Special Issue
Traditions, Myths, and Utopias of Personhood

Traditions, Myths, and Utopias of Personhood: An Introduction

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Abstract

Legal personhood continues to serve an important role in the legal system. The millennial distinction of persons and things, while often unarticulated, is an essential building block of all legal relations. This introduction to persons and things outlines the past tradition, draws on present myths, and construes a utopia of which the articles in this special issue will comment, clarify, and criticize.

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A. Introduction

"In what way is a thing not a person?" asks the bestial protagonist in Margaret Atwood's short story *Lusus Naturae*.[1] In all its apparent simplicity, this is also what the articles in this special issue on Persons/Things address. Why, what, and when does a person become a mere thing or a thing a person?[2] What is the function of the legal distinction between persons and things, if any? The most canonical answer to this question argues that persons are ones who command a capacity to possess things—that distinction between the two is a means to establish property relationships. A person has rights and duties that *allow* her to do, to have, and to be,[3] while a thing merely exists. How much does a person have to do and have in order to exist? Advancement in science and technology, together with globalization, has brought about many thorny issues for law and legal systems at large to solve over past decades. These issues share an intimate connection with the distinction between persons and things. The legal debates over the status of animals, corporations, unborn, non-biological machines, and nature have, for their part, made questions of personhood and personhood's connection to rights topical. These and other things question what is the specific character enjoyed by natural persons, living human beings, that makes their actions significant and their rights legally enforceable in comparison to these other entities—the things. This introductory article, together with the articles of this special issue, argues for a gradual re-orientation of our understanding of personhood and, with that, our appreciation of things.

Any inquiry into legal personhood is an attempt to constitute a tradition, a particular reading of the vast terrain of legal personhood. While the tradition of legal personhood is, in many ways, of more recent origin than its oft-quoted millennial heritage dating it to a Roman Law distinction between persons and things, *persona* and *res*, all attempts to justify a re-reading of legal personhood—ours included—commence with this tradition, contrived as it may be. In short, ours is an attempt through "the use of ancient materials to construct invented traditions of a novel type for quite novel purposes,"[4] that is, an attempt to use legal personhood to argue that there exists a red thread connecting shamanism, fetuses, and corporations, among others, under the umbrella of a new-found tradition. In many ways, such an attempt clings onto a utopia of legal coherence where none might be found. Therefore, rather than arguing for a single, theoretically sound interpretation of legal personhood fit for the present, we trace two divergent paths and encourage following both.

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[1] *See* Margaret Atwood, *Lusus Naturae*, *in* STONE MATTRESS: NINE WICKED TALES 125, 130 (2014).

[2] In what follows a person is an oft-used short-hand for a legal person but we occasionally variate and use terms such as legal personality or legal subject to refer to legal person.

[3] *See* JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 576 (1958).

[4] Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1, 6 (Eric Hobsbawm & Terence Ranger eds., 1983).

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One path leads to dilution of conditions formerly deemed essential for the existence of personhood. Examples of such practices are relatively commonplace, for one, the norm found in the European Data Protection Regulation equates rights with the existence of a living natural person, while simultaneously recognizing that DNA data of a deceased person can also constitute protected personal data.[5] The other path evinces multiplication of entities endowed with personhood in an attempt to correctly attribute rights and duties. These are equally numerous as the examples of dilution of norms, as calls for robot personhood, artificial intelligence agency, or animal *habeas corpus* indicate. Rather than attempting to argue for convergence of these two different paths, we invite a diffractive reading of personhood "attuned to differences—differences that our knowledge-making practices make and the effects they have on the [personhood]."[6]

Alongside an invented tradition of ancient origin, there is a myth of unprecedented inattention fostered by authors writing on the topic of legal personhood. It is commonplace to argue that personhood is "grossly undertheorized"[7] while at the same time participating in a lively debate over personhood across number of disciplines.[8] This foundational myth constitutes the power of a proposed solution and its original, explanatory power by revealing the unprecedented inattention to personhood and, in doing so, making the author's attention to it even more mystical in return.[9] Closely resembling what Susan Marks calls the myth of the dangerous dark,[10] the authors reveal their insights on personhood as a means to reveal something concealed within the dark folds of personhood that the inattention intensifies.[11] Most often, the myth of unprecedented inattention highlights the fact that due to this inattention, a legal entity is discriminated against or not seen in the proper light. The present notion of personhood, grossly undertheorized as it might be, is a malign ideological

[5] *See* General Data Protection Regulation 2016/679, 2016 O.J. (L 119); *see also* Opinion 4/2007 of the Data Protection Working Party on the Concept of Personal Data, 01248/07/EN WP 136) 22–23 (discussing the concept of personal data).

[6] KAREN BARAD, MEETING THE UNIVERSE HALFWAY 72 (2007).

[7] David Fagundes, *Note: What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1768 (2001).

[8] For other examples from upholding this myth, see, e.g., Stephen C. Hicks, *On the Citizen and the Legal Person*, 59 CINCINNATI L. REV. 789, 869 (1991); Anu Pylkkänen, *Onko oikeuden henkilöllä sukupuolta?*, 36 OIKEUS 147, 148 (2007) (asking to "develop an understanding of the legal person," or noting how little discussion there is on what personhood entails" (author translation)).

[9] *See* ROLAND BARTHES, MYTHOLOGIES 29 (1972).

[10] Susan Marks, *Four Human Rights Myths*, *in* HUMAN RIGHTS 217, 231 *et seq.* (David Kinley, Wojchiech Sadurski, & Kevin Walton eds., 2013).

[11] For a discussion with regard to fetal personhood and women's rights, see Alejandro Madrazo, *Narratives of Prenatal Personhood in Abortion Law*, *in* ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 327 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

lens that inverts the universal legal reality it is supposed to uphold to veer towards particularism.[12] Re-adjusting personhood, the myth insists, will correct the wrongs endured. But could it be, as Marks suggests that "we should be more concerned with what happens in broad daylight, then perhaps the key myth is mystification itself—the myth of myths?"[13] Here, we attempt to steer away from repeating the myth of unprecedented inattention. Rather, we seek to analyze the curious perception that often the very act of casting a light on inattention has been employed to perpetuate injustices attributed to that inattention.

Thus, ours is an attempt to build a new tradition and construct a myth to uphold an ideological utopia of legal personality, or, alternatively, a readjustment of the present voluminous debate to address that which hides in the plain sight. This introduction is divided into two distinct parts. The first part provides a brief historical background of the conceptual development of legal personhood in the Occidental legal systems and their offspring, the Eurocentric international law. The latter part offers a more contemporary backdrop within which the articles of the present special issue operate as well as a modest proposal for a lens through which to reflect the emerging arguments for and against new categories of personhood. Even though these parts function independently, the theory formulation in the latter part builds upon the nuanced history of legal personhood.

B. Building a Tradition

The persons/things distinction in the law has many roots. Most Occidental normative orders, whether ecclesiastical or legal, presume existence of such a distinction. The Judeo-Christian maxim of humans' dominion over nature, for instance, adheres to it. The most recurrent reference to a starting point of legal distinction between persons and things emanates from Ancient Roman Law. Gaius, in *Institutiones,* divides the realm of law into three categories: persons (*persona*), things (*res*), and actions (*actiones*).[14] According to the system of the Roman law explained by Gaius, slaves as well as *paterfamilias*, head of the household, are humans (*homo*) but not necessarily persons (*persona*). They may be unequal humans, but humans nonetheless. Also, it is important to note that status as a person fluctuated throughout one's life. Being a human did not prevent one from coming into possession of another. A human could be owned and traded much like a thing, but never become merely a thing. That same human could later gain the status of a person with all the rights and duties that followed. Thus, even though Roman law clearly marks the origin of distinction between persons and things that we still evince today—a fact both lawyers and philosophers agree on—present meaning given to this distinction is of much later origin. The Roman law might

[12] For such a reading of ideology's traits, see Paul Ricoeur, *Ideology and Utopia as Cultural Imagination*, 7 PHILOS. EXCH. 17 (1976).

[13] Marks, *supra* note 10, at 232.

[14] *See* GAIUS, INSTITUTIONES 13 (E.A. Whittuck ed., 4th ed. 1904).

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have contributed to what Roberto Esposito titles a *dispositif* of a person,[15] as discussed, or alternatively we may consider that Roman law functioned as an example of Law for later scholars who have been decisive in formulating our present understanding of personhood and "thinghood ."[16]

I. An Enlightened Way to Make Persons

Many of the histories of legal personhood share much more than a story of origin. The presence of Immanuel Kant, out of all Enlightenment philosophers, is one of these recurring features among legal scholars, even though the Enlightenment provided several formulations of agency, morals, and law.[17] Kant's argument for the inner worth of a person through her dignity, in contrast to a price carried by a thing, lays the groundwork for the modern concept of a legal person. As a consequence of embedding Kant's formulation into law, the formerly porous border between person and thing is sealed. Where relatively late into the 18th century an animal on trial could readily be compared to a human, a thing in the Kantian system cannot be endowed with such dignity.[18] For Kant, the distinction between a person and a thing relies ultimately on the capacity for autonomous agency manifested through moral action that creates a nexus between acts and persons. In short, working his way through Roman law and its distinction between persons and things, Kant established an additional condition for personhood, namely the capacity for moral action, which seemed to exclude not only non-humans but also a part of humanity outside its scope.[19] While similar classifications had permeated both into law and into philosophy before Kant, it was precisely Kant's formulation that gained widespread recognition and imitation, especially in the civil law tradition through the work of Friedrich Carl von Savigny.[20] According to Savigny, rather

[15] *See* Roberto Esposito, *The Dispositif of the Person*, 8 L. CULT. & HUMAN. 17 (2012); ROBERTO ESPOSITO, THIRD PERSON: POLITICS OF LIFE AND PHILOSOPHY OF THE IMPERSONAL (2012).

[16] Christine M. Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 OXF. J. LEG. STUD. 629 (2013); Rafael Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 EUR. J. INT'L L. 627 (2011).

[17] *See, e.g.*, JONATHAN ISRAEL, RADICAL ENLIGHTENMENT: PHILOSOPHY AND THE MAKING OF MODERNITY (2001) (discussing the influence of different stages of Enlightenment with different views regarding universality and what he titles Radical Enlightenment). For a materialist critique on the influence of this, see ANTOINE LILTI, 64 COMMENT ECRIT-ON L'HISTOIRE INTELLECTUELLE DES LUMIERES? SPINOZIME, RADICALISME ET PHILOSOPHIE ANNALES. HISTOIRE, SCIENCES SOCIALES (2009); ANN THOMSON, BODIES OF THOUGHT: SCIENCE, RELIGION, AND THE SOUL IN THE EARLY ENLIGHTENMENT (2008) (attempting to provide a counter-narrative).

[18] The matter was not solely of having trials for animals, but also "the court, viewing insensate creatures as the equivalent of vulnerable minor." *See* Esther Cohen, *Law, Folklore and Animal Lore*, PAST & PRESENT 6, 13 (1986).

[19] As Christine Korsgaard argues, such a position is not sole or even the most likely interpretation of Kant's formulation. Nevertheless, the way Kant's tradition is perceived at present matters relatively little to past interpretation of his work by legal theorists. *See* Korsgaard, *supra* note 16.

[20] *But see* Donald R. Kelley, *Gaius Noster: Substructures of Western Social Thought*, 84 AM. HIST. REV. 619, 645 *et seq*. (1979) (providing an interpretation of Savigny's limited impact outside his work in Roman law).

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than receiving dignity and personhood through moral agency, human beings commanded innate value through the freedom they enjoyed, which ultimately led him to conclude that humans, and humans alone, enjoy legal capacity.[21] Through these successive steps, an open category of a person was first tied to the capacity to act morally, which gained its legal formulation in an even more restrictive formulation that equated such capacity with humanity.

While legal personhood, on a classificatory plane, granted all humans an inherent and equal recognition before the law, positive law limited or even fully negated these rights on a number of occasions. The most noted instances are related to the treatment of slaves, people in the colonies, women and children, and those deemed to be lacking mental capacity. This friction between general dictates of humanity and reducing humans to property is clearly played out in a late 18th century case of a slave brought from America to England.[22] On arrival to England, Somerset—the slave—demanded to be set free, while Somerset's master rejected his claim to freedom, referring to Somerset as his possession and asserted his rights of property ownership over the slave. The court accepted Somerset's claim, but for reasons that were more tightly connected to the state of positive law than on general principles of humanity, "drawing a clear distinction between Somerset's status as a human and his status as a legal person."[23] Thus, a denial of rights through concepts of individualism and property is the other facet of the Enlightenment tradition carried over to the present, demoting some individual human beings to a status closer to thinghood. It is an idea shared equally by Kant and Savigny, as well as Austin in the common law tradition.[24] Austin formulated his own theory as an analytical will theory: for as long as there is a will, there is an entity that the law can command.[25] It is this positive law tradition that also clearly expands the philosophical foundation of the distinction between persons and things further

[21] *See* FRIEDRICH CARL VON SAVIGNY, 2 SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 60 (1840).

[22] Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.).

[23] David J. Calverley, *Legal Rights for Machines: Some Fundamental Concepts*, *in* MACHINE ETHICS 213, 219 (Michael Anderson & Susan Leigh Anderson eds., 2011). Compare however to an account provided in JOHN T. NOONAN, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976) highlighting the role of Blackstone in shaping the doctrine rather than considering the outcome merely a neutral enactment between positive law and more general principles of common law.

[24] Richard Hartzmann, *John Austin*, *in* DICTIONARY OF LITERARY BIOGRAPHY: BRITISH PHILOSOPHERS 1800-2000 18–25 (2002); M. H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEG. HIST. 36 (1985).

[25] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 5 (1832).

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towards contractual and utilitarian foundation,[26] though such features were also perceived—at least by its critics—in the main treatises of the German historical school.[27]

The outline of the persons/things distinction embraced by Enlightenment thinkers and social theorists, lawyers and legal scholars included therein, embedded possessive individualism at the heart of Western normative enterprise.[28] A legal person, equated with willfulness or a human holding interest, functioned as a basis also in social reforms pursued from the late 18th century to the mid-20th century. For a disparate range of thinkers, property served as a model of rights: a primary right among rights. The nexus of freedom and property made it entirely justifiable to demote or deprive rights for those lacking property.[29] Thus, many of the first human rights declarations, in addition to limiting rights to men, limited political rights of those having large debts. These tensions between property and more general human rights are well illustrated through the example of auctioned children—and in some cases elderly and disabled—in Sweden and Finland in late 19th and early 20th century. In this practice, children that fell under the custody of a municipality were publicly auctioned to the lowest bidder, subjecting some auctioned children to slavery-like conditions.[30] The practice—delegalized in 1918 in Sweden and 1923 in Finland—continued in Finland well into the 1930s, an era when supposedly everyone was granted equal rights according to the Finnish Constitution.[31] A lack of means to economically support oneself allowed persons to be demoted to a category of chattel, while large property holdings garnered an increasingly independent status resembling that of a natural person.

Corporations were the hallmark of the extension of rights and legal personality annexed to bodies of property. These were hardly novel developments in the late 18th and 19th century societies where Savigny, Austin, and others worked. The marked difference between earlier

[26] *See* Hoeflich, *supra* note 24, at 44.

[27] *See* Kelley, *supra* note 20, at 644.

[28] It is contested to what extent the individual's command or possession over herself was the very founding treatise of individualism and subsequent form of governance and of law. For debate, see, e.g., C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1977); Quentin Skinner, *The Ideological Context of Hobbes's Political Thought*, 9 HIST. J. 286 (1966), but few would, according to Peter Lindsay, *Possessive Individualism at 50: Retrieving Macpherson's Lost Legacy*, 21 GOOD SOC. 132, 134 (2012) question the existence of such claims at the heart of Enlightenment perception of an individual that was later embodied as a person.

[29] For the historical origins of this nexus, compare Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 18 *et seq.* (1927), with 2 HEINRICH AHRENS, COURS DE DROIT NATUREL OU DE PHILOSOPHIE DU DROIT. 7 *et seq.* (7th ed. 1875) (providing accounts stressing other foundational nexii, such as humanity).

[30] *See* Sofia Lundberg, *Child Auctions in Nineteenth Century Sweden: An Analysis of Price Differences*, 35 J. HUM. RESOURCES 279 (2000); Elisabeth Engberg, *Boarded Out by Auction: Poor Children and Their Families in Nineteenth-Century Northern Sweden*, 19 CONTIN. CHANG. 431 (2004).

[31] *See* FINLAND [CONSTITUTION] July 17, 1919, section 5 (containing general equality clause); *Id.*, section 6(1) (protecting *inter alia* personal liberty).

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corporate bodies and those that appeared first in the late 18th century was the seeming absence of the public facet of a corporation.[32] Unlike the trading companies of the 17th and 18th century, which combined the sovereign (*imperium*) with property and ownership (*dominium*), the 19th century evinced separation of these two functions.[33] Corporations were no longer seen primarily as a sovereign gift serving a public interest, but as a free enterprise independent of all state interest.[34] Savigny considered the corporate body separate from that of its individual owners, such that the decisions a corporation makes or its responsibilities could not be reduced or returned to those of its proprietors. As an independent body wielding significant power, the courts, especially in the United States, started to draw a distinction between the artificial corporate body and its investors. Between the U.S. Supreme Court decision in *Dartmouth College v. Woodward*[35] and the first decades of the 20th century, the U.S. doctrine of corporate personhood was formulated with a concrete set of rights and duties belonging to corporations as well. A contract between private parties became the foundation of a corporation, replacing the formerly public nature of corporations as gifts of sovereign. It was this particular model of corporation that saw unprecedented success throughout the 20th century to the present.[36]

Expansion of rights to corporate bodies was one of the developments that expanded the realm of legal persons. The abolition of slavery as well as women's rights movements across the globe moved many humans towards full legal personhood even though the movement was gradual at best during the 19th and first half of the 20th century. Another corporate body, aside from the economic corporation, that gained recognition internationally during the early years of the 20th century was minorities. Minorities included both minorities as they are at present understood and all aliens residing within a jurisdiction.[37] In the 19th century, for instance, the minority protection provided by the Ottoman Empire and the Austro-

[32] *See* Lawrence B. Glickman, Business as Usual: The Long History of Corporate Personhood, BOSTON REVIEW (Aug. 23, 2017), http://bostonreview.net/politics/lawrence-b-glickman-business-usual-long-history-corporate-personhood (for an argument of long-standing power of perceiving business interests and corporations as apolitical).

[33] *See* PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2011). For a continued relevance of this distinction, see Mikko Rajavuori chapter in this volume, *Making International Legal Persons in Investment Treaty Arbitration: State-owned Enterprises Along the Person/Thing Distinction*, 18 GERMAN L. J. (2017).

[34] *See* Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 373 (2004).

[35] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

[36] *See* JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM (2013). For the most influential formulation in the present, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Henry Hansmann & Reinier H Kraakman, *The End Of History For Corporate Law*, 89 GEO. L J. 439 (2001).

[37] For this and other earlier history of the minority protection, see Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 AM. J. INT'L L. 641 (1923).

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Hungarian Empire was extensive. Crucially, they recognized religious, ethnic, and linguistic minorities as bodies with independent will, interests, and rights. Especially with regard to what were deemed "semi-civilized" states,[38] the rights of minorities signaled a deeply felt distrust by the Euro-American states towards the Ottoman Empire, China, Japan, Persia, etc.[39] Many of these rights were codified during the 1876 Congress of Berlin and later in 1919 under the aegis of the League of Nations, but their enforcement remained haphazard.[40] More important than the rights was the creation of yet another group of things at the margin of the international personality.[41] Much like corporations on the domestic plane, peoples and minorities were seen as a natural expansion to accompany the primary subjects of international law, the States. Christian or European minorities, in particular, ought not to remain under rule of semi-civilized States.

The boundary work evident in the separation of the European States from the rest of the world, carried on in the international legal realm during the same era, led to a similarly winding path as the one evinced in general jurisprudence or legal theory. There were two entangled parts to this development, both relevant to what was to be seen as a legal person in international setting. The dominant of these two focused on scoping those entities that *a priori* were recognized as States in Europe and could be considered meaningful international actors. The second concerned internal debates entertained throughout Europe on what was to be understood as a "state." Much of the legal scholarship at the time merely subsumed existence of a European state as an actor and a "person" on the international plane, but yet there was an extensive political debate—starting as late as the 16th century—on what a "state" stands for.[42] The question of whether a "state" refers to a representation of popular will through actions of a Sovereign or whether it is embodied in a monarch who commands absolutist power had significant repercussions both for the exercise of international relations and also for how personhood came to influence international law. Both the domestic and the international attempts to define state through personhood were based on

[38] Here we use the term employed by Umut Özsu. *See* Umut Özsu, *The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory*, *in* OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 123 (Anne Orford & Florian Hoffman eds., 2016). There are other terms as well, such as semi-sovereign employed by Matthew Craven. *See* Matthew Craven, *Statehood, Self-determination, and Recognition*, *in* INTERNATIONAL LAW 203 (Malcom D. Evans ed., 3rd ed. 2010). In this instance, the choice of the term carries no particular theoretical leaning.

[39] For a critical analysis on the purpose of this system of minority protection in the Ottoman Empire, see Özsu, *supra* note 38.

[40] *See generally* CARO FINK, DEFENDING THE RIGHTS OF OTHERS (2004).

[41] *See generally* Natasha Wheatley, *Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State*, L. & HIST. REV. (forthcoming).

[42] For the English debate, see generally Quentin Skinner, *A Genealogy of the State*, 162 BR. ACAD. PUBL. ONLINE 325 (2008).

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grosso modo similar contractual models;[43] where the contract was used domestically by likes of Hobbes to construe "a reall Unitie of them all, in one and the same Person."[44] A contract on the international plane sought to maintain that the "compound Moral Person"[45] could fulfill interests of "egoistic but interdependent sovereignties . . . to cooperate"[46] through concluding treaties. Ascribing human qualities to the state through the concept of person on the international plane allowed for internal classification among states, as well as exclusion of entities that were not desired as part of the system of international law—for whatever reason.[47]

All in all, the *persona*/*res* distinction of Roman law underwent numerous mutations during the Enlightenment. They were later embedded into diverse legal doctrines during the 19th and early 20th centuries on both the national and international plane. Many of these formulations are still commonplace, such as the basic definition of a legal person as the right-and-duty-bearing unit. The vagueness of this legal division provided personhood with an untold generative power as fuzziness at its borders enabled person to serve virtually all ends.[48] On the international plane, this generative power was occupied by the notion of civilization,[49] whereas in most domestic orders, this role was reserved for consciousness, property, or intellect. As the definition of a legal person was mostly tautological (i.e., those who have rights are legal persons, legal persons are those who have rights) the power to decide whom to grant rights to was also the power to make legal persons.[50] A lack of universalism was in part responsible from an outgrowth that amounted, first, to total negation of parts of humanity, and later, to a promotion of universalism.

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[43] *See, e.g.*, Martti Koskenniemi, *Transformations of Natural Law: Germany 1648–1815*, *in* OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 59 (2016) (showing these contractual similarities); Skinner, *supra* note 42; Craven, *supra* note 388.

[44] THOMAS HOBBES, LEVIATHAN 120 (Richard Tuck ed., 2008).

[45] SAMUEL VON PUFENDORF, LAW OF NATURE AND NATIONS 645 (4th ed. 1729).

[46] Koskenniemi, *supra* note 43.

[47] For these classifications, see Craven, *supra* note 38.

[48] *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926).

[49] S*ee* OUTI KORHONEN, INTERNATIONAL LAW SITUATED (2000) (regarding a State seeking membership among the order of civilized States); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS (2004) (analyzing inclusion/exclusion through universalism/particularism); Vasuki Nesiah, *Human Shields/Human Crosshairs: Colonial Legacies and Contemporary Wars*, 110 AJIL UNBOUND 323 (2016) (discussing the disregard of certain forms of suffering at the dawn of international humanitarian law).

[50] *See* Frederic William Maitland, *Moral Personality and Legal Personality*, 6 J. SOC. COMP. LEGIS. 192 (1905) (proposing the dilemma with regard to corporations).

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II. From Rights of Everyone to a Vanishing Person

The Second World War and its aftermath mark a watershed in much of the debate on legal personhood. Before the War, the system of protection of individuals relied on the protection provided by the State of which the individual was a citizen. Aliens, or stateless persons, were protected based on goodwill of the State that commanded jurisdiction over them. Stateless persons, for instance, were perceived widely as a nuisance or, at most, a problematic individual:

> Actually, if it happens that the stateless person is a highly undesirable individual and liable to deportation under the law, it may not be easy to find a way of carrying out the law in this case, for other countries may well regard him as undesirable too and refuse to admit him.[51]

These undesirables, according to Hannah Arendt, were but a logical consequence stemming from adherence to domestic, positive law founded on utilitarianism. She maintained that even though such laws would cover the whole of humankind, it could still "for humanity as a whole . . . be better to liquidate certain parts thereof."[52] Nonetheless, it was precisely an expansion of rights to every human that became the *modus operandi* of international and domestic rule-making in the postwar era. The United Nations, first through its Declaration of Human Rights and later with the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights, set humanness at the epicenter of rights. At the same time, being human became an increasingly important condition for legal personhood. While making all humans of equal worth in theory, in practice focus on humanity retained many of the prior unarticulated assumptions of personhood, such as its gendered and racial nature.

By foregrounding humanity many of the preconceived ideas formerly held with regard to personhood became blatantly obvious.[53] Formerly employed notions that tied rights to protection of a nation-state through an idea of citizenship were deemed untenable, and calls

[51] David Hunter Miller, *Nationality and Other Problems Discussed at the Hague*, 8 FOREIGN AFF. 632, 633 (1930).

[52] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 299 (1958). For more recent literature, see Hans Lindahl, *A-Legality: Postnationalism and the Question of Legal Boundaries*, 73 MOD. L. REV. 30 (2010); HANS LINDAHL, FAULT LINES OF GLOBALIZATION (2013) (arguing, likewise, against the possibility to include everyone).

[53] Brian S. Turner, *Outline of a Theory of Citizenship*, 24 SOC. 189, 194 (1990) (arguing the same with regard to citizenship, claiming that it required a universalistic notion of subject). This universalistic notion created a space, then, for social struggles, as whoever controlled the definition of what it means to be a citizen controlled the construction of the whole political body. See also *id.*, for language requirements, and discrimination of aboriginal people and people of color in granting citizenship.

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for an end of the era of nationalism were voiced.[54] A flurry of international, regional, and domestic treaties, conventions, and laws seeking to protect *inter alia* racial minorities, women, children, and disabled followed one another. Yet, more than anything, human rights were something imposed from outside upon all sovereign States.[55] While the 19th century had evinced unilateral imposition by the Euro-American powers for protection of their citizens in "semi-civilized" States, it was first in the Universal Declaration of Human Rights where such demands were made with regard to each State—irrespective of recognition of any national political community guaranteeing such rights. A seemingly simple question of membership in a group of human beings turned into a thorny question about how to ensure that all of those human beings were to be respected, irrespective of their differences. As much of the former debate focused on the lacking capacities of those not included among right-holders—for example, criminals, poor, women, ethnic and religious minorities, indigenous people—the postwar debates focused on the denial of such differences. Rather than re-defining "person" or humanity anew, the old standard of personhood was kept alongside with a long erratum listing the others who should also be included.

The end of the World War also captured popular and political imagination in other, more destructive ways.[56] The beginning of the Atomic Era brought about through the destruction of the Japanese cities Hiroshima and Nagasaki at the end of the Second World War, highlighted the destructive powers of technology.[57] In the face of technology capable of annihilating the whole of humanity, an Enlightenment dream of progress appeared in a new light.[58] Wary of such dreams, the military in both the U.S. and the Soviet Union sought to develop ways to foresee incoming destruction—a process that led to development of networked computation, artificial intelligence, and cybernetics. The chasm that had opened after the War between the fear of technology and the humanitarian values of everyone were masterfully captured in Chaplin's wartime satirical drama, *The Great Dictator*:

> *We all want to help one another. Human beings are like that. We want to live by each other's happiness—not by*

[54] *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (rev. ed. 2006).

[55] *See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 13 (2010).

[56] *See* PAUL BOYER, BY THE BOMB'S EARLY LIGHT (1994) (perspective of U.S. events); Special Issue on British Nuclear Culture, *45* BRITISH J. HIST. SCI. (2012) (perspective of U.K. events); s*ee, e.g.*, ALAN MOORE, DAVE GIBBONS & JOHN HIGGINS, WATCHMEN (Len Wein & Barbara Kesel eds., 1987); STANLEY KUBRICK, DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (1964).

[57] *See* Günther Anders, *Theses for the Atomic Age*, 3 MASS. REV. 493 (1962).

[58] *See, e.g.*, MARTIN HEIDEGGER, THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS TECHNOLOGY AND VALUES: ESSENTIAL READINGS 1 (1977) (presenting an account of technology's power to reduce humans into mere standing-reserve for technologies to employ).

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> *each other's misery . . . . We have developed speed, but we have shut ourselves in. Machinery that gives abundance has left us in want. Our knowledge has made us cynical. Our cleverness, hard and unkind . . . . Soldiers! don't give yourselves to brutes—men who despise you—enslave you—who regiment your lives—tell you what to do—what to think and what to feel! Who drill you—diet you—treat you like cattle, use you as cannon fodder. Don't give yourselves to these unnatural men—machine men with machine minds and machine hearts! You are not machines! You are not cattle! You are men! You have the love of humanity in your hearts! You don't hate! Only the unloved hate—the unloved and the unnatural![59]*

Chaplin's movie highlights the ways in which popular imagination placed humans into a system of persons and things. The meek that follow are equated with animals and the brutes that lead are synonymous with machines—the animals being too stupid to think, the machines too unnatural, too calculative to care. Law articulated matters differently, and paid little attention to question of animals or machines. The way personhood was operationalized to include everyone within the sphere of human rights proved decisive in the development of animal and machine personhood debates to come. And those debates inherited the initial positions held in the popular imagination and general social processes well illustrated by Chaplin.

Nonetheless, personhood, from the perspective of law in the postwar era, was a relatively solid bastion with little to add. The human being had become synonymous with rights and duties and, with that, the sole entity capable of independently fulfilling the criteria of legal personhood. Yet, the very inclusion of "everyone" to the sphere of rights proved difficult. Many legal institutions were designed in a fashion that made a truly egalitarian system hard to achieve. Marriage, for one, often created a single representational unit of a family with man acting as a representative of not only himself but also his wife, which lead to extensive limitations on women's rights. Similarly, many of the political rights were tied to mental capacity, personal property, or other status, which allowed some to remain more equal than others and to carry more rights than others. The justification for such differing treatment was imbued in the concept of citizenship, and, with that, of the person, as it developed during the early 20th century. Thus, even though virtually all minorities were protected in the minimal sense, their rights were not equally protected. Rather, they were subject to contestation during the postwar era.[60] While different jurisdictions encountered different

[59] CHARLES CHAPLIN, THE GREAT DICTATOR (1940).

[60] We follow here Willian N. Jr. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) in dividing different parts of this struggle for full set of rights into three: politics of protection, politics of recognition, and politics of remediation (p. 2065). The first stage

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problems with regard to inclusion, yet, at the very least, most if not all encountered some issues related to personhood. For example, Nordic countries carried out an extensive eugenic practice of sterilization of women and sexual minorities, and condoned forced assimilation policies of indigenous Sámi population.[61] In many former colonial States, similar practices were targeting bodies, minds, and liberties of racial minorities. There were commonalities—for example, the suppression of homosexuality—and differences, but the politics of protection and recognition encountered everywhere the politics of preservation seeking to roll back rights legally granted to persons who were perceived as different from the persons protected universally through human rights, namely human beings.

The seeds for the dispute briefly mentioned above, were laid around the turn of the 19th and 20th centuries. With women's rights movements throughout the Occident as the first to initiate and succeed in a struggle to gain equal political rights, suffragette movements sprouted all over Europe and the United Stated in the latter parts of the 19th century and the early 20th century. Traditionally, man's position as the head of a household had pushed women from the public realm into the strictly private sphere of the family.[62] The arguments espoused by the suffragette movements were relatively similar, yet the time it took to recognize of women's rights varied. From the perspective of the legal personhood debate, the underlying assumptions and the counter arguments presented are reflective of the essential ingredients of full personhood. In a number of ways, the minimal container of personhood as a right-and-duty-bearing unit endorsed by legal theorists of the 19th and early 20th century was socially constructed in a highly gendered fashion where the male gender came to signify both independence of agency and higher rationality of such male agency.[63] Therefore, in order to guarantee voting rights, suffragettes highlighted their similarity with the white male population, which—while an effective argument in most jurisdictions—led to the assimilation of personhood based on certain racial traits. To be an equal person and

(protection) attempts to seek safeguards against life, liberty and property, whilst the second stage (recognition) seeks to address remaining discriminatory practices. The third stage of remediation attempts to rectify past material wrongs of past discrimination.

[61] On eugenic practices, see Merle Wessel, *Castration of male sex offenders in the Nordic welfare state in the context of homosexuality and heteronormativity, 1930–1955*, 40 SCAND. J. HIST. 591 (2015); JENNY BJÖRKMAN, VÅRD FÖR SAMHÄLLETS BÄSTA (2001); JUTTA AHLBECK-REHN, DIAGNOSTISERING OCH DISCIPLINERING (2006); MARKKU MATTILA, KANSAMME PARHAAKSI (1999). For the assimilation policies and colonial legacy of Sámi people, see Jukka Nyyssönen, *Sami Counter-Narratives of Colonial Finland. Articulation, Reception and the Boundaries of the Politically Possible*, 30 ACTA BOREAL. 101 (2013); Henry Minde, *Assimilation of the Sami - Implementation and Consequences*, 20 ACTA BOREAL. 121 (2003).

[62] Nira Yuval-Davis, *Gender and nation*, 16 ETHN. RACIAL STUD. 621 (1993).

[63] R.M. Smith, *One United People: Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229 (1988).

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a citizen, being white—and in some countries affluent[64]—was the primary condition.[65] After reaching equal political rights by the 1920s, the women's right movements became dormant for decades to follow. This early struggle for inclusion—while enabling women's political rights—shaped the idea of a citizen and a person of rights towards whiteness, tying the process intimately to the nation-building agenda spreading throughout the West during that era.[66]

These politics of whiteness, and its associated values, were clearly manifest in a range of legal disputes over political rights of minorities and indigenous people. An example of such legislation was a widely held demand for the ability to read and write, typically using the language of the white majoritarian population, to gain the right to vote and other political rights.[67] In Canada, "[t]hese criteria included the ability to read and write in English and French, freedom from debts, and sound moral character,"[68] which *a fortiori* defined a citizen and a person using those very terms. A failure to conform to these demands, to become a member of a nation, was a sign of mental weakness—a member of the "most backward and wretched population."[69] Thus, the politics of protection legally employed two distinct means to achieve those goals: A claim to discriminatory application of enfranchisement criteria or a request for loosening or abolishing them in full. The former was the initial modus operandi of, for instance, the National Association for the Advancement of Colored People ("NAACP") in the United States, as evidenced by its amicus brief filed in *Guinn v. United States*.[70] The NAACP successfully claimed that a practice of a grandfather clause,[71] exempting white

[64] *See, e.g.*, SUZANNE M. MARILLEY, WOMAN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES 1820–1920 (1997).

[65] *See* Ida Blom, *Structures and Agency: a transnational comparison of the struggle for women's suffrage in the Nordic countries during the long 19th century.*, 37 SCAND. J. HIST. 600 (2012) (for arguments employed in Nordic countries).; *see* Smith, *supra* note 62 (presenting arguments in the U.S.); *see* STEVEN C. HAUSE & ANNE R. KENNEY, WOMEN'S SUFFRAGE AND SOCIAL POLITICS IN THE FRENCH THIRD REPUBLIC (1984) (presenting arguments in the French Third Republic).

[66] *See, e.g.*, LOUISE MICHELE NEWMAN, WHITE WOMEN'S RIGHTS (1999).

[67] *See, e.g.*, Pat Stretton & Christine Finnimore, *Black Fellow Citizens: Aborigines and the Commonwealth Franchise*, 25 AUST. HIST. STUD. 521 (1993) (discussing the practice of enfranchisement and disfranchisement through language requirement); Benno C. Jr. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982).

[68] A. McGrath & W. Stevenson, *Gender, Race, and Policy: Aboriginal Women and the State in Canada and Australia*, 38 LAB. HIST. 37, 43 (1996).

[69] KNUT EINAR ERIKSEN & EINAR NIEMI, DEN FINSKE FARE: SIKKERHETSPROBLEMER OG MINORITETSPOLITIKK I NORD 1860-1940, 258 (1981); Minde, *supra* note 61, at 131.

[70] Guinn v. United States, 238 U.S. 347 (1915).

[71] *See* Schmidt, *supra* note 67 (discussing a clause that allowed those whose ancestors were entitled to vote in 1866 to vote without literacy tests.).

population from literacy tests while subjecting black population to such, was a violation of the Fourteenth Amendment preventing racial discrimination. Such legal victories proved short-lived in most jurisdictions. By setting onerous conditions for the exercise of political rights, genuine participation in voting or representation were, often to a great extent, unrealized at the wake of the Second World War.

The dialectic between the emergent politics of protection seeking to establish political and civil rights beyond the white male population, on the one hand, and the countercurrent of the politics of preservation from the side of the politically more potent group of dominantly white males, on the other hand, created a spiral in which persons seeking promised equality came to redefine themselves in terms provided by the past standard of personhood. As, for example, the eugenics movement had debased racial minorities with a stigma of lesser intelligence, it became of paramount importance to question these findings. Yet, the very act of questioning opened a gate for the argument from those seeking to preserve the status quo that, indeed, on some instances the claims of lesser intelligence held true. Thus, rather than denouncing the very classification, the new humanity and the new person that emerged in the postwar era faced a dilemma between expansion of the former categories of citizenship and personhood—for example, indicating that all are human who share same genetic constitution—or their contraction—for example, limiting demands for autonomous agency as too stringent for recognition of core human rights.[72] In what follows, we will briefly go through four scenarios where the concept of legal personhood has either expanded or contracted as a consequence of the politics of recognition that stems from the egalitarian assumption superimposed to states through human rights.

Rebuilding the rights of minorities—or the rights of the majority, when taken in conjunction with the rights of women—in the postwar Occident was a task of recognizing rights rather than establishing or protecting rights for those groups that had their rights partially protected before the war. Although political and civil rights for women and racial, sexual, and religious minorities were *de jure* recognized, much remained to be done in terms of recognition. It still remained, for one, common that rights of married women were curtailed and that the private sphere of family provided shelter from even grave violations of human rights. Likewise, racial and sexual minorities were often suppressed in the public sphere through segregated schools, forced assimilation policies, or criminalization of non-heteronormative sexuality. As a counterpart to all of these diverse classifications stood the idealized white adult male. Nonetheless, the new globally enacted human rights standards imposed a duty, even if mostly unenforceable, for States to act upon these apparent forms of discrimination. The first impetus for abolishing perceivably differing standards between groups was initiated by the United Nations on race and racial differences. In the early 1950s, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") first launched a statement and later a series of booklets written by eminent scholars to battle

[72] *See* Blom, *supra* note 65 (regarding women's position).

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what were seen as prejudices based on race. The clear message, shared by all statements and booklets, was that humanity is one.[73] For example Claude Levi-Strauss argued that the apparent differences in perceivable level of development, noticeable to the man in the street, were not due to the innate aptitude of different races but rather due to cultural differences.[74]

A biological explanation for common humanity thus placed the onus on States to settle the differences that were so apparent in the levels of development of different people. The person, the right-and-duty-bearing unit, ought to be defined simply biologically, UNESCO argued, and such a racially neutral concept of person must apply also in the realm of law.[75] Whether directly or indirectly, the public pressure from the international sphere led to domestic changes. According to Mary Dudziak, the renowned U.S. desegregation decision *Brown v. Board of Education*[76] is more meaningfully understood as a response to the U.S. desire to maintain its role as a custodian of civil rights.[77] She argues that "[t]he abstract principle [of desegregation] of *Brown* seemed to be the thing needed to maintain American prestige,"[78] even though the decision itself changed materially little in terms of rights of the racial minorities. Simultaneously, while many European nations were appalled by U.S. segregation, they still maintained often strained and oppressive relation with their still existing colonies.[79] Yet, the impact of *Brown* was felt also more concretely through adaptation of a wide range of anti-discriminatory measures in Europe from the 1960s onwards.[80] Many of these measures adopted the language of *Brown*, thus expanding scope of discrimination from an abstract equality of chances to cover more indirect forms of discrimination as well.

The changes evinced in the racial narrative also had a profound impact on the perception of a legal person. A demand for singular humanity signaled in the UNESCO race statement and

[73] In a UNESCO Statement Issued 18 July 1950, this much is stated in the first paragraph: "Scientists have reached general agreements in recognizing that mankind is one."

[74] *See* CLAUDE LEVI-STRAUSS, RACE AND HISTORY 5–6 (1952).

[75] *See* UNESCO, THE RACE QUESTION 3 (July 18, 1950), http://unesdoc.unesco.org/images/0012/ 001282/128291eo.pdf.

[76] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)

[77] *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 3 (2000); Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32 (2004).

[78] Dudziak, *supra* note 77, at 39.

[79] *See* FRANTZ FANON, BLACK SKIN, WHITE MASKS (1952).

[80] Bob Hepple, *The European Legacy of Brown v Board of Education*, UNIV. ILL. L. REV. 605 (2006); Martha L. Minow, *Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights and Legal Knowledge*, 50 SAN DIEGO L. REV. 1 (2013); Ruth Bader Ginsburg, *Brown v. Board of Education in International Context*, 36 COLUM. HUM. RTS. L. REV. 493 (2005).

race booklets biologized personhood. At first sight, a biological explanation appears identical to the one included in the Universal Declaration ("All human beings are born free and equal."). Yet, for the law's independence as a system the change was important. Hans Kelsen echoed the views of many contemporary legal theorists when he argued that "[m]an is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms."[81] In short, there was a fear that law could not articulate legal relations on a notion that carried over from the realm of natural sciences—or any sciences for that matter. As the positive law system was bound to a given community, biological human condition seemed to transgress the boundaries of law's reach by expanding it to everyone. The distinction between every biologically human entity and every legal person is what animates debates on matters such as rights of a fetus or those of a deceased person.[82] The other important change brought about through the postwar anti-racist movement was the perceived injustice of laws that separated, but treated addressees nominally equal. Thus, when the new women's rights movement emerged throughout the Occident in the 1950s and 1960s, they inherited a biological conception of personhood together with tools to challenge indirect forms of discrimination.

Victory in a long struggle for political rights for women during the early 20th century left many women in society to face a reality similar to racial minorities: in public life they were considered equal, but in many walks of private life they still ran into problems due to their gender.[83] A division between the public and the private, emblematic of a liberal legal order, had pushed many everyday discriminatory practices out-of-sight as matters of individual, private choice. For many women from the 1950s onwards such practices signaled a rallying call for a genuine equality that would even out differing expectations and entitlements between genders.[84] The "biologization" of life also had a profound impact on lives of many women as birth control and family planning gained importance; contraception and abortion were widely perceived as acts contrary to nature and the biological conception of human served these ends particularly efficiently.[85] Alongside Catholic dogma, biology seemed to suggest likeness of a fetus to a living human being whose termination would be a particularly

[81] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 94 (1949).

[82] See these debates, Tuo Yu, *Approaches for Dealing with the "Natural Person" in the Chinese Legal System: A Statutory Way and a Principled Way*, 18 GERMAN L. J. (2017) and Lisette ten Haaf, *Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches—The Subject of Rights and the Subject of Interests*, 18 GERMAN L. J. (2017).

[83] *See* Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990).

[84] *See* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (discussing the inadequacy of laws alone as means of social change).

[85] *See* Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853 (1999).

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heinous act. These naturalized duties of women, according to likes of Simone de Beauvoir, chained women to serve solely domestic roles—leading a life for others.[86] In international and domestic settings, movements opposing these "traditional" roles of women erected a new person to stand in an oppositional position to that of customarily male personhood.[87]

In order to counter the legal imposition of person as a gendered concept, the quasi-naturalistic positive understanding of law was questioned. If womanhood itself was socially constructed, and not merely a biological condition, the normative order built to reflect on perceivably natural relations between different elements of a community needed revision. A general call for rights to education, health, or employment are not sufficient to ensure the construction of a female gender as equal the male gender. Rather, they necessitate a set of affirmative actions.[88] Such affirmative actions are highly problematic from the vantage point of any unitary conceptualization of legal personhood. After all, what does a legal person stand for if every legal person is defined using different terms? Thus, women's rights appear as a central juncture for personhood as they provide a prism that diffracts personhood in at least two opposing directions. On the one hand, debate over a liberal right to abortion narrows a purely biological or open-ended notion of personhood to conscious actors alone.[89] Demands for wider recognition of *de facto* discrimination, on the other hand, argued for a view of personhood as a simple container or collector of rights that were to be construed and re-construed in a given community countless times. The latter view questioned the centrality of personhood within the whole of the legal system, whereas the former set it centerfold.

Much of the debate over the rights of the child and of disabled persons highlights the inherent tensions within legal personhood prompted by the women's rights movement. Of these two, the rights of the child command a longer tradition both in domestic and international fora,[90] yet many of the more contentious issues over rights of the child, such

[86] *See* SIMONE DE BEAUVOIR, THE SECOND SEX (2010).

[87] *See, e.g.*, Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992) (showing an international legal perspective).

[88] Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 AM. SOC. REV. 303 (1993).

[89] *See* in general of these and other arguments about abortion in KATE GREASLEY, ARGUMENTS ABOUT ABORTION: PERSONHOOD, MORALITY, AND LAW (2017).

[90] *See* Catherine Rollet, *La santé et la protection de l'enfant vues à travers les congrès internationaux (1880–1920)*, 101 ANN. DEMOGR. HIST. (PARIS) 97 (2001); Joëlle Droux, *L'internationalisation de la protection de l'enfance: acteurs, concurrences et projets transnationaux (1900–1925)*, 52 CRIT. INT. 17 (2011); Declaration of Geneva of the Rights of the Child, Mar. 1924, *in* THE RIGHTS OF THE CHILD: INTERNATIONAL INSTRUMENTS 3 (Maria Rita Saulle ed., 1995) (international legal codification).

as questions regarding the status of a fetus, are of later origin.[91] The Christian doctrine of ensoulment as a reason to protect a fetus through a set of limitations imposed on women's right to terminate pregnancy dates back to the 12th century,[92] yet in the meaningful context of legal personhood the postwar formulation of human rights, and their inheritance of Catholic doctrine of human dignity, form an important point of departure.[93] Even though sanctity of life had protected fetuses in the past, arguments stemming from dignity, encoded at the international level, allowed linking of persons and fetuses under the same moniker of human rights. While fetal rights chiefly dominated the right to abortion discussions,[94] they also led to more general debates concerning, for instance, the possibility of pre-birth harm.[95] Dignity served an equally central role in expanding rights to disabled.[96] Rather than articulating treatment of the disabled through a system of privilege provided by the State, early advocates of the rights of the disabled brought the importance of articulating them precisely in terms of rights therewith to the foreground, making disabled individuals appear as persons before the law.[97] Thus, the biological condition of being a member of humanity paired with dignity was instrumental in the expansion of rights to yet a wider group of persons based on a naturalistic interpretation of rights.

While the scope of natural persons proliferated in number and became increasingly diverse in definitions, ranging from an empty container to a rational or spiritual build-up, the artificial or compound person gained depth during the postwar years, both domestically and internationally. The corporate person was, in the first half of the 20th century, seen largely as either a simple legal fiction or, alternatively, an aggregate body of ultimately meaningful

[91] *See* Lee E. Teitelbaum, *Foreword: The Meanings of Rights of Children*, 10 N. M. L. REV. 235, 236 (1980) (presenting a much later general acceptance of the rights of child, declaring "[t]he United Nation's call to arms on behalf of the child apparently finds, therefore, everyone on one side, with no declared enemy to conquer").

[92] *See, e.g.*, Toni Selkälä, *"But in This Twilight Our Choices Seal Our Fate,"* XLVII OIKEUSTIEDE–JURISPRUDENTIA 253 (2014).

[93] *See* SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS (2015).

[94] *See* Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child.*, 12 HUM. RTS. Q. 156 (1990).

[95] *See* Walter Selb, *Schädigung des Menschen vor Geburt—ein Problem der Rechtsfähigkeit?*, 166 ARCH. FÜR DIE CIVILISTISCHE PRAX. 76 (1966).

[96] For Finland, see HELI LEPPÄLÄ, VAMMAISUUS HYVINVOINTIVALTIOSSA (2014). For Germany, see Elsbeth Bösl, POLITIKEN DER NORMALISIERUNG, ZUR GESCHICHTE DER BEHINDERTENPOLITIK IN DER BUNDESREPUBLIK DEUTSCHLAND (2015). For the U.S., see Robert Perske, *The Dignity of Risk and the Mentally Retarded*, 10 MENT. RETARD. 24 (1972).

[97] Stanley S. Herr, *Rights into Action: Protecting Human Rights of the Mentally Handicapped*, 26 CATH. U. L. REV. 201 (1977); Gunnar Dybwad & Stanley S. Herr, *Unnecessary Coercion: An End to Involuntary Civil Commitment of Retarded Persons*, 31 STAN. L. REV. 753 (1979).

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biological entities exercising power.[98] From the 1970s onwards, corporate personhood started to gain an even more independent agency with a moral flavor.[99] Corporations came to be seen as intentional actors that were, in addition to their biological components, responsible for the outcome of their decisions.[100] In stark contrast to what the human rights debate voiced, one of the foremost lessons learned "from an investigation of the legal personhood of corporations [is that] biological existence is not essentially associated with the concept of a person."[101] Turning corporations into moral actors led to two entwined developments. First, the emergence of corporate responsibility in criminal law but also a contemplation of corporations' role in questions of social justice, "environmental protection, product safety, marketing practice, [and] international bribery," often centered on the notion of "corporate conscience."[102] The second development created a shield for corporations from these very concerns by a referral to a flaunted corporate decision-making procedure or the recklessness of an individual. As the moral agency of a corporation came to be defined through the intentionality of an act, the corporate policies and corporate actions could diverge in a relatively similar manner. Only laws and actions were separated in the first wave of human rights codification. A violation was a violation as long as it was the intention of a corporation, rather than merely a negative consequence of its well-intended policies.[103]

On the international plane, the legal personality expanded rapidly to cover new entities in the postwar era. In addition to a whole slew of former colonies becoming states, also

[98] *See, e.g.*, David Millon, *Theories of the Corporation*, DUKE L.J. 201 (1990). For a historical exposition, see, e.g., Tara Helfman, *Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States*, 23 IND. J. GLOBAL LEG. STUD. 383 (2016).

[99] There is a long tradition in philosophy for collective responsibility starting from at latest in Hobbes' oeuvre with, for example, Joel Feinberg, *See* Joel Feinberg, *Collective Responsibility*, 65 J. PHILOS. 674, 687 *et seq*. (1968) (suggesting a contributory group fault where responsibility is collective but not distributive). These differ from what came to be argued as a specific responsibility of corporations falling to them due to actions condoned by its executive structures. From Virginia Held onwards there are specific references to corporations and their particular moral agency. *See* Virginia Held, *Can a Random Collection of Individuals be Morally Responsible?*, 67 J. PHILOS. 471 (1970).

[100] For an example in the field of business ethics, see Rita C. Manning, *Corporate Responsibility and Corporate Personhood*, 3 J. BUS. ETHICS 77 (1984); Kenneth E. Goodpaster & John B. Jr. Matthews, *Can a Corporation Have a Conscience?*, 60 HARV. BUS. REV. 132 (1982); Kenneth E. Goodpaster, *The Concept of Corporate Responsibility*, 2 J. BUS. ETHICS 1 (1983).

[101] Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHILOS. Q. 207, 210 (1979).

[102] Goodpaster & Matthews, *supra* note 100, at 133. For a more recent source, see Christine Parker, *Meta-regulation: Legal Accountability for Corporate Social Responsibility*, *in* THE NEW CORPORATE SOCIAL ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBLITY AND THE LAW 207 (Doreen McBarnet, Aurora Voiculescu, & Tom Campbell eds., 2007).

[103] This notion persists among contemporary business & human rights debate. For a discussion on this, see DAVID JASON KARP, RESPONSIBILITY FOR HUMAN RIGHTS: TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES (2014).

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international institutions gained a status of an international legal person, or subject, already in the 1940s.[104] More than expanding scope of personhood, the international legal personality was profoundly altered in the diversity of States and organizations it came to embrace. While the League of Nations had at most 58 members, the United Nations passed 100 members already in 1960, with majority of new members hailing from the Third World. International organizations, likewise, gained untold influence particularly in the field of economy through the Bretton Woods institutions that became proponents of neoliberal free market ideology at the international plane for decades to come. These two developments—the emergence of Third World States on the international plane and an institutionalized neoliberalism—worked together.[105] International trade and economy was considered early on by many States in the Third World as merely a different sort of colonialism. Proposals such as the New International Economic Order ("NIEO")[106] were seen as essential tools to mitigate the increasing power of institutions and former colonial powers over the Third World countries.[107] Despite, or because, of these calls for greater economic equality between developing and developed states, many of the reforms suggested by the Bretton Woods institutions led into an African debt crisis.[108] As an outcome of the economic turmoil, "key social services, such as health and education . . . slowly decayed,"[109] depriving international sovereignty, formerly a cornerstone of international legal personhood, from select Third World States and placing it in hands of international economic authority. Much like the concerns of the women's rights movement, the NIEO saw the international legal personhood found on formal equality of its members to be lacking in terms of true equality.[110]

Growing diversity and required extensiveness of personhood during the first decades of the postwar era revealed the internal tensions inherent in the notion of legal person: there was little to no consensus as to what personhood entailed. And there seemed to be little reason

[104] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.CJ. 174 (Apr. 11).

[105] *See* ACHILLE MBEMBE, ON THE POSTCOLONY 2 (2001).

[106] *See* G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/5-6/3201 (May 1. 1974) (adopting the "Declaration on the Establishment of a New International Economic Order").

[107] *See, e.g.*, MOHAMMED BEDJAOUI, POUR UN NOUVEL ORDRE ÉCONOMIQUE INTERNATIONAL (1979); Upendra Baxi, *The New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development*, 23 INDIAN J. INT'L L. 225 (1983).

[108] For the dismal outcome of NIEO, see Umut Özsu, *"In the Interests of Mankind as a Whole": Mohammed Bedjaoui's New International Economic Order*, 6 HUMAN. 129 (2015); Margot Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, 62 INT'L & COMP. L.Q. 31 (2013).

[109] NICOLAS VAN DE WALLE, AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979–1999 155 (2001).

[110] *See also* Rajavuori, *supra* note 33.

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why new entities could not gain the status of a person, following the route taken by women, racial minorities, corporations, or international organizations. After all, "[t]he fact is, that each time there is a movement to confer rights onto some new 'entity,' the proposal is bound to sound odd or frightening or laughable."[111] Thus, the avenue was opened for proposals seeking to grant personhood to, inter alia, animals, environment, artificial intelligence, and robots. These new entities demanding for legal recognition are, to a great extent, an outcome of two entangled developments that took place alongside domestic and international struggles for recognition. First was the development of science, medicine, and technology, and their impact on society as a whole and law as a part thereof. These developments, rather than being seen as an existential threat like the Atomic era had claimed, alleviated everyday through automation of many formerly dangerous tasks and provided treatment to many formerly incurable diseases. The second significant development was globalization that created, in good and in bad, contacts between the developed North and the developing South. These new openings and mutations are where myths of present personhood are construed.

C. Constructing a Myth

> Deep Blue was only intelligent the way your programmable alarm clock is intelligent. Not that losing to a $10 million alarm clock made me feel any better.[112]

The vivid recollection of Garry Gasparov of his game against a chess computer in 1997 resembles much the earlier accounts of artificial intelligence provided by some of the field's early pioneers. Quite like Gasparov, Norbert Wiener considered machines of the 1950s as "blind, deaf, and dumb,"[113] but unlike Deep Blue, there was no captivated audience to observe the machine power of early artificial intelligence. Also, unlike the automatic doors and music boxes described by Wiener, the task Deep Blue was set to conduct appeared very human. The witnesses to the spectacle could hardly imagine themselves defeating a grandmaster in a game of chess; in such a game, the achievements of Deep Blue seemed not merely human—they were superhuman.

The scientific and technological progress that brought about the impressive computing power of machines in the late 1990s had but two decades before led to world's first test tube baby. At the same time, a growing number of people were concerned with environmental deterioration, as they experienced burning rivers and cities enveloped in

[111] CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? 8 (1974).

[112] Garry Gasparov, THE CHESS MASTER AND THE COMPUTER NEW YORK REVIEW OF BOOKS (2010).

[113] NORBERT WIENER, THE HUMAN USE OF HUMAN BEINGS: CYBERNETICS AND SOCIETY 22 (1989).

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thick smog, caused by the very same advancements of technology.[114] The world seemed full of technological problems and wonders that profoundly challenged some of the defining traits of humanity and its relation to nature.

As humanity approached the end of the millennium, its problems and solutions were increasingly tied to technology and science. Both the past tradition of conceptualizing ourselves in relation to religion that had animated the imaginations of drafters of the Universal Declaration of Human Rights, and calls for the inherent naturalism found on the human condition that had fueled the UNESCO reports seemed outdated. Biomedical advances—most notably the discovery of the DNA double helix and the assumption of genes as a "code of life" waiting to be discovered—"profoundly altered the perception of personhood within [Occidental] culture."[115] A chance to foresee our predisposition to medical conditions became likened to the very identity of a person,[116] paving the way for the politics of life itself that subjected the "biological lives of individual human beings . . . to judgments of worth."[117] Consequently, interventions and modifications to future life were increasingly targeting fetuses and embryos, casting doubt on their status within the law.[118] The scientific and technological advances affected both the perception of human *an sich* and humanity's connection with nature as well.[119] Through "scientific culture, the boundary between human and animal [was] thoroughly breached,"[120] and also the boundary between human and machine came into question, leading to bold claims for human beings to become "localized in a system architecture whose basic modes of operation are probabilistic, statistical."[121] Scientifically defined and probability driven, the lot of humanity also had a direct bearing on how the law came to be applied.[122]

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[114] With regard to Europe, see Ingmar Von Homeyer, *The Evolution of EU Environmental Governance*, *in* ENVIRONMENTAL PROTECTION: EUROPEAN LAW AND GOVERNANCE 1, 8–11 (Joanne Scott ed., 2009); Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. REV. 89 (2002); DONELLA H. MEADOWS ET AL., THE LIMITS TO GROWTH (1972).

[115] Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 315 (1992).

[116] *See id*.

[117] Nikolas Rose, *The Politics of Life Itself*, 18 THEORY CULT. SOC. 1, 21 (2001).

[118] Martin Scheinin, *Ihmisarvon loukkaamattomuus valtiosääntöperiaatteena*, *in* JUHLAKIRJA KAARLO TUORI 50 VUOTTA 57 (Paul van Aerschot, Paula Ilveskivi, & Kirsi Piispanen eds., 1998).

[119] Of the string of theories proposed at the time, the Gaia theory might be the most notable. *See* James E. Lovelock & Lynn Margulis, *Atmospheric Homeostasis by and for the Biosphere: the Gaia Hypothesis*, 26 TELLUS A 1 (1974).

[120] DONNA J HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE RSEINVENTION OF NATURE 151 (1991).

[121] *Id.*

[122] *See* NGAIRE NAFFINE, LAW'S MEANING OF LIFE 163 (2009).

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Despite embracing science when defining personhood, the law retained many of its past systems of classification, though partly incommensurable with each other:[123] legal personhood could be established on a kernel of humanity embodied in an embryo and at the same time denied from a fetus when terminating a pregnancy. Whether a result of invisible exclusionary practices or law's pragmatism matters little,[124] yet the intricate explanations provided by lawyers and legal scholars fueled additional demands to alter personhood to include some while excluding others. Many of the categories that were contentious in the past were gradually normalized—for example, racial minorities and women—as part of the Western notion of personhood. Although hardly reaching the threshold of equality at a societal level, few would openly question an equal legal standing of, say, women. What the new scientific gaze introduced to law were new entities that appeared to share some of the essential features of these now normalized persons. As courts and scholars struggled during the post-war years to define personhood beyond a bundle-of-rights-and-duties with a human face, the multivariate formulations provided a smorgasbord of classifications for new entities to claim. Is a fertilized embryo not a human in its genetic constitution? Does not an orangutan command as much in terms of will and interests as a child? Would an artificially intelligent machine not show intentionality in its actions if it would prefer some choices and deter others?

Personhood's expansion past the white, affluent, adult male had formerly operated mainly based on the idea of similarity between other categories and the model person. The similarity was often argued based on capacities that were shared between those excluded and included within the remit of personhood. These similarities in capacities relied first on anecdotal evidence, and later on quasi-scientific facts, but they were mostly related to mental faculties. Yet, the "biologized" humanity of the UNESCO reports and claims of rights for the disabled opened up an additional form of kinship, which is founded on belonging to the human species. Rather than looking for capacities, law relied upon concepts such as dignity and humanity to justify expansion of rights to those deemed to lack capacity for moral action. The argument for membership among a species proved potent also in debates over the status of fertilized embryos created as a part of various assisted reproductive treatments ("ARTs"). A fertilized embryo commands attestable uniqueness akin to every living human being. As a capacity to act morally was not a precondition for personhood, the argument went, there hardly exists a reason to exclude members of human species from the scope of personhood simply because they cannot articulate their desires. If law found in itself the ability to protect a fetus during the last trimester of pregnancy, what could possibly

[123] *See id.*

[124] For invisible exclusionary practices, see JUDITH BUTLER, GENDER TROUBLE (1990). The pragmatism of lawyers is of an older origin, with the likes of Roscoe Pound and Oliver Wendell Holmes promoting it in name of legal realism: "Not only does the law in the books seek to surround accused persons with safeguards which the practical exigencies of prosecution will not put up with, but at other times it demands conviction of persons whom local or even general opinion does not desire to punish." *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

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exclude a fetus of an earlier moment or an embryo from such protection? Past claims motivated by religious metaphysics found new refuge from the biomedical knowledge of DNAs, fetal development screening, and later, neurosciences.

Courts and legislators encountered these questions relatively soon after *in vitro* fertilization ("IVF") and other ARTs became more common in the 1980s. The pragmatic approach of lawyers and legislators that had served them well when equating black and white, women and men was found wanting when faced with embryos. The problem was obvious. Most jurisdictions had come to accept abortion as a right, and clearly, if there was no life to protect in a fetus there certainly could be none in an embryo. Yet treating something that held the potential to become a human being as mere chattel seemed like an unattractive solution as well: There was something there, but the question was how to classify that something without greatly limiting the rights of paradigmatic holders of rights. The solution embraced by most jurisdictions was a mishmash of rights flowing and ebbing away, depending on context. Much like personhood in cultures researched by anthropologists, the model of personhood embraced for embryos is contextual and relational. For an example of contextual personhood, most jurisdictions do not impose limitations for those resorting to ART to fertilize excess embryos that may later be used for research, but the very same jurisdictions often do not allow researchers to create—even with informed consent of gamete donors—fertilized embryos for research. Thus, what is acceptable in the context of procreation leading to research is not acceptable solely for research providing a set of rights to embryo in one context but not in another—albeit the right is the negative right to never become. Alternatively, an embryo may gain protection depending on outcomes of treatment. A good example of such consequentialist rights are those related to patentability of stem cell lines created through destruction of human embryos.[125] Here the destruction itself is not prohibited, but economic exploitation of the fruits of such destruction is limited at least to, a certain extent, private interest to destroy embryos.

The conundrum of personhood here is that it is at the same time a number of things, especially if personhood is understood solely as a moniker for a right-and-duty-bearing unit. Protecting the dignity and interests of an embryo in one context but not in another simply illustrates the troubling quality of distinguishing embryos as a category, challenging many of the attributes normally granted to legal persons such as unity and equality.[126] To address these problems, law resorts to a mix of arguments that stem from various sources, even though most arguments are framed scientifically. Yet, whenever protection is granted to embryos, the scientific arguments are set aside and replaced with spiritual or naturalist

[125] Another example could be drawn between the U.S. Federal prohibition on funding research that creates new stem cell lines through destroying embryos, but does not prevent private funding for such projects nor use of already existing stem cell lines in federally funded research projects.

[126] *See* Robin Conley, *"At the Time She Was a Man": The Temporal Dimension of Identity Construction*, 31 POL. & LEGAL ANTH. R. 28 (2008).

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metaphors. The narrative stemming from arguments based on science is employed to set boundaries and rules for recognition,[127] whereas spiritual or naturalist arguments are mainly used to govern the exception. Thus, when a court needs to assess whether an entity counts as an embryo entitled to protection, but is unable to solve the question based on science alone, it resorts to other arguments, as the Court of Justice of the European Union did in deciding whether a parthenote was an embryo:

> an unfertilised human ovum whose division and further development have been stimulated by parthenogenesis does not constitute a 'human embryo', within the meaning of that provision, if, in the light of current scientific knowledge, that ovum does not, in itself, have the inherent capacity of developing into a human being.[128]

Thus, it is not the biological constitution of an embryo but rather its inherent capacity to become a human being that marks it as a human embryo. Obviously, no embryo in a laboratory at present possesses within itself a capacity to develop into a human being without implantation, making the argument entirely dependent on an ethical argument concerning inherent value of human genetic material.

Two divergent paths emerge for personhood. On the one hand, science produced a vision that allowed the creation of entities that entered the realm of law equipped with a set of rights due to their shared genetic constitution with the paradigmatic person—a living adult human. Before the first laboratories fertilized embryos, there was no legal concern over fertilized embryos as no one had a capacity to manipulate or even perceive them. Thus, science created new entities for law to protect with rights. On the other hand, embryos are not in a persistent or even a durable state, but rather mark a fleeting period of transition towards either destruction or life. The ways embryos are treated are decisive on their prospects to become human. While science remains silent on the correct use of embryos, the law has encountered this particular question relatively often. Rather than multiplying the amount of new entities, legislators and courts are asked to accommodate embryos within the existing framework of norms. They are seldom designed to apprehend entities whose status is uncertain. After all, the protection afforded by dignity to embryos in Europe, for one, equates the embryo with a legal person, as "fertilisation is such as to commence the

[127] *See, e.g.*, Assoc'n for Molecular Pathology v. Myriad Genetics, 133 S. Ct. 2107 (2013) (showing that science frames the difference between natural DNA and complementary DNA (cDNA) that is not naturally occurring, allowing patenting of latter but not the former).

[128] ECJ, Case C-364/13, Int'l Stem Cell Corp. v. Comptroller General of Patents, Designs and Trade Marks, ECLI:EU:C:2014:2451, Judgment of 18 December 2014.

process of development of a human being."[129] It erodes the norm of the person commonly found elsewhere in European Union law that requires a person to be a living human being and transforms the concept of a person into a gradient term resembling more a principle than a norm. The two paths that emerge with regard to embryos can be readily attested also with regard to other new entities that have come at the very least to the brink of gaining a limited set of rights and, with that, a personhood.

The rights of the animal predate the scientific argumentation over the rights of an embryo or fetus, yet their genesis during the past decades shares many commonalties. Whereas modern debate over rights for human embryos and fetuses is closely connected to science, the modern animal rights debate is commonly seen to have originated from a set of philosophical writings in the early 1970s.[130] In this vein, some of the first rights were formulated negatively, for example, no undue suffering, and had a close link to human behavior. Although philosophically the argument was, from relatively early on, likening animals to humans, the demands by animal rights scholarship for animal personhood are of later origin.[131] While fetal personhood has at times animated heated public debates, the move of animals from the realm of things gradually towards limited personhood has been politically less controversial.[132] A growing number of States globally recognize in one way or another rights of animals even at the constitutional level, and in recent years courts have also come to recognize *locus standi* for animals, gesturing towards an animal *habeas corpus*.[133] How, and with what means these changes have been brought about remain contested, yet here much like with fetal personhood, science plays a decisive role.[134]

The scientific gaze that came to increasingly target humans during the 20th century had, from the days of Darwin, held animals to be just a few evolutionary steps away from humans. Research on primates and a more general zoological evidence from a wide range of animals—from domesticated animals to fish—indicated the existence of many sensory experiences in animals that were commonly connected to human consciousness. The argument from here to rights was straight forward: if animals at large are able to feel pain,

[129] Case C-34/10, Brüstle v Greenpeace eV, 2011 E.C.R. I-09821, para. 35.

[130] *See* MARK ROWLANDS, ANIMAL RIGHTS: MORAL THEORY AND PRACTICE (2d ed. 2009) (discussing the importance of moral theories in animal rights).

[131] Yasco Horsman, *Braying, Howling, Growling for Justice: Animal Personhood in Law, Literature, and Cinema*, 28 L. LIT. 319 (2016).

[132] *But see* Steven M. Wise, *Animal Thing to Animal Person—Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61 (1999).

[133] *See, e.g.*, Sabine Lennkh, *The Animal: A Subject of Law? A Reflection on Aspects of the Austrian and German Juridical Systems*, 24 INT. J. SEMIOT. LAW - REV. INT. SÉMIOTIQUE JURID. 307 (2011); Camara Federal de Casacion Penal, Orangutan Sandra s/ recurso de casacion S/HABEAS CORPUS, 18 Dec 2014.

[134] *See, e.g.*, CARY WOLFE, BEFORE THE LAW: HUMANS AND OTHER ANIMALS IN A BIOPOLITICAL FRAME (2012).

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have meaningful relationships, show intentionality, and even pursue goals why should they not have rights.[135] Quite like the fetal personhood debate indicates, the existence of scientific, moral, or religious argument in and of itself does not alter law's appreciation of a thing. Law's thing can be commonly held a person and vice versa. Therefore, alongside ethical and scientific arguments, emerged an argument of an animal gaze—a personal account of an encounter between a human and an animal that demands endowment of rights to some or all animals.[136] The reason to grant personhood to animals was grounded, hence, not solely on scientific evidence and moral theories, but to a personal everyday experience with animals, creating a bridge from double contingency to addressability between human and animal.[137] This, according to Gunther Teubner, is one of the three assumptions implied in all personification; once the scientific gaze penetrated the black box of animal experience and double contingency[138] established through moral theories, the addressability took place in a string of anthropomorphic assumptions.[139]

The existence of two overlapping gazes cast on animals, the scientific and the animal or personal, also led the demands for legal personhood down two different paths. The gaze that penetrates the black box of animal behavior classifies animals, normally asking that the greatest appreciation go to primates. They become first among animals with a multitude of animal persons to emerge below them with gradient rights. The second condition of double contingency most notably applies to animals we share the most intimate connection with in our daily lives through consumption or domestication. They are the ones we seek to liberate from suffering. The first path, then, is marked with a proliferation of new contestants for personhood—a diverse set of existing entities that we crave to nominate for personhood either positively, through a set of rights such as habeas corpus or negatively, through animal welfare legislation or ethical fishing standardization. The third condition of addressability achieved through the animal gaze aligns all animals on the same moral plane, what truly matters is the assumedly shared experience between the animal and the human. The brawl that counts is the one experienced by a human, casting doubt on the seemingly rigid

[135] Sabine Brels, *L'animalité humaine : du constat scientifique aux conséquences éthico-juridiques*, 17 LEX ELECTRON. 1 (2012).

[136] *See* Horsman, *supra* note 131.

[137] Double contingency refers, originally, to a confrontation encountered when meeting another human face-to-face. Through a mutual system of symbols, the problem of social interaction is provided with a solution. It asks a simple question of how the other will understand me. With regard to animals, we presume that we share a symbolic system and are able to understand their problems and provide solutions to them. It also means that we give explanations to their gestures that are often derivative from those we share with other humans.

[138] *See* Raf Vanderstraeten, *Parsons, Luhmann and the Theorem of Double Contingency*, 2 J. CLASS. SOC. 77 (2002) (discussing double contingency in sociology).

[139] Gunther Teubner, *Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 J.L. SOC. 497 (2006).

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boundaries of law separating humans from non-human animals,[140] turning morality into a compass for our assessment of personhood in an ever more principle-like personhood. Following Hache and Latour, we can recognize two dimensions of personhood the first of which addresses the distribution of beings able to address us, decided chiefly through means of science, and, second, the dimension that considers "varying the *intensity* of the interpellation required to produce a response, *whatever the type* of being under consideration."[141]

Both animals and fetuses then seem to lead to a problem with any moderate position on law's pragmatism relying on scientific evidence, and a similar argument could be made for machines, the deceased, and a number of other entities. As Leiter argues, scientific pragmatism has worked well in helping "depopulate our ontology of leprechauns and gods and ethers,"[142] but does not seem to work well in depopulating or repopulating the ontology of legal personhood. After all, the very pragmatism that dethroned gods also dethroned human's primary position with regard to the other species populating Planet Earth, wherefore the pragmatist basis of epistemology seems to have lost the foundation it once stood upon.[143] Thus, we can agree with Naffine's argument that

> [i]nstead of looking for the core of essential meaning of the entity, its supposed kernel of truth, we ask instead: How does the concept really work in law? And the way it does its work is likely to turn out to be quite varied; our meanings are more nuanced and less dogmatic than perhaps we first thought.[144]

Even though scientific gaze certainly depopulates and repopulates our legal categories, it is but one of the dogmas adhered to in defining personhood. The other origins gravitate towards reconceptualization of personhood rather than multiplication of its ontological entries suggested by science. A thing excluded from personhood remains as much a mystery for the body politic as ever, unsolvable or unsolved by any community.[145]

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[140] *See generally* SHEILA JASANOFF, DESIGNS ON NATURE (2007). The nomenclature of non-human animals resembles much of that of the pre-embryo employed in biomedical research to justify interventions to some embryos but not others.

[141] Emilie Hache & Bruno Latour, *Morality of Moralism?*, 16 COMMON KNOWLEDGE 311 (2010).

[142] Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

[143] *See* Horsman, *supra* note 131.

[144] NAFFINE, *supra* note 122. *See, e.g.*, Niilo A. Mannio, *Yhteisöllisestä juridisesta henkilöstä*, LAKIMIES 1 (1918) (showing that these thoughts are hardly novel in law).

[145] GIORGIO AGAMBEN, THE OPEN: MAN AND ANIMAL (2004).

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The resistance of legal personhood as a concept to scientific objectivism allows both a challenge from without to within and an active exclusion of many perceived as persons. It is a move Giorgio Agamben labels an anthropological machine, which leads to "the inhuman produced by animalizing the human."[146] In past decades, this animalization of the human has touched large parts of humanity through the construction of an immigrant or a refugee body and through the body of a terrorist. While they pale in comparison to past examples of animalizing the human that took place most notably in the figure of Jews, their logic of operation carries many similarities with the past—a past that was supposedly set aside with the advance of universal human rights. The animalized humans are perceived as an outside threat to the continued existence of the West that should be compartmentalized into pockets of warfare or regional processing centers. Most often related to the body, animalization can take place through varied means from recognition as a military-aged male by a drone operator to issuing a biometric identity at a border.[147] Simultaneously with celebrated cases of primate habeas corpus, a terrorist-suspect in a detention center often in vain seeks to establish a standing under any jurisdiction.[148] Thus, it appears that the present anthropological machine—at least in terms of legal personhood—inherits powers of both the modern machine and that of the earlier times where "non-man [was] produced by the humanization of an animal."[149]

The legal person inside the anthropological machine, then, is amorphous, as it is neither a human nor an animal, nor a machine, nor a corporate body. Agamben calls such an undecipherable life—a "bare life," wherefore a person without qualities would be a "bare person"—a person of strict legalism and legal fiction. Precisely due to personhood's amorphous nature, law is at liberty to decide even among humans to whom to grant personhood, in a striking contrast to solemn declarations issued after the war to end all wars. Unlike with animals and fetuses, a move to devalue part of humanity effectively employs existing legal structures:[150] international humanitarian law allows the use of force in a set of pre-defined conditions and the problem of refugees can be solved through the maintenance of safe zones and collection centers. B.S. Chimni, writing in the early post-Cold War years, bluntly states that "[t]he UN Security Council is, I submit, the modern day Benthamite Panopticon monitoring appropriately created subjects in a bid to ensure, *inter alia*, the

[146] *Id.*

[147] The military-aged male as a legitimate target is explored in GRÉGOIRE CHAMAYOU, DRONE THEORY (2015); *see, e.g.*, BTIHAJ AJANA, GOVERNING THROUGH BIOMETRICS: THE BIOPOLITICS OF IDENTITY (2013) (biometric means to control passage).

[148] Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT'L. J. CONST. LAW 9 (2010).

[149] AGAMBEN, *supra* note 145.

[150] These structures are commonly seen as parts of transnational law, a fusion of international and domestic legal orders, that are instrumental for the liberal theory. *See* José E Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001) (showing liberal theory and its critique).

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immobility of people seeking to bridge the North/South divide."[151] This externalized monitoring was embraced in quick succession by developed countries in their policies towards irregular immigrants and refugees, leading to replacement of "absolute legal rules with pragmatic problem solving."[152] In the light of these pragmatic problem solving rules, it becomes both rational and humanitarian to conclude a treaty transferring misbehaving migrants and replacing them with more noble sufferers,[153] with the ultimate goal to "break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk."[154] More than anything, the body of a migrant is kept at abeyance through an exercise of jurisdiction, foreclosing her entry to the system proper.[155]

The migrant never successfully enters the jurisdiction proper of the developed world, then, though she remains a target of extensive executive actions from governance of airports to declaration of islands as non-territory.[156] As such, the transformation of a migrant into a thing takes place by rendering her invisible, much like the black slaves in the past—a thing to control, not a person to be concerned with.[157] After all, the lauded human rights system works when it can see past the darkness at sea.[158] While the person of migrant is kept at bay and out-of-sight, the person of a terrorist is transformed into a thing precisely through the omniscient surveillant gaze of a drone.[159] Asymmetric, hybrid, or modern, the warfare at present is often waged from a distance, in small pockets of war or zones of hostilities that contract and expand based on the exigencies of a quasi-permanent war on terror.[160] While

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[151] B.S. Chimni, *Responses to Hathaway: Globalization and Refugee Blues*, 8 J. REFUG. STUD. 298 (1995).

[152] Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013*, 54 HARV. INT'L L.J. 315 (2013).

[153] S*ee* ALAIN BADIOU, ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL (2001) (showing the importance of noble suffering and evil to human rights).

[154] EU-Turkey statement, 18 March 2016.

[155] *See* Fleur Johns, *Data, Detection and the Redistribution of the Sensible in International Law*, 111 AM. J. INT'L L. 57.

[156] *See* James C Hathaway & Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANS'L. L. 235 (2015).

[157] *See generally* ACHILLE MBEMBE, CRITIQUE OF BLACK REASON (2017).

[158] *See generally* ITAMAR MANN, HUMANITY AT SEA (2016). For an attempt to shed a light to the events taking place on the perilous journey from thinghood to personhood, see LINDSAY POLLOCK, HASKO POSITIVE NEGATIVES (2015); *see also* Julia O'Connell Davidson, *'Things' Are Not What They Seem: On Persons, Things, Slaves, and the New Abolitionist Movement*, 69 CURRENT LEGAL PROB. 227 (2016).

[159] A terrorist caught is often rendered invisible through a network of clandestine detention centers or camps that escape all but martial jurisdiction. Here, the logic of person-making between a migrant and a terrorist converge.

[160] *See* Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT. CRIM. JUST. 65 (2013).

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the law regulating drone strikes is by no means without contestation, there exist both a relatively well-formed state practice and supportive scholarly writings on the matter.[161] As with migrant and refugee law, the international and transnational legal framework that enfolds the practice of drone strikes is practical and motivated with humanitarian and moral arguments: there are less casualties overall, less civilian casualties, and the warfare is cheaper to wage and easier to motivate domestically.[162] Consequently, "[d]rone warfare . . . can seem to be an inhuman form of war in which bodies appear as dead or dying victims, if they appear at all."[163]

But preceding their disappearance, bodies of victims-to-be are subject to ceaseless, disembodied surveillance from above that turns them into objects of indiscriminate warfare. Expanding the geography of warfare past traditional theatres of war, drone warfare covers large parts of the globe as a zone where being a male equates to being a combatant.[164] While the original intent of drawing a clear boundary between civilians and combatants was to protect civilian lives in a conflict, declaring an everywhere war—where everyone is a potential combatant if linked as a node in terrorism intelligence—does the opposite.[165] The original intent of the Geneva Conventions to provide rules to warfare through enforcement of mandatory distinction between civilians and combatants is overridden with nearly half of the population in countries like Somalia, Iraq, Yemen, and Afghanistan being suspected of participating in a war on terror. The surveillant gaze—or the eye of God[166]—that embodies a victim with a gender simultaneously transforms a person into a thing; once commanding a male body in the eyes of a drone operator one ceases to exist as a person and emerges as an object of war, to such an extent that drone operators attempt to turn everyone male.[167] Thus, much like Heidegger warned in the immediate aftermath of the Second World War, the technology risks turning everyone into a standing-reserve for its exploitation,[168] or "the

[161] *See* Christof Heyns et al., *The International Law Framework Regulating the Use of Armed Drones*, 65 INT'L & COMP. L.Q. 791 (2016).

[162] *See* Roger Berkowitz, *Drones and the Question of "The Human"*, 28 ETHICS INT'L AFF. 159 (2014).

[163] Lauren Wilcox, *Embodying Algorithmic War: Gender, Race, and the Posthuman in Drone Warfare*, 48 SECURITY DIALOGUE 11, 13 (2017).

[164] For an analysis of such power in action, see Jamie Allinson, *The Necropolitics of Drones*, 9 INT. POL. SOC. 113 (2015).

[165] The term everywhere war is loaned from Derek Gregory. *See* Derek Gregory, *The Everywhere War*, 177 GEOGRAPHICAL J. 238 (2011). The function of data to construct nodes and linkages as a highly impersonal sign of terrorism is widely discussed in literature. *See, e.g.*, Jutta Weber, *Keep Adding. On Kill Lists, Drone Warfare and the Politics of Databases*, 34 ENV'T. PLAN. D: SOC. & SPACE 107 (2016); Berkowitz, *supra* note 162; Wilcox, *supra* note 163.

[166] *See* CHAMAYOU, *supra* note 147.

[167] *See* Allinson, *supra* note 164.

[168] *See* HEIDEGGER, *supra* note 58.

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subordination of everything to impersonal logic and to the reign of calculability and instrumental rationality."[169] Yet, there is a risk of confounding drone warfare's technological novelty with its ideological novelty. As Markus Gunneflo shows, there exists a tractable legacy of targeted killings from at latest 1940s to the present.[170] Drone warfare could simply be an extension of a dehumanizing gaze on the global sphere, an extension of methods previously reserved for quelling national dissent.[171]

Nonetheless, the person of an immigrant and that of a terrorist refer to a particular logic of de-personification or reification of persons. In both instances legal systems in developed countries, through the international legal framework, render part of humanity invisible. The cloaking device here is the very law that was installed to make the rights and their holders visible, yet by pushing the persons into zones of indistinction that high seas, regional processing centers, or zone of hostilities mark they are turned into persons without qualities—or simply things.[172] Being under the control of law but out of its reach clearly signals the relative weakness of safeguards installed through the international codification of human rights; keeping terrorists and migrants at arm's length from their borders, the developed countries place the onus of protection in the hands of the very entities the persons are fleeing or fighting against. Upholding a tight territorial nexus to jurisdiction as a precondition for recognition to any perceivable rights is difficult to maintain.[173] Thus, the disavowal of personhood of some has a rationale "far more prosaic: one not grounded in moral theory, principle, or philosophy, but in political expediency"[174]—pointing directly at the bareness of person law upholds. Understood in this light, the existence of multiple competing and slightly differing concepts of personhood is, as likely as a unified notion, describing essential features of a bundle of rights that is a legal person.

The fusion of domestic and international law into a "law beyond a state"—or transnationalism—has conditioned the Western legal system to global influences in new ways. In a networked, global society, laws in Asia, Africa, or South America do have a more intimate bearing on, say, rights of labor, new forms of reproduction, or liabilities of corporations. Although rules of engagement were and are chiefly formulated by the developed countries in the global North, laws adopted in the global South allowed for

[169] Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 18 (2003).

[170] *See* MARKUS GUNNEFLO, TARGETED KILLING: A LEGAL AND POLITICAL HISTORY (2016).

[171] *See* Mbembe, *supra* note 169.

[172] This reading follows Giorgio Agamben. *See generally* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998).

[173] *See* Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT'L L.J. 81 (2015).

[174] *Id.* at 93.

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citizens and persons of the North to become subject to these laws through investments or purchases of goods and service. Personhood is one of arguably many areas of law where there is a marked difference between parts of the global South and the developed countries. While there are obvious difficulties in drawing any direct parallels between legal concepts across such a wide range of systems,[175] it can be said that some concepts travel better than others.[176] Personhood understood minimally as a bundle of rights-and-duties is certainly such a concept. While the more expansive categories of legal personhood found from a set of jurisdictions question the conditions to become a legal person, even these more expansive formulations assume a nexus of rights and persons. There is seldom a doubt whether a person travelling to another country holds a right to purchase goods or services nor is there any doubt that she would be held responsible if she caused damage or harm to someone or something. Under such minimal conditions, the legal personhood conceptualizations of countries throughout the globe come to affect the way personhood is construed in the global North. If congruence and crosspollination of law amid different legal systems of the globe was not obvious at the outset of the United Nations era, with its calls for transnationalism, for globalism, or its embrace of the global order, it has now made this point abundantly clear.

The legal terrain where this infiltration of legal ideas takes place remains heavily contested. We shall focus on the congruence of two different settings, and maybe lived experiences, simply to highlight how the diverse notions of personhood might come in contact with one another and how they influence our perception of legal personhood. The first one is related to non-legal practices, the second to legal practices. First, perhaps the oldest tradition, is that of a certain colonial gaze that "posits a gap, a difference between European and non-European cultures."[177] Portraying difference in terms of cultural aptitude as Levi-Strauss did,[178] allows setting aside many normative orders that are deemed quaint or uncivilized. On these instances, the ensuing conflict of worldviews is normally settled in favor of a notion of personhood comprehensible to the Western perspective. The blood samples taken from the Yanomami tribes in the 1960s and stored for five decades in various research laboratories in the U.S. are a good example of such conflict. For the Yanomami, the destruction of all physical remains at death is essential "so that the dead person can depart and separate the world of living from the world of the dead."[179] The perception of the person as consisting

[175] *See* Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. COMP. L. 111 (1997).

[176] *See* William Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, 1 INT'L. J.L. IN CONTEXT 5 (2005).

[177] Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 742 (2006).

[178] *See* LEVI-STRAUSS, *supra* note 74.

[179] *Indigenous Tribe's Blood Returned to Brazil After Decades*, BBC NEWS (Apr. 3, 2015), http://www.bbc.com/news/world-latin-america-32178286.

also of bodily fluids, such as blood stored decades before, was contested and ignored, for the most part, during the five decades of possessing those samples. Thus, a challenge to Western personhood posed simply in terms of cultural differences, especially those based on tribal or communal rather than legal rules, are predominantly overlooked to the detriment of other conceptualizations of personhood. This marks a gap that Anghie places between the universal Indian and the particular Indian—the universal being defined by the Western concept of personhood to which everyone ought to adhere, while deviation signaled by the particular traits ought to dissipate when being in contact with the Western norms.[180]

The second practice, and more directly connected to the realm of law, are instances where legal personhood has been extended past the sphere of persons commonly held to such standard in the West. Rather than focusing on the anthropologically recorded plurality of persons,[181] this tradition seeks to expand personhood in terms directly articulable to the rule of law and therefore, necessitating a legal response.[182] In recent years more and more jurisdictions have granted a distinct status of personhood to nature; for example New Zealand recognizes a right to personhood for a river,[183] India for waterfalls,[184] and Ecuador for the environment.[185] In contact with these ideas, it is not simply enough to re-state that a person is a right-and-duty-bearing unit or that a person commands innate value. While it is too early to say how New Zealand and India expect, for example, corporate actors to act with regard to newly personified bodies of water, the Ecuadorian experience provides insights into ways the personified harmonious co-existence between humans and nature is operationalized legally, vis-à-vis external actors—mostly Western corporations seeking rights to excavate natural resources.[186] While the Ecuadorian Constitution categorically prevents excavation in the areas of isolated indigenous people,[187] the country's government has—employing human development as an argument—accepted, for instance, oil drilling in

[180] *See* Anghie, *supra* note 177.

[181] *See, e.g.*, EDUARDO VIVEIROS DE CASTRO, CANNIBAL METAPHYSICS (2014); PHILIPPE DESCOLA, BEYOND NATURE AND CULTURE (2013).

[182] *See* P.W. Duff, *The Personality of an Idol*, 3 CAMBRIDGE L. J. 42 (1927) for the long history of this meeting of different ideas of personhood.

[183] *See* Abigail Hutchison, *The Whanganui River As a Legal Person*, 39 ALTERNATIVE L. J. 179–82 (2014).

[184] *See* Miglani v. State of Uttarakhand, Writ Petition No. 140 of 2015, High Court of Uttarakhand at Nainital (India), MCC 139/2017.

[185] *See* Rickard Lalander, *The Ecuadorian Resource Dilemma: Sumak Kawsay or Development?*, 42 CRITICAL SOC. 623 (2016).

[186] *See* Mary Elizabeth Whittemore, *The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 PAC. RIM L. & POL'Y J. 659 (2011).

[187] *See* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] 2008, art. 57.

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the area through its state-owned corporations acting jointly with Western, and in recent years, Chinese companies.[188] Generalized and under-specified constitutional—or more generally legal—rules such as *Sumak Kawsay* ("good living") in Ecuador or *Chipko Andolan* ("hug the trees") in India always imply that humanity is a part of nature, resulting into gradual derogation of norm-like statements.[189] As in Ecuador's decision to abolish the Yasuní-ITT initiative the arguments of common good were used, the Indian court, when protecting waterways and glaciers, "hasten[s] to observe that the local inhabitants living on the banks of river . . . must have their voice too."[190] From the point of view of Western legal personhood, many of these formulations resemble in their normative effect more that of awakening of the environmental movement in the 1970s, than profound challenges they are touted to be to the accepted content of legal personhood.

In sum, the promise of globalization to provide new constellations of global and local "glocal" personhood driven by the global South or the developing countries, seems to be relatively modest. This does not negate international and global law's potency to produce through its processes many new legal persons that merit attention, such as the administrator of Western authority in an invaded country or proliferation of cities as actors on a global scale.[191] These have been driven under the auspices of the Western concept of personhood, leaning to neoliberal ideas of development and urbanization[192] or to medieval conceptualizations of ruler's dual body.[193] More than affecting the Western legal order, the globalization has through diverse means, but most notably through the proxy of corporate actors and institutionalized idea of development, altered the global landscape to resemble to a great extent its own conceptualization of the person. The existence, yet apparent impotency of alternate worldviews and concepts of legal person merely accentuate this conclusion. Rather than enriching Western law with new ways to signal interests and duties

[188] *See* REBECCA RAY & ADAM CHIMIENTI, A LINE IN THE EQUATORIAL FORESTS: CHINESE INVESTMENT AND THE ENVIRONMENTAL AND SOCIAL IMPACTS OF EXTRACTIVE INDUSTRIES IN ECUADOR (2015); Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-sensitive State Ownership Function*, 26 EUR. J. INT'L L. 727–46 (2015) (discussing how states should own and operate according to the European system).

[189] *See* Sam Adelman, *Tropical Forests and Climate Change: a Critique of Green Governmentality*, 11 INT. J. LAW CONTEXT 195 (2015); *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755 (2016).

[190] Miglani v. State of Uttarakhand, *supra* note 184, at 61.

[191] *See* MATILDA ARVIDSSON, THE SUBJECT IN INTERNATIONAL LAW: THE ADMINISTRATOR OF THE COALITION PROVISIONAL AUTHORITY OF OCCUPIED IRAQ AND ITS LAWS (2017); LUIS ESLAVA, LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT (2015).

[192] *See* Peter Brand, *Green Subjection: The Politics of Neoliberal Urban Environmental Management*, 31 INT. J. URBAN REG. RESOL. 616 (2007); *see, e.g.*, Constitution of the City of Mexico (Constitución Política de la Ciudad de México), 5 February 2017, art. 13. (calling for a healthy environment).

[193] *See* ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (2016); ARVIDSSON, *supra* note 191.

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through personhood, the failure, thus far, of these new conceptualizations of a person highlights the unprecedented potency transnational corporations have gained as vehicles of unification.[194]

A continual tension between corporation's artificiality and anthropomorphism is, according to Anna Grear, decisive in its capacity to escape and expect human rights.[195] The power of a corporation "to metastasize into a world power"[196] is, to a great extent, explicable in its ubiquity; even though competing on the market, the corporations can join under a single banner when promoting corporate form as a vessel to conduct business globally. As was briefly explored above regarding rights of nature, it appears evidently true, as Upendra Baxi argues that:

> human rights of individual human beings [and of indigenous peoples] seem to be best served by according an overweening respect to the needs, interests, and desires of transnational corporations and the 'communities' of direct foreign investors.[197]

But what in the corporation turned it from an arguably powerful entity in a national setting into a global power broker in the ways commonly described and evinced? Much of this shift in power is attributable to the ways in which corporate personhood is articulated. Commanding a position of being able to define rights and enjoy their protection, while at the same time escaping attribution to a great extent, is a mighty power attributable to something supposedly fictitious. Essentially, corporations shape the world and rights, but rights and persons are still chiefly defined within the liberal, individualist tone.[198] As neither truly private nor public, the space in-between that corporations command renders them invisible, eternal embodiments of affluence[199] and influence.

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[194] *See* James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004).

[195] *See* Anna Grear, *Human Rights–Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights Theory*, 17 L. & CRITIQUE 171 (2006).

[196] David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 139 (2013).

[197] UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 17-18 (2d ed. 2006).

[198] *See* Ciepley, *supra* note 196.

[199] *But see* Fleur Johns, *Theorizing the Corporation in International Law*, *in* THE THEORY OF INTERNATIONAL LAW 635 (Anne Orford ed., 2016).

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As a primus motor in global economy and "a major threat to the economic autonomy of the nation-state,"[200] the corporation has—long after the trading companies of the 17th century—been re-conceptualized as a sovereign gift endowed by the State. Thus, rather than being solely reflections of private vision and interest, the corporation is perceived as governmental in operation and in provenance.[201] The power of a corporate body to establish and enforce rules transforms wishes and desires of corporations into normative orders dictating the life of those subject to such norms, whether as a factory worker in Bangladesh or as a Muslim woman employee willing to cover herself by a veil. The employed analogies of corporation to human beings or to states, or republics, all tend to conceal foundational differences that set corporations apart: It lacks a body and its citizens,[202] shareholders, are commonly exempt from its rule.[203] Power of a transnational company resides, then, in its disconnect from the preconceived idea of a legal person, while still being able to fully enjoy the benefits of such personhood in terms of rights endowed by state. The corporate body is spectral and unchained, providing it with a global omnipresence no material entity could enjoy, which allows it to "almost produce a substitute for earlier state formation."[204]

The myth of legal personhood pursued in the present is best understood as something that "'goes without saying' but which, when actually said, begins to appear 'falsely obvious.'"[205] At first sight, contemporary personhood is quite like the personhood that was formulated during the post-war years: it is universal and formally egalitarian with regard to humanity, it recognizes corporate personhood, and it denies demands for personhood from animals, machines, and, to an extent, fetuses. Yet there are subtle changes—science on the one hand, and globalization on the other hand—that have been introduced to personhood. Human capacity to alter, enhance, and augment herself through technological means has called into question qualities that are held to be human and, as such, personal, with subsequent effect on legal personhood. Our knowledge of our genetic affinity with simians, promises of integrated computers and strong artificial intelligence as well as neuroscientific models on brain's functioning, have led many to ask what is in human dignity that sets us apart if all elements of that uniqueness can be replicated. Once so obvious assumption of the human specific mind or consciousness is difficult to maintain at present. This has amounted to calls for increasingly material explanations for personhood that seek to explain personhood through material constellations rather than ideas. An alternate set of subtle yet significant movements has taken place in the international or global arena. Most significant of these

[200] PETER DICKEN, GLOBAL SHIFT: MAPPING THE CHANGING CONTOURS OF THE WORLD ECONOMY 106 (5th ed. 2007).

[201] *See* Ciepley, *supra* note 196.

[202] *See* Grear, *supra* note 195.

[203] *See* Ciepley, *supra* note 196.

[204] BAXI, *supra* note 197, at 246 .

[205] Marks, *supra* note 10, at 230.

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has been the overlap of domestic and international legal spheres—transnationalism. As local changes have had repercussions in global events, so have global networks; and increasingly potent multinational corporations have come to define local policies and law's personhood therein included. It has led to more and more recurrent demands to call corporations to account morally for their actions, re-introducing morality to the plane of personhood debate.

D. Upholding Utopia

With "I am a person, and so are you. That much is beyond doubt," Daniel Dennett started his article four decades ago. He simply continued to say that "[i]n the end we may come to realize that the concept of person is incoherent and obsolete."[206] He further developed a six-prong analysis that functions as a continuum from a mere material person to ultimately a moral actor in a philosophical sense. Albeit of limited value for law, models of Dennett and others illustrate clearly why law is struggling with personhood. The concept of a person inherits much from our everyday experience and language, and exploring these everyday contexts within which person is understood allows us to assess feasibility of the story of personhood explored in the preceding chapters. The story provided above is a linear and, arguably, a simple story of "progress" where law moves towards greater inclusion and increasingly "rational" justification for our incoherent and obsolete concept of a person. Tensions are simple and direction is clear, but the purchase of any apparent or illusory similarities to the present remains modest. Even if, say, the migrant and the terrorist are set outside the scope of rights in the same way banning people from political community did in the past, the means and outcomes are very different. Thus, there are limits to answers that look simply to the past—even outside the number of novel questions derived from developments related to new technologies and the creation of the "post human."

Stories of and about personhood—the mythical part—are to a great extent shared between a wide range of explanations and theories of personhood.[207] Virtually all of the numerous

[206] Daniel C. Dennett, *Conditions of Personhood*, *in* THE IDENTITIES OF PERSONS 175 (Amelie Oksenberg Rorty ed., 1976).

[207] For additional sources, see, e.g., LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL, (Alain Pottage & Martha Mundy eds., 2004); Mireille Hildebrandt, *Criminal Liability and "Smart" Environments*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 507 (R. A. Duff ed., 2011); COSTAS DOUZINAS, THE END OF HUMAN RIGHTS (2000); UPENDRA BAXI, HUMAN RIGHTS IN A POSTHUMAN WORLD (2009); Yan Thomas, *Le sujet de droit, la personne et la nature*, 100 DEBAT 107 (1998); Marta Madero, *Penser la tradition juridique occidentale: Une lecture de Yan Thomas*, 67 ANN. HIST. SCI. SOC. 103 (2012); Jonathan Erhardt & Martino Mona, *Rechtsperson Roboter–Philosophische Grundlagen für den rechtlichen Umgang mit künstlicher Intelligenz*, *in* INTELLIGENTE AGENTEN UND DAS RECHT 61 (Sabine Gless & Kurt Seelmann eds., 2016); Reinhard Damm, *Personenrecht: Klassik und Moderne der Rechtsperson*, 202 ARCH. FÜR DIE CIVILISTISCHE PRAX. 841 (2002); Heike Baranzke, *Das Tier als Subjekt eigener Interessen in Recht und Ethik?–Möglichkeiten und Grenzen interessenethischer Ansätze für eine Ethik der Verantwortung für Tiere*, *in* TIERSCHUTZ BEI DER RELIGIÖSEN SCHLACHTUNG / ANIMAL WELFARE AT RELIGIOUS SLAUGHTER 91 (Johannes Caspar & Jörg Luy eds., 2010); CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT (Peter Fitzpatrick & Patricia Tuitt eds., 2004); YORIKO OTOMO, UNCONDITIONAL LIFE: THE POSTWAR

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accounts on personhood propounded focus on similar entities and tell some variation of the story of origin outlined above. Moreover, despite recurrent referral to theoretical omission of personhood, accounts range virtually all fields and approaches of law, and there have been no notable gaps at any recent point on these attempts to provide explanations to what a person in law entails either. Insistence upon the deep dark of theory of the legal person accentuates the story of origin and personhood's often troubled past, without giving much in terms of an answer to the question of why we ought to be concerned with personhood. Often in a circular fashion, personhood is defined as more than a condition of existence for entities carrying rights and duties, but rather the exploration is carried out solely to provide or deny rights and duties of some. Nevertheless, it seems obvious "that unless the question about [personhood] has an answer, we cannot answer certain important questions (questions about such matters as . . . [attribution, morality,] and responsibility)."[208] In our effort to uphold the utopia of personhood, we attempt to provide a reading of the expansive debate to cast light not onto the heart of darkness but to that which lies right before us in the voluminous body of scholarship on personhood.

While many of the choices made in the construction of the concept of personhood in the West are defensible, there are parallel or overlapping narratives that might, on the one hand, allow us to better appreciate present problems and, on the other hand, highlight continuity also where ruptures seem more apparent. There is little doubt that the tradition and myths explored above are among the most prominent ones for explaining legal personhood. It is a narrative that seeks to understand personhood through the lens of a dualist human, one torn between a body and a mind or consciousness. At first, the legal personhood served to bifurcate humanity into two, to those who had a civilized mind and those who did not. Over time it has begun to signal a boundary condition between the moral agency of humans and the mere existence of things.[209] Much like the Indians were included into humanity in the works of Vitoria,[210] present models of personhood may grant animals, AIs and others, view personhood with a minimal sense of respect while barring them from moral agency and, with that, responsibility. This dualist understanding is in sharp contrast to materialism, or monism, that was a prominent alternative that law never embraced despite its prominence during the early Enlightenment[211]—an era when many formulations of law's person were also made both domestically and internationally. The fascination of 18th century with artificial life and mechanical explanations of the human never truly gained

INTERNATIONAL LAW SETTLEMENT (2016); ALAIN SUPIOT, HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW (2007).

[208] Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3, 4 (1971).

[209] *See* DOUZINAS, *supra* note 207.

[210] *See* Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 85–6 (2003).

[211] *See* ISRAEL, *supra* note 17.

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support among lawyers and legislators.[212] Yet, the past few decades with advances in bio and nanotechnology as well as neuroscience and artificial intelligence have forced lawyers, in praxis, to encounter questions of human materiality that scholars have averted in theory. If all elements of a human can be technologically reproduced and replaced—just like the mechanical duck on public display throughout Europe in the 18th century seemed to replicate a biological duck—what does it signify to the human condition?

In her recent article, Britta van Beers marks this bifurcation as one between a natural and an artificial concept of a legal person.[213] She argues that in much of the recent legal theoretical scholarship the artificiality of personhood has gained ground as the original meaning of personhood, highlighting the *persona* as a mask worn to signal changing status of its bearer. As a mask, legal personhood is never truly attached to a natural person but is a fictitious role adapted when entering the realm of law. As a critique to such growing fictitiousness or artificiality of legal personality, van Beers argues that while there is much truth in the postmodern demise of naturalness as a representational category, "law's category of the natural person still has its merits, not only *despite* current [technological] developments, but maybe even *because* of them."[214] And while she admits that technological change might "eradicate the naturalistic premises" attached to law's natural person, she maintains that we have always been partly a product of technological artefacts. While in many ways sympathetic to her arguments in favor of retaining material bind for the concept of legal personhood, the argument van Beers provides to support her premises seems to suggest that the legal fictions related to legal personality are strictly legal—that law construes legal fictions which then come to frame social interaction and society at large. Her examples, taken from the field of biolaw, are related to the definition of death and the so-called wrongful life cases. She argues, in short, that novel definitions of death are means to reach other ends, most notably viable organs for organ donation, and that wrongful life decisions seem to presume existence of another possible world where the genetic constitution of an impaired infant would not have been the same.

While both examples used by van Beers truly highlight how law's language can change the moment of life's beginning and end, and consequently create a fictional disconnect between bodily functions and the human condition and law, her analysis appears to abscond artificiality by embracing it. As Sheila Jasanoff, for example, has shown, the discursive means with which medical and scientific experiments on embryos are justified clearly place their origin outside the realm of law.[215] One could argue that what van Beers considers a

[212] *See, e.g.*, JULIEN OFFRAY DE LA METTRIE, L'HOMME-MACHINE (1865); JESSICA RISKIN, THE RESTLESS CLOCK (2016).

[213] *See* Britta van Beers, *The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person*, 18 GERMAN L.J. 560 (2017).

[214] *Id.* at 582.

[215] *See* JASANOFF, *supra* note 140.

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perplexing hall of mirrors in the wrongful life decisions is but work of a "pre-embryo" devised by the Warnock Committee.[216] In its report on human fertilization and embryology in the United Kingdom, the Committee led by Mary Warnock employed strictly scientific, and thus, according to van Beers, *natural*, reason to allow scientific operations on embryos before 14 days from conception. Thus, in cases where a failure to recognize a disease in a pre-implementation genetic diagnosis (PGD) leads to birth of a child with severe cognitive and/or physical disabilities, there appears to be, for science as much as for law, two different entities, both equally "fictionaliz[ing] the way natural person relates to his or her body."[217] According to the Warnock Committee, there never was an individual who was tested in the PGD as the pre-embryo could still develop into twins—a fiction as potent as one employed by courts when they argue that there would have been a possible world where a disabled child would have never been conceived had the operation targeting this non-unique embryo been conducted with proper duty and care. A rather similar critique could be targeted toward van Beers' other example of diverse forms of death and their medico-legal definitions. While law provides a bulwark against accusations of malpractice to surgeons, the definition of, for example, brain death remains strictly medical and, again, *natural* in van Beers' nomenclature. As early surgeons performing heart transplant surgery noted, calling a person brain dead "is entirely a technical medical decision [that should not], be circumscribed in this decision by legal authority."[218]

In short, while a natural person might not have suffered the fate of an author, employing arguments stemming from the world of science as natural and their legal counterparts as artificial is incongruous at best. As David Kennedy notes:

> [T]he image of experts bringing prefabricated knowledge to bear on world problems captures only a part of the role expertise plays in world making. The knowing, the doing, and the world making are more entangled than that. Background ideas about the world—often experienced as "facts" rather than "ideas"—shape the world before people set to work on the problems they see with the knowledge they have.[219]

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[216] *See* DEPARTMENT OF HEALTH & SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY (1984).

[217] Van Beers, *supra* note 213, at 586.

[218] Margaret Lock, *Death in Technological Time: Locating the End of Meaningful Life*, 10 MED. ANTHROPOLOGY Q. 575, 582 (1996) (citing EXPERIENCE WITH HUMAN HEART TRANSPLANTATION: PROCEEDINGS OF THE CAPE TOWN SYMPOSIUM 13–16 JULY 1968, 40 (Hillel Shapiro ed., 1969)).

[219] DAVID KENNEDY, A WORLD OF STRUGGLE 89 (2016).

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van Beers is certainly not alone in elevating natural to artificial when scientific knowledge encounters law. Yet, such elevation seems to be less a condition of artificiality or fictitious nature of legal personhood, and more a symptom of how legal scholars approach their conceptual tools when they lack immediate and precise normative content. Much of the voluminous scholarship on legal personhood seems to assume that personhood is an emanation of "necessary, universal truths about law."[220] While on these accounts, legal personhood might retain a relationship to the external expertise it embodies, for example neuroscience or data science, when operating within the legal sphere its potency to dictate outcomes is unprecedented—it is seen as a *primus inter pares* explaining why someone is being discriminated against or why society allows organs to be harvested or establishes liability due to a painful existence. Such an account of law and of legal personhood entirely disconnects knowledge of our world from its legal interpretation and cannot help but render everything artificial. Therefore, it is easy to side with van Beers' conclusion that "what is needed is a legal concept of the person which can bring to expression what is, ultimately, at stake in the coming era of human enhancement technologies: Our embodied, human nature."[221] It is also where our utopia stands.

In many ways, the tentative first steps of building such a utopia resemble a story Heidegger loans from Plato's *Theaetetus:*

> The story is that Thales, while occupied in studying the heavens above and looking up, fell into a well. A good-looking and whimsical maid from Thrace laughed at him and told him that while he might passionately want to know all things in the universe, the things in front of his very nose and feet were unseen by him.[222]

Heidegger continues, suggesting that "[t]herefore, the question 'What is a thing?' must always be rated as one which causes housemaids to laugh."[223] Truly, for most lawyers practicing law a genealogical quest to unearth what a legal person is might raise a few justified laughs. The person is seldom contested and a conventional knowledge among the ranks of lawyers would quickly frame legal person to a sufficient extent. Moreover, many fields of law command their own specialized vocabulary to recognize a person from other entities closely resembling it: a corporate lawyer would refer to rules of incorporation, an international lawyer to rules of state formation, and so forth. In many ways, these specialized vocabularies of personhood are what biology, physics, or geology are to things

[220] Brian Z. Tamanaha, *Necessary and Universal Truths about Law?*, 30 RATIO JURIS 3, 4 (2017).

[221] Van Beers, *supra* note 213, at 593.

[222] MARTIN HEIDEGGER, WHAT IS A THING? 3 (1968).

[223] *Id.*

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in Heidegger's quest to understanding them. A philosophically motivated questioning of legal personhood always appears too slow and imprecise when law commands more nuanced, precise, and suitable tools to outline personhood.

Folly of the task at hand is further accentuated by the very fact that while there might exist a kernel of what a legal system means with legal personhood, such a kernel is neither universal nor enduring. Change of time and place affect legal personality in much the same way as they change the understanding of any particular thing. As with the rest of human artifacts, there exists no unique, correct way to group entities that would belong under the moniker of a "legal person." Albeit there is no universal and permanent notion for legal personality; it, like other "conventionally recognized legal forms [is] anything but ephemeral."[224] It is rather a human artefact that changes over time in connection to our other artefacts. Perceiving law as a technological artefact—an expertise in world-making, to borrow from Kennedy—among many that shape us and as something that is shaped by us allows for the positing of bodies and matter in a meaningful relationship with ideas. Maintaining a separate category for body as distinct from matter is a sop to Cerberus. Body or embodiment would merely come to occupy the place currently reserved for a human being commanding qualifying traits. There would be little to prevent law from employing categories akin to the pre-embryo to demote bodies into matter, a point made by Norman Fost with regard to anencephalic infants as organ donors. It "invite[s] constant redefinition whenever utility requires it, creating both instability and the perception of and the possibility that unwanted persons can be defined out of existence if it serves the greater good."[225] As such, a consequence of highlighting embodiment could amount to little more than a change of nomenclature.

In many ways, entities that at present are on the brink of personhood also exemplify the pitfalls of such a simple change. Courts, for example, often approach fetuses and embryos as a *sui generis* category of matter, commanding a string of bodily features yet often failing to earn the status of a person. Yet, whenever claims for fetal rights find the support of courts, they do so in a language that embodies them. Hence, in *Vo v. France,* where a claimant argued that a lost fetus was not nothing, the European Court of Human Rights underlined that, indeed, it was "something" but certainly not "someone."[226] Whenever finding rights before courts, these entities are made persons by donning them traits associated with being a human (for example sentience, desires, feelings of pain and pleasure, a human worth) while when denying existence of independent rights courts' simply refuse to entail them

[224] BRIAN Z. TAMANAHA, WHAT IS LAW? 60 (2017).

[225] Norman Fost, *Organs from Anencephalic Infants: An Idea Whose Time Has Not Yet Come*, 18 HASTINGS CENT. REP. 5, 7 (1988).

[226] Vo v. France, Center for Reproductive Rights (intervening) and Family Planning Association (intervening), App. No. 53924/00 (2004).

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within such categories. The idea of the body is the idea of a human and whenever traits deemed human are seen in a matter that matter becomes embodied. The task of courts and legislators would then be no different with regard to a natural, embodied notion of personhood than it is at present, where instead of applying bodily categories courts apply ideas to things. Courts and legislators are often called to readjust the misaligned moral compass and transform personhood into a protean concept able to accommodate fetuses, animals, deceased, robots as well as living human beings and corporations. After a new-found body of a legal person would have emerged, the same artificiality traced by van Beers in present concept of personhood would continue as is—solely more reflective of material bind of humanity than at present.

In order to avoid merely replacing artificial with natural without changing anything but the concept, a simple call for embodiment as such is hardly sufficient. Rather, what an account tied to matter necessitates is a full eradication of a preferred category of a person from the classical Roman trifecta of *persona-res-actiones*, placing the true chasm "not between humans and the world, but between *objects and relations*."[227] After all, for as long as there exists a preferred category, everything failing to reach such a standard is something of lesser worth. At present, the preferred category of a person at the apex of personhood is that of "the healthy adult, to whom can be awarded the title of being truly and properly a person."[228] Resembling Agamben's anthropological machine, Roberto Esposito argues that placing a golden standard of personhood will amount to marking everyone else with qualities attributed to the paradigmatic thing in a gradient scale from personhood to thinghood. If, for example, a lifeless, motionless object is taken as a standard for thinghood, a human being in a permanent vegetative state unable to move or breath independently can easily be seen to stand on the verge of thinghood—embodied or not.[229] Moreover, as science and technology have provided new modes to describe matter they also enable new and ever more nuanced classification of objects on their scale from full personhood to full thinghood as evinced by the constant development of new categories of death.[230] Examples of such newly employed classifications enabled by technology are sentience or pain,[231] but

[227] GRAHAM HARMAN, TOOL-BEING 2 (2002).

[228] Esposito, *supra* note 15. One could also conceive of the person at the apex even in a more limited fashion as a masculinist. *See, e.g.*, OTOMO, *supra* note 207. Or one could go even further as to conceive of the person as "the white, European male property-owner." *See* Anna Grear, *Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"*, 26 L. & CRITIQUE 225, 237 (2015).

[229] *See* ROBERTO ESPOSITO, PERSONS AND THINGS 26, 33 (2015).

[230] *See* Ian Hacking, *Making Up People*, *in* BEYOND THE BODY PROPER: READING THE ANTHROPOLOGY OF MATERIAL LIFE 150, 158 (Margaret Lock & Judith Farquhar eds., 2007).

[231] *See* Dominique Lestel, *The Question of the Animal Subject*, 19 ANGELAKI 113 (2014).

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also more social qualities such as legality of a body at borders based on digitally recorded biometric information.[232]

To avoid contamination between categories that allows debasement of some entities *ab initio*, a removal of the apex of personhood dominated by a natural person allows reinstating material at the epicenter of personhood. Rather than working as a more profound or privileged form of critique to personhood, such leveling opens a parallel form of criticism. Whereas upholding a person/thing distinction populates a single notion of personhood with different intensities of personality, a single category of objects will produce a great number of entities that reflect different facets of personhood. Quite like the two ontological orientations of sociology outlined by Nedim Karakayali,[233] these two different modes of perceiving a legal person rely on a specific ontological orientation. While persons/things distinction maintains a rigid boundary between the two, a single category of material objects, "considerably blurs the boundaries"[234] between the two. Consequently, there emerges

> an imagery that regards the yesteryear theologized body in human rights discourse as an anachronism because both the 'body' and 'mind' emerge as no more than coded programs of information, which in turn may be disembodied and invested with other more perennially enduring mediums.[235]

Yet, these imageries are not limited to humanity but expand to all entities that can or could foreseeably inherit one of the disembodied, coded programs of information. Such a disaggregate account of what is essential to a legal person enables law to summon new, partly overlapping conceptualizations of personhood.[236]

Subsuming all objects from stones to humans in a single pool that could merit legally relevant personhood shares much with wider post-humanist scholarship. According to Rosi Braidotti, the posthuman condition "means that matter is not dialectically opposed to culture, nor to

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[232] *See* Irma Van der Ploeg, *The Illegal Body: "Eurodac" and the Politics of Biometric Identification*, 1 ETHICS & INFO. TECH. 295 (1999); AJANA, *supra* note 147.

[233] *See* Nedim Karakayali, *Two Ontological Orientations in Sociology: Building Social Ontologies and Blurring the Boundaries of the "Social,"* 49 SOC. 732 (2015).

[234] *Id.* at 738.

[235] BAXI, *supra* note 207, at 206-207.

[236] *See, e.g.*, CARY WOLFE, WHAT IS POSTHUMANISM? 57–61 (2010) (regarding animals).

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technological meditation, but continuous with them."[237] As an essentially deconstructive move, the posthuman condition returns elements of legal personhood to its constitutive parts. Hence, there is a space for shamanism[238] and animism[239] as cultural practices as much as neural networks[240] and fetal surgery[241] as technological events to construe new persons that flourish alongside and partly overlapping the legal person of adult human beings. In a world where everything and everyone can be a person, as in the animistic tradition, the value law can attribute to personhood obviously diminishes—both in good and in bad. On a positive note, multiplication of personhoods to cover diverse entities eradicates the current pitfalls linked to centrality of narrowly defined apex of personhood. The populous mass of diverse personhoods from electronic to animistic, or from orangutan to autonomous vehicle, would grant a legal recognition to a wider range of entities without having to demote human beings.[242] Moreover, equating personhood with matter would demystify the criteria upon which law grants rights and duties to entities. With such an expansive category of entities capable of commanding rights, law would have to reassess many of those relations presumption of humans as actors has clouded. For example, to what extent a weak artificial intelligence merely responding to sensory stimuli ought to be held responsible from any damage caused?

Ultimately, the reason to theorize legal personhood cannot be solely to render the category barren and featureless catchall. Turning personhood into featureless and barren serves as such no function. The purpose for doing so is to highlight multifarious tasks personhood does for law, many of which go unnoticed in the everyday functioning of law. Removing the illusion of its precise contours, a featureless object *qua* person serves to highlight those functions and relations, and as such, creates a countercurrent to a narrative of personhood bound to humanity. Which legal relations truly necessitate existence of a human actor and why? Juxtaposing a naked, object-like person to the fuller contours of a legal person bound to humanity provides a diffraction that can guide the reassessment or simply facilitate the closer scrutiny of those legal relations. Thus, alongside its emancipatory potential, a material account of personhood exposes legal relations by showing that a legal person was never

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[237] ROSI BRAIDOTTTI, THE POSTHUMAN 35 (2013).

[238] *See* Alvarez-Nakagawa chapter in this volume, 18 GERMAN L.J. (2017).

[239] *See* Casper Bruun Jensen & Anders Blok, *Techno-animism in Japan: Shinto Cosmograms, Actor-network Theory, and the Enabling Powers of Non-human Agencies*, 30 THEORY, CULT. & SOC. 84 (2013).

[240] *See* John Danaher, *The Threat of Algocracy: Reality, Resistance and Accommodation*, PHIL. & TECH. 1 (2016); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N. CAROL. L. REV. 1231 (1992).

[241] Irma Van der Ploeg, *"Only Angels Can do without Skin": On Reproductive Technology's Hybrids and the Politics of Body Boundaries*, 10 BODY SOC. 153 (2004).

[242] Compare to some of the present proposals for animal personhood that rely on sentience that would remove personhood from many humans.

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simply a bundle of rights and duties, but a powerful idea that has shaped legal relations even when never articulated. Laying bare the person as nothing but an object enables a reformulation or reassessment of those legal relations to serve, say, other than strictly human ends—of granting trees with standing and apes with copyrights.

To map the role legal personhood serves in diverse legal relations, both interpretations of legal personhood—as a right-and-duty-bearing-unit and as a featureless object—are needed. To reveal personhood's role, the two are to be used together to find where, if anywhere, effects of personhood are noticeable.[243] Seeing what effects a change has reveals, in part, in which, often unarticulated, ways legal relations have integrated the legal person within them. The articles of this special issue are all tentative steps in understanding how personhood is embedded in more or less obvious ways in a wide range of legal phenomena.

The articles that make up this Special Issue may be divided into two distinctive, if not overlapping, categories. In the first category, authors embark on a series of case studies that investigate specific instances where seemingly stable conceptions of legal personality are problematized. Probing the many invented traditions, myths, and utopias outlined in this introduction, these interventions cover the key areas of law where contemporary legal personality surfaces as an essential concern for the legal relations in question. The human body,[244] the post human body,[245] the doctrinal body,[246] and the corporate body[247] are drawn to the fore, and all have their doctrines, ontologies, and politics assessed. In the second category, the articles are more concerned with the future of legal personality and its ramifications. The main commonality between these interventions relates to suspicion of the *persona/res* distinction and their willingness to unearth competing hybrid theories of personality,[248] regulation,[249] political community[250] and, ultimately, law.

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[243] *See* Donna Haraway, *The Promises of Monsters: A Regenerative Politics for Inappropriate/d Others*, *in* CULTURAL STUD. 295, 300 (Lawrence Grossberg, Cary Nelson, & Paula A. Treichler eds., 1992).

[244] *See* Lisette ten Haaf chapter in this volume, 18 GERMAN L.J. (2017); Tuo Yu chapter in this volume 18 GERMAN L.J. (2017).

[245] *See* Jannice Käll chapter in this volume, 18 GERMAN L.J. (2017).

[246] *See* Ukri Soirila chapter in this volume, 18 GERMAN L.J. (2017).

[247] *See* Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017).

[248] *See* Alexis Alvarez-Nakagawa chapter in this volume, 18 GERMAN L.J. (2017).

[249] *See* Mika Viljanen chapter in this volume, 18 GERMAN L.J. (2017).

[250] *See* Susanna Lindroos-Hovinheimo chapter in this volume, 18 GERMAN L.J. (2017).

Situating the impacts of the personhood and thinghood mostly in the present, the special issue nevertheless begins by confronting the past.[251] In an article that expands—both in terms of substance and method—beyond the outlined dualist structure, *Visa Kurki* provides an analytic examination on the roots of legal personhood and thinghood. Expanding on our brief description on the significance of Enlightenment to the development of contemporary myths of personhood, Kurki traces the intellectual history of thinghood. Turning to present, Kurki then applies his analytic scheme to one of the most contested contemporary things, the animal.

The first set of articles focuses on the human body, and particularly its earliest forms, embryos and fetuses. As discussed above, the biotechnologies are responsible for perhaps the most intrusive destabilizations in natural and legal personhood. They deeply problematize the origins of quintennial personhood and force clear political borders on our physical bodies. In these circumstances, the case studies by *Lisette ten Haaf* and *Tuo Yu* provide a clear view into two national legal constellations which determine how varied conceptualizations of person, or lack thereof, mutate both the objects of inquiry and the possible legal relations that courts and legislators can use their space to maneuver.

ten Haaf's article explores the status of the unborn and future child within the Dutch legal context. Her article works on the boundaries of personhood and the feasibility of tentatively alluring answers for protecting unborn and future children from harm. *ten Haaf's* analysis indicates, through the characteristic choices of the Dutch law, ramifications for considering an entity to be one with rights and with personhood or, alternatively, one with interests. Both choices trigger different legal mechanisms, while neither choice is evidently better than the other. As such, *ten Haaf's* article is an insightful indication of the power of legal artifacts as well as a useful reminder of the limits of personhood as a protective bulwark.

Yu's article tackles Chinese legal context, which, while greatly influenced by the Continental tradition, presents a rather unique setting for developing the notions on the unborn. In *Yu's* account, the famous one child policy and the lax abortion legislation emphasize the role of civil law concept of the person when Chinese courts, scholars, and the legislator seek to respond to rapid technological change. Contextualized in Chinese case law and the recent adoption of the new civil code, *Yu's* article provides significant possibilities for comparative studies while illuminating Chinese responses to borders of natural and legal personality.

The article by *Jannice Käll* takes a leap from the human to the post-human body. Positioned within the posthuman turn in social theory, *Käll* provides a thorough examination of the concept of "data subject," a curious but crucial concept developed in the European data protection regime. In her analysis, the strained relationship between the immaterial data and the material body provides an opening to deconstruct subjectivity, analyze it as an

[251] *See* Visa Kurki chapter in this volume, 18 GERMAN L.J. (2017).

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embodiment of advanced capitalism, and offer an alternative normative reading of legal persons and things in the age of big data.

The second set of case studies turn to international law as bodies of law. Opting for the lens of Roberto Esposito's political philosophy, both *Ukri Soirila* and *Mikko Rajavuori* investigate the recalibration of international legal personality along the Esposito's person/thing distinction. *Soirila* takes issue with the emerging "law of humanity," an intellectual tradition, if invented, that places an individual and not a state, at the center of international law as the new quintennial international legal person. In *Soirila's* view, the utopia of the humanity's law does not survive the critical intervention posed by Esposito's broad philosophical framework. Instead of offering radical redemption, construing international legal personality from the perspective on an individual rather reproduces the same immunitary consequences that flow from the Enlightened personality.

While remaining in broadly similar theoretical framework, *Mikko Rajavuori* uses Esposito's concepts to gauge international legal personality in investment treaty arbitration. Introducing the perspective of a state-owned enterprise, a corporate body, in the discussion, *Rajavuori* analyses the creation, maintenance, and ramifications of international legal personality. Juxtaposing doctrinal and postcolonial narratives, *Rajavuori's* intervention is positioned in the liminal stage between traditions and myths of personhood.

In the second stream of articles, *Susanna Lindroos-Hovinheimo*, *Mika Viljanen*, and *Alexis Alvarez-Nakagawa*, pursue their own distinctive paths in the search of a principled way forward in imagining legal relations that a different concept of personhood could bring forward.

Susanna Lindroos-Hovinheimo focuses on the individual as the epicenter of the unique political community known as the European Union. Interested in the place of a subject in a community, her discussion is structured on Jean-Luc Nancy's ontology of singular plurality—suggesting subjectivity be conceptualized as both singular and plural. *Lindroos-Hovinheimo* makes a sweeping claim about the task of European politics and the reconfiguration of subject within the European project.

In contrast to a range of recent interventions, including many articles in this Special Issue that juxtapose changes in legal personhood with rapid technological change, the article by *Alexis Alvarez-Nakagawa* offers a welcome escape into the arcane. Drawing primarily on anthropology, *Alvarez-Nakagawa* makes a unique argument that weaves together legal magic, shamanism, and even cannibalism in search of a framing that transcends the persons/things distinction and provides an alternative to law.

The final piece shifts the lens from the law's person to its strategies and consequences. Rooting his discussion in cybernetic and regulation theory, the article by *Mika Viljanen* explores how various modern branches of law, such as capital adequacy regulation, operate

by affecting the make-up of cybernetic organisms, new kinds of legal subjects that destabilize former conceptual boundaries between humans and non-humans. Ultimately, Viljanen argues also that the cyborg turn into law to lead to distinct *cyborg legality* that feeds upon the shades of grey in law's effectivity and inverts its normal temporality.

All of the articles step from a concrete and present legal conundrum and provide it a reading by reflecting it in the flickering light of personhood. They offer a unique way to glance into what law was, is, and what it might be if we were to reconsider the legal person or even explore its contours in more detail. As always with utopias, the future is where the promise lies. The ideas law and legal scholarship have come to attach to personality are numerous, but they often seek solely to address the function of personhood as a gatekeeper: a stopgap to prevent yet another affront to human dignity or a sanctuary from the peering eyes of the public. In our utopia, personhood stands for all of those relations and more by highlighting what is taken for granted. The persistence of legal personhood as what remains mostly unarticulated in legal relations conceals well the extent with which personality shapes our present understanding of law. By talking more about what is right before our eyes, that which we have learned to pass over, is hopefully merely a modest utopia—a utopia these articles will make that much closer to reality.

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