

## LEGAL PERSONHOOD: HOW WE ARE GETTING IT WRONG

ALEXIS DYSCHKANT\*

*This Note argues that lawmakers and judges have not been applying the concept of legal personhood correctly, and should divorce the idea of humanity for the legal definition of personhood. The term “legal person” has long been associated with humanity, and even the paradigm of artificial persons, corporations, relies upon analogizing to humanity. Some humans which have been attributed legal personhood status, however, have comparable abilities to exercise rights and duties as many animals, while other humans have no such abilities at all. This implies that one can have the attributes of legal personhood without being a human being, and one can be a human being without being a legal person. The solution is to divorce the capacities-focused definition of legal personhood from the species-based definition of humanity.*

## TABLE OF CONTENTS

|      |   |      |
|------|---|------|
| I.   | INTRODUCTION.....   | 2076 |
| II.  | BACKGROUND .....  | 2078 |
|      | A. <i>The Legal Person as Human: “Natural Person”</i> .....                                       | 2078 |
|      | 1. <i>Natural Persons as the Model for Legal Personhood</i> .....                                 | 2078 |
|      | 2. <i>Children and Legal Personhood</i> .....   | 2081 |
|      | 3. <i>Fetuses and Legal Personhood</i> .....  | 2082 |
|      | B. <i>The Legal Person as Corporation: “Artificial Person”</i> .....                              | 2084 |
|      | 1. <i>The Role of Humanity in Corporate Personhood</i> .....                                      | 2084 |
|      | 2. <i>Models of Corporate Personhood: Corporations as<br/>        Constituted by Humans</i> ..... | 2086 |
|      | 3. <i>Models of Corporate Personhood: “Human<br/>        Embodiment”</i> .....                    | 2088 |
| III. | ANALYSIS .....  | 2090 |

---

\* 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. I would like to thank the hardworking editorial staff of the University of Illinois Law Review for their dedicated and diligent work editing my piece, especially my note editor Marissa Meli. I would also like to thank my advisers throughout my Ph.D./J.D., Colleen Murphy, Michael Moore, Heidi Hurd, Robin Kar, and Jonathan Livengood, who were instrumental in the development of the account of legal personhood presented in this work. Last, but not least, I would like to thank my family and friends who supported me throughout my legal education, especially my best friends Laura Peet and Sierra Hennings, and my supportive husband, Rizwan Ahmed.

|     |   |      |
|-----|---|------|
| A.  | <i>Humans that Aren't Capable of Holding Rights and Duties..</i>                  | 2091 |
| 1.  | <i>Prerational Humans: Fetuses</i> .....  | 2092 |
| 2.  | <i>Postrational Humans: Comatose Humans as Bearers of Rights and Duties</i> ..... | 2096 |
| B.  | <i>Nonhuman Candidates for Personhood: Animals</i> .....                          | 2099 |
| 1.  | <i>Animals' Capabilities</i> .....  | 2101 |
| 2.  | <i>Animal Capabilities as Analogous to Human Person Capabilities</i> .....        | 2103 |
| IV. | RECOMMENDATION .....  | 2107 |
| V.  | CONCLUSION .....  | 2109 |

## I. INTRODUCTION

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,<sup>1</sup> in order to make contracts or hold property you must be a legal person,<sup>2</sup> and most importantly legal persons are the sole bearers of rights and duties.<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</sup>

This definition reflects a modern trend to associate legal personhood 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 on-*

---

1. See, e.g., U.S. CONST. amend. XIV, § 1 (For example, notice the distinction made between protections afforded to “person” and “citizen”: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

2. See generally Lewis A. Kornhauser & W. Bentley MacLeod, *Contracts Between Legal Persons* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 16049, 2010) (arguing that only persons can contract, and contracts must at least involve natural (or human) persons).

3. See Bryant Smith, *Legal Personality*, 37 YALE L. J. 283, 283 (1928).

4. This definition has a long history in American jurisprudence. See generally JOHN SALMOND, JURISPRUDENCE 318 (Glanville L. Williams ed., 10th ed. 1947) (a person is “capable of rights [and] duties”); Smith, *supra* note 3, at 283 (a person is “the subject of rights and duties”).

5. BLACK’S LAW DICTIONARY 791 (9TH ED. 2009).

ly in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.<sup>6</sup>

Despite this emphasis on rights and duties, legal personhood has been almost equivocated with humanity.<sup>7</sup> Broadly put, any and all humans are persons, and nonhumans are only persons if they are properly analogous to humans. This method of determining legal personhood may be a good heuristic; after all, most of the legal persons we interact with are normal, adult human beings.<sup>8</sup> The definition of legal personhood, however, asks us to identify the capabilities of a creature, not its genetic makeup. When we look at the fringes of humanity—such as fetal life, infant life, and the permanently comatose—and the abilities of higher mammals, we see how the definition of legal personhood is not easily mapped directly onto the category of humanity.

I argue that the lawmakers and judges have not been applying legal personhood correctly—we have been getting it all wrong. If we are to take seriously the importance of legal personhood, we must divorce legal personhood from humanity because accurately identifying who has rights and duties is too important to use a heuristic. “Once we have grasped this thick conception of legal personhood, it should become clear that in an ideal legal system we could not arbitrarily draw a line between humans and animals.”<sup>9</sup> One important and controversial outcome of this argument, which is discussed in more detail below, is that some humans may not be legal persons, and some nonhuman animals may be legal persons.

In Part II, I demonstrate that the term “legal person” is associated with humanity, or the “natural person.” I then show that even the paradigm example of an “artificial person,” the corporation, is only granted personhood status because it is directly analogized to humanity. I use historically important Supreme Court decisions<sup>10</sup> to show that when the issue of personhood arises, the concept of humanity is employed to resolve it. In Part III, I show how some humans which have been attributed legal personhood status, either by state or federal law, have comparable abilities to exercise rights and duties as many animals. A plain reading of the

---

6. SALMOND, *supra* note 4, at 318 (emphasis added).

7. See generally Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 460 (2013) (“[F]uture efforts to determine the boundaries of legal personhood should incorporate human embodiment as a guiding framework for thinking about who ‘counts’ in the community of persons.”); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1285 (1992).

8. Solum, *supra* note 7, at 1285 (“All of the persons we have met have been humans, and the overwhelming majority have been normal humans who give clear behavioral evidence of being conscious, having emotions, understanding meanings, and so forth.”).

9. Carter Dillard, *Empathy with Animals: A Litmus Test for Legal Personhood?*, 19 ANIMAL L. 1, 11 (2012).

10. Some of these cases include *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (concerning corporate personhood); *Cruzan ex rel. Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261 (1990) (concerning the personhood of the permanently comatose); *Roe v. Wade*, 410 U.S. 113 (1973) (concerning fetal personhood).

definition of legal personhood should, at least, make us open to including nonhumans as legal persons. Finally, in Part IV, I argue that we must divorce the capacities focused definition of legal personhood from the species based definition of humanity. One can be a legal person without being a human being, and one can be a human being without being a legal person. Our current practice of first looking for the creature's humanity before attributing personhood is in conflict with the purpose of the definition of legal personhood.

## II. BACKGROUND

In order to evaluate the accuracy and usefulness of the current definition of legal personhood, one must first understand how the current definition is being used. In this section, I explore the categories of "natural person" and "artificial person" and present the explanations for including or excluding entities as legal persons. Because there is no standard for applying the definition of legal personhood at the state or federal level,<sup>11</sup> I generally consider prominent judicial decisions and legislation as adequately representative for my purposes. I argue that most discussions of legal personhood use the adult human as a model for attributing legal personhood to entities.<sup>12</sup> As such, the definition of personhood is applied to nonhuman persons via analogy to the human.

### A. *The Legal Person as Human: "Natural Person"*

#### 1. *Natural Persons as the Model for Legal Personhood*

As stated above, the key feature of a legal person—the ability to bear rights and duties—is commonly associated with humanity.<sup>13</sup> The most common and intuitive definition of a legal person is a natural person or human being.<sup>14</sup> Humans are called "natural" persons because they are persons in virtue of being born, and not by legal decree.<sup>15</sup> Corporations and even inanimate objects, such as ships, have been deemed legal persons by decree, and thus are non-natural.<sup>16</sup> Nonetheless, natural per-

---

11. Tom Allen & Robin Widdison, *Can Computers Make Contracts?*, 9 HARV. J.L. & TECH. 25, 35 (1996) (noting that there is no "single principle" by which the legal system assesses legal personhood).

12. For a variety of descriptions of how attributing legal personhood to nonhumans is based on analogies to humans, see generally George F. Deiser, *The Juristic Person*, 57 U. PA. L. REV. & AM. L. REG. 131, 133 (1908); Kornhauser & Macleod, *supra* note 2, at 4; Matambanadzo, *supra* note 7, at 506.

13. BLACK'S LAW DICTIONARY 791 (9TH ED. 2009).

14. *See id.*

15. *See Solum, supra* note 7, at 1258 (noting that natural persons are persons that are born).

16. Smith, *supra* note 3, at 287.

sons compose the majority of legal persons<sup>17</sup> and have served as a model for attributing legal personhood to non-natural persons.

If an entity, collective, or individual can be regarded as resembling an embodied human being, then it is often accorded a legal status. It is worthy of recognition. If an entity, collective, or individual cannot be regarded as resembling a human being, then its legal status is far more uncertain.<sup>18</sup>

Legal scholars have offered a variety of reasons for this easy association. Lawrence B. Solum argues that the association between legal person and natural person is rooted in our intuitions and experiences.<sup>19</sup> It is only natural that we associate normal human beings with personhood given that we interact with other humans on a daily basis.

All of the persons we have met have been humans . . . it is not surprising that our concept of person is fuzzy at the edges. For most practical purposes, this fuzziness does not get in our way. We treat humans as persons, and we need not worry about why we do so.<sup>20</sup>

The relevant point is that the human being acts as a heuristic, or a practical guide, to spotting other persons. Personhood is a “fuzzy” concept so we rely on our experiences to help us determine what counts as a person, and our experiences are with other humans. It is a system that has served us well in the past, and can continue to act as a general guide for assigning personhood. It is only when entities are not sufficiently like humans that assigning personhood becomes difficult.

However, some argue it is not mere familiarity that accounts for our association between humans and legal persons. Natural persons, then, serve as the basis for all attributes of legal personhood because they are the most important category of person. The U.S. Constitution draws a principled distinction between natural persons and other legal persons, securing some rights for natural persons alone.<sup>21</sup> For example, the Privileges and Immunities Clause of the Fourteenth Amendment applies only to citizens—which are “persons born or naturalized in the United States.”<sup>22</sup> The Privileges and Immunities clause is limited to natural persons because they have “a more robust set of rights than all persons generally.”<sup>23</sup> In fact, some go as far as to say that natural persons are the only persons that truly matter and we only confer personhood to nonnatural

---

17. See Solum, *supra* note 7, at 1285 (explaining why there is a strong association between legal persons and humans. “All of the persons we have met have been humans, and the overwhelming majority have been normal humans who give clear behavioral evidence of being conscious, having emotions, understanding meanings, and so forth.”).

18. Matambanadzo, *supra* note 7, at 460.

19. See Solum, *supra* note 7, at 1285.

20. *Id.*

21. See U.S. CONST. amend. XIV, § 1; Solum, *supra* note 7, at 1239.

22. U.S. CONST. amend. XIV, § 1.

23. Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 341 (2005).

persons when it serves the interest of natural persons.<sup>24</sup> Such scholars suggest that there are only two kinds of legal persons: natural persons (or real persons) and *persona ficta* (or fictional persons).<sup>25</sup> Thus, the distinction between natural person and nonnatural person is not only intuitive, but fundamental for a complete understanding of legal personhood. Bryant Smith argues that too many legal scholars have forgotten that only natural persons exist and assign too much value to other kinds of legal personhood.<sup>26</sup> Through time, the practice of calling nonhuman persons “becomes habitual, the forms grow rigid, the behavior patterns are fixed” but at this point “to work out new forms and theories and processes, would too severely tax the ingenuity of the [legal] profession.”<sup>27</sup>

So, why is the natural person (appropriately or not) the anchor for legal personhood? As described above, a legal person is one that is capable of exercising rights or owing duties, and “[a]ny 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.”<sup>28</sup> It is not that being a human being is necessary for being a person, but that the average adult human is presumed to have the capacity to exercise rights and owe duties. So, if one can make a reasonable analogy from human to some other entity, then one can also reasonably attribute the capacity to exercise rights and bear duties.<sup>29</sup> The image of the embodied human being allows us to “draw[] on shared intuitions about who counts in our community of legal persons and how we should take account of them.”<sup>30</sup> The more like an average, adult human being, the more likely an entity is a person. As I argue later in Part III.A–B, the tendency to equate legal personhood with humanity is so strong that it can lead lawmakers to declare humans to be persons that are incapable of exercising rights or owing duties and refuse to declare nonhumans to be persons that are capable of exercising rights and owing duties.<sup>31</sup>

Given this model—that of evaluating an entity’s potential personhood in light of its similarities to the average, adult human—we can now turn to humans other than average adults that have been granted the status of legal persons.

---

24. See, e.g., Deiser, *supra* note 12, at 133 (“[Non-natural persons] are artificial persons or corporations, and they exist because associations of large groups of men can conduct enterprises impossible to any member of the group as an individual.”).

25. *Id.* at 136 (stating that any nonhuman person is a fictional person).

26. Smith, *supra* note 3, at 294.

27. *Id.* at 287.

28. SALMOND, *supra* note 4, at 318.

29. See Matambanadzo, *supra* note 7, at 506 (arguing that an analogy to the human is the correct way to understand legal personhood for corporate personhood).

30. *Id.*

31. See *infra* Part III.A–B.

## 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 Fourteenth Amendment.”<sup>32</sup> The justification for including illegitimate children 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.”<sup>33</sup> The Supreme Court also held that the Fourteenth Amendment protects children as well as adults.<sup>34</sup> This clearly places children in the category of legal persons according to the constitutional 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 duties. For example, children, although persons, are not bound by contractual agreements<sup>35</sup> and children of a certain age are not allowed to marry although the right to marry is constitutionally protected.<sup>36</sup> There is, however, 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 personhood is not regularly challenged.<sup>37</sup> 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.<sup>38</sup>

---

32. 391 U.S. 68, 70 (1968).

33. What it means to “have their being” is exactly the subject matter of this note. Justice Douglas does little to explain what “having a being” entails for the sake of personhood.

34. *In re Gault*, 387 U.S. 1, 13 (1967) (stating “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”).

35. See RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (“A natural person...has full legal capacity to incur contractual duties ...unless he is...an infant . . .”).

36. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”) (internal citation omitted).

37. For example, see *Garratt v. Dailey*, 279 P.2d 1091, 1093 (Wash. 1955), in which the court does not question whether a small boy is a person for the sake of a battery claim.

38. See *Solum*, *supra* note 7, at 1285 (“For most practical purposes . . . [w]e treat humans as persons, and we need not worry about why we do so.”).

### 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 personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>39</sup> The Court denied fetuses the status of legal persons.<sup>40</sup>

Important to the Court’s analysis is the fact that, as a practical matter, the use of the word “person” in the Fourteenth Amendment generally only has postnatal application with no indication of any possible prenatal application.<sup>41</sup> The presumption seems to be that the rights and 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 attribute personhood to fetuses directly tracks the question of fetal humanity. 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,”<sup>42</sup> “potential human life,”<sup>43</sup> and “potential future human life.”<sup>44</sup> In contrast, states which support including fetuses as persons also refer to the fetus as already human, sometimes at the point of conception.<sup>45</sup> The AMA Committee on Criminal Abortion, which seeks to reduce or end abortions generally, claims that abortion is an “unwarrantable destruction of human life.”<sup>46</sup> Anti-abortion

---

39. 410 U.S. 113, 156–57 (1973).

40. *Id.* at 158 (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

41. *Id.* at 157 (“[T]he use of the word [person] is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.”).

42. *Id.* at 114.

43. *Id.* at 159.

44. *Id.* at 170.

45. *See id.* at 150 (“[S]ome of the argument for this justification rests on the theory that a new human life is present from the moment of conception.”). For a survey of state policies regarding policing abortions and state interests, see ARIZ. REV. STAT. ANN. § 13-3603 (1978); CONN. GEN. STAT. § 53-29 (1968) (repealed 1990); IDAHO CODE ANN. § 18-601 (1948); 720 ILL. COMP. STAT. 510/5 (1975); IOWA CODE ANN. § 146.1 (West 2015); KY. REV. STAT. ANN. § 436.020 (West 1962) (repealed); ME. REV. STAT. tit. 17, § 51 (1964) (repealed 1979); MICH. COMP. LAWS § 750.14 (1948); MO. REV. STAT. § 559.100 (1969); TENN. CODE ANN. § 39-15-201 (1989), WIS. STAT. § 940.04 (1969); WYO. STAT. ANN. § 35-6-102 (1977).

46. *Roe*, 410 U.S. at 142 (internal quotation marks omitted).



states at the time widely had adopted legislation declaring a fetus to be a human life.<sup>47</sup>

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 imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”<sup>48</sup> 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.”<sup>49</sup> 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.”<sup>50</sup> The Court’s discussion of the relevance of viability in *Roe* demonstrates the importance of belonging to humanity. It states that determinations of viability can be framed in terms of when a “fetus became ‘formed’ or recognizably human, or in terms of when a ‘person’ came into being.”<sup>51</sup>

The disagreement about whether to extend personhood to fetuses rest, fundamentally, on how to handle cases at “the raw edges of human existence.”<sup>52</sup> 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 personhood; 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 often 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.

---

47. See, e.g., WIS. STAT. § 940.04 (6) (1969) (defining a fetus as “a human being from the time of conception”).

48. 505 U.S. 833, 846 (1992).

49. Matambanadzo, *supra* note 7, at 506.

50. *Id.* at 460.

51. *Roe*, 410 U.S. at 133.

52. *Id.* at 116.

*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.<sup>53</sup> Corporations can own property, enter into contracts, and sue and be sued.<sup>54</sup> Moreover, corporations are persons for the sake of the Fourteenth Amendment, providing them with the protection of the Due Process Clause.<sup>55</sup> 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 not 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."<sup>56</sup> The Court thought it was so obvious that liberty was a right for natural persons that it was "too plain for discussion."<sup>57</sup>

*1. The Role of Humanity in Corporate Personhood*

Even though corporations are clearly not natural persons, the concept of humanity has been fundamental for attributing personhood to corporations. A concise definition by Justice Story helps clarify why; a corporation "is an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage."<sup>58</sup> First, corporations' "powers" exist in virtue of the natural persons that compose it. The extension of personhood to corporations was described in light of the role of human beings in corporations. Corporations are "constituted by and encompass large numbers of other legal persons," including the natural persons that control them.<sup>59</sup> It is the capabilities of the human beings who control the corporation that actually

---

53. Matambanadzo, *supra* note 7, at 470 (noting that "corporate persons possess numerous settled rights, privileges, and entitlements as juridical persons").

54. *Id.* at 471.

55. See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778–79 (1978); *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 176 (1893) ("The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose.").

56. *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

57. *Id.* ("The liberty referred to in that Amendment is the liberty of natural, not artificial, persons. Nor, in any true, constitutional sense, does the Missouri statute deprive life insurance companies doing business in that state of a right of property. This is too plain for discussion.").

58. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819) (Story, J., concurring) (suggesting that the Court adopt a *persona ficta* view in which we only pretend that the corporation is a person. In any case, its justification as a person (real or fictional) is directly linked to its connection with human bodies, or natural persons.).

59. *Kornhauser & MacLeod*, *supra* note 2, at 4.

constitute the personhood of the corporation. Without a natural person to make decisions and act on behalf of the corporation, the corporation would not be a legal person at all.<sup>60</sup>

Second, in the United States, corporations are legal fictions but are treated *as if* they were real. In the United States and England, lawmakers and legal scholars purposefully distinguish corporations as “artificial persons,” marking them as less real than their natural counterparts.<sup>61</sup> The Supreme Court has maintained that corporations are “paradigmatic artificial ‘person[s]’”<sup>62</sup> and often times refers to a corporation’s personhood in quotation marks (i.e. “person”),<sup>63</sup> emphasizing its merely fictitious application. While human beings are born as persons, such that the law cannot help but recognize them as persons, corporations are merely a legal construct.<sup>64</sup>

In contrast, some countries do not treat corporations as artificial persons, but real legal persons similar to humans.<sup>65</sup> For example, China includes a definition of legal personhood in the General Principles of Civil Law of the People’s Republic of China which states that “[l]egal persons are organizations that have civil capacity, are competent to perform civil acts, and according to law independently enjoy civil rights and assume civil duties.”<sup>66</sup> There is no distinction between natural and artificial persons and, in fact, the type of legal person first listed is an “organization.” There is no mention of a human being in the entire chapter dedicated to defining legal personhood.<sup>67</sup> Likewise, the Italian Constitution includes registered trade unions as legal persons explicitly and makes no reference to their artificiality.<sup>68</sup> In both of these instances, the nations answered the question of corporate personhood directly in their founding documents. This allows for a definitive legal stance on the status of cor-

---

60. *Id.* (emphasizing the necessity of natural persons for interaction with the legal system: “Legal persons act through natural persons. When the legal person is simply a natural person, both action and identification of which acts are attributable to her is relatively straightforward. Many legal persons, however, are complex; they are constituted by and encompass large numbers of other legal persons, both natural and artificial.”).

61. See Deiser, *supra* note 12, at 142.

62. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187–88 (1990).

63. See, e.g., *id.*

64. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”).

65. See Deiser, *supra* note 12, at 142 (describing that in some countries “the corporation is a real person (as in Germany, France, Spain and some other countries)”).

66. General Principles of Civil Law of the P.R.C. Art. 36 (1987) (China).

67. General Principles of Civil Law of the P.R.C. ch. 3 (1987) (China).

68. Art. 39 Costituzione [Cost.] (It.) (“Registered trade unions are legal persons. Being represented in proportion to their registered members, they may jointly enter into collective labour contracts which are mandatory for all who belong to the categories referred to in the contract.”).

porations.<sup>69</sup> The unfortunate silence of the American founding documents<sup>70</sup> as to the nature of personhood leaves no choice but to create a fiction.

## 2. *Models of Corporate Personhood: Corporations as Constituted by Humans*

How, then, is the fiction of corporate personhood explained? Most theories rely on the beliefs, reasons, duties and/or rights of the human beings who make up the corporation. One such explanation, the organizational model, attempts to explain how corporations can be seen to make decisions at all.<sup>71</sup> It models corporate personhood on natural personhood by analogizing human reasoning to the decision procedures of corporations.<sup>72</sup> The idea is that we can determine the beliefs or reasoning process of a corporation based on some combination of the beliefs or reasoning of the natural persons that compose the corporation.

For example, many states allow a doctor to conscientiously object to providing requested treatment (usually reproductive procedures) on the basis of moral or religious beliefs.<sup>73</sup> A recent Ninth Circuit opinion described how a pharmacy business (Ralph's) could be seen as conscientiously objecting to stocking forms of birth control based on the religious and moral beliefs of the natural persons that compose it (the Stormans).<sup>74</sup> This case is especially interesting given that in order to conscientiously object, a person must have moral or religious *beliefs*.<sup>75</sup> Although corporations may contract, be sued or own property,<sup>76</sup> some argue that it is deeply counterintuitive to attribute beliefs to a corporation, given that they do

69. Smith, *supra* note 3, at 292–93 (“The voluminous arguments about whether corporate personality is real or fictitious, are, for the most part, to no purpose, chiefly for lack of a definition of terms. One man’s reality is another man’s fiction.”).

70. Allen & Widdison, *supra* note 11, at 35 (“No single principle dictates when the legal system must recognize an entity as a legal person, nor when it must deny legal personality.”).

71. Kornhauser & MacLeod, *supra* note 2, at 4 ([T]he organizational model “addresses problems of the internal organization of the firm or legal person . . . [and] identifies a decision procedure for the firm.”).

72. *Id.* (“[O]rganizational law identifies a decision procedure for the firm.”).

73. See, e.g., 720 ILL. COMP. STAT. 510/13 (2014) (“No physician, hospital, ambulatory surgical center, nor employee thereof, shall be required against his or its conscience declared in writing to perform, permit or participate in any abortion...”); IOWA CODE § 146.1 (2015) (“An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual’s religious beliefs or moral convictions to perform, assist, or participate in such procedures.”); ME. REV. STAT. tit. 22, § 1903 (2014) (“No private institution or physician or no agent or employee of such institution or physician shall be prohibited from refusing to provide family planning services when such refusal is based upon religious or conscientious objection.”).

74. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1140 (9th Cir. 2009).

75. *Id.* at 1137.

76. See Matambanadzo, *supra* note 7, at 471 (stating that “corporations may sue and be sued, hold property, and make contracts”).

not have their own distinct reasoning process (or brain).<sup>77</sup> Natural persons are the sort of entities that have beliefs (especially moral ones). So in order to grant a corporation the right to conscientiously object, the court employs organizational model:

Stormans alleges that Ralph's cannot sell Plan B "based on religious and moral grounds," and that Kevin "Stormans' [s] religious beliefs prevent him from selling a drug that intentionally terminates innocent human life." Stormans argues that Ralph's is an extension of the beliefs of members of the Stormans family, and that the beliefs of the Stormans family are the beliefs of Ralph's. Thus, Stormans, Inc. does not present any free exercise rights of its own different from or greater than its owners' rights. We hold that, as in *Townley*, Stormans has standing to assert the free exercise rights of its owners.<sup>78</sup>

The beliefs of Ralph's are directly derived from the beliefs of Ralph's owner and human employees. The religious and moral beliefs of the human constituents may be transferred to the corporation.<sup>79</sup> In this way, we can see Stormans Inc.'s claim of conscientious objection as identical to the collective claim of conscientious objection maintained by its human parts. Thus, the "fiction" of corporate personhood serves the function of allowing collective human efforts to enjoy the benefits and protections of personhood—but essentially we are protecting the natural persons behind the corporation.<sup>80</sup>

As of June 30, 2014, the Supreme Court has affirmed this kind of reasoning, even stating that a corporation can exercise religious freedom, in *Burwell v. Hobby Lobby*.<sup>81</sup> Hobby Lobby argued that the Affordable Care Act's mandated coverage of "abortion inducing drugs" violated Hobby Lobby's right to religious freedom.<sup>82</sup> Intuitively, it seems odd to attribute religious practice to a corporation at all—a corporation does not hold beliefs itself, only its human constituents do. The Court stated that since the term "legal person" applies to all corporations, not just some, we can assume that the proper use of the term "person" in the Religious Freedom Restoration Act also includes all corporations.<sup>83</sup> In response to the objection that a corporation cannot exercise its freedom,

---

77. Robert F. Card & Karl G. Williams, *Emergency Contraception, Institutional Conscience, and Pharmacy Practice*, 27 J. OF PHARMACY PRAC. 174, 176 (2014) ("Does a pharmacy have a right of conscience in itself, over and above the consciences of the employees who carry out the everyday actions of the corporation/institution, so that it could conscientiously object to satisfying the stocking rule? This case raises the interesting ethical dimension of whether a pharmacy has a right of conscience in itself.").

78. *Stormans*, 586 F.3d at 1120.

79. *Id.*

80. Matambanadzo, *supra* note 7, at 474 ("The corporation's status as a person does the work of coalescing a collective of already legally recognized individuals . . .").

81. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

82. *Id.* at 2755.

83. *Id.* at 2768.

the Court responds that neither the Department of Health and Human Services (“HHS”) nor the dissent “provides any persuasive explanation for this conclusion.”<sup>84</sup> This is particularly important for my purposes. The Court seems to be directly contradicting the view that a “legal person” is meant to track the ability to *exercise* rights and duties, instead relying on the history of calling corporations persons.

3. *Models of Corporate Personhood: “Human Embodiment”*<sup>85</sup>

Importantly, corporations are not only useful legal fictions that serve human interests, but an explanation of their very existence depends on an analogy to, or explanation using, normal human reasoning. Some scholars wish to make the analogy from artificial personhood to natural personhood even more explicitly dependent on humanity. Saru Matambanadzo argues that we should understand corporate personhood using the human body as a model: “[E]ven for corporations—disembodied, legally constructed entities lacking many of the rights and privileges of personhood—the human body serves as an important framework for shaping the legal community of persons and resolving theoretical disputes concerning those legal persons.”<sup>86</sup> As such, the boundaries of legal personhood should be determined using the human body and human brain as a model; the more humanlike an entity is, the more likely it is a person.<sup>87</sup>

The analogy from corporation to human body has a long history in Anglo law.<sup>88</sup> In historical English law, for example, nonnatural persons were called “Body Politic” and considered a collection of natural bodies.<sup>89</sup> William Shephard, who wrote the first treatise on corporate personhood,<sup>90</sup> constantly referred to what a natural body could do—for example, commit treason or die—that a corporation could not do, but

---

84. *Id.* at 2769.

85. Matambanadzo, *supra* note 7, at 460 (explaining that corporate personhood can be explained using a full analogy to human bodies).

86. *Id.*

87. *Id.* (“[F]uture efforts to determine the boundaries of legal personhood should incorporate human embodiment as a guiding framework for thinking about who ‘counts’ in the community of persons.”).

88. The analogy arguably traces back to Thomas Hobbes’ *Leviathan* in which the government is personified as a human body, whose parts are made up of human bodies. THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1996) (1651). Matambanadzo also relies on the Hobbesian body analogy, “[t]he body politic most famously figures in *Leviathan*, Thomas Hobbes’ account of the rise of political government. In *Leviathan*, Hobbes describes the state as a body politic, an ‘artificial man’ whose ‘sovereignty is an artificial soul’ that gives life to the whole body. The body politic is constructed by Hobbes as an embodied entity, with nerves located in its legal and social structures in order to dole out punishment and reward.” Matambanadzo, *supra* note 7, at 489.

89. WILLIAM SHEPHEARD, *OF CORPORATIONS, FRATERNITIES, AND GUILDS* 2 (1659), available at [http://eebo.chadwyck.com/search/full\\_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID=V115686](http://eebo.chadwyck.com/search/full_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID=V115686).

90. Matambanadzo, *supra* note 7, at 489.

insisted that the model of the human body was the best way to understand corporate personhood.<sup>91</sup> The human body is the “frame of reference” by which we judge whether a corporation has a certain right—if the structure or needs of the corporation are similar to those of the human body then the corporation has that right.<sup>92</sup>

Matambanadzo argues that we should continue to use the human embodiment model to ascertain legal personhood for nonhumans.<sup>93</sup> Matambanadzo relies on the “nerve center test” in *Hertz Corp v. Friend*.<sup>94</sup> In *Hertz*, there was a dispute regarding whether Hertz Corp. could be required to appear in a California District Court.<sup>95</sup> At issue was the company’s citizenship.<sup>96</sup> As Shephard would point out,<sup>97</sup> the problem of corporate citizenship is that, unlike a human body, there is no corporeal corporate body actually located anywhere. The Court thus puts forward the “nerve center test” in which the principle place of business for a corporation (for the purpose of determining citizenship) refers to “the place where a corporation’s high level officers direct, control, and coordinate the corporation’s activities . . . *i.e.*, its nerve center . . . .”<sup>98</sup> The “nerve center” test helps eliminate the problem posed by the lack of physical body by placing the corporation in a single place and equating the decision procedure with that single location.<sup>99</sup> The obvious analogy to the human body is that of the human brain, the single place in the human body where all decision procedures occur. The brain “direct[s], control[s], and coordinate[s]” the body’s actions.<sup>100</sup> The principle place of business is likened to the human brain, and the corporation is likened to the human body. The imagery of the brain sending signals to the human body is captured by a single nerve center of a corporation from which “it radiates out to its constituent parts” like a network of nerve endings.<sup>101</sup>

Matambanadzo argues that the Court used the following reasoning: the brain is the control center of a person. Corporations are like natural

---

91. SHEPHEARD, *supra* note 89, at 109–29 (making analogies between the abilities of a human body and the abilities of the “corporate body”).

92. Matambanadzo, *supra* note 7, at 490 (“The body is the consistent frame of reference for the endowment of rights and entitlements. The corporation is organized as a human being would be and treated in law as a human being.”).

93. *Id.* at 497 (“When it comes to disputes about corporate personhood, those who make and interpret the law still rely on the body and embodiment to make their determinations about the contours of legal recognition even in the contemporary context.”).

94. 559 U.S. 77 (2010).

95. *Id.* at 81.

96. *Id.*

97. See generally SHEPHEARD, *supra* note 89, at 100–29.

98. *Hertz*, 559 U.S. at 78 (internal quotations omitted).

99. *Id.* at 79 (“A corporation’s ‘nerve center,’ usually its main headquarters, is a single place” which is determined by “measuring the total amount of business activities that the corporation conducts there and determining whether they are significantly larger than in the next-ranking State.”).

100. *Id.* at 78.

101. *Id.* at 90 (quoting *Scot Typewriter Co. v. Underwood Corp.*, 170 F.Supp. 862, 865 (S.D.N.Y. 1959)).

persons in that they are controlled by a central source. The location of a natural person is determined by their brain. Therefore, the location of a corporation is determined by its controlling central source.<sup>102</sup> It is an easy next step to call the central controlling source a “nerve center.” She thinks that this is not merely a helpful tool for solving the problem of corporate personhood, but that similarities to the human body should serve as a principled test for determining legal personhood. “Given how central the body has been to defining the nature of legal recognition, even for disembodied, collective entities like corporations, it may be necessary for courts and lawmakers to consider the relationship between legal personhood and the body.”<sup>103</sup>

This exposition of legal personhood illustrates that although there is a definition of legal personhood based upon the capacities of having rights and duties, overwhelmingly personhood is associated with humanity. The central question for attributions of legal personhood is whether the entity is similar enough to human to warrant attribution. The next Part argues that the near equivocation of humanity and personhood is not compatible with the general definition of a legal person as an entity that is capable of bearing rights and duties.

### III. ANALYSIS

The most common categories of legal personhood—natural persons and corporate persons—should fit nicely into the most general definition of personhood as an entity that can bear rights and duties.<sup>104</sup> We have already seen that the importance of being human has played a pivotal role in carving our categories of legal personhood, so ideally, there should be some strong connection between being human and being capable of bearing rights and duties. There are some obvious problems with the association between human and person—namely inanimate objects, such as ships, buildings, and sculptures, which are not even composed of natural persons, have been deemed legal persons.<sup>105</sup> One who defends modeling

---

102. Matambanadzo, *supra* note 7, at 499 (arguing that the analogy between the brain and the controlling center is nearly obvious: “[p]ersons are citizens of some place (state or nation) for the purposes of jurisdiction. Corporations are persons. If corporations are persons, with all the rights, privileges, and entitlements that this entails, then they must be citizens of some place for the purposes of jurisdiction. We know the brain is the control center of the nervous system of a person.”) (internal citations omitted).

103. *Id.* at 507.

104. SALMOND, *supra* note 4, at 318 (that definition is embodied by Salmond’s succinct treatment of a legal person).

105. Solum, *supra* note 7, at 1239 (“[I]nanimate things have possessed legal rights at various times. Temples in Rome and church buildings in the middle ages were regarded as the subject of legal rights. Ancient Greek law and common law have even made objects the subject of legal duties. In admiralty, a ship itself becomes the subject of a proceeding in rem and can be found ‘guilty.’ Christopher Stone recently recounted a twentieth-century Indian case in which counsel was appointed by an appel-



legal personhood after humanity, however, could dismiss such examples as oddities or extreme legal fictions.<sup>106</sup> So, in this section, I avoid “oddities” and instead evaluate entities that are legal persons but do not seem capable of bearing rights and duties (prerational humans such as children and fetuses and postrational humans such as the comatose) and nonhumans that may be capable of bearing rights and duties (animals). Lawrence Solum also believes that these situations put pressure on the association between humanity and personhood:

Abortion and the cessation of life-sustaining treatment for humans in permanent vegetative states both raise questions about the status of personhood that cannot be answered by a simple comparison with a normal human adult. A third case is that of those higher mammals that seem most likely to have a mental life that is similar to that of humans.<sup>107</sup>

These cases demonstrate where humanity and personhood come apart. I argue that the near equivocation of “humanity” with “personhood” obscures the definition of a legal person as one who is capable of bearing rights and duties. Specifically, the connection between “human” and “person” obscures any discussion of what it actually means to be *capable* of bearing rights and duties. We are left still questioning what it means to be capable of bearing rights and duties.

A. *Humans that Aren't Capable of Holding Rights and Duties*

One motivation for equating legal persons with humans (or human like things) is that most humans are persons, and so we can usually equate the two concepts and “not worry about why we do so.”<sup>108</sup> When we examine the edges of humanity, however, and the fuzziness of personhood at those edges, it becomes clear why we should worry about why we equate humanity and personhood. We should worry because treating “human” and “person” as synonyms ignores that the terms have fundamentally different kinds of definitions. “Human” refers to a biological category while “person” refers to an entity with a set of capabilities.<sup>109</sup> There is nothing in either definition that suggests that all members of a species will have a set of capabilities, nor that any subject that has a set of capabilities will belong to a certain species. Once we see this distinction, the problem of fetal personhood and permanently comatose personhood becomes much clearer.

---

late court to represent a family idol in a dispute over who should have custody of it.”) (internal citations omitted).

106. Smith, *supra* note 3, at 287 (arguing that calling inanimate objects persons is merely a legal convenience and such conveniences should not influence a definition of legal person).

107. Solum, *supra* note 7, at 1285.

108. *Id.*

109. SALMOND, *supra* note 4, at 318.

### 1. *Prerational Humans: Fetuses*

Supreme Court decisions regarding abortion closely consider the status of human when determining when the interests of a fetus can outweigh the interests of the mother.<sup>110</sup> Once a fetus is noticeably human like enough that it is “capab[le] of meaningful life outside the mother’s womb,” then the fetus’ life may also be valuable enough to warrant legal protection.<sup>111</sup> The connection between viability and the potential of a meaningful future provides an opportunity to evaluate what is meaningful about a normal human life.

Philosopher Don Marquis argues that abortion is, often times, as morally wrong as killing an adult human because it deprives a fetus of a valuable future like ours.<sup>112</sup> This argument based on potential future value underlies the reasoning prevalent in most legal decisions to protect fetuses.<sup>113</sup> He argues that killing an adult is wrong because it deprives a person of a meaningful future, interrupts their plans, and stifles a flourishing life.<sup>114</sup> A fetus, likewise, has the potential for a valuable future, and it is likewise wrong to kill a fetus.<sup>115</sup> Even more so, the fetus has more future life than the average adult.<sup>116</sup> Marquis explicitly links the value of life to being human. However, he recognizes that assigning value to membership in a species is intuitively odd:

The standard anti-abortionist principle “It is *prima facie* seriously wrong to kill a human being,” . . . can be objected to on the grounds of ambiguity. If ‘human being’ is taken to be a *biological* category, then the antiabortionist is left with the problem of explaining why a merely biological category should make a moral difference.<sup>117</sup>

Marquis addresses the classic question: what is so special about being human? It surely cannot be a particular set of chromosomes or genetic makeup, unless having a certain number of chromosomes carries with it moral significance. The most common response to this question is to the value of humanity in terms of what humans can do or how they feel.<sup>118</sup> Humans think, plan, feel, experience suffering, have values, and have ro-

---

110. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

111. *Id.* The Court marks the viability point as having both “logical and biological justifications” clearly showing the significance of belonging to the biological category of human. *Id.*

112. Don Marquis, *Why Abortion is Immoral*, 86 J. PHIL. 183, 183 (1989) (“[A]bortion is, except possibly in rare cases, seriously immoral, that it is in the same moral category as killing an innocent adult human being.”).

113. *Id.* at 189–90.

114. *Id.* at 189.

115. *Id.* at 192.

116. *Cf. id.* at 196 (“Obviously, if it is the continuation of one’s activities, experiences, and projects, the loss of which makes killing wrong, then it is not wrong to kill fetuses for that reason, for fetuses do not have experiences, activities, and projects to be continued or discontinued.”).

117. *Id.* at 186.

118. *Id.* at 189.

bust self-conceptions.<sup>119</sup> So when Marquis discusses the potential of a valuable future life like our own, he refers generally to all the capacities and experiences of the average human that makes being human valuable.<sup>120</sup> This seems to mirror exactly the reasoning used in some key abortion opinions. The Court, in *Roe*, explicitly makes reference to the possibility of a meaningful life in the future as justification for impeding a woman's right to her body.<sup>121</sup> The reasoning seems to be that to be human is to have the capacity to have a meaningful future, and this potential can be enough to justify infringing on a bodily right (of the mother). This sounds suspiciously close to attributing the benefits of personhood to the fetus on the basis of its status as human like (at viability).

By holding that a fetus is not a person under the fourteenth amendment (sic), the Supreme Court did not prohibit lawmakers from *extending to the unborn the benefits of personhood* in other cases. In fact, the Court noted that the state has an "important and legitimate interest in protecting the potentiality of human life."<sup>122</sup>

The most precious aspect of being declared a legal person is having the protection of the government. Even if the fetus is not declared a legal person technically, giving the government the authority to protect its life over the rights of another natural person seems to do some of the work of the status of legal person.

States wishing to limit abortion have adopted this model of recognizing the fetus's humanity and then protecting it on the basis of its humanity. Either through judicial opinion or legislation, some states have defined a fetus as a human for the sake of protecting its future life. For example, California has interpreted *Roe v. Wade* as recognizing a state's interest in protecting the potentiality of human life and "the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide."<sup>123</sup> Fetal homicide statutes have become increasingly prevalent in order to defend a fetus against being killed by a third party. These fetal homicide statutes became prevalent after *Roe* as a way of protecting fetal life without having to prescribe fetal personhood—declaring a fetus a human being was enough to declare the fetus worth protection.<sup>124</sup> "A person commits capital murder if he intentionally

---

119. For a general discussion of the competing accounts of human value see generally, Joel Feinberg & Barbara Baum Levenbook, *Abortion*, in *MATTERS OF LIFE AND DEATH: NEW INTRODUCTORY ESSAYS IN MORAL PHILOSOPHY* 198–200 (Tom Regan ed., 1993).

120. As a matter of technical dispute, Marquis challenges the adequacy of the terms "human" and "person", and prefers to discuss only those characteristics that make life meaningful; however, the philosophical dispute is not relevant for my purpose here. Marquis, *supra* note 112, at 187–88.

121. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

122. Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 258 (1982) (emphasis added).

123. *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994).

124. See, e.g., CAL. PENAL CODE § 187 (West 2014); MO. ANN. STAT. § 1.205 (West 2014); N.D. CENT. CODE ANN. § 12.1-17.1-02 (West 2014).

or knowingly causes the death of an individual . . . [a] ‘person’ includes ‘an individual.’ An ‘individual’ is ‘a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.’”<sup>125</sup>

The legal reasoning here is similar to that of *Marquis*: a human life is valuable and a fetus is a potential human, thus a fetus’ life is valuable. Once the “potential human argument” is on the table, however, it very quickly becomes the “potential person argument,” once again marking the almost unconscious equivocation between human and person. Even legal scholars writing on the topic seem to make the switch between human and person without an argument validating such a switch. “Some lawmakers protect potential *human* life by equating the *human* unborn with those born alive, creating parity between *people* of tomorrow and *people* here today.”<sup>126</sup>

Why is this close connection between human and person a problem? In short, it is a problem because the equivocation is made often times without any argument or reflection. This equivocation completely obscures the relevant differences, and functions, between the definition of human and person. A human is a biological kind. The Webster’s Dictionary definition of “human” is “a bipedal primate mammal.”<sup>127</sup> This definition makes no reference to the moral value of humanity or the capacities of humans. However, the working definition of person, one that has rights and duties, makes no reference to biological membership, but instead to the characteristics and capacities of a person. One definition is scientific and biological, the other functional. It may be the case that, as a matter of fact, the biological category of human corresponds with the capacity to have rights and duties, but this is an empirical question. If we unreflectively equate humanity with personhood, then we close ourselves to the possibility that the biological human does not correspond perfectly to the functional definition of person. The equivocation prematurely ends an important debate regarding why we need a definition of legal personhood at all by simply ignoring the question.

The fetus seems to be a perfect example of the danger of ignoring important personhood questions by relying on their humanity. First, by declaring a fetus a person for the sake of fetal homicide statutes, a fetus is a person with rights against bodily harm against some (third parties) but not against the mother.<sup>128</sup> A mother has the right to end the fetus’ life

---

125. *Lawrence v. Texas*, 211 S.W.3d 883, 885 (Tex. App. 2006) (citations omitted).

126. Jeffrey A. Parness, *The Legal Status of the Unborn After Webster*, 95 DICK. L. REV. 1, 6 (1990) (emphasis added).

127. MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/human> (last visited on Apr. 19, 2015).

128. Mark A. Pemberton, Note, *Kentucky, Fetal Homicide, and the Supreme Court’s Problematic Personhood Jurisprudence*, 1 LIBERTY U. L. REV. 173, 188–89 (2006).

for any reason before viability, but a third party does not.<sup>129</sup> So a fetus has the rights of a person only in relation to third parties.<sup>130</sup> It is common enough for people to have some rights and not others,<sup>131</sup> but it is strange to think that one has a right against some private persons but not others. Perhaps there is an answer to this problem, but the immediate assumption that declaring a fetus a human is enough to secure its rights as person leaves these problems unresolved, or even worse, unasked.

Second, fetuses clearly do not owe duties to others simply because they are not the sort of creatures that can be held morally or legally responsible, they have no means of impacting the external world, and lack the neurological and musculoskeletal capabilities of interacting with the world.<sup>132</sup> So, what is the significance of a person who is capable of bearing rights, but not duties? Smith argues that paramount to the definition of legal person is that it identifies the capacity for a legal relationship—owing duties to others and having rights which others have duties to respect.<sup>133</sup> Fetuses are incapable of being in a legal relationship at all because they are incapable of owing anything at all. It seems like we are left with a unilateral legal relationship in which we owe duties to fetuses, but the fetus owes nothing to us. If this is the case, then being capable of being in a legal relationship is not a necessary condition for legal personhood.

My concern here is to illustrate how the answers to these questions are important for understanding and applying the definition of legal person. By simply securing the fetus' humanity and then extending personhood to it on that basis, we completely ignore these questions. The status of personhood just becomes an instrument for securing certain rights. However, as we will see later, these questions are of the utmost importance when determining whether personhood should be extended to nonhuman animals. They should not be ignored, especially if exploring

---

129. *See id.* at 189.

130. *Id.* at 188–89 (“[W]hen the fetal homicide statute established that unborn children had a life-interest in relation to third parties but not in relation to their mothers, the statute created a new kind of legal entity, the status of which is not completely clear. An unborn child, as described by the statute, is essentially a quasi-person and is simultaneously both a person and not a person. Relative to third parties, the fetal homicide statute regards unborn children as possessing the same right to life as traditional persons. However, relative to their mothers, the quasi-persons have no life-interest whatsoever.”).

131. Parness, *supra* note 126, at 1 (“Consider distinctions among ‘persons’ granted the right to marry, the right to drink, and the right to drive a car. Another example of multiple meanings of a word is found in the federal constitution itself, where the term ‘state’ as used in the fourteenth amendment has a very different meaning from the term ‘state’ as used in the eleventh amendment. Therefore, legal personhood must always be defined by context.”).

132. ROSAMUND SCOTT, RIGHTS, DUTIES, AND THE BODY: LAW AND ETHICS OF MATERNAL-FETAL CONFLICT 176 (2002).

133. Smith, *supra* note 3, at 283 (“Among definitions to be found in discussions of the subject, perhaps the most satisfactory is that legal personality is the capacity for legal relations.”).

them in the fetal context can shed light on whether nonhuman animals are persons.

2. *Prostrational Humans: Comatose Humans as Bearers of Rights and Duties*

Another challenge to the implicit association between personhood and humanity is the end of life human and the permanently comatose. In *Roe*, the Court emphasized the fact that fetuses could not practically exercise the rights or have the interests protected by the Fourteenth Amendment.<sup>134</sup> Theoretically, a similar argument applies to those adult humans who are permanently comatose and approaching the end of his or her life. Both fetuses and the comatose are incapable of exercising rights and adhering to duties.<sup>135</sup> The Supreme Court, however, has implicitly recognized the comatose as persons, calling them “incompetent persons.”<sup>136</sup> There are some relevant differences between fetuses and the comatose, for the sake of this exposition, that may explain the different treatment of the comatose and fetuses.

First, the comatose are clearly humans, while the Supreme Court has held that some fetuses are not.<sup>137</sup> So, following the procedure of modeling personhood after humanity, we would expect lawmakers to be more likely to attribute personhood to the comatose than to fetuses. Unlike in *Roe*, the Court overwhelmingly recognizes that a comatose individual is a human being.<sup>138</sup> The fact that a comatose person is incompetent or incapable of exercising her rights does not diminish her “human dignity.”<sup>139</sup> The fact that one cannot exercise her rights does not mean that she is not a person according to the Fourteenth Amendment.<sup>140</sup> This point is particularly important because it reemphasizes that what matters for personhood is being a part of humanity. The definition of being capable of exercising rights is set aside in the case of the comatose human, because “human dignity” is truly the relevant criteria for Fourteenth Amendment protection.<sup>141</sup>

Second, the comatose are at the end of a human life while fetuses precede a human life. The comatose were once persons, and so it is easi-

---

134. *Roe v. Wade*, 410 U.S. 113, 158–59 (1973).

135. *See Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990) (“An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a ‘right’ must be exercised for her, if at all, by some sort of surrogate.”).

136. *Id.* (calling a woman in a persistent vegetative state an “incompetent person”).

137. *See generally id.*; *Roe*, 410 U.S. at 158–59.

138. *Cruzan*, 497 U.S. at 280 (acknowledging that the state has a legitimate interest in preserving human life).

139. *See id.* at 271.

140. *See id.* at 280.

141. *See id.* at 271.

er to extend their personhood. Because the comatose individual, however, is incapable of expressing interests or exercising rights, we must rely on her expressed interests before she became incompetent. The Court thus holds that in order to withdraw lifesaving support from a comatose person, there must be clear and convincing evidence of a wish to withdraw life sustaining treatment.<sup>142</sup> The assumption seems to be that the comatose person's interests and rights remain even when the ability to express interests and exercise rights are no more. This, of course, poses a consistency problem with the definition of person as those creatures *capable* of bearing rights and duties. At a minimum, it is easy to see that one in a persistent vegetative state is incapable of owing a duty—they cannot produce new contracts, or exercise the mens rea requirement for most tort or criminal claims.<sup>143</sup> Without demonstrating a capability to have rights and duties, the Court is left inferring that the personhood of the permanently comatose is necessarily rooted in the fact that they *once were* active persons.<sup>144</sup> The fact that the comatose are still human, and humanity a highly suggestive indication of personhood, is of paramount importance.

I argue, however, that this association between humanity and personhood is unnecessary and unhelpful. The legal definition of the death of a human being helps illustrate this fact. Medical scholars and legal experts agree that death occurs when one experiences brain death.<sup>145</sup> In 1981, the Office of the President commissioned a lengthy investigation into the nature of death.<sup>146</sup> The goal of such a definition should be to “guide those who will decide whether (and if so, when) a person has passed from being alive to being dead.”<sup>147</sup> The commissioned experts considered legal definitions of death across the nation and internationally and concluded that there was no uniformity of definition and that definitions were often confusing even to doctors.<sup>148</sup> Some states defined death as “partial brain death,” meaning the death of the part of the brain

---

142. *Id.* at 280.

143. See generally Jeffrey B. Hammond, *The Minimally Conscious Person: A Case Study in Dignity and Personhood and the Standard of Review for Withdrawal of Treatment*, 55 WAYNE L. REV. 821, 830–31 (2009) (arguing that personhood in the very sick could be judged by how “animated and demonstrative” the human is such that a permanently unconscious human is likely not a person).

144. *Cruzan*, 497 U.S. at 311 (quoting *In re Gardner*, 534 A.2d 947, 953 (Me. 1987)).

145. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *DEFINING DEATH: MEDICAL, LEGAL AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH* 78 (1981) [hereinafter *DEFINING DEATH*]; Lawrence O. Gostin, *Legal and Ethical Responsibilities Following Brain Death: The McMath and Muñoz Cases*, 311 JAMA 903, 903 (2014), available at [http://jama.jamanetwork.com/article.aspx?articleid=1818922&utm\\_source=silverchair%20information%20systems&utm\\_medium=email&utm\\_campaign=jama%3aonlinefirst01%2f24%2f2014](http://jama.jamanetwork.com/article.aspx?articleid=1818922&utm_source=silverchair%20information%20systems&utm_medium=email&utm_campaign=jama%3aonlinefirst01%2f24%2f2014).

146. *DEFINING DEATH*, *supra* note 145, at 1.

147. *Id.* at 55.

148. *Id.* at 71–72. See, e.g., FLA. STAT. §382.085 (1980) (defining death as “the irreversible cessation of the functioning of the entire brain.”); WYO. STAT. ANN. §35-19-101 (1979) (stating that a person is dead he “sustain[s] . . . irreversible cessation of all functions of the entire brain”).

responsible for active thought, decision making, and/or emotion, while other states insisted on “whole brain death,” characterized by the cessation of all brain activity including brain stem.<sup>149</sup> The commission eventually settled on recommending the latter and the Uniform Determination of Death Act was enacted defining death as the cessation of pulmonary and cardiovascular function or “irreversible cessation of all functions of the entire brain, including the brain stem.”<sup>150</sup> So it seems that, once again, a natural person has died when her body has died. The Commission had the opportunity to define death as the cessation of a thoughtful, active life, but instead chose to tie death to the cessation of bodily function. Why is this important? Because, as mentioned above, a living human being that is permanently vegetative, but whose brain stem is functioning, is incapable of exercising rights and acting upon duties. Just like a fetus, the permanently comatose cannot act on any duty or right.

Some scholars, however, have read the Uniform Determination of Death Act as offering a conceptual distinction between a human and a person.<sup>151</sup> So while a human may be alive, a person may not. Importantly, the Commission was very aware that they were considering the death of a human being. The Commission used the term “individual” in the drafting of the Uniform Determination of Death Act in order “to conform to the standard designation of a human being in the language of the uniform acts. The term ‘person’ was not used here because it is sometimes used by the law to include a corporation.”<sup>152</sup> This recognizes that the category of things that can be persons (corporations as the most salient) can be distinguished from the category of humans. So, this Act allows that a human being may be alive while a person may not exist. The medical experts who drew this distinction were, of course, not intending to extend this distinction between humans and person beyond that odd category of artificial persons, but a cohort of legal scholars advocate for extending this distinction hinted at in the construction of the Uniform Determination of Death Act to all types of legal persons.<sup>153</sup> The idea is that a person is one *capable* of exercising rights and duties and one who is vegetative cannot:

“Personhood” or “selfhood” theory is the idea, active in modern bioethics for at least the past thirty years, that the more animated and demonstrative the human subject is (usually a patient subject to some form of medical treatment), the more likely he or she may be deemed a full and complete “person,” and therefore deserving of the most robust ethical and legal protections. Conversely, the more placid, irretrievably ill, permanently unconscious, or deficient in the

---

149. DEFINING DEATH, *supra* note 145, at 18, 61.

150. *Id.* at 73; UNIF. DETERMINATION OF DEATH ACT § 1 (1981).

151. DEFINING DEATH, *supra* note 145, at 6.

152. *Id.* at 74.

153. *Id.*



ability to make one's wishes known . . . in short, the less the subject looks and acts like a "normal" person who can live, work, and take care of himself - the less likely the subject is to be called a person, and by extension the less deserving she is of the full panoply of protections made available at law.<sup>154</sup>

The operative part of the definition of a legal person is what the person can do, what rights she can exercise, and what relations she can be in.<sup>155</sup> All of those capacities are not made possible by a properly functioning brain stem, they are made possible by a healthy cerebral cortex.<sup>156</sup> While a human being is alive when her brain stem is functioning, a person ceases to exist when her cerebral cortex dies. "The neo-cortical definition realizes that a person in a permanent . . . vegetative state is not in the process of dying, nor is she languishing in a suspended state of animation later hoping to magically reawaken and return to normal human intercourse. Rather, the permanently vegetative person is dead."<sup>157</sup>

By examining the personhood of fetuses and the permanently comatose, we see the very edges of personhood where the equating of humanity to personhood fails to be logically consistent and clear. Both a fetus and a permanently comatose human being are incapable of acting on rights and interests, but a fetus is not a person while a permanently comatose person is. Moreover, while the Supreme Court has stated this clearly,<sup>158</sup> some states still declare fetuses persons<sup>159</sup> and administrative commissions draw distinctions between persons and humans.<sup>160</sup> The problem, as stated above, is the failure to recognize that a human being is a biological kind, a member of a species, while a person is defined by its capabilities.

### B. *Nonhuman Candidates for Personhood: Animals*

Recently, the question of legal personhood received worldwide attention when India seemingly attributed legal personhood to dolphins.<sup>161</sup> In response to activism against the cruelty of dolphin shows in India, the

154. Hammond, *supra* note 143, at 830–31.

155. *Id.*

156. VERNON B. MONTCASTLE, PERCEPTUAL NEUROSCIENCE: THE CEREBRAL CORTEX 43 (1998).

157. Hammond, *supra* note 143, at 830.

158. Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280 (1990) (calling a woman in a persistent vegetative state an "incompetent person"); Roe v. Wade, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

159. See, e.g., CAL. PENAL CODE § 270 (West 2006); MO. ANN. STAT. § 1.205 (West 2006); N.D. CENT. CODE ANN. § 12.1-17.1-02 (West 2006).

160. DEFINING DEATH, *supra* note 145, at 74.

161. See, e.g., Timothy Bancroft-Hinchey, *India: Dolphins Declared Non-Human Persons*, PRAVDA.RU (May 8, 2013), [http://english.pravda.ru/science/earth/05-08-2013/125310-dolphins\\_india-0/](http://english.pravda.ru/science/earth/05-08-2013/125310-dolphins_india-0/); Laura Bridgeman, *India Takes Another Anti-Captivity Stance*, DOLPHIN PROJECT BLOG (May 18, 2013), <http://dolphinproject.org/blog/post/india-bans-captive-dolphin-entertainment>.

Indian Central Animal Authority stated that dolphins should be “seen as ‘nonhuman persons’ and as such should have their own specific rights.”<sup>162</sup> Policymakers were motivated by the cruel and harsh conditions that dolphins were kept in. That, in conjunction with scientific research to support the dolphins high-level of emotional and practical intelligence,<sup>163</sup> prompted activists and legislators to seek a way to protect dolphins. Legal personhood is the ultimate protection. Given that a legal person is the bearer of rights, often times inalienable bodily rights, granting dolphins the status of a legal person would attach significant protections to the animal. This was exciting to many, not just for the animal rights implications, but also because of the recognition that being a person depends on a certain cognitive capacity for thought, emotion, and decision making.

Despite all the excitement about the possibility of including dolphins as legal persons, dolphins were never declared official persons.<sup>164</sup> The minister of India’s Ministry of Environment and Forests stated in an interview that dolphins should be *seen* as nonhuman persons,<sup>165</sup> but this does not amount to the legal designation of dolphins as persons. In fact, this was merely a policy statement, not an official legal declaration.<sup>166</sup> But that raises the question: why not make it official? If we wish to give dolphins rights to protect them from harm and they exhibit many of the cognitive capacities we think are important for personhood, then why not grant them the legal category? I argue that one major reason that animals are not granted the status of legal personhood is that they are not human. Even animals that exhibit cognitive capacities far beyond a human infant, child, or permanently comatose individual, are denied the status of legal personhood merely for not belonging to the right species. Solum suggests this is because we cannot “communicate with higher mammals in a way that yields clear behavioral evidence of a mental life of human quality, and higher mammals like whales are clearly not humans. In none of these cases is the behavioral evidence sufficient to establish that persons are (or are not) present.”<sup>167</sup> I present recent evidence in animal cognition and neuroscience that attempts to show that we can

---

162. Bridgeman, *supra* note 161.

163. *Id.* (“The Ministry notes increasing worldwide efforts to bestow basic rights onto dolphins, such as the rights to life, liberty and bodily integrity. ‘Various scientists . . . have suggested that the unusually high intelligence . . . means that dolphins should be seen as ‘nonhuman persons’ and as such should have their own specific rights . . . [it is] morally unacceptable to keep them for captive entertainment purposes.’”).

164. George Dvorksy, *No, India Did Not Just Grant Dolphins the Status of Humans*, IO9.COM (Aug. 15, 2013), <http://io9.com/no-india-did-not-just-grant-dolphins-the-status-of-hum-1149482273>.

165. Jim Crabtree, *India Bans Captive Dolphin Shows as ‘Morally Unacceptable’*, ENVTL. NEWS SERVICE (May 20, 2013), <http://ens-newswire.com/2013/05/20/india-bans-captive-dolphin-shows-as-morally-unacceptable/>.

166. *Id.*

167. Solum, *supra* note 7, at 1286.

be fairly confident that animals have capabilities beyond that of some humans (infants and the permanently comatose).

### 1. *Animals' Capabilities*

The Nonhuman Rights project consists of legal experts, scientists, and philosophers who believe that nonhuman animals should be granted the status of legal person.<sup>168</sup> They strive to “change the common law status of at least some nonhuman animals from mere ‘things’ . . . to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.”<sup>169</sup> They began filing cases in many jurisdictions in December 2013 challenging the legal status of animals.<sup>170</sup> As of now, courts have firmly rejected classifying nonhuman animals as legal persons.<sup>171</sup> However, just this year, the Nonhuman Rights Project has filed suit on behalf of a chimpanzee in order to establish its standing as a legal person.<sup>172</sup> The Nonhuman Rights Project’s main contention is that some animals are just as capable of exercising duties and rights as many humans who enjoy the status of legal person.<sup>173</sup> This point can be made in two ways: first, by showing the capacities of animals and second, by analogizing the kinds of animal capacities to the capacities of other legal persons. I take these points in turn.

First, animal scientists and philosophers have long challenged how humans conceive of animals. Philosopher Jacques Derrida famously chastises humanity for grouping a diverse and complicated community of animals into the single category of animal:

There is no Animal in the general singular, separated from man by a single, indivisible limit . . . . I repeat that it is rather a matter of taking into account a multiplicity of heterogeneous structures and limits: among nonhumans, and separate from nonhumans, there is an immense multiplicity of other living things that cannot in any way be homogenized, except by means of violence and willful ignorance . . . .<sup>174</sup>

---

168. For more information see their website at NONHUMAN RTS. PROJECT, <http://www.nonhumanrightsproject.org/> (last visited Apr. 19, 2015).

169. *Id.*

170. *Id.*

171. *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc.*, 842 F.Supp. 2d 1259, 1263 (S.D. Cal. 2012) (“The only reasonable interpretation of the Thirteenth Amendment’s plain language is that it applies to persons, and not to non-persons such as orcas.”).

172. Jon Kelly, *The Battle to Make Tommy the Chimp a Person*, BBC NEWS (Oct. 9, 2014), <http://www.bbc.com/news/magazine-29542829>.

173. *Id.*

174. JACQUES DERRIDA, *THE ANIMAL THAT THEREFORE I AM* 47–48 (Marie-Louise Mallet ed., David Willis trans., 2008).

Derrida stresses that it is uncharitable to any animal to lump it together with any other nonhuman.<sup>175</sup> The lamprey is as distinct from the human as it is from the squirrel, while the bonobo is far more different from the lamb than from the human. If the legal person is defined by what it can do, or is capable of having (rights and duties) then we cannot continue to lump vastly disparate populations of animals together and deem them all incapable of having rights and duties.

A quick look at the state of animal science brings this point home. Susan Savage-Rumbaugh has been the leading animal scientist working on ape capacity for language. She and her colleagues have produced several studies showing that various apes are capable of manipulating symbols to communicate with other apes and humans.<sup>176</sup> Her key subject, a bonobo named Kanzi, was introduced to language naturally.<sup>177</sup> Kanzi was raised in an environment surrounded by language, grammar, symbolic notation, and keyboards, just as a normal human child would be raised. Her findings were impressive:

By age five Kanzi had easily mapped over a hundred symbols on his keyboard, and was combining them into simple two and three-word utterances. The utterances were not imitations of his caregivers and they followed ordering rules based, at the very least, on semantic categories if not abstract linguistic categories. By age nine Kanzi was demonstrating comprehension of spoken English at the level of the individual sentence, as well as following the meaning and inferences of multiple sentences across a narrative. He mastered the English abstract grammatical categories of subject, verb, and object and complex grammatical structures such as recursion and possession in tasks of comprehension, but not in his lexical productions.<sup>178</sup>

Savage-Rumbaugh emphasizes that these results should remind us that although animals seem different from us, that does not mean they are different in kind. “No one should expect apes to behave precisely as humans do unless they are raised *as humans*, in a human world.”<sup>179</sup> With a natural human education, at least some animals are capable of standing in important relationships with humans. Kanzi was able to understand rules and relationships, and obey orders. This seems, at least *prima facie*, like the sort of skills important for being a legal person.

The literature on ape language purports to show that nonhuman animals have cognitive, intellectual and linguistic capacities.<sup>180</sup> Some scien-

---

175. *Id.*

176. Sue Savage-Rumbaugh et al., *Empirical Kanzi: The Ape Language Controversy Revisited*, 15 SKEPTIC 25, 27–28 (2009).

177. *Id.* at 30.

178. *Id.* (footnotes omitted).

179. *Id.* at 33.

180. *See supra* notes 176–79 and accompanying text.

tists are attempting to show that animals have emotional capacities.<sup>181</sup> Another team of scientists have concluded that “dogs are people, too” after subjecting dogs to MRI scans to ascertain how dogs are “feeling.”<sup>182</sup> Gregory Berns is testing to see if dogs react to pain and pleasure like humans do.<sup>183</sup> The caudate nucleus region of the brain is active when we are presented with things we enjoy like food, pleasure or beauty.<sup>184</sup> In dogs, Berns found that the caudate region activated in response to hand gestures indicating food or the smell of familiar humans.<sup>185</sup> This suggests that dogs experience “positive emotions” like happiness and joy similarly to humans; “[t]he ability to experience positive emotions, like love and attachment, would mean that dogs have a level of sentience comparable to that of a human child.”<sup>186</sup> Berns thinks this is enough to take seriously the suggestion that dogs are legal persons; after all, legal personhood is an important concept for protecting violence against dogs such as puppy mills, dog racing, and animal experimentation.<sup>187</sup>

These two experiments—ape language and dog emotion—are representative of a vast community of scientists attempting to give a more robust account of animal abilities. They show both cognitive and emotional intelligence in many animals. If we believe Berns, animals are capable of experiencing emotion like us, and if we believe Savage-Rumbaugh, animals are capable of understanding and communicating about that emotion. In fact, they are sometimes better at it than many human children.<sup>188</sup> But children are persons and animals are not. With the growing scientific support of animal abilities, the justification for this difference is growing weaker.

## 2. *Animal Capabilities as Analogous to Human Person Capabilities*

Now that the capacities of animals have been introduced, the second step in the defense of personhood status for animals is to show the capacities of the animal are analogous (if not more robust) than some human persons.

---

181. See, e.g., Gregory Berns, *Dogs are People, Too*, NY TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html?pagewanted=all>.

182. *Id.*

183. See *id.*

184. *Id.* (“Rich in dopamine receptors, the caudate sits between the brainstem and the cortex. In humans, the caudate plays a key role in the anticipation of things we enjoy, like food, love and money.”).

185. *Id.*

186. *Id.*

187. *Id.* (“The ability to experience positive emotions, like love and attachment, would mean that dogs have a level of sentience comparable to that of a human child. And this ability suggests a rethinking of how we treat dogs.”).

188. *Id.*; Savage-Rumbaugh, *supra* note 176, at 29–31.

Historically, many societies recognized that animals are among legal persons in virtue of holding them accountable for their legal wrongs.<sup>189</sup> Pigs were formally prosecuted for attacking human boys<sup>190</sup> and donkeys were recognized as “victim[s] of violence.”<sup>191</sup> For example, in 1457 in Savigny, France, a five year old boy was attacked and killed by a sow and her six piglets.<sup>192</sup> Instead of being immediately “put down,” the animals were given a formal trial with the showing of evidence and the representative of a defense attorney.<sup>193</sup> Some may argue that this was merely a theatrical showing and not evidence that France took the animals to have a right to a trial. However, when we take seriously the effort and cost of the trial, and the fact that only some of the pigs were finally executed, we can see that the villagers of Savigny seemed to be interested in seeing the pigs receive a fair trial.<sup>194</sup> James McWilliams, an advocate of including animals as legal persons, emphasizes that “[i]n a court of law, [animals] were treated as persons. These somber affairs, which always adhered to the strictest legal procedures, reveal a bygone mentality according to which some animals possessed moral agency.”<sup>195</sup>

What evidence do we have that these animals were considered “moral agents”? When deciding whether a particular animal was guilty of a crime, the court regularly looked to the animal’s intentions or mental states to determine culpability.<sup>196</sup> The piglets in the aforementioned case were exonerated because they “were immature” and “raised by a rogue mother . . . and thus unable to internalize the proper codes of conduct for village-dwelling piglets.”<sup>197</sup> This sort of reasoning sounds shockingly similar to the reasoning in *Roper v. Simmons*.<sup>198</sup> When deciding that a child between the ages of fifteen and eighteen should not be sentenced to death for first-degree murder, the Court stated:

The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’ Their own vulnerability and comparative

---

189. See generally Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97 (2003).

190. James E. McWilliams, *Beastly Justice*, SLATE (Feb. 21, 2013, 8:17 AM), [http://www.slate.com/articles/life/history/2013/02/medieval\\_animal\\_trials\\_why\\_they\\_re\\_not\\_quite\\_as\\_crazy\\_as\\_the\\_y\\_sound.html](http://www.slate.com/articles/life/history/2013/02/medieval_animal_trials_why_they_re_not_quite_as_crazy_as_the_y_sound.html).

191. Girgen, *supra* note 189, at 110.

192. McWilliams, *supra* note 190.

193. *Id.*

194. *Id.* (“[I]t wasn’t for a show trial—this was the real deal, equipped with a judge, two prosecutors, eight witnesses, and a defense attorney for the accused swine. Witness testimony proved beyond reasonable doubt that the sow had killed the child. The piglets’ role, however, was ambiguous. Although splattered with blood, they were never seen directly attacking the boy. The judge sentenced the sow to be hanged by her hind feet from a ‘gallows tree.’ The piglets, by contrast, were exonerated.”).

195. *Id.*

196. *Id.*

197. *Id.*

198. 543 U.S. 551, 570 (2005).

lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.<sup>199</sup>

That which exculpates a young human is that which exculpates a young piglet: immaturity, the lack of internal character development, and the ease by which they are misled. We see another example of the court considering the mental states of animals when two separate herds of swine trampled a man to death.<sup>200</sup> While only one herd ignited the trample, and the other herd only joined afterwards, both were sentenced to death because "their evident cries of enthrallment during the melee were said to confirm their expressed approval of it."<sup>201</sup> Mental states could also make animals the victims of human mistreatment.<sup>202</sup> "In 1750, a man was sentenced to death for" having sex with a donkey, but the donkey was spared because she "was the victim of violence and had not participated in her master's crime of her own free will."<sup>203</sup>

This shows us that, at least historically, the mental capacities of animals were recognized as relevant to legal responsibility in the same ways that human mental states were. I argue this is partly because the category of legal personhood had not been so strongly associated with humanity. When determining whether a creature warranted a trial, the question was merely whether the creature had the requisite mental states or volitional powers that could affect whether the animal should be punished. The question was about the capabilities of the animal. This approach is more in line with the modern definition of legal personhood, because it is a functional approach to the definition.<sup>204</sup> Ask what the creature is capable of, not what species it belongs to.

This is strongly contrasted with modern animal legal proceedings which have basically ceased to exist,<sup>205</sup> except when animals are punished

---

199. *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

200. *McWilliams*, *supra* note 190.

201. *Id.*

202. *See Girgen*, *supra* note 189, at 110.

203. *Id.* (internal quotations omitted).

204. *See supra* notes 4–6 and accompanying text.

205. *See Girgen*, *supra* note 189, at 128 (stating the ways in which animals legal punishment has changed: "First, although the formal prosecution of animals has for the most part ended, animals nevertheless continue to be punished for their 'crimes' against human beings. Second, the public executions of the past have been replaced by out-of-sight animal shelter and veterinarian office euthanizations and hasty backyard executions. Finally, it is extremely rare for a person who summarily executes an animal to be charged with, and convicted of, cruelty to animals.").

for their harms against human beings—for example, vicious dog hearings.<sup>206</sup> When a dog harms a human being, there is no investigation into the dog’s mental state, but only into whether the dog is in fact prone to attack.<sup>207</sup> In fact, the only mental state that matters for assessing liability is the mental state of the animal’s owner. Liability attaches only to “[a]n owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal’s category . . . .”<sup>208</sup> Moreover, humans are no longer sentenced to death for violence against animals.<sup>209</sup>

What is all of this meant to show? First, that we once did recognize the possibility of animals to participate in the legal system, and we have since abandoned that recognition. Second, and more importantly, the way in which we held animals responsible was similar to that of other human beings. The standard of piglet responsibility was akin to child responsibility and the standard of donkey consent was akin to human consent. So, as animal science progresses, providing more evidence for the analogous abilities of animals and human persons, a plain reading of the definition of “legal person” seems ever more likely to include at least some animals.

Take, as my final example, a further study done by Susan Savage-Rumbaugh on bonobo abilities. Kanzi, Savage-Rumbaugh’s key study participant, was exposed to a semantic system which used basic grammatical structures to combine words into small chains for the purpose of expressing information.<sup>210</sup> Part of the study included a comparison of Kanzi’s abilities to that of a child named Alia.<sup>211</sup> Alia and Kanzi were trained to use language in much of the same way and both demonstrated “mastery” of basic English syntactical structures such as “Put X on Y” or

---

206. *Id.* at 124.

207. RESTATEMENT (THIRD) OF TORTS § 23 cmt. c (2010) (“For strict liability to attach, it is not required that the animal be ‘vicious’ or aggressive; a finding of the animal’s abnormal ‘dangerousness’ is sufficient.”).

208. *Id.* § 23.

209. See Girgen, *supra* note 189, at 129–30.

210. Savage-Rumbaugh, *supra* note 176, at 30 (The various combinations of words took the following forms: “1. Put X in/on transportable object Y (Put the ball on the pine needles—the objects in this construction could be reversed because both could be moved.) 2. Put X in/on nontransportable object Y. (*Put the ice water in the potty—the objects in this construction could not be reversed because one of them was too heavy to move or was attached to the substrate.*) 3. Give (or show) object X to animate A. (*Give the lighter to Rose.*) 4. Give object X and object Y to animate A. (*Give the peas and the sweet potatoes to Kelly.*) 5. Do action A on animate Y. (*Give Rose a hug.*) 6. Do action A on animate A with object X. (*Get Rose with the snake.*) 7. Do action A on object X with object Y. (*Knife the sweet potato.*) 8. Take object X to location Y. (*Take the snake outdoors.*) 9. Go to location Y and get object Y. (*Go to the refrigerator and get a banana.*) 10. Go get object X that is in location Y. (*Go get the carrot that’s in the microwave.*) 11. Make pretend animate A do action A on recipient Y. (*Make the doggie bite the snake.*).

211. *Id.*



“Give object X and object Y to animate A.”<sup>212</sup> Much to Savage-Rumbaugh’s disappointment, however:

The critics rejected the interpretation of this data by asserting that Kanzi could carry out novel test sentences simply by recognizing any two nouns (for example dog and snake) and then *inferring* the rest of what he was [to] do (i.e. make the dog bite the snake). They granted Alia grammar even though she had more difficulties than Kanzi, simply because she was human.<sup>213</sup>

This shows us the extent of the deep connection between human and person. Even when both animal and human are asked to perform the same task, the status of “language user” is denied to the animal. I argue the same sort of problem is occurring with legal personhood. It has so long been assumed that only humans are legal persons that many are not even open to the possibility that animals could possess some of the mental states that make humans capable of bearing duties and rights. Studies, like those done with Kanzi, should be done to determine if animals are capable of understanding concepts important to rights and duties—such as property ownership or consent. If we take seriously the definition of personhood as concerned with capabilities, and not with species membership, we should at least be open to studies showing that nonhumans have these capabilities as well.

An exposition of human beings who seemingly do not possess the capability to exercise rights and duties, namely because they lack the requisite mental states, and nonhumans who seem to possess those very mental states demonstrates the tension of so closely associating personhood with humanity. The definition of legal person traditionally accepted<sup>214</sup> asks us to identify certain capabilities, behaviors, capacities, or functions. We do so by looking to the mental capacities of the creature in question. This process does not require identifying the subject in question as human.

#### IV. RECOMMENDATION

In order to return to a more plain reading of the definition of legal person and open up the possibility that some humans will not be legal persons and some nonhumans may be legal persons, we must remember the function of legal personhood is to attribute value and rights to the individual. We must first look to whether the creature is capable of having rights, and we do so by looking at their standing in society and relationship with others:

---

212. *Id.*

213. *Id.*

214. SALMOND, *supra* note 4, at 318 (a person is “capable of rights and duties”); SMITH, *supra* note 3, at 283 (a person is “the subject of rights and duties”).

A right is inconceivable without corresponding relations between some individual and the community to which he is subject. *If we find a right, such as that of ownership, in existence, we must discover a subject for that right.* If the right attach to a human being, he is the subject; if it attach to a name used to designate the collective will of a group of men, the name or collective will is the subject.<sup>215</sup>

The relevant point here is that we should first look for the presence of a right—such as ownership or the right to one’s body—then, if we find such a right, then attribute to the creature in question personhood regardless of its species-membership. To be clear, I am not advocating for immediate inclusion of animals as legal persons or the exclusion of the permanently comatose as legal persons. I am advocating instead for a conceptual divorce between legal person and human so that we are able to honestly and appropriately evaluate whether any particular creature is a legal person without the humanity bias.

We may benefit from remembering that being capable of having rights and duties is not always a zero sum game, and sometimes more like a spectrum. There are already lots of variations on which sorts of rights some humans have on the basis of their status as a prisoner or as a minor. Some humans have more rights and some have less. It seems plausible that animals could also exist on this spectrum; “one can be more or less a legal person according to whether one is a prisoner, minor, parolee, probationer, future person, intending immigrant, corporation, *animal*, etcetera . . . .”<sup>216</sup> While it would be ridiculous to give bonobos the ability to vote, that should not be a barrier to considering a bonobo a person in some respects. After all, it would be just as ridiculous to grant a human infant the ability to vote for many of the same reasons.<sup>217</sup> The fundamental point is that we must apply the same standards to humans and non-humans when attributing legal personhood:

It should become clear that in an ideal legal system we could not arbitrarily draw a line between humans and animals. Law, as described herein, requires much of its true subjects, more than simply being human. Its subjects must be able to understand law, communicate the law, make law, and comply with the sanction-free norms of law itself, all in the interests of others. If we exclude animals because they primarily respond to sticks and carrots, we might do the same with some humans.<sup>218</sup>

---

215. Deiser, *supra* note 12, at 137–38 (emphasis added).

216. Dillard, *supra* note 9, at 4 (emphasis added).

217. *See id.* at 11 (“The thought of animals going to court seems ridiculous because they cannot relate to the law. The same problem, however, arises with the many humans who have difficulty understanding, communicating, and making law, and who would not comply with the law, assuming they grasped it, without sanctions.”).

218. *Id.*

## V. CONCLUSION

Some have already begun to challenge the status quo of legal personhood by planning to file a case on behalf of a chimpanzee client.<sup>219</sup> The Nonhuman Rights Project hopes to have this chimpanzee declared a legal person in the eyes of the court for the purpose of securing the animal's rights.<sup>220</sup> This plan is likely to fail, but The Nonhuman Rights Project is attempting to bring to light the tension present in the legal system—humanity is necessarily tied to legal personhood even though the definition of legal personhood prompts us to investigate a creature's capabilities, not its genes. Resolving this tension will not occur in one legal case, and it may take decades or centuries, but legal scholars must continue to confront the inconsistencies present in how legal personhood is applied in order to make change. Legal personhood is fundamental to our conceptions of rights, morality, agency, and obligations. Getting it right is not optional.

---

219. Chris Berdik, *Should Chimpanzees Have Legal Rights?*, BOSTON GLOBE (July 14, 2013), <https://www.bostonglobe.com/ideas/2013/07/13/should-chimpanzees-have-legal-rights/Mv8iDDGYUFGNmWNLOWPRFM/story.html>.

220. *Id.* (“Their goal is to win animals a toehold in the world of legal rights—a strategy that is the culmination of more than two decades of writing and legal work by lawyer Steven Wise and an allied group of attorneys, scientists, and animal activists. They hope to have an animal declared a ‘person’ in a court of law, breaking down a legal barrier between humans and other species that has stood for millennia.”).

