

Special Issue  
Traditions, Myths, and Utopias of Personhood

## Animals, Slaves, and Corporations: Analyzing Legal Thinghood

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### Abstract

*The Article analyzes the notion of legal “thinghood” in the context of the person–thing bifurcation. In legal scholarship, there are numerous assumptions pertaining to this definition that are often not spelled out. In addition, one’s chosen definition of “thing” is often simply taken to be the correct one. The Article scrutinizes these assumptions and definitions. First, a brief history of the bifurcation is offered. Second, three possible definitions of “legal thing” are examined: Things as nonpersons, things as rights and duties, and things as property. The first two definitions are rejected as not being very interesting or serving any heuristic function. Conversely, understanding legal things as property is meaningful, useful, and helps to understand what it means to say that animals are legally things. Defining things as property has certain rather important implications, which are analyzed at the end of the Article. For instance, not everything needs to be either a person or a thing: The historical institution of outlawry involved treating individuals neither as legal persons nor as legal things. One must conclude that the person–thing bifurcation is less fundamental than is often assumed.*

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## A. Introduction

The terms “person” and “thing” are used in numerous contexts—mundane, literary, and academic. Especially when the two terms come together in academic writing, they often refer to a supposed person–thing bifurcation existing in our moral or legal thinking.

In the legal setting, this bifurcation is presented in roughly the following way. We—or our legal systems or our conceptualizations of the law—divide the world into two parts: Persons and things. Persons are those who hold rights and whose interests are protected by the legal system, whereas things do not hold rights and exist merely for persons to use. It is sometimes implicitly or explicitly assumed that this division would be exhaustive: Every entity in the universe is classifiable either as a person or as a thing, and there is no third category—*tertium non datur*.<sup>1</sup>

Examples of the person–thing distinction abound. Many civil codes of civil-law jurisdictions contain distinct chapters addressing persons and things; this is the case with the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB). In BGB, things are understood as the property of persons. Another example of where the person–thing distinction is often invoked is when jurists attempt to understand and explain the legal status of animals. For instance, the U.S.-based Nonhuman Rights Project and its founder Stephen Wise argue that nonhuman animals cannot currently hold legal rights because they are legal things.<sup>2</sup> The legal status of animals will be a major test-case here for different theories of thinghood. Other central examples include the historical institution of slavery, which is sometimes explained as the treating of human beings as things,<sup>3</sup> and the interesting double status of the corporation, which is both a thing—*vis-à-vis* its owners—and a person—*vis-à-vis*, say, its clients.<sup>4</sup>

Compared to the other articles in this Special Issue, this Article pursues a distinctive methodology. This Article does not make normative arguments regarding, for example, whether animals should be treated as property. Rather, its aim is to bring more clarity to the discourse by exposing some of the ambiguities and problems pertaining to the label “thing.”

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<sup>1</sup> See e.g., SASKIA STUCKI, GRUNDRECHTE FÜR TIERE 175 (2016).

<sup>2</sup> See generally Steven M Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT L. REV. 793 (1998).

<sup>3</sup> Steven Wise endorses this understanding of slavery as well. See *id.* Older examples include, for instance, the Oxford jurisprudence professor Thomas Holland, who wrote that slaves are things, being “Objects of Rights and Duties.” See Thomas Erskine Holland, THE ELEMENTS OF JURISPRUDENCE 68 (1880).

<sup>4</sup> See generally Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).

Much like with “person” or “legal person,” it should not simply be assumed that “thing” has some given, established meaning or that it could be used to draw legal conclusions without specifying its meaning first. Similarly, one should not take as a given that everything is either a person or a thing. This Article argues that the best definition of “thing” is as property, and not every thing needs to be a person or property. The Article is thus primarily analytic rather than normative in nature.

The essay is structured as follows. Section B will provide a historical background for why “person” and “thing” are defined in legal thought the way they are. Both concepts have their origins in Roman legal thought, but our current understanding of them has more to do with how 16<sup>th</sup> century legal scholars started employing old Roman labels and ideas to systematize legal thought. Those ideas were developed by German legal scholars and philosophers, and then imported to the Anglophone world by John Austin. Section C will identify three modern ways of defining thinghood in legal discourse: A thing is (1) anything that is not a person, (2) rights and duties, or (3) an ownable object—property. The Article will then argue that among these three definitions, the third one is the most apposite. Finally, the Article will point out some implications following from adopting this definition.

The focus here is exclusively on *legal* things. Much like legal personhood is a concept distinct from other types of personhood, legal thinghood should be treated as a specifically legal notion. In moral philosophy, “person” is often used to denote beings that have ultimate value and/or that can hold rights, whereas “things” are only endowed with instrumental value and/or are unable to hold rights. This moral person–thing distinction can very well be a useful and illuminating basic division, but the same does not have to be true of legal personhood and thinghood.<sup>5</sup>

This Article pertains to a larger project: To provide an account of legal personality that is theoretically defensible and fruitful. A successful analysis should shed light not only on the paradigmatic cases of legal personhood and thinghood, but also on the more difficult issues such as the legal status of animals and the historical institution of slavery. This Article will be using slaves and animals as central—though by no means the only—examples here, as well.

## **B. The Historical Background of the Person–Thing Distinction**

### *I. Persons and Things in Roman Law*

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<sup>5</sup> Some moral philosophers have proposed different classifications. For Peter Singer, sentience is sufficient for ultimate value, but he reserves the label “person” for self-conscious rational beings. See PETER SINGER, *PRACTICAL ETHICS* (1993).

As is often the case, one should start with the Romans. Legal scholar Gaius famously divided law into that of persons (*personae*), things (*res*), and actions (*actiones*) in his introductory book *Institutes*.<sup>6</sup> It is not at all established, however, that Gaius proposed dividing the reality into three principal parts. Slaves, for instance, were mentioned both as things and as persons; nowhere in the *Institutes* is it mentioned that slaves would not be persons.<sup>7</sup> The Gaian trifurcation seems rather to have been a practical way of organizing the relevant legal rules under three categories. The law of persons was, according to Gaius, the law of statuses: How different individuals are treated differently depending on whether they are Roman or non-Roman; free or slaves; under the control of a *paterfamilias* (head of family) or not; and so on. This is consistent with the fact that the primary meaning of *persona* had to do with one's role or appearance rather than denoting an individual, as "person" most often does today.<sup>8</sup> Hence, the law of persons was about the different statuses human individuals could have in the Roman society. The law of things was, roughly speaking, what we would call property law; things were divided between the corporeal and incorporeal. Finally, the law of actions had to do with the enforcement of obligations.<sup>9</sup>

The *Institutes* likely did not propound a strict, mutually excluding bifurcation between persons and things. It is more probable that the idea of the strict person–thing distinction was conceived much later. *Institutes*, written originally around 160 AD, would later be incorporated with some changes into the major text of Roman law, *Corpus Iuris Civilis*, on which much of Western legal scholarship is based. The *Corpus* would serve as an inspiration for the new type of legal scholarship that sought to understand legal materials in terms of general principles and concepts.

## II. The Early Modern Era and "Rights over Things"

It would seem that the French law professor Hugues Doneau (also known as Hugo Donellus) took the first steps in developing a technical legal concept of personhood. Doneau, a member of the Renaissance humanist movement, studied the *Corpus* critically and attempted to establish the systematic foundations of the law.<sup>10</sup> He uses the word *persona*

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<sup>6</sup> GAIUS, INSTITUTIONES OR INSTITUTES OF ROMAN LAW (Edward Poste trans., 4th ed., 1904).

<sup>7</sup> See especially P.W. DUFF, PERSONALITY IN ROMAN PRIVATE LAW 6–25 (1938).

<sup>8</sup> See, for instance, Christopher Gill, *Personhood and Personality: The Four-Personae Theory in Cicero, De Officiis I*, in OXFORD STUDIES IN ANCIENT PHILOSOPHY: VOLUME VI 169 (1988).

<sup>9</sup> The law of persons is mainly addressed in Book I, the law of things in Book II, and the law of actions in Book IV. GAIUS, *supra* note 6.

<sup>10</sup> See Ernst Holthöfer and Johanna M Baboukis, *Doneau, Hugues*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N. Katz ed., 2009). Doneau was not the first humanist jurist; he was preceded by several scholars

in a new, technical sense in his main work, *Commentarii in iure civili* (“Commentaries on the Civil Law”). *Persona* is now the point of departure of legal analysis, and any individual that has a positive *status libertatis, civitatis, and familiae* is a *persona*.<sup>11</sup> There is an analogy here to the original idea of *persona* as a role, as one’s legal personality would now refer to one’s legal roles in the civil society. Doneau did not yet clearly distinguish between *homo* and *persona*. This was done by the German jurist Hermann Vultejus. According to Vultejus, *homo* refers to a human being, whereas *persona* is a *homo habens caput civile*, a human being with a civil standing. Vultejus uses the word *caput*, which, as noted, the Roman jurists occasionally used to refer to the kind of legal standing that free men had and slaves lacked.<sup>12</sup> Vultejus, however, seems to be the first to have defined these terms clearly, and the first to have claimed that slaves lacked legal personality—that they were not *personae*.

The great 17<sup>th</sup> century natural lawyer Hugo Grotius continued on the path paved by Doneau, employing a systematic approach to legal doctrines that would replace “the disorderly assemblage of formularies, commentaries and glosses characteristic of medieval legal scholarship.”<sup>13</sup> Grotius is renowned for his foundational work on the theory of international law, but he also worked on systematizing domestic law in his *Introduction to Dutch Jurisprudence*. He wrote: “In order to understand rights of persons to things, since law exists between persons, to whom the right belongs, and between things, over which the right extends, we must treat first of the legal condition of persons, secondly of the legal condition of things.”<sup>14</sup> Here, the mutual exclusivity is much more palpable than in the *Institutes*.

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who would start systematizing Roman law in a critical manner. See Peter Stein, *Systematization of Private Law in the Sixteenth and Seventeenth Centuries*, in *ENTWICKLUNG DER METHODENLEHRE IN RECHTSWISSENSCHAFT UND PHILOSOPHIE VOM 16. BIS ZUM 18. JAHRHUNDERT 122–3* (Jan Schröder ed., 1998).

<sup>11</sup> Christian Hattenhauer, “*Der Mensch Als Solcher Rechtsfähig*”—*Von Der Person Zur Rechtsperson*, in *DER MENSCH ALS PERSON UND RECHTSPERSON 44–46* (Eckart Klein & Christoph Menke eds., 2011).

<sup>12</sup> *Id.* at 47–9.

<sup>13</sup> NE Simmonds, *Grotius and Pufendorf*, in *A COMPANION TO EARLY MODERN PHILOSOPHY 210* (Steven Nadler ed., 2002).

<sup>14</sup> HUGO GROTIUS, *THE JURISPRUDENCE OF HOLLAND 15* (R.W. Lee trans., 1926). See also JR Trahan, *The Distinction between Persons and Things: An Historical Perspective*, 1 *J. CIVIL L. STUD.* 9, 12–13 (2008). One should note, however, that Grotius did not use the Latin derivative *persoon* but rather the word *mensch*—archaic for *mens*, “human being”—in the Dutch original. The Dutch original reads as follows: “Wat het eerste belangt, om ‘t selve welt te verstaen, alsoo ‘t recht bestaet tusschen de menschen, dien het recht toe-komt, ende tusschen de zaecken, daer over het recht streckt, zoo state eerst te handelen van de rechtelicke gestaltenisse der menschen, ende daer nae der zaecken.” HUGO DE GROOT, *INLEIDINGE TOT DE HOLLANDSCHE RECHTS-GELEERDHEID 6* (2d ed., 1910).

*III. Things as “Objects of Rights” According to Leibniz*

After Grotius, many German philosophers and thinkers would start employing the person–thing distinction. The ethos of the Enlightenment and philosophical rationalism of the 17<sup>th</sup> century would lead to a particular type of natural law scholarship in Germany. Hugo Grotius had still been rooted in the scholastic and humanist traditions, but the natural law scholarship that would succeed him attempted to depart both from the Christian scholasticism and from Roman law toward a putatively “ahistorical” type of legal scholarship. Legal works of this era can even be described as quasi-mathematical in nature; they were attempts to derive answers to any legal problem from a set of basic axioms.<sup>15</sup>

Gottfried Leibniz was an important representative of the natural law tradition. One of his many projects involved the creation of a civil code for Holy Roman Emperor Leopold I.<sup>16</sup> Leibniz was strongly influenced by Grotius, and he employed the Roman trifurcation in his attempt to build a system of private law. Incorporating the basic elements of person, thing, and action, his system defined them respectively as the *subject*, *object*, and *cause of a right*. The concept of right would thus serve as the fourth basic concept. He compared these concepts to the basic terms of geometry:

[B]oth have elements and both have cases. The elements are simples (*simplicia*); in geometry figures, a triangle, circle etc.; in jurisprudence an action, a promise, a sale, etc. Cases are complexions (*complexiones*) of these, which are infinitely variable in either field. Euclid composed the *Elements of Geometry*; the elements of law are contained in the *Corpus Juris* . . . . To us it seems thus: the [simple] terms from whose complexion there arises the diversity of cases in the law are persons, things, acts, and rights.<sup>17</sup>

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<sup>15</sup> See FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE 199–278* (1995) for a thorough exposition of the legal scholarship of this era.

<sup>16</sup> ROBERT BERKOWITZ, *THE GIFT OF SCIENCE. LEIBNIZ AND THE MODERN LEGAL TRADITION* 17 (2005).

<sup>17</sup> GOTTFRIED WILHELM LEIBNIZ, *SÄMTLICHE SCHRIFTEN UND BRIEFE, SECHSTE REIHE, ERSTER BAND 189* (2nd ed., 1990). English translation from Latin in Alberto Artosi, *Leibniz: Logico-Philosophical Puzzles in the Law*, in *PHILOSOPHICAL QUESTIONS AND PERPLEXING CASES IN THE LAW* xxv (Bernardo Pieri & Giovanni Sartor eds., 2013).

According to Leibniz, these four basic terms are present in any particular legal situation. First, subjects or persons—which can be natural (*naturalia*,) or artificial (*artificialia*)<sup>18</sup>—have the capacity to hold rights (*iura*). The holding of a right means that a person has the “moral power to execute his or her will”<sup>19</sup>; a right imposes on some other person “the moral necessity to forebear some right,” which Leibniz terms an obligation (*obligation*). In addition, every right pertains to a thing—an object—and is acquired on the basis of an act or cause.<sup>20</sup> Peter König describes the system as follows: “When one asks: who against whom?, one is asking about the subject of rights and duties, when one asks: to what?, [one is asking] about the object of a right, and when one asks: on what ground?, [one is referring] to the *causa*.”<sup>21</sup>

There are some exceptions to the basic rule that persons are the subjects and things are the objects of rights. Things, such as animals, could occasionally own things: For instance, a bridle could be bequeathed to a horse. On the other hand, in family relationships, persons could occasionally be the objects of rights, if a person was under the power of another.<sup>22</sup> It seems thus that Leibniz continued along the path paved by Grotius: Understanding things as “objects of rights” is not so different from understanding them as those “over which the right extends.”

Leibniz also seems to have been one of the last authors that paid attention to the third category of actions. Grotius had already been much less interested in actions than in the other two categories, and ever since actions have received much less attention from legal and moral thinkers than the first two.<sup>23</sup> This development is understandable, given that Romans likely lacked the concept of a “subjective” right that exists in modern Western legal thinking. For Romans, *actiones* afforded redress in different ways, and an “action” could

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<sup>18</sup> LEIBNIZ, *supra* note 17, at 189.

<sup>19</sup> BERKOWITZ, *supra* note 16, at 57.

<sup>20</sup> *Id.* at 56–57.

<sup>21</sup> “*Sofern man fragt, wer gegen wen? fragt man nach dem Subjekt des Rechts und der Verpflichtung, sofern man fragt: auf was? nach dem Objekt des Rechts, und sofern man fragt: aus welchem Grund? nach der causa.*” Peter König, *Das System des Rechts und die Lehre von den Fiktionen bei Leibniz*, in *ENTWICKLUNG DER METHODENLEHRE IN RECHTSWISSENSCHAFT UND PHILOSOPHIE VOM 16. BIS ZUM 18. JAHRHUNDERT* 156 (Jan Schröder ed., 1998).

<sup>22</sup> Klaus Luig, *Die Privatrechtsordnung im Rechtssystem von Leibniz*, in *GRUND- UND FREIHEITSRECHTE VON DER STÄNDISCHEN ZUR SPÄTBÜRGERLICHEN GESELLSCHAFT* 356 (Günter Birtsch ed., 1987).

<sup>23</sup> Certain contemporary authors do make some mention of actions. For instance, Tomasz Pietrzykowski maintains that this is “the standard conceptual framework of the legal thinking, which, from Roman times, has divided reality principally into three categories: persons, things and actions.” Tomasz Pietrzykowski, *Law, Personhood and the Discontents of Juridical Humanism*, in *NEW APPROACHES TO THE PERSONHOOD IN LAW* 13, 16 (Tomasz Pietrzykowski & Brunello Stancioli eds., 2016).

include both lawsuits and self-help.<sup>24</sup> On the one hand, modern legal systems distinguish between rights and the legal procedure pertaining to their enforcement, which is why procedural law does not need to be included in an account of the world outside of law.<sup>25</sup> Moral philosophy, on the other hand, is relatively uninterested in the details of the legal enforcement of rights. Thus, it is understandable that moral philosophers have paid little attention to the third Gaian category.

#### IV. Kant, Hegel, and the Historical School

The person–thing bifurcation was central to the moral and legal philosophies of the immensely influential Immanuel Kant and G.W.F. Hegel. For instance, according to Kant, persons had a dignity (*Würde*), whereas things had only a price (*Preis*).<sup>26</sup> Even though both Kant and Hegel were familiar with Roman law, they, like Grotius, did not seem interested in the third category of actions.

Kant's moral philosophy is founded on the categorical imperative, the second formulation of which demands that we never treat the humanity in ourselves and in others purely as a means to an end, but always also as an end in itself. Conversely, things may be used purely as means. They do not have a value, but only a price.<sup>27</sup> One can see a connection to the Roman-influenced person–thing distinction, and this is no coincidence: Kant was familiar with Roman law and took it to be superior to the German law of his time.<sup>28</sup>

In addition to Kant's legal philosophy, one must take account of G.W.F. Hegel's "philosophy of right," which was strongly influenced by Kant's works. Hegel employed the person–thing distinction to the same extent as Kant. In Hegel's work, persons have the "capacity for right" (*Rechtsfähigkeit*), which he terms the *abstract right*—personality can simply be understood as the abstract basis for the right to things.<sup>29</sup>

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<sup>24</sup> See generally Ernest Metzger, *Actions*, in A COMPANION TO JUSTINIAN'S INSTITUTES 208 (Ernest Metzger ed., 1997).

<sup>25</sup> Procedural law is naturally of central interest to lawyers and judges, but it does not have to do with construing an "inventory" of the non-legal world.

<sup>26</sup> IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, 4:435 (Mary Gregor trans., 1998). See also Christine M. Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 OXFORD J. LEGAL STUD. 629 (2013).

<sup>27</sup> *Id.* at 631.

<sup>28</sup> IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE. PART I OF THE METAPHYSICS OF MORALS* xxxi (1797).

<sup>29</sup> GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 36 (1820). One should note that the German word *Recht* can denote both "a right" and "law." *Rechtsfähigkeit* can be translated as "capacity for right(s)" or "legal capacity."



[P]ersonality alone confers a right to *things*, and consequently that personal right is in essence a *right of things*—‘thing’ [*Sache*] being understood in its general sense as everything external to my freedom, including even my body and my life. This right of things is the right of *personality as such*.<sup>30</sup>

The “right of personality” is thus the capacity to hold rights to things, and things are anything external to persons. This is related to the idea of a “sphere of freedom” that persons hold in relation to things that are external to them. Persons can “place” their will in “any thing,” whereby the thing “becomes *mine* and acquires my will as its substantial end (since it has no such end within itself), its determination, and its soul.”<sup>31</sup> Animals are also things, which is why they can be owned, as Hegel explicitly notes.<sup>32</sup>

Hegel’s idea of the sphere of freedom would be echoed in some German jurists’ works. Hegel’s general emphasis on the role of history as a process which would realize the freedom of persons and the “objective spirit”—*Geist*—of a people<sup>33</sup> would also inspire the Historical School of jurisprudence of the late 18<sup>th</sup> century and the first half of the 19<sup>th</sup> century. Its most important proponent was Friedrich Carl von Savigny, whose scholarship would have a lasting impact on the legal thinking of much of the Western world. In his major work, *System of the Modern Roman Law*, Savigny propounded a theory of legal personality, which equated legal personality with the capacity to hold rights (*Rechtsfähigkeit*). Savigny also introduced the term *Rechtssubjekt*, “legal subject” or “subject of law/right(s),” as a synonym for “legal person.”<sup>34</sup> John Austin seems to have been the first Anglophone legal theorist to employ the Continental views on personhood and thinghood in his works. He had studied in Bonn, Germany, and had become acquainted with Roman law and Continental legal scholarship.

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<sup>30</sup> *Id.* at § 40. (emphasis in original, word in brackets by translator).

<sup>31</sup> *Id.* at § 44.

<sup>32</sup> *Id.*

<sup>33</sup> See GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* (2001).

<sup>34</sup> The first appearance of the term *Rechtssubjekt*—or its 19<sup>th</sup> century spelling *Rechtssubject*—in the text corpus *Deutsches Textarchiv* is in Savigny’s *System*. Yves Charles Zarka claims that Leibniz was the first to use the phrase *subjectum iuris* (“subject of law”). Yet, Leibniz’s use of the phrase was different from the use of it since Savigny, as becomes apparent from the example employed by Zarka: *Deus est subjectum juris summi in omnia*, that is, “God is the subject of supreme law over all things.” Yves Charles Zarka, *The Invention of the Subject of the Law*, 7 BRITISH J., FOR THE HIST. PHIL. 245, 258–9 (1999).

At that time, Bonn was still dominated by natural law thinking, rather than the Historical School, though Austin would become familiar with both schools.<sup>35</sup> He was persuaded by the systematic approach of German jurisprudence and used it in his lectures which he started delivering at University College London in 1829. Some of his lectures were published during his lifetime as *The Province of Jurisprudence Determined*, which is mainly concerned with expounding Austin's general theory of positive law. The end of the book, however, contains an outline of the rest of his lectures wherein he already makes numerous references to persons. He writes for instance: "There are certain *rights* and *duties*, with certain *capacities* and *incapacities* to take rights and incur duties, by which *persons*, as subjects of law, are variously determined to certain *classes*."<sup>36</sup>

The influence of Continental scholarship is clear in this passage, as can be seen when Austin identifies persons as "subjects of law"—assumedly a translation of the German *Rechtssubjekt*. He also introduces the distinction between rights *in rem* and rights *in personam* to Anglophone jurisprudence and discusses the bifurcation of law into that of persons and that of things.<sup>37</sup>

Most of Austin's remarks about personhood and thinghood in *Province* are made *en passant*, whereas a whole chapter is dedicated to such questions in his *Lectures on Jurisprudence*, published posthumously in 1879. In *Lectures in Jurisprudence*, he makes reference to "the modern Civilians," that is, the Continental jurists of his time:

['Human being'] is the meaning which is given to the term person, in familiar discourse. . . . Many of the modern Civilians have narrowed the import of the term person as meaning a physical or natural person. They define a person thus: . . . a 'human being, invested with a condition or *status*.' And, in this definition, they use the term *status* in a restricted sense: As including only those conditions which comprise *rights*; and as excluding conditions which are purely onerous or burthensome, or which consist of duties merely.

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<sup>35</sup> MICHAEL HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 11–12* (1997).

<sup>36</sup> JOHN AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* xvi (1832). (emphasis in original)

<sup>37</sup> *Id.* at xvi ff.

According to this definition, human beings who have no rights are not persons, but things.<sup>38</sup>

Austin, however, dissents from this definition. He uses “person” in the sense “individual,” and claims that “[p]ersons are invested with rights and subject to obligations, or, at least, are capable of both.”<sup>39</sup> Austin does not completely agree with this definition. For him, “person” and “human being” are virtually the same thing; it just happens that only human beings can hold rights and bear duties. Hence, Austin even took slaves to be persons rather than things. Regardless, he introduced the Continental person–thing distinction to the English-speaking world.<sup>40</sup>

### C. Definitions of Thinghood Today

In the legal writing of today, it is often assumed that “person” and “thing” would have established meanings. “Person” or “legal person”—or, in civil-law countries, “legal subject”—is usually taken to mean “someone or something that holds legal rights,” even though there are ample slightly differing formulations. Regardless, this definition of legal personality—which will be referred to as the *legal-persons-as-right-holders view*—is often taken to be more or less axiomatically true. I have argued elsewhere against this orthodox account—defining a legal person as an entity that holds rights serves to muddle our understanding of both right-holding and legal personhood, because there are either legal nonpersons that hold rights or legal persons that do not hold rights.<sup>41</sup>

First, note that Western legal systems normally define born human children as legal persons and animals as legal nonpersons. It should follow that human children hold legal rights and nonhuman animals do not. Yet, this does not follow when applying modern jurisprudential theories of what right-holding means.

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<sup>38</sup> JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW, VOL I 348 (1885). I am not certain why Austin claims that civilians would have taken only right-holding to be constitutive of personhood; Wolff and Thibaut, for instance, clearly define persons as the subjects of rights and duties/liabilities (*Verbindlichkeiten*). ANTON THIBAUT, SYSTEM DES PANDEKTENRECHTS 140–41 (1803). The Prussian Civil Code of course defined personhood in terms of right-holding, as noted above. (emphasis in original)

<sup>39</sup> AUSTIN, *supra* note 38, at 358. (emphasis in original)

<sup>40</sup> Regarding the influence of the German personhood theories in the Nordic countries, see LARS BJÖRNE, BRYTNINGSTIDEN: DEN NORDISKA RÄTTSVETENSKAPENS HISTORIA. DEL II, 1815-1870, 349–65 (1998).

<sup>41</sup> See generally Visa AJ Kurki, *Why Things Can Hold Rights*, in LEGAL PERSONALITY: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Visa AJ Kurki & Tomasz Pietrzykowski eds., 2017).

For instance, thinking that children hold the right not to be physically abused is most likely subscribing to the *interest theory*, a conception of rights that equates rights with the legal protection of interests through legal duties. The duty not to hit children is in the interests of children, which is why such duties constitute rights for the affected children. If we agree that such protections can legitimately be called “rights,” then we must likely attribute rights to nonhuman animals as well: The interests of nonhuman animals are protected in a similar, though less robust, way as those of human children. Conversely, the *will or choice theories* of rights understand right-holding in terms of choices. According to these theories, right-holding consists of being able to affect the duties of others by, for instance, choosing to enforce or waive a contract. Yet, young children are unable to make these kinds of choices even though they are widely classified as legal persons. Hence, we either have legal nonpersons that hold rights, like animals, or legal persons that do not hold rights, like young children.<sup>42</sup> It is perfectly reasonable in this discourse to talk of the rights of animals, as jurists do in their everyday language talk of the rights of children—and hence occasionally employ the interest theory of rights.

Legal personality is, then, usually equated with right-holding, even if it should not be. Legal personality should instead be understood as a cluster concept, incorporating distinct, but interconnected incidents. The notion of a legal thing, on the other hand, can be understood in at least three main senses, which are related to each other, but clearly distinct.

### *I. Three “Things”*

First, “thing” can refer to anything that is not a person.<sup>43</sup> This usage was endorsed by the German 19<sup>th</sup> century scholar Anton Thibaut and by Hegel.<sup>44</sup> The same definition is endorsed, at least implicitly, by all legal scholars who claim that the person–thing distinction would be jointly exhaustive, meaning that it would cover the whole universe and that there would be no third category.

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<sup>42</sup> For contemporary interest theories, see Matthew Kramer, *Rights without Trimmings*, in A DEBATE OVER RIGHTS. PHILOSOPHICAL ENQUIRIES (Matthew H Kramer, NE Simmonds & Hillel Steiner eds., 1998) and Joseph Raz, *On the Nature of Rights*, in MIND 194 (1984). For will theories, see Nigel Simmonds, *Rights at the Cutting Edge*, in A DEBATE OVER RIGHTS. PHILOSOPHICAL ENQUIRIES (Matthew H Kramer, NE Simmonds and Hillel Steiner eds., 1998) and CARL WELLMAN, REAL RIGHTS (1995).

<sup>43</sup> See Trahan, *supra* note 14, at 11.

<sup>44</sup> “By Person is meant whatever in any respect is regarded as the subject of a right: by Thing, on the other hand, is denoted whatever is opposed to person.” ANTON THIBAUT, AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE § 101 (Nathaniel Lindley trans., 1885), cited in Trahan, *supra* note 14 at 15. According to Hegel, a thing in its “general sense” was “everything external to my freedom, including even my body and my life.” G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 71 (Allen W. Wood ed., H.B. Nisbet trans., 1991).

Second, *res* was also used by Roman scholars to refer roughly to what we could call rights and duties.<sup>45</sup> For instance, Gaius mentions “the right of letting rain-water fall in a body or in drops on a neighbour’s roof or area” as an example of a “thing incorporeal.”<sup>46</sup> This sense is still reflected in certain modern usages, such as the common law phrase “thing in action,” or “chose in action,” meaning essentially the right to sue.

Third, “thing” can refer to anything, or at least any physical object, that is susceptible to being owned. Gaius called these “things corporeal”; they were “tangible” and included “land, a slave, clothing, gold, silver, and innumerable others.”<sup>47</sup> Many contemporary legal scholars use “thing” in a similar manner. Jeffrey Nesteruk defines “thing” as “the subject of property,” writing that “[i]n law, ‘property’ is not a ‘thing’ although ‘things’ are the subject of property.”<sup>48</sup> This understanding of “thing” is also reflected in phrases such as “rights *in rem*” or “rights to things,” meaning crudely speaking property rights, as opposed to “rights *in personam*” or “rights in relation to persons,” such as contractual rights. Similarly, the phrase *res nullius* denotes an object that can be owned, but is not currently owned by anyone. Some modern civil law codifications employ this third sense of “thing” as well, defining things as physical objects that can be owned. For instance, Part II of the German Civil Code is titled “Things and animals,” which follows Part I, “Persons,” and contains rules pertaining to the possession, buying, and selling of goods. Before the year 1990, that part was called simply “Things,” but animals have since then been declared as “not things” — even if the provisions that apply to things apply to animals as well, unless otherwise provided.<sup>49</sup>

“Thing” is used in different contexts, and none of the usages can be said to be “wrong” or self-contradictory. Nevertheless, using the same label for different concepts is prone to cause confusion and conflation, which is why it is worth considering whether preference should be given to one of the usages. I will therefore examine these usages of “thing” and determine whether they are useful legal categories that serve a heuristic or an explanatory purpose.

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<sup>45</sup> Trahan, *supra* note 14, at 11.

<sup>46</sup> GAIUS, *supra* note 6, at § 14.

<sup>47</sup> *Id.* at § 13.

<sup>48</sup> Jeffrey Nesteruk, *Persons, Property and the Corporation: a Proposal for a New Paradigm*, 39 DEPAUL L. REV. 543, 543 (1990).

<sup>49</sup> BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 90a.

*II. Things as “Not Persons” and “Rights”*

This and the next Section will address the first two conceptions, according to which things are “not persons” and “rights,” focusing mostly on the “not persons” conception.

Defining a legal thing as “anything that is not a legal person” gives the word an extremely wide scope of application. Such a concept includes not only cars, houses, and animals, but also quarks, numbers, ideas, and so on. Does employing such a concept serve any heuristic purpose? Do these various entities have anything legally relevant in common that would make this category interesting? First, it is commonplace to claim that only legal persons hold legal rights and/or duties. Hence, nonpersons would be united by the fact that they do not hold any such rights or duties. Nevertheless, as already mentioned, one can reasonably say that nonhuman animals already hold legal rights even though they are currently property and not legal persons. Similarly, slaves in the antebellum United States held both rights and duties despite being property and being commonly classified as not persons.<sup>50</sup> Therefore, we would have things that hold rights and duties. This putative commonality between all nonpersons can consequently be dismissed.

Another potential unifying feature between all non-persons would be that all rights “pertain” to nonpersons. This is a rather multifaceted issue that will be analyzed next.

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<sup>50</sup> For instance, Section XXVIII of the South Carolina Slave Code of 1740 penalized the willful killing of slaves:

And whereas cruelty is not only highly unbecoming of those who profess themselves Christians, but is odious in the eyes of all men who have any sense of virtue or humanity; therefore to restrain and prevent barbarity being exercised toward slaves, Be it enacted, That if any person or persons whosoever, shall willfully murder his own slave, or the slave of another person, every such person shall upon conviction thereof, forfeit and pay the sum of £700 current money.

Such a protection would constitute rights according to the interest theory.

### III. Things as “Objects” of Rights and Duties

Leibniz claimed that things are “objects” of rights.<sup>51</sup> A related claim is that rights and duties, or legal relations, always “pertain” to things.<sup>52</sup> We have to be careful because it is not clear what the words “object” and “pertain” mean here—the terms are very vague. Can we give them more precise definitions that are legally interesting?

What unifies all duties is that they prescribe or permit someone to perform an act or refrain from some act. Conversely, rights are often understood as the correlative entitlements of duties. Consequently, one could say that rights and duties only pertain to acts and forbearances. As mentioned above, the interest theory of rights defines rights as interests that are protected or served by some duty, whereas the will theory of rights understands rights as control over someone else’s duty.<sup>53</sup> We do not need to pick sides between these two theories because both of them yield the same conclusion: As duties prescribe or prohibit some action and thus “pertain” to actions and forbearances, their correlative rights must also pertain to the same actions and forbearances. Yet, using the word “thing” as a synonym for “act” or “forbearance” would be odd.<sup>54</sup> It would be a rather radical departure from ordinary language without any conceivable benefit, as the more specific and established terms—such as “act” and “forbearance”—are better-suited for the task.

Do rights and duties pertain to something else other than acts and forbearances? Property rights and some other rights can have a “subject-matter” or a “compass” that is usually a physical object.<sup>55</sup> Such rights are occasionally called rights *in rem*, “rights to things.” Thus,

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<sup>51</sup> See *id.* at X. See also Tomasz Pietrzykowski & Brunello Stancioli, *Introduction: Modern Challenges to the Concept of a Person in Law*, in *NEW APPROACHES TO THE PERSONHOOD IN LAW* 7 (Tomasz Pietrzykowski & Brunello Stancioli eds., 2016) (“In other words, one may be either a subject of a party of legal relations (a person) or merely their object (a thing).”).

<sup>52</sup> Hegel was rather famous for insisting that all rights pertain to things. See HEGEL, *supra* note 29, at 71. See also STUCKI, *supra* note 1, at 176.

<sup>53</sup> See generally A DEBATE OVER RIGHTS. PHILOSOPHICAL ENQUIRIES (Matthew H Kramer, NE Simmonds & Hillel Steiner, 1998). I am here talking of rights and duties as Hohfeldian legal positions, for example, as outcomes of legal interpretation. There are of course some alternative accounts of rights. According to Joseph Raz, rights are *reasons* to set someone under a legal duty. Regardless, they pertain to duties and hence to actions and forbearances. RAZ, *supra* note 42.

<sup>54</sup> I use the word “act” here, rather than “action,” to underscore that I’m not referring to the Gaian category of actions.

<sup>55</sup> John Austin was likely the first to use the compass metaphor. AUSTIN, *supra* note 38 at 874 and 973. See also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 201 (2011):

Lawyers frequently talk about rights, not as three-term relations between two persons and an act of a certain type, but as two-term

the subject-matter of a property right is a physical object of a certain type, a banana or a mobile phone, for example. Such objects fall under the third definition of “thing” *qua* property. In this property context, saying that the right pertains to the physical object makes sense and is not overly vague, as the legal rules of ownership apply here: Bananas and mobile phones can be sold and stolen. But we cannot generalize this observation to all rights—not every right has this kind of connection to the rules of ownership. Consider X’s right not to be murdered. What does the duty “pertain” to here, other than everyone else’s conduct with respect to X? It does, of course, in some sense pertain to X’s body, but differently than how ownership rules pertain to the bodies of pets, for example. Pets can be sold and stolen because they are property; legal persons cannot, at least under normal circumstances.<sup>56</sup>

Talking about what all rights “pertain to,” or their “objects,” can easily get either confusing, vague, or both. Different kinds of rights and duties have different kinds of salient subject-matters: With the central instances of property rights, the subject-matter is a physical,<sup>57</sup> clearly defined object that can be owned, whereas this is not the case with the rights and duties flowing from the legal prohibition of murder. It would be odd to assemble all these disparate subject-matters under the category of legal things.

To conclude, there is surely nothing inherently problematic or contradictory with defining a “legal thing” as “anything that is not a legal person,” but this proposed category is not very interesting or heuristically useful. Classifying an entity as a thing—*qua* not a legal person—does not tell us, for instance, whether a given entity holds rights or what kind of legal rules likely apply when dealing with these entities. This Article would propose “nonperson,” or “legal nonperson,” as a better alternative for covering the wide range of entities that are not legal persons. This simple term is much less ambiguous, and illustrates the fact that nonpersons are defined by making reference to persons: Everything that is *not* a legal person is a legal nonperson.

The second proposed definition identified “things” as rights and duties themselves. Much of the criticism that has been advanced above applies to this definition of “thing” as well. Most importantly, we have at our disposal much less ambiguous terms to discuss rights and duties,

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relations between persons and one subject-matter or (in a broad sense) thing: for example, someone’s right to £10 under a contract, or to (a share in) a specified estate, or to the performing rights of an opera.

<sup>56</sup> The exception is of course corporations, which can be bought and sold, though not really stolen, in a literal sense.

<sup>57</sup> Immaterial property is, however, not physical in nature.



such as “right” and “duty”—or the more precise Hohfeldian terminology if we need to make specific distinctions.<sup>58</sup>

#### IV. *Things as Ownable Objects*

As already hinted, understanding “things” as objects that are susceptible to being owned is a much more fruitful approach. Even though ownership is a cluster concept, consisting of distinct incidents that are not always present at every instance of ownership, it still serves a heuristic purpose. If something is owned, there is at least a *pro tanto* reason to assume that a certain array of legal rules applies to the object in question. For instance, property can freely be sold, donated, destroyed, and used by the owner, even if there are exceptions—the owner of a master painting can be forbidden from destroying the painting, whereas the owner of a banana may usually freely consume the fruit.<sup>59</sup>

Understanding things specifically as property refines the claim that slaves and animals are “things.” For instance, Steven Wise has often compared the status of animals as things to that of the historical status of slaves.<sup>60</sup> Yet he clearly has in mind things *qua* property. Slaves were not simply legal nonpersons; they were property. The same is true of animals today. Consider the difference between slaves and outlaws—the latter being another historical category of human beings stripped of the rights that belong to persons. Both slaves and outlaws are legal nonpersons. Slaves, however, can legally be bought and sold; whereas, an outlaw is simply outside of the law’s protection and in a sense “unregulated.” A legal system would neither forbid nor enforce the sale of an outlaw. Animals are in this regard like slaves, not outlaws, because Western legal systems actively enforce the sale of animals. Though the institution of outlawry has now disappeared, the legal status of undocumented migrants resembles the status that was occupied by outlaws in some ways: Such migrants are not treated as property, but they lack—at least *de facto* if not *de jure*—most of the legal rights that are accorded to the country’s lawful permanent residents.<sup>61</sup>

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<sup>58</sup> Wesley Newcomb Hohfeld presented his scheme in Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L. J. 16 (1913).

<sup>59</sup> See generally Anthony M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed., 1961).

<sup>60</sup> See e.g., Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIM. L. (2010).

<sup>61</sup> I would like to thank Toni Selkälä for this example. Slavery as a legal institution has disappeared, but *de facto* slavery likely still exists. See KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (2012).

### V. Implications

This Article has now analyzed the concept of a legal thing; understanding a legal thing as property has appeared as the most meaningful definition of the concept. This Article now looks at the implications of that analysis, and in particular how it can aid in analyzing the normative discourse concerning animals.

First, some things can hold rights. Animals are property, but hold rights regardless; these rights mostly serve to limit the property rights of the owner, though they also impose duties on all human beings and corporations collectively. Similarly, slaves in the antebellum United States held certain rights toward both their owners and third parties.

Second, not everything needs to be a legal person or a legal thing—*tertium datur est*. This is true of entities that conceptually cannot be either legal persons or things—such as numbers—but also of entities that can conceptually be owned.<sup>62</sup> An outlaw would be neither a legal person nor a legal thing—even if human outlawry is likely legally impossible in an era of universal human rights. Animals could potentially receive a similar status, which would involve not treating them as property, but not endowing them with legal personality in the full sense either. For instance, one could make the argument that we can indeed use animals for different purposes, but that it is wrong for the legal system to enforce animal exploitation.

Thirdly—and perhaps most interestingly—one can be *both* a legal thing *and* a legal person for certain purposes. As legal thinghood does not imply legal nonpersonality, there is nothing intrinsically problematic with this result. Business corporations are famous for having this kind of double status, as they are both the objects and subjects of property rights: Companies are owned, yet as legal persons they can also own things themselves. Nevertheless, this example is somewhat knotty; for instance, one could argue that it is not the corporations themselves that are owned, but rather their stock.<sup>63</sup> In addition, this Article maintains that being owned enables the corporations to act as legal persons, as the owners contribute to the group agency of the corporation in much the same way as members or delegates can contribute to the group agency of an association.

Regardless, it is easy to think of less problematic examples of a being that is both a legal person and property. Slaves in the United States were treated as property and as potential malefactors in the eyes of the criminal law. This is very explicit in Thomas Morris's book on

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<sup>62</sup> Strings of numbers can of course constitute immaterial property.

<sup>63</sup> See *e.g.*, Iwai, *supra* note 4, at 593.

slavery, Part II of which is entitled “Slaves as Property” and Part III “Slaves as Persons.”<sup>64</sup> An animal could also be property, but have a limited legal personality, as is exemplified by David Favre’s account of animals as “living property.” The debate over the legal status of animals can—very crudely—be divided into two camps: Welfarists and abolitionists. On the one hand, welfarists believe that animals should be protected from cruelty in many ways, but that they should not be accorded anything resembling legal personhood. Abolitionists, on the other hand, demand that animals’ status as property be abolished altogether. Favre argues for a middle position: Animals could *both* retain their status as property *and* receive a limited type of legal personhood, with accompanying rights. He writes:

Within this new property status, animals have the right:

1. Not to be held for or put to prohibited uses.
2. Not to be harmed.
3. To be cared for.
4. To have living space.
5. To be properly owned.
6. To own property.
7. To enter into contracts.
8. To file tort claims.<sup>65</sup>

Even if this list of rights is extensive, Favre denies that animals should be classified as legal persons rather than “living property.”<sup>66</sup> If one wants to understand this proposal in the context of the person–thing bifurcation, one cannot understand that bifurcation as mutually exclusive.

Understanding things as property serves also to explain certain further issues regarding the legal status of slaves and animals as “things.” The fact that an object falls under the legal category of property does not only imply certain private law rights and duties for the owner and third parties—such a classification also has implications for the field of public law and criminal law. For instance, according to Finnish animal welfare law, animal welfare officials typically can only issue administrative decisions to the owners or possessors of the animals.<sup>67</sup>

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<sup>64</sup> THOMAS D MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860* (1996).

<sup>65</sup> David Favre, *LIVING PROPERTY: A NEW STATUS FOR ANIMALS WITHIN THE LEGAL SYSTEM*, 93 *MARQUETTE L. REV.* 1021 (2010).

<sup>66</sup> *Id.*

<sup>67</sup> See generally Birgitta Wahlberg, *Pro bono publico? En studie om fjäderfäns välbefinnande och tillsynsmyndighetens befogenheter i relation till livsmedelssäkerhet och folkhälsa*, 144 *TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND* 1 (2008).

The private law concepts of ownership and possession—both of which pertain primarily to physical objects that are susceptible to being owned—serve a kind of indirect function in public law. Similarly, certain crimes are only applicable to things that are owned: Animals can be stolen and slaves could be stolen, whereas an outlaw could not. Natural persons can be kidnapped, but this does not constitute theft.

#### **D. Conclusion**

This Article sought to problematize legal thinghood, much like legal personhood should be problematized. Both concepts are vague, and authors employing them occasionally do so without specifying their meaning; they can also simply assume that the meaning they have chosen is the axiomatically “correct” one. The person–thing bifurcation should, however, be specified in various ways before it is used to systematize our legal thinking.

This Article argued that it is best to understand the person–thing distinction as a person–property distinction. This gives an account of legal things that has heuristic value and that can be defined positively—as something to which the incidents of ownership can apply—rather than negatively, as for instance “everything that is not a legal person.” Many negative definitions of thinghood have turned out to be problematic: For instance, the idea of understanding things as nonpersons is simply not very useful or interesting.

The legal person–thing distinction can also be a red herring regarding the perceived moral status of some entity. Sweeping claims about the moral implications of legal personhood and thinghood should at least be avoided. For instance, a moral philosopher might criticize the fact that corporations are legal persons on the ground that the law treats as intrinsically or ultimately valuable something that is merely of instrumental value. Corporations should, according to the philosopher, be treated as legal things because they are moral things, but such a claim would require further argumentation. It is not in any way obvious that the legal personality of corporations has anything to do with their perceived moral value—nor do most jurists likely think that. A budding group of business associates who decide to found a corporation are probably not seeking legal recognition for their putative claim that the common venture would be of ultimate value. Rather, for example, they want the corporation to own property—things—that is distinguishable from the property of the members.

Moral considerations may, in fact, require endowing moral things with legal personhood. For instance, Protocol 1 Article 1 of the European Convention on Human Rights—which protects property—includes not only natural persons, but also artificial persons, such as

business corporations, within its ambit.<sup>68</sup> One could very well make the argument that some moral considerations underlie the inclusion of artificial persons. Protecting the property of corporations is likely understood as protecting, by extension, the property rights of the stockholders. Thus, extending the protections of legal personality to a moral thing could even be the morally right thing to do.

The legal category of thinghood and the label of “thing” can have moral import in many other ways as well. For instance, the civil codes of certain countries, such as Germany, have relabeled animals as “animals” instead of “things.” It is rather interesting that this relabeling does not purport to change the legal treatment of animals in any way. The German Civil Code, for instance, is explicit in that the provisions that apply to things apply to animals as well, unless otherwise provided.<sup>69</sup> Saskia Stucki has—when addressing the Swiss Civil Code, which has undergone largely the same relabeling with regard to animals as the German Civil Code—summarized this change in legal taxonomy as follows: “[A]nimals are not treated as things but *like* things.”<sup>70</sup> As the legislative change does not effect any direct legal consequences, it must be interpreted as conveying a certain message about the perceived moral value of animals.

Finally, it should be questioned whether the person–property distinction is as fundamental as it is occasionally taken to be. It does occupy a central position in Western legal thinking, but if things can hold rights, persons can be things, and some entities are neither persons nor things, perhaps the distinction in fact explains fewer issues than is occasionally assumed. Additionally, if everything does not need to be a person or a thing, whole new categories could be introduced. Perhaps the category of animals will eventually become a truly independent and idiosyncratic third category. For instance, Tomasz Pietrzykowski has proposed that animals be reclassified as “non-personal subjects of law.” They would not receive the rights that legal persons hold today. Yet, they would receive the right to have their interests considered.<sup>71</sup> This proposal is, in fact, quite close to how animals are treated today. Animals are currently things *qua* property, but also protected by the animal welfare

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<sup>68</sup> See also MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* (2006); DAVID JASON KARP, *RESPONSIBILITY FOR HUMAN RIGHTS: TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES* (2014) and Peter Oliver, *Companies and Their Fundamental Rights: A Comparative Perspective*, 64 INT’L & COMP. L. Q. 661 (2015).

<sup>69</sup> BGB, *supra* note 49.

<sup>70</sup> *Tiere [werden] rechtlich also statt als Sachen wie Sachen behandelt*. Saskia Stucki, *Rechtstheoretische Reflexionen zur Begründung eines tierlichen Rechtssubjekts*, *Developments and Perspectives in the 21st Century*, in ANIMAL LAW—TIER UND RECHT 146 (Margot Michel, Daniela Kühne & Julia Hänni eds., 2012).

<sup>71</sup> Tomasz Pietrzykowski, *The Idea of Non-personal Subjects of Law*, in LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Visa A.J. Kurki & Tomasz Pietrzykowski eds., 2017).

law, which grants them rights and does not apply to other legal things, such as bananas and mobile phones. Thus, one could make the argument that the law of many Western countries already purports to take the interests of animals into account—though whether it in fact succeeds in this task is another question. Regardless, if Pietrzykowski's proposal were implemented, we would have returned to a trifurcation—though a trifurcation very different from the one proposed by Gaius. The almost-forgotten Gaian classification of actions would have been replaced by the category of animals.