so apparent, and costly case-by-case litigation would be needed to make findings. Different courts would doubtlessly weigh the interests differently, inviting inconsistent and confusing case law.

Animal rights activists' potential attraction to the legal messiness this tort would create, which would in turn further magnify the messiness, bears repeating. To the extent that animal lawyers perceive themselves as working toward vitally important public policy concerns, the profit factor that heavily influences most litigation is diminished on the plaintiff's side. Animal rights activists' passion likely makes them willing to accept no compensation or less compensation than they could otherwise earn if they believe they are potentially making a difference for their cause. If the very existence of expansive litigation, regardless of whether most of it ultimately does not result in a plaintiff's judgment, hurts those performing scientific research on animals, those raising animals for food, and so forth, many animal rights activists would feel that they are furthering their cause by initiating as many of these tort actions as possible.

### Link---Animals---Food Industry

#### Activists flood the courts against the meat and dairy industries

Richard L. Cupp 7, John W. Wade Professor of Law, Pepperdine University School of Law “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status,” Southern Methodist University, 2007, 60 SMU L. Rev. 3 (2007), https://www.animallaw.info/article/dubious-grail-seeking-tort-law-expansion-and-limited-personhood-stepping-stones-toward

Opening up tort lawsuits by animals against the meat and dairy industries would perhaps cause even more societal upheaval, at least from an economic perspective. A New Tort proposes to somehow bar lawsuits based on the permissibility of killing animals for food from its animal tort cause of action, yet allow lawsuits based on the quality of life afforded to animals used for food. In practice, the article's proposed distinction might make little difference, as those passionately opposed to eating animals or to the use of other animal products would have countless opportunities to initiate costly lawsuits even without reaching the question of whether animals may in any circumstances be killed. As noted above, animal rights activists estimate that 25 to 28 billion animals are killed for food or other human use in the United States every year. Almost any approach to treatment of livestock or other animals kept for economic uses could be at least argued to be inappropriate. As with scientific research on animals, animal rights activists would not even need to be successful in winning judgments to create enormous havoc. Given the scale of animal use for food or other economic benefit in our society, simply bringing lawsuits addressing even a small percentage of the billions of potential animal plaintiffs could lead to overwhelmed courts and nationwide economic blight.

### Link---Animals---Damages

#### Damages make it worse!

Richard L. Cupp 7, John W. Wade Professor of Law, Pepperdine University School of Law “A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status,” Southern Methodist University, 2007, 60 SMU L. Rev. 3 (2007), https://www.animallaw.info/article/dubious-grail-seeking-tort-law-expansion-and-limited-personhood-stepping-stones-toward

As noted above, one of the most societally destructive aspects of A New Tort's proposed action is its open invitation to an enormous expansion of litigation, regardless of whether much of the litigation would ultimately prove successful. Given the billions of potential new plaintiffs and the passion of animal rights attorneys willing to damper lawyers' usual profit motive because of their idealism, litigation costs to animal owners and burden on the courts alone could be overwhelming. However, A New Tort further compounds this problem by asserting that when the lawsuits are successful, the animals should be awarded money damages in addition to other remedies. Further, it suggests a compensatory damages standard inconsistent with courts' accepted approach to such damages.

A New Tort includes pain and suffering damages in its list of appropriate categories of damages animals should be able to recover. The article suggests that the money could be placed into trusts for the animals' benefit created by the courts. Obviously this could generate a huge amount of money overall if even only a small percentage of all of the lawsuits that might be brought for billions of animals were successful.

The enormous draining of society's financial resources would not be the only cost of allowing animal plaintiffs to win pain and suffering damages awards. There is also a problem regarding the limits of humans' capacity to understand animals and thus make appropriate awards for their pain and suffering. Awarding money to compensate pain and suffering requires creative and abstract thinking on the parts of jurors and courts even in cases involving humans, and such awards have recently been a point of significant focus in tort law scholarship--much of it critical of the notion that dollars can compensate pain. As difficult as it is for jurors and courts to determine how much money would be needed to compensate the pain and suffering involved in a particular case involving humans, trying to determine a dollar amount appropriate to compensate pain and suffering for another species borders on absurdity--particularly when money is meaningless to all nonhuman species.

A New Tort seeks to address this challenge by suggesting that compensatory damages in these lawsuits should perhaps be set at the amount of money “sufficient to assure the conditions do not reoccur.” A fly in the ointment in this proposed approach to compensatory damages is that it has nothing to do with compensatory damages. Compensatory damages narrowly focus on the plaintiff--specifically, making the plaintiff whole from the harm suffered in the case before the court. Compensating the plaintiff may have a deterrent effect, but compensatory damages are not structured toward that end. They do not take into account the wealth of the defendant, how likely the defendant is to commit the wrong again, etc. They only focus on remedying the plaintiff's loss.

Punitive damages, rather than compensatory damages, allow a focus on defendants and on deterring future misconduct. They are not designed to compensate plaintiffs, but rather to deter defendants and potential future defendants from committing further bad acts, and to provide punishment. Many people would be dubious about further expanding already controversial punitive damages by opening them up to billions of potential new plaintiffs, and it is important to identify when they are in effect being expanded.

Although protecting animals and caring for their welfare is necessary in a moral society, awarding money to animals simply seems odd. Perhaps, to some, an attraction of awarding such damages is that they could provide income to animal rights' lawyers suing on behalf of animals. Most tort lawsuits are filed on a contingency fee basis, with the plaintiff's lawyer receiving a percentage of the recovery. If the dominant contingency fee approach were applied to animal tort lawsuits, activist lawyers who might not receive any compensation for winning an injunction could perhaps earn their living--with billions of potential plaintiffs, possibly even a very comfortable living--through winning damages awards for their animal clients. This financial incentive of course would attract yet more activist lawyers (and, if the money is good enough, even nonactivist lawyers) toward filing animal plaintiff lawsuits. Because the cause is important to many lawyers interested in animal rights, even modest judgments in lawsuits involving animal plaintiffs might fuel rapid expansion of such cases. Due to the potential quantity of lawsuits and huge potential litigation costs associated with animal-plaintiff lawsuits, allowing such lawsuits could be societally disastrous even if damages were not permitted as a remedy. Adding damages as a remedy makes the potential harm yet worse.

### Link---Nature

#### River rights create costly litigation which limits case success

Julia Talbot-Jones 18, Victoria University of Wellington, “Flowing from fiction to fact: the challenges of implementing legal rights for

Rivers”, International Water Law Project, 5-7-2018, https://www.internationalwaterlaw.org/blog/2018/05/07/flowing-from-fiction-to-fact-the-challenges-of-implementing-legal-rights-for-rivers/

Unintended consequences of granting legal rights to rivers

For policy makers or judicial experts interested in granting rights to rivers, the elements of the broader Te Awa Tupua framework are important to note, particularly because, in the absence of an integrated framework, granting a river legal rights could have unintended consequences for society as a whole.

For example, recognizing a river as a person will require the political system to find ways and means to deliver and uphold a river’s new legal rights, sometimes at the direction of the courts. Because judges do not typically have the discretion to make decisions based on the potential consequences of their decrees, this means that upholding the rights of the river may impose unexpected costs on other sections or scales of society.

Further, although granting legal rights to rivers has the potential to benefit some industries and professionals, who stand to gain by providing court-mandated goods and services, it also carries the risk of forcing the court to become politicized. This could compromise moral authority and public confidence in the system. The series of events following the Uttarakhand decision provides evidence of how this can, and has, occurred (BBC News Service, 2017).

Granting legal rights to rivers also places the responsibility of looking after, and representing, the environmental good or resource in the appointed guardians, rather than elected officials. Without broader institutional and financial support, this means that only wealthy or well-endowed representatives will be able to challenge decisions and enter costly litigation, should a river wish to sue or find itself the subject of an individual or class action.

Given the financial burden of engaging in judicial process, perhaps it is not surprising that Ecuador – a country that granted all of nature legal rights in 2008 (Constitution of the Republic of Ecuador, 2008; Revkin, 2008) – has had only three cases of the rights of nature being successfully brought to court by civil society (Kauffman & Martin, 2017). In the first case, two American residents who live parttime in Ecuador brought a case against the provincial government of Loja on behalf of the Vilcabamba River. The plaintiffs owned property downstream of a road that was to be widened and that runs past the river. The couple argued on behalf of nature that the new construction was adding debris to the river and thus increasing the likelihood of floods that affected the riverside populations that use the river’s resources (Daly, 2012).

Admittedly, in the case of the rivers discussed here, nominated guardians have been appointed to speak on behalf of the rivers, and in the case of the Whanganui River, a NZ$ 30 million contestable fund has been created for the purposes of improving Te Awa Tupua’s health and well-being, as well as litigation purposes. However, in the case of the Ganges and Yamuna Rivers, no financial support has been provided, which limits the legitimacy and power of their legal rights, and that of the guardians who represent them.

## Court Legitimacy / Rule of Law DA

### Link

#### The use of legal fictions to resolve conceptual problems in AI undermines broader faith in the legal system---particularly for AI

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

We took a careful look at how a criminal law regime that punished AI might be constructed and defended. In so doing, we showed that it is all too easy to underestimate the ability of criminal law theory to accommodate substantial reforms. We explored the ways in which \*384 criminal law can--and, where corporations are involved, already does--appeal to elaborate legal fictions to provide a basis within the defensible boundaries of criminal law theory for punishing some artificial entities. We showed what a system of punishment for AI might look like and showed how some hasty arguments against it can be answered.

The use of legal fictions to solve difficult conceptual questions or practical problems--such as how to conceptualize or prove particular sorts of mental elements for AI or misbehavior by its developers--gives criminal law theory impressive plasticity. Legal fictions help turn the criminal law into a pragmatic tool for solving social problems. Nonetheless, legal fictions must be used with caution, as their overuse risks eroding public trust and weakening the rule of law. Moreover, allowing legal fictions to proliferate unchecked can lead to widespread injustice either through punishing the innocent or by punishing more harshly than one's culpability calls for. While some legal fictions can be justified,251 they must be used judiciously. For this reason, there is and should be an onerous burden to meet before we can be confident that a particular legal fiction--such as legal personality for AI or the invention of culpable mental states for AI--is adopted. Embracing legal fiction without meeting this justificatory burden would be tantamount to believing in science fiction.

#### Legal fictions undermine the rule of law

Arthur Bryant 13, Executive Director of *Public Justice*, “The Supreme Court’s Majority: Undermining The Rule Of Law With Legal Fictions”, Public Justice, 6-26-13, https://www.publicjustice.net/the-supreme-courts-majority-undermining-the-rule-of-law-with-legal-fictions/

The U.S. Supreme Court is supposed to stand for — and symbolize — the rule of law in America. This term, however, the Court’s majority has undermined the rule of law. And it has repeatedly used legal fictions to do so.

Ironically, the term ended with Justice Scalia dissenting in United States v. Windsor, which declared the Defense of Marriage Act unconstitutional, and proclaiming: “This case … is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today’s opinion aggrandizes the latter, with the predictable consequence of diminishing the former.” His words aptly describe the effects of the decisions he and the Court’s usual five-member majority issued throughout the past year.

Black’s Law Dictionary defines “legal fiction” as, “Believing or assuming something not true is true.” It says legal fictions are, “Used in judicial reasoning for avoiding issues where a new situation comes up against the law, changing how the law is applied, but not changing the text of the law.” That’s how the Court’s majority has used them.

On Monday, for example, in Vance v. Ball State and University of Texas Southwestern Medical Center v. Nassar, two 5 to 4 decisions, the majority made it harder for employees to prove they were discriminated against on the basis of race, color, religion, sex and other characteristics in violation of Title VII of the Civil Rights Act of 1964. How? In Vance, the majority said that, contrary to the definition the federal government has used for a decade, someone who is “authorized to direct the employee’s daily work activities” is not a “supervisor.” (So companies aren’t liable when people like that discriminate.) In Nassar, the majority said that there was no “retaliation” on the basis of race, gender, or another prohibited characteristic if that characteristic was just a “motivating factor” for the employer’s action and not the “but for” — i.e., sole or determining — reason for it. Two legal fictions.

Similarly, in Mutual Pharmaceutical Co. v. Bartlett, the majority held that a horrifically injured woman could not sue a generic drug manufacturer for defectively designing the drug that caused her injuries — which was far more likely to cause them than other similar drugs — because it was “impossible” for the manufacturer to comply with both federal law and the New Hampshire law on which the woman’s suit was based. As a result, the state law was preempted and void. The federal law prohibits generic drug manufacturers from changing their label. The New Hampshire law requires manufacturers of “unreasonably dangerous” products to compensate the people they injure. Impossible to comply with both? Please. Legal fiction.

On Tuesday, in Shelby County v. Holder, the Court, as Forbes magazine described it, “cut out the heart and soul of the Voting Rights of 1965.” Why? Because in 2006, when Congress reauthorized the Voting Rights Act, it did not recognize (as the majority does) that discrimination is no longer the problem it was in the state and local governments required to get prior approval from the U.S. Justice Department for changes in their voting procedures that could disenfranchise minorities. If it had, it would have realized (as the majority does) that requiring preclearance for those governments was unconstitutional without newer data — even though, for example, there were more Justice Department objections to proposed voting law changes by these governments between 1982 and 2004 (yes, including Reagan and Bush I and II years) than there were between 1965 and 1982. Again, legal fiction.

And that’s just the decisions this week. Last week, in American Express Co. v. Italian Colors Restaurant, the majority held that corporations could use mandatory arbitration clauses to force their customers out of court and into individual arbitration (and ban class actions in both), even if that meant the companies could steal billions (yes, billions) from their customers and walk away with the money. Why? Two legal fictions: The customers, the majority said, agreed to these terms. And the ability to pursue rights in arbitration is what matters, not the ability to enforce them.

The same “agreement” legal fiction was the basis for U.S. Airways v. McCutchen, where the Court held that ERISA insurance plans had to be enforced as written by the insurer — even if they left injured employees worse off for obtaining compensation from the people who injured them or their own uninsured motorist coverage than if they got no compensation at all. The employees agreed to this, the Court declared, even though the employees never saw the ERISA plan. (In fact, they could not even get it after they sued, until the Solicitor General intervened.) They just went to work and got a “summary plan description” (which did not accurately describe the plan).

I could go on, but why belabor the point? The majority is undermining the rule of law, rolling back and gutting extraordinarily important federal and state laws — substantive and procedural — that have protected people from government and corporate abuses for decades. In a way, the majority seems dedicated to refighting the battles of the sixties. Just look at what it is going after: Title VII of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and, among other things, in a barrage of decisions I have only touched on, class actions — which the 1966 amendments to the Federal Rules of Civil Procedure launched in their modern form.

It is doing so, moreover, not by being straight, but, rather through transparent legal fictions — assertions that almost everyone knows are not true. (Like the majority’s assertions in Citizen United that corporations are the same as people for First Amendment election financing purposes; “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” in politics; and that the “the appearance of influence or access” by corporations “will not cause the electorate to lose faith in our democracy.”)

The majority’s resort to such fictions decreases respect for the Court and further undermines the rule of law.

### Link---AI

#### Punishing AI harms the rule of law and public trust in criminal law

Ryan Abbott & Alex Sarch 19, Abbott, Professor of Law and Health Sciences, University of Surrey School of Law and Adjunct Assistant Professor of Medicine, David Geffen School of Medicine at University of California, Los Angeles; Sarch, Reader (Associate Professor) in Legal Philosophy, University of Surrey School of Law, “Punishing Artificial Intelligence: Legal Fiction or Science Fiction,” 53 U.C. Davis L. Rev. 323, November 2019, WestLaw

Instead, the Eligibility Challenge, properly construed, comes in one narrow and one broad form. The narrow version is that, as a mere machine, AI lacks mental states and thus cannot fulfill the mental state (mens rea) elements built into most criminal offenses. Therefore, convicting AI of crimes requiring a mens rea like intent, knowledge, or recklessness would violate the principle of legality. This principle stems from general rule of law values and holds that it would be contrary to law to convict a defendant of a crime unless it is proved (following applicable procedures and by the operative evidentiary standard) that the defendant satisfied all the elements of the crime.124 If punishing AI \*350 violates the principle of legality, it threatens the rule of law and could weaken the public trust in the criminal law.

## Spillover/Precedent DA

### Yes Spillover

#### Legal personhood designations require line-drawing---standards articulated in any case spill over.

Jessica Berg 7, Professor of Law and Bioethics, Case Western Reserve University Schools of Law and Medicine. B.A., Cornell University, 1990; J.D., 1994, Cornell University, “Of Elephants and Embryos: A Proposed Framework for Legal Personhood,” 59 Hastings L.J. 369, December 2007, WestLaw

Since the focus of this paper is on legal, not moral status, the evaluation of fetal interests is constrained. Legal and moral evaluations are intertwined, but not necessarily equivalent. As stated previously, moral status, or the lack of it, does not determine legal personhood status. An entity may lack moral status, but still be considered a legal person. Conversely, an entity may have moral status but not be considered a legal person. In such a case, the lack of legal recognition would not negate the entity's moral status, and the absence of legal obligations would not imply the absence of moral obligations.

The concern is not with determining at what point the fetus develops any interests, but at what point those interests should form the basis of legal personhood. This is a question of line drawing--legal personhood must come into play at some point in time even though fetal interests likely develop along a continuum. The law is a rather blunt instrument. Although there may be a way to achieve a somewhat nuanced legal approach by recognizing juridical personhood at an early stage of fetal development, and subsequently natural personhood at a later stage, both designations still must be based on fairly easily identifiable standards--in other words, we must still draw lines. The final determination of whether and how to draw distinctions between different developmental levels of human beings may depend on practical needs in identifying clear legal lines. If this is the case, then the lack of legal personhood recognition will not negate the moral claims of the entity in question. The entity may still have certain moral rights, and others will have moral obligations to respect those rights.

There are a number of possible biological events that can be used to determine legal status, each having significance in different ways. I will not go through all the potential biological landmarks in the subsections that follow. Rather, this section considers the legal significance of, and interplay between, three important factors in fetal development: sentience (consciousness), birth, and physical development. I choose not to focus on viability since it is a changing line (as technology improves, viability will push back towards conception), as well as an incredibly imprecise standard-- does the standard mean viable for a minute, an hour, a day, a week, a month, or longer?

a. Sentience

Prior to the development of sentience, which occurs in the latter part of the second trimester, the fetus does not have interests of its own and thus does not have the requisite basis for natural personhood. Sentience, \*394 or conscious awareness, is necessary to feel--for example, fetuses cannot perceive pain prior to sentience (and thus have no interest in avoiding pain).103 Sentience cannot occur until the neural system is sufficiently developed to allow for brain functioning and consciousness, at around twenty-two to twenty-four weeks.104 While this currently provides a rough match with the present standards for viability, unlike viability the timeline will not change as medical technology advances. Eventually artificial womb technology may suffice to keep the ex utero fetus alive from the embryonic stage, and allow development to continue. But prior to sentience the fetus will not have interests, regardless of its location in or outside the body. This is not to say that artificial womb technology should not be used prior to sentience, but merely that its use cannot be based on regard for the fetus's own interests, but must refer to the interests of others.

I have pointed out previously that natural personhood is rarely, if ever, granted merely on the basis of the interests of others. It is hard to understand how the interests of currently recognized people would suffer if we do not include non-sentient fetuses on an equal legal footing. Fetuses are not currently recognized as natural persons, and there is little or no evidence that the legal rights and interests of currently recognized persons have suffered. An argument to recognize fetuses as natural persons should bear the burden of showing that the interests of others are harmed, or else it must rest on the interests of the fetus itself. As noted above, prior to sentience fetuses lack interests of their own, under the Feinberg/Steinbock approach, thus juridical personhood prior to sentience would be inappropriate. Arguably, the Supreme Court jurisprudence recognizing increasing state interests after viability (which maps roughly onto sentience) is compatible with the notion that prior to sentience the interests at stake (those of others, not the fetus) are too weak to provide significant legal protections for the fetus itself. Others are certainly free to reject the Feinberg/Steinbock concept of interests, and attempt to develop a different theory of interests that would apply to fetuses. My point is that if fetuses are to be considered natural persons because of their interests, an argument must be made that they have interests, using a coherent understanding of the term that can be applied across different entities. If fetuses are to be considered natural persons because of the interests of others, there must be some argument about how the interests of others are harmed by the exclusion of fetuses in the category of natural persons. All of this is not to say that fetuses are not \*395 entitled to legal protection, or that juridical personhood is not a possibility, merely that natural personhood prior to sentience is not warranted.

But what happens after sentience? At this point fetuses have claims based on their own interests. What would be the effect of granting natural personhood status to fetuses when they reach the point of sentience? Significantly greater restrictions on abortion would result as states would have an obligation to protect fetuses, just as they now do to protect already-born children. Moreover, designating fetuses as natural persons prior to birth would limit the rights of other currently recognized natural persons--particularly pregnant women whose decisions during pregnancy might be constrained in the same way that parents' decisions are constrained by the interests of their already born children. Fetal interests at the point of sentience are not strong enough to justify these limitations. Arguably newborn interests at the point of birth are not sufficient either. Rather, the natural person designation at birth is based on protection of the interests of others. However, during the prenatal period, the interests of others are not strong enough to justify granting fetuses full natural personhood status or protections while still in utero based solely on sentience--other factors must also be present. Those who disagree with this position should have the burden of showing that limiting the rights of others (by designating fetuses as natural persons) would be necessary in order to fully protect the rights of currently recognized people.

Would it be appropriate to consider a sentient in utero fetus a juridical person with certain legal protections prior to birth? The answer here is likely yes. It would be a matter of state choice (as are other juridical personhood designations). Those states that choose to afford sentient fetuses juridical personhood status would need to align the rights given to the interests at stake. The fact that sentience is not possible prior to twenty-two and twenty-four weeks gestation does not mean that the fetus has fully developed cognition and perception. At this point, for example, the fetus may not be able to feel pain, and thus has no interest in avoiding pain.105 If this is so, a state should not be able to require fetal anesthetic use during all abortions at twenty-two weeks based on sentience.106 Legislation providing specific protections prior to birth, but \*396 after sentience, is an area which states might explore in more detail.

b. Cognitive and Physical Development

The closer to birth, the greater the interests of the fetus, and the greater the interests of others in providing the same kinds of protections as are granted to currently recognized persons such as children. If we give newborn infants legal protections based on these interests, why not fully developed fetuses? It is hard to understand why an entity at this stage should not be considered as having equal legal status as an entity outside the womb. But one problem with a “development” standard is that it does not take into account fetuses that have problems in development. As a result, we might set the standard based on gestational age, rather than “full development.”

At the end of the eighth month of pregnancy (thirty-two weeks), in most cases, all of the fetus's internal and external organ structures have substantially developed.107 Natural personhood and thus constitutional protections could apply at this late stage of development. The result would change in the analysis of both abortions and forced caesarian-sections after this time point--the rights of the pregnant woman would be balanced against the rights of a “fetal natural person.” I will discuss this in more detail in the following section. While it may be tempting to change the timeline for according natural personhood, there are reasons to be wary. First, fetal age determinations can be inexact.108 Second, even in the absence of natural personhood protections prior to birth, the fetus is entitled to significant moral status--status which may be recognized under a juridical personhood framework. Pregnancy terminations at this point are highly restricted; except in cases of severe fetal abnormality, they are almost always undertaken with the goal of achieving a live birth (e.g., ending the pregnancy, but not the life of the fetus). In cases of severe fetal abnormality, the issues raised are similar to those raised by neonatal euthanasia.109 The only difference is the added complication of the pregnant woman's right of bodily integrity, which plays a significant role in the analysis and does not change if the fetus is considered a natural person. As a result, it may not be necessary to consider the fetus a natural person prior to birth to achieve fetal protections, and may significantly complicate the situation to do so.

\*397 Juridical personhood based on developmental or gestational age may be appropriate. This is already done implicitly by states which accord fetuses limited rights prior to birth by recognizing a variety of causes of action for harm done to fetuses at different stages of development. Alternatively, gestational age might serve as a bright line cut-off for sentience. Thus a state might explicitly grant juridical personhood protections at twenty-two weeks gestation, on the assumption that for a normally developing fetus that point marks the earliest time at which sentience is possible. For fetuses which are not experiencing normal development, the presumption of personhood could be rebutted--much as is done currently in determining viability or lack thereof.

c. Birth

There are practical reasons for choosing birth as the latest point at which personhood protections adhere, and thus at which the label “natural person” must be applied. Likewise, a fetus born prematurely, but after sentience, should also be considered a natural person and treated as a full-term newborn would be treated under the law. Except in the absence of brain material or brain activity, it is practically impossible to determine sentience using current medical technology, and treatment decisions for premature neonates are based on rough approximations of development, rather than evaluations of sentience. But what about a fetus “born”110 clearly prior to sentience,111 as might be the case if artificial womb technology advances?112

The answer depends on whether there are interests of others in according legal personhood protections, as is the case with anencephalic infants.113 Unlike anencephalic infants, however, these entities may not \*398 share any form with later developed humans. Would an eight-week old fetus be considered a legal person if in an artificial womb? The interests of others do not seem strong enough to accord natural personhood protections in this case. But this may be a situation in which juridical personhood protections are appropriate. A living but pre-sentient fetus outside the mother's body (in an artificial womb) creates an unusual situation. In utero fetuses have the ancillary protections of their mother's legal personhood. But ex utero fetuses would not have these protections. While parental property interests would function and may provide a basis for decision making and control (as they do in the ex utero embryo context),114 we may well need the additional identification of the developing ex utero fetus as a separate legal actor. As artificial womb technology advances, this question should receive more thought and analysis.

d. Summary: Juridical to Natural Persons

Thus far I have argued that sentience is crucial for the development of fetal interests, and birth and external form each play a role in considering the interests of others. The same constraints that limit the scope of juridical personhood rights for embryos function in the pre-consciousness context for fetuses. Granting juridical personhood status to fetuses prior to sentience may undermine the rights of currently recognized persons--for example pregnant women's rights to make a variety of decisions in the first trimester would be limited. Even apart from abortion decisions, if we grant fetuses such status, women may have constraints placed upon their decisions to engage in risky activities, or to partake of legal substances that are harmful to the fetus. In order to justify this, proponents would need to show that the legal recognition was necessary in order to safeguard rights of currently recognized natural persons, and that the result would be a greater protection of the rights of natural persons overall. This is an extremely difficult argument to make, and may fail in many situations. Arguments that the lack of legal recognition of fetal rights prior to sentience harms the rights of people generally, ignores the harm to the rights of people resulting from the recognition itself. Thus prior to sentience the fetus should be considered neither a natural, nor a juridical person. There may be restrictions on what can be done with fetuses born extremely early, either because of an interrupted pregnancy, or because they were never implanted after in vitro fertilization, but these limitations are not based on the personhood status of the fetus. The interests of others can function to limit many actions, without resulting in personhood status for the entity in question. Consider, for example, legal restrictions related to actions involving \*399 endangered species.115 We may not be allowed to destroy the habitat of a particular type of frog, regardless of whether that frog can make any claim to personhood. The protections are based on the interests of others in maintaining the diversity of species on this planet, not necessarily on the interests of the species itself. Likewise, there may be a variety of restrictions on what can be done to a pre-sentient fetus based on the interests of currently recognized persons.

Birth, after sentience, is sufficient for natural personhood status-- not because the interests of the fetus are any greater with the birth, but because the interests of others in affording full natural personhood protections are strong enough to grant natural personhood. This is true regardless of the physical development of the child. Birth without sentience due to developmental problems, but at the point of significantly complete physical development, also provides a basis for natural personhood, again based on the interests of others. Substantially full physical development (eighth month of pregnancy or later) combined with sentience may be sufficient to accord the fetus the protections of natural persons, but careful consideration should be given to the practical effect of such designation.

In the period of time between sentience and natural personhood, there may be reasons to provide fetuses the status and protections of juridical persons. Sentience does not mean that the fetus attains equal status with adult competent human beings,116 merely that the fetus has characteristics that can form the basis for personhood protections based on its own (rather than other's) interests. Moreover, as the fetus develops closer to a newborn infant, both its interests and the interests of others that form the basis for juridical personhood protections may increase.117 The following section discusses some initial implications of this proposed framework.

e. Implications

My goal here is not to provide a full analysis, nor even a complete summary of the relevant issues, but rather to begin to refocus, in light of my proposed framework, the debate in some of the most highly contentious areas of law such as abortion and medical interventions on behalf of a fetus. Paradoxically, perhaps, the framework I suggest should \*400 not result in drastic changes in current laws. This is one of the strengths of the proposal, as it should not result in great legal upheaval. The most significant change should be in how the cases are analyzed, and the basis for evaluating future cases that do not fit well under the current model (such as fetuses in artificial womb environments). The shift in focus should clarify the issues that need further evaluation, and move us away from the simplistic, and misguided, assertion that Roe's determination about whether the fetus is a person under the Fourteenth Amendment is the only relevant question.

To begin, I want to make two, interrelated, points. The first is that fetuses are considered persons already under the laws of many states.118 The second is that this recognition should be explicit and fetuses should be labeled juridical persons for purposes of the application of these rights. The status designation serves a number of purposes. It emphasizes that the rights in question are rights of persons, but those of a juridical person, not a natural person. To some extent this clarifies the apparent inconsistency between laws allowing abortions, for example, and laws allowing tort suits for pre-birth injuries. It is not that fetuses are considered persons for some laws and not for others, but that they are considered juridical persons with specific, but not complete, rights. Finally, explicit recognition allows states to identify specifically the rights in question that go with the status, rather than simply assert that the fetus is a “person” (without limitation) for some purposes and not a person for others. This should result both in more detailed policy discussions about allowing fetuses certain “personhood” rights, understanding that the recognition of the rights limits the rights of existing natural persons, and also more attention paid to why we grant certain juridical personhood rights to various entities, and whether those should be limited or even extended. As a result, we may choose to provide personhood protections for sentient fetuses without granting them the same rights as fully recognized natural persons. Juridical personhood is not a unitary concept; there are different kinds of juridical persons and different rights which may adhere. To the extent that states have discretion in determining which entities will be considered juridical persons, they may make different choices about the types of rights which they grant sentient fetuses. This has already proved to be the case, as demonstrated by the vast array of prenatal laws currently in place.

There is little in the above analysis that should change abortion laws which apply prior to twenty-two to twenty-four weeks, that is, prior to the development of sentience, other than to reinforce that the restrictions before this time period cannot be based on fetal interests.119 The above \*401 framework may, however, have some implications both for evaluations of abortion restrictions post-viability and for prenatal and medical care decisions made by a pregnant woman towards the very end of the pregnancy. The current “undue burden” test articulated in Planned Parenthood of Southeastern Pennsylvania v. Casey120 and reaffirmed by Stenberg v. Carhart121 is based on balancing the interests of the woman making the abortion decision against the interests of the state. Certainly this balance would still be a factor even if the fetus is granted additional legal rights. That is, the state would still have interests which may need to be balanced against the individual's interests.

Designating fetuses as legal persons, however, would create a situation in which the fetus's interests would have to be taken into account on their own (not simply indirectly as is now done through the state's interests in protecting potential life). Thus the analysis would look more like the analysis that takes place in the context of parental decisions regarding minor's medical care--specifically, refusal of life-sustaining medical treatment. Others have pointed out that the language of “rights” is less helpful in the parental decision-making context, since “parental rights” do not rest on any clear constitutional basis.122 In contrast, the abortion situation does involve constitutional rights of bodily integrity.123 Weighing the rights of one natural person against another natural person is difficult. To the extent a fetus is considered a natural person, the abortion debate will have to consider how to weigh the woman's right of bodily integrity against the fetal right to life. Although a complete analysis is beyond the scope of this Article, we can draw some initial conclusions. Since there are no laws requiring parents to sacrifice their lives for their children, it would be hard to imagine that we would accept a legal requirement to do so in the context of pregnancy. Thus between the woman's right to life and the fetus's right to life, the woman's legal rights should be given preference. Harder, of course, is the balance between the woman's right to health, and the fetus's right to health or even life. The varying opinions either allowing or disallowing forced c-sections for almost full-term pregnancies is evidence of the difficulty courts have weighing these issues.124 The framework I have suggested here should encourage a shift in thinking about these issues to focus on the parallel between this situation and \*402 others that involve direct conflicts between the health/life of one person and the health/life of another. Moreover, it should lead to greater evaluation of the concept and extent of so-termed “bodily integrity” rights.125

My proposal should have three significant advantages over the current mode of analysis. First, it will allow states to “experiment” in finding the best system of recognizing and balancing legal rights in cases involving embryos and fetuses. Since legal personhood should no longer be viewed as a closed question, states should be free to consider how best to accord juridical personhood status. Second, it should allow us to find better and conceptually more appealing answers to new debates in reproductive law. This will be extremely important as reproductive technology advances and the legal cases continue to move away from the traditional abortion context. Finally, it may achieve a compromise position in an area that has thus far been marked by heated and divisive commentaries.

B. Non-Human Animals and Artificial Intelligence

Although I have focused primarily on embryos and fetuses thus far, the framework suggested here may be applicable to other entities. The idea that we might exclude from legal status an entity that meets all the attribute requirements for equal moral status with currently recognized persons, but that is not genetically human, raises the question of why genetic humanness matters.126 It seems inconsistent to argue for the extension of legal protection to a non-sentient multi-celled human organism in the beginning stages of development (i.e., an embryo) and withhold such protections from fully developed sentient, and perhaps even rational, non-human animals.127 If genetics is the sole basis for legal personhood, there must be some explanation as to why this characteristic is so important.128 Thus far no one has provided a satisfactory argument \*403 in this respect.129

#### The law is chaotically under-theorized in this area, and progress informs many future cases on emerging tech, animal law, and transgenic animals

HLR 1 [Harvard Law Review. "What We Talk about When We Talk about Persons: The Language of a Legal Fiction." <https://www.fordham.edu/download/downloads/id/3307/natural_law_colloquium_fall_2015_cle_materials.pdf>]

The law of the person is fraught with deep ambiguity and significant tension, and the problem extends far beyond the standard interpretive difficulties attending the meaning of legal metaphors. The law's use of the fiction "person" to define its object inevitably evokes the anxiety that accompanies social definitions of personhood. This difficulty is exacerbated by the tension between our strongly individualist legal culture and the utter dependence of law on this metaphor. Moreover, social anxiety about personhood matters not only because it exposes ambivalence within the law, but also because the law, through its expressive dimension, signals norms and values that influence ideas and opinions about personhood. This anxiety is likely to become more acute. Technological and economic progress promise to muddy further the waters of personhood, calling into question the once-stable notion of who counts as a living human. On one front, animal rights theorists142 and activists 143 argue that the human/nonhuman distinction is founded on illegitimate notions of an absolute hierarchy of worth that places humans above other animals. On another, technology may soon enable the creation of entities that are neither.clearly human nor nonhuman, such as transgenic animals, 144 or that closely replicate human consciousness, such as artificially intelligent beings. 145 The grossly undertheorized character of this field suggests that the problem merits more attention. Such attention would not only aid in understanding the scope and meaning of the law's use of the fiction "person" to define its object, but - considering this metaphor's extralegal implications - would also help law contribute more fully to social dialogue about what it means to be human.

### Yes Spillover---Unrelated Areas

#### The logic of the plan can be strategically invoked as precedent in other areas.

Erin Phillips 19, University of New Mexico School of Law, Class of 2019, “The Silent Problem: The Implicit Personhood Determination in State v. Montoya,” 49 N.M. L. Rev. 134, Winter 2019, WestLaw

VII. JUDICIAL OPTIONS IN ADDRESSING PERSONHOOD AND MONTOYA'S IMPLICIT SUPPORT OF THE PERSONHOOD MOVEMENT

The Montoya Court had a difficult decision on their hands, as policy concerns rightfully guided the decision to uphold the conviction. In order to answer those policy concerns and the conviction, the Court had to reach beyond the statute towards the rational link standard, since a literal application of the robbery statute would not have been sufficient to uphold the conviction. But whether intentional or \*147 not, the Court ultimately determined that the deceased victim was a person and in doing so opened a door to potentially dangerous reliance in the future. Although it may seem unlikely that a Personhood Movement proponent would seek out Montoya as a resource to support claims that state legislatures should consider fetuses as persons and expand their afforded rights, it is possible.90 It is possible because the Montoya Court determined by default that, because the conviction of robbery--a crime against persons and property--was upheld, the deceased victim of the crime was necessarily a person. In response to the first question of this note, “can a dead person still be considered a person under a criminal statute,” the Montoya Court offered a silent but definitive answer of “yes.” Were a Personhood Movement proponent to rely on Montoya, they would be able to argue that the boundaries of what defines personhood have expanded.

In response to potential future reliance on Montoya, there should be an amended solution for contemporary decisions dealing with personhood, given the relentless efforts of the Personhood Movement.91 One option would be to adopt a tiered approach to addressing questions of personhood. Such a tiered approach might hold:

that ‘personhood’ is a concept that admits of degrees and shades of gray. According to this theory, beings should be considered ‘full-fledged’ persons if they should be the bearers of all of the rights and obligations that our legal system has to offer. Contrarily, they should be considered ‘partial’ persons if they should only have the privilege to enjoy some of the rights that our constitutional and statutory provisions confer to persons.92

If the Montoya Court had adopted a similar tiered approach to addressing the defendant's personhood argument, then it may have been able to definitively speak to why, for the purpose of their decision, the deceased victim was going to be considered a “partial” person, retaining the rights to control the property attached to their body. Had such a clarification been made, the Court may have been able to freely uphold the robbery conviction and satisfy the policy concerns without also inferring a broad yet unspoken determination of the victim's personhood status. A tiered approach to personhood questions could generally assist courts or legislators in achieving goals without drawing drastic implications that could affect the rights \*148 of women seeking reproductive healthcare or those who wish to access end-of-life assistance.

This discussion does, at least in part, center on the importance of establishing clear judicial stances through consistent language: why didn't the Montoya Court just say why it wasn't going to decide on the personhood issue, even if the reason was that it did not want to enter into a controversial realm? Why didn't it just say that it was not going to decide the case based on personhood because it thought the precedent based on policy concerns was more important to ensuring the safety of society than addressing the defendant's claim? Because doing so would have meant making an overt statement, either that the dead person was or was not a person. Understandably, the Court didn't want to make such a determination, or simply did not think their inevitable personhood determination was relevant or impactful. No matter the motivations, a state court cannot afford to avoid such an argument. And, ultimately, the Court's refusal to speak to the personhood argument resulted in a determination that the deceased victim was a person. Given that the Court made a determination that it presumably did not want to make, a more deliberate approach would have been beneficial. This could have been solved by a tiered approach, allowing the Court to define its own boundaries of personhood to fit the Montoya facts without interfering with the Constitutional provisions with which its holding intersected.

VIII. CONCLUSION

The Montoya Court needed to uphold the lower court's robbery conviction due to overwhelming policy concerns.93 Because the Court could not achieve this end through a literal application of the robbery statute, the Court turned to the ambiguous but logical rational link standard in order to show that because the defendant's crimes were sufficiently related to one another, as the robbery was made possible by the antecedent assault, the conviction could be upheld.94 Despite the Court's admirable motivation to address policy concerns, within its decision to uphold the robbery conviction was a silent determination that the deceased victim was, in fact, still a person after their death. This problematic determination means that Montoya implicitly held that a dead person is still a person in the eyes of the law. This holding could mean that, as national efforts continue to pass legislation expanding the recognition of fetuses as persons and of permanently-comatose individuals as non-persons, Montoya could be relied upon to show just how far one New Mexico court was willing to go in order to expand the scope of personhood rights.

### Yes Spillover---Animals AFF

#### Personhood for even one animal species amounts to breaking the wall---a slippery slope of species AND other areas AND legal theories would follow

Richard L. Cupp Jr. 15, John W. Wade Professor of Law, Pepperdine University School of Law, “Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals Climate, Energy, and Our Underlying Environmental Ethic: Essay,” Pace Environmental Law Review, vol. 33, no. 3, 2016/2015, pp. 517–541

V. HOW FAR MIGHT ANIMAL PERSONHOOD AND RIGHTS EXTEND?

The NhRP has stated that a goal of using these lawsuits is to break through the legal wall between humans and animals.66 But we have no idea how far things might go if the wall comes down. One might suspect that many advocates would push for things to go quite far.

As noted above, in the real world, law does not fit perfectly with any single philosophical theory or other academic theory because judges must be intensely conscious of the practical, real world consequences of their decisions. One practical consequence courts should expect if they break through the legal wall between animals and humans is the opening of a floodgate of expansive litigation without a meaningful standard for determining how many of the billions of animals in the world are intelligent enough to merit personhood. We should not fool ourselves into minimizing the implications of these lawsuits by thinking that they are, in the long run, only about the smartest animals.

How many species get legal personhood based on intelligence is just the start. Once the wall separating humans and animals comes down, that could serve as a stepping stone for many who advocate a focus on the capacity to suffer as a basis for granting legal personhood. Animal legal rights activists do not all see eye to eye regarding whether they should focus on seeking legal standing for all animals who are capable of suffering or on legal personhood and rights for particularly smart animals like chimpanzees. However, these approaches may only be different beginning points with a similar possible end point.

The intelligent animal personhood approach is more pragmatic in the short term, because the immediate practical consequences of granting legal standing to all sentient animals could be immensely disruptive for society.67 We do not have \*538 much economic reliance on chimpanzees, there are relatively few of them in captivity compared to many other animals, and we can recognize that they are particularly intelligent and closer to humans than are other animals. Thus, perhaps a court could be tempted to believe that granting personhood to chimpanzees would be a limited and manageable change. If that were accepted as a starting position, there is no clear or even fuzzy view of the end position. It would at least progress to assertions that most animals utilized for human benefit have some level of autonomy interests sufficient to allow them to be legal persons who may have lawsuits filed on their behalf on that basis. Professor Richard Epstein has recognized the slipperiness of this slope, pointing out that “[u]nless an animal has some sense of self, it cannot hunt, and it cannot either defend himself or flee when subject to attack. Unless it has a desire to live, it will surely die. And unless it has some awareness of means and connections, it will fail in all it does.”68

Opening the personhood door to the more intelligent animals would also encourage efforts to extend personhood on the basis of sentience rather than solely seeking extensions based on autonomy. The implications of much broader potential expansion of legal personhood based on either autonomy definitions or sentience could be enormous, and society should carefully think them through. Any court that contemplates making this restructuring of our legal system must also contemplate the practical consequences.

#### It'd be impossible to cabin

Paul McKellips 14, Executive Vice President of the Foundation for Biomedical Research, “The Slippery Slopes with Tommy, Kiko, Hercules, Leo and Duke,” Lab Animal, vol. 43, no. 2, 2, Nature Publishing Group, 02/2014, pp. 69–69

Last December, the Nonhuman Rights Project (NhRP) filed lawsuits in three New York counties on behalf of Tommy, Kiko, Hercules and Leo. NhRP wanted judges to grant “legal personhood” to these four chimpanzees. Their stated mission was to change the common law status of nonhuman animals from mere things to persons who possess fundamental rights such as bodily integrity and liberty.

Unlike previous “personhood” lawsuits that appealed to existing written statutes or even the Constitution, these new lawsuits are trying to modify common law standards. Common law tends to evolve as society evolves. Things that were once considered taboo, morally wrong and ultimately illegal become accepted as settled law under a new moral code. The real problem is that when deciding common law cases, judges can rely on their own morals.

NhRP took their suits a step further by filing them under the common law writs of habeas corpus. Simply put, habeas corpus lets a petitioner get around the roadblocks of legal standing by allowing someone else to argue on the captive's behalf—in this case, for the benefit of Tommy, Kiko, Hercules and Leo.

Well, the lower courts threw these particular cases out. And as they did, one could almost hear a collective sigh from the biomedical research community, not to mention the eye rolls from coast to coast. It'll never happen. Right? Not so fast. Hold on to your PPE for just a lab animal New York minute.

In New York, habeas corpus petitions are automatically sent to the higher courts, first the Intermediate Appellate Court, then the Court of Appeals. All the while, Tommy, Kiko, Hercules and Leo continue to become international news celebrities. Media outlets from around the world are following the legal adventures of these four chimps as school children use crayons and construction paper to make greeting cards of support and solidarity. As international media attention increases, the notion of an animal gaining personhood becomes less and less novel. A new generation of people screaming “Free Willy” is growing in both volume and quantity, and certainly, one must assume, some sympathetic common law judges—who can lean on their own morals—are probably listening.

Expanding the common law of New York is exactly what the NhRP is trying to do. And here, the slippery slope for Tommy, Kiko, Hercules and Leo leads to Duke.

The NhRP website lays it all out very clearly: “Our goal is to breach the legal wall that separates all humans from nonhuman animals.” If a judge can use his or her own morality as a guideline, and a chimp gets common law personhood, then why wouldn't we also grant common law personhood to rhesus monkeys, guinea pigs, rabbits, rats, genetically modified mice, zebrafish and, yes, even fruit flies?

#### Personhood determinations set precedent

Emily A. Fitzgerald 15, J.D., University of Texas School of Law, 2015; B.A., magna cum laude, University of Arkansas, 2012, “[Ape]rsonhood,” 34 Rev. Litig. 337, Spring 2015, WestLaw

3. Regardless of Whether Chimpanzees Are Deemed Legal Persons, Courts Should Clearly Establish a Standard for Juridical Personhood to Promote Judicial Economy

The NHRP lawsuits present the best vehicle for courts to clearly establish the standard for which non-humans qualify for legal personhood. Thus, courts can clarify the definition of “person,” promote judicial economy by providing guidance to future courts and litigants, and maintain the intended flexibility of common law habeas corpus.

The need for clarification by courts is clear, since opponents argue that “[a]ssigning rights to animals akin to what humans have would be chaotic for the research community . . . . First it's chimps; what's next?”248 If a court grants personhood to a non-human--whether it is on the basis of autonomy or using a different standard--the court must clearly explain the requirements for the personhood designation. Without laying out the specific requirements on which the designation of personhood is based, the law of personhood will remain unclear and the possible application of personhood will remain undefined. Providing clarity for designating personhood will help to circumvent a “slippery slope” of personhood litigation by establishing the necessary qualifications a non-human must have in order to qualify as a juridical person. Regardless of which standard a court decides to rely on to afford personhood status to a non-human, the court needs to explicitly clarify the standard it chooses.

Even if courts deny legal personhood status to non-humans, clarifying the law of personhood will be beneficial for judicial efficiency. Without clarifying what qualities are necessary for an non-human to be declared a legal person, courts will have to face the personhood question in future litigation on behalf of a seemingly endless list of possible plaintiffs.249 Thus, the NHRP lawsuits present an opportunity for the courts to clarify the definition of “person” regardless of the substantive result the courts reach.

\*378 VI. CONCLUSION

Chimpanzees are incredibly similar to humans biologically, cognitively, and socially, making differentiating the two species exceedingly difficult. Any differentiation based on species is necessarily arbitrary, and therefore the real issue lies in the evaluation of the cognitive comprehension necessary and sufficient to qualify as a legal person. Chimpanzees are capable of communicating with humans in human-created language, are cognitively comparable to human children, and are self-aware. Thus, our closest living relatives present an interesting question: Why not [a]personhood?

The law of personhood remains unclear, and many believe that courts draw arbitrary distinctions in assigning legal personhood. Whether or not this is true, the NHRP lawsuits give courts an opportunity to clarify the definition of “person,” establish non-arbitrary legal standards for determining which non-humans qualify as legal persons, and maintain the flexibility of habeas corpus. This Note argues that no matter what substantive determination the courts make in regard to chimpanzee personhood, courts need to establish a standard to delineate which non-humans qualify for legal personhood.

### Yes Spillover---Animals AFF---AI

#### Principles for denying AI personhood are similar to the principles denying personhood for animals. Deciding that animal autonomy and conscience are sufficient to merit personhood would inform litigation about AI.

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

B. Animals

Animals may appear to be a more nuanced analogue for the legal treatment of A.I.-caused harm. Animals have a level of autonomy that consumer products \*282 lack, but they still are not governed by a conscience “and possess great capacity to do mischief if not restrained.”100 Consequently, legal systems invariably impose legal obligations on owners and keepers of animals to ensure that those animals do not cause harm to others. Similar impulses may well guide the legal treatment of A.I. systems.

In common law jurisdictions, the extent of an animal keeper's duty traditionally depends on whether the animal is a “wild” animal or a “domestic” animal.101 For a wild animal that is considered dangerous by nature and kept as a pet, the animal's owner or keeper is strictly liable for any injury or property damage that the animal causes.102 If a farmer has a pet wolf that kills two of his neighbor's chickens, the farmer is legally responsible for compensating the neighbor for the lost chickens--even if the wolf had always been perfectly tame previously. The theory behind imposing such strict liability is that wild animals are inherently dangerous, such that a wild animal's keeper is effectively on notice from day one that the animal presents a risk to others.103

For domesticated animals kept as pets, however, the owner generally must have some knowledge of that specific animal's dangerous propensity and thereafter failed to take adequate precautions.104 In other words, if the farmer owned a golden retriever instead of a wolf in the previous example, the neighbor would have no remedy unless he could show that the dog had eaten a neighbor's chicken or otherwise shown “dangerous propensities” at least once before. This rule gave rise to one of the more amusing legal expressions: every dog gets “one free bite.”105

\*283 What lessons might animal liability law offer for A.I.? If we believe that A.I. systems are inherently risky (or if we just want to be extra cautious), we could treat all A.I. systems like wild animals and hold their owners strictly liable for harms that they cause. But such a blanket rule would seem unfair if applied to A.I. systems whose functions are so narrow that they do not present much of a risk to anyone. It would seem somewhat silly to treat AlphaGo, a system designed to play a board game, as if it is just as dangerous as an autonomous weapon system.106

A better approach might be to treat different classes of A.I. systems as akin to different species of animals. The classification of system as “wild” or “domesticated” could be based on the intended function of the system-- perhaps an autonomous security system is inherently dangerous, but a computerized tennis coach is not. Or it could be based on the operational history of A.I. systems with similar software and hardware--if a particular type of A.I. system has a proven track record of safe operation, it could be declared “domesticated” and their developers, distributors, and operators would enjoy relaxed standards of liability.

#### Animal law would be cited as precedential in AI cases---there are no cases that speak squarely to the question.

Matthew U. Scherer 18, Associate, Littler Mendelson P.C., and member of Littler's Workplace Policy Institute and Robotics, Artificial Intelligence, and Automation practice group, “Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems,” 19 Nev. L.J. 259, Fall 2018, WestLaw

C. Conclusion

One may reasonably question why Bayern's articles and the ideas espoused therein merit seven thousand words of refutation. The answer is twofold. First, many people read law review articles as a source of legal information, particularly in emerging and uncertain areas of law. If the information in a law review article is inaccurate or incomplete, a reader will end up with a skewed idea of what the law is. That danger is particularly acute if the reader is someone without legal training. Here, there is scant case law discussing the possibility of a zero-member LLC, and no case law discussing A.I. personhood. Consequently, if a person wishes to know whether it is possible to create an autonomous A.I. \*278 system and have the law treat it like a person, Bayern's articles and those citing it would very likely be among the first things they would come across.

That leads to the second, deeper reason that Bayern's proposal matters: if some misguided entrepreneur actually attempted to put Bayern's framework into practice, they would actually be creating a situation where, regardless of whether Bayern is correct or incorrect, victims likely would be unable to obtain compensation if the ostensible “memberless LLC” causes harm.

Part I's discussion on the definition of legal personhood explains why a dissolved entity loses the capacity to sue. That may seem to be a good thing if a court were faced with a “memberless LLC,” since that lack of capacity would limit the erstwhile LLC's ability to take legally meaningful actions. But there is a dark flip side to a dissolved entity's inability to sue to enforce its rights--namely, that others cannot sue that entity to enforce their rights. Ordinarily, when someone is injured or their rights are violated, that person can sue whoever caused the injury and seek compensation or some other form of redress. This option is not available if the injury was caused by something that is not a legal person and therefore lacks the capacity to be sued. The well-known legal maxim “for every wrong, the law provides a remedy” does not hold true for harms caused by non-persons.

This means that a “memberless LLC” could be effectively immune from suit for events that occurred after the withdrawal of the last member. Injuries caused by the system would be like injuries caused by a wild animal. Because animals are not legal persons, victims of animal attacks have no legal remedy unless they can identify a legal person who can be held legally responsible for the animal's conduct. With respect to wild animals, who are not owned or possessed by any person or entity, the lack of animal personhood means that no one can be held legally responsible for harms they cause.

### Yes Spillover---Animals AFF---Fetuses

#### Considerations that favor expanding animal rights will be coopted by anti-abortion activists.

Kathie Jenni 94, Department of Philosophy, University of Redlands, “Dilemmas in Social Philosophy: Abortion and Animal Rights,” Social Theory and Practice, vol. 20, no. 1, Florida State University Department of Philosophy, 1994, pp. 59–83

Many people find themselves embracing both animal rights and feminism as social causes. Animal rights proponents increasingly seek the support of feminists, noting connections between the exploitation of women and animals, and ecofeminists have ex tended their concerns to embrace not just women's equality, but the welfare of nonhuman animals and the natural environment. Concern to protect groups that are vulnerable and exploited makes feminism and animal rights activism seem natural partners, and the advantages of pooling resources make a joining of these move ments seem tactically wise.

But feminism in its most popular forms and consistent concern for all sentient beings do not comfortably coexist. It has become something like orthodoxy for feminists to embrace a thoroughgoing pro-choice stance on the abortion issue: to support unrestricted access to abortion. At the same time, animal rights philosophy has undercut the position that only full-fledged persons deserve moral consideration, urging that we give the interests of sentient nonpersons due weight in moral decision-making.

The problem is that fetuses attain a rudimentary sentience sometime during the second trimester of development. Thus even if fetuses are not persons, serious moral problems face seekers of responsible abortion policy. If the fetus is sentient, late abortions may harm morally considerable beings, and thus may not belong to the realm of private, discretionary choice. If law should prohibit the infliction of pain and death on animals except for very serious reasons, it ought to prohibit abortion of sentient fetuses except for very serious reasons, or so it seems plausible to argue. Thus a liberal abortion policy, considered by many feminists an essential element in women's liberation, appears at odds with animal rights defenders' desire to extend legal protection to sentient beings who cannot speak on their own behalf.

### Yes Spillover---Animals AFF---Nature

#### Granting animals legal personhood spills over to the environment

Kelsey Kobil 15, J.D. Candidate, The Dickinson School of Law @ Pennsylvania State University, “When it Comes to Standing, Two Legs are Better than Four”, 10-1-15, 120 Dick. L. Rev. 621 (2015).

If Animals Are Granted Standing, Where Will it End? Animal Rights Activists Desire to Extend Rights Beyond "Intelligent" Animals

There is no consensus among animal rights activists as to which animals should be granted standing. 167 The NRP suggests a gradual approach to granting animals legal rights. 168 The organization states that they will begin with animals that exhibit "complex cognitive abilities such as self-awareness and autonomy."1 69 Intentional behavior, linguistic ability, 17 emotional capability, and personality traits are additional defining characteristics suggested as guidance to determine if an animal should possess legal personhood status. 171 Some animal rights activists reject the notion that there should be a distinction between different types of animals; they say if it is an animal, it should possess the same rights as humans. 72

Looking to the NRP, Wise desires to extend legal rights to all animals with the capacity to suffer. 173 Under Wise's definition, almost every single animal will be capable of having a lawsuit filed in its name. For example, a goldfish 174 could conceivably bring a claim of false imprisonment for being held in a tank in a child's bedroom.

Environmental Rights Activists Are Pursuing Similar Goals for the Environment

Although animal rights activists argue that animals should be granted legal personhood status and standing to sue based on the animals' ability to reason, feel pain, and suffer, 175 those limitations on expanding legal personhood may not be in place for long. In 1972, Christopher Stone 176 first 177 articulated the argument that the environment should possess rights, particularly the standing to file suit on its own behalf.178 Both movements have since shared similar characteristics and followed common legal strategies. 179 It is no stretch to believe that if animals are granted standing to sue, trees and lakes will not be far behind.

### Yes Spillover---Animals AFF---Grey Goo Impact

#### Spills over to stop regulation of grey goo

Stephen E. Weil 1, Emeritus Senior Scholar in the Smithsonian Institution’s Center for Museum Studies, “Cloning and Copyright,” Cardozo Arts & Entertainment, Vol. 19, 137-148

If animal cloning is a temptation, consider what it might be like for artists when they acquire the ability to express themselves by designing their own creatures—when every artist can become a “Dr. Frankenstein.” Imagine the extraordinary tangle of legal issues that such extraordinary creative power might generate.

Given the danger that an artist could accidentally flood the planet with self-replicating creatures that might in time compete with humans for food and space, ought we to permit this type of creation at all? If we do, then how should the resultant creatures be classified? If we consider them human, then a variety of civil and human rights issues will beg resolution. If we instead consider them to be animals, then now-surfacing issues of animal rights may come into play.13 [FOOTNOTE 13 BEGINS] 13 For a discussion concerning the strength of such animal rights’ claims, see generally STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (Perseus Books ed., 2000) (arguing that at least certain animals-chimpanzees and others-ought to be granted a legal “personhood” that would be the basis of at least limited rights). [FOOTNOTE 13 ENDS] Even if we were to create some new category for the creatures, a host of intellectual property and personal property questions would need to be addressed.

### Yes Spillover---Corporations AFF

#### Expansions of rights to legal persons lack a limiting principle---it’ll spill over

Elizabeth Pollman 21, Professor of Law, University of Pennsylvania Law School, “Corporate Personhood and Limited Sovereignty,” 74 Vand. L. Rev. 1727, WestLaw

We did not focus on a related line of critique--that the Supreme Court's corporate rights jurisprudence since the nineteenth century has dramatically expanded and revealed that the Court does not observe a limiting principle to the doctrine of corporate personhood. All corporations ultimately have natural persons involved in some respect--even shell corporations are created by natural persons for some objective that ultimately serves human ends. If a derivative approach to corporate rights is taken without serious effort to distinguish between the kinds of organizations that further the purpose of the right at issue from those which do not, then it is meaningless as a method of determining corporate rights.

\*1751 Neither denying corporations all rights because they have separate legal personality, nor granting all rights to all corporations because they bear some connection to human interests, is a coherent approach. Admittedly, from time to time, the Court has reasoned or simply noted in passing that corporations are not entitled to “purely personal guarantees”120--but it has not consistently used this as a limiting principle or fleshed out its content.121 Instead, the Court has tended to grant corporations' claims for protections based on derivative and instrumental rationales with little clarity on a means of analytical line drawing.122

Using this flawed approach, the Court's expansion of corporate rights has furthered the trends of increasing corporate influence over the regulatory state and the rise of rival powers, subjects of concern that had troubled early American jurists, lawmakers, and citizens. Whereas the Court in the nineteenth century denied claims for corporate rights on multiple occasions, this pattern shifted in the twentieth century, particularly since the 1970s.123 Although many factors have contributed to increasing economic concentration and corporate power in recent decades, the Court's corporate political spending jurisprudence has allowed corporations to use their money and influence in a variety of ways that impact the very political and regulatory environment in which they act.124

\*1752 Recent years have highlighted the perils of this dynamic. Some of the world's largest companies also appear to be some of the biggest political spenders. We cannot accurately determine the precise contours of corporate political spending because of the lack of transparency,125 but we can observe, for example, that Facebook and Amazon were at the top of the list in 2020 for federal lobbying expenditures.126 These companies, and others that bear resemblance in their size or social footprint, are global behemoths that scholars have indeed likened to “private governments,”127 harkening back to concerns about imperium in imperio and rivals to states that could erode democratic governance.128

And, finally, the Court's failure to set out a limiting principle to its derivative and instrumental approach looms large on the horizon as the Court appears poised to hear claims for expanded speech and religious liberty rights, as well as claims for rights previously denied to business corporations, such as the Fifth Amendment privilege against self-incrimination and privacy rights.129 It cannot be enough to simply locate natural persons involved in the corporate claimants as a basis for granting rights. For a derivative approach to have meaning, the facts on the ground must be confronted, such as the nature of the \*1753 participants' relationships to the corporation, the corporation's purpose and its governance, among other considerations, in determining if it serves the purpose of the right to extend it to a particular corporation.130 As the Court continues to hear claims for rights beyond those incidental to basic features of legal personality, these decisions hold the potential to shape not only the continued utility of the corporate form but also the role of corporations in society and the means by which we hold them accountable.

### Yes Spillover---Fetuses AFF / Abortion

#### Limited grants of fetal personhood spill over---even if the initial grant was limited to a single territory or state.

Carliss Chatman 22, \* Associate Professor, Washington and Lee University School of Law (BA Duke University, JD University of Texas at Austin School of Law), “We Shouldn’t Need Roe,” SSRN Scholarly Paper, 4006774, Social Science Research Network, 01/12/2022, papers.ssrn.com, doi:10.2139/ssrn.4006774

In May of 2019, I wrote a tweet that has proven to be evergreen.2 It states:

If a fetus is a person at 6 weeks pregnant, is that when the child support starts? Is that also when you can’t deport the mother because she’s carrying a US citizen? Can I insure a 6-week fetus and collect if I miscarry? Just figuring if we’re going here we should go all in.3

The tweet asks that if a fetus is a person, as many of the recent laws banning abortion suggest, then why don’t we give fetuses full access to things ancillary to personhood—including the rights of citizenship that flow from being born in America?4 The premise of the tweet and my subsequent publications5 is simple: persons and citizens have constitutional guarantees that should not vary state-by-state.6 Thus, if a fetus is given personhood status, it is owed equal protection under the law.7 States with fetal personhood laws create a legal fiction wherein both the fetus and the pregnant person have full equal protection rights simultaneously. In reality, if there is conflict, those laws will prioritize the life of the fetus in all contexts, even if the life of the pregnant person is at risk.8 In addition, fetal personhood may not end at the borders of the states with these laws because the idea that fetal personhood in one state requires equal protection in all states for those fetuses is supported by the U.S. constitution and its jurisprudence.9 In other words, fetal personhood in one state is a slippery slope towards fetal personhood in all states; thus it requires consideration of the full scope its consequences.

### Yes Spillover---Nature AFF

#### Rights of nature creates a legal personhood slippery slope.

Lawrence Heim 21, has been practicing in the field of ESG management for more than 35 years, “A New Realm of Risk: Legal Personhood for Nature,” PracticalESG, 8-18-2021, https://practicalesg.com/2021/08/a-new-realm-of-risk-legal-personhood-for-nature/

This article in Adventure Journal says that some non-US countries are starting to grant the status of “personhood” to rivers and other natural resources – which can affect how people treat the river and even form the basis for tort-based legal actions. The article states:

Environmental personhood is a legal concept that endows different environmental entities with the same status as a person in court, and is being used by many groups to protect natural resources in the modern world.

Earlier this month, it happened in Minnesota. The White Earth Nation of Ojibwe has filed suit against the Minnesota Department of Natural Resources in tribal court on behalf of wild rice. The tribe established a law in 2018 granting rights to manoomin (as the plant is called in the native language) as a living entity. The case does not claim economic damages or seek relief under endangered species protections as is more traditional in natural resource damages actions. If the tribe is successful in court, already permitted groundwater use for an Enbridge Energy pipeline construction project could be halted.

What This Means

It is too early to tell if this novel legal strategy will be validated in courts and/or spread. It seems a potentially dangerous slippery slope that could expand beyond its original intent and lead to dramatic unintended consequences, especially in the United States. At the same time, it might be prudent for companies to monitor these developments and possibly begin thinking about how to respond if a similar suit is brought against them.

#### Limited rights of nature claims spill over. It’ll be weaponized broadly against industrial activity.

Brian Sullivan 14, a former assistant copy editor, joined the ABA Journal staff in 1992, worked as an editor in ABA Press, “Activists try to gain legal personhood for animals and ecosystems,” ABA Journal, 2/1/2016, https://www.abajournal.com/magazine/article/animal-rights\_activists\_try\_to\_gain\_legal\_personhood\_for\_certain\_species

In early December the Nonhuman Rights Project, a Coral Springs, Fla.-based animal rights group, filed a lawsuit in Fulton County Court in New York. The suit asserts that, according to scientific evidence, chimpanzees have complex cognitive abilities—such as being able to recognize themselves in a mirror—and have a “concept of their personal past and future.”

The lawsuit focuses on a chimp named Tommy and seeks to bestow upon him “legal personhood” to prevent him from being kept in a “small, dank cement cage in a cavernous, dark shed” at a used-trailer lot in Gloversville, N.Y. Tommy’s owners have been quoted as saying that he is well cared for while they seek space for him at a sanctuary.

On Dec. 9, the court struck down the lawsuit, though the Nonhuman Rights Project plans to appeal. NRP leader Steven Wise told Reuters: “We’re just going to keep filing suits.”

But this effort could become a slippery slope indeed. Where would the legal-personhood line be drawn? Just the cute ones? Just the “smart” ones? Just the ones we keep as pets? If chimps, why not dolphins? If elephants, why not goldfish? (Actually, if goldfish were “persons,” many of us would be much more diligent about changing the water.)

So while the personhood-for-animals movement tries to gain a toehold (or paw-, claw- or finhold), another legal strategy is taking shape that seeks to bestow rights upon not only animals but plant life as well—in other words, entire ecosystems.

One of the more recent examples is provided by the Boulder County, Colo., planning commission, where an effort is underway to include language in the comprehensive plan that would state: “Boulder County acknowledges the rights of all naturally occurring ecosystems and their native species populations to exist and flourish.”

Language of this type has been used in other jurisdictions with the apparent objective being the prevention of non-eco-friendly activities such as mining, fracking and waste disposal. Just make every earthworm, every blade of grass and every bird in the sky a legal person and therefore, ipso facto, untouchable.

Declaring every animate object a legal person might make us feel all warm and tingly, but the reality is that the legal obstacles could be insurmountable. Too bad, though. Tommy deserves a chance to swing like an ape.

### Yes Spillover---Robots AFF

#### AI spillover link

Dalton Powell 20, Duke University School of Law, J.D and LL.M. in Law & Entrepreneurship expected, May 2020; Truman State University, B.S., May 2017, “Autonomous Systems as Legal Agents: Directly by the Recognition of Personhood or Indirectly by the Alchemy of Algorithmic Entities,” 18 Duke L. & Tech. Rev. 306, April 2020, WestLaw

The Restatement (Third) of Agency's definition of personhood is ripe for reconsideration, and the internal tensions of the definition are an underexplored area of legal scholarship--despite what appears to be extensive discussion of AI agency in philosophy. The emergence of AI computing, and the associated development of truly autonomous computer systems, will test traditional agency law with questions like who or what can be a person. These autonomous systems can be persons in two ways: either as a direct person that is independent or as an indirect person that is formed by an algorithmic entity. The recognition of personhood for autonomous systems should be direct and based on the acceptance that personhood depends on the moral recognition of autonomy; but, at the very least, recognition of personhood should be indirect as algorithmic entities under the traditional doctrine.

The recognition of the direct personhood of autonomous systems requires a fundamental shift in the Restatement's definition of personhood. The shift would be from the sole focus on rights and obligations to a more holistic determination that autonomous judgment should determine the ability to be a principal and agent. This normative theoretical shift within the definition is appropriate as the internal tensions of the traditional analysis are heightened with the rapid development of new technology. Fortunately, this fundamental shift will not require the common law to write on a blank slate; the philosophical analysis of agency can guide the law here.

Indirect personhood for autonomous systems occurs by attaching them to previously recognized legal entities that fit into the traditional definitional analysis. In traditional doctrine, the Restatement's definition of person attempts to distinguish legally recognized persons from purely organizational entities and mere instrumentalities. At present, the Restatement views computer programs as mere instrumentalities of the using person and thus not a separate person capable of being a principal or agent. The traditional doctrine also focuses almost exclusively on the ability to be the object of liabilities and the holder of rights. Thus, the presence of the recognized legal entity will allow the autonomous systems to attain indirect personhood. But the reliance of indirect personhood on organizational law that is easily amendable by the legislature necessitates analysis of direct personhood for autonomous systems.

\*331 Ultimately, autonomous systems should be recognized as legal persons for the purposes of agency law. This acceptance has the potential for significant knock-on pragmatic benefits, with one such example being improved corporate decision-making.

There are several downstream implications that are ripe for future research if autonomous systems are directly or indirectly recognized as persons. The most critical determination will be deciding what level of autonomous judgment is enough for personhood. While this Note clearly accepts that autonomous systems, as defined in Part I, are on the right side of the line of autonomous judgment, the line must be drawn somewhere. For computer-related systems, the appropriate line might be between autonomous and automated systems. 132 Overall, this line-drawing will “highlight how difficult it is to identify machine consciousness or personhood [and] how uncertain we are about the boundaries of our own [consciousness and personhood].”133 Other areas of study include reacting to the inherent risks posed by recognizing the direct personhood of non-humans or so easily allowing the satisfaction of personhood by indirect personhood.

#### AI personhood innovations spill over

Dafni Lima 18, Ph.D. Candidate in Criminal Law at the Aristotle University of Thessaloniki (Greece) and Fulbright Foundation Doctoral Dissertation Visiting Research Student at the Harvard University Initiative on Law and Philosophy (United State), “Could AI Agents Be Held Criminally Liable? Artificial Intelligence and the Challenges for Criminal Law,” 69 S.C. L. Rev. 677, Spring 2018, WestLaw

Artificial intelligence and its development in the next years will undoubtedly pose great challenges for criminal law, which go beyond the question of criminal liability. With new technology and a far more widespread use of AI agents than is currently conceivable, new opportunities for crime will arise. For instance, if autonomous vehicles become commonplace on our streets, we will sooner or later need to think about new types of crimes that could be committed by hackers and how to prevent the commission of terrorism offenses that could be perpetrated by using the extended capabilities of smart cars.51 Furthermore, new legal rules will have to be devised to regulate safe driving and relevant crimes;52 the relationship between an autonomous vehicle, its driver and passengers, and third parties (other drivers, \*695 passengers, or pedestrians); insurance and tort claims;53 and privacy with regard to autonomous vehicles.54 Finally, law enforcement will have to be equipped with new powers and duties in order to address the new situation; for example, we will need to think about under which circumstances a law enforcement officer might be allowed to pull over an autonomous vehicle, and how.55

However, the very first wave of vibrations that will be felt in criminal law will undoubtedly include issues that revolve around criminal liability. In this context, legal professionals will be invited to revisit, enrich, and reshape fundamental concepts, as discussed above. Lawmakers and common law judges will have to come up with models that adequately address allocation and imposition of criminal liability, practitioners and adjudicators will have to understand how to best apply them in practice, and research by legal scholars will have to shift focus in order to inform this debate. The results might be as groundbreaking as AI technology itself; these reforms might even one day lead us to reconsider the very foundations of criminal liability, wrongful acts, and blame.

### Yes Spillover---AT: Logical Limits Solve

#### The conception of what “legal personhood” necessarily includes is vague at best, infinite at worst

Paweł Banaś 21, Faculty of Law and Administration, University of Warsaw, Jagiellonian Centre for Law, Language and Philosophy, Jagiellonian University, “Why cannot anything be a legal person?,” OpenEdition Journals, 11-1-2021, https://journals.openedition.org/revus/7335

3 Visa Kurki’s position

In his book, Kurki insists that not anything could be a legal person. To understand what he means by this, one could try to apply the essentialist framework I have briefly described. This seems consistent with Kurki’s observation that the term “legal person” can be used either to refer to some legal kind, conceived as “a bundle of legal positions” (i.e. a bunch of legal entitlements and burdens), or to an entity holding this bundle of legal positions (Kurki 2019: 133). According to Kurki, this ambiguity can be a source of non-sequitur mistakes when these two meanings of “legal person” are confused. Hence, Kurki suggests that we should use the term “legal platform” when referring to a legal person as a bundle of legal positions and reserve the term “legal person” for those uses in which we (directly?) refer to an entity to which certain legal platforms might be ascribed.

Whereas I find the concept of a legal platform as a legal kind identical to a bundle of certain legal properties (legal entitlements and burdens) stipulated in law to be largely straightforward, the concept of Kurki’s (sensu stricto) legal person requires some further analysis. Although it seems like most of the time the author uses the term “legal person” in reference to entities that are (supposedly) members of some legal platform, he also defines it as follows: “(…) one’s being a legal person is an attribute of a non- legal entity, conferred by an efficacious legal system” (Kurki 2019: 133). Hence, Kurki’s “legal person” seems to remain ambiguous as to whether it is a reference to an entity or an attribute. This ambiguity runs deeper given that he provides an analogy according to which a legal person “is much like the status of a piece of fibre as money in some legal system” (Kurki 2019: 133). By this he clearly refers to the idea of Searlean status-function (see Searle 2010), which he introduced few pages earlier. Although Searle himself was rather vague in his approach towards kinds in general, his commentators would usually identify a status function with an (institutional) kind.

This ambiguity that I have just ascribed to Kurki need not necessarily be a problem. The author might, for example, defend himself by saying that by legal persons he means entities qua their legal status. Or, someone could point out that kinds themselves can also be considered entities qua members of some other (maybe higher-order) kinds; i.e. that it is possible that legal platforms can be ascribed to legal persons conceived as legal kinds (or a single legal kind). Although possible, however, this defence is somewhat inconsistent with Kurki’s obvious motivation to clarify such ambiguities. It also raises the question of whether the initial problem of constraints on the concept of legal personhood can be solved in that way.3 Without doubt, “(…)distinguishing between the notions of legal person and legal platform brings more clarity to the discourse”. It is not obvious to me, however, whether this clarity provides a sufficient framework to solve the problem. Although it is question-begging, for the time being let us consider this issue irrelevant and focus on Kurki’s general line of argumentation.

What is clear from Chapter 4 of Kurki’s book (as well as the rest of it) is that he recognises that one can look at the problem of constraints on legal personhood in two different ways: either by focusing on the bundle of legal positions (i.e. legal platforms) or on the entities (i.e. legal persons) to which this bundle can be ascribed. This is, prima facie, consistent with the essentialist framework I introduced, provided that a “legal platform” can be identified with a given “legal personhood” kind.4 In line with this framework, I read Kurki’s theory as one that rejects essentialism about the legal personhood kind while at the same time embracing essentialism about legal personhood kind membership. It is this latter form of essentialism that justifies his insistence that not anything could be a legal person.

Essentialism about the legal personhood kind membership seems, prima facie, hardly controversial. It is rather implausible that either my newest T-shirt or a cake I just made could be ascribed legal personhood. This could be coined in terms of there being entities that necessarily cannot be legal persons. A weak consequence of this would be that there are entities that, when a certain sufficient condition is satisfied, can be considered legal persons. A stronger consequence, along the lines of Kurki’s theory, would be that, when certain entities satisfy that condition, they are (necessarily) to be considered legal persons. According to the author, the general condition in question is the ability to hold claim rights or to perform acts5 (Kurki 2019: 138). It is an interesting part of Kurki’s theory that this ability (and legal personhood as a corresponding act, respectively) has different dimensions (benefits, responsibilities and capacity for legal acts) and that these dimensions may be realised to various degrees. Kurki uses this to justify further categorisation of legal personhood into purely passive personhood, dependent legal personhood, independent legal personhood and purely onerous personhood. These are clearly substantial claims with serious consequences for the very possibility of ascribing legal personhood to non-sentient beings, such as environmental entities or (contemporary) AI. Neither rivers nor trees can by themselves perform acts, which is why they cannot be legal persons. As far as my article is concerned, however, what matters is that Kurki seems to be a Naffine’s Realist in that he makes being a legal person dependent on having some (natural) attribute characteristic of human beings. This attribute ought to be somehow “discovered” since “(…) in order to determine which entities can be legal persons, we must determine the relevant building blocks of legal personhood and then ascertain to whom or what these elements can be extended” (Kurki 2019: 138).

Interestingly, however, Kurki does not embrace essentialism toward legal personhood as a kind. To be precise, he openly rejects essentialism about legal platforms as bundles of rights and duties. Since, as I argued above, different legal platforms are best identified with different types of legal persons, one could think of them as kinds themselves (rather than as entities, i.e. members of that kind). Kurki accepts that legal platforms can be “defined into existence” or “stipulated” and speaks of no necessary condition that bounds their scope. He seems to situate legal platforms among normative categories—to be filled, however, with natural entities.

### No Spillover

#### No spillover

Joyeeta Biswas 18, staff at ABC News, “Horse's case raises an important question: What would happen if animals could sue us?,” ABC News, 8/23/2018, https://abcnews.go.com/US/horses-case-raises-important-question-happen-animals-sue/story?id=57167970

Other legal experts, however, said such fears were usually unfounded, calling it the "slippery slope" argument, which is a small, insignificant change that will begin a chain of events that will result in a much larger change.

"Slippery slope arguments are typically used when defendants don't really have a strong argument in their immediate case at hand," Chris Green, the executive director of Harvard Law School’s Animal Law & Policy Program, told ABC News.

"They usually are just fearmongering. Throughout history, different classes of beings have been prevented from doing something by entrenched interests warning that it would end up bankrupting America, flooding the courts, or leading to social turmoil. These include women being able to vote, Asians being allowed to serve on juries, and people of different races or similar genders being allowed to marry one other. Opponents say that if you allow this social progress, it's going to cause all this other harm down the road. But it very rarely ends up happening."

#### Personhood is not a unified body of law---different areas don’t spill over.

HLR 1 [Harvard Law Review. "What We Talk about When We Talk about Persons: The Language of a Legal Fiction." <https://www.fordham.edu/download/downloads/id/3307/natural_law_colloquium_fall_2015_cle_materials.pdf>]

As the cases discussed above illustrate, the various theories of the person that American courts can deploy permit virtually any result, from the sharply limited creature of the state in Dartmouth College to the worried, anxious, and peculiarly humanoid entity in Martin Linen. These different approaches have raised the question whether the Court's corporate personhood jurisprudence is purely result oriented. 64 At least, it does not seem a coincidence that as the increasingly complex modern corporation has become increasingly dependent on Bill of Rights protections and the American economy has become increasingly dependent on corporations, courts have adjusted definitions of personhood to accommodate the modern corporation's need for these protections.65

3. Borderline Humans. - The personhood status of the fetus raises particularly difficult questions, ones not present in cases involving the personhood of corporations or slaves. Whether legal persons or not, it was clear that slaves were human and it is clear that corporations are not, while debate continues to rage about when - if at all - a fetus becomes a human being. 66 The legal personhood of the fetus raises many problems; this section focuses only on legal approaches to the question whether an attack on a pregnant woman that results in the death of her fetus constitutes murder.6 7 This situation raises the issue of legal personhood in two ways: overtly, as when a court interprets a murder statute that includes the word "person," and covertly, as when legislatures criminalize attacks on fetuses in a way that places fetuses on the same level as born humans.

The legal status of the fetus with respect to personhood varies widely from state to state. Twenty-four states criminalize actions against the fetus in some manner; the rest do not.68 Criminalization of feticide through interpretation of state murder statutes engages the issue of legal personhood most directly. In Commonwealth v. Cass,69 the Massachusetts Supreme Judicial Court held that a fetus was a "person" within the meaning of the state vehicular homicide statute. 70 Emphasizing that statutory terms should be construed in light of their ordinary meaning, the court argued that "[a]n offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb." 71 The statute's ordinary meaning, and the failure of the legislature to provide any "hint of a contemplated distinction between pre-born and born human beings," 72 effectively created a presumption that fetuses count as persons. 7 3

Most states, however, address feticide through various forms of legislation. Some states include in their criminal codes sections that prescribe separate penalties for killing fetuses. The Minnesota legislature, in response to a state supreme court decision that held that fetuses are not "persons" within the meaning of that state's murder statute, 74 created a separate chapter of its criminal code entitled "Crimes Against Unborn Children." 75 This chapter established penalties for various types of violence against the fetus, including murder. Some states have taken a more straightforward approach by merely including feticide as a form of murder.76 Other states use a similar strategy but employ legal personhood as the means of criminalizing feticide. Utah law, for instance, stipulates that "[a] person commits criminal homicide if he ... causes the death of another human being, including an unborn child."77

A final strategy - and one that prevails in several states that do not formally regard fetuses as persons for the purposes of their murder laws - is to penalize assaults against pregnant women that result in either miscarriage or injury to the fetus. In Delaware, for example, public outrage at a man who strangled his pregnant wife led to the swift passage of a law making it a felony to abuse or assault a pregnant woman. 78 In one sense, these statutes do not address the issue of personhood nearly as directly as does common law interpretation of the term "person" in murder laws, because they do not entail ongoing public considerations of and conclusions about legal personhood. However, these laws can still send a strong message about the personhood status of fetuses. Though Indiana 79 and California80 extend to fetuses protection from assault while clearly differentiating homicide and feticide, the act of criminalizing feticide, regardless of the method, sends a message about the state's regard for fetal life and thereby implicitly grants fetuses limited personhood status.8' And though states that focus on fetal assault from the perspective of protecting the pregnant woman deemphasize the issue of fetal personhood, they cannot avoid it altogether.82

Alternatively, several jurisdictions still construe the term "person" within their murder laws to exclude fetuses. In some states, this interpretation is a result of clear statutory statement, as when the statute defines "person" as "a human being who has been born and was alive. '8 3 In the eight states that lack this particular definition of "person," courts have interpreted "person" as excluding fetuses, largely out of deference to the long-standing common law "born-alive" rule, whereby only humans that were born and alive could be considered persons for the purposes of murder statutes.8 4 For example, in State v. Beale,s5 the North Carolina Supreme Court held that fetuses did not count as persons for the purpose of its homicide statute,8 6 despite its earlier holding that fetuses counted as persons for the purpose of its wrongful death statute.8 7 The court emphasized both the venerability of the born-alive rule, which it claimed prevailed in the "overwhelming majority" of jurisdictions,88 and the lack of any affirmative indication from the legislature that it intended North Carolina's homicide statutes to extend to fetuses.8 9

Roe's famous dictum that fetuses are not constitutional persons 90 has done little to settle interpretive problems regarding personhood in the context of feticide law. Although the Roe dictum rendered fetuses nonpersons for constitutional purposes only, it represented a method of reasoning about fetal personhood that courts use to approach the issue. As this Note argues below, courts have not always applied this approach. Though courts consistently treat the issue of legal personality in feticide law as a matter of statutory or common law interpretation, just as the Roe Court approached the issue as one of constitutional interpretation, strikingly different theories of what personhood does or should mean have animated their interpretive efforts.

In some cases, courts have assumed that all fetuses are human. The Massachusetts Supreme Judicial Court adopted the strongest version of this approach in Cass, when it regarded the issue as resolved by a simple syllogism: all human beings are legal persons; fetuses are human beings; therefore, fetuses are legal persons. 9 1 The obvious objection to this approach is that it presumes an easy answer to a hard question. Society has not reached a consensus on the issue of when - if at all - a fetus becomes human. This is a point the Levy Court left open in its biological definition of personhood, which did not require that humans be born to possess legal personality.9

Further, courts differ greatly in their insistence on whether the term "person," or at least the question whether fetuses count as persons for the purpose of statutory construction, has to be given a transsubstantive application. In State v. Home,93 the South Carolina Supreme Court found it intolerable that the legal personhood of fetuses would differ in the civil and criminal contexts. 94 Other jurisdictions, such as North Carolina in Beale, share no such insistence on a unitary notion of personhood. 95

Though these different courts approach the determination of fetal personhood through statutory interpretation, their differing treatments of the issue of the transsubstantive consistency of legal personality suggest a deep theoretical divide. To courts that regard similar entities as persons in one area of law but not in another, "person" represents nothing more than a means of indicating a subject of rights and duties that may vary among bodies of law. A refusal to countenance different meanings of "person" among different areas of law, however, implies a rejection of - or at least discomfort with - this analysis. An insistence on consistency may indicate that a court regards the legislative statement of what counts as a "person" not merely as signifying the subject of rights and duties, but rather as expressing some notion of what it means to be a person in an a priori sense that should remain expressively stable.

These examples with respect to the legal status of slaves, corporations, and fetuses provide only an impressionistic sense of the fragmented body of personhood law. Yet each example provides a similar impression. The question of personhood arises inevitably in statutes and common law alike, inviting - often requiring - interpretation. Such interpretation may take place explicitly, as when a court openly engages the meaning of the word "person," or implicitly, as when a court presumptively treats certain groups as outside the range of legal subjects affected by a given law. In either case, interpretations vary widely. Although it may be unsurprising that "person" means radically different things within different bodies of law, this reality reflects the fundamental disorganization that characterizes the doctrine of legal personhood.

The doctrinal discord in the law of the person results largely from the lack of a coherent theory of the person. One feature common to each of the current approaches is a disinclination on the part of courts to engage in theoretical inquiry into the nature of personhood as a basis for conclusions about legal personhood. The Supreme Court's theoretical stance in Roe, in which it preemptively disavowed any implication that its decision regarding a fetus's constitutional personhood reflected at all on the philosophical question of when life begins, epitomized this approach. 96 A similar disinclination is evident in each of the decisions discussed above, in which courts relied on assumptions about legal personhood but declined to include in their reasoning any reference to the considerable theoretical literature on this topic. The absence of any coherent theory raises an inference that courts' determinations of legal personality are strongly result driven, with judges selecting whatever theories of personhood suit the outcomes they desire.97 As one commentator observed, "Personhood is ... a conclusion, not a question." 98

### No Spillover---Animals AFF

#### Courts can police the boundaries and decide cases of individual animals one at a time.

Dr Linda Roland Danil 17, researcher presently living and working in London, “Legal personhood for non-human animals: Part II,” UK Human Rights Blog, 12-26-2017, https://ukhumanrightsblog.com/2018/06/01/legal-personhood-for-non-human-animals-part-ii-dr-linda-roland-danil/

Practical consequences

As argued in an earlier post, and as the NhRP has made clear a number of times, their quest for legal personhood is, at present, limited to individual animals from certain animal species, and strictly relates to habeas corpus. It further needs to be noted that these rights should only apply vis-à-vis humans, and not lead to unnecessary interference by human beings with nature to adjudicate rights between non-human animals in the wild, for example.

On a practical level, an incremental approach needs to be taken so that decisions can be made on an individual, case-by-case basis by interested parties that initiate proceedings on behalf of specific, individual animals – and this is precisely what the NhRP is doing.

This diminishes the worry of the slippery slope argument – because the courts, as well as society more broadly, will have the time to reflect upon what decisions to make and the consequences. As Taimie L. Bryant argues, it unquestionably is the case that ‘An unavoidable feature of incrementalism is that all of the perspectives and solutions cannot be known in advance’ – but that is no reason to not act at all. As Steven Wise has argued in relation to an argument made by New York State Supreme Court Justice Barbara Jaffe, what matters is that if the litigant in front of a judge is entitled to relief, then the litigant should get it – and where that may lead is up to another judge to take on.

What, therefore, would this mean for successful applicants? If the release of a great ape, dolphin, whale, or elephant presently in captivity is ordered, then they will be moved to sanctuaries, or have sanctuaries purposely built for them. Releasing them into the wild would most likely not be a viable option if the individual animals in question have been in captivity all their lives (though if this is a viable option it should be considered). There may be expense involved if a sanctuary must be built specifically, but my answer would be that we created the problem, so it is up to us to fix it in a manner that is ethically and morally correct.

It is possible, therefore, that this will mean that individual animals presently being kept in zoos — and most prominently in zoos in which they are not adequately cared for – will be moved to sanctuaries. I extend my sympathies to those that enjoy trips to the zoo to view these animals, but my wager is that the correct thing to do is not expect these animals to fulfil the purpose of being a spectacle for us.

What of the argument that, for example, David Pannick QC recently made in The Times on 24th May, that:

If a chimpanzee could claim habeas corpus, what about a chicken due to be slaughtered for food, or my dog, Bubbles, who has never agreed to the restrictions imposed on him?

My answer is that such an argument is jumping the gun. At present, what is being discussed is individual great apes, dolphins and whales, and elephants – not chickens, and not companion animals such as dogs.

An incremental approach may very well eventually mean that companion animals and animals that are consumed as food will be treated separately under the law. Perhaps companion animals, rather than being classified as property, will move towards a legal categorization that sees them as family members. This might well be a truer reflection of how owners see their animals. Or their legal categorization may not change at all, or may not change until a long way into the future.

Conclusion

As scientific advancements mean that we increasingly understand different animal species better, it may very well be that different animal species will begin to be treated differently under the law in accordance to their species specific needs.

However, the present paralysis in this area of law means that all animals suffering in captivity end up being unfairly boxed under the categorization of ‘property’ – a violent simplification that is borne of the fact that there are a number of animal species, idiosyncratic in their own way, and who serve human beings in different ways, if at all. That is to say, they are all boxed in the same category as ‘property’ because it is just easier that way – and they all continue to suffer because we are too lazy or it is ‘too hard’ to try and change things.

I am not denying that it is going to get complex – but that is no good reason to continue allowing individuals animals such as great apes, dolphins and whales, and elephants in captivity to suffer and not have adequate recourse to protect their fundamental rights to bodily liberty and bodily integrity.

## Public Trust CP

### PTD CP

#### The public trust doctrine provides identical protections to personhood rights, but bases them off the common good of the public, not the entity itself---most common literature is in the nature area

Emilie Blake 17, Texas Tech School of Law, “Are Water Body Personhood Rights the Future of Water Management in the United States?”, 47 Tex. Envtl. L.J. 197 (2017).

The public trust doctrine is based on the idea "that the public possesses inviolable rights in certain natural resources" and emerged as a way for the public to "control navigable waters for the protection of certain public uses." 64 These uses include navigation, commerce, or even recreation. 6 5 The public trust doctrine first received exposure in the water rights context in National Audubon Society v. Superior Court, where California applied the public trust doctrine to protect Mono Lake from increased water diversions previously authorized under state law.66 More importantly, the court essentially held that preserving Mono Lake (and its unique ecology) was more important than the City of Los Angeles's need for water. 67 In fact, "the public trust doctrine serves to balance the scales by injecting common public interests into resource management decisions." 68 At the end of the day, however, because California still controls the allocation and regulation of Mono Lake, the decision between development of water rights and conservation remained with the government.69

Similarities Between Rights Of Personhood And The Public Trust Doctrine

Similar to the public trust doctrine, assigning water bodies the rights of personhood will protect natural resources from harm, although perhaps for different reasons. 70 The public trust doctrine has been "fine-tuned to meet the . . . necessities of local situations." 7 1 The same could occur with environmental personhood rights as injury standards are defined and the body of law develops in each jurisdiction-in essence, capturing the chameleon-like qualities of the public trust doctrine. For example, the law could grow not only in statutory law but also in the court system. 7 3

The public trust doctrine has a few main purposes: it guarantees the public access to trust resources; it protects public regulation of private activities from takings claims; it acts as a rule of statutory and constitutional interpretation of explicit language; and it also requires regulatory involvement.74 States could use environmental personhood rights in similar ways, and thus mirror public trust law as needed.79 Since the basic foundation of personhood rights is to protect a water body against injury, courts and legislatures could use this theme to promote public easements, regulate private activities, protect the personhood right, and appoint administrative guardians.76

Despite the structural differences of the public trust doctrine and the right to personhood, at its core, the right to personhood might have the same effect that the public trust doctrine has had in natural resource law.n7 For example, in jurisdictions where the government owns the water, lawmakers can use the public trust doctrine as a basis for instream flow regulation.78 The reasoning rests in the benefits instream flows have: "[filowing water helps to maintain water quality and furthers other uses such as recreation, aesthetic values, and ecological interests. . . . [and] the increasing demands of consumptive water users are significantly reducing stream flows and lake levels in many parts of the country."79 As such, lawmakers have suggested the public trust as a remedy to protect bodies of water with large instream flow rights.s0 Personhood rights could be used in an identical way-to preserve the vitality of a water system.8

### PTD CP---Competition

#### Personhood rights necessitate a private guardian ad litem to defend the entity, while the Public Trust Doctrine means it’s managed publically

Emilie Blake 17, Texas Tech School of Law, “Are Water Body Personhood Rights the Future of Water Management in the United States?”, 47 Tex. Envtl. L.J. 197 (2017).

However, all decisions made in reliance on the public trust doctrine lack one key component that the right to personhood has: a private guardian.8 2 This is the fundamental turning point in the comparison between the public trust doctrine and personhood rights.8

Unlike the public trust doctrine, personhood rights will not permit a state to decide between development and water conservation because of the water body's appointed guardian.84 According to the rights of personhood, a guardian will consistently and zealously advocate on behalf of a water body to defend it against any form of injury."' The public trust doctrine, on the other hand, requires a state or organization to protect natural resources or keep them viable.86 Further, some scholars criticize the public trust doctrine as non-substantive and having no intrinsic standards, whereas the right to personhood is based on an injury standard.87

Also, the public trust doctrine offers an expanded range of parties that may sue for enforcement-private citizens can sue the government or other private parties, and the government may sue private parties for alleged violations.88 In the case of personhood rights, although a state may also have a guardian of the water body, like New Zealand, another interested party will be appointed to protect the water body. 89 However, this may be implemented differently across the United States. In states that own all of the water, it might go against public policy and the public ownership law to designate a private organization as the guardian of a river or lake.90 This could also lead to standing issues of who may sue on behalf of a water body-will standing exist just for the guardians or for private parties as well?9"

Further, the "injury" to be prevented in the case of personhood rights might end up being a higher standard than holding a resource in trust for the public.92 The public trust doctrine offers various paths that a court can take in interpreting statutes. 93 Courts might uphold the language narrowly or broadly, depending on what is considered injury to a water body and society as a whole. Holding a resource in trust does not necessarily mean no injury can occur to it-rather, a court may consider what is in the best interest of the trust.95

In short, the right to personhood is not a glorified public trust doctrine.96 Although there are similarities, there is a large difference: the guardian.97 The private guardian of a water body will play a key role in distinguishing the two theories of law and how they each play out in protecting natural resources.98 However, the public trust doctrine is more firmly rooted in the western states rather than in the east.99 If personhood rights jumped into the mix of water conservation laws, it would result in confusion-instead states should simply strengthen application of the public trust doctrine instead of developing a new body of natural resource law.100

#### PTD is an alternative to granting personhood

Randall Abate 20, the inaugural Rechnitz Family Endowed Chair in Marine and Environmental Law and Policy and a Professor in the Department of Political Science and Sociology, “Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,” Cambridge University Press, 2020

The Supreme Court’s decision makes Colombia the ﬁrst country in South America to recognize that a portion of the Amazon is a legal “person.”260 Unlike the Atrato River decision, the Supreme Court based its ruling on both nature and future generations. The CEO of the Center for International Environmental Law, Carrol Muffet, stated that this case is “not about [legal] personhood for the forest itself”; instead, the case “is so powerful and remarkable” because it joins a growing body of atmospheric trust litigation using future generations as a legal argument.261 The Supreme Court ruled that the “fundamental rights of life, health, liberty, and human dignity are determined by the environment and ecosystems. Without a clean environment the plaintiffs and human beings, in general, can’t survive, much less protect those rights for the children of future generations. The existence of family can’t be guaranteed, either, neither from society or [sic] the state itself.”262

### PTD CP---Nature

#### Compounding climate threats are diminishing vital water resources---BUT resolving gaps in PTD standards is sufficient to mandate recharge.

Joseph Regalia 19. Associate Professor of Law, William S. Boyd School of Law; Research Fellow, Great Lakes Environmental Law Center; J.D., summa cum laude, University of Michigan Law School, 2013; B.A., summa cum laude, University of Nevada, Reno, 2010. "A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts." Kentucky Law Journal, vol. 108, no. 1, 2019-2020, p. 42-46. HeinOnline, <https://heinonline.org/HOL/P?h=hein.journals/kentlj108&i=11> //EM

A. We are in a water crisis and adaptive, aggressive action is needed to protect precious water resources, especially in the west.

There is little dispute about the pressing need for governments to protect their winnowing water resources.93 The western U.S. is facing the worst water crisis in more than a century.94 And climate change is altering water resources across the nation.

In Nevada, for example, a long-term drought has gripped much of the Colorado River Basin.96 The amount of water flowing into Southern Nevada's major water storage, Lake Mead, has declined rapidly.97 Climate change is predicted to put increasing pressure on Nevada's water resources. 98 Rainfall is expected to decrease, evaporation will increase, and water resource availability will decrease. 99 The same crisis is faced by many other states.' ° And that includes not just the arid west, but the east, too.

Couple these climate threats to water with an increase in water usage and greater demands for water in urban areas and you have a water management dumpster fire. We are already seeing water supplies dwindle in some areas of the U.S., as well as degraded water quality nationwide.10 2 Government agencies have identified areas that will face critical water supply threats, regardless of climate change.0 3

I won't belabor the threats to water resources because so many other scholars have done so, and better than I can." You might think that given these threats, federal and state governments would be passing water management policy at every legislative session, anything to avert the coming disaster. But no. There remain glaring shortcomings in water management policy across the country, including stark gaps in state adoption of public trust duties to protect water resources.

B. Many states have shed or cut their public trust duties.

Following federal directives that states should decide the reach of their public trust obligations (at least beyond the historical minimum), a patchwork of approaches have developed. °5 This is not necessarily a bad thing: one of the advantages of the public trust framework is that it is adaptive to local needs.'0 6

But one major problem stems from states that have narrowly confined or abdicated their public trust duties altogether. This make some sense, given that the prior appropriation doctrine, at its heart, favors private water users.' 0 7 Using up water-indeed, using every drop of it up-is the goal in a pure prior appropriation world: "[W]ater users perceived pumping a stream dry not merely as an allowed outcome, but as a desired one."'0 8

States have cabined the reach of their public trust duties in terms of(1) the waters covered, (2) the uses protected, and (3) the power of the trust obligations themselves. Other scholars have done admirable jobs of sorting the precise contours of each state's public trust doctrine, so I won't repeat all that here.'0 9

In short, many states have narrowed the waters, uses, and impact of the public trust doctrine to the basic scope described in a U.S. Supreme Court case from the 1800s, Illinois Central Railroad Co. v. Illinois. "' Major waterways and the trinity of uses are protected, but not much more.' Some states have expanded the scope of waters to include waterbodies capable of floating logs, or supporting certain sorts of recreation, or to artificial and major waterways.' 1 2 But most states have maintained a relatively narrow scope similar to the Illinois Central standard from the late 1800s, with modest expansions.113 For example, Alaskan caselaw largely mirrors Illinois Central's minimums," 4 despite the fact that Alaska enacted far-reaching statutory language suggesting that the public has broad rights in all sorts of water bodies." 5 Arizona," 6 Idaho," 7 and Kansas similarly limit their trust duties, to name a few states."l 8

#### Expanding PTD will ensure adaptation and sufficient management by adjusting to the contours of current crises.

Joseph Regalia 19. Associate Professor of Law, William S. Boyd School of Law; Research Fellow, Great Lakes Environmental Law Center; J.D., summa cum laude, University of Michigan Law School, 2013; B.A., summa cum laude, University of Nevada, Reno, 2010. "A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts." Kentucky Law Journal, vol. 108, no. 1, 2019-2020, p. 42-46. HeinOnline, <https://heinonline.org/HOL/P?h=hein.journals/kentlj108&i=11> //EM

V. THE JUDICIAL FRAMEWORK FOR THE PUBLIC TRUST DOCTRINE

How might this all look in practice? Most importantly, this framework will plug up the public trust holes that several states have created. This includes the legislative, executive, and judicial holes. Because the courts are interpreting the boundaries of sovereign authority,3 74 courts can no longer relegate the public trust to merely a common law rule that can be overruled on a whim. Even better, the court's role would now include interpreting the reach of the doctrine.

This version of the public trust doctrine is also simply more robust than others. With the view that states have obligations to protect trust duties as to all flowing waters-only at the point that public trust interests are seriously threatened-states are not merely required to "consider" the public trust, instead, they are required to preserve it.

Another key advantage is that if we recognize that the public interest and rights in the entire corpus of flowing water predated our nation's founding-and that those interests and rights were conferred in trust to the states-then challenges to state water decisions under the Takings Clause will have less force.3 76

Other scholars and states have done admirable jobs at proposing how legislative and executive branches should practically carry out their trust duties.3 7 7 Some important fundamentals include requiring that every allocation of water touching on judicially determined trust waters must include a public interest consideration.

Presumably, if courts determine that expanding public trust waters and uses is warranted, then the public interest factor should be given extra, if not dispositive weight in water management decisions. In other words, states act within their constitutional authority only if they determine that the public interest is not impacted by a particular water allocation.

Determining what waters need to be brought into the trust as a remedy for harms to the public interest should be no problem for courts. Nor should determining when states have failed to consider the right factors and thus abdicated their trust duties to consider the public interest. 378 Courts conduct a similar analysis all the time under various environmental statutes.379

This judicial-based approach will also free up courts in even the most progressive states to further embrace the flexible public trust approach to water management. That may be of some value. As mentioned above, the water crisis is quick-moving and dire. A flexible public trust doctrine offers the adaptiveness states need to protect their diminishing water resources. The legislative approach to water law has a lot of shortcomings that an even more robust judicial approach can fill.38 ° As a few other scholars have explained at length, the public trust doctrine's common law character makes it a much better answer to many water problems today.3 8

After all: The Anglo-American common law system, for example, is in some ways more procedurally adaptive than the legislative process. A common law court has the capacity to distinguish previous cases when addressing new factual circumstances. If Congress wants to amend a statute to address a new situation not covered by existing law, or because changed circumstances have undercut the effectiveness of existing law, it must follow the constitutionally prescribed method for changing the law-adoption of the same bill by both houses of Congress and either presidential signature or legislative override of a presidential veto by a two-thirds vote.38 2

As Robin Craig explains at length, the shortcomings of many legislative answers to water law problems align quite nicely with a common law approach.3 83 This includes:

\* The localized nature of water management needs;384

\* The threats to water are ever-changing; 385

\* Experimentation is needed to find the best approaches to water management;

\* A flexible common-law approach will allow the doctrine to evolve. 387

VI. CONCLUSION

We should consider a framework that fully empowers the federal and state judiciary to determine the scope of the public trust in all of our nation's waters. This framework acknowledges the basic relationship between threats to water and the contours of the public trust. When courts determine that the public's interest requires an extension of trust obligations to a new set of waterways or uses-then it can say so. The court is declaring the bounds of the state's authority over water. With those boundaries set, the other branches decide what to do on the ground. The implications for this framework are many. State courts can now extend the reach and force of the public trust doctrine, even in the face of the political branches refusing to act. As important, federal courts can enforce the public's right to water to ensure that states protecting the public's basic rights to water. The public, in other words, can hold its government accountable to the social contract it signed when the nation was founded-a contract to protect the public's natural resources today and for future generations.

#### Personhood rights are ecocentric, while PTD is anthropocentric

Erin Ryan 21, Elizabeth C. & Clyde W. Atkinson Professor and Associate Dean for Environmental Programs, Florida State University College of Law,et al. Holly Curry, Hayes Rulet, Research Assistants, “Environmental Rights for the 21st century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement” Cardozo Law Review, 2021, 42(6), 2447-2576.

What Do the Public Trust Doctrine and Rights of Nature Do Differently?

Under an environmentally protective version of the public trust doctrine, like California's, groundwater withdrawals that threaten public trust values in a navigable waterway would be protected (and in Hawaii, all groundwater would be). Moreover, an environmentally protective public trust could be applied to protect purely ecological concerns, as well as traditional values associated with navigability. If groundwater withdrawals threatened the navigability or recreational values on the connected surface water, or if ecological values associated with the trust resource were threatened, the public trust would be implicated and there would be a potential legal remedy to stem the harm-at least to the extent it is feasible to do so while also protecting competing public interests, such as access to drinking water.666 By contrast, rights of nature laws, at least as they have been envisioned in Florida, are written to be unapologetically protective of ecosystems, even where they compete with other public interests. For the sake of comparison, a typical domestic rights of nature ordinance would recognize the right of a water body to "flow," "flourish," or "maintain a natural ecosystem."

In this comparison, one can easily imagine circumstances in which the public trust doctrine will be less protective than the rights of nature approach, even considering a protective California version of the public trust. The public trust doctrine might be sufficient to protect some public interests in the resource, but insufficient to protect ecological values where they conflict with other compelling public interests. For example, the public trust doctrine might protect river flows that are sufficient to protect kayakers and anglers, but it might balk at the anthropocentric flows needed to maintain the integrity of an ecosystem supporting endangered mussels. The rights of nature approach may be tangentially worried about kayakers but more wholesomely concerned about the mussels.

Even under an expanded public trust doctrine that applies to groundwater and protects ecological values, rights of nature principles would be implicated far earlier, at a more nature-protective threshold.

### PTD CP---Data

#### Data assets fit under the PTD---they’re measured through aggregates, are difficult to standardize, and are a normatively good fit for public domain

Aziz Z. Huq 21, Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School, “The Public Trust in Data”, The Georgetown Law Journal, 2021, Vol. 110:333

B. Fitting data within a Public Trust Framework

The public trust form has potential in the personal data context because of congruities of form and function. First, there is a fit between the formal qualities of data as an asset and the formal qualities of other assets subject to the public trust doctrine. Second, there is a close match between the jurisprudential ambitions baked into the public trust and the desirable mix of public and commercial uses of personal data.

Data Is an Archetypal Public Trust Asset

Let us start with a negative: there is a profound mismatch between the standard, individualized form into which property is usually sliced, and the way in which personal data is circulated and exploited. This incongruity emerges in doctrine. It can also be seen in the misalignment between the leading justification for creating discrete, fungible property interests and the manner in which value is in fact extracted from personal data. Supreme Court precedent on property in information strongly suggests that there is no individualized property interest in personal data. At least as a matter of black-letter law, therefore, the aggregations of data that comprise the most important asset in the personal data economy are simply not within the private property system.

The leading decision on information aggregations is Justice O’Connor’s 1991 opinion Feist Publications, Inc. v. Rural Telephone Service Co. 366 Feist concerned a copyright claim to the compilation of names, addresses, and telephone numbers in a white-pages directory.367 Taking originality as a constitutional floor, the Court held that the “selection, coordination, and arrangement of . . . white pages do not satisfy the minimum constitutional standards for copyright protection.”368 Mere “facts” are “uncopyrightable.”369 After Feist, lower courts have found compilations to be copyrightable only when they evince some “judgment” about divisions within data or summary statistics.370 Whether a particular aggregation created through personal data economies reflects sufficient creativity depends, of course, on its particular facts. But in at least one lower-court decision, locational data generated through a sensing net has been characterized as beyond copyright’s constitutional domain. So even when a given database architecture can be copyrighted, the actual data within it will not thereby become property.372 Although contract, trade secret, antitrust, privacy, and other bodies of law may inflect how information can be alienated or used, constitutional basics dictate that data is “largely free from property rights”373 defined in terms of private ownership.

This absence of an individualized property interest in information means that there can be no objection from prior owners to the recognition of a common, aggregate form of property in personal data. In particular, it vitiates objections on Fifth Amendment grounds pursuant to the Takings Clause.374 It does not supply, though, a positive reason for adopting a public trust for data.

Yet from another perspective, the economic logic of property rights does conduce well to an aggregative, common governance regime. An individualized, granular, and standardized mode of property is appropriate when social value is realized through the partition of assets. In the personal data economy, however, value is created through aggregation. 375 A single data point is rarely of much value on its own, at least unless it concerns a celebrity or public figure. This means that the commercial value of personal data emerges only when it has been lumped together. It also means that while a few harms associated with personal data economies concern individualized data, many emerge only after aggregation. As a rough first cut, privacy, dignity, and exploitation worries attach to discrete items of data without regard to aggregation. In contrast, economic inequality, democratic backsliding, state dominance, and the underproduction of public goods are associated with data aggregates. To the extent the law seeks to mitigate the latter as well as the former, it should intervene with respect to data aggregates, not target the flow of discrete bits of information.

The public trust is commonly deployed for assets that are hard to slice up into discrete, individualized assets. These include clean ambient air,376 navigable waters,377 ground water,378 the recreational use of a lake,379 and beach access.380 Divisible resources, such as oysters and fish, might be parceled out by quota systems, but their component items are fungible and better considered as aggregates. As such, the public trust has been developed for assets with the same relation to aggregation as personal data.

Further, while the harms of personal data economies cannot be captured without an accounting of data in its aggregate form, the individuation of data as property does not yield the payoffs associated with other discrete and parceled forms of data. In a leading economic account of individual property rights schemes, Thomas Merrill and Henry Smith argue that the transaction costs of trading in property are a function of information costs third-parties experience when trying to evaluate a good.381 “As a consequence, property is required to come in standardized packages that the layperson can understand at low cost.”382 Because these information costs “impinge upon a very large and open-ended class of third persons”383 in market contexts, standardization is necessary to trade’s viability. Merrill and Smith point out that even though items of personal property can vary in multitudinous ways, legal standardization is most useful “in connection with the dimensions of property rights that are least visible, and hence the most difficult for ordinary observers to measure.”384

This logic does not translate well into the personal data context. The standardization of data does not have the same payoffs as the standardization of land and chattels. Rather, it presents different and sharper challenges. Personal data is much more difficult to standardize than goods. Data from the varied digital tributaries feeding the larger personal data economy will be as varied as personal property, but will lack the manifest and observable qualities of “size, shape, color, or texture” that obviate certain forms of standardization.385 Data will vary in nature and content depending on whether it comes from a cellphone, a vacuum cleaner, a dating app, an artificial pancreas, or a public surveillance camera.386 It will not reliably have “complementary attributes,” while the “information-hiding and limited interfaces” used to standardize land and chattels may be available only by losing precisely that which creates value in the first instance—the informational content of the data. Standardizing will often both require large investments in computation and come with heavy informational losses.

This is not to say that data is on all fours with assets historically subject to a public trust. The latter commonly preexist man-made action or commercial investments and can easily be seen to require protection from such investments. Yet this distinction, while real, is easy to overdo. A public trust asset—such as lakebed property close to Chicago or fresh water near Los Angeles—merits protection not because it is valuable in isolation. To the contrary, it has value—and needs legal shelter—because of commercial investments in proximate real property. The noncommercial interactions swept into social media networks can, similarly, be thought of as a “natural” phenomenon that accrued value because of a shift in locus.

A possible distinction between assets traditionally subject to a public trust and data is the former’s rivalrous quality. That is: a public trust is established when an asset is capable of exhaustion. Data, however, cannot be exhausted: it is nonrivalrous. There are traces of this idea in some cases. But reported decisions do not reflect a purely instrumental account of what is and what is not a public trust. An asset is subject to public trust not because it is rivalrous in use, but for fear that it will somehow be spoiled by exclusively private use. The decision to use a public trust reflects a normative understanding reflecting a sense of what ought to be in the public as opposed to the private domain. Even if data is nonrivalrous in the sense that it cannot be exhausted, many of its benefits (and harms) arise from the manner in which its uses affect collectives rather than individuals. Its effects on inequality and democracy, in particular, are aggregate rather than individual in scope. This collective impact makes a public trust regime desirable even if data itself is nonrivalrous.

The public trust form, when all is said and done, is well fitted in theory to the governance and management of personal data. Information is not personal property. It comes in aggregates that are poor fits for the day-to-day system of sliced up, discrete property entitlements for chattels and land. And the principal justification for cleanly individuated and sharply distinguished property is mostly inapposite in modern data economies.

#### PTD solves data management---that prevents employee exploitation, democratic backsliding, and state repression

Aziz Z. Huq 21, Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School, “The Public Trust in Data”, The Georgetown Law Journal, 2021, Vol. 110:333

The Justifications for the Public Trust Doctrine Apply to Personal Data

At its core, the public trust is a governance regime designed “to protect the people’s common heritage” from public and private misuse.389 An asset fit for public trusteeship, accordingly, is a “common” one in the sense that it can be enjoyed by an economically and sociologically varied public. Fishing for trout or oysters, larking about on a sandy Atlantic beach, or enjoying fresh potable water—all these are goods enjoyed by the public at large. A rule of common access is markedly progressive in its distributional effect. Moreover, in each case, the asset in question is durable: it is a resource that has historically been enjoyed from one generation to the next—and is therefore a legitimate object of people’s expectations.390

At a high level of generality, there are five parallels between the justifications for a public trust and the regulatory gaps to be found in public data economies. To begin with, the pools of information created through engagement with platform economies and sensing nets are the product of common labor. Their value exists thanks to the mutual expression of our “natural compulsion to reciprocate” and “existing solidaristic bond[s].”391 On familiar Lockean grounds, that endows their collective creator—not one single person, but a networked assemblage of all— with a collectively held title.392 The public trust hence puts ownership in the hands of those who deserve it, and allows them to reap a fair return via user fees.

Second, personal data is not only created by common, albeit uncoordinated, action. It could also be designed for the enjoyment and benefit of all, rather than for the benefit of a narrow coterie of monopsonistic purchasers and brokers. That is, personal data economies as they exist now imply a choice: should it be exploited for the good of the few or titrated for the benefit of the many? The public trust in data is a way to create democratic control over a resource’s use—barring undesirable effects and eliciting public goods.

Third, personal data as an asset is durable. It cannot be exhausted (although its misuse can yield spoilage of the public square). It endures for generations, and it affects many parts of human life.393 The reservoirs of personal data being filled now are thus as much a kind of common heritage as the air we breathe. It is worth emphasizing again that what is spoiled is less the resource, and more the ambient social conditions of equality and adequate resources for all that make personal data economies useful in the first instance.

Fourth, several of the most penetrating normative challenges of personal data economies arise from disparities of information and influence between firms and the public. Across varied fronts, the concentration of profits and knowledge in a small number of firms is a fulcrum of normative concern. Platform economies and sensing nets extract data that firms value in ways users cannot. This many-toone character of many platform economies, which is baked into both design and technological detail, spills over into another asymmetry: even if Facebook yields substantial gains for individual users, the sheer gap between their numerosity and Facebook’s unity has distributive effects. Small per-person profits captured by a single firm from millions of people daily generates a large, lopsided concentration of both wealth and influence. Technical and legal complexity allowing firms to exploit workers’ and users’ cognitive weak spots only exacerbates this tilt.394 The public trust doctrine changes this many-to-one dynamic into a one-to-one contest. It hence levels the playing field.

This leveling means that the public trust can directly respond to many of the critiques lodged against data economies. Concerns about exploitation, inequality, and the undersupply of public goods are all best understood as objections to the regressive dynamics layered into personal data economies. Retail privacy worries about improper sharing, data breaches, and unanticipated affordances also have a distributive character: in addition to the first-order objection to privacy losses, they are instances in which platform economies or sensing nets extract a greater informational surplus than consumers reasonably anticipate. Concerns about democratic backsliding and state repression are also objections to certain kinds of asymmetrical arrangements focused on political rather than economic hierarchies. The American public trust doctrine as revived and rearticulated by Illinois Central provides a well-tailored vehicle for addressing those redistributive concerns. From its inception, it was understood as a means of curbing the influence of powerful interest groups over important common assets.395 The Illinois Central Court conceived of the problem presented by the Lake Front Act in terms of legislative corruption, resulting in the improper transfer of assets to the company.

The state today may not act corruptly in the same raw way as the Illinois legislature circa 1880. It is instead more likely to fail, either by negligence or undue influence, to prevent immediate harms or larger structural imbalances from materializing. As with the Lake Front Act, the effect is to allow an undue part of the value created by a public resource to flow to small number of firms. The data public trust corrects for that.

Fifth and finally, at the remedial end, the public trust harnesses “checks and balances of government” to prevent an asset’s misuse, but at the same time reposes no “blind” trust in the state.397 It accounts for both market and government failures. Hence, from Justice Field’s opinion in Illinois Central onward, the public trust doctrine has been organized around the creation of judicial mechanisms to ward off various ways in which government might connive with interest groups to spoil or alienate an asset to the detriment of the public at large.398 It is a means to regulate the “collective ownership . . . [of] public property” through a mix of “inalienab[ility]” rules and other restraints.399 Although the Illinois Central Court enforced an inalienability rule to void the transfer of Chicago’s lakefront, the doctrinal entailments of a public trust can be more subtle and varied, extending from a light review of the formal qualities of an asset’s use to a hard look at the motives and justifications for a particular arrangement.400 A public trust might also be a semicommons—an arrangement in which common usages are mixed with extractive private uses.401 In addition, a public trust in data can be hedged around with rules to prevent the government’s misuse of its contents, such as the kind of limits on disclosure and sharing that apply to social and taxing authorities.402 Public ownership need not therefore mean transparency with respect to state officials.

### PTD CP---Future Gens

#### The PTD solves future gens

Ylam Nguyen 17, J.D. Candidate 2017, University of California, Hastings College of the Law, ,“Constitutional Protection for Future Generations from Climate Change”, Hastings West Northwest J. of Envtl. L. & Pol'y, Vol 23:183 (2017)

2. The Public Trust Doctrine as Applied to Climate Change and Future Generations

The Public Trust Doctrine has great potential to protect future generations from climate change. Various states’ constitutions—such as Hawaii, Illinois, and Pennsylvania—explicitly declare that the states have a duty to preserve the environment for future generations, while other states— such as Connecticut, New York, Washington, and West Virginia—have statutes that mention the states’ duty to preserve natural resources for future generations.53 Furthermore, California has invoked the Public Trust Doctrine to protect future generations.54 The California Supreme Court noted in National Audubon Society v. Superior Court that the Los Angeles Department of Water had a duty to consider the impacts of water diversions on future generations.

Although the Court recognizes the Public Trust Doctrine, various states have applied it differently. The Public Trust Doctrine should be invoked under the unenumerated powers of the Ninth Amendment, thereby requiring the federal government to recognize the climate system as protected as a public trust.

### PTD CP---Future Gens---ATL

#### Atmospheric Trust Litigation solves future generations

Ylam Nguyen 17, J.D. Candidate 2017, University of California, Hastings College of the Law, ,“Constitutional Protection for Future Generations from Climate Change”, Hastings West Northwest J. of Envtl. L. & Pol'y, Vol 23:183 (2017)

\*\*ATL = “Atmospheric Trust Litigation”, sadly, not Atlanta, GA\*\*

3. Why Atmospheric Trust Litigation Is a Viable Option for Future Generations

ATL has been criticized as having flaws that undercut its viability in addressing the climate crisis.56 Caroline Cress opines in her comment, It’s Time to Let Go, that ATL is an ineffective solution in addressing climate change.57 Cress first argues that the Public Trust Doctrine is built on inconsistent historical precedent and applied inconsistently, with great variation among the states.58 Second, Cress contends that expansion of ATL would expand police power to an unaccountable judiciary. Finally, Cress maintains that ATL would face a variety of political obstacles, making it infeasible.

Despite the criticism, utilizing courts through ATL to protect future generations is not only feasible, but has already begun.61 Last June 2015, Judge Hollis Hill ordered Washington State to reconsider eight youths’ petition for rulemaking.62 The youths petitioned Washington’s Department of Ecology to create a rule addressing GHG emissions in light of the most current climate change science, arguing the state had a duty to protect the youth and future generation’s constitutional rights to essential public trust resources.63 Rejecting the petition, Washington’s Department of Ecology reasoned they wanted to delay taking action until the international climate conference in Paris in December.64 However, Judge Hill rejected Washington Department of Ecology’s argument, relying on an expert declaration from NASA climate scientist, Dr. Pushker Kharecha. Dr. Kharecha noted that atmospheric carbon dioxide (“CO2”) concentrations had exceeded the level estimated to be safe (350 ppm) in 1988.66 He cautioned that if no action is taken to return the atmospheric concentration of CO2 to 350 ppm within the next 100 years, then the Earth’s climate system will be pushed past a point of no return, leading to disastrous and irreversible impacts on today’s youth and future generations.67 Indeed, the youths were successful in Washington, as the court recognized that the state must not only consider what emission reductions are required to achieve climate stability but also make the reductions a reality.68 More recently, in April 2015, in a historic decision, Judge Coffin decided in favor of the twenty-one plaintiffs represented by Our Children’s Trust, rejecting the government and fossil fuel industry’s motion to dismiss. Judge Coffin characterized Our Children’s Trust’s lawsuit as an “unprecedented lawsuit”70 addressing “government action and inaction,”71 believing that the plaintiffs’ case was justiciable by “asserting the harms that befall or will befall them personally,”72 thus “necessitat[ing] the need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government.”73 Accordingly, “when combined with the EPA’s duty to protect the public health from airborne pollutants and the government’s public trust duties deeply ingrained in this county’s history, the allegations in the compliant state—for the purposes of a motion to dismiss—a substantive due process claim.74 These encouraging decisions bring a sense of optimism and show that courts are open and willing to consider ATL as a legitimate solution to address climate change.75

Furthermore, much statutory law is deficient in protecting future generations from climate change.76 Current statutes are narrow in their focus and largely procedural, as the statutes exclusively focus on regulating power plants or carbon emissions from vehicles.77 The present statutory law is not geared toward achieving overall lower carbon emission and is narrow in orientation.78 The climate crisis is beyond what many of these narrow statutes can handle, making ATL an ever-more viable solution because ATL is a comprehensive strategy characterizing the atmosphere as a single trust that must be protected.79 ATL calls for courts to intervene because only courts can enforce a wide-encompassing response with the urgency necessary to combat against climate change.80 ATL is an attainable solution, which can be utilized towards gaining constitutional protection from climate change for future generations

### PTD CP---NB---Clog DA

#### Court Clog Net Benefit---PTD has a higher threshold to prove harm

Erin Ryan 21, Elizabeth C. & Clyde W. Atkinson Professor and Associate Dean for Environmental Programs, Florida State University College of Law,et al. Holly Curry, Hayes Rulet, Research Assistants, “Environmental Rights for the 21st century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement” Cardozo Law Review, 2021, 42(6), 2447-2576.

Before litigants could invoke the public trust doctrine, they would need to affirmatively demonstrate potential impacts to cognizable trust values-for example, a loss of recreational access, impacts to a vulnerable species, or negative impacts on navigation. For the rights of nature, however, any alternation of flow or impact to the natural ecosystem, no matter the magnitude, could theoretically be sufficient to warrant a claim. Taken to its extreme, any alternation of natural flow could be held to violate the rights of nature-creating a potential conflict reminiscent of the anthropocentric pressure that historically caused the original English common law rule of natural flow riparian rights to give way to the more modern American reasonable use doctrine.667 It would be interesting to see, centuries later, if such a transformation could truly be unmade. Certainly, it would be a very uphill battle (or a very upstream journey).

## Multilat / Treaties CP

### Multilat / Treaties CP

#### **National law and IHRL protect similar rights and freedoms but apply them distinctly**

Parvez Sattar 21, Department of Law, School of Liberal Arts and Social Sciences, Independent University, “Redefining Personhood: A Synoptic Analysis of Human Subjectivity from Legal and Human Rights Perspective”, Beijing Law Review, March 2021, Vol 12, No. 1

However, in a parallel analysis, this article also finds itself content with one particular aspect of this debatable argument, i.e. the distinctions drawn in terms of application of constitutional or fundamental rights (also called civil rights in some jurisdictions, such as the USA) within a national jurisdiction, and that of the universal norms and standards of human rights.

Most national constitutions enumerate a catalogue of rights and freedoms as fundamental rights applicable to individual persons within the legal jurisdiction of that country. Unlike the protection of international human rights, the fundamental or constitutional rights and freedoms are protected by the relevant laws of the land with judicial enforceability in the domestic courts concerned (even though many of these civil rights and freedoms overlap between human rights law and national laws). Since the attributes of citizenry as membership of a political state represent an agreement between specific individuals in question and the political entity, application of the fundamental rights dependently vary between the provisions in this regard in the domestic laws ( Miller & Cross, 2012). International law is not, generally speaking, responsible for overseeing enforcement of these latter rights within a domestic jurisdiction in contrast to the enforcement of human rights and liberties ( Sattar, 2020a). Also, many national constitutions categorically specifies the fundamental rights that would apply only to the citizens and those that would apply to all citizens or not-within the legal jurisdiction of the state.

#### International legal personhood is not a precondition to rights under IHRL---the definition is flexible

Parvez Sattar 21, Department of Law, School of Liberal Arts and Social Sciences, Independent University, “Redefining Personhood: A Synoptic Analysis of Human Subjectivity from Legal and Human Rights Perspective”, Beijing Law Review, March 2021, Vol 12, No. 1

3.3. Emerging Questions of International Legal Personality

The concept of personality is unequivocally linked to the subjects of international law. As noted by Dixon, personality is to be understood as “a body or entity recognized or accepted as being capable, of exercising international rights and duties” ( Dixon, 2007). This means, that if an entity is said to have international legal personality, that entity is provided with rights and duties derived from international law, and this is argued in the following sections of the essay by providing evidence from international criminal law and international human rights law.

Significantly, the International Court of Justice, in the so-called Reparation for Injuries Opinion (1949), has linked the subjects of international law directly to the international legal personality and made it clear that there may be other subjects than states ( Harris, 2004). As pointed out by McCorquodale: “while the State is the primary subject of the international legal system, the subjects of that system can change and expand depending on the needs of the [international] community and the requirements of international life” ( Evans, 2018).

Rights and privileges that individual human person has been provided with under international law are of different character. They might be claim-rights, a privilege, a power, or immunity. The fact that individuals are provided with rights under international law, makes them subjects in their own right. The human rights sphere is incontestably the area in which individual rights under international law is most developed.

Talking about the requirements (conditio sine qua non) for recognition and activism of non-state subjects of international law within a given legal situation, Jan Klabbers considers personality of any such entity as “a threshold, which must be crossed” ( Klabbers, 2010). In other words, claims and belonging to the global community of these entities are conditional to possessing legal personality in international law.

However, how the elements of this international legal personality are defined is an increasingly complex question that arises in the contemporary political and legal discourses, particularly in the context of recent development in international criminal justice and the principle of universality, application of international humanitarian law and individual responsibility for international crime as well as responsibilities for violation of norms and standards of international human rights law ( Sattar, 2020b). Arguably, at least insofar as individual responsibility under the universality principle is concerned, the traditional requirement of legal personality in international law is no longer a condition precedent to entitlement to rights and duties in law-a proposition that comes in sharp contrast with the conventionalism (that existed even in the 1990s)6 affiliated to this long-maintained normative standing.

Naturally, what follows from the argument above is: does personality (or legal personality to be precise) in international legal discourse exclusively signifies possessing rights and obligations as in the case of the objects of PIL? In this respect, the point of view expressed by Kelsen can be interpreted to note that the law cannot just think in terms of rights and duties when it comes to the application of the law of nations, but also needs to be able to point to someone or something possessing those rights and duties arising from conventional as well as emerging attributes of subjectivity in international law ( Kelsen & Wedberg, 1945).

#### **The definition of an international “person” is contested and expandible**

Parvez Sattar 21, Department of Law, School of Liberal Arts and Social Sciences, Independent University, “Redefining Personhood: A Synoptic Analysis of Human Subjectivity from Legal and Human Rights Perspective”, Beijing Law Review, March 2021, Vol 12, No. 1

Relation between Person, Human and Human Rights

Human rights are rights inherent to all human beings and this is the very first philosophical core propounded by the pioneers of the postulant concept in the middle of the 20th century that later continued to lay the foundation of the doctrinal and normative development of international human rights law. A common parlance in almost all the major human rights treatise in defining the idea- and thereby portraying its subjectivity and entitlement- is expressed in the popular words: human rights are the basic rights and freedoms that belong to every person. At the centre of the idea lies the fact that these basic rights and freedoms represents a set of ideal standards that allow a person to live with dignity, freedom, equality, justice, and peace. Every “person” has these rights simply because they are human beings. On the other hand, as observed by the Stanford Encyclopedia of Philosophy (2019): “all living humans—or perhaps all living persons—have human rights”. In both the approaches noted above, it is apparent that the terms person and human have been used synonymously in relation to human rights at least in the early development of the doctrine. The purpose of the following section of this article is to examine the scope and extent to which such subjective interchange between human, person and human rights reflect the post-modern conceptual innovations of personhood.

Ohlin (2005) opined that personhood is indispensable for making a human rights claim. Earlier, McCartney noted many different and conflicting notions in legal literature as to what constitutes “personhood”, and attributing lack of consensus to our “age that eschews meta-physics and asserts that much of our understanding of reality is invented, created, or is the product of interpretation” ( Mccartney, 2002).

It would be no exaggeration to say that the greatest innovation in the progressive development of a new world order in the twentieth century is the revolutionary global shift in revisiting the regulatory, institutional and politico-economic framework from the sovereign entity—the king and his prerogatives—to the wellbeing and interests of the individual human persons. As discussed earlier in this paper, along with the emphasis on maintenance of global peace and security based on international cooperation between nations, the pathway in the search for a new world led to a process founded essentially on recognition of dignity and worth of every human person as well as respect for and promotion of human rights and freedoms.

Accordingly, this process in its natural course established a profound connection between human and human rights. One may thus rightly argue that human rights themselves, transcending beyond their normative notions to a set of unique attributing features, define what humans are. In other words, it can be said that the beings that possess human rights are human.

Events in the trail of history remind us of the periods when despite possessing all other features and attributes, certain groups of individuals were not as such recognized as human (or fully human) such as the slaves, women or people of color ( Jardina, 2019). Talking about placing human persons in differentiated hierarchical recognition (as human), in a comical gesture, one may recall George Orwell’s Animal Farm-a text-based, choice-driven narrative where “all animals are equal, but some animals are more equal than others” ( Britannica, 2020); or, on a more serious note, in the words of Thomas Jefferson, the 3rd President of the US (1743-1826): “There’s nothing more unequal than the equal treatment of unequal people” ( Boyle & Burns, 2012).

Furthermore, noted earlier in this section, it is obvious from the wording of the UDHR that the United Nations has clearly intended that “human rights” are rights inherent to all “humans”. This would mean that an individual does not need to be a person to avail this right. But how can a human be a human and not a person? The 1857 case of Dred Scott v John Sandford9 may aid in answering this question. It was decided in this case that a black man did not qualify as a citizen and hence not entitled to the rights and privileges. It was mooted in the court that he was indeed a “human being” but he did not qualify as a “person”, that is a full member of the American society. Once again it is evident that person can be more than just a synonymous term of human and inevitably mean a member of a group as mentioned above.

In the above context, reference may also be made to another aspect of the long standing debate, i.e. the controversies involving humanhood of unborn child or fetus. Due to the specific relevance and significance of the status of fetus in terms of entitlement to basic human rights, this aspect is discussed in further details in this paper (see section VI below). It may, however, be noted at this stage that the American Convention on Human Rights (ACHR), 1969 is the only major human rights instrument that deviates from the common trend of the other international instruments by recognizing an unborn child as a human with entitlement to the right to life [Article 4(1)]. Also, the Convention in Article 1(2) states that that human means “every Person”.

Along with the controversies around the question of personhood (and also humanhood) of fetuses, several theorists suggest that some animals meet most criteria for personhood and are therefore (arguably) claimants of certain human rights. Ohlin opines that “part of these debates stem from the law’s reliance on the mutually exclusive concepts of persons and property”, neither of which are entirely satisfactory for dealing with animals” ( Ohlin, 2005). Again, from the perspective of social contact theory, in contrast to the utilitarian arguments in many animal rights literature ( Francione, 1997), some animals have the “cognitive sophistication to be considered auxiliary members of the social contract and therefore deserve respect under the Kantian view” ( Cavalieri, 2002). However, the questions involving as to how far these academic wrangles impact on the conceptual expansion of human rights and personhood are increasingly bringing experimental and inventive ideas (and hence controversies) in both national and international laws.

Another related issue that emerges from the reference to the term “everyone” (or “no one” in cases of right to freedom) in the international human rights instruments underlines resembling postulation of contrast and interconnectivity between the perceptive and jurisprudential rationalization of person and humanhood. Thus, for instance, all the thirty articles enumerating the thirty substantive rights in the UDHR use the term “everyone” (or “no one”); the same may be observed with regard to the twelve substantive articles of the European Convention. It is not clear whether it was an intention of the drafters of the instruments to emphasize “natural person” as the subject of the rights protected by avoiding reference to “every person” in the relevant articles

However, from the perspectives of the arguments justifying referral to “every individual” (and occasionally to “citizen” and “all people”) in the African Charter on Human and Peoples’ Rights, it appears evident that the Charter focuses its objectives within the framework of rights and freedoms of natural human person and groups thereof. Accordingly, from the postulated premises with regard to the terminological and typological implications in the preceding sections of this article, it is (arguably) logical to infer that a natural human person has been conceived to be the prima facie beneficiary of the rights and freedoms guaranteed by these instruments.

Again, the argument made above can be compared (and to some extent contrasted) with the use of the term “every person” in the American Convention of Human Rights, a contrast that can probably be explained by reference to Article 4(1) of the Convention that affirmatively indicates that the rights protected by the ACHR shall apply to every natural human person “from the moment of conception”. This provision of the ACHR comes in sharp contrast with the “Due Process Clause” of the Fourteenth Amendment to the US Constitution providing that no states shall deprive any “person” of “life, liberty or property” without due process of law, a fundamental human right that is commonly recognized by all the major human rights instruments. However, it is not clear whether reference to “person” (or alternatively “everyone”, “every individual” etc. as noted above) in these provisions of human rights instruments intended to mean that the person should only be a natural person, or would this also include legal and artificial persons (e.g. a corporation).10

In the Granger Cases (1877),11 the US Supreme Court in relation to the question of possessing and enjoying a property by incorporated entities clearly indicated that a corporation (a legal person) cannot be deprived of enjoying its property “without due process of Law”.12 Although various decisions have held that the “liberty” guaranteed by the Fourteenth Amendment to the US Constitution is the liberty of natural,13 not artificial, persons,14 nevertheless, in 1936, a newspaper corporation successfully objected that a state law deprived it of liberty of the press.15

While the US constitution ascribes 14th amendment rights to “persons”, the UDHR makes reference to human beings and the International Covenant on Civil and Political Rights refers to both. Questions may arise as to the significance and/or implications, if any, of these terminological technicalities. There are also instances-such as the British Human Rights Act 1998 (HRA: Section 7) that enable any “person” to avail such right. One may notice that although the UK statute is titled as human rights, it specifically mentions that only a “person” can obtain that right. Apparently, a key indication of the HRA seems to be that it is not available for all humans, but rather individuals that fall within the categories of persons in regards to the UK’s HRA, 1998.

However, from a different perspective, does the use of the term “person” mean that one has the same cognitive abilities that others from the same community do and that he belongs to a member of a social association? This would mean that the aliens in “E.T.”, the extra-terrestrial character from George Lucas’s 1977 science-fiction film Star Wars, that speak a language, make moral judgments, create their own habitat, etc. would also be considered “persons”. Or, how about someone in a vegetative state, someone severely mentally handicapped? Such a person may still be a human in a natural course of thoughts, but may not be a person as he has lost or is unable to do what an ordinary person does-and hence perhaps be denounced of being a “person” in its technical sense.

Again, speaking generally, the rationale for animal rights activists to claim the status of a legal person for non-human animals is to protect them from abuse, brutality and unnecessary violence. It would probably not be inappropriate to use the term inhumane treatment in this regard. At the core of these activisms is the essential claim that animals are also entitled to certain rights and dignity (freedom from torture, for instance), like a Human person, or a human-animal to approach concomitantly, is inherently entitled to.

However, from the traditional legal mind-set, laws and courts are generally reluctant to give non-human animals the status of a legal person. An illustration of this may be seen in the New York State Supreme Court’s case of Hercules & Leo (2013) where a demand was made for recognition of Hercules” and Leo’s (two chimpanzees) legal personhood and right to bodily liberty (through a writ of Habeas Corpus); the petition was finally rejected.16 It has been thus evident that legal and judicial frameworks consider animals as a thing rather than person. Arguably, the most liberal approach to animal personality is that even though animals can possess some characteristics of a person, but this should not be confounded with the legal person concept

Again, it has been argued that a “person” has certain requirements that may not be met by animals. Thus, for instance, Bioethicist Joseph Fletcher (1972) presented a list of 15 positive propositions that define a person. These are: 1) Minimum intelligence; 2) Self-awareness; 3) Self-control; 4) A sense of time; 5) A sense of futurity; 6) A sense of the past; 7) The capacity to relate to others; 8) Concern for others; 9) Communication; 10) Control of existence; 11) Curiosity; 12) Change and changeability; 13) Balance of rationality and feeling; 14) Idiosyncrasy; and 15) Neo-cortical function. If an animal does not possess these 15 propositions then in accordance to Fletcher, they are not a person ( Fletcher, 1972).

However, an inevitable question that arises in this regard is what if some animals do meet these criteria-the features of a sentiment being? What if an animal, such as an ape or dolphin, does have the minimum level of intelligence, self-awareness, self-control, a sense of time, curiosity and so on? It is believed by many modern scholars, Lori Marino amongst them, that such animals are indeed persons ( Morell, 2014). This obviously has its limitations as not all animals share Marino’s propositions, and therefore not all animals can be persons. However, this argument was further backed by prominent scientists when in 2012 they signed the Cambridge Declaration of Consciousness in which they clarified that they support the fact that animals are conscious and aware to the degree a “person” should be, similar to humans ( Dvorsky, 2012). Therefore, one may state that since animals can possess characteristics of a person, they remain claimants of certain qualified personhood of their own both in legal and social philosophy as well as in ethological studies.

The flow of the preceding discussion also takes us to the question of personhood of incorporated entities. Human beings are natural persons while corporate entities cannot be human being, but can still be a legal person, also known as artificial person. Noted earlier, companies have been given the status of corporate personality as confirmed in the 1897 decision of Salomon v Salomon.17 However, what is relevant in the current context is to note that the concepts of human personality and the notions of corporate identity are essentially separate discourses. In the simplest terms, humanity is a state of nature and legal personality is an artificial construct-continuity and extent of which are conditional upon unique given circumstances.

Another much discussed but still emerging issue in legal jurisprudence is-what is the rationale behind allowing companies to claim status as a person when they are definitely not human? A common general principle of corporate rules of law practiced by national and international legal regimes is that a company is a separate legal entity from its members and accordingly possesses its own rights and obligations. This clerically means that a company has the ability to do something a person would be able to do. It is undoubtedly clear that a company could not be human as in order to belong to the human race one must be born from two homo sapiens, and be a homo sapiens himself or herself. A company, created by prescribed legal rules and procedures, does not meet these requirements, and hence cannot be treated as a human as such. However, while clearly companies cannot be a human person, in law, they are still recognized as a person in legal jurisprudence.

Comprehensively, the outcome from Salomon v. Salomon led to the lasting principle that a company has to fulfill its duties, has its rights, and is subject to certain obligations. Inevitably, as mentioned previously, a person is an identity, a being, that belongs to a group, has specified rights and bears certain obligations. More relevantly to the question, the rationale behind allowing companies to claim status as a person is to protect the whole concept of a company. If a company did not have its rights, did not have obligations or duties, and was not equivalent in the law to a person, then there would be no distinction between being a sole trader and running a company i.e. the doctrine of corporate veil ( Green, 2010).

However, it was clarified in the Irish Supreme Court decision in Battle v Irish Art Promotion Centre,18 that the company does indeed have its limitations and further in the UK case Re A Company,19 the courts clarified as to when the company, being a person can be stripped of its person-hood and how the veil can be pierced. Understandably, therefore, a legal person, a company, is a person and the rationale behind allowing a company to claim status as a person is to aid the way its businesses are done.

From the viewpoints highlighted above, taking this analysis to a broader perspective, this paper apparently deviates from a contemporary trend amongst academics and practitioners, while addressing the issue of person and humanhood in relation to human rights, of differentiating between civil rights and human rights. While liberty and human personality are seen as essentially integrated elements of being an individual person “possessing the human desire to achieve full potential and dignity” ( McHugh, 1992), liberty and civil rights have been viewed as a qualified status with additional precondition of possessing certain standing in the legal strata, citizenship for example. In this sense, it has been noted that “human rights are rights one acquires by being alive. Civil rights are rights that one obtains by being a legal member of a certain political state” ( Casey, Alayan, Jorgensen, & Monroe, 2021).

#### ILaw’s conception of “human” should be redefined to include modern conceptions of the human---all main topic areas are relevant

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7. Human and Legal Personhood in Human Rights Framework

Noted in the earlier section of this paper, although “humans” and “persons” are terms that are often used interchangeably in the international human rights vocabulary, none of the international human rights instruments, global or regional, attempts to define the words in jurisprudential terms with the only exception of the American Convention on Human Rights, 1969 (ACHR). The Inter-American Court of Human Rights (IACtHR) in a 2016 Advisory Opinion examined the question of whether legal entities have standing before the Human Rights Court and finds that “a literal interpretation of Article 1.2 of the Convention leaves no space for doubt, since it states that ‘person’ means human being”.29 In this regard, as noted by Florencia Bohl, “the eventual conclusion of legal entities lacking a stand before the human rights system (because they are not human rights holders) leads to a closure of the potential justiciability of legal entities’ human rights” ( Bohl, 2016). In that sense, it affects the right to an effective remedy for both natural and legal persons. It is further noted that the IACtHR addressed the issues surrounding the interpretation of Article 1.2 of the American Convention of Human Rights (ACHR) in a “literal, teleological, systemic, and evolutionary approach” ( Bohl, 2016).

In our natural reflex of thoughts we take it for granted as obvious fact that human is a certain personality that exists as a human in this world. We do not recognize the necessity of determining who will be human and who will not be. With the changing world where we have artificial intelligence taking priority and dominance in our social, business or industrial lives, and in a world where green rights, animal rights, developmental rights and so forth are requiring more legal protections to be ensured, the question of legal personality for non-human entities are getting increasing eminence.

This paper has asserted that (arguably) humans are human because they have human rights (at least in the modern usage of the term). The underlying concepts of the idea that humans inherently and in natural course of life have what has been termed as human rights in the middle of the twentieth century is deeply rooted in the British legal history because of the landmark developments in that jurisdiction in civil rights movements such as the Magna Carta of 1215, the Habeas Corpus Act of 1679 and the Bill of Rights (1689). All of these historic documents helped building the inner frame of the modern human rights law. However, question still remains what do these events and documents mean when they use the terminology human?

For understandable reasons, human rights law does not define the term “human” as such because back in 1948 or 1950, during the drafting and adoption of the Universal Declaration of Human Rights (UDHR) or the European Convention of Human Rights (ECHR), among other instruments, the drafters did not feel the need to define this term. However, one may still argue that human rights law does not require a discussion on who is a human as human have become human because they have human rights. From this perspective, none of the definitions of the term human can be treated as conclusive.

Accordingly, it may rightly be argued that humanity needs to have a definition that justifies humanity in its legal perception because human rights cannot describe human. From the perspectives of this article, the term “human” did not attain its full acknowledgement as a normative terminology until the revolutionary development of the international legal edifice (as a complex system of beliefs) of human rights- a set of universal common standards to define and establish the inherent dignity and worth that formally institutionalized the human species as the indubitable and unassailable claimant of fundamental rights and freedoms. Prior to this, humans were humans in a sense of a scientific expression or as the subject centripetal to the cores of social philosophy or demographic phenomenon, not an existence that resembles certain qualities and characteristics in the concrete terms of international human rights law that differentiate humans from other living animals.

Considering the above argument from a different perspective, apart from the theological disagreements in this regard, looking back to the propositions made in relation to the constituting traits-the characteristic features and distinguishing attributes of human—it is puzzling to perceive in the context of the traditional approaches to humanhood that humans in the historic timelines of evolutionary anthropology were “less human” every previous day, at least travelling backward by six million years to the world of Hominidae—the chimpanzees, gorillas, and orangutans ( Pontzer, 2012). This academic puzzle is irrespective of the consideration whether humans in this biological theory of evolution attain more humanity tomorrow compared to today. As noted in this paper, the terminological tangle created by reference to person, human, everyone, etc., “without indicating whether each term encapsulates distinct or overlapping groups” ( Ohlin, 2005), leads to complex legal controversies with regard to what may be called as qualified persons such as partial, potential, past or almost persons.

Again, theories propounded by the naturalists, Darwinism and other, the “Adam-Eve” concept of the origin of human creation in theology, Thomas Hobbes” “social contract theory” (human as “unsocial” being—individualistic, competitive, envious, hateful and belligerent) ( Lloyd & Sreedhar, 2002) and its sharp contradiction by Emmanuel Kant’s refusal of the negativity of human person by recognizing “the dignity of humanity in every other man” based on morality and rationality ( Von der Pfordten, 2009), or the possessor of rights, protections, privileges, responsibilities and liberty in the modern day politico-legal frameworks, have been accosted with emerging jurisprudential concerns in the recent and contemporary development in human rights based approaches to personhood.

8. Conclusion

Even in the twenty-first century post-modernity, as revealed in the increasingly expanding globalization of socio-economic and technological revolutions, the age-old debate of “personhood” has not fully come to a compromise, let alone be resolved. In the most popular trends of this discourse around the world, from legal jurisprudence to socio-political philosophy, the focus has only shifted, albeit in more complex and broader spectrum, from the ancient anthropocentric approaches to the evolving notions of biocentrism or sentiocentrism ( Bekoff & Meaney, 2013), ecocentrism ( Newman, 2011), technocentrism ( Mason, 2012), corporate-centrism ( Sirota, 2004), and so on.

Based on a synoptic analysis of the propositions made in this article, it is now clearly evident that the correlated concept of human and person is embedded in a broad area of legal and philosophical concerns that have been addressed with different strategies, visions and approaches. In so far as international human rights law is concerned, the thematic differences between the two terminologies, or the application thereof in international normative standards, have not been clarified.

Again, the underlying proposition of the paper also indicates that personhood holds an imperative position in daily real life as well as in legal jurisprudence. It is undeniable that only being a biological human being is not enough to live a life with the basic standards of dignity, worth and social standing; the status and recognition of personhood in law is equally, if not more, more important to possess in this regard. These also lead the analysis to the future of the concept of personhood, and to some extent human as well, as it is apparently inevitable that in the rapid progression of science and technology, among other factors, there are several other potential categories of beings and existence where personhood is, and would increasingly be, a supervening concern. While some would justifiably argue that many of these issues are founded on merely predicted whats and ifs, from a realist’s perspective, academically, today’s world needs to recognize the essence of redefining the concept of personhood in conjunction with the contemporary notions of humanhood.

Accordingly, this paper concludes its intended proposition with an emphasis on the essence of these HRB approaches in redefining personhood premised on the core doctrinal discourse in international law that unequivocally recognizes the broadening spectrum of dignity, rights and freedom as the foundational building blocks of the re-construed ideas and standards in inter and intra-disciplinary reciprocation between personality and humanity.

### Multilat / Treaties CP---Animals

#### ILaw is uniquely receptive to nonhumans receiving legal personhood---empirics and past attempts fo universalizing animal rights proves

Anne Peters 18, Professor of Law, Director at the Max Planck Institute for Comparative Public Law and International Law, “Symposium on the Universal Declaration of Human Rights at Seventy: Rights of Human and Nonhuman Animals: Complementing the Universal Declaration of Human Rights”, American Society of International Law,

International Animal Personhood

In law, personhood is a precondition for holding rights. Personhood is best understood as a cluster concept that does not depend on a set of definite properties but has blurry boundaries. The legal ascription of personhood is internal to a given legal order. This means that an actor or an entity can be a person for some purposes (or in some subfields of the law) and a nonperson for others.

Importantly, international law has dynamically recognized the personhood of a host of actors, and international law is particularly open to the personhood of nonhumans—with states being the main persons in this legal order. Humans were in the late nineteenth and early twentieth centuries explicitly and adamantly qualified as “objects” of international law. Accordingly, early international treaties to suppress the trade in women and girls (often referred to as the “white slave trade”) were intended to preserve morality; rights of women and children were unknown.11 With regard to animals, that line of reasoning persists. Until the beginning of the twentieth century, all normative restrictions on animal abuse served to protect public morality, “decency,” or “chastity.” Animal cruelty was a “public misdemeanor” and was prohibited only if it took place in public.

The parallels between the past status of humans in international law and the present status of animals is striking, as a textbook recognizes: In modern systems of municipal law all individuals have legal personality, but in former times slaves had no legal personality; they were simply items of property. Companies also have legal personality, but animals do not … . In the nineteenth century … international law regarded individuals in much the same way as municipal law regards animals.

In international regulation against human trafficking, the purely other-regarding “public morals”-rationale has been overcome, and modern domestic animal laws protect animals for their own sake, as sentient beings, mostly without granting them rights. Only for humans has an actual rights revolution taken place in national and international law.

Against the background that corporations can be persons for purposes of domestic commercial law, and that the legal status of humans has changed from objects to subjects of international law, there is no intrinsic conceptual barrier to assigning international legal personality to animals—basically because personhood is a purely technical juridical device, a legal fiction. But in social and cultural terms, this will be a difficult goal to achieve.

Animal Rights and Human Rights:

Universality Skepticism about international animal rights is tempered by recalling that fundamental objections against the internationalization of rights have likewise bedevilled the international human rights regime. It has been said that the animal rights movement is “yet another crusade by the West against the practices of the rest of the world,”13 and that the propagators of such crusades claim universal validity in order to impose their own, local preferences on other cultures, so as to consolidate cultural and political dominance over the non-Western world, especially the Global South. This charge is not trivial. There is a real risk that the protection of animals targets minority practices (such as Muslim ritual slaughter or indigenous seal and whale hunting), although these practices are in numerical terms insignificant in comparison to the majority’s “normal” massive use and killing of animals. This targeting manifests and fuels majority prejudices against the singled out groups, and can pave the way for intervention and domination. In fact, “dominant groups have long justified their exercise of power over minorities or indigenous peoples by appealing to the ‘backward’ or ‘barbaric’ way they treat … animals.”14

However, references to cultural traditions suffer from three flaws. First, historical experience shows their frequently pretextual character. Typically, ruling elites abusively invoke “culture” to secure illegitimate privileges. Second, we should not exaggerate cultural difference. The massive use of animals for human needs and the paucity of reflection on and justification of these practices in ethical terms is a shared feature of all cultures. Third, cultures do not unfold inevitably, as if according to a genetically defined pattern. Eating shark soup made from fins cut off live sharks, fox hunting with hounds, staging bullfights, and stuffing geese for foie gras may be traditions just like relegating women to the house and prohibiting them from exercising certain professions or driving a car. But simply because these are traditions they are not immutable and are not worth protecting as such. Instead, morals, traditions, and legal provisions (in short, culture) are made, practiced, and applied by human beings capable of learning, and can change.

Conclusion

The legal correspondence (and arguably mutual enrichment) of rights for human and nonhuman animals was intuitive when the quest for human rights was still exotic. The great English social activist Henry Stephens Salt, who campaigned against the death penalty, cofounded the British Humanitarian League, and propagated vegetarianism, started his trailblazing study entitled Animals’ Rights with the opening sentence: “Have the lower animals ‘rights’? Undoubtedly—if men have.”15 In 1892, Salt noted that human (“men’s”) rights were “looked upon with suspicion and disfavour by many social reformers,” and Salt basically used the term in quotation marks only.16

In the decades to follow, the quotation marks around the “rights of men” disappeared. After 1948, the terms of the UDHR even guided protection for animals. For example, the Preamble of the UDHR proclaims “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.”17 These famous four freedoms inspired the so-called “five freedoms for farm animals” of the 1965 Brambell report: freedom from hunger and thirst, freedom from discomfort, freedom from injury, pain or disease, freedom to express normal behaviour, and freedom from fear and distress.18 These “freedoms” could be creatively understood as legal rights, and could be complemented by more fundamental rights such as the rights to life and liberty.

At the occasion of the fiftieth anniversary of the UDHR in 1978, an NGO coalition elaborated a “Universal Declaration on Animal Rights” (UDAR) in deliberate alignment with the UDHR.19 This Animal Rights Declaration was revised in 1989 and again in 2018.20 The 1978 version of its Article 1 was modelled on Article 1 UDHR and states, “All animals are born with an equal claim on life and the same rights to existence.” The UDAR was formally proclaimed in 1978 at the UNESCO premises in Paris (by civil society actors). Although this ceremony attracted public and media attention, the declaration did not result in palpable practical effects. Neither have the academic (both philosophical and legal) debates on animal rights—ongoing since the 1960s —led to any serious international codification. The seventieth anniversary of the UDHR might be a symbolic moment to tackle international animal rights not only at the NGO-level but also among governments.

The classic argument in favor of moral duties towards animals has been that prohibiting cruelty on animals suppresses callousness in men.21 This consideration has traditionally motivated animal welfare laws. It could and should also motivate more ambitious animal rights codifications. Along those lines, the preamble of the UDAR of 1978 stated “that the respect of humans for animals is inseparable from the respect of man for another man.” The intuition that containing violence against animals ultimately contributes to containing violence against fellow-humans has been frequently investigated in sociological and criminological research.22 This research recently found that prejudice against members of an outgroup (such as migrants, minorities, and women) is correlated (and maybe even causally linked) to violence against animals, which is in turn exculpated by ideologies of human supremacy over animals. The belief in a rigid human/animal divide seems to condone the dehumanization of humans. The acknowledged need to combat such dehumanization is an argument in favor of dismantling the legal species hierarchy. President Trump’s statement at the U.S.-Mexican border demonstrates its relevance. Because the most powerful symbol against such a hierarchy would be the institution of animal rights, states should seriously consider legalizing some relevant rights for some nonhuman animals (notably the right to life, liberty, and freedom from torture), as a complement to the UDHR. This anthropocentric rationale for animal rights would be very traditional and would not call into question what it means to be human. Reliance on it is a tactic, not a moral argument. This is exactly why its invocation might appeal to different audiences than animal-centred arguments do, and could contribute to building a universal overlapping consensus on animal rights. We should not wait until a human, ecological, or health-related catastrophe comparable to the horrors that motivated the adoption of the UDHR occurs. An international animal rights codification would not only mitigate animal suffering but also would create positive synergies with the UDHR towards fulfilling its core mission, which is to prevent the commission of “barbarous acts which [outrage] the conscience of mankind.”24

#### ILaw solves and causes domestic follow-on---Purely domestic rights lead to outsourcing animal products when turns the case

Anne Peters 18, Professor of Law, Director at the Max Planck Institute for Comparative Public Law and International Law, “Symposium on the Universal Declaration of Human Rights at Seventy: Rights of Human and Nonhuman Animals: Complementing the Universal Declaration of Human Rights”, American Society of International Law,

The Need for International Animal Rights, 2018, Vol 112

Purely domestic rights for animals would not be enough. The principled arguments that have led to the codification of human rights in international agreements are relevant for potential animal rights as well. First, from the perspective of fairness and justice, such rights (once accepted as a matter of principle) belong to animals independent of their place of birth and abode, and they are therefore universal. Second, international rights would serve as a benchmark for domestic law. International instruments would potentially allow for some monitoring or at least facilitate the formulation of criticism against domestic practices that do not satisfy the international standard. Third, while the main mechanism for enforcing rights in domestic law is a court process where standing for animals creates additional problems, international rights are often monitored in nonadversarial reporting procedures in which the rights-holders do not act as parties. The factual difference between human victims and animal victims that cannot speak for themselves does not bear on these proceedings.

Fourth, nation-state-based rights would not suffice because the problem is a global one. Industrialized meat, dairy, and pet production is now spreading to countries of the Global South and to developing countries in which the demand and purchase power for animal products is steeply rising. Those industries have become globalized through transnational supply chains. The manufacturing and trade conditions are leading to a dramatic increase of “normal” violence against animals in sheer numbers (confinement, mutilation, killing). The transnational dimension of these more or less violent activities has intensified, because animals and the equipment to confine, mutilate, and kill them form part of global production chains.

Against this background, the endorsement of animal rights only on the national level in some states would probably lead to the outsourcing of the relevant industries. This risk is already present when one state has higher protective standards than others, and it could be exacerbated when one but not all states embrace a rights-based approach to animal protection. In order to prevent a competitive disadvantage to industries subject to higher domestic standards, and to forestall a race to the bottom, states must seek harmonized universal standards and a level playing field. Such harmonization is also desirable to accommodate consumers’ concerns about the importation of animal products from low-standard countries, and would obviate import prohibitions based on such public morality concerns.9 For all these reasons, an intergovernmental universal declaration on animal rights is warranted.

### Multilat / Treaties CP---AI

#### International Legal Personhood solves criminal responsibility for AI---could be through a treaty or through CIL

Valentina Petrovna Talimonchik 21, Department of General Theoretical Legal Disciplines, Northwest Branch of the Russian State University of Justice, “The Prospects for the Recognition of the International Legal Personality of Artificial Intelligence”, MDPI, 11-11-21, https://www.mdpi.com/2075-471X/10/4/85/htm

2.2. The Statement of the Problem of the International Legal Personality of Artificial Intelligence

The legal personality of artificial intelligence is discussed from the standpoint of the general theory of law. This issue is related closely to the problem of responsibility for actions performed using artificial intelligence.

In the legal doctrine, we find various points of view regarding the legal personality of artificial intelligence, and unity of opinion has not been achieved. The range of concepts Laws 2021, 10, 85 4 of 11 differs from recognizing the legal personality of artificial intelligence to its complete denial. Below are examples of several original holistic concepts demonstrating different approaches to the legal personality of artificial intelligence.

Considering the criminal responsibility of artificial intelligence, Abbott and Sarch (2019) propose resolving the responsibility of artificial intelligence by introducing legal fiction.

In legal doctrine, we also find the idea of non-personal subjects of law and its application to artificial intelligence (Kurki and Pietrzykowski 2017).

Sthifano Bruno and Santos Divino proposed the idea of an electronic personality, “analysis from the point of view of objective responsibility brings important considerations since it dispenses with the faulty analysis. Preference is given to this institute rather than its subjective mode. However, in order to avoid solipsistic embarrassments in certain judgments, it is proposed to create an electronic personality, translated into the hypothesis of legal insertion of an incision in the role of objective responsibility . . . ” (Divino and Bruno 2020).

Mindaugas Naucius considered the essence of the discussion about the legal capacity of artificial intelligence very carefully. This author notes the lack of consensus among professors on issues of morality and consciousness concerning artificial intelligence. Some professors believe that since artificial intelligence is not inherent in morality or consciousness, it cannot be recognized as a legal personality. Others believe that improving the ability of artificial intelligence to solve mental problems should lead to the recognition of the legal competence of artificial intelligence (Naucius 2018).

Kara Kilicarslan, in her research, also covered the essence of the discussions about the legal personality of artificial intelligence (Kilicarslan 2019).

Pin Lean Lau considered the essence of the debate at the European Parliament (Lau Pin 2019).

Without belittling the role and significance of the scientific discussion related to recognizing the legal personality of artificial intelligence in states’ legal systems, one should note that international legal personality has its specifics. This is due to the features of the system of international relations and the role of states in the development of international law provisions. The state is the main subject of public international law and a non-main subject of private international law. International legal personality, as a category of public international law, can be given to another subject by states only by including the relevant provisions into an international treaty or establishing an international custom. As a result, the prospects for recognizing the international legal personality of artificial intelligence should be considered because of the international legal personality of non-state actors, especially legal entities. Given the variety of theories of international legal personality that Roland Portmann classified and analyzed in his work (the ‘state-only’ conception, the ‘recognition conception’, the ‘individualistic conception’, the ‘formal conception’, and the ‘actor conception’) (Portmann 2010), the ‘recognition conception’ will be used for this paper, as it is the prospects for the recognition by states of the international legal personality of artificial intelligence that are explored.

### Multilat / Treaties CP---Rivers

#### ILaw solves river rights---uses international treaties and the PTD

Mara Tignino 18, Reader of International Law at the Faculty of Law and the Institute for Environmental Sciences of the University of Geneva, et al. Laura E. Turley, PhD Candidate and Teaching Assistant at the Institute for Environmental Sciences, University of Geneva, “Granting Legal Rights to Rivers: Is International Law Ready? • The Revelator,” Revelator, 8-6-2018, https://therevelator.org/rivers-legal-rights/

Last year, four rivers were granted legal rights: the Whanganui in New Zealand, Rio Atrato in Colombia, and the Ganga and Yamuna rivers in India. These four cases present powerful examples of the increasing relevance of rights-centered environmental protection. Like corporations, which have legal rights in many jurisdictions, these rivers are rights-bearing entities whose rights can be enforced by local communities and individuals in court. But unlike corporations, these rights are not yet recognized in international treaties. Which raises the question: what are the implications of rights for nature for international environmental law?

Granting Rights to a River: Enhancing a Right-Based Approach

In international law, legal standing is principally employed to distinguish between those entities that are relevant to the international legal system and those excluded from it. Current international law conventions do not give legal standing to water resources. Instead, international conventions — such as the Convention on the Law of Non-Navigational Uses of International Watercourses — mainly address water management from the perspective of the participating states. Similarly, European legislation on freshwater resources, such as the Water Framework Directive, recognizes the importance of protecting water resources, but views them entirely as natural resources belonging to states.

In contrast to international law, some countries have granted rights to the nature, and specifically to rivers, in their national laws. In 2008, Ecuador recognized the constitutional right of Mother Earth and, in 2010, Bolivia adopted the Laws on the Rights of Mother Earth, which gives legal standing to nature and establishes an ombudsman for the protection of its rights. And in May 2017, Colombia’s Constitutional Court recognized the Atrato River as a legal person.

More recently, the Parliament of New Zealand granted the country’s third-longest river, the Whanganui, the legal rights of a person, after a 140-year campaign by the Whanganui Iwi tribe. In addition to compensating the Whanganui Iwi for grievances, the move seeks to preserve the river for future generations of Whanganui Iwi and all New Zealanders. As such, the river gains its legal personality not from an abstract legal entity, but from the people that are connected with the river.

India’s Ganges River and one of its main tributaries, the Yamuna River were granted these same rights. The high court in the northern state of Uttarakhand — not the national government, as in New Zealand, Ecuador, and Bolivia—issued the order, citing the case of the Whanganui in establishing that that the Ganges and the Yamuna should be accorded the status of living human entities.

These rivers now have the right to representation in the form of “guardians” or “allies” in legal proceedings against threats to their wellbeing, such as degradation. Like a charitable trust or society, these rivers can have “trustees” looking out for their best interests. Like people, these rivers have the right to sue others, seeking to force communities to take better care of the river, or face penalties

Critics argue that these rulings could set precedents for granting rights to other natural entities such as forests, mountains, and deserts, inviting lawsuits to protect resources from degradation. Some critics have even pointed to extreme spin-offs in which stones and pebbles could eventually sue people for stepping on them. Defenders reject this view, and say the point is to protect the ecosystems human life depends on.

The practical implications of these legal innovations are not clear yet, but the stage is being set for an interesting comparative study: How does legal representation for rivers play out in different social, ecological, and economic contexts?

The Whanganui River is a relatively pristine ecosystem — especially in contrast to the heavily polluted Yamuna and Ganges rivers. Each day, 1.5 billion liters of untreated sewage enters the Ganges River, and many attempts to clean up the river have failed over the years. Will the river’s legal status improve this situation?

The governance challenge in India is significant: the limitations of a state court’s control over an environmental resource — which is by its very nature inter-jurisdictional — become clear. Furthermore, there are no financial resources to support the implementation. In New Zealand, however, financial redress of NZ$80 million was included in the settlement, as well as an additional NZ$1 million contribution towards establishing the river’s legal framework.

Are Transboundary Rivers People, Too?

The international treaties that govern transboundary rivers focus on the participating countries’ rights and entitlements, to ensure that one riparian country’s use or management of the river does not negatively affect the rights of another riparian. These international agreements rarely grant rights to individuals and local communities—and if they do, they usually only address access to information, public participation in decision-making processes, and access to justice.

In the transboundary context, the concept of trusteeship might be useful. According to the public trust doctrine, a nation has a legal duty to protect its natural resources for the public interest and for the common benefit of present and future generations. International rivers could come under the protection of the public trust, and local communities would be both owners and beneficiaries of the trust’s interests. In 1998, for example, Melanne Andromecca Civic proposed that the United Nations Trusteeship Council should be charged with the management of the Jordan River.

It is not clear whether these are the first steps towards a new international norm in the coming years. It is however clear that an anthropocentric view of the environment is, in some circumstances, being replaced by an eco-centric perspective — at least in some countries.

The anthropocentric and eco-centric perspectives can go hand-in-hand. For example, in 2018, the Inter-American Court of Human Rights recognized, for the first time in international law, an autonomous right to a healthy environment under the American Convention. Moreover, the Global Pact for the Environment, an initiative launched by France during the 2017 UN General Assembly, affirms this right in its first article.

This double movement — on the one hand, recognizing the human right to a healthy environment, and on the other, the rights of nature — are both means to enhancing the legal protection of the environment and to “humanize” it. Granting legal personality to transboundary rivers may reinforce their environmental protections and strengthen the rights of riparian communities. National laws and jurisprudence could pave the way for new features in international legal frameworks that will take into account the granting of rights to shared water resources.

### Multilat / Treaties CP---NB---Clog DA

#### ILaw circumvents clog---it’s dependent on monitoring and reporting, not litigation

Mona Zahir 21, Author at Faunalytics, “Toward International Animal Rights,” Faunalytics, 10-19-2021, <https://faunalytics.org/toward-international-animal-rights/>

Dr. Peters also points out that rights-based laws carry a symbolic, social, procedural, and legal weight that welfare-based laws cannot match. Rights-based laws would require any interferences to animals’ lives to be demonstrably justified in court. This mandatory justification would help prevent practices that violate animals’ fundamental rights to life in the name of non-essential human desire. Furthermore, rights-based laws can be applied to the interests of individual rights-bearing animals, and rights-based laws are better equipped for future expansion. Currently, domestic rights-based laws protecting animals are few and scattered. For example, courts in Argentina and Columbia granted habeas corpus to apes and a bear, whereas similar efforts in the U.S. to grant habeas corpus to chimpanzees have failed in lower courts.

The U.S. and many other domestic courts limit humans from enforcing legal violations that harm the interests of animals unless they can prove that harm has occurred to human or corporate interests. That is, the interests of animals are not legally enforceable for their own sake in these types of court systems. This problem could be circumvented when it comes to international laws, which rely on monitoring and reporting of rule breaks rather than litigious court cases that require defendants to prove that harm came to humans or corporations before prosecuting violations of animal protection laws.

## Personhood PIC / Confer Rights CP

### AFF Perm for Preferred Res Wording

#### Wordings that allow the AFF to confer individual rights and obligations would not force giving ‘full’ legal personhood, only parts, amounting to the equivalent of personhood without saying the words.

Diana Mădălina Mocanu 22, Centre for Philosophy of Law (CPDR), Institute for Interdisciplinary Research in Legal Sciences (JUR-I), Université Catholique de Louvain, Louvain-la-Neuve, Belgium, “Gradient Legal Personhood for AI Systems—Painting Continental Legal Shapes Made to Fit Analytical Molds,” Frontiers in Robotics and AI, vol. 8, 2022, Frontiers, https://www.frontiersin.org/article/10.3389/frobt.2021.788179

At any rate, partial legal capacity does not work by limiting capacity, but by allocating or adding legal capacities as they are justified, as opposed to legal personhood, which asks us to justify their subtraction. This is how partial legal capacity is supposed to, solve the slippery slope of having to justify denying worker and constitutional rights to AI systems, which is one of the “negative side effects of full legal personhood” being attributed to these entities (Schirmer, 2020). Seen through the lens of the bundle theory and the above examples, partial legal capacity could actually amount to personhood, albeit as a smaller bundle.

These examples do not show legal persons with full legal capacity, but they do show legal subjects nonetheless, though with the range of their subjectivity limited by their specific functions. This characterization joins the bundle theory’s assertion that there are several ways in which the law might treat entities in the world “more or less as persons” (Kurki, 2019). It might do so for a particular purpose and not others, it adds, pointing to the general variety of the law’s purposes and the corollary flexibility required of legal personhood for it to better suit them. It leaves some doubts, however, as to the nature of the conceptual relationship between function, purpose, and competence with the latter taking center stage when the bundle theory is applied to the case of AI systems in the commercial context as we have seen.

### Personhood PIC

#### The question of whether someone or something is accorded the protection of the law should be separted from their ‘personhood’ status.

Bartosz Brożek 17, Department for the Philosophy of Law and Legal Ethics, Jagiellonian University, “The Troublesome ‘Person,’” Legal Personhood: Animals, Artificial Intelligence and the Unborn, edited by Visa A.J. Kurki and Tomasz Pietrzykowski, vol. 119, Springer International Publishing, 2017, pp. 3–13 DOI.org (Crossref), doi:10.1007/978-3-319-53462-6\_1

It is difficult to escape the uneasy feeling that something has gone terribly wrong here. Too much seems to hang together with the definition of a person one embraces. In what follows, I will try to show that the feeling is fully justified.

1.1 From Mask to Theology The notion of the person (Lat. persona) stems from the word prosopon. This term referred to a mask in Greek (and Roman) theatre and its application in philosophy came somewhat later since we cannot find any trace of it in Ancient philosophy (Wiles 1991). It was initially utilised in Roman law but Roman jurists did not equate the word persona with the word homo. One man could, from the legal perspective, be many persons. As it was termed: unus homo sustinet plures personas. It functioned thus so that persona identified (some) legal status of a man, independent of their other statuses (Ball 1901: 78). Romans could thus be one person as a Roman citizen, another as pater familias, yet other if they performed certain public offices. It is not difficult to see why the word persona was so appealing in this context: for the law, a man – depending on the legal context – wore different ‘masks’: as a senator, the head of the family, a praetor etc. It was exactly the legal notion of the person which was utilised in Adversus Praxean by Tertullian, a thinker who undoubtedly was aware of the basic notional categories of the Roman law. In his exploration of the mystery of the Holy Trinity he claimed that the Father, the Son and the Holy Spirit are different persons, although one should acknowledge that each of the persons in the Trinity is one and the same God (Tertullian 1973). This conceptual solution of the problems surrounding the Holy Trinity was not accepted immediately however. It only came about in the fourth century AD during a debate on the meaning of the Greek word hypostasis (Boethius 1918). The problem focused on in what way it was possible to express the fact that the Holy Trinity was one and tripartite at the same time. The unity of the Trinity had been express by saying that the Trinity is one substance (ousia, substantia), while the tripartite nature had been captured with the help of the Greek term hypostatis. The problem was that hypostasis, like ousia, was translated into the same Latin word, substantia. In order to eliminate misunderstandings, the translation was altered to subsistentia. However, by the fourth century this subtle distinction had fallen into obscurity, a direct way to conceptual problems or even heresy. As a result, they reverted to Tertullian’s notion of persona: it was formulated as God is one but in three personae in documents from the Council of Alexandria in 362 AD. However, in the sixth century the controversy arose once again. In his work Contra Eutychen et Nestorium, Boethius introduced his own formulation – and perhaps the most famous – of the definition of a person: persona est rationalis naturae individua substantia: a person is an individual substance of rational nature (Boethius 1918). He explained that we “are related in this manner to what the Greeks called hypostasis” (Boethius 1918). Boethius differentiated between the notion of subsistence (essence) and substance. Subsistentia (essentia), related to the Greek term ousia, refers to being which is not impaired (i.e., enjoys the so-called independent existence). In turn, substantia (hypostasis) refers to being which may be the basis for impairment (impairment may belong to it). A person (persona) is that substantia which is individual and rational. In the conception of Boethius, man is simultaneously subsistentia, substantia and persona. Meanwhile, God is a unified subsistentia but also three substantiae (and thus three persons). Boethius highlights, however, that talking about the three divine substances has been forbidden by the Church as it leads to certain heresies. What is interesting in this consideration is that Boethius ‘inverts’ the traditional translation of the Greek concepts. Normally ‘ousia’ is identified with ‘substantia’ and ‘hypostasis’ with ‘subsistentia’. The notion of the ‘person’ played, perhaps surprisingly, a minor role in Scholastic ethics, largely remaining at the service of theology. Józef Bocheński noted: There is no equivalent expression to ‘person’ in Aristotle, in his philosophy. It does not feature yet this has not stopped him from becoming one of the greatest moralists in history. In St Thomas Aquinas, the expression persona often features in dogmatic theology. Yet in moral philosophy it appears only once, namely in his article De acceptione personarum. It takes into account man in his personal relation to a candidate, not his value. It is the only example in which St Thomas uses the expression ‘person’ in his ethics, which does not prevent him from being a great moralist (Bocheński 1998: 130). The close connection between the notion of the person and Thomism only featured with the twentieth century Personalists. This fact is important for two reasons. Firstly, Personalism, even though it was not an official doctrine of the Catholic Church, played a role in the conceptions of its representatives which is hard to overestimate. As a result, Personalism has become undoubtedly one of the most important voices in bioethical discussions. On the other hand, however, it is important to stress that the marriage of Thomism with the Personalist approach is, while at least historically charming, artificial. For Boethius, the notion of the person had a technical character. Its introduction was indispensable in terms of Boethius’s great effort of trying to unite Greek philosophy with Christian faith. It was not meant to – and did not – play a crucial role in ethical discussions. Such a utilisation of the notion of the person is much later. Put plainly, it became a reaction to different conceptions of the person which have arisen in modern times. 1.2 The Early Modern Conceptions of the Person At the forefront of these theories, two undoubtedly stand out: the conceptions of Locke and Kant. In Essays Concerning Human Understanding Locke wrote: “we must consider what PERSON stands for; which, I think, is a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places” (Locke 1961: 280). Locke formulates in this passage the psychological conception of a person: the crux of personhood is the ability to reflect and, in particular, to reflect on oneself and thus have a feeling of identity in different times and places. This vision is fundamentally different from the classical conception of the person. It is important to remember that Locke is one of the main philosophers responsible for the “subjective turn” in philosophy, the appreciation of the subject which Descartes undertook – more or less explicite – with his fundamental ontological division of the res cogitans and the res extensa. In other words, in modern philosophy the person is not a psychophysical unity – the person is a thinking subject, ego cogitans. Such an understanding of the person is opposed by Kant in his Critique of Pure Reason: By this I, or he, or it (the thing), which thinks, nothing is represented beyond a transcendental subject of thoughts = x, which is known only through the thoughts that are its predicates, and of which, apart from them, we can never have the slightest concept, so that we are really turning round it in a perpetual circle, having already to use its representation, before we can form any judgment about it. And this inconvenience is really inevitable, because consciousness in itself is not so much a representation, distinguishing a particular object, but really a form of representation in general, in so far as it is to be called knowledge, of which alone I can say that I think something by it (Kant 2007: A346). Kant thus argues that the psychological definition of a person is inadequate since – at the level of theoretical reason – any potential representation of the self already presupposes a kind of personal identity, which is a form of cognition. Self is not a representation but an empty idea, whose only role is to unify our inner experiences. Things change as soon as one considers the practical reason. In the Metaphysics of Morals he states that “A person is a subject whose actions may be imputed to him. Moral personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is usually understood as an ability to be conscious of one’s identity in different conditions)” (Kant 1996: 6232). In other words, for Kant the person is defined by the fact that she is responsible for her own acts. This conception may be termed the ethical theory of the person. It is worth emphasising again that it was developed against the backdrop of Kant’s metaphysical project. As we know, Kant attempted to show that metaphysics – at the level of theoretical reason – is impossible. He stated that in our cognition, such notions as the world, the soul or God could correspond to no object. Those notions played a role of the transcendental ideas whose task is to organise our experience. Metaphysics is possible, however, on the grounds of practical reason and it was to this sphere that the Kantian notion of the person belongs. The above presentation of the three most important conceptions of the person – the classical, the psychological and the ethical – shows that attempts to compare these views abstracted from their general metaphysical background, from the very foundation on which they were constructed, is a senseless task. One may not refer to the classical definition of Boethius if one does not simultaneously accept the metaphysics of Aristotle, which was structured by the ontological principles of form, matter, cause and goal. The psychological conception is rooted in the fundamental separation of mind and body. Finally, the ethical conception is groundless for those who ignore the basic Kantian distinction between theoretical and practical reason. In other words, each of these three basic definitions of the person are accompanied by metaphysical baggage; accepting any of them commits us to a certain view of the world. 1.3 The Contemporary Debate Over Person The twentieth century debate over the notion of the person – broadly speaking – lies between two positions. The first may be termed the descriptive and the second, the axiological. The descriptive conception of the person stems mainly from analytic philosophy, directly tied to the tradition of Locke, and defines the person according to certain empirical (mental) criteria. In turn, the axiological approach places emphasis on the fact that the person is a bearer of values. In this school, the positions are of the classical (mainly Thomist) and – perhaps more importantly – the Kantian and neokantian origins. One of the most famous examples of the descriptive theory of the person is that proposed by Peter Singer. It defines the person as the bearer of certain mental attributes: an ability to feel and understand, self-awareness and autonomy, the ability to imagine oneself in the future, etc. These characteristics are not fulfilled by all people – e.g. those who are in a coma. On the other hand, such an understanding of personhood may be ascribed to some animals (e.g., non-human primates) (Singer 1975). A similar position has been expressed, already quoted in this essay, by Hugo Engelhardt: “Not all people are equal. […] Not all people are persons. Not all people are conscious, understanding and able to praise or criticise something. A foetus, a newborn, the mentally handicapped, those in a deep coma – are examples of people who are nonpersons” (Engelhardt 1996: 135–138). Advocates of the descriptive conception of the person – at least those who are engaged in a reflection of an ethical character – do not limit their deliberations to such definitions. These definitions are used in ethical discourse. The descriptivists claim that a person is someone entitled to certain rights whereas non-persons are not entitled to such. For example, Singer claims, with the support of his conception of the person, that in ethics and law it is necessary to reject the dichotomy of ‘human – non-human’ and put in its place a division of ‘person – non-person’, in which rights are ascribed to persons only. Singer’s theoretical manoeuvre is typical for the advocates of the descriptive conception of the person. A ‘person’ is defined solely on the basis of descriptive, psychological criteria, but then the definition is utilised normatively, to decide legal and ethical controversies. Thus, the descriptivist approach suffers from a kind of ‘methodological schizophrenia’: the notion of the person is defined descriptively, but used normatively. Another approach is offered by the advocates of the axiological conception of the person. In this case, the ethical value of a person is ontologically prior and defines personhood. In such a consideration, the person is independent of any contingent mental attributes which stem from, for example, a serious impairment, or the stage of personal development (foetus, infant etc). The axiological view of the person may be ascribed to various contemporary philosophical schools, such as personalism or neokantianism. Of course, their conceptions of the person differ in more or less important aspects, but they share the conviction that the person is a bearer of values and hence a moral agent, responsible for her actions.

1.4 The Person in Law

As we have already mentioned, the notion of the person (persona) was introduced for the first time in Roman law. It was a technical term which denoted a bundle of rights. A human, in accordance with unus homo sustinet plures personas, could be many persons. To this day the notion of the person in law (the physical person and the legal person) has a technical character and is not connected with any concrete philosophical content.

It is easiest to show this by analysing something key to the shaping of the contemporary law – normative acts. For example, from the Universal Declaration of Human Rights we read:

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. (…)

Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. (…)

All human beings are born free and equal in dignity and rights.

It is easy to see that in this key declaration, the word ‘person’ never features. The only exception occurs in the preamble to the Declaration in which (but only in the English version) can we read that “the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person”. In the official Polish translation, for example, the word ‘individual’ is used.

The term ‘person’ is used only in a technical sense, in the Universal Declaration as well as in other acts of international law. For example, the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 refers to the right of every human to life, clarifying that the deprivation of life will not be regarded as contrary to the convention if it occurs as a result of the necessary use of force in defending any person from illegal violence. ‘Person’ here is but an ‘empty slot’, a place-holder for a proper name of an individual. This technical sense of ‘person’ is utilised also in the famous Oviedo bioethical convention (convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine). The term ‘person’ does not even feature in the title and when it does feature in the text, it is in the technical legal understanding such as when it refers to the consent that must be given by a person in agreeing to medical procedures or when protecting a person who is not in a state to express such a consent.

It may also easily be shown that legal regulations do not presuppose any concrete philosophical view of the person. As an example, let us consider a section from the Polish Civil Code. This code does not define what is a physical person. However, in the first of the articles of Title II, “Osoby [Persons]”, in Article 8 kc, it states:

Article 8§1 Every human, from the moment of their birth, has legal capacity.

Legal capacity – which consist of a certain bundle of rights – is bestowed upon every human from the moment of their birth. The capacity to perform legal acts is different, as it is limited to people who turned thirteen and have not been incapacitated. It follows that the capacity to perform legal acts does not constitute a subset of the rights contained in legal capacity. The Code limits the capacity to perform legal acts not only according to age but also in terms of mental illness or other kinds of mental disturbance. These circumstances do not, of course, limit legal capacity.

An important anthropological presupposition is contained in the articles relating to the declaration of intent, in particular Article 60 and Article 82 kc:

Article 60 (…) the intent of a person to perform legal act may be expressed by all actions manifesting that intent in a sufficient manner (…)

Article 82 The declaration of intent made by a person, who lacks conscious or free ability to make decisions and express their will, are to be regarded null and void. This refers in particular to mental illnesses and other, even lapsed mental disturbances.

We can see that, firstly, the use of the notion of the person in both articles has a technical (legal) character. It stems from the understanding of the person which may be reconstructed with the help of the above cited article of Title II of the Code. Secondly, Articles 60 and 82 kc presuppose a certain thesis of what a human is. In particular, a human being is capable of expressing their will in a free and conscious manner. We should be aware, however, that the fact that someone is unable to express their will (whether incidentally or permanently), does not mean they lose their status as a person (in the legal sense).

One may therefore say that the notion of the ‘physical person’ does not correspond with that outlined in the descriptive notion of the person (in the philosophical sense). We should bear in mind that in the opinion of authors such as Singer or Engelhardt, the person is an individual who possesses the ability to feel and understand, is self-aware, has the ability to praise or rebuke someone. In the legal sense, a man who does not fulfil these criteria remains a person (in the legal sense). On the other hand, the provisions of civil law presuppose a certain “model” view of man. Such a “model” is that of an adult and healthy person who has the ability to freely and consciously express her will. It is obvious that this is in accordance with the descriptive understanding of the notion of the person. In other words, the civil code presupposes certain elements of the descriptive conception but not as criteria of legal personality.

On the other hand, the meaning of the notion of the ‘physical person’ does not correspond to the meaning of the notion of the person in the axiological conception either. We should be aware that it is the civil law that ascribes a bundle of rights to a ‘physical person’; the criterion for establishing personality is descriptive, and the value is ascribed by the law. In particular, the notion of the ‘physical person’ cannot be equated with the notion of the person according to the Personalists. The main trend of Personalism rests on Thomist philosophy, in which a key role is played by the principle of purpose (telos). As a result, Personalism regards a foetus as a person, something which civil law does not. There do exist, however, legal regulations – such as the already mentioned declaration and convention of human rights as well as some constitutions – which see a certain “original” value in man (e.g., dignity). We thus have to do with the situation in which legal acts presuppose a vision of man which is consistent with some theses of the axiological conception of person. Once again, however, these aspects do not constitute a legal definition of a person but rather are elements which make up the legal view of man.

1.5 The Ordinary Person

So far I have argued that there is no single, universally accepted philosophical conception of the person. In philosophical discussions, competing theories of the person exist, such as the descriptive and the axiological views. They stem from fundamentally different presuppositions and often rest on historical accidents or misunderstandings. Moreover, I have claimed that in law there appears a technical notion of the person which does not correspond with any philosophical notion of the person. As a result, the risk of equivocation arises, in particular in cases when we mix legal and philosophical discourse. Law contains, to be sure, certain elements of a view of man: some of them belong to the descriptive and others to the axiological account of the person. All this leads to a methodological rule of caution: when utilising the concept of the person, one needs to bear in mind its many dimensions, both philosophical and legal.

However, the story of person does not end here. It is a notion that we regularly use in ordinary language, usually understanding one another, even if no clarification of what ‘person’ means is supplied. Some philosophers even claim that the concept of the person is pivotal in the conceptual scheme underlying ordinary language. Such authors as Gilbert Ryle (Ryle 2002) and J.L. Austin (Austin 1976) argue that our way of speaking is based on a fundamental distinction between persons and things; a distinction which goes so deep that it determines the very foundations of our thinking about the world and other people. Thus, even if the philosophical conceptions of the person are many and mutually incompatible, and the law uses the term only in the technical sense, it is tempting to consider whether the category of person cannot be ascribed a more stable and fixed meaning within the context of our linguistic practices and cognitive activities.

In order to answer this question, it is reasonable to begin with the concept of folk psychology. Generally speaking, folk psychology is the ability of mindreading, i.e. of ascribing mental states to other people. A more detailed characterisation – albeit not an incontestable one – has it that folk psychology is a set of the fundamental capacities which enable us to describe our behaviour and the behaviour of others, to explain the behaviour of others, to predict and anticipate their behaviour, and to produce generalisations pertaining to human behaviour (Stich, Ravenscroft 1992: 457–459). Those abilities manifest themselves in what I call the phenomenological level of folk psychology as “a rich conceptual repertoire which [normal human adults] deploy to explain, predict and describe the actions of one another and, perhaps, members of closely related species also. (…) The conceptual repertoire constituting folk psychology includes, predominantly, the concepts of belief and desire and their kin – intention, hope, fear, and the rest – the so-called propositional attitudes (Davis, Stone 1995: 2).”

One can also speak of the architectural level of folk psychology which consists of the neuronal and/or cognitive mechanisms which enable ascribing mental states to others. Importantly, this level is not fully transparent or directly accessible to our minds – while we are able to easily describe the conceptual categories we use to account for other people’s behaviour (at the phenomenological level), we usually have no direct insight into the mechanisms behind mindreading. In psychological and philosophical literature there emerged two kinds of theories pertaining to the architectural level of folk psychology: the theory of mind (TOM) and simulation theory (ST). According to the proponents of TOM, folk psychology is based on often unconscious and automatic inferences about the target’s mental states. These inferences take advantage of a tacit theory about the relations between mental states as well as between mental states and behaviour. Until the late 1980’s TOM was the leading theory of the architectural level of folk psychology. However, in 1986 Robert Gordon proposed a very different theory (Gordon 1986). According to his radical simulationism, there is no need to propose an internally represented knowledge structure to explain the phenomenological manifestation of folk psychology. Instead of taking advantage of such a knowledge structure, the mindreader imagines the world from the perspective of her explanatory target, or, in other words, she puts herself in their shoes. When simulating another person’s behaviour, the decisionmaking mechanism of the one who simulates works off-line, and the generated decision does not lead her to behave accordingly, but instead it is ascribed to the explanatory target.

There is little controversy regarding the biologically hard-wired nature of the architectural level of folk psychology. However, the question of how it generates the phenomenological level, and what exactly is the extent of culture’s influence on the way we understand and explain the behaviour of others, is a matter of fierce controversies. There is substantial evidence which seems to put into doubt the claim that the phenomenological level of folk psychology is culture-independent and hence universal. The capacity to mindread seems to be realised differently in different cultures, and the standard understanding of the phenomenological level of folk psychology assumed by many philosophers and psychologists is an artefact of the Western culture.

For obvious reasons, the concept of a person is strictly connected to the phenomenological level of folk psychology, given that the latter constitutes the cognitive apparatus which enables people to explain, predict and describe the actions of others. Therefore, the question is, what is the view of personhood as encoded in our folk psychology: does it differ from culture to culture, and if so – to what extent. In his seminal paper, “Native’s Point of View”: Anthropological Understanding, Clifford Geertz argues that the Western conception of the person – “as a bounded, unique, more or less integrated motivational and cognitive universe, a dynamic centre of awareness, emotion, judgment, and action organised into a distinctive whole and set contrastively both against other such wholes and against its social and natural background” (Geertz 1974: 59) – is quite alien to other world cultures.

For example, he claims that the Javanese embrace a highly dualistic notion of the self. The inner self (batin) is connected to the “felt realm of human existence,” while the outer self (lair) consists of the external observable actions of the individual. Crucially, both selves are independent of one another, even though the goal in both cases is to achieve ordered life (alus) as opposed to kasar, a coarse and vulgar mode of existence. In the Balinese culture, in turn, personhood has little if anything to do with individualism. People are understood as actors in a kind of “grand cosmic drama,” an it is where they find the source of their identity – in precisely scripted social roles. Finally, Geertz describes the Moroccan concept of nisba, a term which may be translated in different ways as ascription, attribution, imputation, relationship, affinity, correlation, connection, or kinship. “Nothing if not diverse, Moroccan society does not cope with its diversity by sealing it into castes, isolating it into tribes, dividing it into ethnic groups, or covering it over with some commondenominator of nationality (…). It copes with it by distinguishing with elaborate precision, the contexts – marriage, worship, and to an extent diet, law, education – within which men are separated by their dissimilitudes, and those – work, friendship, politics, trade – where, however warily and however conditionally, they are connected by them” (Geertz 1974: 67). Moroccans are “contextualised persons”: what it means to be a person is ultimately decided by concrete interactions.

All three cultures – Javanese, Balinese and Moroccan – utilise concepts of personhood which are substantially different from one another as well as from the Western conception of the person. This shows the extent of the influence culture exercises on our basic conceptual apparatus. The fact that the representatives of the Western world see themselves as “bounded, unique, and integrated motivational and cognitive universes,” does not mean that in other cultures the self is constructed in the same way. The architectural level of folk psychology provides us with a framework, which may be filled with different cultural contents. The concept of a person buried deep in the underlying scheme of the ordinary English is by no means universal. It also transpires that there must be a kind of feedback loop between the folk psychological (or ordinary) concept of the person and the philosophical theories of personhood. On the one hand, the classical, the psychological and the ethical conceptions of the person must have grown out of the ordinary understanding of the concept: they simply represent the outcomes of theorising some aspects thereof. On the other hand, however, over the centuries they have essentially influenced the way we – the Westerners – understand ourselves.

∗∗∗

I hope that the above considerations show clearly that the concept of the person is troublesome. It comes with different philosophical meanings; it serves as a technical device in the legal discourse; and it can be associated with no unique and universal cognitive contents. Under such circumstances, any attempt at providing a new, commonly acceptable definition of the person is destined to fail. Engelhardt and Singer may stipulate that some human beings are nonpersons, while some non-human primates are, but their strategy does not get us far. The concept of the person is deeply rooted in culture; it brings to the fore differentiated, often mutually incompatible connotations, and no definition can make those conceptual ramifications disappear. On the other hand, it would be naive to suggest that in our ethical and bioethical debates we should simply dismiss the concept of the person altogether. The reason is the same as in the case of revolutionary, novel definitions: we belong to a certain culture and are embedded in a long tradition of theorising about human action, and hence no meaningful ethical debate can do without speaking of persons.

Our considerations lead to a different conclusion: when too much depends on some unique, proper or ideal definition of a concept, the possibility of error looms large. We should rather follow a sound advise of Karl Popper, who observed that no progress has ever been made in philosophy, science or ethics through polishing our conceptual schemes and developing well-formed definitions (Popper 2002: 15–30). The progress is an outcome of tackling problems. Instead of asking, what is the proper definition of the person, or whether a mentally handicapped individual or a bonobo count as persons, one should concentrate on a different kind of questions, such as “Should comatose patients be protected by the law and in what way?” or “Should non-human primates be objects of ownership?” The important insight is that the answer to those questions cannot be “Yes/No, because they are persons/nonpersons”.

#### There may be a ‘substrate’ beneath full personhood that can be thought of as ‘legal subjectivity’ which would confer rights but would not the status of a person. This would avoid a spillover DA about granting personhood status to AI which causes extinction.

Federico Gustavo Pizzetti 21, Professore ordinario di Istituzioni di diritto pubblico; Università degli Studi di Milano, “Embryos, Organoids and Robots: “legal subjects”? ,” BioLaw Journal, January 2021, https://air.unimi.it/retrieve/handle/2434/820147/1720592/FGPIZZETTI\_Organoids\_Biolaw.pdf

5. Towards a new “multidimensional” category of “legal personhood” (for the disruptive techno-scientific developments)

Anyway, all these blurring scenarios show how, right now and eventually more in the future, we might have to “unbundle” the package of legal personhood by separating and distinguishing the “legal personhood” (humans) from the “legal subjectivity” (embryos, AI-systems).

The “legal personhood” remains the classical juristic condition of the physical individual’s full aptitude to be the owner of rights and the bearer of duties. It is, typically, the (universal and equal) legal “status” of the human-being, born and alive.

The “legal subjectivity” might be, in some cases, also attributed to some entities that are not considered as legal persons. These cases comprehend the embryos as human beings not-yet born and alive but capable of self-development into a human-being, and (maybe) the AI-system as sophisticated artificial beings capable of autonomous agentivity. From this specific (and narrow) point of view, the legal subjectivity might be the conceptual juristic “substrate” for recognizing some specific rights to be protected and balanced with others’ rights and interests (like life and health) such as in the case of embryos, or for imposing some responsibility for making good any damage they may cause (like tort and other illicit) such as in the case of the AI-systems.

At the same time, the case-law mentioned above reveals a fundamental juristic factor — i.e., the “human dignity” (Art. 2 and 3 It. Const., Art. 1 CFUE, Art. 1 UDHR) — which, in any case and forever, distinguishes human beings (born and not-yet-born) from robots and AI-systems (and, at the same time, also from organoids).

As reported above, the courts consider human dignity strictly interwoven with human life, starting at its inception, even before birth.

If the proper characteristic of dignity is human life “as it is” (even at the embryonic stage, but capable of becoming a complete human person, not a synthetic “organoid,” and until the individual’s death), it is clear that human life cannot be shared with non-living and non-human artifacts. In fact, androids or other intelligent devices remain just “inanimate things,” notwithstanding the level of skills — motor, sensitive, cognitive, or even “conscious” or “intelligent” — of their hyper-sophisticated technological bodies. Negating the attribution of “human dignity” to robots or AI-systems from a legal point of view seems also to be a strategic move. Even if it may be just dystopia, we do not know for sure if — as has been warned by Stephen Hawking24 — artificial intelligence could outsmart all of us or act in a way we cannot simply understand, and, thus, if it presents (or not) a substantial threat to humankind in the future. Therefore, it could be necessary to establish specific, differentiated legal regimes for humans and robots, to prevent humans from being put in hazardous or harmful situations by the autonomous and intelligent behaviors of the artificial machines we might not control. As a consequence, we may need to ensure that the legal personhood, which will have been given to artificially intelligent machines, could be legally limited to set rules effective for avoiding behaviors that result in threats to mankind. Under this perspective, the value of dignity — as an exclusive position of mankind, that the robots are not vested in — might become a sufficient constitutional and international basis to justify, and tolerate, a legal diversity of the intelligent artifacts which limits even robustly their agentivity.

The organoids, on their side, are still just insulated part of human tissue, which will never become a human body so that they cannot be “equated”, under the point of view of dignity, with the human entity “as a whole” (even if that human entity has not yet reached the stage of a human body like the embryos or the fetuses during the pregnancy). To attribute, for mere hypothesis, the human dignity to the organoids would mean, moreover, to assign the highest legal “value” to an entity that has never been incorporated in a human being composed of body and brain. The consequence would be, therefore, to implicitly “reduce” the “whole human being”, deserving of dignity in its “organic entirety”, to only a single, limited, part as it could be a "mini-brain". This does not exclude, of course, that if in the distant future, it were technically possible to make brain organoids reach very sophisticated levels of neuronal activity, legal measures could not be adopted to regulate the creation and use of such types of organoids.

### Personhood PIC---Animals

#### Granting legal personhood to animals cements tests for personhood based on normative understandings of cognitive capacity which ableist dehumanization and horrific violence. Protective approaches centered on human responsibility are best.

Richard L. Cupp Jr. 15, John W. Wade Professor of Law, Pepperdine University School of Law, “Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals,” Pace Environmental Law Review, vol. 33, no. 3, 2016/2015, pp. 517–541

We should focus on human legal accountability for responsible treatment of nonhuman animals rather than radically restructuring our legal system to make them legal \*518 persons.1 This essay, provided at the kind invitation of the Pace Environmental Law Review and Steven Wise, President of the Nonhuman Rights Project, Inc.,2 outlines a number of concerns about animal legal personhood. It does so primarily in the context of the plaintiff's brief in The Nonhuman Rights Project, Inc. v. Lavery, filed in the New York Supreme Court, New York County.3 The first Lavery lawsuit (Lavery I) was filed in Fulton County in late 2013.4 After Lavery I was dismissed at the trial court and appellate levels, the second Lavery lawsuit (Lavery II) was filed in New York County in late 2015. The Pace Environmental Law Review is publishing a memorandum of law by Steve Wise and Elizabeth Stein in support of the petition for habeas corpus in Lavery II5 along with an amicus brief by Professor Laurence Tribe6 supporting the the appeal of Lavery I and this essay opposing the lawsuit.

The arguments plaintiffs provide in their Lavery I brief and in their Lavery II brief feature many similar themes, but this essay will focus primarily on the language of the Lavery II brief, as it is the more recent. As with Lavery I, the Lavery II brief \*519 seeks a common law writ of habeas corpus for a chimpanzee named Tommy that was kept in upstate New York by a private individual.7 As with Lavery I, the Lavery II brief does not claim that any existing laws are being violated in the chimpanzee's treatment. Rather, both the Lavery I and Lavery II briefs argue that the chimpanzee is entitled to legal personhood under liberty and equality principles.8 The Lavery II brief specifically asserts that he “possesses dozens of complex cognitive abilities that comprise and support his autonomy and bodily liberty. Moreover, he can shoulder duties and responsibilities both within chimpanzee societies and within human/chimpanzee societies.”9 As with Lavery I, the Lavery II brief also asserts that Tommy is entitled to legal personhood under a New York statute allowing humans to create inter vivos trusts for the care of animals.10 Both Lavery briefs seek to have the chimpanzee moved to a sanctuary that confines chimpanzees, but in a manner the briefs argue is preferable to the chimpanzee's living situation when the lawsuits were filed.11

The NhRP has filed several closely related lawsuits seeking legal personhood for chimpanzees, including Lavery I and Lavery II, in New York since late 2013.12 As of the writing of this essay, \*520 all of the courts making decisions on the cases have rejected them.13 By the author's count, at least twenty-three New York judges have participated in ruling against the lawsuits thus far.14

A cursory history of the Lavery I and Lavery II lawsuits may be helpful for understanding the context of the Lavery II brief. After first being rejected by the Fulton County Supreme Court, Lavery I was again rejected by a unanimous five-judge panel of the New York State Supreme Court Appellate Division, Third Judicial Department, in People ex rel. Nonhuman Rights Project, Inc. v. Lavery.15 In the Lavery I decision, the court emphasized that “collectively, human beings possess the unique ability to bear legal responsibility.”16

The NhRP filed a motion for leave to appeal to the Court of Appeals of the State of New York,17 but the Court denied the \*521 motion in September 2015.18 The NhRP then filed Lavery II in New York County, providing additional expert affidavits and arguing that the Third Department's appellate decision in Lavery I was wrongly decided.19 The trial court dismissed Lavery II in December 2015, writing only that it “[d] eclined, to the extent that the Third Dept. determined the legality of Tommy's detention, an issue best addressed there, [and] absent any allegation or ground that is sufficiently distinct from those set forth in the first petition.”20 The NhRP has indicated that it will appeal this decision.21

Although the NhRP has not yet succeeded in making animals legal persons in either Lavery case or any other lawsuits, these \*522 lawsuits are only the beginning of a long-term struggle, and the issue's ultimate outcome is far from clear. Although the lawsuits are misguided in many ways, they should not be underestimated. The question of how we treat animals is exceptionally serious, both for animals and for human morality.22 The emotional appeal of doing something very dramatic in an effort to help animals, especially the animals that are most like us, is understandably strong to many people. This essay encourages greater empathy for animals, but introduces and briefly outlines several problems with the lawsuits and calls instead for a focus on evolving standards of human responsibility for animals' welfare as a means of protecting animals rather than granting legal personhood to animals.23

I. ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE LAVERY LAWSUITS WOULD POSE THREATS TO THE MOST VULNERABLE HUMANS

A danger that is underestimated and far out on the horizon may be more likely to advance from threat to harm than a similar danger that is immediate and clearly seen. One of the most serious concerns about legal personhood for intelligent animals is that it presents an unintended, long-term, and perhaps not immediately obvious threat to humans -- particularly to the most vulnerable humans.

Among the most vulnerable humans are people with cognitive impairments24 that may give them no capacity for autonomy or less capacity for autonomy than some animals, whether because of age (such as in infancy), intellectual disabilities, or other reasons.25 To be clear, supporting \*523 personhood based on animals' intelligence does not imply that one wants to reduce the protections afforded humans with cognitive impairments. Indeed, my understanding is that the Lavery briefs seek to pull smart animals up in legal consideration, rather than to push humans with cognitive impairments down.26

However, despite these good intentions, there should be deep concern that over a long horizon, allowing animal legal personhood based on cognitive abilities could unintentionally lead to gradual erosion of protections for these especially vulnerable humans. The sky would not immediately fall if courts started treating chimpanzees as persons. As noted above, that is part of the challenge in recognizing the danger. But, over time, both the courts and society might be tempted not only to view the most intelligent animals more like we now view humans but also to view the least intelligent humans more like we now view animals.

Professor Laurence Tribe has expressed concern that the approach to legal personhood set forth in a much-discussed book by Steven M. Wise might be harmful for humans with cognitive impairments. The book, Rattling the Cage, was published in 2000, \*524 and it broke new ground in setting forth arguments for intelligent animal legal personhood directed at a popular audience.;27 In 2001 Professor Tribe stated “enormous admiration for [[[Mr. Wise's] overall enterprise and approach,” but cautioned:

[o]nce we have said that infants and very old people with advanced Alzheimer's and the comatose have no rights unless we choose to grant them, we must decide about people who are three-quarters of the way to such a condition. I needn't spell it out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.28

Mr. Wise later responded in part: “I argue that a realistic or practical autonomy is a sufficient, not a necessary, condition for legal rights. Other grounds for entitlement to basic rights may exist.”29 But Mr. Wise also noted that, in his view, entitlements to rights cannot be based only on being human.30 I did not find in the Lavery briefs an explanation of why, despite Mr. Wise's apparent view, that being part of the human community is not alone sufficient for personhood; he and the NhRP think courts should recognize personhood in someone like a permanently comatose infant. If the argument is that the permanently comatose infant has rights based on dignity interests, but that dignity is not grounded in being a part of the human community, why would this proposed alternative basis for personhood only apply to humans and to particularly intelligent animals? Would all animals capable of suffering, regardless of their level of intelligence, be entitled to personhood based on dignity? If a rights-bearing but permanently comatose infant is not capable of suffering, would even animals that are not capable of suffering be \*525 entitled to dignity-based personhood under this position?31 The implications of some alternative non-cognitive approach to personhood that rejects drawing any lines related to humanity may be exceptionally expansive and problematic.

Further, good intentions do not prevent harmful consequences. Regardless of the NhRP's views and desires regarding the rights of cognitively impaired humans, going down the path of connecting individual cognitive abilities to personhood would encourage us as a society to think increasingly about individual cognitive ability when we think about personhood. Over the course of many years, this changed paradigm could gradually erode our enthusiasm for some of the protections provided to humans who would not fare well in a mental capacities analysis. Deciding chimpanzees are legal persons based on the cognitive abilities we have seen in them may open a door that swings in both directions regarding rights for humans as well as for animals, and later generations may well wish we had kept it closed.32

\*526 II. APPLAUDING AN EVOLVING FOCUS ON HUMAN RESPONSIBILITY FOR ANIMAL WELFARE RATHER THAN THE RADICAL APPROACH OF ANIMAL LEGAL PERSONHOOD

When addressing animal legal personhood, the proper question is not whether our laws should evolve or remain stagnant. Our legal system will evolve regarding animals and indeed is already in a period of significant change. One major reason for this evolution is our shift from an agrarian society to an urban and suburban society. Until well into the twentieth century, most Americans lived in rural areas. Most American families owned or encountered livestock and farm animals whose utility was economic.

Now we are an urban and suburban society, and relatively few of us are directly involved in owning animals for economic utility. Rather, when most of us now encounter living animals, they are most frequently companion animals kept for emotional utility. Most of us view the animals in our lives as in terms of affection rather than as financial assets. As law gradually reflects changes in society, transformation in our routine interactions with animals doubtless has influenced the trend toward providing them more protections in many respects.

A second major reason we are evolving in our legal treatment of animals is the advancement of scientific understanding about animals. We are continually learning more about animals' minds and capabilities. As we have gained more understanding of animals, we have generally evolved toward developing more compassion for them, and this increasing compassion has been, to some extent, and will continue to be, increasingly reflected in our protection laws.33

This evolution is a good thing, and it is probably still closer to its initial significant acceleration in the twentieth century than it is to a point where it will slow down. In other words, it seems quite probable that we will continue in a period of notable change \*527 in our treatment of animals for some time. We will continue evolving; the only question is how we should evolve.

Two unsatisfactory positions and a centrist position may be identified in answering this question. One unsatisfactory position would be clinging to the past and denying that we need any changes regarding how our laws treat animals. A second unsatisfactory position on the other extreme would be to radically reshape our understanding of legal personhood, with potentially dangerous consequences.

A centrist alternative to these extremes involves maintaining our legal focus on human responsibility for how we treat animals, but applauding changes to provide additional protection where appropriate. As emphasized by the Third Department in unanimously dismissing the NhRP's Lavery appeal: “[o]ur rejection of a rights paradigm for animals does not, however, leave them defenseless.”34 When our laws or their enforcement do not go far enough to prevent animals from being mistreated, we should change our laws or improve their enforcement rather than assert that animals are legal persons.

#### This captures most of the benefits of conferring actual personhood on animals.

David J. Wolfson 2k, corporate associate at Milbank, Tweed, Hadley & McCloy, LLP, a member of the Association of the Bar of the City of New York's Committee on Legal Issues Pertaining to Animals and the author of several law review articles relating to animals and the law, “Steven M. Wise: Rattling the Cage--Toward Legal Rights for Animals,” 6 Animal L. 259, 2000, WestLaw

It is certainly hard to ignore the fact that if Wise's position was adopted a number of animals that are sentient (and that can suffer pain and distress) would not be granted legal rights. And many may be understandably uncomfortable with the linkage of rights to what may seem like intelligence, rather than sentience. Still, it should be recognized that Wise can only work with what the common law provides him. The common law does not tie legal rights to sentience or suffering; instead, it ties legal rights to personhood, and, in turn, personhood to dignity and autonomy. In this context, Wise has molded a persuasive \*267 and revolutionary argument that the common law possesses the necessary tools to grant certain non-human animals certain legal rights. This is a huge step and should be recognized as such. It is also impossible to predict the ramifications of Wise's position. The recognition of legal rights for chimpanzees and bonobos would cause a profound change in society's view of animals which could, in turn, lead to the embrace of a more generous standard for the grant of legal rights to animals.33 [FOOTNOTE 33 BEGINS] While the limitations of the common law may restrict legal personhood and legal rights to the benchmark of autonomy, this is not the case with respect to the grant of legal rights through legislation. And, as Sunstein suggests, it could be argued that the foundation for the current statutory protection of animals is grounded in the recognition that animals are sentient beings that suffer. See Sunstein, supra note 4 at 1363. See also, Wise, Hardly a Revolution, supra note 24, at 912. Consequently, it would be a natural evolution for legislatures to base any future grant of legal rights on the principles of sentience and suffering. This broader ‘benchmark‘ for legal rights for animals supports Francione's and Sunstein's focus on the legislature as a positive source of progressive change in the context of legal rights for animals. Indeed, it is unclear what value the term ‘legal personhood‘ has in the context of statutory legal rights despite its undoubted importance as a conduit for common law legal rights; instead, the issue of standing seems to be the key prerequisite for effective legal rights. See supra note 24. [FOOTNOTE 33 ENDS]

Wise could be criticized for relying on the common law in the first place. At the outset, the common law limits the grant of legal rights to legal personhood, and the grant of legal personhood to autonomy. By contrast, the legislature is free to justify the grant of legal rights to animals on suffering or sentience (or any other relevant characteristic), if it chooses. Furthermore, although Professor Gary Francione agrees with Wise that the legal personhood of animals should be recognized so as to create legal rights for animals, Francione does not think it realistic to believe that a judge interpreting the common law will grant legal personhood to animals. Instead, he believes it is far more likely viable legal rights will be granted by the legislature. For the interpretation of the common law relies on judges, who tend to be older, privileged, notably conservative and unlikely to challenge the profitable paradigm of animals as a property. These are unlikely leaders of the most radical social change movement in history! Certainly, social change in the United States has often not been driven by the courts; for example, the abolition of slavery, and the granting of civil rights and women's rights, occurred through legislative reform. Why should Wise place his faith in the common law process when it failed to prohibit the enslavement of African-Americans in the United States?

One possible response is that, despite this valid criticism, the common law has proven itself to be an agent of significant social change: for example, as Wise documents, the freeing of slaves in England (it could be argued that Lord Mansfield was old, conservative and commercially focused) and the recognition of legal personhood and fundamental legal rights for fetuses. Moreover, judges in the near future (many of whom may have studied animal law with Professors Wise, Francione, or others) will be far more racially and gender diverse than \*268 today. It could also be argued that the treatment of animals in the United States today can be distinguished from the historical treatment of slaves by American judges. In the past, when natural law and fundamental common law legal rights were not acknowledged to the extent they are today, many jurists were circumscribed by the fact that the United States Constitution recognized the institution of slavery.34 This positive constitutional ‘stamp of approval‘ effectively restrained judges from interpreting the common law to prohibit slavery. By contrast, given the rise of natural law and fundamental legal rights in the post-Nuremberg world, a judge may now be free to interpret the common law to grant the legal rights of bodily integrity and bodily liberty to animals, even in the face of statutes that, it could be argued, specifically sanction the ‘enslavement‘ of animals or invade the bodily integrity and bodily liberty of animals.

In addition, while the judiciary can be accused of conservatism, the legislature may not be the best institution to challenge the economic model of animal use; any change for animals raised for food is certainly unlikely given the power and control of agricultural interests over legislative committees that continually veto statutes aimed at humane treatment (although an eye should be kept on the ballot initiative, a truly exciting and powerful tool for change). Perhaps judges may be less susceptible to economic pressure from industries that profit from animal abuse. It was a judge, the late Charles R. Richey, who stated in a lawsuit regarding the Animal Welfare Act, ‘This case involves animals, a subject that should be of great importance to all humankind . . . furthermore, this case illustrates the need for Congressional reform . . . and also illustrates that Congress, in large measure, is beholden to special interest groups who are unknown to the general public.‘35

While Wise's arguments may seem extremely optimistic, consider the concurring opinion of Justice Eric Andell of the Texas Court of Appeals in the 1994 case Bueckner v. Hamel:

Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now know that mammals share with us a great many emotive and cognitive characteristics, and that higher primates are very similar to humans neurologically and genetically. It is not simplistic, ill-informed sentiment that has led our society to observe with compassion the occasionally televised plights of stranded whales and dolphins. It is, on the contrary, a recognition of a kinship that reaches across species boundaries. The law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of revolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, property. The law should reflect society's recognition that animals are sentient and emotive beings . . . .36

\*269 Or consider the High Court of India's recent opinion:

It is not only our fundamental duty to show compassion to our animal friends, but also to recognize and protect their rights. In this context, we may ask why shouldn't our educational institutions offer a course on ‘Animal Rights Law‘ with an emphasis on fundamental rights as has been done by Harvard Law School recently. If humans are entitled to fundamental rights, why not animals? In our considered opinion, legal rights should not be the exclusive preserve of the human, and have to be extended beyond people thereby dismantling the thick legal wall with humans all on the one side and all non-humans on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.37

Ultimately, Rattling the Cage is an important and groundbreaking book. Regardless of whether chimpanzees or bonobos should (or will) be recognized as legal persons and granted fundamental legal rights under the common law, Wise's arguments demand that we stop bowing to ghosts, and justifying the legal classification of animals as property, without viable legal rights, by repeating precedent without question. As Oliver Wendell Holmes stated, ‘It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry V.‘38 Those who wish to continue the status quo should be prepared to provide better reasoning than past justifications that, as Wise persuasively demonstrates, are based on ancient cultural or religious beliefs, faulty science or human prejudice. If the current legal status of animals as property should be maintained, better justifications are needed.39 [FOOTNOTE 39 BEGINS] But See Francione, supra note 6, at 14. [‘We could decide to grant certain rights to animals while continuing to regard them as property. The problem is that as long as property is, as a matter of legal theory, regarded as that which cannot have interests or cannot have interests that transcend the rights of property owners to use their property, then there will probably always be a gap between what the law permits people to do with animals and what any acceptable moral theory and basic decency tell us is appropriate. It is my tentative conclusion that animal rights (as we commonly understand the notion of ‘rights') are extremely difficult to achieve within a system in which animals are regarded as property...‘]. Contra Sunstein supra note 4, at 165 [[‘It is possible to imagine a regime of animal welfare in which the interest in avoiding pain and suffering is taken extremely seriously, so much so that it overcomes significant human interests. (We could imagine protections against cruelty in connection with raising animals for food that would be so stringent, and so expensive, as to reduce both the supply of animals to eat and the demand for eating animals).... We can imagine a situation in which animals are owned, but in which the right of ownership does not include the right to inflict suffering; indeed, that is very much the law as it now stands. The rights of ownership is significantly qualified by restrictions on what can be done with that right. There is nothing unusual about this; rights of ownership are always qualified in one way or another. I do not believe it is necessary to consider animals to be persons, or to insist on certain cognitive powers in order to say that, by virtue of their capacity to suffer, they deserve legal rights against cruelty, abuse or neglect. But the rhetoric does matter. In the long term, it would indeed make sense to think of animals as something other than property, partly in order to clarify their status as being with rights of their own. ‘]. This author seriously questions Sunstein's statement that, as the law now stands, the right of ownership is significantly qualified and generally does not include the right to inflict suffering. In fact, according to the law as it ‘now stands,‘ a common or normal or customary farming practice, no matter how cruel and no matter how much suffering occurs, cannot be found to be a violation of the majority of state anti-cruelty statutes. As a result, owners (or the farming community) can currently inflict an egregious amount of suffering on animals who represent over ninety-five percent (approximately 8 billion) of the animals killed annually in the United States. Thus, the farming community determines what is or is not cruelty (under the criminal law) to animals in their care. It is hard to argue that, in this context, the right of ownership is significantly qualified and does not include the right to inflict suffering. See David J. Wolfson, Beyond the Law, supra note 9; David J. Wolfson, McLibel, supra note 11. [FOOTNOTE 39 ENDS]

### Competition

#### Granting individual rights is ‘fundamentally different’ than granting the status of personhood.

Visa A.J. Kurki 19, Academy of Finland Postdoctoral Fellow at the Law Faculty of the University of Helsinki, received his PhD in 2017 from the University of Cambridge, has published on legal personhood, rights theory, and animal law, is also vice president of the Finnish Society for Legal Philosophy, “The Incidents of Legal Personhood,” A Theory of Legal Personhood, Oxford University Press, 08/08/2019, pp. 91–126 DOI.org (Crossref), doi:10.1093/oso/9780198844037.003.0004

My theory is—to my knowledge—the first modern and wide-ranging theory of legal personhood that explicitly rejects all the formulations of the Orthodox View. I should regardless acknowledge that some authors have propounded views that are not straightforwardly reducible to that position. For instance, Jonas-Sébastien Beaudry writes:

The strategy of claiming legal personhood would allow animals to get direct access to the special category of ‘persons’ which legal systems associate with a plethora of the most robust kinds of protections and rights. [ … ] Granting legal personhood is fundamentally different from granting ‘weak’ legal rights, protections or entitlements, insofar as legislators can posit various rules protecting any object without endorsing the idea that these objects are ‘persons’ or matter for their own sake.1

### Competition---Animal Trusts

#### Animal trusts do not create legal personhood

Richard L. Cupp Jr. 15, John W. Wade Professor of Law, Pepperdine University School of Law, “Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals Climate, Energy, and Our Underlying Environmental Ethic: Essay,” Pace Environmental Law Review, vol. 33, no. 3, 2016/2015, pp. 517–541

VIII. ANIMAL TRUSTS DO NOT CREATE NEW LEGAL PERSONS

The Lavery I brief and the Lavery II brief argue that animals are already recognized as legal persons in New York. They assert that a New York state statute allowing humans to create an inter vivos trust for their companion animals or other animals makes the animals beneficiaries, and that “only ‘persons' may be trust beneficiaries.”73 But when a state permits people to create trusts to care for animals, the legislative intent is not to declare that the animals are now legal persons with autonomy rights. Rather, the intent is doubtless to give humans peace of mind in knowing that their beloved animals will be cared for after they pass away, as well as to facilitate good care for animals. Further, as explained by New York Assistant Attorney General Christopher Coulston in opposing this argument in one of the related chimpanzee cases, elsewhere a New York statute defines the term “animal,” which is used repeatedly in the companion animal inter vivo trust statute, as “every living creature except a human being.”74

## States CP

### States CP

#### States can spell out what entities can have certain legal statuses and set out the consequences of that status. Federal law creates a floor for legal status---not a ceiling.

Brandon L. Garrett 14, Professor of Law, University of Virginia School of Law, “The Constitutional Standing of Corporations,” 163 U. Pa. L. Rev. 95, December 2014, WestLaw

A. To Whom Do Constitutional Rights Attach?

Asking whether a corporation itself has standing to litigate a constitutional right in federal court is a question that implicates the underlying legal status of the corporation and the interests accompanying it. State law defines the status of an incorporated or other form of business entity.39 State or federal law may provide a natural person with some type of legal status like citizenship, domicile, or marriage. State law defines the organizational requirements for being recognized as a type of corporation or partnership, as well as the legal consequences of such status.40 A corporation may have a very large group of shareholders and separate management if it is a public corporation with stock that is listed, or it may be a very large corporation with private owners. A corporation may have a small group of members (or not, if it is a sole proprietorship); in fact, the vast majority of corporations are quite small.41 Other organizations include partnerships, owned by a group, and limited liability corporations (LLCs). LLCs are simple to create, like partnerships, but enjoy limited liability like corporations.42 Since a corporation is a creature of state law, federal courts may be leery of interfering with the definition of its legal status under state law.43

In contrast, federal courts play an important role in defining status relating to citizenship and immigration, which are defined by the Fourteenth Amendment and federal law. The Fourteenth Amendment guarantees citizenship rights, making such questions of federal and constitutional concern. For example, the right to vote is “a citizen's right to vote.”44 Legal permanent residents and other gradations of immigration status may bring with them intermediate forms of constitutional protection.45 Juveniles do \*106 not enjoy the same constitutional rights as adults, although they will with age become full rights-bearing citizens.46 Criminal convictions may cause citizens to lose the right to vote or serve on juries, and prisoners may have altered constitutional rights as well.47 Those questions about altered constitutional rights as connected to citizenship status do not affect domestic corporations (though perhaps they could affect foreign corporations) because corporations are not citizens, as the Supreme Court has held since Chief Justice John Marshall's decision in Bank of the United States v. Deveaux.48 As a result, as Amy J. Sepinwall puts it, “[c]orporations, it goes without saying, are neither expected nor entitled to vote, perform jury duty, or serve in the military.”49

That said, in other contexts in which state law defines legal status, the Court has set out constitutional limits on the degree to which a state may limit access to that status or burden it. For example, the Court has recognized a fundamental right to access to marriage.50 The Court has recognized certain rights of parents, including that parents may constitutionally challenge state decisions to remove children from their custody, while non-parents do not enjoy the same constitutional rights to seek custody of a child.51 A married couple may enjoy joint rights as well as obligations of the marital status. A state adoption judgment may create parental status.52 Nor is there anything unusual about shared property interests, or multiple \*107 people bringing legal actions asserting shared or competing property interests.53

### States CP---AI

#### Federalism is the best approach to AI personhood, but the AFF has some deficits.

Ugo Pagallo 18, Law School, University of Turin, “Apples, Oranges, Robots: Four Misunderstandings in Today’s Debate on the Legal Status of AI Systems,” Philosophical Transactions. Series A, Mathematical, Physical, and Engineering Sciences, vol. 376, no. 2133, 10/15/2018, p. 20180168

6. Legal experimentalism

There are two different kinds of rule, through which the law may aim to govern the process of technological innovation, e.g. the new scenarios of human–AI robot interaction (HAIRI). In accordance with Herbert Hart's classical distinction, we should consider the primary rules of the law and its secondary rules separately [26].

(a) Primary rules of the law

The primary rules of the law aim to directly govern social and individual behaviour, both human and artificial, e.g. corporations. This kind of regulation entails four different levels of analysis, that is (i) the regulation of human producers and designers of AI robots through law, e.g. liability norms for manufacturers of robots; (ii) the regulation of user behaviour through the design of AI robots, that is by designing robots in such a way that unlawful actions of humans are not allowed; (iii) the regulation of the legal effects of AI robotic behaviour through the norms set up by lawmakers, e.g. the effects of AI contracts and negotiations, and (iv) the regulation of robot behaviour through design, that is by embedding normative constraints into the design of the machine [27]. This differentiation can be complemented with further work on how the environment of HAIRI can be regulated, and the legal challenges of ‘ambient law’ [28]. Accordingly, the focus should be on the set of values, principles and norms that constitute the context in which the consequences of such regulations have to be evaluated [29].

As a case study, consider a corollary of the ‘two abuses' doctrine––and of many views against the legal agenthood of some AI systems––such as the traditional interpretation of the role of robots and AI systems as simple tools of social interaction. This legal approach, i.e. cases ‘I-3’, ‘SL-3’ and ‘UD-3’ of table 1, mostly hinges on forms of strict liability and at times the application of the precautionary principle. These methods of accident control aim to cut back on the scale of the activity through the threat of physical sanctions. Yet, on the one hand, we already stressed above in §5 that such legal techniques can hinder responsible research and innovation, e.g. the drawbacks of the ENIAC regulations. On the other hand, this approach ends up in a Hegelian night where all kinds of responsibility look grey, because designers, manufacturers, operators and users of AI robots should be held accountable in accordance with the different errors of the machine and the circumstances of the case. For example, it is difficult to accept that humans should not be able to avoid the usual consequence of AI robots making a decisive mistake, e.g. the annulment of a contract, when the counterparty had to have been aware of a mistake that due to the erratic behaviour of the artificial agent, clearly concerned key elements of the agreement, such as the market price of the item or the substance of the subject-matter of a contract. Correspondingly, a three decade long debate on the legal agenthood of AI robots, namely the ‘I-2s’, ‘SL-2s’ and ‘UD-2s’ of tables 1 and 2 illustrated above, is not a simple intellectual exercise of philosophers and dreamy experts. Rather, some of the specific solutions that have been advanced over the past years, e.g. the ‘Turing Registry’ proposed by Justice Karnow in the 1990s [2], are a response to the apparent limits of the robots-as-tools approach and a way to prevent cases of impunity.

In addition to the ‘I-2s’, ‘SL-2s’ and ‘UD-2s’ illustrated above in §4c and d, i.e. on ‘registries’ for AI systems and robots as ‘data controllers’, consider a further example on the accountability of artificial agents in the context of public AI car sharing. In the traditional world of human drivers, many legal systems had to introduce––in addition to compulsory insurance policies––public funds for the victims of road accidents, e.g. the Italian legislative decree no. 209 from 2005. In the foreseeable world of autonomous vehicles, hypotheses of accountable AI car systems may thus make sense because a sort of digital peculium, embedded in the design of the system, can represent the smart AI counterpart to current public funds for the victims of road accidents [23]. Once clarified the level of abstraction on the variables of the legal agency, e.g. different kinds of rights and duties established by the AI system, such a legal agency should not be discarded a priori. Whether new forms of accountability for AI robots can properly address some drawbacks, loopholes or gaps of current legal frameworks is indeed an empirical issue, which requires tests and experiments. Next section explores how scholars and, more importantly, lawmakers have followed this road of experimentation recently.

(b) Secondary rules of the law

In the analysis of Herbert Hart, the secondary rules of the law comprise three different types, namely (i) rules of recognition, such as the constitution; (ii) rules of adjudication, so as to prevent e.g. conflicts of jurisdiction for extra-territorial effects of individual conduct; and (iii) rules of change. Comprehensibly, in this context, the focus is on the secondary rules of change. Leaving aside Hart's ideas on legal theory, let us assume here the rules of change as the rules that allow to create, modify or suppress the primary rules of the system. More particularly, dealing with today's debate on the legal status(es) of AI robots, two secondary rules of change have to be mentioned. They regard proper forms of legal experimentation and the doctrine of competitive federalism.

(c) Special zones

We can tackle some of the normative challenges of AI robots through forms of legal experimentation, as the Japanese government has worked out over the past 15 years. By creating special zones for AI and robotics empirical testing and development, the overall aim of these open labs is to set up a sort of interface, in which scientists and common people can test whether robots fulfil their task specifications in ways that are acceptable and comfortable to humans vis-à-vis the uncertainty of machine safety and legal liabilities that concern, e.g. the protection for the processing of personal data [7]. These experiments could obviously be extended, so as to strengthen our understanding of how the future of HAIRI and further smart AI robots could turn out with some of the issues examined in the previous sections. We can collect empirical data and sufficient knowledge to make rational decisions for a number of critical issues. We can improve our understanding of how such systems may react in various contexts and satisfy human needs. We can better appreciate risks and threats brought about by possible losses of control of AI robots, so as to keep them in check. We can further develop theoretical frameworks that allow us to better appreciate the space of potential systems that avoid undesirable behaviours. Last, but not least, we can rationally address the legal aspects of this experimentation, covering many potential issues raised by the next-generation AI robots and managing such requirements, which often represent a formidable obstacle for this kind of research, as public authorizations for security reasons, formal consent for the processing and use of personal data, mechanisms of distributing risks through insurance models and authentication systems and more.

At least in the field of autonomous vehicles, some European legal systems have followed suit. Sweden has sponsored the world's first large-scale autonomous driving pilot project, in which self-driving cars use public roads in everyday driving conditions; Germany has allowed a number of tests with various levels of automation on highways, e.g. Audi's tests with an autonomously driving car on highway A9 between Ingolstadt and Nuremberg. Whereas this kind of legal experimentalism has also been implemented in other domains, such as finance, such an approach should be expanded to further fields of AI and robotics. After all, in the early 1980s, Western car producers had to learn a hard lesson when Japanese industry first began to implement robots on a large scale in their factories, acquiring strategic competitiveness by decreasing costs and increasing the quality of their products. Nowadays, it seems wise to admit that we should follow once again Japanese thinking and their policy of setting up special zones for AI robotics empirical testing and development. As stressed time and again throughout this paper, most of the issues we are dealing with in this field of technological innovation should in fact be tackled pragmatically.

But, how about the USA?

(d) Competitive federalism

Another example of secondary rules of change is given by Justice Brandeis's doctrine of experimental federalism, as espoused in New State Ice Co. v Leibmann (285 US 262 (1932)). The idea is to flesh out the content of the rules that shall govern social and individual behaviour through a beneficial competition among legal systems and in accordance with the principle of implementation neutrality. This is what occurs nowadays in the field of self-driving cars in the USA. On the one hand, regulations are by definition specific to that technology and yet do not favour one or more of its possible implementations. The Federal Automated Vehicles Policy adopted by the U.S. Department of Transportation in September 2016, illustrates this legal technique. Although regulations are specific to that technology, i.e. autonomous vehicles, there is no favouritism for one or more of its possible implementations. Even when the law sets up a particular attribute of that technology, lawmakers can draft the legal requirement in such a way that non-compliant implementations can be modified to become compliant.

On the other hand, the secondary rules of the law may help policy-makers to specify the content of the primary rules through competition between legal systems at a national level. This means that regulatory powers are first exercised by the States of the Union. More particularly, after the Nevada Governor signed a bill into law that for the first time ever authorized the use of driverless cars on public roads in June 2011, several states in the USA soon followed the example. While, as of 2016, seven states enacted laws for this kind of technology, they became 21 (plus the District of Columbia), as of February 2018. At its best possible light, this mechanism is also at work with the EU's norms on data protection, the ‘GDPR’. The provisions of Article 35 on a new generation of privacy impact assessments go hand-in-hand with the powers of the supervisory authorities pursuant to Article 36 of GDPR. The idea is to pre-emptively assess the impact of new technologies on the processing of personal data, in order to minimize or prevent any kind of ‘risk to the rights and freedoms of natural persons’. While the supervisory authorities of Article 36 are those of each Member State where the controller has its main establishment, a room for innovation is set with the secondary rule of Article 55, because this legal mechanism of delegating powers back to states and national authorities may favour a beneficial competition among legal systems [30].

Admittedly, Justice Brandeis's doctrine of experimental federalism has some limits of its own. First, the non-divisibility of data and compliance costs of multi-national corporations dealing with multiple regulatory regimes can make it difficult for manufacturers catering for the international market to design in specific law abiding rules. This scenario may prompt most manufacturers to adopt and adapt themselves to the strictest standards across the board, as occurred in the case of Internet companies vis-à-vis data protection issues. Second, there are risks of fragmentation, e.g. multiple jurisdictions of national supervisory authorities in the field of EU data protection. Such risks can obviously be tackled either with technical standards, or with efforts of coordination, and yet this set of secondary rules does not guarantee per se a coherent interaction between multiple national legal systems and their supervisory authorities. Third, methods of legal competition between regulatory systems are provisional. They represent, after all, the way in which the secondary rules of the law should help us understanding what kind of primary rules we may wish at a federal level. Going back to the field of autonomous vehicles, this is what seems to occur in the USA, where the House of Representatives passed the Self Drive Act in September 2017. The intent is to provide a federal framework for the regulation of autonomous vehicles, regarding such aspects as ‘safety assessment certifications’ (§4), cyber security (§5), data privacy (§9) and more. Whether or not the US Senate will pass similar provisions in its bill is, of course, an open question. Still, in general terms, the case illustrates a wider dilemma. Methods of legal experimentalism and competitive federalism––in addition to further possible uses of the secondary rules of change––are means of legal flexibility, which should allow us to finally determine the content of the primary rules of the law. What should our conclusion be in the case of today's dilemmas on the legal status(es) of AI robots?

7. Conclusion

The paper examined a series of ‘Gordian knots' that concern the polarization of today's debate on the legal status(es) of AI robots. The aim was twofold. First, the intent was to flesh out four different kinds of misunderstanding in the current debate on both the legal personhood and agenthood of AI robots and their variables. Once clarified the terms of this misunderstanding, the further aim of the paper was to stress that whether or not new forms of agenthood for AI robots can properly address drawbacks, loopholes, or gaps of the law, is an empirical issue that should be addressed pragmatically. This at the end of the day means

(i) in the mid-term, we should skip any hypothesis of granting AI robots full legal personhood, as the EU Commission suggested in its April 2018 document on AI;

(ii) we should take seriously into account the possibility of new forms of accountability and liability for the activities of AI robots in contracts and tort law, e.g. new forms of AI peculium for cases of complex distributed responsibility in the field of autonomous vehicles. This is what appears reasonable of the 2017 EU Parliament's resolution on the ‘electronic personhood of robots’; and

(iii) we should test new forms of accountability and liability through methods of legal experimentation, widening that which has been so far the policy of several legal systems in specific domains, e.g. road traffic laws in the Japanese Tokku of Fukuoka since 2003.

On the basis of this approach, admittedly, we will not find the solution for all of the hard cases and dilemmas brought about by AI and robotics. Still, by preventing misunderstandings and the polarization of today's debate, methods of legal flexibility and pragmatic experimentation will allow us to tackle such hard cases in a rational way. In light of the probability of events, consequences and costs of AI behaviour, we should prevent cases of legal impunity and overcome some deficiencies of current regulatory frameworks. As shown by the digital peculium for AI car sharing systems and the public funds for the victims of car accidents, new legal forms of agency for some of such AI robots may help us tackling these problems more efficiently.

#### States solve

John Villasenor 19, Nonresident Senior Fellow - Governance Studies, Center for Technology Innovation, 10-31-2019, "Products liability law as a way to address AI harms," Brookings, https://www.brookings.edu/research/products-liability-law-as-a-way-to-address-ai-harms/

Just as occurs in other areas of products liability, AI liability will generally be handled through state court systems and legislatures.[7] Of course, it will take many years to develop a body of case law and statutory law specific to the intersection of AI and products liability, and not all courts will reach the right answer in every case. Over time, though, products liability law will adapt to address the specific questions raised by AI as it has in relation to other emerging technologies. One way to smooth and accelerate this process as well as to reduce the challenges that can arise due to state-by-state variations is through voluntary frameworks. For example, the American Law Institute (ALI) is a respected organization that produces “scholarly work to clarify, modernize, and otherwise improve the law.” If the ALI or a similar organization were to develop and publish model principles of law and/or legislation specific to AI products liability, this could help to promote greater predictability and uniformity in state-level approaches.

### States CP---AI---Federalism NB

#### AI regulatory federalism is good.

Chad Squitieri 21, associate in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, member of the Appellate and Constitutional Law, Labor and Employment, and Administrative Law and Regulatory practice groups, served as a law clerk to Chief Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit, “Federalism in the Algorithmic Age,” Duke Law & Technology Review, Vol. 19, No. 1, 2021, pp 139-158

The robots will not be pleased with Frank Pasquale. In New Laws of Robotics, the Brooklyn Law professor outlines two possible futures that can emerge from a growing conflict between human and robotic thought. The first is a future of robotic dominance. In that future, decisions traditionally made by human professionals (e.g., who goes to jail, what medicines are prescribed, and what news gets published) are decided by robots powered by artificially intelligent algorithms. The second future offers robots a less-favored role in the ordering of human affairs. Pasquale earns the displeasure of our would-be robotic overlords by outlining the path to this second future, where human professional judgment is enhanced by (but not replaced with) robotic systems.

The second future may seem too obvious a preference to merit a book-length discussion. Humans, after all, might be presumed to instinctively work towards a future where human thought prevails. But as Pasquale observes, economics make the first future appear attractive—at least in the short term (p. 172).1 Robots have no need for vacation days, lunch breaks, or even sleep. Robots do not call in sick, nor do they ask for pay raises. Given as much, companies will increasingly have short-term incentives to replace costly human labor with less costly robotic systems. Cash-strapped governments face a similar calculus, too. It may one day be cheaper, for example, for governments to reimburse a fleet of robotic caregivers than a team of human nurses.

Of course, succumbing to the short-term incentives afforded by automation can lead to disastrous societal effects in the long run. Companies may find it difficult to sell their widgets if would-be consumers have been forced out of work on a widespread basis (pp. 188–89). And governments might find their fiscs emptier yet if citizens with taxable wages are replaced by tax-deductible machines (p. 26). 2 Thankfully, humans have developed a system (i.e., political governance) capable of producing outcomes (i.e., laws) that can alter short-term incentives to advance society’s long-term goals.

Thus enters Pasquale’s four new laws of robotics. 3 Collectively his laws aim to structure how human professionals incorporate artificially intelligent robots into their workplaces (pp. 3, 12–13). The goal is to ensure that professional judgment is exercised by disperse sets of humans with localized knowledge, not robots powered by algorithms that are centrally developed and controlled (pp. 4, 178). Pasquale’s four new laws of robotics provide as follows:

1. Robotic systems and artificial intelligence (“AI”) should complement professionals, not replace them (p. 3);

2. Robotic systems and AI should not counterfeit humanity (p. 7);

3. Robotic systems and AI should not intensify zerosum arms races (p. 9); and

4. Robotic systems and AI must always indicate the identity of their creators, controllers, and owners (p. 11).

Pasquale applies these four laws in dozens of case studies. Each case study illustrates the harms his laws are intended to prevent—i.e., the harms associated with centralizing professional judgment in the small group of roboticists and computer scientists responsible for developing and controlling advanced decision-making algorithms.

The education industry offers one such case study. In the near future, teachers may be required to cede decision-making authority to algorithms capable of running hyper-efficient classrooms (p. 176). By reviewing classroom video from all over the world, a centralized algorithm could analyze student behavior (such as puzzled looks and questions) to craft the perfect lecture (pp. 60, 75). One can imagine the benefits of utilizing such an algorithm to improve educational outcomes— particularly for students who might not otherwise have access to premiere educators. But harnessing those benefits requires subjecting students to increased surveillance. And students, cognizant of such surveillance, might change their behavior in unhelpful ways—failing to ask clarifying questions or express confusion, less the algorithm label them “problem kid[s]” unfit for certain colleges or occupations (p. 74). Further, centralized algorithms might fail to appreciate peculiarities for which human teachers readily account. Where an algorithm might schedule an afternoon multiplication lesson, a human teacher might recognize the need to reschedule the lesson when unseasonably warm weather makes it difficult for fidgety students to concentrate (p. 6).

Pasquale’s book is critical reading for those interested in addressing the harms and benefits of the coming algorithmic age.4 But if there is a critique to be made, it is that Pasquale offers little detail as to who is to enforce his new laws of robotics. Moreover, when he does offer detail, he appears to rely too heavily on federal regulators. 5 In suggesting, for example, that his laws be enforced by “independent agencies,” such as those created in “the New Deal,”6 the book does not fully account for the critical role state governments play in shaping workplaces and professional responsibilities.

In this Review, I argue that while New Laws of Robotics presciently outlines the harms associated with centralizing professional decision-making authority, it remains silent (at best) as to the harms associated with centralizing governmental decision-making authority. This is notable because the two categories of harms share much in common.

Like how centralizing professional judgment can create an unacceptable “mental monoculture” (p. 178), so too can centralizing governmental authority. Notable efforts (such as Pasquale’s) to prevent the centralization of professional judgment should be careful to avoid an unnecessary centralization of governmental authority. Any success in maintaining a world of disperse sources of professional knowledge will be short-lived if it comes at the cost of policing professionals with single sets of requirements established by the federal government.

I. TWO CATEGORIES OF HARMS

In Part I of this Review, I address two categories of harms. First is the category attributable to a centralization of professional decisionmaking authority. Second is the category attributable to a centralization of governmental decision-making authority.

Pasquale dutifully describes the first category, which can arise when professional decision-making authority is shifted from disperse sets of human professionals to algorithms that are centrally developed and controlled. But Pasquale does not account for the second category of harm, which can arise when governmental decision-making authority is shifted from state governments to the centralized federal government. In failing to address the harms associated with centralized governmental authority, Pasquale risks undermining his arguments regarding the harms associated with centralized professional authority.

A. Centralized Professional Decision-Making Authority

Pasquale frames his discussion of the harms associated with a future of centralized robotic decision-making by outlining the economic incentives that might bring such a future into fruition. 7 In “[f]ield after field,” employers face a temptation to replace costly human workers with relatively cheaper robots (p. 26). Replacing human labor can provide some benefits—namely, cheaper services (id.). “If I can replace my dermatologist with an app and my children’s teachers with interactive toys,” Pasquale writes, “I have more money to spend on other things” (id.). And “[t]he same goes for public services; a town with robot police officers or a nation with drone soldiers may pay less taxes to support their wages and health care” (id.).

But those benefits come with costs. For one, “doctors, teachers, soldiers, and police are all potential purchasers of what others have to sell. And the less money that they have, the less money I can charge them” (id.). When policymakers consider these economic factors in the aggregate, “mass unemployment” can become a major concern (p. 2). Aiming to balance the potential costs and benefits of cheap robotic labor, Pasquale offers a middle path: Some (but not all) jobs should be saved from automation (p. 4). His argument focuses on the “professions,” which he contends should be reserved for humans.

The vast amount of literature covered by Pasquale makes a clear definition of “profession” unavailable. 8 He does offer a working definition of the term, which is “capacious, and . . . include[s] many unionized workers” (p. 5). Pasquale’s broad definition of “profession” thus includes traditional professionals—such as lawyers, doctors, and engineers—as well as new classes of professionals, each capable of “preserv[ing] certain human values in health, education, journalism, policing, and many other fields” (pp. 22, 171). Readers are left with the impression that, at bottom, determining whether a particular occupation qualifies as a “profession” requires determining whether the occupation amounts to a “fulfilling vocation[]” (p. 4).

For Pasquale, human professionals are worth preserving from automation because they “alleviat[e] classic tensions between technocracy and popular rule” (id.). “The bargain at the core of professionalism,” he writes, “is to empower workers to have some say in the organization of production, while imposing duties upon them to advance the common good” (id.). Thus, “local professionals” help promote important societal benefits (p. 25). Throughout the book, Pasquale expresses his concern that the societal benefits he attributes to human professionals may be undermined should professional decision-making authority come to be exercised by centralized algorithms.

The fundamental problem with professional automation, from Pasquale’s perspective, is that algorithms seek to simplify complicated professional judgments that are unfit for simplification (pp. 23–24). “There is too much uncertainty in ordinary medical practice,” for example, “to reduce it all to algorithms, which are commonly derided as ‘cookbook medicine’” (p. 25). It would be better, he argues, to have different doctors exercise independent professional judgments informed by growing professional consensus (pp. 25, 44). More broadly, Pasquale expresses his concern that, when attempting to replicate and automate human professional judgment, “there is a temptation to simply set forth quantifiable metrics of success . . . and to optimize algorithms to meet them” (p. 28). This presents a problem because “the definition of what counts as success or failure in [professional] fields is highly contestable” (id.).9

Given the contested nature of defining successes and failures in professional fields, automation risks giving roboticists and computer scientists undue influence over some of society’s most important decisions. In seeking to replicate complicated professional judgments in computer code, roboticists and computer scientists can define successes and failures pursuant to their own biases and motives.

Poorly replicating professional judgment in computer code can cut short important professional disagreements that might otherwise crystalize into professional consensus. 10 There may be a need, then, to avoid favoring the biases and motives of the relatively small number of roboticists and computer scientists charged with replicating the professional judgments of a larger class of varied professionals. Pasquale proposes fulfilling that potential need by placing human professionals “at the point of contact of AI—to meditate its effects, assure good data collection, report errors, and do other vital work” (p. 28).

Pasquale’s efforts to keep human professionals “in the loop” are intended to bring about a future where “doctors, nurses, teachers, home health aides, journalists, and others . . . work with roboticists and computer scientists, rather than meekly serving as data sources for their future replacements” (pp. 2, 213). He would prefer a future of “distributed expertise,” where “variation” in professional thought can be appropriately “checked,” not a future where important professional decisions are made uniformly by centralized algorithms (p. 24).11 His preference is in part informed by equitable considerations, and it seeks to avoid a world where human professionals are reserved for the wealthy (pp. 34, 57).12

Human professionals can make mistakes, of course; Pasquale freely admits as much (p. 5). But his concession does not undermine the broader observation that the mistakes and biases associated with human behavior are not magically avoided by automating professional judgment (p. 39). Instead, human mistakes and biases shape the algorithms intended to replicate professional thought. 13 On this, Pasquale and I agree.14

Underpinning Pasquale’s overarching concern is a tradeoff between (1) mistakes and biases attributable to human professionals accountable to the local community members they serve, and (2) mistakes and biases attributable to roboticists and computer scientists working in far-away places behind complicated corporate structures. Because “[d]istance frustrates accountability and threatens to obscure responsibility in a haze of computation,” he posits that the mistakes and biases of faceless roboticists and computer scientists should not be favored over the mistakes and biases attributable to identifiable human professionals leveraging “local knowledge” (pp. 24–25, 213).

B. Centralized Governmental Decision-Making Authority

Pasquale offers his four laws as a path to a better future, one not overrun by centralized algorithmic decision-making. His laws, however, are not self-actualizing. To be sure, he expects organized professional associations to achieve much of his vision by voluntarily incorporating his laws into new professional norms (pp. 34, 177). But private ordering will quickly come up against the very economic pressures Pasquale outlines at the start of his analysis.15

Those professional associations that adopt Pasquale’s laws will increase their members’ labor costs, at least when measured against robotic substitutes (p. 170). Given as much, there is likely to be some hesitation to adopt newly crafted professional norms when there is no legal obligation to do so, and when one’s competitors may not.16 In light of these economic considerations, Pasquale implicitly acknowledges that, for his laws to have any real effect, they must become actual laws (i.e., government mandates). Indeed, Pasquale is clear in arguing that, by regulating artificially intelligent technologies, “the state” can “better protect the rights and prerogatives of workers” (p. 172). But as is central to this Review, Pasquale is less clear as to which portions of “[t]he state” he is referring.

In the United States, state power (i.e., governmental power) is split between the federal government and state governments. State governments are in turn made up of political subcomponents exercising various degrees of autonomy. 17 Pasquale is of course familiar with this concept of federalism. Indeed, he notes the relationship between federalism and “subsidiarity,” the latter of which “commends a devolution of responsibility to the most local entity capable of handling it well” (p. 176).18 His book’s single reference to federalism, however, is only offered as something of an analogy from which lessons for the workplace can be derived. To wit, Pasquale draws on the concept of federalism to argue that “[m]aintaining human control over AI systems represents another form of subsidiarity, more functional than territorial” (id.). He analogizes to federalism to argue for “democracy in the workplace,” “local governance by . . . professionals,” and “democratically governed communities of expertise” (i.e., professional associations), but never explains why federalism makes for good government in the first place (pp. 176, 187, 197).

Federalism produces two positive goods worth mentioning here. First, federalism helps prevent tyranny. “[T]he genius” of the Framers was to “split the atom of sovereignty” such that “citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”19 Because state governments and the federal government exercise different authorities, no single government can wield absolute power. Federalism thus protects individual liberties in a way similar to the separation of federal powers.20 As James Madison put it, federalism and the separation of powers offer the people “a double security.”21

In addition to helping prevent tyranny, federalism helps promote competition between governments, which can produce better policies. Unlike a centralized government, where decisions to implement AI may be made uniformly, federalism permits different states to take different approaches. As Justice Brandeis famously explained: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”22

Both the prevention of tyranny and the promotion of competition suggest that state governments should play a key role in any effort to enforce Pasquale’s four laws. As to the prevention of tyranny, developing labor law was a responsibility historically reserved for state governments—although that responsibility was altered in the wake of the New Deal, when the federal government came to play a larger role in regulating workplaces.23 That altering of the traditional balance between federal and state power was supported by a broader interpretation of Congress’s power to regulate commerce.24 For some, the growing prevalence of AI may signal a need for an even stronger federal role. Placing AI in historical context counsels against such an approach.

As Pasquale has elsewhere argued, AI represents only an “evolution, not revolution” in technology.25 “In many cases, AI is little more than a better-marketed form of statistics,” a method of analysis long utilized by professionals.26 Those professionals, still today, remain closely regulated by state governments. 27 As the Supreme Court has recognized, the “State[s] bear[] a special responsibility for maintaining standards among members of the licensed professions.”28

Should AI be used as a rationale for the federal government to play a new, outsized role in overseeing the professions, policymakers may unknowingly usher in something of a Trojan Horse. As AI becomes a regular feature in the modern workplace, a federal government with outsized enforcement responsibilities would be able to assert itself more aggressively in professional decision-making. And permitting federal technocrats to more aggressively insert themselves between professionals and their clients would seem to upset the very balance between technocracy and popular rule that Pasquale identifies as a benefit of professionalism (p. 4). To prevent that sort of unchecked federal “incursion”29 into the arena of professional relationships, state governments should play a leading role in any regulatory regime addressing AI in the workplace.

As to promoting competition, introducing AI into the workplace presents a moment ripe for state experimentation. There is little reason to dictate the precise forms nascent technologies might evolve into when different states can instead experiment with different regulatory regimes.30 If a uniform regulatory regime were to be selected, it should only be selected after a period of percolation, during which time states’ relative successes can be comparatively examined.31 Even if some states initially choose “wrong” regulatory regimes, this would not merit premature intervention by the federal government, which is at least just as likely to choose “wrong” in the first instance.

States that initially choose “wrong” regulatory regimes are free to change course after observing the relative successes enjoyed by states utilizing different regimes. This point is not novel; the law has long promoted regional variety in regulating professionals, even when it means some localities may initially choose the “wrong” paths. The locality rule in tort law, for example, requires physicians to provide patients the degree of skill that a reasonable physician in the same locality would provide.32

Throughout the book, Pasquale is (understandably) more focused on the substance of his four laws than he is the procedure of how those four laws might be enforced. When he does mention enforcement, he suggests a federal-centric approach. “Because legislators cannot possibly anticipate every situation that authorities may need to address,” he argues, the “[n]ew laws of robotics should be . . . [enforced by] dedicated regulators” that can “solicit expert advice” (pp. 3, 41). This reference to “regulators” is left undefined, and thus could be a reference to state regulators. But the benefits offered by state governments justify more than a potential reference. Moreover, Pasquale’s warning to avoid “kneecap[ing] federal regulatory agencies” suggests that he has federal regulators in mind (p. 40). Indeed, he specifically calls for “independent . . . regulatory bodies,” (p. 131), and has elsewhere proposed that his four laws be enforced by “independent agencies” like those created in “the New Deal.”33

To be sure, Pasquale would carve out some role for “local entities . . . to develop their own standards” (p. 41). But even if that is a reference to local governments, rather than local professional associations, the envisioned role is marginal at best. State governments can do more than offer “granular” changes to regulations that are otherwise “harmonized internationally or for a nation” (id.).

My critique of Pasquale’s relative silence as to who should enforce his four laws constitutes more than an idiosyncratic reader’s request for additional information. I readily acknowledge that there is only so much one author (at least one human author) can fit in a single book. Pasquale cannot be expected to explain every nook and cranny of his proposal. But the proper division of governmental power is a core consideration in evaluating the correctness of the book’s overall proposal. 34 Because Pasquale so masterfully highlights the benefits of promoting subsidiarity when it comes to professional decision-making, he prepares readers to expect a similarly commanding analysis of the benefits of promoting federalism when it comes to governmental decision-making. His relative silence as to enforcement and federalism is therefore notable.

Throughout the book, there are instances when offering more detail about enforcement would have resulted in a more complete argument. Consider again Pasquale’s suggestion that, for an occupation to be worth preserving for human labor, the occupation must be a “fulfilling vocation[]” (p. 4). It is crucial for local government officials to play a role in making that determination, or at least just as crucial as the need (which Pasquale identifies) for professionals to play a role in defining successes and failures within their own professions (p. 28).

A federal regulator in Washington, D.C. might determine that a West Virginia coal miner and a Massachusetts fisherman perform “dangerous or degrading” work unfit for humans (p. 4). But local government officials, by comparison, may readily recognize that certain miners and fishermen find significant fulfillment in their jobs. Perhaps they find fulfillment in performing work that connects them to family members from past generations, or work connecting them to a prized natural resource unique to their home state. This is not to say that every miner and fisherman enjoys such fulfillment; it is unlikely that such a blanket statement could be made about any occupation. But it is to say that determining which occupations qualify as being worth preserving for human labor is a determination that would benefit from input by local officials.

Pasquale’s relative silence on enforcement and federalism is also notable because the technological advances encouraging a centralization of professional judgment are some of the same advances encouraging a centralization of governmental power. Consider the driverless car. Traditionally, automobile speeds have been established by state and local governments targeting human drivers.35 In setting speed limits, local officials could consider a wide set of factors, including safety, the needs of industry, and urban planning goals. A key route connecting two markets, for example, might be assigned a relatively high speed limit in order to facilitate trade—save for a few miles where officials determine that speeds should be reduced so as to limit unwelcome noise, or where slower speeds might encourage patronage at local establishments.

Locally established speed limits may be eliminated, however, when a national set of regulations targeting driving technologies can replace localized sets of regulations targeting human drivers. Technology empowering driverless cars, after all, could be programmed with nationwide maps pre-set with speed limits designed to achieve national prerogatives. Sure, driverless cars could be programmed to respect locally set speed limits to the extent that federal law does not preempt them. But once it is determined that speed limits are a proper federal concern, is there any doubt that local speed limits will be preempted?

How much influence, for example, would local home and business owners in Topeka, Kansas have in shaping national speed limit legislation identifying Topeka (and dozens of other towns) as existing along a key trade route between New York and Los Angeles? Would those local home and business owners have more or less influence than they would if their speed limits were set by local officials who drive on the very roads they regulate? One need not be an expert in Topeka politics to have informed answers to those questions.

Driverless cars offer just one example of a broader trend. Similar mismatches between local interests and national decision-making can arise in other contexts. Do we need doctors in Appalachia when it may be more efficient for a robot to collect medical information from a patient, send the information to Boston to be analyzed on cutting-edge equipment, and have a diagnosis delivered back to Appalachia? As “smart contracts” proliferate with the promise of automatically enforceable agreements based on software programmed in San Francisco, do we really need judges and lawyers in Reno? And what happens to state licensing associations (and the state tort law they help create) when it becomes possible to regulate legal and medical technologies on a national level, rather than regulate human lawyers and doctors on a regional basis?

These hypotheticals present complex questions requiring complex answers. In one sense, individuals in Appalachia or Reno might prefer to have their medical information analyzed and contracts drafted by advanced algorithms designed and controlled elsewhere. On the other hand, the widespread adoption of those preferences reduces the ability for doctors and lawyers to make a living in Appalachia and Reno, where those professionals might have otherwise provided personalized services difficult to replicate by machine.

There is something to be said about receiving diagnostic information from a human capable of expressing empathy in person, or having a will drafted by a neighbor who personally understands the subjective value assigned to each heirloom. Pasquale agrees that those types of values are worth preserving (pp. 25, 33, 65), but he does not argue for the type of federalist regulatory structure that can ensure that those values are preserved.36 State and local governments can play a critical role in ensuring that values associated with human professionalism are protected, but that role is at risk of extinction if the wisdom of our federalist system is not carried forward into the algorithmic age.

### States CP---Animals

#### Animal rights can be recognized by state courts

Lawrence Wright 22, staff at the New Yorker, “The Elephant in the Courtroom,” New Yorker, 2/28/2022, https://www.newyorker.com/magazine/2022/03/07/the-elephant-in-the-courtroom

In 1985, Wise had an epiphany: “I concluded that the real problem was rights. Only entities that had rights were ever going to be able to be appropriately protected.” In common law—the law generated in the courtroom by judges, not by elected legislators—rights accrue to persons, not things, so Wise settled on a strategy of seeking personhood for animals. In 1998, he unveiled the Nonhuman Rights Project in an article for the Vermont Law Review titled “Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy.” The organization’s goal was to get state courts to accept that a nonhuman animal has the capacity to possess “at least one legal right”: to be a person in the eyes of the law.

### States CP---Corporations

#### Corporations are defined by state law.

Carliss N. Chatman 18, Assistant Professor, Northern Illinois University College of Law (J.D., The University of Texas at Austin School of Law; B.A., Duke University), “The Corporate Personhood Two-Step,” 18 Nev. L.J. 811, Spring 2018, WestLaw

Corporations are defined by state law, and have rights incidental to that status. Corporations also have rights defined by statutes. Because corporations are not naturally occurring, corporate constitutional rights should be analyzed within the parameters of how the corporation is defined and how the corporation operates. When courts issue decisions that define corporate rights without first defining the corporate person, they may unintentionally alter what it means to be a corporation.2 When the Supreme Court gives consideration to the rights of the people who make up the corporation, it lays the framework for a corporate personhood doctrine that relies on the sanctity of constitutional rights for human beings.3 This is both a conflation of the various business entities as well as a false equivalency between corporations and natural persons, which is outside of the scope of how the state defines the corporation. As a result, corporate personhood and constitutional rights derived solely from the rights of the people who make up the corporation are outside of the scope of what the corporate founders intended when choosing the corporate form.

#### States can reform what attaches to that status.

Carliss N. Chatman 18, Assistant Professor, Northern Illinois University College of Law (J.D., The University of Texas at Austin School of Law; B.A., Duke University), “The Corporate Personhood Two-Step,” 18 Nev. L.J. 811, Spring 2018, WestLaw

Through business codes and case law, states have clearly defined the distinctions between entities and natural persons, along with the differences between the various business entities.246 If the Court acknowledges how corporations function, it can develop a corporate personhood theory that grants corporate rights equal to natural persons where appropriate, yet upholds appropriate state limitations that reflect the nature of the corporation. Viewing the corporation as a real entity limited by the realities of the corporate form as defined by state law, may reconcile Citizens United with jurisprudence that allows the state to draw distinctions between natural persons and corporations. Recognition of the realities of how corporations are formed and managed will allow the Court to start in the right place when analyzing corporate rights, developing an accurate and binding theory of corporate personhood.

### States CP---Nature

#### Solves and spills up

ELC 20 – Earth Law Center, collaboration with; The Cyrus R. Vance Center for International Justice, and International Rivers; 2020, “Rights of Rivers,” https://3waryu2g9363hdvii1ci666p-wpengine.netdna-ssl.com/wp-content/uploads/sites/86/2020/09/Right-of-Rivers-Report-V3-Digital-compressed.pdf

Thus far, Rights of Nature provisions in the United States—normally framed as rights of standing—have had little impact. No body of nature has successfully asserted its right to sue. However, it should be noted that rights are gaining traction in Native American law, and the Third Circuit Court of Appeals has not completely ruled out the future assertion of rights in federal court. Because Native American law has greater sovereignty than local government ordinances, Native American statutes may have a stronger chance of withstanding lawsuits by extraction corporations. Furthermore, the example of Nottingham, New Hampshire suggests that Rights of Nature may have moral and political force as part of a wider campaign. Weaker Rights of Nature laws, such as Santa Monica’s sustainability ordinance, are also important: They contain fewer environmental protections, but are more likely to withstand lawsuits and could drive changes in legal culture over time. Finally, state constitutions protecting environmental rights other than Rights of Nature appear to have been more effective.283 [FOOTNOTE 283 BEGINS]See e.g. Robinson Twp. v. Commonwealth of Pennsylvania, 623 Pa. 564 (2013) concerning environmental rights contained in the State Constitution of Pennsylvania. For further discussion of the rights of nature in Pennsylvania, see Erin West, Could the Ohio River have rights? A moment to grant rights to the environment tests the power of local control, Environment Health News (Feb. 4, 2020). <https://www.ehn.org/ohio-river-naturerights-2645014867.html?rebelltitem=4#rebelltitem4> [FOOTNOTE 283 ENDS]

### States CP---Nature---Ext

#### Parallel legal doctrines succeeded at the State-level

Dinah Shelton 15, Professor Emeritus of International Law, George Washington University Law School, 2015, “Nature as a Legal Person,” https://journals.openedition.org/vertigo/16188?lang=en

Public Trust: A Move towards Legal Personality?

The doctrine of public trust in Roman law held that navigable waters, the sea, and the land along the seashore constituted a common asset open for use by all.10 From Roman law antecedents, early English common law distinguished between private property which could be owned by individuals and certain common resources which the monarch held in inalienable trust for present and future generations. Many common law courts have adopted and applied this law, conferring trusteeship or guardianship on the government, with an initial focus on fishing rights, access to the shore, and navigable waters and the lands beneath them.11 The domain of common property cannot be destroyed or alienated by the legislature or the executive.12 After the 1970 publication of an influential law review article by Joe Sax,13 courts in the United States (US) began to expand the doctrine and apply it to other resources, including wildlife and public lands.14

15 States in the U.S. have the power to provide their citizens with rights additional to those contain (...)

16 For a listing of all environmental provisions in state constitutions, see Bret Adams et al., Enviro (...)

17 See Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; Haw. Const. art. XI; (...)

8US state constitutions revised or amended from 1970 to the present have incorporated pubic trust doctrine to provide greater protection to the environment.15 In fact, every state constitution drafted after 1959 explicitly addresses conservation of nature and environmental protection.16 One group among these constitutions calls for the acquisition and regulation of natural resources as part of the public trust. Another set of constitutional provisions expressly recognizes the right of citizens to a safe, clean or healthy environment, in a manner that also implies a stewardship over natural resources.17

The first constitutional recognition of environmental rights in the U.S. appeared in Pennsylvania in connection with the first Earth Day.18 The author of the proposal said he intended to “give our natural environment the same kind of constitutional protection that [is] given our political rights.”19 The proposed amendment was approved overwhelmingly by voters in the state, on May, 18, 1971.20 The provision, now Article I, section 27 of the state constitution, sets forth (emphasis added):

Section 27. Natural resources and the public estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

10There are several evident features about this text. First, it declares the “people’s” right to environmental amenities with a directive to the state to act as a trustee for the “public natural resources” of the state. The resources mentioned are declared to be common property and held for future as well as present generations.

Many state constitutional provisions, like the Pennsylvania provision quoted above, refer to long-established doctrines of public trust.21 Pennsylvania courts have interpreted the state constitutional provision to mandate the management of public natural resources of the state.22 A three-part test has emerged for judging the legality of state action under the constitutional provision,23 but it must be noted that an overriding aspect of the test is its deference to decisions made by the government.24

25 Haw. Const. art. XI, § 1.

12Hawaii's constitution goes further than that of Pennsylvania, creating a public trust over all of the state's natural resources: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

#### Trends prove---States are increasingly winning protection for non-human entities

ALDF 17 – Animal Legal Defense Fund, “Animals’ Legal Status,” https://aldf.org/issue/animals-legal-status/

There are already non-human persons under the law. For example, corporations and ships are defined as persons for limited legal purposes. There is also a growing “environmental personhood” movement in which entities of nature, such as rivers, have been granted legal personhood to provide a means of protection from exploitation.[2] In a couple of rulings outside the U.S., individual great apes have been declared persons in a limited context

Legal personhood is not a “one size fits all” designation and does not necessarily convey all the legal rights granted to human persons under the law. Rather, it simply elevates an entity’s status under the law and confers legally recognizable interests, which are specific to the needs and nature of that entity. So, for example, recognizing a dog as a legal person would not give her the right to vote. However, it might give her the right to not be used in a painful experiment or the right to have a court appoint a guardian to protect her legal rights.

Nonhuman animals are not the only living beings that historically have been characterized as property under the law. Slaves, women, and children were all at one time defined as property. As society progressed, these groups were reclassified from legal things to legal persons.

Legal Status as a Continuum

While replacing animals’ property status with legal personhood represents one ideal, property and personhood are not necessarily mutually exclusive categories. Being defined as property does not preclude also being a legal person, as in the above example of ships and corporations. Therefore, property and personhood can be considered points on a continuum rather than binary categories.

Animals can have a hybrid status where they are recognized as both property and persons under the law. However, as long as they are still classified as property they will not be “full persons” – one end of the property/personhood continuum that grants the strongest legal recognition of interests. Because “animals” are a diverse group, with varied capacities, and different societal uses, legal personhood would look different for different species of animals, based on what they need to thrive.

Sometimes More than Property: Distinctions and Evolution in the Law

Although classified as property, the legal system treats animals distinctly in some cases. For example, unlike all other forms of property, animals are protected by criminal cruelty laws. As of 2017, animals can be the beneficiaries of legally enforceable trusts in all 50 states, and a majority of states allow them to be included in domestic violence protection orders

Similarly, some courts have held that non-economic damages are available when people suffer emotional harm as a result of tortious misconduct aimed at their animal companion. And federal and state laws have evolved over the past decade to address the needs of those with companion animals during natural disasters and emergency evacuations.

Recently, some states have enacted legislation requiring courts to consider the interests of companion animals in divorce and dissolution proceedings, in contrast to the strict property analysis that has long been the standard in determining ownership (or custody) of an animal. The traditional property analysis treats companion animals like furniture or other material assets to be equitably divided, but these new laws mention the “well-being” or “care” of the animal, thereby recognizing that animals have interests of their own that should be considered.

Additionally, some state legislatures have addressed animal sentience. For example, as a result of legislation that the Animal Legal Defense Fund helped draft and pass in 2013, Oregon law recognizes that “animals are sentient beings capable of experiencing pain, stress and fear.” Importantly, it also states that “animals should be cared for in ways that minimize pain, stress, fear and suffering.”

Another promising development is that animals are increasingly achieving crime victim status, particularly as it relates to which victims “count” at sentencing. Both federal and state courts have recognized that each individual animal who suffered as a result of a crime is a crime victim for sentencing purposes. In one state, Connecticut, special advocates can speak directly on behalf of animal victims throughout the entirety of a criminal animal cruelty case, and more states are currently considering enacting this Courtroom Animal Advocate Program model.

# Generic K

### Top Level

#### K debates on this topic will be phenomenal and educational.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

[T]he master’s tools will never dismantle the master’s house. (Lorde, 1983)

Part of the necessary work is . . . to learn to become comfortable with the unknown depth of the challenges that we face, and with the inevitable uncertainties involved in transformation. We must develop the stamina for addressing complex problems without a predeﬁned end point, and for experimenting (responsibly) with different possibilities when opportunities arise. (Andreotti et al., 2018: 33)

Thinking about climate injustice against Indigenous peoples is less about envisioning a new future and more like the experience of de´ ja` vu. (Whyte, 2017b: 100)

In October 2018, the Intergovernmental Panel on Climate Change (IPCC) called for ‘robust, stringent and urgent transformative policy interventions’ to combat climate change (de Coninck et al., 2018: 321), warning that the window of possibility for effective action sits at around 12 years. The IPCC’s words are both an accelerant and a brake, warning of impending catastrophe but also hinting that we cannot invest precious time and energy on the wrong solutions, that we do not have time for failures, detours or dead-ends.

A logical impossibility underpins this call for urgent, evidence-based global change. Robustness and urgency operate on different timescales. Rigorous, responsible, implementable social policy is produced through the slow accumulation of evidence, the hard labour of collaboration, and the ethical imperative of understanding multiple perspectives. The scientiﬁc consensus on climate change has been reached through these very processes over decades, and its translation into meaningful action is bound to the complex temporalities of socio-political and cultural transformation, which are by nature non-linear, complex and contested. Environmentalist action must grapple with numerous colliding temporalities: the urgency of ‘now’, the cautionary impetus of ‘robust’, the longer, slow temporalities of paradigmatic transformation, and the stalling and regressions caused by those with ideological or ﬁnancial investments in the status quo. It may also be torn between the recuperative impetus of conservation and the scientiﬁc possibility that for some ecosystems that moment has already passed. For example, coral reef scientists Hughes et al. claim: ‘Returning reefs to past conﬁgurations is no longer an option. Instead, the global challenge is to steer reefs through the Anthropocene era in a way that maintains their biological functions’ (2017: 82). Further adding to the complexity, a truly decolonial environmentalism must take seriously an Indigenous perspective in which ‘climate vulnerability’ might not be experienced as a novel threat but rather ‘as an intensiﬁcation . . . of colonialism’ (Whyte, 2017a: 155).

The epigraphs to this paper implicitly or explicitly address some of the conﬂicting tem- poral dimensions of deep socio-political change. First Nations scholar Kyle Powys Whyte (2017b) points to the particular difﬁculties for Indigenous people in imagining ‘new’ futures. Audre Lorde’s (1983) famous conclusion about the necessary means to racial equality entrains two logical temporal possibilities for paradigmatic change: either the precipitous change of revolution or the long patient haul of structural change in the fashion of the Ship of Theseus.1 Andreotti et al.’s (2018) proposition focuses on the slow work of social exper- imentation and the need for stamina, patience and compassion. Their emphasis on unknow- ability and experimentation reﬂects their disciplinary context – education – and their insistence that decolonisation, by which they mean the undoing of a set of interlocked racial, environmental and other apparatuses, is a labour that is epistemological, ontological and embodied. For Andreotti et al., the work of systemic change, even ‘in uncertain times’, is unavoidably slow:

Since we are deeply embedded in the current system, we cannot simply jump beyond existing horizons into something new without ﬁrst digesting the lessons from the old and composting its waste. Given this, we will need to experiment with new kinds of education that can enable us to sit with the discomforts and complexities of death and (re)birth. (2018: 11)

This does not mean that there can be no accelerants or quick victories, just that there is an inevitable unevenness to social change, and that detours, obstructions, and mistakes are inescapable – and some can potentially ultimately be useful.

Some natural species and ecosystems, however, do not have time on their side. The World Heritage-listed Great Barrier Reef (henceforth GBR), for example, is ‘an icon under pressure’ (GBRMPA, 2014: v), with each year bringing new markers of decline. The Reef’s governing body, the Great Barrier Reef Marine Authority (GBRMA), notes that the dev- astating bleaching events of 2016 and 2017 have led to ‘widespread coral decline and habitat loss’ and have ‘severely diminished’ the resilience of the Reef north of Mackay (GBRMA, 2017).2 Such ‘natural’ events have been compounded by widely criticised political decisions, including the Authority’s own decision in January 2014 to approve the dumping of three million tonnes of dredge spoil within the Park boundaries (Jabour, 2014) – a decision ‘noted with concern’ by UNESCO’s World Heritage Committee (UNESCO, 2014: 104) – and ongoing state and federal government support for the contentious Adani Carmichael Mine project and associated infrastructure, which would have disastrous direct and indirect impacts on the Reef (Slezak, 2017). Such events have strengthened the perception, both popular and scholarly, that existing governance provisions are not sufﬁcient to ensure the Reef’s long-term healthy survival, a perception that the Federal Government’s preposterous response to the IPCC report only strengthens.3 Meanwhile, perceptions that the Reef is dying add directly to the Reef’s stresses via increased visitation and indirectly via despair- induced paralysis (Eagle et al., 2018).

In a climate of generalised environmental concern, the Great Barrier Reef has become a compelling popular and scientiﬁc exemplum of the failure of existing mechanisms to protect even the most self-evidently valuable of natural sites. If we can’t save the Reef, what can we save?

From within the bowels of this grim context I seek to retrieve some political value in this highly visible failure of care by examining the stalled campaign for legal personhood (hence- forth LP) for the Reef, launched in 2014 by the Environmental Defenders Ofﬁce of North Queensland, one branch of Australia’s only national network of public interest environ- mental lawyers. The campaign (EDO NQ, n.d.) was formally launched in February 2014, having been publicly foreshadowed for almost a year. The campaign has not formally been withdrawn but has proven unable to withstand the onslaught of two devastating rounds of funding cuts to EDOs: the Queensland government’s cessation of all funding to the state’s EDOs on 30 June 2012 and the complete cut in federal funding to EDOs announced without warning on 17 December 2013 (EDO, 2013).

The failure to care for the Reef is ‘spectacular’ in two senses of the word: it is both disastrous and visible, especially given the ‘global economy of appearances’ (Tsing, qtd. in Igoe, 2010: 377) in which large-scale conservation takes place. Like Uluru, the Reef is an object of international scrutiny and it plays an important symbolic and sentimental role in the Australian national imaginary. Its unparalleled ecological value, remarkable beauty, economic signiﬁcance, and particular place in the hearts of most Australians (Wynveen et al., 2010, 2012) put it in the practical and symbolic spotlight. The Reef is being watched closely by Indigenous Traditional Owners, as well as by the tourists who emerge from its waters, whether delighted, dismayed or uneasy, and the Australian families who are making plans to see it ‘before it is gone’4 – a phenomenon known as ‘last chance tourism’ (Dawson et al., 2012). It is being closely monitored by the World Heritage Committee, who remain vigilant and concerned (Dale et al., 2016) though they have declined to list the Reef as ‘In Danger’, following lobbying by the Australian government.5 The Reef is also the object of celebrity activism, including that of Leonardo DiCaprio (Gillespie, 2016). If a national government is going to fail to act, the planet’s largest World Heritage area (Baxter, 2006) is a pretty spectacular place to choose.

Although LP for the Reef is now an unlikely practical result, the Reef’s visibility gives the campaign some potential to act as a serious piece of practical imagining. It can act as a popular and scholarly thought experiment – a public staging of alternative futures – at a time when experimental legal tactics and concepts are energising law around the world. These experiments are, to pick up a metaphor used by Andreotti et al. (Stein et al., 2017), attempts to rattle some of the foundations of the House that Modernity Built, such as anthropocentrism and Western conceptions of autonomy, separability, and property. Andreotti et al. argue that modernity cannot be transformed all at once, that some ‘hospic[ing]’ of a dying system is required and inevitable as a new system is being created (2018: 11). Solutions-oriented thinking will always carry with it elements of the system it is seeking to move beyond. Not all experiments will be successful, nor their implications always evident from the outset. But ‘we can be taught by our inescapable failures’ (Andreotti, 2016: 318).

To retrieve value from failure is neither to celebrate nor to romanticise it but instead to see pedagogical value in a dead-end, using it as an opportunity to learn and to advance public discussion: ‘The point of experimenting with possibilities is not so much the construction of the new system, but of learning from the experimentation itself’ (Andreotti, 2016: 318).

What might we learn from the LP campaign for the Reef? Among other things, it provides a good chance to think through more slowly, and in the hypothetical register, the ambiguous political implications for Indigenous people of using personhood as a mechanism for Rights of Nature interventions. A badly conﬁgured personhood proposal might inadvertently sideline Indigenous interests and risk obscuring an Indigenous view of climate change as an extension of colonial violence (Whyte, 2017a, 2017b). Even a well-designed one will never be decolonial in the stringently literal sense advocated by Tuck and Yang, who object to the metaphorical use of the term; it could, at best, be an example of anti-racist ‘social justice work’ (2012: 17). This is true not only of the legal personhood mechanism speciﬁcally but also the broader umbrella of Rights of Nature under which some person- hood campaigns take place, which, despite its potential afﬁnity with Indigenous worldviews, risks buying into romantic understandings of indigeneity, a politically hollow ‘new fantasy of a panhumanity’ (Stacey, 2000: 125), and hegemonic Western conceptions of personal autonomy (Rawson and Mansﬁeld, 2018).

This paper does not address Rights of Nature in its entirety; instead, it focuses on one experiment with the legal personhood mechanism, holding it up to critical scrutiny by considering its practical efﬁcacy, environmental merits, conceptual foundations and ethico- political import. It begins by making the case that the failures of mainstream environmental law have generated a climate of legal experimentation in which existing legal frameworks are being creatively assayed in ways that often involve fundamental longer-term challenges to the metaphysics that underpin them. It outlines and critically examines the core propositions and exponents of one of the liveliest of these experimental movements – Earth Jurisprudence (Wild Law) – before turning to the possibilities and pitfalls of the legal personhood mechanism speciﬁcally, using the Great Barrier Reef as a working example. Its overall argument is that such experiments are to be welcomed, whether as immediate opportunities, thought experiments, or pressure points, but that public and scholarly discussion of legal personhood needs to be alert to twin dangers: on the one hand unknowingly and ironically replicating dominant power relations while seeking to overthrow them; on the other, of shutting down alternatives at precisely the moment we need them most.

#### Legal personhood law has a social and political effect because it informs the behavior and values of the surrounding society – that makes doctrinal changes particularly significant for both individual behavior and the future interpretations of courts in related but different cases

HLR 1 [Harvard Law Review. "What We Talk about When We Talk about Persons: The Language of a Legal Fiction." <https://www.fordham.edu/download/downloads/id/3307/natural_law_colloquium_fall_2015_cle_materials.pdf>]

It is not a coincidence that personhood occupies a central place in debates over America's most divisive social issues.9 9 The idea of per sonhood is simply too rich for it to be manipulated without making, or at least intimating, some kind of statement about what it means to "count" for the purposes of law. This point becomes particularly relevant when one considers legal personhood in light of the expressive dimension of law. This approach attends to the social meaning of statements in statutes and judicial opinions, arguing that law does more than regulate behavior: it embodies and signals social values and aspirations."° ° Describing this function of law as "expressive," however, understates its importance. In addition to reflecting social ideals, law actually shapes behavior by creating social norms that people use to measure the morality and worth of their actions.' 0 ' Eric Posner has argued that when law signals a certain set of values, it works two kinds of changes on the social structure. 10 2 The first is behavioral: by sending a signal about what behavior is unacceptable, law may cause people to engage in those actions less frequently. The second is hermeneutic: through this mechanism, law shapes and changes the beliefs people hold.103

The hermeneutic aspect of law's expressive function bears greater relevance to the law of persons. When the law manipulates status distinctions through the use of the metaphor "person," it necessarily expresses a conception of the relative worth of the objects included 'and excluded by the scope of that metaphor. These expressions then affect general understandings of personhood and regard for the objects of the law, as the law's values influence society's values.

B. The Expressive Dimension of Personhood

The social meaning and symbolism of law are deeply bound up with social understandings of status. 10 4 As one commentator has observed, "law often directly reflects social status or helps preserve status markers. Sometimes law helps constitute hierarchies of social status directly." 0 5 No less than other legal pronouncements, legal statements regarding personhood express normative assumptions about social status.106 This notion, of course, contradicts Gray's assumption that the metaphor of legal personality exists independently of social understandings of personhood. This Part argues that this long-assumed distinction is untenable. The law of the person entails considerably more than a functional abstraction of a disembodied notion of legal capacity. When law uses the metaphor "person" to define its object, that metaphor acts as a vehicle for expressing beliefs and values about persons, both legal and natural. This phenomenon is evident when courts address or avoid the problem of legal personality in the contexts of slavery, feticide, and corporate law. And because legal personality becomes relevant most obviously in the context of America's most "exquisitely sensitive" 10 7 social issues, it often expresses a deep anxiety not just about what a person is, but about the basic contradiction inherent in creating and manipulating status distinctions in a highly individualist legal culture.

Though courts say little about legal personhood, what they do say on the subject reflects a basic ambivalence that goes considerably beyond the manipulation of a standard legal metaphor. The Mississippi Supreme Court, for example, extended legal personality to slaves for the purposes of common law murder prohibitions: In some respects, slaves may be considered as chattels, but in others, they are regarded as men. The law views them as capable of committing crimes. This can only be upon the principle, that they are men and rational beings.... In this state, the Legislature have considered slaves as reasonable and accountable beings and it would be a stigma upon the character of the state, and a reproach to the administration of justice, if the life of a slave could be taken with impunity, or if he could be murdered in cold blood, without subjecting the offender to the highest penalty known to the criminal jurisprudence of the country. Has the slave no rights, because he is deprived of his freedom? He is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law, but in vain shall we look for any law passed by the enlightened and philanthropic legislature of this state, giving even to the master, much less to a stranger, power over the life of a slave. Such a statute would be worthy the age of Draco or Caligula, and would be condemned by the unanimous voice of the people of this state, where, even cruelty to slaves, much less the taking away of life, meets with universal reprobation. 108

Even courts that came to the opposite conclusion shared the Jones court's sentiment that the extension to slaves of legal personality directly implicated society's moral character. In concluding that slaves were not persons for the purposes of common law battery when assailed by their masters, Judge Ruffin of the North Carolina Supreme Court, in State v. Mann, 10 9 expressed deep moral ambivalence about the result: "I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so."110 Had the Mann court not been conscious of the expressive impact of its decision, it would not have felt compelled to admonish the public to take away precisely the opposite moral message.

These approaches to legal personality reflect an assumption that the issue is closely tied to moral and ethical considerations, that what the law refers to as persons, and the act of the law's referring to entities as persons, shapes what society thinks of as human. 1 This linkage expresses one of the core contradictions at the root of American slavery: that obviously human entities were regarded by the law as less than human, or at least, as less than full legal persons. 11 2 Judicial rhetoric regarding- slaves' legal personality, then, discloses anxiety about personhood itself, raising this category above the level of neutral abstraction to an expression of social mores.

#### That legal responsibility and capacity to hold rights is referred to as ‘personhood’ is not an accident---it is inextricably tied to enlightenment notions of rights and responsibility and inseverable from the carceral system.

Visa A.J. Kurki 19, Academy of Finland Postdoctoral Fellow at the Law Faculty of the University of Helsinki, received his PhD in 2017 from the University of Cambridge, has published on legal personhood, rights theory, and animal law, is also vice president of the Finnish Society for Legal Philosophy, “The Incidents of Legal Personhood,” A Theory of Legal Personhood, Oxford University Press, 08/08/2019, pp. 91–126 DOI.org (Crossref), doi:10.1093/oso/9780198844037.003.0004

Persons and Legal Persons

I will end this chapter by considering why legal personhood comprises the incidents outlined here. Even though I maintain that legal personhood should be treated as separate from other types of personhood, it does share connections with those other types—it is not a mere quirk of history that the word ‘person’ is used when referring to moral, metaphysical, as well as legal persons.

First, many theorists understand (moral) persons as rational agents who can be held accountable for their actions and consequently subjected to legal sanctions. Michael Moore writes (emphases added):

[W]hat I regard as the deepest and the most basic of the psychological suppositions on which the criminal law rests [ … ] are the suppositions about the subjects of responsibility. Who or what can be morally responsible, what attributes a being must have to be held responsible, are the questions to which such suppositions give answer. The general form of that answer is in terms of persons, and so the suppositions in question amount to the criminal law’s theory of personhood.88

The fact that persons can be held responsible for their past actions is also central in the Lockean account of a person that ‘extends itself beyond present existence to what is past, only by consciousness, whereby it becomes concerned and accountable [and] owns and imputes to itself past actions’.89 Doctrines of tort and criminal law rely on such a fundamental understanding of personal identity. In addition, the Lockean account underpins many legal institutions that govern the exercise of legal competences. For instance, most contracts presuppose that the parties are accountable for their past actions whereby they agreed to perform given undertakings.

Locke’s account—though focused on ‘actions and their merit’—is relevant with regard to passive legal personhood as well. Incidents such as special rights and the capacity to suffer legal harms normally presuppose a personal identity that extends over time. In a contract between Mary and John—where Mary agrees to perform (p.125) some service to John in a year’s time—it is assumed that both Mary and John will exist in a year’s time. If Mary does not perform the service, John has been harmed and is entitled to compensation. The protection of nonpersons is often different in this regard: crimes committed against animals are not understood as having wronged any individual animal that would be entitled to compensation. Favre’s idea of tort for animals (presented above) would change this state of affairs, given that a specific animal could receive compensation for harms caused to that particular animal. The animal would, shortly put, be treated as an individual that can be wronged, rather than as an abstract representative of its species. Pet trusts illustrate the same aspect of personhood: when an owner sets up a trust for his pet, he is not looking to benefit animal welfare in general but rather to ensure that the particular animal companion that he has had during his lifetime will be taken care of even after his death.

In addition, many non-consequentalists maintain that there should be deontic constraints with regard to how we treat (moral) persons, regardless of the beneficial consequences a given type of treatment could have. This corresponds in particular with the fundamental protections of legal persons. Whereas slaves were only protected from ‘unnecessary and excessive’ whipping, interfering with the bodily integrity of free people usually requires special justification. Similarly, endowing nonhuman animals with fundamental protections implies that some of their interests are not subject to being balanced away as easily as they are under laws prohibiting the infliction of unnecessary suffering.

Finally, the Kantian account of the rights and the external freedom of persons can be explicated in terms of my theory. This external freedom can be seen as consisting of fundamental protections and property rights, which determine the sphere where a person’s body and things ought not to be interfered with. Kantian contractual rights, on the other hand, can be understood as functioning through a combination of one’s status as a beneficiary of special rights and one’s exercise of legal competences. According to Kant, only rational beings that can legislate their own moral laws should have access to these legal institutions. Modern will theories of rights are also usually founded on such an understanding of the right-holder as a sophisticated rational agent.

### AFF---Generic

#### This evidence outlines a variety of K AFF approaches to the topic.

Ruth Barcan 20, University of Sydney, Australia, “The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care,” Environment and Planning E: Nature and Space, vol. 3, no. 3, 09/2020, pp. 810–832

Legal personhood

Legal personhood (or personality) is ‘the legal capacity to bear rights and duties’ (Tur, 1987: 121). For something to ‘count jurally’ in its own right (Stone, 1972: 458, original emphasis) it must have legal standing – that is, there must be some court or review body prepared to acknowledge its rights (p. 458). This entrains at least three capacities: the power to institute legal actions, be recognised as suffering injury, and to receive relief in one’s own right (p. 458, emphasis added). A ‘high-threshold’ (Tur, 1987: 119) conception sees a legal person as one who has rights and obligations, can enter into contracts, own property, initiate legal action, employ people and sue and be sued (Tricker, 2012: 41; Tur, 1987: 119).

These capacities are all key components of liberalism and they reﬂect its foundational individualism. Nonetheless, even within that context, ‘rights’ is not a singular concept; there are different classes of, and context for, rights (Gray, 1921: 29–30). LP is not absolute, an all-or-nothing thing. It neither promises nor guarantees unfettered autonomy, and the rights it accords can in certain situations be suspended (e.g. for prisoners). Nor do all human persons have access to ‘full’ (Tur, 1987: 119) legal personhood. It is not the case, for exam- ple, that an infant, a person in a coma or an intellectually disabled person would be under- stood as capable of performing the same duties. For operational purposes, individuals can be empowered to act as guardians or proxies for such persons, a possibility built on a ‘social compact’ that sees humankind as a ‘moral community’ (Cupp, 2016: 527).

Historical exclusions and political contestations

Despite this inclusive ideal, it is self-evident that LP has not historically encompassed all human persons. On the contrary, full legal recognition of certain kinds of persons – women, slaves, Indigenous people – has been slow and hard-won, reform occurring only after centuries of debate, agitation, activism and often violence. Today, even at this most basic level, the full legal equality of all humans remains a work in process, globally speaking.

Moreover, it is not the case that once certain core legal achievements (like women’s suffrage or constitutional recognition of Indigenous people) have been granted, then its new subjects are on an equal footing. As feminists and scholars of race contest, contempo- rary Western law retains its deep anchoring in patriarchal and hierarchical values and norms. The legal subject remains, in subtle and insidious ways, implicitly white, masculine, able-bodied and adult (Nafﬁne, 1990). The epistemologies and values that underpin the law – reason, objectivity, private property, autonomy – are gendered and racialised (Lloyd, 1984; Thornton, 1991). Moreover, Western law is underpinned by normative conceptions and ideals of embodiment (Travis, 2014) against which experiences like pregnancy or disability implicitly and explicitly ﬁgure as particularised states of exception (Nafﬁne, 2011: 23).

Feminists, Indigenous scholars and theorists of race and disability differ in the extent to which they emphasise reforming the existing law to ﬁght its gendered, racialised, classed and embodied ‘closures and exclusions’ (Hudson, 2006: 29) versus critiquing or even rejecting it as irredeemably white, masculinist and Eurocentric. In some cases, this may be a false binary. James Tully, for example, argues that while many Western theories of property ‘do not provide an impartial conceptual framework’ (1994: 153) by which Indigenous/ First Nations claims for justice can be assessed, in some postcolonial instances there may be a recoverable ‘cross-cultural “middle ground”’. He sees some of the precepts developed in Commonwealth and US constitutional common law as ‘commensurable’ with the Indigenous responses to Western property law that emerged in North America in the wake of colonisation (p. 154), arguing that this might offer a just basis for the reformation of Western law in the interests of Indigenous peoples (p. 158).

The technicalities of this claim are well beyond my interdisciplinary competence, but Tully’s contention suggests the possibility of progressive solutions emerging from unpromising histories, while also making evident the need for contextual speciﬁcity in making claims about any solutions.

Extension of LP beyond the human person

Existing examples. The idea of extending legal personhood beyond what the law calls natural persons might, to the uninitiated, seem bizarre. But in his classic essay ‘Should Trees Have Standing?’ Christopher Stone recalls that all historical extensions of legal rights have been met with fear, derision or ﬁerce opposition: ‘The fact is, that each time there is a movement to confer rights onto some new “entity”, the proposal is bound to sound odd or frightening or laughable’ (1972: 455). The same can be argued of cross-cultural comparisons, in which the ontologies of ‘other’ cultures often strike outsiders as odd (see Tur, 1987: 119–121). Stone itemises a number of non-human legal persons:

The world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention just a few. (Stone, 1972: 452)

Indeed, ‘the law itself is personiﬁed, as an agent capable of acting’ (Tur, 1987: 118).

The corporation is the example most commonly cited by those wanting to argue that it is not unthinkable for the environment to be granted rights. The corporation’s legal person- hood has colonial roots, originating in a parasitical and corruptly authorised exploitation of the anti-slavery provisions of the 1867 Fourteenth Amendment to the US Constitution (McQueen, 2001: 23–26). To its critics, these origins make the corporation’s personhood nothing short of an ‘original sin’ (Westra, 2013: 6). Jo Littler (2009: 54) notes that the Fourteenth Amendment went on to protect far more corporations than African Americans: between 1890 and 1910 it was used in court by 19 African Americans and 288 corporations.

Despite this history, the rights granted to corporations via legal personhood are now so historically entrenched as to be normalised as an ‘ongoing assumption’ (Westra, 2013: 6). As a legal person, the corporation can sign contracts, persist beyond the life of its directors and shareholders, sue, and be sued. There is debate about the extent to which the corpora- tion can or should be understood as having some component of the moral person (French, 1979: 207).

New thresholds: Legal personhood for animals and artificial intelligence. Numerous technical, scien- tiﬁc, social and ethical developments have made the expansion of LP the subject of lively investigation. For example, some animal rights activists seek LP for non-human animals, often for particular species prioritised because of their putative autonomy, ‘cultural’ forms, biological proximity to homo sapiens or advanced cognitive capacities. For example, US civil rights organisation the Nonhuman Rights Project is using the common law principle of habeas corpus to seek release for certain animals in captivity and/or to seek LP for partic- ular animal individuals (e.g. several great apes in New York) (Hatten, 2015: 39). In a con- temporary attempt to re-purpose anti-slavery constitutional provisions, People for the Ethical Treatment of Animals (PETA) mounted an unsuccessful legal action against SeaWorld California on behalf of whales, using the Thirteenth Amendment (the abolition of slavery). In keeping with my argument that failed experiments are not necessarily value- less, and can indeed be useful, Kerr et al. (2013) argue that the Tilikum et al. v Sea World8 case represents a crucial step in rethinking who or what counts as a person in law.

Meanwhile, technological developments like robots and driverless cars have given urgen- cy to longstanding debates about the LP of artiﬁcial intelligence (Muzyka, 2013; Solum, 1992). The development of lethal autonomous weapons has likewise moved questions of autonomy, moral reasoning and legal personhood from abstract or hypothetical ones to an urgent practical necessity.9

Legal personhood for ‘natural objects’. Christopher Stone’s essay ﬁrst brought the idea of extend- ing LP to ‘natural objects’ to prominence, opening by rebutting the common-sense view of its unthinkability. But of course the idea is confronting only within particular socio-legal cosmologies and in actuality legal standing beyond the human person is a feature of ‘the law of any jurisdiction you care to choose’ (Tur, 1987: 121).

Stone’s essay was given life in law only days after it was published, when it was cited approvingly by the dissenting judge in a 1972 case brought by an environmental organisa- tion trying to block the development of a ski resort (Sierra Club v Morton). Though the action was unsuccessful, it provided the platform that gave wider voice to Stone’s propo- sitions, helping them to become generative over the longer term. There has been a sprinkling of successful personhood applications over recent years: the 2006 Tamaqua Borough Sewage Sludge Ordinance in Pennsylvania10 (the ﬁrst community ordinance to accord rights to a local ecosystem via legal personhood (Boyd, 2017: 112)); the 2014 Whanganui River settle- ment in New Zealand; and the 2017 Yamuna and Ganga rivers decision in India (Mohd. Salim v State, 2017). The EDO NQ campaign needs to be understood in this wider context.

Even while legal personhood for nature is an attempt to move beyond the conception of nature as property, it is still foundationally bound to it. As Margaret Radin argues, property and personhood are deeply entwined: ‘Almost any theory of private property rights can be referred to some notion of personhood’ (1982: 957). And yet it may have more ambiguous potential. Rather than simply acting as an extension of hegemonic conceptions of human selfhood, calling personhood up for contestation subtly calls all personhood into question, potentially destabilising and denaturalising elements of the conceptual and political status quo, including the human/non-human binary. Moreover, since debates about extending LP to nature routinely use the corporation as their most persuasive analogy, they have the effect of signalling the contingent nature of the literal and ﬁgurative power accorded to corporations today.

#### K AFFs can build on the themes of the topic while proposing reforms that transcend strictly legal change to include community-level work.

Natalie Kofler & Colleen M. Grogan 21, Kofler teaches Environmental Ethics and Justice at the Center for Biomedical Ethics at Harvard Medical School; Grogan is a Professor at the University of Chicago Crown Family School of Social Work, Policy, and Practice, “Giving Voice to the Voiceless in Environmental Gene Editing,” Hastings Center Report, Vol. 51, Issue S2, 2021, pp. S66-S73, https://doi.org/10.1002/hast.1322

What do we learn from experiences to date with granting legal status to nature? While it is too early to make any definitive claims, one conclusion seems clear: that legal standing does not substitute for inclusive deliberative processes and the need to give voice to the voiceless—in this case, nature. First, the New Zealand case illustrates that while granting legal personhood status to a river allows the river to sue the state (or a corporation) if environmental harm has occurred, it does not substitute for the need to create deliberative inclusive processes to inform decision-making regarding the management and sustainability of the river. The role is granted to the strategy group, which is defined in fairly common ways as a participatory stakeholder group.

Second, while legal standing may be incredibly useful to protect ecosystems from unwanted interventions (such as genetically engineered organisms), legislative or judicial acts to create legal standing typically occur only after a social movement develops and the community demands such legal status. Pittsburgh City Council member Ben Price, who led the charge to pass Pittsburgh's community bill of rights, acknowledges that the rights-of-nature law would not have passed without substantial organizing in the community,22 and environmental legal expert Erin O'Donnell holds that legal status is not a substitute for community deliberation—either before or after nature is granted legal standing.23 While granting legal standing to nature could be an essential strategy for a community (or nation) to protect nature, there must still be public deliberation that explicitly includes, and considers how to include, the voice of the voiceless.

### AFF---Black Posthumanism

#### The traditional category of personhood relies on antiblack metaphysics – only transforming “personhood” displaces Enlightenment man

Jackson 13 – Associate professor of English and director of the Center for Feminist Research at the University of Southern California.

Zakiyyah Iman Jackson, “Animal: New Directions in the Theorization of Race and Posthumanism,” *Feminist Studies*, vol. 39, no. 3, 2013, pp. 670-673, https://www.jstor.org/stable/pdf/23719431.pdf?casa\_token=DjXlXcI7gvAAAAAA:7HDC7S8xqbUcsD6zHIjzVW-HjOaQXYyTgXtz0zIb5fBqe0oA-ShBljCwD97tieCga0TTF9JwDCraYwX4PNu5NDNvg5UvgQGHciUvbbQcjSwr-A2dOMI.

Yet, I worry that to suggest a seamless, patrilineal link between poststructuralist criticism and posthumanist theory could potentially display a Eurocentric tendency to erase the parallel genealogies of thought that have anticipated, constituted, and disrupted these fields' categories of analysis. For instance, fifteen years before Foucault's publication of The Order of Things, Aimé Césaire, in Discourse on Colonialism, set before us an urgent task: How might we resignify and revalue human ity such that it breaks with the imperialist ontology and metaphysical essentialism of Enlightenment man? Césaire's groundbreaking critique was hastened by a wave of decolonial resistance that arguably provided the historical conditions of possibility for Foucault's subsequent analysis. Like Césaire, critics commonly associated with the theorization of race and colonialism, such as Frantz Fanon and Sylvia Wynter, anticipated and broadened the interrogation and critique of "man" by placing Western humanism in a broader field of gendered, sexual, racial, and colonial relations. Their work, like that of Foucault, is similarly invested in challenging the epistemological authority of "man," but they also stress that "man's" attempts to colonize the field of knowledge was, and continues to be, inextricably linked to the history of Western imperialism. They maintain that the figure "man" is not synonymous with "the human," but rather is a technology of slavery and colonialism that imposes its authority over "the universal" through a racialized deployment of force.

With the full-fledged arrival of posthumanist theory in the 1990s, the epistemological integrity of "man" was subject to a heretical critique, as posthumanists challenged a range of conceptual pieties rooted in Enlightenment thought. Posthumanists attempted to reorient our understanding of human agency by underscoring human subjectivity's interdependency and porosity with respect to a world Enlightenment humanists often falsely claimed to control. Demonstrating a profound skepticism of subject/object distinctions and dominant ontologies, the first decades of posthumanism generated vital critical concepts, such as "cyborg,"1 "autopoiesis,"2 and "virtual body.”3 Together, these concepts stressed the processual and co-constitutive nature of human embodiment, knowledge production, and culture in relation to environment, objects, nonhuman animals, and technology. (Human) agency was reconceived as a network of relation between humans and nonhumans, replacing the figure of sovereignty with the process of enmeshment such that intentionality is de-ontologized.4 What posthumanists held in common was a critique of the Enlightenment subject's claims to mastery, autonomy, and dominance over material and virtual worlds.3 Posthumanist theory powerfully demonstrated the constructed and often spurious concept foundation of Enlightenment humanism. However, its critics maintained that the acuity of posthumanism's intervention was undercut when its scholars effectively sidestepped the analytical challenge posed by the categories of race, colonialism, and slavery.6 In short while posthumanism took note of the challenge posed by Foucault, I argue that it still too often bypasses the earlier one posed by Césaire.

However subversive posthumanism's conceptual points of departure, posthumanism remained committed to a specific order of rationality, one rooted in the epistemological locus of the West, and more precisely that of Enlightenment man—Wynter’s “Man.”7 While posthumanism may have dealt a powerful blow to the Enlightenment subject's claims of sovereignty, autonomy, and exceptionalism with respect to nonhuman animals, technology, objects, and environment, the field has yet to sufficiently distance its hierarchies of rationality: "Reason" was still, in effect, equated with Western and specifically Eurocentric structures of rationality. Thus, the very operations of rationality used to of the Enlightenment subject remained committed to its racial, gendered, and colonial hierarchies of “Reason” and its “absence.”

Therefore, it is perhaps unsurprising that during the 1990s some scholars of race expressed ambivalence about the stakes and promise of calls to become "post" modern and "post” human. Some believed, like Africana philosopher Lewis Gordon, that black people must be humanists for the "obvious" reason that "the dominant group can 'give up' humanism for the simple fact that their humanism is presumed,” whereas "other communities have struggled too long for the humanistic prize."8 However, I would argue that these, and similar, sentiments have been largely misunderstood. It is not that critics such as Gordon simply sought admission into the normative category of “the human”; rather, they attempted to transform the category from within, and in fact they hoped to effect a greater understanding and appreciation of the transformative potential of Africana thought more generally. The hope was not that black people would gain admittance into the fraternity of Man—the aim was to displace the order of Man altogether. Thus, what they aspired to achieve was not the extension of liberal humanism to those enslaved and colonized, but rather a transformation within humanism.

Even here, as I observe the customary practice of providing a brief genealogical sketch of the field, I find myself amid troubling gendered and racialized citational waters. I wonder how the conceptual touchstones that have come to define posthumanism and its emergent expressions might be altered if a philosopher such as Wynter— associated with the different but not unrelated field of Caribbean literary criticism—were to be widely perceived as belonging to post humanism's genealogy. Cuban-born Jamaican scholar Sylvia Wynter, writing during the same period as posthumanism's most commonly named progenitors—Margaret Boden, Gregory Bateson, Humberto Maturana and Francisco Varela, and Bruno Latour9—developed a remarkably dexterous transdisciplinary critique of antiblackness that was as engaged with the anticolonial thought of Césaire and Fanon10 as it was with key theories now commonly associated with posthumanism. Wynter utilized many of posthumanism’s critical concepts, including autopoiesis, artificial intelligence, and cybernetics, but more importantly she interrogated the racialized and gendered relevance of these thematics, often transforming posthumanist concepts in the process.11 For instance, Wynter's critique of the metaphysical and ontological imperialism that underwrites the globalizing equation of "woman" with a biocentric conception draws on Francisco J. Varela's argument that all "self-organizing systems depend for their autonomy on a mode of systemic closure, both cognitive and organizational." 12 In Wynter's view, the current order of Man, its auto-institution and telos of stable replication, effectively ignores the incommensurable cultural motivations and meanings that shape the divergent subjectivities of those it deems "woman” according to its biocentric model. In other words, Man's culture-specific mode of identity, and the self-referentiality of its code, potentially leads to cognitive and affective closures, even in Western feminisms. While a fuller engagement with Wynter's work is beyond the scope of this review essay, her provocation is worth considering: Might there be a (post) humanism that does not privilege European Man and its idiom? Post-humanism's past and, arguably, ongoing investment in Europe as standard-bearer of "Reason" and "Culture" circumscribes its critique of humanism and anthropocentricism because it continues to equate humanism with Enlightenment rationality and its peculiar representation of humanity, "as if it were the human itself.”13 Is it possible that the very subjects central to posthumanist inquiry—the binarisms of human/animal, nature/culture, animate ganic—find their relief outside of the epistemological locus of the West? Perhaps the "post" human is not a temporal location but a geo graphic one —a matter I will return to at the end of this essay.

#### The aff redefines the category of “legal personhood,” rejecting Enlightenment humanism in favor of a revolutionary posthumanism that centers black people’s capacity to remake the human

Bergner 19 – Associate professor of English at West Virginia University.

Gwen Bergner, “Introduction: The Plantation, the Postplantation, and the Afterlives of Slavery,” *American Literature*, vol. 91, no. 3, September 2019, pp. 451-455, https://read.dukeupress.edu/american-literature/article/91/3/447/139934/Introduction-The-Plantation-the-Postplantation-and.

In sum Scott v. Sandford reasons that people of African descent cannot be US citizens and have no rights under the Constitution because they are part of a slave race distinct from civilized man.6 Thus we might yet consider how the slave’s “mixed character” as both human and property made for a hybrid that consternated philosophical, moral, and political categories of humanity. As Saidiya V. Hartman (1997: 5) puts it, “Although the captive’s bifurcated existence as both an object of property and a person . . . has been recognized as one of the striking contradictions of chattel slavery, the constitution of this humanity remains to be considered.” Yet, in reading the opinion this way, am I simply deconstructing its racializing logic along conventional lines, pointing to a node in the “historical nexus when slavery and race conjoined,” as if to find “in the coupling of European colonial slavery and racial blackness a history both inevitable and determined” (Best 2012: 454)? That is not the goal or method of this revision of the plantation form and its permutations. As Stephen Best reminds us, we cannot simply map the slave past onto the present without “divesting history of movement and change” or find in slavery’s dispossession the ethical glue of political affiliation without potentially sacrificing “effective political agency” (454). For these reasons, recent work in black posthumanism has sought less to restore humanity to those rendered differently human than to transform the framework of liberal humanism. For posthumous rehabilitation to humanist Man does not help us recover the modes of being of those rendered bare life by the necropolitics of colonial plantation slavery and its afterlives.

This recent work in racially aware posthumanism, new materialism, environmental criticism, and other methods marks a shift from analyzing Western processes of racialization to uncovering the response, experience, and agency of those oppressed by slavery, colonialism, and imperialism. The new critical assemblage also formulates the question of agency through a “flow of knowledge, archives, and geographic spaces” that includes the Caribbean, a region often sidelined within Latinx or American studies (Fiol-Matta and Gómez-Barris 2014: 494). This turn in transnational American studies, which in its earlier phase focused more on the discursive structures of US imperialism than on the forms of resistance and self-making devised by the colonized and enslaved, also signals a shift in postcolonialism away from the Fanonian psychoanalytic subject and preoccupation with melancholia, which arguably provide only ambivalent possibilities of representing subaltern agency. The essays here thus seek to discover what exceeds, escapes, remains outside, or is made new through, around, and in spite of slavery and later formations of white supremacy. Yet they respect the limits of the archive, avoiding fantasies of historical subjects of unfettered agency, resistance, and revolution. This search for modes of being within the plantation structure and succeeding states of exception offers one way to rewrite histories of slavery other than as dehumanization, dispossession, and determinism.

Monique Allewaert’s essay in this issue,“Super Fly: François Makandal’s Colonial Semiotics,” does just this work of reconsidering what counts as knowledge, agency, and object of study in relation to the transnational circuits of eighteenth-century colonial plantation slaver y in Saint-Domingue (now Haiti). Allewaert examines the ritual practices of the legendary hero François Makandal, whose fetish making and alleged poisoning of whites, as well as his evasion of execution by transforming into an insect, was said to inspire the Haitian Revolution. She considers the textual evidence in the French colonial archive as well as the vernacular history that circulates in Haiti even today, finding that the archival evidence on Makandal is, in fact, as fully implicated in the ver y practices of syncretic assemblage it ostensibly documents. That is, both the French colonial text about Makandal’s fetish making that Allewaert examines and Makandal’s fetishes themselves constitute material artifacts that mediate among domains of knowledge, culture, and environment. In this way, she reconsiders the archival text as something that acts on the world, like a fetish, rather than something that provides authoritative knowledge about fetish making. This approach to the artifact checks contemporary scholars’ tendency to privilege colonial European knowledge about enslaved nonwhite peoples and proposes new ways of reading the archive of slavery slave law, United States v. Amy (1859), DeLombard demonstrates how the case shows the “lethal legacy of slave personhood as a debilitating mixture of civil death and criminal culpability.” That is, the law recognized the slave as a legal person primarily to subject her to criminal prosecution and punishment. The result is that slave law naturalized black humanity as criminality, a legacy that persists in the mass incarceration, police misconduct, and racist profiling in US law and culture today, all of which enable the prison-industrial complex to exploit black humanity for profit. Against this criminal visibility and civil invisibility, black people have long offered a politics of counter-civility. Analyzing the dash cam video of Sandra Bland’s encounter with Texas state trooper Brian Encinia in 2015, DeLombard explains how videos of police misconduct reveal in real time and space the confrontation between the criminalization of black people and African Americans’ counterassertions of civil personhood.

Shifting to the early twentieth century, Jarvis C. McInnis’s essay examines circuits of control, communication, and self-determination in plantation spaces of what he calls the global black south. Here the plantation takes a corporate form—in the Delta and Pine Land Company (DPL), which employed thousands of black sharecroppers, tenant farmers, and day laborers in the Mississippi delta, and in the United Fruit Company (UFCO), which operated across the Caribbean and Central America, including the site in Panama he discusses. McInnis uncovers the production and circulation of the Cotton Farmer, a paper published by the black tenant farmers of the DPL and circulated through the DPL’s eighteen plantations in the 1920s. Learning that the Cotton Farmer’s editor received a subscription request from a reader in Panama, which the editor speculated was due to the paper’s positive attitude toward Marcus Garvey, McInnis traces this route, as well as those of laborers who migrated throughout the US South, Caribbean, and Central America, to reveal “a dynamic, yet relatively underexplored geography of black transnational mobility and diasporic affiliation” that works within and against the modern management practices of the corporate plantation. Like Allewaert, McInnis attends to the biopolitical mechanisms of plantation control of bodies, labor, cultural practices, and knowledge, even as plantation laborers enact modes of self-determination, affiliation, and communication within their spatial-political constraints.

Like McInnis, Benjamin Child’s essay, “The Plantation Countermelodies of Dunbar and Du Bois,” proposes that black engagement with agriculture during the most repressive Jim Crow era of sharecropping and tenancy “both reflect[s] and create[s] forms of resistance” despite the structural legacies of slavery. Child argues that Paul Lawrence Dunbar’s plantation poems and W. E. B. Du Bois’s cotton novel, The Quest of the Silver Fleece (1911), provide imaginative accounts of agricultural life that transform the necropolitical legacies of the plantation into a politics of possibility by showing how “the subject and the nation are inscribed on the ground itself.” This interembodiment of human and nonhuman nature is not just metaphorical but material and historical in, for example, Dunbar’s poems of a tree used for a lynching or a Civil War battleground that absorbed the miscegenational blood of both black and white soldiers. Contrary to the usual accounts whereby the slave plantation’s transition to Jim Crow tenancy perpetuates black political and personal dispossession, Child traces in Dunbar’s and Du Bois’s “agropolitical texts” a radical black embodied selfhood and political agency grounded in the rural landscape.

Julius B. Fleming Jr. picks up on this reworking of the meaning and effect of southern land and plantation ground in his study of the Free Southern Theater’s staging of radical plays in the Jim Crow South during the civil rights movement. Fleming documents how the Free Southern Theater “used plantations, porches, and cotton fields” in Mississippi to stage plays such as Samuel Beckett’s Waiting for Godot (1954) for black audiences. Fleming claims that these time-conscious performances “revise[d] the oppressive histories of time rooted in the material geographies of the US South,” thereby calling audiences to action. In other words, the staging of these plays on the actual grounds of the former slave plantations called attention to the ways that slavery’s necropolitics worked through insisting on or requiring black patience with oppression and suffering in order to change the audience’s relationship to the time and space of the slave plantations and their afterlives.

Roberta Wolfson’s essay “Race Leaders, Race Traitors, and the Necropolitics of Black Exceptionalism in Paul Beatty’s Fiction” also considers spaces of black community and modes of political organizing but in the contemporary postracial moment rather than during the civil rights era. She examines contrasting examples of black exceptionalism—a race hero and a race traitor—in two of Beatty’s novels to explain “the necropolitics of black exceptionalism.” That is, US society celebrates or censures exceptional black figures that are marshaled as evidence of a color-blind society only to entrench the social death and civic exclusion of black people generally. As Wolfson illuminates, Beatty places these singular black celebrities in the contemporary necropolitical sites of the basketball court and the segregated urban neighborhood, comparing these spaces to the plantation and its exploitation of black bodies for white entertainment and profit. Beatty’s satirical fictions counter this exploitation with modest proposals for political agency and affiliation through mass suicide and the reintroduction of slavery and segregation, proposals that Wolfson explores in relation to the fraught question of how to organize effective black activism in the neoliberal present

In his influential work Habeus Viscus (2014), Weheliye asks what agency or resistance might look like under forms of extreme subjection such as slave plantations or concentration camps (2). Noting the question embeds problems of method and epistemology because the terms resistance and agency tend “to blind us, whether through strenuous denials or exalted celebrations of their existence,” he nonetheless calls for “new modes of analyzing and imagining the practices of the oppressed in the face of extreme violence” (2). This collection goes some of the way toward answering that call. What stands out here is less the brutality and persistence of the plantation and its permutations than the creative agency black people have deployed despite them. From passage into insect life, to assertions of civil presence in the face of police misconduct, to recalibrations of plantation time and space through performance, the essays here excavate the afterlives of bare life and civil death to demonstrate that “racializing assemblages of subjection . . . can never annihilate the lines of flight, freedom dreams, practices of liberation, and possibilities of other worlds” (2).

#### That “fugitive humanism” is key to reconstituting the social order, creating a space for black self-creation within and against civil society

Johnson 18 – Assistant professor of English at the University of Virginia.

Lindgren Johnson, “Introduction: Fugitive Humanism in African America,” *Race Matters, Animal Matters: Fugitive Humanism in African America, 1840-1930*, Taylor and Francis 2018, pp. 15-17.

So how might the deeply challenging work of animal studies and, specifically, its posthumanist insistence be relevant to the study of African American literature, a literature that largely speaks out of a subject position that is violently denied the privileges of humanity under humanism? It might seem as if we are traveling over old territory at this point, repeating earlier questions about African American subject formation, but my point here is to consider the methodology by which we approach this subject formation. Is the theoretical apparatus of posthumanist studies, an epistemology specific to the late twentieth and early twenty-first centuries, methodologically germane to African American literature? In other words, can a posthumanist approach to African American literature be relevant, much less appropriate, in an examination of authors who are so desperately striving to secure the privileges of humanism—to move into, it would seem, and not beyond, humanism.

In Modernism and the Harlem Renaissance, Houston Baker argues that modernism, a movement long associated with exclusively white artists and intellectuals such as T.S. Eliot, Ezra Pound, and F. Scott Fitzgerald, and its emphasis on a “putting back together” of the pieces shattered by World War I, is an existential framework inappropriate to African American literature and culture of the period. The Harlem Renaissance, long seen as a failure under such a white modernist rubric, Baker argues, was not about putting the pieces of a fractured identity back together; rather, it was about piecing together literal survival: coming up with economic and material goods in order to sustain individual and community. “Modernism” meant something entirely different for African America than it did for European America.

Baker’s point is not that the theory of white modernism should simply be discarded. Rather, he works to reveal how a supposedly culture-neutral movement is one that has been limited to historically specific white concerns and exclusions surrounding identity and subjectivity. Posthumanism arguably falls prey to these same racial limitations in its uni-directional assault on humanism (the “post” of posthumanism). At the same time, however, posthumanist theory provides an essential theoretical framework that allows for a radical interrogation of the seemingly transparent and homogeneous “human,” a term which largely “[ignores] the unequal experience of humanness” (Ruffin 19), opening up other ways of thinking about humanness and race. As Wolfe explains, posthumanist theory

actually enables us to describe the human and its characteristic modes of communication, interaction, meaning, social significations, and affective investments with greater specificity once we have removed meaning from the ontologically closed domain of consciousness, reason, reflection, and so on. It forces us to rethink our taken-forgranted modes of human experience. (What is Posthumanism? xxv)

Given posthumanist interrogations, it is not, then, the “humanism” part of posthumanism that is the catch, but the “post” part. While posthumanism allows us to consider restrictions imposed by and under humanism, it is, by definition, a move, ethically and historically, beyond humanism, one that occurs after humanism.10 This trajectory makes various assumptions about how humanism works as an ideological model of subjectivity, the most basic of which is that this model can only be interrogated after the fact—after one’s inclusion. Such an interrogation emerges out of privilege and assumes an exploration to be launched, yet again, from a detached purview—from a humanity that, for practical purposes, is quite secure within the human; the way posthumanism is done, then, starts to look suspiciously like the very thing it is working against: extensionism. The difference—and this is a big and important difference—is that the nonhuman is considered as a result of theoretical “contraction,” not extension, a contraction that is deeply and radically expansive in its apprehension of differences.

My point here is to insist that we pay attention to those moments when the human is explicitly denied and subsequently and explicitly sought. How might dehumanization positively inform the move into a new kind of humanism, one that, while it does not reject, casts doubt on the exclusions of humanism and, in this sense, resembles posthumanism? And how is the human revised to allow for alternative ways of being human? In other words, as “we” find ourselves in a space after the human, it becomes crucial to examine that space before the human, that space most dangerously, tenuously, and often beautifully occupied by African Americans in the long history of humanism’s discriminations and exclusions: what comes before the subject that is the human, I argue, offers as ethically challenging and fertile ground as, from the framework of posthumanism, what comes after the subject. Moreover, in examining this “space before” through what I call fugitive humanism, we not only apprehend the inherent fragility of humanism, but are also able to view a lived morality that revises without indulging in what Cora Diamond refers to as the “deflections” of philosophy (11–12), where moving into the human is potentially simultaneous with a new way of being human. As Zakiyyah Iman Jackson has argued, “far too often, gestures toward the ‘post’ or the ‘beyond’ effectively ignore praxes of humanity and critiques produced by black people, particularly those praxes which are irreverent toward the normative production of ‘the human’ or illegible from within the terms of its logic” (215–216).

### AFF---Fugitivity

#### Blackness transcends juridical constructs of the human – fugitivity rejects redemptive interpretations of law and humanism in favor of embracing blackness’s abjection of the social order

Neary 19 – Professor of English at Hunter College. PhD in English from UC Irvine.

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Stolen Life is the second book in Fred Moten's recent series, consent not to be a single being, published within a year by Duke University Press. Like the other books in the series, Black and Blur and The Universal Machine, Stolen Life is a set of interrelated essays in which Moten uses blackness as an analytic to propose open-ended ways of being in the world that sharply cut and exceed the seeming wholes and totalities that form the commonplace understanding of the modern world. In this aleatoric collection that resists collection (xii), Moten presents his inimitable and endlessly generative mode of thought in encounters with a wide range of primary and scholarly texts. From the opening essay, "Knowledge of Freedom," which draws on Winfried Menninghaus, Olaudah Equiano, David Kazanjian, Ronald Judy, and Bryan Wagner (among others) to produce a sustained analysis of the foundational disturbance of blackness in Immanuel Kant's Critique of Judgment, to the concluding essay, "Erotics of Fugitivity," which thinks alongside Sora Han's "Slavery as Contract" to present a fierce and beautiful re-thinking of consent as refusal in order to dismantle the terms of liberal statism, Moten illuminates what he has called the "improvisational immanence" of blackness to show how—as concept, radical aesthetic, political tradition, and mode of being—it precedes and disrupts the regulative discourses that enshrine notions of sovereignty.

Situating himself as student and teacher, Moten is both frank pragmatist addressing concrete realities of life in the academy and among subjects who imagine themselves to be sovereign and sonic theorist performing devotional acts of analysis. The dynamic essays collected in Stolen Life enact the black radical tradition, recursively unfolding a reclamation of the antenormative (what he terms the "insistent previousness" of blackness in In the Break), dispatching "normative individuation," "judicial ownership," and "legislative priesthood" in ways that entail a rethinking of every aspect of epistemology and of human relations. If the collection is a kind of intellectual ensemble that returns often to Moten's primary interlocutors (Denise Ferreira da Silva, Nahum Chandler, Hortense Spillers, and Nathaniel Mackey), the essays are predominantly dialogic, each taking flight from a particular intellectual point of departure, drawing in and from many voices but moving by way of a devotional agonism in which one principal text becomes the grain against which Moten thinks. This method of critical close reading is the foundation of Moten's powerful critique of the academy's abetting of liberal individualism, even while he thinks out loud about how to be inside these structures without acceding to their terms. To describe Moten's fugitive engagement with continental philosophy, one could do worse than to cite his comment that in Kant's writings he finds an "unruly sociality, anarchic syntax, extrasensical poetics" (2).

Stolen Life extends and amplifies the work of In the Break, presenting us definitions of blackness as boundless, dynamic, and vital, as "non-performed performance[,]…the surrealization of space and time," against the notion of blackness as "death-driven epiphenomenon…[either] bound by [or] originating in the white/nonwhite binary" (33). In Stolen Life, as in his other work, blackness is, rather than is not, and Moten recruits DuBois (via Chandler's reading of his early work) to present "blackness as that which is before the binary that has been said to define our existence" (35). In so doing, Moten presents a temporal and logical challenge to the notion of "blackness as an effect of the color line, which is to say the white/nonwhite binary which orients it and by way of which it is plotted" (33). Moten argues that to imagine that blackness is reducible to this axis is to accede to the very terms of the negation, which, in "its most extreme development," refuses "the idea of blackness as a form of life" (33-34).

One consequence of this intervention is the philosophical distinction between blackness and black people. Though Moten is clear that "black people have a privileged relation to blackness" and "that black cultures are (under)privileged fields for the transformational expression and enactment of blackness" (18), quoting Wagner he identifies his aims as

'to name the blackness in the black tradition without recourse to those myths that have made it possible up to this time to represent the tradition as cultural property'; to 'track…the emergence of the black tradition from the condition of statelessness'; and 'to describe its contours by tracking the tradition's engagement with the law.'

(27)

He differs from Wagner "regarding the origin of blackness and of law" (27). This difference represents the collection's most novel intervention: Moten's mobilization of blackness as legal critique. Rather than a reaction to state brutality, Moten understands blackness as "jurisgenerative," which is to say, before the law, "ante-interpellative" and "anterelational" (27), a proposition that identifies a disruption at the heart of the law, a kind of 'call coming from inside the house' in which blackness itself is critical capacity: "The black radical tradition is in apposition to enlightenment…. Stolen by it, it steals from it, steeling itself to it in preservative, self-defensive, disjunctively anachoreographic permeance" (41).

"Stolen life," the philosophical through-line of the essays, is most clearly articulated in "Knowledge of Freedom," the collection's cornerstone. "Stolen life" names a fugitive dynamic wherein the very regulatory discourses that organize themselves by exclusions, limitations, and hierarchical assessments of human life are dependent upon race as the categorical instantiation of regulation, a recognition that illuminates a paradoxically intimate relationship between regulation and the disturbance(s) or wildness that it attempts to distinguish, extinguish, name, contain, or transcend. Moten's meditation on Kant's treatment of imagination recognizes the ambivalently generative potential of the disavowal at the heart of Kantian philosophy:

The regulative discourse on the aesthetic [taste] that animates Kant's critical philosophy is inseparable from the question of race as a mode of conceptualizing and regulating human diversity, grounding and justifying inequality and exploitation, as well as marking the limits of human knowledge through the codification of quasi-transcendental philosophical method, which is Kant's acknowledged aim in the critical philosophy.

(2)

To recognize this more-than-proximity is also to engender what Moten elsewhere calls "the enthusiastic social vision" of blackness, to reclaim the "radical sociality of the imagination," and to dwell in the materiality that is the ground of distinction and the substance of thought; as Moten puts it, "the ones who work the ground are the ground" (3).

Extending this recognition of how "race moves against its own regulatory derivative" (17), Moten adapts the foundational solipsistic American metaphors of the "errand into the wilderness" to describe constitutive, generative abjection:

Too often life is taken by, and accepts, the invasive, expansive aggression of the settler, venturing into the outside that he fears, in search of the very idea as it recedes from its own enabling condition, as its forms are reclaimed by the informality that precedes them.

(xi)

"This," he writes, is "how the unnameable comes to bear the imposition of a name" (3). The violence indexed by this maneuver, however, also marks the critical capacity and generative force of reclaiming the anoriginal "ground" of philosophy and of modern statehood: "What if," Moten asks, "the ones who are so ugly that their utterances must be stupid are never far from Kant's mature and critical thoughts? What if they, or something they are said and made to bear alone, are the fantastical generation of those thoughts?" (2). One of the most interesting aspects of Moten's theory, here, is the relationship between the material and the temporal: "The irreducible materiality of the beautiful and the irreducible irregularity of the imagination define an enclosure that will have always been disruptively invaded, as it were, from the inside" (5). The dynamic captured here is the critical move that characterizes all of the essays in the collection: the recognition of anoriginal, undifferentiated materiality that is paradoxically foundational to the regulatory, a recognition that enacts critical capacity and enables collective insurgency.

In turning Kantian philosophy inside out, all the essays in Stolen Life perform immanence, directing our attention to the potential of reclaiming anoriginal, unnamed materiality from the false transcendence and violent naming that is the engine of sovereignty. Such a rethinking has at least three primary, related consequences: a critique of individuality, a recentering of black women, and an insistence on—and celebration of—the pathological.

Moten continually turns to unruly black narratives to challenge what Lindon Barrett has called the "subject-effect" (256). Calling on Ronald Judy, Wahneema Lubiano, Sylvia Wynter, and Barrett, Moten replaces the notion of a "'universal' Kantian subject" with an "improvisational" Kantian subject whose "generative incoherence" "opens a critique of being" (52). Repeating a version of the question that inaugurates In the Break, Moten asks, "What would it mean to think and to inhabit the object?" (84). The figures most powerfully situated to challenge normative individuality are black women. As figures that materially exist in the space between two fantasies—"the black (woman) as regulative instrument and the black (woman) as natural agent of deregulation"—Moten asserts black women's privileged access to "a turmoil foundational to the modern aesthetic, political, and philosophical fields" (3). Here Moten seems to be working in the same groove as Harryette Mullen, who argues that, "in some instances the stark materiality of [black women's] embodied existence gave [them] a clarity of vision about their position as slaves and as women" (246). Consequently, the arc of Stolen Life moves from the identification of black immanence within Kant, which establishes that it is "the outlaw that guarantees the law" (15), to the "anoriginal lawlessness" enacted by an enslaved black woman, Betty, who refuses the terms of liberal subjectivity by electing to return to slavery with her masters after the Massachusetts Supreme Court declares her to be free (the basis of Sora Han's reading in "Slavery as Contract"). In Han's words, Betty's "decision is an a priori fugitivity to becoming a fugitive of the law of slave and free states" (qtd. in Moten, 247). In Moten's, "The question of breaking the law is immediately disrupted by an incapacity for law, an inability both to intend the law and intend its transgression" (15). Moten celebrates Betty as a figure of abjection.

For Moten, to be in and with the generative disruption is to reclaim pathology against uplift. Rather than work to "negate the negation" (a reactive pose Moten unequivocally rejects), Moten's thought recovers what is "before and against the grain of that negation" (xi). In other words, Moten suggests that rather than cleaving to the false comfort of recovery and uplift, endlessly demonstrating the error of the exclusion, one must claim and revel in abjection:

What if blackness is, in fact, abject, threatening, servile, dangerous, dependent, irrational, and infectious precisely insofar as it is the continual refusal of normative individuation, which is supposed to be the enactment of everything opposite to these qualities?

(265-266)

The collection ends by dwelling on the historical and literary trace of a black woman inhabiting the tension between the two fantasies into which the modern liberal state and existential discourse would attempt to corral her. Moten calls out "certain critico-redemptive projects" (x), such as the scholarly impulse toward uplift. Following Saidiya Hartman, Moten rejects academic projects characterized by a "tendency toward the production of anti-anti-blackness that will have been activated by the way of the liberal subject's capacity to imagine some combination of uplift and overturning" (265). He has yet harsher words for defenders of academic freedom, which he understands to be an expression of settler colonialism: "Academic freedom is a form of violence perpetrated by academic bosses who operate under the protection and in the interest of racial state capitalism" (221).

The two essays in the collection that wrangle most personally with life in the academy are also the most formally experimental and the most affecting. In "The Touring Machine (Flesh Thought Inside Out)," oblique autobiography breaks into the essay as Moten thinks through the ways his neuroatypical son was risked in traditional schools. Writing from the other side, as an agent within the academy, in "Anassignment Letters," Moten adapts the assignment form into an epistolary essay that directly addresses his students, beginning, "I think I figured out what my job is: to support you in the development and refinement of your own intellectual practice" (227). In what follows, Moten deconstructs the assignment form as a tool of possessive individualism that forces hierarchy, closure, and arrival, offering in its stead "intellectuality [as] fugitivity, as a mode, and as a quality, of life" (227). Rejecting the assignment as such, Moten insists on cultivating intellectual practice as open-ended, processional, and fundamentally collective.

Despite the emphasis on the flesh (and the distinction he teases between Spillers and Fanon, the distinction between flesh and skin), to read Stolen Life is to move into language and live differently there. Moten's agility with language is unparalleled (though to say so is to speak in categorical and hierarchal terms at odds with his writing; one of the book's commitments is a rejection of the solo). Yet it is impossible to encounter the book without tangling with and marveling at Moten's virtuosity with language, which is, in his hands, difficult, opaque, inexhaustible, material, and suggestive. Language is thought, rather than a medium for thought, and language itself often drives the essays' analytic innovations. For example, in the preface he writes that "in that exhaustion of what it is to acquire, a choir is set to work" (ix), using homophones to stage the tension between the collective ensemble's organization against an eviscerating, acquisitive, destructive racial capitalism. Later, the insurgency of oral culture disrupts the text of continental philosophy and becomes a way of getting at blackness's immanence within Kant: "Black chant, is, among other things a transverse reenactment of black Kant, pronounced cant, of blackness in Kant insofar as it intones the foundational interplay of sense and non-sense" (32). In both of these examples it is unclear whether argument or sound (inseparable for Moten) have priority. The most sustained example of Moten's sounding openings for philosophical paths is the essay "Black Op," dedicated to Lindon Barrett, an interlocutor whose ideas are felt beyond this essay that bears his name. The title of this short essay enacts multiple-entendre by operating both sonically and graphically as shorthand, cut-off generation, unfinished multiplicity; one may imagine an asterisk at the end of "Black op\*" such as one would use when entering a term into a search engine to capture all the potentialities of a beginning—or at least to refuse the limit of completion—proliferating/suggesting/searching "black optimism," "black operation," "black opposition," "black optics," and on. As he does with the assignment form, Moten uses the sonic materiality of language to counter the ways it has been used violently to name, identify, limit, and categorize.

Finally, it is important to note that what Moten deems the "improvisation of [the Kantian] subject" (52) has implications for literary study. It is in deconstructed literary texts that Moten finds the most compelling enactments of the black radical tradition, but also where we most urgently see the necessity of rejecting narrative. Considering the violent imposition of narrative form on enslaved peoples' experiences of slavery as they are related in slave narratives, Moten identifies the problem as "how to tell the story of a rupture that has broken the ability to tell and how to have that telling be free and be in the interest of freedom" (42). Moten's answer to this question is to recover the improvisational subject instantiated by a forever rematerializing, always anoriginal frontier. Recalling Sylvia Wynter and putting what I will call his Kantian formula into action, Moten is

interested in how the free story that forms the paradoxically anarchic ground of the black radical tradition will have rationalized that conception of 'Man,' improvising through its exclusionary force and toward theory and practice that reconstitutes both the methods and the objects of ethics, epistemology, and ontology.

(42)

Throughout the collection, Moten demonstrates the ways blackness is paradoxically both foundational to and disruptive of the law, continental philosophy, aesthetics, imagination, and what we understand to be the contours and commitments of the archive. Employing a series of logical and linguistic declensions, Moten confronts grammatical and philosophical cul-de-sacs that he repeatedly finds his way out of, tracing "the open obscurity of a field of study and a line of flight" (x). His analysis is animated by and dwells in the materiality of language and flesh that precedes naming, subjects, and sovereignty, preparing the ground for his reclamation of the abject. It is fundamentally collective and non-dyadically relational, sketching a world that is appositional, simultaneous, irreducible. To end with his own words,

## Disability

### AFF---Disability

#### Legal personhood is routinely denied for disabled folks---that causes dependency and both covert and overt relationships of physical, social, and psychological domination---Western legal individualism is insufficient, only a relational approach to personhood that recognizes the necessary dependence we have on our community is able to solve

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III. Domination, paternalism, and othering in the recognition of legal personhood

Dominance has many different meanings and its precise boundaries have been debated by many theorists from many different disciplines. For example, in political theory, the concepts of dominance and non-dominance have been a preoccupation of neo-republican theorists.26 They have generally defined it as arbitrary interference with the individual – accentuating physical interreference or threat of physical interference without a justification such as imminent harm or criminal behaviour. They have highlighted non-dominance as essential for liberty and freedom.27 Similar definitions of dominance in social psychology have identified that it can erode an individual’s ability to participate in community and public life – and that it carries significant psychological implications.28 Political scientists have argued that dependency can breed such domination.29 Adding more nuance, social and political theorists have argued that a definition of dominance that primarily considers control over the individual or entity from an intentional and physical perspective – consistent with the ideas of many neo-republican political theorists – is grossly underinclusive because it does not take into account the vast amount of domination that takes place via social and psychological means that are often unintentional. This domination may occur through discrimination, marginalisation, social exclusion, and other insidious and intangible methods. Most constructions of the concept of dominance encompass both the experiences of people with disability and the relationship that humans have with nature. This dominance is negative due to the inherent lack of power of one party and the inherent inability of that party to reframe their situation or to seek redress if the party in the position of dominance exerts their power over them.31

A. People with disability

In the context of disability, domination occurs via physical means as well as social and psychological means.32 This domination is often the result of dependence on others, which is often caused by social marginalisation, as discussed above. Physical dominance is often experienced by people with disability due to bodily dependence on others that is sometimes a result of biological factors, but more frequently is a result of inaccessible physical spaces. For example, a lack of accessible public toilets forces some people with disability into potentially dangerous situations of physical dependence on others.33 Physical dominance can also occur due to physical dependence on the state. For example, people that live in institutional settings that are owned and managed by the state; people that are wards of the state; and people with mental health disability who are subjected to mental health laws that specifically allow for bodily interference of people with mental health disabilities. These situations place decisions about the individual’s body and environment in the hands of the state. These situations can propagate particularly profound physical dominance because to escape such dependence on the state, you must overcome an entire governing body and bureaucracy. People with disability are also often socially and psychologically dependent due to prejudice, marginalisation, and oppression. For example, the social world is sometimes so hostile to people with disability that they become socially isolated. In these situations, the few relationships that people with disability build are at risk of becoming relationships of dependence because of the rarity of their existence. In these ways – and in many others – people with disability are experiencing marginalisation and domination.

In addition, some relationships of domination that people with disability experience are created and perpetuated by specific legal measures that remove the legal personhood of people with disability. These measures can create relationships of both physical dominance as well as social and psychological dominance. For example, due to ableist notions that de-value the decision-making skills of people with disability, many jurisdictions have purportedly objective legal measures that subject people with disability to alternative forms of decision-making that include decisions being imposed upon them either regarding a particular decision, particular areas of decision-making, or to all their decisions. For example, guardianship, conservatorship, interdiction, and other such measures can be imposed in a limited fashion to constrain the legal personhood and agency of an individual with disabilities, or, in some jurisdictions, they can be used to wholly remove an individual’s legal personhood and vest their decision-making power in another individual or in the state. These legal mechanisms create relationships of dominance between the individual with disabilities and the state or other actor that is vested with their decision-making power – the individual with disabilities is subordinated because their decision-making power is removed.34

There are also mechanisms in most criminal justice systems that divert people with disability into a separate – often less rights-protective – justice system. For example, ‘unfitness to plead’ laws that are used to determine that an individual cannot participate in a trial or in his own defence. These laws are usually applied to people with cognitive disability and/or mental health disability. They are often purported to protect individuals with disabilities from being forced to participate in legal proceedings. However, in many jurisdictions, there is evidence to indicate that they are used disproportionately for racial minorities and Indigenous Peoples and that they often result in the individual being diverted into a much less preferable situation in which they may be held in prison indefinitely or for significantly longer than if they had been convicted of the crime that they were charged with.35 These are only a few examples of how the legal personhood of people with disability is routinely denied and they are subjected to relationships of dominance in which they lack the power to enforce their own wishes or make decisions in their lives. The impact of these denials of personhood is profound and far reaching – it decreases the individual’s power and privilege significantly and can result in bodily interference, psycho-social disempowerment, among other effects of decision-making denial.

It is important to note, that not all people with disability are experiencing domination and marginalisation. There are, of course, people with disability that enjoy a wealth of social capital and minimal dependence – either physically, socially, or psychologically – on others or on the state. However, the unfortunate history of poor treatment of people with disability has resulted in many experiencing high levels of dependence and relationships of domination. This dependence and domination is often a result of the legal personhood of the individual being denied or curtailed – as described above – which has necessitated the emergence of the fight to secure the right to legal personhood for people with disability.

B. Nature and natural entities

Categories of legal person have expanded over time to explicitly include women, children, persons with disabilities, as well as ‘fictional’ persons such as corporations.36 However, the central hierarchy of law has gone unchallenged. Legal subjects matter more than legal objects, and the natural world has largely retained its status as merely a legal object. Even the advent of environmental law since the 1960s, ‘a massive upwelling of layer upon layer of substantial public and private law doctrines, almost volcanic in the power and mass of its eruption’37 which recognised the environment in law as a socio-ecological concept,38 did not fundamentally alter the status of nature as ‘other’: a legal object under the dominion of humans, and separate from us.39 Modern environmental law continues this tradition of dominion and disconnection by ‘assum[ing] that we can isolate and control elements of the natural world as we choose’.40

The nature/human duality is also a particular cultural framing in which ‘agency has erroneously become exclusive to humans, thereby removing non-human agency from what constitutes a society’.41 Vanessa Watts argues that the very foundation of ‘Euro-Western’ understandings of the world, what she terms the ‘epistemological-ontological divide’, artificially separates theory from place and practice, and leads to ‘an exclusionary relationship with nature’.42 In settler colonial states, this conceptual framing of the world, in combination with the invasion and theft of Indigenous peoples’ lands, has contributed to the erasure of both the ongoing role of Indigenous peoples in creating and caring for Country,43 but also of Indigenous cosmologies which recognise that ‘all elements of nature possess agency’.44 In acknowledging this, we also recognise that there is no such thing as a ‘pan-Indigenous’ cosmology, and that the laws and cultural protocols of each Nation/Tribe/Clan group are specific to both people and place.

Almost fifty years ago, in 1972, Christopher Stone’s provocative paper posed an ‘unthinkable’ question for Euro-Western law: what if, instead of remaining a legal object, nature could be the subject of legal rights and legal personhood? In order to do so, Stone argued that nature required three things: ‘first, that [it] can institute legal actions at its behest; second, that in determining the granting of legal relief, the court must take injury to it into account; and, third, that relief must run to the benefit of it’.45 In Stone’s argument, granting legal rights (and legal personhood) to nature was explicitly framed as a way to address the domination and othering of nature, by making it as visible to the law, and as able to act in law, as human persons and corporations.

Although Stone’s argument has been influential,46 it failed to stimulate significant legal change for almost forty years. The concept of ‘nature’ as a legal subject with rights languished on the fringes of environmental law until the mid-2000s, when local ordinances recognising natures’ rights began being passed by communities in the USA.47 In 2008, the issue gained global traction with the creation of the new Constitution in Ecuador, which granted nature specific rights. In 2011, these rights were put to the test in the case of the Río Vilcabamba, in which the court recognised the right of the river to be protected from the impacts of road construction.48 By the mid-2010s, the legal approach to the ‘rights of nature’ began to shift away from recognising a universal construct of nature in totality, and instead began to focus on specific natural entities. Broad rights of nature continue to be pursued in a number of jurisdictions, but there is a growing transnational movement to recognise rivers and other landscape features (natural entities) as legal persons, legal subjects, and/or living entities.49 The earliest example of this shift comes from Aotearoa New Zealand, which granted legal personhood to the Te Urewera National Park, as part of a treaty dispute settlement with Māori.50 In 2017, Te Urewera was joined by Te Awa Tupua (the Whanganui River),51 and then by the Ganga and Yamuna Rivers in Uttarakhand, India,52 and the Río Atrato (Atrato River) in Colombia.53 By 2020, Lake Erie in the USA had gained and lost legal rights,54 and all rivers in Bangladesh were recognised as legal persons and living entities.55 In the USA, Tribes are also recognising nature’s rights in various ways within their own jurisdictions – for individual species (such as manoomin/wild rice),56 rivers (the Klamath River),57 and nature as a whole.58 Again, it is important to note that ‘rights of nature’ as expressed in settler state law, while they may attempt to embody and reflect the laws and cultural protocols of Indigenous peoples, are a Euro-Western interpretation or translation of Indigenous laws and cultural protocols, and often only a weak form of legal pluralism.5

As rights of nature have become more widely enacted, the reasons for doing so have likewise diversified. Whilst environmental protection remains a key driver (and was explicitly cited by courts in Uttarakhand and Bangladesh), the relationship between people and nature as a reason to recognising nature’s rights is emerging more strongly, as seen in Māori concepts of kaitiakitanga (which can be loosely although not completely understood as guardianship) and the explicit recognition by the courts that protecting the rights of people depends on protecting the rights of the environment.60 In Aotearoa, it is also important to see the recognition of natural entities as legal persons in the context of treaty dispute settlements: the use of this legal tool was explicitly employed as a form of circuit breaker in negotiations to enable the natural entity to ‘own’ itself, rather than continue to be ‘owned’ by either the New Zealand government or Māori.61

Although the rights of nature, in various forms, are increasingly recognised in a growing number of jurisdictions, threshold questions remain.62 How can these rights be given force and effect? Who speaks for nature? How do we even know what natural entities ‘want’? The issue of representation is emerging as a crucial issue for law in supporting the realisation of legal personhood for nature.63

C. Relational personhood to combat dominance

Similar to neo-republican theorists, we are arguing that autonomy is essential for combating such relationships of dominance.64 However, we are also drawing on moral philosophy and feminist theory, including the work of Indigenous scholars, to argue that the concept of isolated autonomy is not enough – that the idea that autonomy must be exercised individually is biased towards (white) men, is illusory, and is unproductive.65 It is biased towards white men because it is based on a history of male decision-makers subjugating others, largely women (and men of colour), and ignoring the contributions that these subjugated ‘others’ make that are essential for the effective decision-making of men. This is exemplified in the support required for an individual’s health, wellbeing, and home to run smoothly in order to create the space for decision-making. It is illusory because the reality is that we are all intertwined, and our decisions are dependent upon the decisions of one another – both because we all require support in multiple areas of our lives in order to have space to make decisions and because even our thoughts are not wholly independent thoughts – they are continually influenced by others and shaped by our experiences and relationships with others (including the world around us). If this relational aspect of autonomy is not recognised, seeking ‘independent’ autonomy is unproductive because you are seeking something that does not exist and is impossible to accomplish.

We are arguing that the recognition of legal personhood is essential for the recognition of an entity’s autonomy and for the freedom for that entity to exercise that autonomy. We are also arguing that the recognition of an individual’s personhood and autonomy are essential for overcoming relationships of dominance with both other individuals, legal entities, as well as the state. Finally, we are arguing that the recognition of personhood and autonomy only has the power to overcome dominance if it is conceived of as shared – if there is an understanding that we simultaneously exist as both individual entities and as part of a whole. Our personhood and autonomy are our own, but they are also intricately tied to those around us and the systems that we live within. This is true for every entity. However, it may be particularly important in the context of disability, nature, and other historically marginalised individuals and entities that have experienced profound domination by other individuals, groups, and entities.

In this section, we have explored the ways in which formal recognition of legal personhood has been an important step for both people with disability and natural entities in pushing back against entrenched modes of dominance and dependence. However, we have also highlighted the continued necessity of relying on others to give full effect to personhood in different contexts. Making sense of this apparent tension between independence and reliance on others requires us to acknowledge that autonomy is inherently relational.

IV. Relational autonomy as a means of expressing legal personhood

Toward the end of the last century, a historical discussion re-emerged within the anthropological community debating the concept that personhood is a relational as opposed to an individual construct. This discussion emerged from a desire of feminist theorists and anthropologists to address Geertz’s claim that the ‘Western conception of the person is … a rather peculiar idea within the context of the world’s cultures’.66 These discussions primarily centred around Confucian and Buddhist concepts of personhood, whereby the individual is seen as existing in relation to and inextricably bonded with ‘the other’.67 The family, community or village is seen as central to the person.68 These scholars argue that the individualised (as opposed to collective) self is a western postmodern construct and is not generally desired in more socially interdependent cultures. Adopted by feminist theorists, the concept of relational personhood or relational autonomy was born, promoting the idea that it is ‘the group’ that shapes the personhood and personal identity of an individual.69 Moreover, it is ‘the group’ that supports, and collaborates with the individual to achieve personal agency, a concept at the heart of personhood.

These concepts are also reflected in Article 12 of the CRPD. Paragraph 3 of Article !2 requires that state parties to the convention provide access to support for the exercise of legal capacity. This paragraph is the first time that a human rights instrument has explicitly acknowledged that legal personhood is relational – that we all exercise our personhood in relation to those around us. Paragraph 4 also requires that any mechanisms related to the exercise of legal personhood must respect the rights, will and preference of the individual. This is revolutionary because it recognises that the right to legal personhood and agency is an individual right and that the individual is entitled to protection for his or her will and preference. However, it is simultaneously recognising that legal personhood can be exercised via relationships with others – and that there is a state obligation to ensure that every individual has access to such relationships. This goes beyond the conception of relational personhood identified by the anthropological community, because it embraces the western concept of an individual right to personhood – however, it requires recognition that individual personhood is inherently relational. This revolution has significant implications for marginalised communities because they are the individuals who often utilise support for the exercise of legal personhood (often because their marginalisation and domination has left them in positions without individual power and a need to depend on others, as described above). In addition, the effective use of such support has the potential to elevate marginalised groups by facilitating their exercise of legal personhood and, thereby, potentially mitigating some of the dominance that they are experiencing. In these ways, ‘relational personhood’ has the power to achieve greater equality for marginalised groups.

A. People with disability

A focus on this notion of relational personhood and autonomy highlights the need not only to explore the role of the ‘other’ in realising an individual’s personhood, but the nature of the relationship between individuals. As we acknowledged above, the mere dependence of a person with disabilities on others (either because of severe disabilities, or through a combination of disability and socially constructed constraints) can give rise to situations of dominance, leading to disempowerment and dehumanisation. One of the reasons for this is inherent to the concept of ‘guardianship’ and its assumption that the guardian can act in the best interests of the individual. By articulating those ‘best interests’ as distinct from the will and preference of the individual, guardians are encouraged to substitute their interpretation of the best interests of their wards. This substitution becomes especially likely in situations where communication between guardian and ward is extremely limited, such as in cases of severe physical and/or intellectual disability. As Watson and colleagues noted:

when a person with severe or profound intellectual disability’s right to personhood is respected, the very practical issue of communication challenges for people with severe or profound intellectual disability remains. These challenges exist specifically in relation to having their expressions of preference acknowledged, interpreted and ultimately reflected in decisions made about them.70

How can guardians avoid this substitution, and become an effective mechanism for giving effect to the full personhood of their wards? In 2017, an exploration by Watson and colleagues of the importance of relational closeness between people with severe intellectual disability and their support network has revealed important insights into how to solve this problem. Relational closeness is a measure of the intimacy of a relationship between an individual and members of their ‘circle of support’ (Figure 1).71 An intimate relationship includes ‘knowledge of the person’s life story, enjoyment of their company, and a willingness and ability to see the person “beyond their disability.”’72

[CHART OMMITTED]

Watson et al. found that there was a strong link between communicative responsiveness and relational closeness, and that this played an essential role in the realisation of autonomy and legal personhood for human beings, particularly those with severe cognitive disability.73 At the centre of these findings is the notion that a person’s autonomy and therefore personhood is heavily reliant on the ability of other(s) to respond to a person’s expression of will and preference. Watson et al characterise responsiveness as a complex process made up of several distinct tasks, including the ability to acknowledge, interpret and act on communication in multiple forms (verbal, behavioural, and via body language). Supporter responsiveness is most likely to be highest in relationships characterised as ‘intimate’, as this enables the supporter(s) to develop an understanding of the multiple forms of communication, particularly when these are non-verbal. Watson et al describe the actions of responsive supporters of individuals with disabilities as follows:

Supporters acknowledge/notice, as opposed to ignore, expressions of preference; they interpret these expressions of preference, assigning meaning to them; and they act on this meaning.74

They further argue that:

It is via this focus on determining the will and preference of the focus person by supporters, that people with severe or profound intellectual disability can achieve decisions that encompass their preferences.75

In addition, Watson et al focus on the role of the supporter(s) as the key component that is ‘amenable to change’, as opposed to the expression of preference by the individual with disability. This not only removes the burden of doing additional work to give effect to their own personhood from the shoulders of the person with disability, but is also consistent with a social model of disability, where the ‘onus of change is not on the person with a disability, but rather, the environment of which they are a part’.76 Watson’s work has also included the creation of training packages to further assist supporters in harnessing their relational closeness to become effective and responsive supporters of decision-making by people with disability.77 This emphasis on the role of supporters also points to a role for the state in ensuring that people with disability can give effect to their full legal personhood. Given the central importance of relational closeness and circles of support to the expression and implementation of an individual’s will and preference, it becomes incumbent on the state to enable and support relational closeness as a key strategy for legal personhood.

This body of work provides a strong basis for the important role a close and responsive relationship may play in realising legal personhood not only within the context of human relationships, but also those between humanity and nature. Just as an exploration of relational closeness between people with severe intellectual disability and those close to them has revealed a pathway to legal personhood for people traditionally denied such status, so too may an exploration of the relationship between humanity and nature.

B. Nature and natural entities

Recognising natural entities as legal persons and the subject of legal rights increases their legal powers, whilst at the same time, collapsing the notion of a mountain, a river, a national park, a non-human species, or all of nature into an atomistic, individual actor within the Euro-Western legal framework. Mary Graham describes this unmoored state as the ‘fearful freedom’ of the individual, in which each ‘discrete individual then has to arm itself not just literally against other discrete individuals, but against its environment’.78 Giving force and effect to the legal rights of nature thus requires institutional capacity (organisation, funding, human resources) to ensure that the rights of nature are defended from encroachment. However, mere capacity to perform these functions will not be sufficient to genuinely represent the interests of natural entities in Euro-Western legal frameworks. As we explored above, autonomy and personhood are dependent on the person’s will and preference being understood by others. As Vanessa Watts explains, ‘it is necessary to tease out what the land’s intentions might be, and how she tries to speak through us’.79

Although we acknowledge the important distinctions between natural entities and human persons, the findings from Watson and colleagues’ work with persons with disabilities described above are also significant for the rights and personhood of natural entities. Watson and colleagues position the relationship between the person seeking agency, and the individual or group supporting them to realise it, as fundamental to legal personhood. So then, what are the ideal characteristics of this autonomy enhancing relationship, and how can they be replicated within the context of the relationship between humanity and the natural world?

At the centre of Watson and colleagues’ findings is the notion that a person’s autonomy is reliant on a supporter (representative) or support network’s ability to embark on a complex process of responding to that person’s expression of will and preference. As described above, this process of responsiveness can be understood as three distinct tasks: acknowledgment of an expression of will and preference, interpretation of that expression, and finally, the acting on that interpretation. Responsiveness depends on a high degree of intimacy in the relationship between the autonomy seeker and their support network, which is most likely to be present when several key conditions are met.

One of these conditions is a relationship that exists physically, in a person’s physical presence, acknowledging the importance of the ‘here and now’. The idea of relational closeness being rooted in the ‘here and now’ resonates with what Mihnea Tănăsescu describes as the ‘ontological relationality’ of place-based Indigenous cosmologies.80 He further describes this concept by saying:

[i]n relational ontologies it is this land, here and now, specific to a location and a people, that acts and is therefore given voice through particular partnerships with particular people, who themselves take their character from the land.81

Another condition of relational closeness that Watson and colleagues found to be essential to supporting autonomy was a genuine sense of reciprocity, and the notion that a relationship is mutually beneficial. Watson () found that where a supporter and the person being supported appeared to enjoy one another’s company on an equal basis, the supporter/representative was more likely to be responsive to the person’s expression of will and preference, in terms of their acknowledgment, interpretation and action. Linda Te Aho, writing explicitly of Māori cosmologies, explains that for Māori, ‘rivers are inextricably linked to tribal identities’.82 Tikanga (laws and practices) ‘recognised that if the people care for the river, the river will continue to sustain them’,83 introducing elements of both agency and reciprocity into the relationship between people and rivers, which echo ideas reflected in Watson and colleagues’ research.

There are two immediate implications of relational autonomy (and the corresponding need for relational closeness) for giving effect to the rights of nature. Firstly, the relationship must be specific, between nominated individuals and local, place-based understandings of nature. In the case of Ecuador, the rights of nature created in the Constitution ‘encourage the inauguration of nature as a legal person who, by virtue of its intrinsic characteristics, can have a representative relationship with anyone’.84 As a result, it is difficult (if not impossible) to avoid the problem of substituting the representative’s will and preference for that of the natural entity. Kauffman and Martin, in their analysis of the successful government-initiated ‘rights of nature’ cases in Ecuador note that:

[s]ometimes, these [cases] are motivated by instrumental policy considerations directed by President Correa, while other times the Ministry of Environment simply invokes [rights of nature] to justify routine administrative actions.85

Although the success of these cases may help to substantiate the concept of nature having legal rights, they can also act to undermine the autonomy and personhood of nature, by implying that anyone is able to speak and act on behalf of nature in Ecuador: ‘the relationship between the thus-created legal person and any group is left wide open’.86 This situation is in stark contrast with developing supported decision making practice, designed to enhance human autonomy, which calls for specific relational support, characterised by someone who knows the person they are supporting intimately. Alternatively, the situation in Ecuador can be compared with the relationships in both in Aotearoa New Zealand and Colombia. In Aotearoa, as Tănăsescu notes, the ‘Te Urewera Act creates Te Urewera as a legal entity and establishes a relationship of representation between this entity and a particular Māori group’, the Tūhoe.87 Similarly, Te Awa Tupua (Whanganui River) reflects a specific relationship between the river and the Whanganui iwi, with both the New Zealand government and iwi responsible for appointing the two members of Te Pou Tupua (the face of Te Awa Tupua).88 Tănăsescu argues that the ‘Ecuadorian rights of nature seem to derive most of their force from being embedded in a constitutional provision, while Te Urewera draws strength from the fact that it has appointed representatives’.89

In Colombia, the court acknowledged the special relationship between the communities along the Río Atrato, and that these communities received special protections in Colombian law (due to their status as Indigenous peoples, or descendants of former slaves). Although the court originally nominated the Ministry for Environment as the guardian of the river, the appointed river guardians now include one man and one woman from each of the seven villages along the river, reflecting the deep and ongoing relationships between the river and the people who live along it.90

The second implication of relational autonomy for rights of nature is that this relationship should be active and contemporaneous, as a ‘particular connection with the land is as good as the practices that keep it alive’.91 For Indigenous peoples, the processes of colonisation interrupt ‘our ability to communicate with place’.92 Although the history of the relationship remains, colonisation can erode awareness and understanding of laws and cultural protocols, so that this communication and understanding of the land’s agency must in some cases be re-learned and re-activated. In the case of Te Urewera, the supporting strategy document, Te Kawa o Te Urewera, ‘sets out from the beginning to be a philosophical guidebook in finding one’s way in building [and re-building] relationships with the natural world’.93

As the examples from Aotearoa and Colombia demonstrate, there is a role for the law in defining, and supporting, the specific, active relationships between people and nature, and emphasising relational closeness as the necessary element for giving full effect to legal personhood for nature. Tănăsescu argues that:

the Te Urewera Act constitutes, in my view, the most significant innovation in nature’s representation so far, precisely because of the minimalist grant of legal entity status and the determined focus on representative arrangements. Te Urewera, in contrast to nature’s rights in Ecuador, is a particular place that enters into anthropomorphic relations with particular people, now potentially empowered to reinvent future relationships which can unsettle the definition of what constitutes a human as much as what constitutes ‘nature’.94

V. Relational personhood: a new conception of legal personhood

The essence of our argument is that personhood is never independent. Personhood for every individual and natural entity is reliant upon and supported by their environment, relationships, and power dynamics. We are arguing that liberal political theorists in the Euro-western world were wrong to conceive of the legal person as an isolated, atomistic individual. However, we are also arguing that they were correct to conceive of legal personhood as an individual right that has the power to overcome hierarchies of domination and social marginalisation. As such, our conception of legal personhood is one of relational personhood that attaches to the individual or entity and connects them to the world around them. In other words, we believe that it is critical that humans (and, increasingly, natural entities) have a right to be recognised as individual legal persons. We also believe that the law should recognise that the exercise and expression of that legal personhood is often, if not always, a relational process whose success is heavily dependent upon the individual or entity’s environment, relationships, and socio-economic position.

In this paper, we have developed the concept of relational personhood as a way of broadening and deepening our understanding of personhood in general. In addition, we use this concept as a way of explicitly identifying how to give personhood full force and effect, particularly for non-verbal communicators (such as some persons with disabilities, or natural entities such as rivers). Relational autonomy is a mechanism by which individual rights can be operationalised. For clarity, we are not arguing here for the creation of group or community rights (although we also acknowledge that this may be occurring in the field of rights of nature), but about how those individual rights can be operationalised.

We find the work of Watson and colleagues to be instructive in demonstrating the practicality of identifying and creating relationships of sufficient closeness and understanding that they can be a means of giving expression to a communicator who is expressing their will and preference nonverbally. For many people with disabilities, this is essential for the operationalisation of their personhood: rather than privileging the decisions of a guardian acting in the ‘best interests’ of the person, it is now feasible to acknowledge a special relationship as a means of expressing the will of the person directly. This empirical work shows that there is a genuine alternative to substituted decision-making, and shows how the identified indicators could become part of a recognised legal framework.

We also acknowledge that in itself, this recognition of the ‘special relationship’ does not solve the problem of dominance or potential abuse of power. Merely because a relationship is close does not necessarily ensure that the relationship will be one of mutual benefit. However, the concept of relational autonomy requires us to focus not only on the relationship, but to see the relationship as a means towards giving effect to autonomy. The concept of relational personhood explicitly acknowledges that we are all of us in relationships, and that these relationshisps can be both barriers to, or expressions of, our individual personhood. By bringing these relationships to the fore, we can explicitly identify (and strengthen) the indicators of relational autonomy, and acknowledge and address relationships that undermine autonomy. Every person is vulnerable to relationships of dominance, and rather than relegating such discussions to special circumstances of vulnerability, the concept of relational personhood places this analysis front and centre for all legal persons.

Extending rights to natural entities was historically constructed as an individualised creation of personhood to effectively achieve Christopher Stone’s three elements: legal action at its behest, the consideration by the court of injury to nature itself, and that any relief goes to the benefit of nature.95 However, although an individualised concept of personhood for nature can formally address these three elements, they can only be effectively achieved via the actions of a representative who can understand and act on the expressed preferences or interests of the natural entity. We argue here that relational closeness is the only way to achieve this outcome, by enabling the representative to communicate with the natural entity, as well as facilitating the communication of the natural entity with the rest of the world, including the court system.

As Martuwarra River of Life et al (this issue) describe, the legal personhood of natural entities requires a new, fit-for-purpose form, which they define as an ‘ancestral being’, leaving open the question of precisely which rights and powers would accompany this status in law.96 The ancestral being concept is another way of describing ‘relational personhood’, as the purpose of ‘ancestral’ is to formally acknowledge the interconnectedness between humans and natural entities. Some natural entities have received a recognition in law as a ‘living entity’ rather than a legal person,97 which in the absence of the rights and powers of personhood, depends even more heavily on this relationship, and the willingness of representatives to act.98

There are no easy answers to the question of how we can know what a natural entity’s will and preference is. But relational personhood shows that there is a way to combine autonomy and power (which natural entities may need in order to be protected within Western legal frameworks) with the close relationships of interdependence and interconnection necessary to give expression to nature’s rights and interests. Considering this from an explicitly pluralist perspective also emphasises the laws and protocols that Indigenous peoples have developed over tens of thousands of years in partnership with the world around them. Relational personhood can thus be a powerful tool for an anti-colonial form of environmental protection.

## Legalism

### NEG---Top Level

#### Articulating rights claims in terms of legal personhood results in legal disembodiment.

Miguel Vatter & Marc de Leeuw 19, Vatter is Professor of Politics at Flinders University, Australia; De Leeuw is Senior Lecturer at the Faculty of Law at UNSW Sydney, “Human Rights, Legal Personhood and the Impersonality of Embodied Life,” Law, Culture and the Humanities, SAGE Publications, 06/16/2019, p. 1743872119857068

I. Introduction

Since Locke, the concept of person has been closely linked to the idea of a subjective natural right and, later, to the concept of human rights.1 Human rights, in this view, are grounded in moral-legal notions like the dignity or the autonomy of the human person.2 In this article we attempt to trouble this connection between humanity and personhood. For legal personhood is also a power dispositive,3 whose unquestioned adoption prevents human rights from being the kinds of rights possessed by “all human beings simply in virtue of their humanity.”4 In the first half of the article, we identify a fundamental problem in the usual way human rights are connected to the device of legal personhood. While human rights are intended to offer protection to the “precarious” reality of human embodied life,5 we hypothesize that the fiction of legal personhood generates a dis-embodiment whereby this human life is left exposed and defenseless. In the second half, we propose reconstructing the idea of legal personhood with insights drawn from the political anthropology of embodied life and from critical race theory, so that it may be more adequate to the required conception of human rights.

The claim that moral-legal construals of personhood do not give due consideration to the dimension of embodiment is not unprecedented. Feminist jurisprudence has historically found the connection between rights and persons understood as owners of their (and not only their) bodies problematic.6 Ronald Dworkin also argues for a legal standpoint beyond the person when theorizing “life’s dominion” in law. In particular, he calls for the recognition of both the claim of intrinsic value of life as zoe and the dignity of an autonomous life as bios, thereby employing a distinction also found in the discourse on biopolitics.7 In this article, we discuss Roberto Esposito’s recent biopolitical critique of personalism as it applies to human rights discourse. For Esposito, the device of legal personhood “appears to be an artificial screen that separates human beings from their [human] rights” by reducing their embodied life to a thing without claims to rights.8

We then suggest that an alternative bio-political conception of the person need not have the alienating consequences envisaged by Esposito and can be helpful to reconceive an account of human rights beyond legal personhood. To do so, we present the account of human embodiment and personhood that the German philosopher Helmuth Plessner formulated in a critical engagement with the existential Dasein-analysis developed by Martin Heidegger during the same years.9 In this account, personhood does not turn embodied life into a thing to be possessed because it is conceived from an “impersonal” or third person perspective on embodied life as the subject of human rights. In this way, the need for human rights emerges from the embodied character of human personhood.

Plessner developed his political anthropology during the same years that the racially supremacist thanatopolitics of Hitlerism was coming to power. Plessner criticized Heidegger’s analysis of Dasein on the grounds of its Eurocentrism: this analysis inevitably brought up the “typical traits of life that govern ‘our’ existence, the existence (Dasein) of Europeans.”10 He opposed Heidegger’s approach by starting from the principle of the “unknowability of human beings” and what human beings are still capable of becoming. “Only insofar as we take ourselves to be unknowable, can we give up the standpoint of supremacy against other cultures seen as barbarian and simply other, and we can renounce the mission against foreigners as if they come from a not yet redeemed, immature world. Only in so doing can we open up the horizon of our own past and present to a form of history that is broken up by the most heterogeneous perspectives.”11 In this sense, Plessner’s political anthropology of embodiment has some unsuspected affinities with the kind of postcolonial philosophical anthropology developed by Sylvia Wynter, for whom “the West, over the last 500 years, has brought the whole human species into its hegemonic, now purely secular … model of being human” and the task is “to replace the ends of the referent-we of liberal monohumanist … with the ecumenically human ends of the referent-we in the horizon of humanity.”12 The last section of this article proposes a reading of Ta-Nehisi Coates’s account of racialized disembodiment in Between the World and Me in light of Plessner’s political anthropology and its “horizon of humanity.” We seek to test the hypothesis that a discourse on human rights can be reconstructed by giving a new anthropological basis to legal personhood such that it corresponds better to the desideratum of critical race theory that we stop “seeing race biologically, and as part of a natural hierarchy” in order to “reconceptualise it so it refers to one’s structural location in a racialized social system.”13

II. The Fiction of Legal Personhood and the Paradox of Human Rights

John Dewey begins his famous essay on legal personality as follows: “The survey which is undertaken in this paper points to the conclusion that for the purposes of law the conception of ‘person’ is a legal conception; put roughly, ‘person’ signifies what law makes it signify.”14 Personhood in law is a legal construction. This is a tautology, but one rife with implications. As a construction, legal personhood is certainly fictional and allowing for either natural personhood (i.e., a human being) or artificial personhood, as in the case of a corporation.15 Yet the fiction of legal personhood becomes indisputably real within the legal system. We pose the question of whether the price paid for the reality of the legal fiction is a self-referential insulation of the legal person from embodiment and biological life; if so, this form of personhood is problematic from the perspective of human rights.

### AFF---Answers

#### The concept of rights does not have an oppressive essence; violent material manifestations are the issue. But structuring resistance around negating rights claims misdirects activist energies and is self-defeating because it empowers crackdowns.

Paul O’Connell 18, Reader in Law, SOAS University of London, “On the Human Rights Question,” Human Rights Quarterly, vol. 40, no. 4, Johns Hopkins University Press, 11/14/2018, pp. 962–988

These, then, were the main lines of the CLS critique of human rights developed in the 1980s. For a variety of reasons, among which we could number the fall of the Berlin Wall and the triumph (in the forms of Clinton and Blair) of Third Way liberalism, these critiques of rights did fall somewhat out of fashion. However, following the election of George W. Bush as president of the US and the illegal US-led invasion of Iraq, a new wave of human rights critiques emerged. One prominent account was articulated by David Kennedy, who argued, following in the CLS tradition, that:

Even very broad social movements of emancipation—for women, for minorities of various sorts, for the poor—have their vision blinkered by the promise of recognition in the vocabulary and institutional apparatus of human rights. They will be led away from the economy and toward the state, away from political/ social conditions and toward the forms of legal recognition.84

For this and other reasons, Kennedy concluded, reluctantly, that human rights and the extant human rights movement might, on balance, “be more part of the problem in today’s world than part of the solution.”85

Similar misgivings about human rights have been expressed by another prominent international lawyer, Martti Koskenniemi; for him, one of the fundamental problems with human rights is that it is a language which can be mobilized by both sides in any given dispute or argument.86 As a result, the value of human rights language in effecting meaningful change is undermined and, for Koskenniemi, individuals and movements should look to other languages, such as economics, to advance their causes.87 With Kennedy and Koskenniemi we have a restatement of key elements of the earlier CLS critique, namely that rights are indeterminate and do not touch the real, material causes of injustice and inequality. From Wendy Brown, and others, we also get a restatement of the idea that human rights are problematic because they entrench forms of individuality and subjectivity which, on balance, tend to sustain the status quo. 88 Likewise, Zizek and others argue that the language of human rights mainly provides an ideological apologia for Western imperial interventions around the world.89 In this way, “human rights practice essentially results in both the reproduction and strengthening of the very state-governing apparatuses it confronts, and as a result ultimately undermines its own aims.”90 From all of this, it follows, that movements for fundamental social change should be skeptical of and eschew the language of human rights, and instead should focus on other emancipatory discourses.

C. The Limits of Critique

The first thing that needs to be said about these critical accounts of human rights is that they raise crucially important and valid critiques of dominant liberal discourses of human rights. With that said, these critiques also fall short in several important ways. Three of the main shortcomings in these critiques are: (i) the overemphasis on the dominant narrative of human rights; (ii) the idealistic nature of the critiques (in the sense that they are, in the first instance, an engagement with and critique of ideas and concepts in the abstract); and (iii) the divorce of this critique from concrete struggles. Each of these shortcomings, more pronounced in some cases than others, reduces these critical accounts to a sort of radical quietism; a stance which decries the extant order, without conceiving or countenancing any meaningful alternative.

The indeterminacy critique, highlighting the atavistic forms of individuality at the heart of mainstream accounts of human rights and the cynical deployment of human rights to justify imperialist depredations, are all valid. The problem, however, is when these legitimate critiques of liberal/dominant rights discourses evolve into a rejection of rights as such. It is undeniable, as Blackburn puts it, that human rights are cynically deployed for “greatpower ends,”91 that liberal rights discourse entrenches a truncated form of individuality,92 and that rights are not the neutral, determinate rules that liberal legalism pretends they are.93 All of this, however, merely demonstrates the inaccuracy of the self-perception of dominant human rights discourses, and says little or nothing about how movements striving for fundamental social change can or should engage with the language and concept of rights as such.

Tied to this one-sidedness is the idealistic character of these rights critiques. In a rather scathing manor, Anthony Chase highlighted this shortcoming in the context of the first wave CLS critique of rights in the 1980s. As Chase sardonically put it:

Nothing is more striking about the literary criticism approach than the unwillingness or inability of its practitioners to provide concrete historical and sociological studies of instances where the “self-confidence” or “self-activity” of radical social movements (whether in the Americas, Europe, Africa, Asia, or the Middle East) have actually been “crushed”, not by arduous working conditions or impoverization, not by the inability of civil society to impose civil rights and liberties against state power, not by police surveillance or death squads, not by famine or inadequate public health services, not by the dull necessity of economic reproduction, not by armed invasions, prison and torture cells, or “surgical air strikes” against villages and cities, but, rather extraordinarily, by the central target of CLS critique: appellate judicial reasoning in the liberal mode. The enormous emphasis upon and exclusive focus given to the rhetoric of judges in (apparently) maintaining empires, civilizations, and the fabric of societies, has made CLS a unique form of social theory (if one may call it that), in existence hardly anywhere outside of the cloistered legal academy.94

Though caustic, Chase’s insight is valid and important. It is not the language of human rights that sustains the extant social order, though it can and does play a part in the broader ideological apparatus, but an array of material relationships. Critiques of rights in the broad CLS tradition routinely lose sight of this, and become trapped in a hall of mirrors where the enemy is a discourse, rather than the material relationships that structure discourses one way or another.95

Finally, then, these critiques are lacking because they are divorced from concrete struggles and the ideas which animate such struggles. So, for example, it is true to say that rights can have myriad different meanings in the abstract, but in concrete cases they are given a specific meaning. This meaning is fought over and determined in and through social struggles, which sometimes make their way to the rarefied environs of the courtroom, but are not limited to this. The critique of rights, in the abstract, loses much of its veracity and efficacy when the messiness of political and social struggles have to be accounted for. One way, then, in which the shortcomings of human rights, rightly highlighted by these critiques, can be addressed, is through embracing a substantive political or social vision of change. As Morton Horwitz argued, the “most promising way to ensure that rights may be used on behalf of the socially weak, and to mitigate . . . undesirable long-term risks of rights conceptions, is to ground rights theory in a substantive conception of the good society.”96

In a similar vein, Karl Klare, reflecting on the CLS tradition after the collapse of the Berlin Wall, argued that “perhaps the best conclusion is that rights discourse needs to be transformed, not abandoned; that its individualism should be tempered by an infusion of communitarian and egalitarian values; and that rights discourse must be made more sensitive to issues of gender and cultural difference.”97 Divorced from concrete struggles and visions of an alternative world, critiques of rights end up accepting, much like the theories they critique, the extant, capitalist order as their perennial premise.98 In the next section, we will see how, by shifting our understanding of rights and situating it within the broader, emancipatory theory of Marxism, it is possible to mobilize the language of rights without succumbing to the siren call of liberal legalism.

#### Incremental assertions of rights are necessary for broader systemic critique. Oppositional framings and zero sum thinking are worse.

Ayten Gündoğdu 18, Tow Associate Professor for Distinguished Scholars in the Department of Political Science at Barnard College, “On the Ambivalent Politics of Human Rights,” Journal of International Political Theory, vol. 14, no. 3, 10/2018, pp. 367–380

Human rights and the heterogeneous practices of emancipation

Human rights turn democratic politics into “a theater of contestation,” Claude Lefort argues, because they “go beyond any particular formulation which has been given of them” and contain within them “the demand for their reformulation” (Lefort, 1986: 258). The books under review share Lefort’s crucial insight that the political function of human rights cannot be limited to their legitimation of sovereign power. To the extent that the human rights discourse renders the concept of “humanity” indeterminable and opens it to political contestation, it contains within it possibilities of challenging existing power relations and established understandings of rights. But how can human rights be mobilized so that they contest and transform dominant political and normative orders instead of reinforcing them? And how does the critical theorist differentiate between the “emancipatory” and “hegemonic” articulations of human rights? What kinds of criteria, if any, could one use in making such judgments?

Among the works under review, Hoover’s Reconstructing Human Rights is the one that is most emphatic about the need to understand human rights in terms of “a democratizing ethos of disruption and change” (2016: 77). It is also the only book that discusses in detail how a collective political struggle can invoke human rights for the purposes of contesting “the coordinates of sovereign authority and political membership” (2016: 148). Focusing particularly on ONE DC, a grassroots organization advocating for fair and affordable housing and the preservation of historically black neighborhoods in Washington, D.C., Hoover challenges some of the conclusions in criticisms of human rights, particularly Wendy Brown’s argument that the hegemonic language of human rights has displaced “dissonant political projects” that “may offer a more appropriate and far-reaching remedy for injustice defined as suffering and as systematic disenfranchisement from collaborative self-governance” (Brown, 2004: 461–462). In response to such criticisms, Hoover points out that the struggles that demand housing as a human right in Brazil, South Africa, and the United States, among other places, do not simply appeal to the state to remedy a rights violation or plead for inclusion in the existing order. They articulate much more radical demands that reframe “housing as a right rather than a commodity” (Hoover, 2016: 190), criticize “larger economic and legal structures” of property ownership (2016: 201), “[reclaim] collective democratic agency” (2016: 199), and support “a more substantive vision of justice” and “an alternative political subjectivity” (2016: 205).

Similar radical possibilities can be found in Golder’s discussion of Foucault’s efforts to articulate a right to suicide. When liberal theorists defend such a right, they approach it primarily as a matter of striking a balance between the state’s interest in the preservation of life and the individual autonomy to choose one’s manner of dying (Golder, 2015: 130). As a result, they fall short of challenging the biopolitical power that the governmental and medical authorities exercise in regulating life and death (Golder, 2015: 130, 131). Golder shows how Foucault diverges from such a liberal approach and appropriates the rights discourse subversively for the purposes of envisioning new forms of subjectivity that could resist biopolitical governance. Refusing to proceed with the highly medicalized framework of assisted suicide, Foucault instead invites rethinking suicide as “an aesthetic and creative act” (Golder, 2015: 133), perhaps even a “heterotopic experience” (Golder, 2015: 134), that could open up “a space for a kind of ethical conduct, or self-transformation” (Golder, 2015: 133). Foucault’s proposals to stage different imagined encounters with death, including suicide festivals, point to “a highly individualized” form of resistance, as Golder recognizes (Golder, 2015: 137). Arguably, such proposals could validate the critics who highlight the depoliticizing risks of privileging “the care of the self” as the primary site for resisting existing forms of power (e.g. Myers, 2013: 21–52). In response, Golder represents Foucault’s defense of a right to die as a performative political act that “prompt[s] us to rethink how we are led to live [our lives] under biopolitical care” (Golder, 2015: 137). Foucault’s critics may still have objections, but more importantly for the purposes of this essay, given the tendency to see rights in individualistic terms, it would have been perhaps a more persuasive move to illustrate the potentially subversive effects of rights with a collective political struggle that contests the biopolitical regulation of life and death.

Similar to Hoover and Golder, Perugini and Gordon also challenge overwhelmingly negative critics of human rights and argue for the need to recognize the possibilities of mobilizing human rights as “a counterhegemonic and counterdominant discourse” (Perugini and Gordon, 2015: 129). They only briefly allude to such possibilities, however, as they mention the Boycott, Divestment, Sanctions (BDS) movement at the very end of the book, without detailing how it “deploys human rights alongside discourses of antiracist, anticolonial, and antiapartheid popular inclusion” (Perugini and Gordon, 2015: 138). But they emphasize that human rights can be reconnected to their “emancipatory legacies” only by adopting “a nonlegal perspective” that breaks away from the reformist strategies of remedying “the institutionalized excesses of oppressive legal regimes” (Perugini and Gordon, 2015: 136, 137). Human rights litigation ends up “oiling an unrecoverable apparatus of injustice,” Perugini and Gordon seem to suggest, whereas a non-legal emancipatory struggle would instead strive to “create new political communities based on justice” (Perugini and Gordon, 2015: 138).

This last point, read alongside the arguments of Golder and Hoover, raises the question of how the critic differentiates between the “emancipatory” and “hegemonic” uses of human rights. All the authors would probably agree with Golder that the critic “is located immanently within the social field and so is necessarily invested and implicated in the object under critique” (Golder, 2015: 36). But at times the critic seems to be elevated above that social field, adjudicating on rights claims and struggles on the basis of certain assumptions about what counts as “democratizing,” “emancipatory,” or “counterhegemonic.”

To give some examples, Hoover’s analysis often pits “universal,” “general,” and “abstract” principles against “particular,” “situated,” and “lived” experiences of political subjects (e.g. Hoover, 2016: 46–47, 60–61, 86–87). Such oppositions frame his critique of universalistic theories as “forcible imposition[s]” that distort the “lived experience” of marginalized communities (Hoover, 2016: 87, 86). But if certain strands of universalism fail to attend to how rights struggles may involve community-based claims that exclude the oppressors from their scope for the purposes of countering historically rooted forms of oppression (e.g. Hoover, 2016: 47, 54), Hoover’s account risks underemphasizing that such struggles also involve universalizing, generalizing, and abstracting moves, as can be seen in ONE DC’s demand for “universal housing.”1 Perugini and Gordon are right to highlight that human rights cannot, and should not, be reduced to their legal codifications, but their insistence on “a nonlegal perspective” (2015: 136) risks disregarding legal efforts that could involve “strategies of rupture,” to use a term proposed by Emilios Christodoulidis (2009) and discussed by Golder (2015: 124–125). Such strategies could mobilize an immanent critique of law for the purposes of making it more responsive to forms of violence that would otherwise be invisible or unintelligible within its “economy of representation” (Christodoulidis, 2009: 5). Finally, in discussing Foucault’s refusal to use the language of rights to oppose the death penalty, Golder argues that a “tactical” invocation of rights in that context would have called for prison reforms but fallen short of the “strategic” goal of prison abolition. But this conclusion risks “subsum[ing] local, tactical interventions under a totalizing theory of the social whole,” to recall Foucault’s own critique of Leninism (Golder, 2015: 124). Following Foucault’s argument that strategy can only be built from local, tactical interventions (Golder, 2015: 124), we could note, for example, how the language of human rights has been mobilized by organizations such as the Human Rights Coalition and the Abolitionist Law Center in the United States to reframe the pervasive rights violations within prisons as systemic problems inherent to the American penal system.2

As this brief discussion highlights, various rights struggles call into question the binaries of universalizing/situated, legal/nonlegal, tactical/strategic, which shape the conclusions of the accounts under review, and bring to view heterogeneous understandings and practices of “emancipation” in human rights politics. Particularly when human rights are mobilized for the purposes of challenging existing relations of power, they appear to result in an ineluctably impure politics, one that may also complicate, and even defy, what critics take to be “democratizing,” “counterhegemonic,” and “emancipatory.”

Conclusion

In her interpretation of Sophocles’s Antigone, Judith Butler draws attention to the impurity that characterizes languages of resistance: “[A]s Antigone emerges in her criminality to speak in the name of politics and the law,” Butler (2000) argues, “she absorbs the very language of the state against which she rebels, and hers becomes a politics not of oppositional purity but of the scandalously impure” (2000: 5). Butler’s description of Antigone’s resistance aptly captures various human rights struggles that put universality to imaginative uses in particular contexts, incorporate ruptural legal strategies for making claims that challenge existing juridical orders, and destabilize the distinction between reformist tactics and emancipatory strategies. This point is very much in line with the arguments that Golder, Hoover, and Perugini and Gordon make about the ambivalent politics of human rights, but it also pushes their conclusions further by urging scholars to pay closer attention to the heterogeneous practices of “emancipation” in political struggles that contest established orders of rights, articulate new conceptions of equality and freedom, and redefine what it means to be “human.”

#### Legalism is not the issue with rights claims. Legalistic arguments complement pragmatic ones in propagating acceptance of rights norms.

Dustin N. Sharp 18, Associate Professor at the Joan B. Kroc School of Peace Studies at the University of San Diego, “Pragmatism and Multidimensionality in Human Rights Advocacy,” Human Rights Quarterly, vol. 40, no. 3, Johns Hopkins University Press, 2018, pp. 499–520

I. INTRODUCTION

Recalling the ancient if apocryphal Chinese curse, these are truly “interesting times” for human rights. Only several short decades ago, there was general faith that the global spread of liberal democracy and human rights was inevitable. It was not a question of “if,” but “how” and “when.”1 Today, democracy is in retreat in numerous countries around the world, and trust in democratic institutions is eroding, even in some consolidated liberal democracies.2 Alongside this assault on democratic norms, we bear collective witness to wavering commitments to the rule of law and human rights. Whether it is death squads in the Philippines, US drone strikes around the world, or the carnage in Syria, powers small and large appear to act with total impunity when it comes to established international human rights law and the laws of war.3 Meanwhile, books are published predicting the “endtimes” or “twilight” of human rights,4 and there seems to be a more general anxiety about the ability of what Louis Henkin once called “the idea of our time”—human rights—to shape a better world.5

For human rights advocates and institutions, the contemporary global climate for human rights and the attendant sense of human rights pessimism raise hard questions about how to respond. How do we account for flagrant flouting of established norms, even in countries that have at times championed human rights?6 Does the human rights “idea” need fundamental reconfiguration?7 Should advocates keep the faith and double down on existing strategies for change-making, honed in the euphoric post-Cold War world, or are more radical adaptations required to address the landscape of the twenty-first century? While the bigger empirical picture may not be dismal,8 neither have the last few years been a happy time for human rights and international justice advocates—to say nothing of the victims of abuses—and the recent backsliding provides a critical opportunity for taking stock and looking forward.

Constructive prescriptions for change depend in large part on an accurate diagnosis of the underlying problems. For the most strident pessimists, the human rights idea is fading in part because its positivist legal dimensions have been overemphasized, and have ultimately failed to constrain power when it counts the most.9 In this telling, human rights are now entering a twilight phase because their proponents have exhibited excessive inflexibility and absolutism, seemingly incapable of adapting themselves to the complexity, variability and diversity found in the world.10 Advocates have been too apt to dogmatically assert and reassert the law, and too little inclined to seek to persuade the unpersuaded and to engage with the hard business of governance involved in creating a world where the realization of human rights principles is realistically possible.11

If this is the correct diagnosis, it might seem reasonable to say that the remedy should involve some kind of pivot to more flexible and less rigidly legalistic approaches under the banner of “pragmatism,” or perhaps to abandon human rights law altogether in favor of something radically different.12 But what does it really mean to be “pragmatic” in human rights advocacy, and is it really true that the law-centricity of human rights thinking and practice has been so much a “part of the problem”?13 Rather un-pragmatically, the authors of recent human rights jeremiads calling for change and pragmatism have been rather long on critique and short on details as to what such new approaches might entail, and the literature in this area is fairly thin.14

In this article, I will argue that we should be cautious both in assuming that human rights advocates have not been pragmatic, and that the failures of human rights can be attributed to blinkered legalism. Even if more flexible and less law-centric approaches to human rights can play a useful role going forward, a heavy shift in emphasis to such approaches would come with costs and tradeoffs that are also important to assess. The concept of human rights is fundamentally multidimensional, oscillating between moral, legal, and political domains from which it draws its collective power. Each dimension offers possibilities for advocacy and action. De-emphasizing the legal dimensions of human rights to place greater weight on political or moral dimensions might make sense in some contexts, but not in others. The essence of human rights pragmatism involves weighing the costs and benefits of a particular vocabulary and set of strategies against alternatives in a particular context. For this reason, a truly pragmatic turn in human rights will not involve categorical sensibilities about the value (or lack of value) of law-centered approaches in all times and places, but will instead emphasize the specific opportunities and advocacy hooks available in a particular context, whether moral, legal, political, or otherwise.

This article will continue with five additional sections. In section two, I outline the recent wave of human rights pessimism and associated calls to shift the focus of human rights thinking and practice. In section three, I explore the multidimensionality of human rights—outlining the moral, legal, and political dimensions of human rights as a heuristic aide to facilitate discussion of potentially shifting emphasis and strategies. In section four, I explore what a pivot away from stricter, law-centered approaches might look like, sketching out ten illustrations. In section five, I analyze the potential costs associated with both over and under-emphasis of the various dimensions of human rights, including possible tradeoffs associated with a pivot away from the legal dimensions of human rights. Section six concludes the article.

II. HUMAN RIGHTS PESSIMISM AND CALLS TO “PRAGMATISM”

The post-9/11 world has provided ample grist for the mill for the human rights pessimists of the world. From the fall of the Twin Towers to the ascendency of Trump Tower, it is easy to feel that the “age of rights” is in decline.15 Anecdotal evidence is not in short supply. Cases by the International Criminal Court have imploded rather spectacularly in Kenya, have died of neglect in Darfur, and for a time, an African exodus from the Court seemed plausible.16 The current president of the United States was elected on a platform that included the reinstatement of torture and the rejection of refugees on a religious basis, amongst other things.17 European countries have shown reluctance if not outright refusal to adhere to obligations under the Refugee Convention.18 Civilians are openly slaughtered in Syria, Yemen, and elsewhere with the full knowledge of all, and the support of great powers.19 The Arab Spring, which initially seemed to echo the “third-wave” of democratic transitions of the 1980s and 1990s20 fizzled, save in the lone case of Tunisia.21 Meanwhile, muscular authoritarianism has been growing in Poland, Turkey, Hungary, Russia, the Philippines, and elsewhere.22

To be sure, the plural of anecdote is not data, but the impression of backsliding that the onslaught of news stories seems to convey has certainly contributed to a growing sense of human rights pessimism.23 In 2017, Foreign Policy published pieces entitled “We Are on the Verge of Darkness” by Kenneth Roth, executive director of Human Rights Watch, and “Welcome to the Post-Human Rights World,” by Sebastian Strangio.24 While some of this might be attributed to the anxiety brought to a head by the 2016 US presidential election, human rights pessimism had been growing prior to the phenomena of Trump, Brexit, and Le Pen. In 2013, Stephen Hopgood published the provocatively-titled book, The Endtimes of Human Rights. 25 Not to be outdone, Eric Posner followed with The Twilight of Human Rights in 2014.26 These works were preceded by, and in Posner’s case partially inspired by, an emerging body of empirical work suggesting that ratification of human rights treaties too often yields disappointing results.27

A common thread that unites many human rights pessimists is a general skepticism about the ability of law to foster positive change for human rights, and an argument that rigid, law-based approaches need to give way to alternatives that are more flexible, pragmatic, or otherwise less law-centered. Eric Posner, for example, concludes that human rights law has failed to improve respect for human rights because the law is weak, vague, and inconsistent, and because people and states ultimately do not care enough about violations to meaningfully address the existing limitations on legal enforcement.28 Posner therefore advocates abandoning the “utopian aspirations of human rights law” in favor of the experimentalism and empiricism of developmental economics.29 (Ironically, development is a field plagued with its own sense of pessimism and crisis).30 Stephen Hopgood skewers the arrogance of what he calls “Human Rights” (capital H, capital R)—the global system of formal laws, courts, and organizations.31 At the same time, he appears to hold out some hope for “human rights” (lowercase h, lowercase r)—the struggle of activists everywhere to combat violence and deprivation using a variety of “flexible and negotiable” vocabularies and strategies of emancipation.32 In the realm of transitional justice, itself beset by a sense of crisis,33 Jack Snyder and Leslie Vinjamuri, argue that advocacy groups suffer from a “fundamentally flawed understanding of the role of norms and law in establishing a just and stable political order,” effectively putting the legal cart before the political horse.34 Instead, they argue that strategies of justice should be “shaped by pragmatic bargaining rather than by rule following.”35 Even Philip Alston, himself no human rights pessimist, has suggested that we need to relax strident insistence on some legal principles in the international justice arena.36

Taken together, these scholars suggest that human rights and international justice need a course correction that would push law and associated international institutions out of the foreground in favor of more open-ended and negotiable approaches thought to be more “pragmatic.”37 And yet if, following David Kennedy, the essence of human rights pragmatism is the weighing of the costs and benefits of the vocabulary and strategies of human rights against alternatives,38 several problems emerge. First, even with the food for thought they have provided, human rights pessimists have done very little to develop much in the way of concrete alternatives, or to think through the costs and benefits of the alternatives, such as a turn to developmental economics, that have been proffered. Second, it is far from clear that human rights law is as useless and blameworthy as suggested. Posner, for example, reserves a special scorn for what he calls “rule naïveté”—a simplistic faith in a sort of magic legalism.39 Yet this is more of a straw man than a depiction of the attitudes of modern-day human rights advocates, many of whom have a far more nuanced understanding of the limitations of the law needed to produce social change than is suggested.40 Similarly, the question of whether human rights laws and prosecutions have made an empirical difference is highly contested. There are in fact ample grounds for optimism,41 even if what Philip Alston has called “the populist challenge to human rights” remains startling and sobering, serving to dampen some of that bigger picture optimism.42 Therefore, before throwing out the baby with the bathwater, true pragmatism requires a fuller weighing of the costs and the benefits of limiting or abandoning law-centered approaches to the realization of human rights, and a more detailed examination of the costs and benefits of potential alternatives. The concept of human rights is fundamentally multidimensional, offering multiple bases on which to ground advocacy efforts in addition to law. In the following section, I will explore this multidimensionality as a prelude to developing and evaluating some possibilities for less law-centric approaches to human rights advocacy.

III. THE MULTIDIMENSIONALITY OF HUMAN RIGHTS

It is easy to furnish one-dimensional caricatures of human rights. To some critics, human rights express a naïve and utopian legalism, a faith unsupported by experience in the power of rules to constrain power and act as the “gentle civilizer of nations.”43 To others, human rights are primarily a function of hegemony, an expression of politics and power that serve to give a new lease on life to the historical civilizing mission of the West.44 To others still, they are “nonsense upon stilts,” mere moral aspirations without enough teeth to give them reality.45 Despite the occasional tendency to elide complexity, the human rights idea simmers and bristles with varied impulses and contradictions. It is less a monolith than a heterogeneous composite of a number of moral, legal, political, cultural, religious, and philosophical traditions that continue to evolve and interact over time, and which are both a function of and partially constitutive of the chaotic kaleidoscope of global politics. There is therefore an inherent polyphony and multidimensionality to the human rights idea. Simplifying this multifaceted nature somewhat, a Venn diagram illustrating the overlaps between the moral, legal, and political dimensions of human rights serves as a heuristic aide to facilitate discussion of contemporary dilemmas, strategies, and priorities, including those inherent in calls to “pragmatism” or away from legalism.

## Race

### NEG---Top Level

#### The category of legal personhood is circumscribed by Western man – the aff’s idea that “personhood” is what grants legal recognition belies their investment in antiblack notions of the human

Bergner 19 – Associate professor of English at West Virginia University.

Gwen Bergner, “Introduction: The Plantation, the Postplantation, and the Afterlives of Slavery,” *American Literature*, vol. 91, no. 3, September 2019, pp. 448-451, https://read.dukeupress.edu/american-literature/article/91/3/447/139934/Introduction-The-Plantation-the-Postplantation-and.

Poststructuralist theory’s critique of the West’s supposed rational social organization challenged conceptions of the subject. If the modern state is structured by its power over life and death rather than its composition by a polity of autonomous subjects amalgamated through collective rationality, then what of “man,” its ideal citizen? The Enlightenment conception of man as a rational, conscious individual produced the subject of human rights and democratic citizenship; however, this ostensibly universal category in fact distinguished white men from those considered irrational, primitive, and ignorant of the rule of law—including women, blacks, and other nonwhite peoples. In the 1990s a burgeoning posthumanism critiqued the modern conception of the human as a historically contingent construct rather than transcendent truth (see, e.g., Jackson 2013: 671–73). This line of inquiry is usually traced to poststructuralist critiques of epistemological certainty, but anti- and postcolonial writers such as Frantz Fanon, Aimé Césaire, and later Sylvia Wynter had since the mid-twentieth century noted that the category of man is circumscribed by its foundational role in the modern Enlightenment project that gave rise to colonial slavery. This other genealogy provides a crucial corrective to posthumanism’s continued investment in Western rationality and hierarchies of knowledge. We ask how a racially aware posthumanism illuminates what we mean by Black Lives Matter and why we still need to declare it.

As we reconsider the time and space of the plantation from beyond the liberal humanist idiom, we must guard against “reductive claims” of dehumanization that “obscure more nuanced argumentation” about the ways that racist ideologies construct and sustain hierarchical relationships among humans (DeLombard 2018: 805). As Jeannine Marie DeLombard explains, “Far from denying black humanity, slaveholders extracted profit from recognizing and exploiting that humanity” (800). Conversely, it was the slave’s status as both human and property that made slavery abhorrent to abolitionists and unassimilable to our notions of humanness today. How to account for the compatibility of human and property status in the racial ideologies of the plantation slavery era? Bearing in mind this important caveat to distinguish between the liberal humanist subject man, which excluded people of African descent, and the species category of the human, which did not, we might ask, How did eighteenth- and nineteenth-century law and science, as mechanisms of biopower, divide the human species into hierarchically arranged racial subcategories to enable slavery and its legacies?

Taking my cue from DeLombard’s study of nineteenth-century slave law in this issue, I would like to consider briefly the example of Supreme Court chief justice Roger B. Taney’s opinion in Dred Scott v. Sandford (60 U.S. 393 [1857]), which famously held that people of African descent in the United States were considered “so far inferior that they had no rights which the white man was bound to respect” (407). Though reviled in the annals of Supreme Court history, the farreaching decision reflected the position of the pro-slavery faction leading up to the Civil War.2 On the issue of citizenship, Taney ruled that people of African descent, even if freed or born to free parents, cannot become citizens of the United States or find protection under the provisions of the US Constitution. They form no part of “the political body” (404) because the “degraded condition of this unhappy race” (409) proves its exclusion from “universal” (407) conceptions of civilized man and, therefore, from the founding documents’ declarations of the rights of man. For though the Declaration of Independence’s statement that all men are equal and endowed with unalienable rights “would seem to embrace the whole human family . . . it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people” (410). In other words, though this race is human, its members are not among the men referred to by the declaration. Further, the Constitution establishes “the negro race as a separate class of persons, and show[s] clearly that they were not regarded as a portion of the people or citizens of the Government then formed” (410). Taney thus codifies the exclusion of black people from liberal humanism’s man to compromise their legal personhood.3 This reading of the nation’s founding documents renders people of African descent bare life. They exist in a permanent state of exception outside the political body of the sovereign state and subject to the “absolute and despotic power” (409) of the state.

Furthermore, in the hierarchy of human races, the “negro African race” (406) is different from other races not only in degree but also in kind. For “this population was altogether unlike the Indian race” (403) and “the subjects of any other foreign Government” (404) who may become naturalized US citizens.4 Though Taney considers the “uncivilized” Indians “a free and independent people, associated together in nations or tribes and governed by their own laws” (403), he recognizes no such existence for the “negro African race” prior to or apart from slavery.5 Slavery’s mark is eternal because in colonial law black people “were never thought of or spoken of except as property” (410), and those who had been emancipated were “regarded as part of the slave population rather than the free” (411). Moreover, “no one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise” (411). In thus canonizing the natal alienation of US slavery, Taney reserves this special unassimilable status for this “subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority” (404–5). The opinion thus works through a tautology whereby members of one race were imported as slaves due to the race’s inferior status, and its inferior status is proved by the fact that its members are slaves. The tautological reasoning required to rationalize liberal humanist democracy’s relegation of only one race to the status of human-as-property, such that its property status is tantamount to its human status, blurs the boundaries of humanity even as it upholds the claim that (white) man is but a subset of the species.

#### Aff is undergirded by the politics of institutional recognition – their presumption of a malleable “personhood” that can remedy dispossession thru liberal rights claims ignores the singularity of gratuitous violence

Winters 17 – Alexander F. Hehmeyer Associate Professor of Religious Studies and African and African American Studies at Duke University.

Joseph Richard Winters, “Blackness, Pessimism, and the Human,” *Black Perspectives*, 5 September 2017, https://www.aaihs.org/blackness-pessimism-and-the-human/.

There is a specter haunting black studies, black freedom struggles, humanism, and the politics of recognition. This recalcitrant specter currently dons the name “Afro-pessimism.” Its ghostly presence refuses to be exorcized or conjured away by invocations of racial progress and the promise of American democracy, or by appeals to iconic black figures (like the Obamas) who supposedly demonstrate that black bodies have been included, albeit uneasily, within the elastic domain of the Human. Afro-pessimism is indebted to authors like Frantz Fanon, Saidiya Hartman, and Hortense Spillers, and contends that there is a fundamentally antagonistic relationship between blackness and the Human. While the pessimist can acknowledge change and variation over space and time within the racial order, s/he denies that these factors alter the constitutive quality of the Black/Human antagonism. The Human is a domain that will always mark black people as sub-human or not quite human. In what follows, I am not interested in corroborating or disproving the arguments put forth by the Afro-pessimist. Hasty subscriptions to or reflexive dismissals of Afro-pessimism tend to miss an opportunity for patient, receptive engagement with the stakes and implications of this burgeoning discourse. Consequently, I am more interested in tracing the widespread assumptions and tenacious commitments—occasionally shared by black studies, liberal democracy, and critical theory—that the Afro-pessimist puts into play, exposes, and disconcerts.

What exactly is Afro-pessimism? Who are its proponents? While several authors currently identify with the Afro-pessimist position (Jared Sexton and Calvin Warren, for instance), Frank Wilderson has provided the most acute and well-recognized definition of the term. In his incisive text Red, White, and Black: Cinema and the Structure of US Antagonisms, Wilderson writes, “The Afro-pessimists are theorists of Black positionality who share Fanon’s insistence, that though Blacks are sentient, the structure of the entire world’s semantic field…is sutured by anti-black solidarity” (58). According to this description, the domains of meaning, grammar, and law are defined over and against the black body, which came into being through the gratuitous violence of kidnapping, the Middle Passage, and slavery. The Afro-pessimist contends that humanism incorrectly assumes that all forms of suffering can ultimately be redressed and overcome through the grammar of rights, respect, and compassion. To the contrary, Wilderson contends that humanism cannot acknowledge “an object who has been positioned by gratuitous violence—a sentient being for whom recognition and incorporation are impossible” (55). In other words, humanism is blind to its own condition of possibility because the coherence of the Human relies on the exclusion of blackness. There is no grammar for black suffering within humanism because humanism treats suffering as contingent and resolvable through the process of assimilation. This familiar stance cannot register the constitutive quality of anti-black violence, which is a condition that can only be eliminated, according to Wilderson, by bringing about the end of civil society as we know it.

Perhaps what is so powerful—attractive to some, repulsive to others—about Wilderson’s formulation is how it compels us to re-examine pervasive assumptions about race, black struggles for freedom, history, and human recognition. For clarity, I break these assumptions into three parts: the politics and grammar of recognition, the Human as a site of racial transcendence, and the relationship between structure and agency.

It is very difficult to talk about the strivings of excluded groups apart from the politics of recognition. Persecuted communities are required to articulate their grievances and aspirations through the language of recognition, a predicament outlined by the German philosopher G.W.F. Hegel. In his oft-cited description of the Master/Slave relationship, Hegel suggests that antagonistic, hierarchical relationships can be overcome through struggles for mutual recognition. Mutual recognition is the capacity of two or more people to see themselves as participants in a shared ethical and political life. Instead of seeing each other in a hostile, contentious manner, mutual recognition occurs when individuals see themselves in others and vice versa. This mutual acknowledgement is possible because of collective norms and practices, and the general realization that individual lives depend on the broader social world for survival, affirmation, and ethical formation.

While this sounds encouraging, Wilderson maintains that this domain of mutual recognition depends on a fundamental barring of black bodies. He claims that “Whereas Humans exist on some plane of being and thus can become existentially present through some struggle for, of, or through recognition, Blacks cannot reach this plane” (38). This plane of recognition is anti-black. Eric Garner experienced this throughout his life and in his last breath. His chokehold killing at the hands of police officers was deemed legal and appropriate, indicating a long-lasting antagonism between the law and blackness (the law reproduces itself through the surveillance and containment of blacks). Some even refused to blame Garner’s death on the violent actions of the police officers and instead blamed his obesity, demonstrating how the “excessive” black body eludes everyday practices of recognition and compassion.

The assumption about the viability of mutual recognition, which is contested by the pessimist, dovetails with enduring desires for racial transcendence. Whether one believes that we live in a post-racial world or not, the transcendence of racial difference supposedly occurs when we embrace our common humanity. According to this view, race is merely an illusory social construct that hampers people’s ability to acknowledge similarities across racial lines. When someone claims, “I am part of the human race” or “All lives matter,” the assumption is that the Human is a universal, all-accessible category. In other words, the Human is an inclusive category while the invocation of blackness is divisive. Following Fanon, the pessimist reminds us that the Human is also a divisive modern construct that emerges alongside racial formations. More specifically, the qualities of the ideal Human—reason, freedom, property, accumulation—are defined in opposition to certain kinds of undesirable characteristics and positions—wildness, excess, slavery, and the vagabond. Consequently, the Human that imagines itself settled and standing his/her ground (George Zimmerman) is justified in attacking a black body that seems out of place (Trayvon Martin), that is wandering aimlessly and “up to no good.” While Wilderson can concede that the Human, as the domain of recognition, has assimilated formerly unrecognized groups and communities, he suggests that the very process of becoming Human requires an acceptance of anti-blackness. Therefore, there are structural limitations to the inclusivity of the Human.

#### The perm sucks – even radical visions of “personhood” presume that personhood is what should matter in the first place

Guha-Majumdar 19 – PhD candidate in political theory at Johns Hopkins University.

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Despite similar objects of critique, antiracist and antianthropocentric scholarship have not always traveled well together. A central tension revolves around the post- in posthumanism. Some critics— especially those inspired by Sylvia Wynter’s work, which charts the colonial emergence of the Western figure of “Man”— charge that the attempt to go beyond or after “the human” moves too quickly over the plight of those never considered properly human in the first place. To throw out human-centered concern risks prematurely pulling in a life preserver for marginalized humans just when they may need it most. It risks treating humanity as a monolithic agent of violence, overlooking the multiple ways of being human concealed by hegemonic conceptions of the human. Zakiyyah Jackson, in a review of texts also examining the intersection of race and posthumanism, argues that instead of taking “‘the human’s’ colonial imposition as synonymous with all appearances of ‘the human,’ there is a need to “reimagine ‘the human’ as an index of a multiplicity of historical and ongoing contestations.”7

Part of the problem stems from the way posthumanism has come to describe many diverse schools of thought—from cyborgs, to transhumanism, to new materialism, to animal studies, to object-oriented ontologies, to plant theory—even though one major critique of anthropocentrism has been precisely that “the” nonhuman is not singular but an incredible multitude of beings. Another problem is lexical: humanism is already a vexing and polysemous term, and the prefix post- only compounds the trouble. Cary Wolfe, prominently associated with posthumanism, has noted that the term is not about being posthuman at all, in that it does not seek to transcend human embodiment, but is rather posthumanist, in that it “opposes fantasies of disembodiment and autonomy” inherited from humanism. Moreover, it is not straightforwardly after humanism but also before it, in that it names humanity’s embeddedness in a material and technical world before the emergence of a historically specific concept of Man.8 Nonetheless, it is difficult to escape the semantic residue implied in post-, and critics are correct to note that any account of the emergence of humanism that omits the role of slavery and colonialism misses a crucial, transformative element. Perhaps, following Jackson’s call to attend to the multiple contested histories of the human, the way to think together critiques of the human that come from the situations of both marginalized humans and nonhumans is to attend to their relationships in specific, critical historical contexts rather than try to settle the question of “the human” from afar.

Joining the debate, Boisseron’s, Johnson’s, and Ellis’s texts all respond to an impasse that often occurs when questions about animals and slavery arise. As Claire Jean Kim puts it, mainstream animal rights scholarship often deploys slavery analogies comparatively rather than relationally, in ways “symptomatic of an antiblack order that depends upon denying the singularity of racial slavery and confining it in the distant past.”9 Boisseron’s Afro-Dog draws on Che Gossett’s work to describe this move as the “sequential” idea that the animal is the “new black” (ad, xxi). Johnson’s Race Matters, Animal Matters calls this move a politics of “extensionism” (rm, 4–5). On the other side of the analogical coin, the idea that slavery treats the enslaved “like animals” is one of the most common articulations of slavery’s essential violence. This description can be helpful if we consider the ways nonhumans too are “animalized,”10 but it raises further questions: What does it mean to be treated like “an animal”? Is that the same as how they should be treated, and does that make a difference? Is being treated like “a human” the opposite of being treated like “an animal”? At stake are fundamental questions about the precise character of humanism and liberal personhood’s violence and exclusions.

Writing in the wake of a problematic history of comparison between animals and the enslaved, these authors do not treat slavery’s dehumanization of Homo sapiens as a mere symptom of anthropocentric violence. At the same time, they recognize and avoid the way that claims for liberation sometimes presume proximity to animals as an inherent state of ontological degradation. Boisseron and Johnson are wary of what Cristin Ellis’s Antebellum Posthuman terms “a politics of recognition” (ap, 4), which aims to secure acknowledgment of a being’s humanity or other proper moral status. For them, slavery presents an important site for redefining the structure of human/animal opposition altogether. Speaking to this relationality, Boisseron’s text uses the figure of the “Afro-Dog” to give an account of animality and blackness in the black Atlantic. The “Afro-Dog” suggests the variety of relationships between black people, dogs, and other animals, as well as the system of domination that often pits them against each other. Boisseron explicitly contrasts her approach with a comparative, analogical one, but maintains that these connections cannot be ignored, “if only because [they reveal] a long-standing trend in American and transatlantic consciousness to associate blackness with animality” (ad, xi). Thus,

the question should not be whether the once chattel slave should claim his humanity. . . . The question is rather how the once chattel slave may be in the best position to challenge this so-called humanity and, in the process, redefine the meaning of existence beyond the human-animal divide. In other words, how can the black diasporic subject in the Americas abide by a different set of identifications, one that would not consist of refuting a putative inhumanity, since such regulation validates the accepted (racially invested) norm of humanity’s signification? (ad, 90–91)

#### Blackness is a form of personhood constructed by its subordination to Whiteness---the concept of legal personhood is a Racial Contract that positions Blackness as non-human and devoid of legal protections---this framework is used to stratify and solidify racial castes

Marissa Jackson Sow 22, Assistant Professor of Law, St. John’s University School of Law, “Whiteness as Contract”, St. John's University School of Law, 2022, 78 Wash. & Lee l. Rev. 1803

Blackness as Existential Purgatory

The impact of the Detroit water shutoff program on the lives of the Detroiters subjected to disconnections reveals the narratives—mostly of Black women—whose existences are suspended between the human and the non-human animal, or somewhere between life and death. It is a settled fact that human beings cannot survive without water and cannot thrive without clean running water.141 It is equally settled, in the human rights canon, that human beings have a right to water.142 In Detroit, homes subjected to water disconnections risk referrals to Child and Family Services because homes lacking running water are considered unsafe for children.143 But no such right to water is recognized in the United States, which has been used to justify the water shutoff program by Detroit’s local government as well as the federal court presiding over Detroit’s municipal bankruptcy.144

Prior to Governor Whitmer’s institution of a temporary moratorium on the shutoffs in March 2020,145 Detroiters were forced to survive for months, and even several years, without water because of the City’s extremely high water and sewage pricing.146 One elderly woman, who had been without water for two years, described saving up enough coins to wash her clothes at the laundromat every couple of months and only flushing her toilet after bowel movements.147 Of her plight, she said, “You use your brain. You scramble. You survive because you’re used to dealing with nothing.”148 Another woman, Mattie McCorkle, described the experience of filling up buckets of water at a car wash for months to bathe herself and her three children as if she were “less than a person.”149

The treatment of Detroiters like Ms. McCorkle by their local governments begs the question: In a society where all people are guaranteed equal rights under the law, are Black people really people at all? Bernadette Atuahene and Timothy Hodge underscored the centrality of property to personhood in their work on the property foreclosure scandal in Detroit by mentioning that foreclosure has “injurious emotional, social, political, and cultural consequences” as well as financial impact.150 Of the relationship between home ownership and personhood, Atuahene and Hodge note, “When the home is foreclosed upon, a family loses more than an economic asset; their personhood is also impacted.”151 There are political ramifications bearing on personhood too, because ownership of “property serves as a bulwark against state encroachment on individual autonomy.”152 Ms. McCorkle’s feelings of sub-humanity, then, stem from the fact that the deprivation of an essential utility—itself property, and also inextricably linked to the habitability of her real property—stripped her of social, political, and even natural personhood by the state.153

Commissioner Welch’s views on race and personhood were not only a reflection of Justice Taney’s view on Black sub-personhood in Dred Scott,154 but also reflect Homer Plessy’s views concerning whiteness as capital155 and the Supreme Court’s rulings attaching American citizenship to one’s status as either white or Black per the Naturalization Act of 1906. In Plessy v. Ferguson,157 the Court upheld racial segregation by declaring that Black people were “separate but equal”—“tiered personhood”158 that elevated the legal status of Black peoples in the United States while still insisting upon their subjugation.

Though centuries have passed since the Three-Fifths Clause was repealed and replaced by the Fourteenth Amendment, the sociopolitical personhood of Black people in America remains an unsettled question. The legal rights of Black Americans, while solid in theory and codified, are still uncertain in practice. Where rights and remedies are concerned, social contract theory asserts that natural humanity has never been enough. Rights are political constructions, given force by and through law, and most importantly, bargained for by a body politic.159 That Black people have been excluded from the body politic necessarily means that rights that would apply to them on the basis of their natural humanity in theory, do not apply to them in practice.160

Of course, many Black scholars have addressed Black people’s persistent exclusion from full citizenship benefits in the United States (and beyond) despite the nation’s formal commitments to the equality of all citizens under the law.161 Journalist and author Isabel Wilkerson has advanced a theory of race as a mere “visible manifestation” of the nation’s caste system, which concerns power and is perpetuated by division of labor.162 For Wilkerson, the subordination of some people under others is, as Mills posits, about exploitation and domination, but unlike Mills, Wilkerson minimizes race as a sort of discursive crutch that Americans use when they should, in fact, be describing caste.163 While I agree with Wilkerson that white supremacy is sustained by the caste-ing of human beings and that white supremacy has always held wealth extraction and domination as its goals,164 I join the chorus of race scholars who understand that while caste is not necessarily race, race is always caste.165

Atiba Ellis’s theory of tiered personhood posits Blackness as a form of personhood that is subordinated to whiteness but still part of the political and social project.166 Per Ellis, political personhood is a status allowing people to exercise constitutional rights and receive constitutional protections, and a framework for reifying status and stratifying those of certain status and power above or below others.167 Notably, Ellis describes the concepts of personhood and citizenship as conceptually distinct.168 The Racial Contract essentially fuses the two concepts by granting those natural persons raced as white full personhood, citizenship in both the racial state and the racial superstate, and the core rights (of property and contract)—and by stripping those raced as Black of political personhood, citizenship, and rights irrespective of formal legal transformations-as-codified.

Lolita Buckner Inniss also elucidates the dynamics created and exploited by whiteness in her work on white witnesses. For Inniss, white people and men are public people who “deploy power both by observing and by being observed . . . dismantle and erect visual barriers by shaping laws, rules and norms,” while non-white people and non-men are private people “who see little and are little seen.”170 Whiteness requires the relegation of non-white people to private life because the public domain is the political, contracting, and decision-making realm from which non-white people are excluded so that they may be efficiently and effectively exploited.171 By placing Black people outside of the public, they are placed out of the realm of politics even when (or especially if) public law offers a grant of rights and a promise of equal protection of the law.172 The private order can therefore carry forth exploitation and human rights abuses not reached by the law.173 Uncovering abuse and exploitation perpetuated in the private order often requires the act of a public person—for example, white witnesses who record abuses against Black people—to elevate the atrocities experienced by Black people into public consciousness and discourse.174

#### The contract of Whiteness makes itself invisible at will---its signatories believe antiracist acts within the law as breeches to the contract and respond with extralegal violence---Black and Indigenous folks will never be legal persons within the contract and can be massacred with impunity

Marissa Jackson Sow 22, Assistant Professor of Law, St. John’s University School of Law, “Whiteness as Contract”, St. John's University School of Law, 2022, 78 Wash. & Lee l. Rev. 1803

The Racial Contract in U.S. Law: A Construction of Caste and Power

Ta-Nehisi Coates has said that race is “the child of racism and not the father.”51 Race is a social construct, but it is equally, and more consequentially, a legal construct. The theory of whiteness as contract is the theory of an invisible contract, under which Black Americans exist and are policed and governed. Mills understands this contract to be: [A] set of formal or informal agreements or meta-agreements between the members of one subset of humans, henceforth designated . . . as white, and coextensive . . . with the class of full persons, to categorize the remaining subset of humans as ‘nonwhite’ and of a different and inferior moral status, sub-persons, so that they have a subordinate civil standing . . . .52

A common retort to the presentation of the theory of the Racial Contract is that the Racial Contract is not a real contract, but rather a metaphor based in the theory of social contracting.53 Those who offer such rejoinders generally do not believe that social contracts are real, limiting their definition of real contracts to those tangible agreements which are enforceable under the law.54 Other critics will make the case that statutes and constitutions are a “poor excuse”55 not just for contracts, but even for social contracts, as they do not represent the consent of all citizens.56 But Mills’s theory of the Racial Contract is more than a metaphor: Mills discusses a real social contract that creates and employs race to establish and enforce an economic order, and which has at times and in places been enforceable as public, codified law and which has also been enforced within the private and public sectors alike via traditional commercial contracting.57 Social contracting is of intrinsic value when discussing the rights of and relating to property, as the regulation of property is a central goal of social contract theory.58 Under the Racial Contract, all of the negotiating parties are those whose consent matters: those people, raced as white, to whom political personhood and contractual capacity is attributed and who demonstrate their assent to the contracting process by performing the Contract per its terms.59 The concrete consequences of this social contracting for Black people are real, and therefore Black theory concerning the role of social and commercial transacting in the perpetuation of race and racism—which are necessarily disruptive of “classical” knowledge—matters.60 Like Mills, I seek to decolonize social contract theory by applying it to the bargain for whiteness. However, I also assert the applicability of classical contract theory to the construction and negotiation of whiteness and non-whiteness and contend that social and commercial contracting serve each other in maintaining the terms of whiteness as property, as personhood, and as power.

A key contribution of Mills’s theory of the racial contract is its contextualization, if not outright repudiation, of key aspects of Rawls’s idealistic social contract.61 As with so many other critiques of Rawls’s social contract theory, Mills’s theory reveals that Rawls’s ideals—including his veil of ignorance—are no match for human realities such as power and special interests such as racial identity.62 Rawls, of course, envisioned a fair society devoid of inequality of any type.63 He realized that this society did not exist, but he believed it was attainable.64 Indeed, Rawls’s theory of justice envisions a society for which many Americans—and especially non-white Americans—persistently lobby. Accounting for the reality of race requires the decolonization of social contract theory—this means recognizing that the social contract theories of Hobbes, Locke, and Rawls are themselves the products of Western philosophical tradition and, therefore, the products of thinkers who existed (and whose thinking is highly valorized) because they were Western and white.65 Secondly, the decolonization of social contract theory requires the amplification and valorization of thought from non-white thinkers from colonies or the Global South. Said another way, Mills’s theory of the social contract is itself decolonial, and decolonization requires that his theories not be considered marginal with respect to those of Hobbes, Locke, and Rawls, but rather centered as a standard—as the warning warbling of the miner’s canary—by which the theories hailed by colonizing forces are tested and adjudged.66

The United States’ primary social contract—the United States Constitution—established the centrality of property ownership, and necessarily, the right of contract to American citizenship. Black people were formally excluded from these rights, and the terms of the Racial Contract were set forth in law with particular clarity by Justice Taney in the Supreme Court’s decision in Dred Scott v. Sandford.67 He stated, The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?68

Taney’s answer to his own question was emphatically negative. It firmly placed Black people outside of the American political project and franchise. He ruled that American citizenship would remain perpetually out of reach for people of African descent, whether enslaved or free: We think . . . that [Black people] are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.69

With the formal end of chattel slavery came the period of Reconstruction, and with Reconstruction came transformational legislation to formally revoke the racist social contract upon which the Republic had been founded.70 Notably, the Constitution’s Three-Fifths Clause, which expressly quantified Black sub-personhood vis-à-vis white personhood, was replaced with the Fourteenth Amendment—overturning Dred Scott and guaranteeing Black Americans (but not Indigenous Americans) United States citizenship.71 In one of the rare instances in which whiteness is even mentioned in the United States Code, sections 1981 and 198272 established for non-white people the rights to make and enforce contracts, and to property, as “enjoyed by white citizens.”73 This legislation was thorough and clear. For example, § 1981 elaborates that the term “make or enforce contracts” includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship” and that “[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”74

Even as antidiscrimination laws sought to reform Western legal systems, they did little, if anything, to transform the underlying ideologies of white supremacy and the desire to dominate material resources that undergird both. The backlash against Reconstruction-era reforms such as the Civil Rights Act of 1866 was marked by campaigns of vicious violence,75 including lynchings, massacres, and lootings of Black American property and assets.76 The signatories to the white supremacist racial contract viewed antiracist legal reforms as breaches to the contract and always sought to remedy those breaches via legal, illegal, and extralegal means.77

After the Civil War, between 1865 and 1885, tens of thousands of formerly slaveholding American Southerners moved to Brazil at the enthusiastic invitation of Brazilian Emperor Dom Pedro II.78 Slavery would remain legal in Brazil until 1888,79 and Dom Pedro wanted the Americans to bring with them agricultural techniques for growing cotton.80 Still more white American Southerners fled to what is now Belize, but was then British Honduras, forming the Confederate Settlements in British Honduras.81 The British government sold arms to the Confederate states during the American Civil War, underscoring yet again the economic and racial interests at play with respect to the perpetuation of whiteness, particularly across national and colonial borders.82

Ultimately, as this Article contends, the Racial Contract has never been revoked. As a social contract, it uses statutory law, but is not dependent upon it. Signatories to the Contract viewed the Reconstruction-era legislation as a breach of the Contract, and they revolted against the attempts at social transformation: (1) using vicious state-sanctioned white violence to terrorize and kill Black people;83 (2) simply fleeing to other territories in hopes of replicating the same racial and economic order; 84 and (3) replacing de jure racial oppression with de facto racial subordination.85 The Racial Contract, then, transformed itself from a formal contract codified in federal law to an informal contract. The Contract, which was once plainly visible, would become invisible, or semi-visible, as necessary.

White Supremacy and the Terms of Whiteness

Frances Lee Ansley has defined white supremacy as encompassing much more than “self-conscious racism of white supremacist hate groups,”86 classifying it as: “[A] political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”87 Ansley articulates two models of white supremacy in her attempt to account for the persistence of racism and the varied approaches of scholars charting out legal and political strategies for achieving racial justice—the class model and the race model.88 The class model characterizes white supremacy as a system that uses racism as means to justify and secure class dominance and economic power,89 while the race model articulates a system in which all white people, regardless of class, are united in a collective interest to be—and to feel—superior to non-white peoples, both materially and psychologically.

Fusing Ansley’s class and race models, as Ansley herself recommends,91 provides for a model in which people raced as white rely on a shared heritage of imperial or colonial rule to guarantee their exclusive political, economic, and social power. The contracting of whiteness depends on Black and Indigenous labor, innovations, and creative talent, and therefore depends on exclusive control over Black and Indigenous human capital.92 Essentially, white supremacy requires perpetual domination over Black and Indigenous labor and land, first established via the commercial contracting of territory and enslaved human beings.

To maintain this racially-casted domination, signatories to the social contract of whiteness continue to negotiate the terms of whiteness to fight the existential threats to that domination—including the struggle of Black and Indigenous peoples for their own contracting and property-holding authority.93 White supremacy is threatened by the presence of Black and Indigenous peoples on their own native lands with any other status besides the personal property of white people. The historical solution to this problem was dispossession (of land, family, and physical liberty), confinement (to reservations and plantations), exclusion (from the political project, citizenship, legal protections, and privileges), and elimination (via massacres, lynchings, destruction of family structures, and cultural and discursive erasure).94 These mechanisms are regularly employed today, via mass incarceration, immigration policy, gentrification schemes and redlining, the destruction or dispossession of land and community utilities, social murder, and systematic killings.95

The ideology of white supremacy justifies such atrocities as land seizures, enslavements of human beings, and massacres. Those invested in white supremacy came to believe in the truth of that ideology, not only because it served their economic interests, but also because it served their social, psychological, and political interests.96 Colonizers, slave owners, and every other person invested in the maintenance of European-American (physical and political) expansion used philosophy, science, and religion to empiricize—and therefore legitimize—white supremacy, which was meant to legitimize the brutal methods by which the racial state would be established and perpetuated.97 Under this model, the signatories to whiteness had to believe that the sons of Europe were destined and called by God to dominate and order the world as they pleased, and that whatever they did to African and Indigenous peoples—no matter how immoral, destructive, or violent—was good and, more importantly, innocent because African and Indigenous people were not human and could never become political or legal persons with rights.98 This ideology places African and Indigenous people outside of the realm of polities that white men have built around and on top of them, on their soil, and with their forced labor, excluding them from citizenship and the authority to contract, hold, and convey property associated therewith.99