ABSTRACT

Title of Dissertation: WHO IS A PERSON AND WHY?
A STUDY OF PERSONHOOD IN THEORY AND THE LAW

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This study concerns what it means to be a person and the role the law plays in bestowing the status of person. The purpose of this dissertation is to further our understanding of how courts in the U.S., and especially the U.S. Supreme Court, have defined "person" as a legal construct within Constitutional law. In order to achieve this, court decisions concerning the personhood of key entities with a claim to personhood are analyzed and compared in order to yield a more meaningful understanding of the word "person." The entities studied include slaves, corporations, fetuses, and higher-order animals.

To focus the study, several theoretical dichotomies are presented that unite the scholarship of personhood as it pertains to each of these entities. These include the dichotomy between a human being and person; property and person; and inclusion or exclusion in a community of persons. Each of these entities is then thoroughly examined in terms of the theories of personhood that are applicable to that entity, the particular historical and political circumstances that surround each entity, and finally the court decisions that determined that entity's status as a person.

Through careful analysis of court documents, the study tests to see if the legal decisions reflect the dichotomies between person and human being or person and property. Further, these legal decisions are compared in order to determine if the courts have been consistent in the bestowal of personhood. Through a thorough analysis of judicial decisions concerning personhood combined with a theoretical foundation of the interdisciplinary discussions that inform and affect judicial and moral personhood, this study seeks a more concrete answer to the question, “Who is a person and why?”

WHO IS A PERSON AND WHY?
A STUDY OF PERSONHOOD IN THEORY AND THE LAW

By

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Chapter One
Theories of Personhood

I think I am a person, and I am pretty sure you, the reader, are a person too. We are both human beings. We are not property owned by someone else. We are rational, able to consider our own futures, and able to communicate. Thus, I conclude that we are persons. Were we always persons? When I was just a fetus, did I count towards anything resembling personhood? If I were to fall into a terminal coma with no ability to think or speak, would I retain my status as a person? If I am someone's slave and someone has ownership rights over me, do I lose my personhood? If I join a group which takes on a personality of its own, is this group a recognized person in its own right? What about my dog Baxter? He seems to be pretty rational: he obeys commands, shows emotions, and appears to consider options. Is Baxter deserving of any recognition or protection for his own sake?

What exactly is a person or, in other words, who exactly can claim personhood under the law? The word "person" is used in a variety of contexts and has a diversity of meanings depending upon the context. In colloquial conversation, "person" might simply mean a human being. In ethical discussions, focus shifts to the rights and duties ascribed to persons as moral agents. In the world of psychology, mental functioning and continuity is significant, while in biology, concerns range from DNA to functioning of specific organs.

It seems that the word "person" has a variety of meanings none of which is definitive. Scholars have been studying the meaning of this term for centuries without reaching concrete conclusions as to what criteria is necessary for the status of person.

While theorists continue to debate this topic, in one arena, an understanding of personhood may be more settled. The law has had to wrestle with the topic of personhood in a number of cases that have been adjudicated within the American legal system. In these cases, justices and judges have had to adjudicate what constitutes a person who subject to rights and duties. Thus, perhaps in order to reach a more concrete answer to who is a person, it would be wise to turn to the law.

The law helps sets the standards by which society conducts itself, and in doing so helps a society define who matters and why. The law's definition of personhood can be considered foundational for determining who qualifies as a person. The U.S. Constitution and its Amendments use the word "person" or "persons" fifty-two times and the word "people" ten times. Certainly, a term used so many times in the founding document of the Nation's government would be defined in the law. Surprisingly, the Constitution does not authoritatively define persons or personhood. The Supreme Court has only explicitly ruled on the meaning of "person" twice – in *Santa Clara v Southern Pacific Railroad Company* 118 U.S. 394 (1886) and *Roe v. Wade*, 410 U.S. 113 (1973), but as this thesis demonstrates, neither of these Supreme Court decisions was conclusive in defining personhood. The fact that "person" remains a nebulous term in the law seems unbelievable since many of the rights and responsibilities conferred by the Constitution are given to "persons." In order to know to whom these rights and responsibilities are given, it is critically important to understand the meaning of "persons."

While the law has not definitively declared an absolute legal meaning of "person" or "personhood," the courts have had opportunities to adjudicate the meaning of personhood in respect to a variety of different entities and have had concrete things to say

about each of these entities. Therefore, though studying what the courts have to say on personhood through a variety of cases, perhaps something significant and unique could be contributed to the understanding of personhood. While the topic of personhood has been studied by scholars for centuries, this approach has the potential to add significantly to the scholarship.

This study examines the notion of personhood through the eyes of the courts in a variety of political conflicts that are adjudicated by courts. For instance, if a comatose human being loses his or her "personhood" when brain capacity ceases, then it may be possible to euthanize the human being with impunity. If fetuses are persons, then the argument against abortion is much stronger. Because slaves were not considered "persons" under the law, they did not possess any inalienable rights. Corporations have attained the status of "persons" and based on this status have attained legal standing and other privileges such as Fourth Amendment protection. With these significant issues at stake, understanding the legal conception of "persons" is vitally important. In order to know who is bound by the law, we must know what "person" in the law means. Although the Supreme Court has not provided a compact definition of "person," through its history of decisions, the Court has deemed certain entities to be persons and has deemed that other entities do not fall under the category of persons. Perhaps by comparing various decisions where the Court has deemed certain entities to be persons, we can gain some clarity on the term.

When this nation was founded, slaves were a category of humans that were not considered persons. They were human beings that were property and did not possess the rights conferred upon persons. Yet, even though they did not have rights as persons, they

were still culpable for crimes as persons. The abolishment of slavery ended the property status of many African Americans, but it would take a long struggle that continues today for African Americans to gain all rights and freedoms guaranteed by the law.

While former slaves were struggling to gain the rights guaranteed to persons, railroads were fighting their own battle through the courts to attain personhood for corporations. Ostensibly, the state granted the corporate charter in order to ease the difficulty of doing business for individuals working as a group. The corporate charter granted limited liability for its shareholders and granted the entity unlimited life to do business. While these privileges proved to be essential for the corporation to do business, they seemingly were not enough as far as many corporations were concerned. Corporations began to bring cases to the Supreme Court claiming that as persons, they had a right to further privileges under the Constitution and the Bill of Rights. The issue came to a head when numerous railroad corporations began to swamp the Court with personhood claims under the Fourteenth Amendment. By 1886, the Supreme Court declared that the corporations were included under the word "person." The Fourteenth Amendment very quickly became the "liberator" of the corporation rather than the African slave.

A very current conflict over the meaning of "person" concerns the status of the fetus. In *Roe v. Wade*, the Supreme Court ruled that fetuses were not persons under the Fourteenth Amendment. Instead the Court decided that the fetus was a "potential" human life that the state had an interest in protecting once it reached viability. This ruling left many issues open to interpretation and thus the debate over the status of the fetus rages on and is arguably one of the most divisive political conflicts in the U.S.

Does a potential person merit any rights or protections? It is not entirely clear that an infant who is not able to rationalize, communicate coherently, and self-reflect is truly a person, either. If an infant and/or a small child do not have the capacities we equate to persons, do they have any protected rights? Not only are the rights of the fetus at stake, but so are the rights of privacy and bodily integrity of the woman. If the woman does not have control over her own body, is she diminished as a legal person? If a criminal act is committed against a pregnant woman and her fetus is killed, is the perpetrator guilty of murder or homicide against this entity which is not a person? All these questions are important considerations involving the Court's determinations of the personhood status for the fetus.

Finally, a quickly emerging sector of jurisprudence involves animal rights. To what extent are animals protected from harm? Scientists have shown that certain primates such as chimpanzees and apes have the mental capacity to reason, recognize themselves, and communicate with humans. In fact, they seem to have the mental capacity of a three-year-old human. Does this mental capacity entitle certain animals to protection under the law and further, does it entitle them to be considered as "persons?" It might seem paradoxical that an animal should be considered a person, but if the definition of a person does not necessarily mean human being, it may be possible to include certain primates within the category of persons.

Each of these four entities (slaves, corporations, fetuses, and certain animals) has a claim to personhood that is debated in both the theoretical and legal understandings of personhood. Through a number of judicial decisions involving these four entities, the law interpreted the meaning of personhood and defined who matters in the law and in

society. The law has absorbed, reflected, and expressed ideas from a variety of political theories in its effort to explain why some entities are granted personhood and why others are denied personhood. A hallmark of the American precedent-based legal system is that it should promote consistency throughout its body of jurisprudence in order to promote universal understandings of important definitions, relationships, rights, and obligations. Thus, by analyzing the political theory of personhood for each of these entities and the corresponding legal jurisprudence in which the legal system has offered opinions on personhood, a more complete understanding of personhood should be attained.

The purpose of this dissertation is to further our understanding of how courts in the U.S., and especially the U.S. Supreme Court, have defined "person" as a legal construct within Constitutional law. The focus of this thesis is a study of what it means to be a person and the role the law plays in bestowing the status of person. Who or what should the law recognize as a person and who or what should be excluded? An account of the American legal system's interpretation of this word will shed light on the evolving meaning of the word. Thus, my thesis is a comparative examination of a variety of important court decision involving the personhood of various entities should provide a better understanding of this legal and moral term. By looking at what the courts had to say in these cases, how the decisions compared, what criteria was used, and what consistencies exist, I will be able to gain clarity on what the Courts consider to be a person.

While the principal purpose of this study is an examination of how the courts have adjudicated and interpreted the meaning of "person," there is a vast body of scholarship that examines personhood from a theoretical standpoint. These theoretical underpinnings

are rich and influential, and without examining this theoretical foundation that influences judicial decision makers, an analysis of the law would be incomplete. A foundation in theory helps elucidate the court opinions. The background of the political theory of personhood helps provide continuity and clarity to the wide range of court decisions that are examined in this thesis. This study brings together two sets of literature – a literature grounded in political theory and philosophy that discussed the essence of a person as well as the judicial literature created by the courts that discussed what a person means in the law.

Theorists have studied the concept of personhood for centuries as scholars have analyzed what is really means to be a "person." These theorists have tried to determine what sets a person apart from human beings and other animals; what criteria is needed to qualify as a person; and what the status of person signifies in a political society. Volumes have been written about personhood with the most influential of these arguments influencing the way society understands personhood. These influential studies of personhood form what I consider to be a core theory of personhood that influences how the law adjudicates personhood.

My first hypothesis is that there is a core body of political theory concerning personhood that influences the law. This core has its roots in the liberal tradition and is based on the seminal works of John Locke and Immanuel Kant. Within this tradition, many modern scholars continue to study issues of personhood that are relevant to the law's interpretation of the word "person." Through a review of what I consider to be the most important theories of personhood in the liberal tradition, I will develop a core theory of personhood that forms the basis of how law makers contemplate personhood. I will

then explore the extent to which and the conditions under which judges and justices utilize this body of political theory when developing opinions concerning the meaning of personhood.

While this hypothesis is important in setting up this study, the core theory of personhood that I develop is very broad and diverse even though it has a foundation in Locke and Kant. Therefore, while the political theories of personhood augment a legal understanding, due to the depth of the core theory, it is possible to find echoes of the core theory in many legal interpretations of personhood if one looks carefully enough. Therefore, while this hypothesis is important as a starting point, it is not the most important avenue of discovery for this study. In order to dig deeper into conceptions of personhood, I turn to my second hypothesis.

Much of the core theory, including the seminal works of Locke and Kant, conceptualizes "person" by distinguishing "person" from "human being" and "property." My second hypothesis is that the judicial opinions will reflect the dichotomy between person and human being and the dichotomy between person and property and will utilize this dichotomy as a method of defining "person." Are judges and justices consistent in their legal understanding of the meaning of person as opposed to human being and property, or do opinions diverge? Further, when analyzing cases concerning various categories of persons such as slaves, corporations, fetuses, and great apes, do judges and justices rely on a particular standard comparison to human beings or property, or are comparisons inconsistent among the categories? What accounts for consistencies or inconsistencies? Analyzing the meaning of "person" through this type of

conceptualization should allow a deeper understanding of the legal interpretation of "person."

The judicial system, both Supreme Court and lower courts, have had many opportunities to expound on the meaning of personhood through a wide range of decisions. I am particularly interested in examining cases that fall into four distinct categories: slavery, corporations, fetuses, and great apes. Each of these entities has distinct claims to personhood within both moral theory and legal theory. However, each of these entities also has properties that would seemingly exclude them as candidates for personhood. Hence, a body of jurisprudence exists for each of these categories as these entities fought (or had someone fight on their behalf) to attain personhood status under the law. Because the underlying theme in the jurisprudence concerning these entities is a claim to personhood, I would expect that there are underlying constitutional constructs, precedents, and theory that are consistent for each category. Thus, my third hypothesis is that the case law pertaining to the personhood slaves, corporations, fetuses, and great apes should be consistent in its basis in political theory and constitutional constructs.

I contend that through studying these diverse categories of jurisprudence, I will find consistent themes including the tendency to define "person" in contrast to both human beings and property. I expect to find that the case law is indeed patterned on a core political theory; that this theory defines personhood in relation to the "other" – human being and property; and that the consistencies within the core theory and jurisprudence lead to a better understanding of the meaning of "person" in the law and common understanding.

Thus, this dissertation will seek to integrate various theories of personhood and various bodies of caselaw into a more coherent whole in order to see if a more concise meaning of personhood emerges. These hypotheses lead to a bevy of research questions that I hope to answer through the course of my work. Although the Constitution does not define "person" nor has the Supreme Court specifically defined the term, can we derive some sense of what "person" means by looking at various entities that the Supreme Court (and lower courts) have included and excluded as persons? When the Court confers the status of personhood, is the Court consistent with the theoretical underpinnings as understood in the disciplines of philosophy, political science, or psychology? The Supreme Court, as well as many lower courts, has examined the entities of slaves, corporations, fetuses, and great apes largely in isolation from each other. Are Supreme Court decisions concerning various "person" entities even coherent as a whole? Has the Court been consistent in declaring some entities to be included in the designation of persons while other entities are not included? Finally, after examining each of these entities, can we conclude that the judicial system has correctly included some entities while excluding others? What does the future hold for entities who might seek personhood?

Overview of Proposed Study

In order to complete this study, I will assess the scholarship concerning the theories and issues related to the meaning of personhood in academic and common understanding. This body of scholarship forms the core political theory that I will then use to conduct an analysis of a body of legal jurisprudence dealing with issues of

personhood. This study builds upon the work of Ronald Dworkin who studies the concept of "personhood" in light of the debate over abortion and euthanasia, Davies and Naffine who study the concept of self-ownership in current legal debates, and other scholars who study the entwined theoretical and legal aspects of personhood.[1]

My analysis of the theoretical and legal dimensions of personhood is a comparative analysis of a variety of judicial opinions concerning personhood in order to determine both the consistencies and inconsistencies in the bestowal of personhood. In order to make this determination, I propose to study the case law pertaining to four entities whose status as persons has been debated in the judicial system.

- Slaves – entities that at the founding of the Constitution were considered property but were restored to persons through the Civil War and the passing of the Thirteenth and Fourteenth Amendments.
- Corporations – entities that are property in that they are owned by stockholders and are traded on the stock market, but have been deemed legal persons by the Supreme Court for the ease of doing business.
- Fetuses – entities that straddle the line between human being and persons. Although the Supreme Court has declared that fetuses are not persons under the Fourteenth Amendment, they have been deemed "potential life" and thus are entitled to some state protection.
- Great apes– entities that are not human but have the mental capacities equivalent to a three-year-old human. Great apes and other animal pets have been historically considered property, but a growing body of very current literature argues great apes should be granted personhood status for some circumstances.

This study is unique in that it brings together a wide breadth of literatures and judicial decision-making. While much of the scholarship in the theoretical disciplines comments on judicial decisions, these decisions are not analyzed in terms of a coherent body of literature from other disciplines. For instance, while Locke and Kant provide the

[1] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom,* [Vintage Books, New York, 1993]; Margaret Davies and Ngaire Naffine, *Are Persons Property* [Dartmouth: Ashgate Publishing Company, 2001].

foundations for much of our understanding of personhood, decisions such as *Roe v. Wade* are not often studied from a Lockean or Kantian perspective. Further, while there is a substantial amount of scholarship examining personhood of slaves, corporations, fetuses, and great apes, very few scholars examine these entities together to compare and contrast their claims to personhood.[2] Similarly, court opinions that concern one type of entity rarely refer to cases concerning other entities vying for personhood. For example, the opinions concerning fetal personhood do not often reference corporate personhood or the personhood of the slave. This study integrates these various bodies of scholarship and wide range of judicial opinions into a more coherent whole.

I have chosen these four categories because they represent four diverse entities that have all faced legal battles to determine their status as persons. Slaves were unarguably human beings yet they were excluded from the "We the People" of the Constitution and denied all political rights and freedoms. An entire "science" tried to prove that Blacks were inferior intellectual beings and thus were not worthy as rational, self-aware entities deserving personhood. Although human, they were classified as property and thus denied personhood. The dichotomy between person and property is clearly seen as slave owners used every conceivable method to preserve the property status of their human slaves. Further, the personhood of slaves came into question when

[2] Margaret Davies and Ngaire Naffine's *Are Persons Property: Legal Debates about Property and Personality* [Dartmouth: Ashgate Publishing Company, 2001] compares the concept of personhood across a number of entities although they entities they study differ from those in this study. A few other studies provide brief comparisons within their analysis of personhood. Please see: Ngaire Naffine, *Laws Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person*, [Hart Publishing, Portland, OR, 2009]; Warren Bourgeiois, *Persons: What Philosophers Say About You,*[Wilfred Laurier University Press, 1995]; Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery,* [Mirror Books I.D.E.A., 1997]; Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, [New York, NY: First Vintage Books Edition, 1994]; Berthoff, Rowland. "Conventional Mentality: Free Blacks, Women, and Business Corporations as Unequal Persons, 1820-1870" *The Journal of American History*, 76 no. 3 (1989).

slaves were accused of crimes as persons but were simply property in the law. Because the slave was both person and property, the courts faced a unique and confusing entity that did not fit within property law. Cases involving slaves generally considered only the economic value of the slave as property to the master. The slave, as an alienated being, was not recognized as an agent to be compensated for harm. In many instances, slaves were treated in the same way as cattle because both were the master's property. When a slave was killed or harmed, the master would collect restitution for his property. In fact, the "person" of the slave was rarely considered except in cases considering the culpability of a slave in criminal suits. In these instances, a slave was generally treated as a rational, sentient being capable of defending himself and committing crimes.

The Constitution uses the word "person" twenty-two times but never uses the word "slave" or "slavery." During the Constitutional Convention, slavery was already a point of contention. Thus, the Constitution did not use the word "slave" or "slavery" because the Founding Fathers were reluctant to tarnish the great document with a word that many of the Founders believed represented an evil institution. However, slavery is referenced in several key areas – the Three-Fifths Clause, the Migration or Importation Clause, and the Fugitive Slave Clause. Each time slavery is referenced, the word "person" is used although it is qualified with "other" or "such." Although these references to qualified "persons" still had a malevolent meaning, the word "person" was vague enough that it did not sully the Constitution. Southern justices, who often personally disagreed with slavery, justified their decisions by claiming that positivism prevented the interjection of their beliefs. By clinging to this justification, Southern justices were able to uphold the abhorrent practices of slavery under a Constitution that

claimed liberty and freedom. In the face of antislavery demand, the justice was able to respond, "I cannot" thereby attempting to placate antislavery supporters while still ruling in favor of Southern plantation owners. Legal scholar Robert Cover argues that the Constitution itself provided a remarkably powerful symbol of judicial fidelity to positive law. Cover argues that justices did not choose between liberty and slavery. Instead, they chose between liberty and federalism; liberty and the limits on judicial function; liberty and fidelity to public trust; and liberty and support of the social compact in the Constitution.[3]

The Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments ended slavery and ostensibly restored the personhood of former slaves. However, the effects of denying personhood to this group of humans were long lasting. Even though Blacks were persons, they were not full persons in the sense of status, rights, or liberties. Thus, although the Fourteenth Amendment ostensibly granted all persons "privileges and immunities" and the right of "life, liberty, and property," Blacks as a degraded class of persons still faced many of the same injustices that they faced when their status was mere property. This was indeed the plight of the newly freed slaves. Their newly gained status of personhood did not automatically entitle the free man to a bevy of political and civil rights. Their status as "persons" was still much lower than whites as "persons." Thus, personhood was seen as a matter of degree. Further, freedmen also faced a battle to achieve the political rights of citizens which was not guaranteed to them via personhood. Blacks were not accepted as full persons, and the aftershocks of

[3] Robert M. Cover, (1975) *Justice Accused: Antislavery and The Legal Process.* [New Haven, CT: Yale University Press, 1975].

slavery persisted as African Americans were (and arguably still are) systematically denied rights and protections as citizens.

The corporation's legal personality is quite unique in that the corporation is not a rational, self-determined human being that is easily recognized as a candidate for personhood, yet the corporation claimed rights of legal personality before former slaves attained their political rights. Corporations are not human beings but are organizations of humans who have joined together for business purposes. Just as slaves, their status straddles the line between person and property. The corporation is at the same time both a person and property in that it is both the subject of property rights and the object of property rights. As a person, a corporation may own things such as goods, equipment, stocks and bonds, and even other corporations. At the same time, human beings own the corporation; it is a commodity on the stock market as humans buy and sell shares of it. Thus, the corporation is neither person nor property, but legally endowed as both. Thus, the entity of the corporation is tied up in the same anomaly as the slave. The distinction between human and person is even more complex. A corporation is not a human being nor is it a rational creature. However, as an organization composed of rational human beings, corporations have successfully claimed personhood status.

The corporate charter granted limited liability for its shareholders and granted the entity unlimited life to do business. While these privileges proved to be essential for the corporation to do business, they seemingly were not enough as far as many corporations were concerned. Corporations began to bring cases to the Supreme Court claiming that as persons, they had a right to further privileges under the Constitution and the Bill of Rights. The issue came to a head when numerous railroad corporations began to swamp

the Court with personhood claims under the Fourteenth Amendment. The Fourteenth Amendment very quickly became the "liberator" of the corporation rather than the African slave.

Charles and Mary Beard allege that the word "person" was deliberately used in the Fourteenth Amendment in order to include corporations.[4] Although this theory has never been completely proven, several of the Congressional leaders who framed the Fourteenth Amendment were also lawyers arguing for the railroads in Supreme Court cases. Corporations were formally granted personhood in the clerk's notes of *Santa Clara County v. Southern Pacific R.R.* 118 U.S. 394. There has been much historical and academic debate over the validity of the case as a precedent for corporate personhood. Regardless of the controversy over the opinion, the *Santa Clara* case effectively granted corporate personhood and has been cited ever since in cases referring to Fourteenth Amendment rights for corporations. As *Santa Clara* and its judicial progeny granted corporations personhood, corporations continued to use the judicial process to gain more rights as persons including First Amendment protections of Free Speech, Fourth Amendment protections from search and seizure, and the Fifth Amendment's right to remain silent in criminal cases. Corporate personhood has had far reaching consequences for the legal, social and economic arenas.

Although in some parts of the world slavery still exists, in the United States, slavery has been abolished unequivocally and humans of all races have been declared persons. And although the seemingly limitless power of corporations is protested around the globe, in the U.S., the status of corporations has been decided in favor of personhood.

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[4] Charles Beard and Mary Beard, *The Rise of American Civilization,* [New York: MacMillan Publishing, 1942]: 113.

In contrast, the status of the fetus and animals such as great apes is very much contested in current judicial and political debates. As a human being, the fetus has a potential claim to personhood. However, this claim is in contention with the woman whose right to control over her body is a component of her rights as a person. In *Roe v. Wade*, the Supreme Court ruled that fetuses were not included in the meaning of "persons" for purposes of the Fourteenth Amendment. If the Court had found that the fetus is a person with a corresponding right to life, abortion would necessarily be first degree murder and illegal. However, the Court's ruling that abortion is permissible and that the fetus is not a person under the Fourteenth Amendment did not completely resolve the issue. The Court also found that the state has a legitimate interest in protecting the "potential" life of the unborn and that this interest grows as the woman approaches full term. As potential persons, the status of the fetus is still nebulous.

Fetuses are undoubtedly Homo sapiens and it is widely agreed that they are human beings. However, as humans who do not have the status of person, potential rights and duties towards these entities is uncertain. The question of personhood for the fetus presents the dichotomy of person versus human being in stark contrast. The fetus is certainly a biological human being, but it lacks many of the criteria needed for personhood such as rationality and second order volitions. However, as the *Roe* Court noted, the fetus has the potential to develop these capacities, and indeed has brain activity in as few as eight weeks. Further while the fetus is not a rational agent, neither is an infant nor the comatose. Fetal personhood also demonstrates the dichotomy of the person versus property. If a woman has a property right over her body, she has the right to make decisions concerning her body. While the fetus is an entity that, as a biological human

being, may deserve a certain amount of respect and protection, the mother is also a person whose rights must be upheld. Does a property right to one's own body include the right to evict the fetus living within the body?

The abortion debate is the most visible arena where the status of the fetus is at stake as the potential rights of the fetus compete with the rights of bodily integrity of the woman. While abortion is the most obvious issue caught up in fetal personhood, other legal issues are involved as well. For instance, the law has long recognized that the fetus has rights to inherit given that it is subsequently born alive. A more pressing issue is involved when a crime is committed against the mother and subsequently harms the fetus resulting in death or injury. At least thirty-six states currently have fetal homicide laws and fifteen of these laws apply during early stages of development. Some of these laws imply and others explicitly state that for the purpose of the statute, the fetus is a person.[5]

Great apes are certainly not Homo sapiens and not human beings. However, their ability to reason at a fairly high level gives pause to concerns over their status. Studies of chimpanzees reveal that they are capable of self-recognition in a mirror, display some signs of self-awareness, and have long-term memory. Chimpanzees and orangutans have DNA that is 96 percent the same as humans. Should our nearest biological cousins have rights as persons? Animal rights activist and Utilitarian philosopher Peter Singer argues that denying rights to animals simply because they are not human is a type of arbitrary discrimination called "speciesism."[6] Legal scholar Steven Wise questions why

[5] National Conference of State Legislature, available from http://www.ncsl.org/programs/health/fethom.htm, accessed on 1 April 2007.

[6] Peter Singer, *Animal Liberation*, [HarperCollins, New York, 2002].

humanness is a prerequisite for legal rights.[7] He argues that primates who have the mental abilities of some humans should, at minimum, have basic legal rights such as bodily integrity. These rights preclude invasive medical research and captivity. Wise contends that without personhood, animals are invisible to the law.

There are valid reasons for seriously considering the personhood of great apes and considering the proposition that primates should have standing in a court of law. Once again, the discussion over personhood for animals can be framed in terms of person versus human being and person versus property. While animals are clearly not human beings, the intellectual capacities of certain animals are greater than those of many mentally handicapped humans. The person versus property distinction is particularly salient because animals are almost universally considered property in Western culture. Domesticated animals are indisputably property under the law. Wild animals pose a more complicated problem. While the designation "wild" connotes something that is not the property of another, wild animals are generally seen as objects for human use. Once captured or hunted, these animals are the property of the humans who caught them. Even wild animals that are protected by statutes such as endangered species lists or other conservation programs are not generally protected for their own sake. Rather, these statutes protect animals for the benefit of humans who enjoy observing them. As property, the law denies animals any rights or privileges accorded to humans and therefore animals do not qualify for standing in the courts. Animal rights and their status as persons are avant-garde in political debates and promises to be widely contentious in future debates over the entities included as persons.

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[7] Steven Wise, *Drawing the Line*, [Perseus Publishing, Cambridge, MA, 2002]; Steven Wise, *Rattling the Cage,* [Perseus Publishing, Cambridge, MA, 2001].

The four entities I have chosen represent two (slaves and fetuses) are human, while apes are decidedly not human and corporations are unique in that they are organizations of humans. All four entities raise the distinction between person and property. Slaves were owned by their masters. Corporations are owned by the stockholders. Fetuses, it can be argued, are "owned" by the mother who has a property right in her own body. Finally, animals, including primates, are generally considered human property or, at the very least, objects for human use. Thus, in choosing these four entities to compare and contrast, there is a fairly wide diversity that will shed light on the meaning of person as understood within the law.

Although I will assess these four entities, there are other categories of beings that also have claims to personhood that would be interesting to study. For instance, the law has deemed that a ship is a person under the law in certain circumstances even though it is a non-human entity and the property of the ship owner. There is a sizeable amount of literature concerning denial of personhood to women in American law.[8] The corpse presents an anomaly of a human being whose mental capacities and bodily functions have ended but whose intentions extend past the grave in the form of a legal will. The physically and mentally disabled have endured a long legal and political battle to gain rights and immunities as persons under the law. Yet, when mental capacity is at issue, their rights can be legally limited. For those who argue that mental capacity is the primary criterion for granting personhood, comatose or brain dead humans no longer possess the status of personhood. In the same way, it can be argued that children who are

[8] For cases pertaining to denial of personhood for women in American law, please see *State v Emery*, 31 S E 2d 858, 862, 224 N C 581 (1944); *Mashburn v State*, 65 Fla. 470; 62 So. 586; (1913), *Glidden v Philbrick*, 56 Me 222, (1868).

not able to fully reason and make independent decisions are not fully persons. To some extent, the issue of children will be addressed in the discussion of fetuses. A recent trend in Hollywood is to insure and copyright one's own image. By doing so, the famous individual has asserted a property right on his own self. This would seem to confuse the distinction between person and property. Although each of these entities merits further discussion, they will need to wait for my next project.

Methodology

My methodology for this study will primarily consist of contrasting various Supreme Court cases in these four categories and applying existing theories of personhood to these cases. The law of persons is not a discrete branch of law such as criminal law or property law but instead is an underlying concept in many fields. In order to select the cases most relevant to a discussion of personhood, I will survey a variety of branches of the law and choose cases that explicitly discuss the meaning of personhood. These cases will span the fields of criminal law, torts, property law, and other areas where issues of personhood are discussed.

These cases, including the supplementary documents, such as head notes and briefs, will then become my data for analysis. I will analyze the language and the concepts of personhood used in decisions of personhood. I will compare the opinions, concurrences, and dissents to see if they are consistent within each category, consistent among the four categories, and consistent with the core political philosophy. Within each category, I suspect that the same language and concepts are quite similar. Among the four categories, I suspect that I will find more variation especially since each of these

categories is particular to a specific time period with its unique courts and political circumstances which influence legal outcomes. The historical and political circumstances of each decision therefore must be considered. However, basic constructs from the Constitution as well as the distinctions between persons, human beings, and property should be present.

Because each entity I will be studying must be understood within its political context, I will need to provide some historical background for each category and some of the surrounding political arguments and legislation. For instance, the records of the debates over the Constitution and over the Fourteenth Amendment give insight to why the Founders chose the word "person." These arguments are necessary for understanding the original intent of the law as well as the ways in which the legal concept of "person" has evolved. In order to facilitate understanding these categories within their historical perspective, I will address them in the order that they were first considered within the judicial system.

I will also address the political circumstances in which the personhood of each of these entities is debated and the influence of the political elites who either promoted personhood or opposed the personhood of each entity. Politically powerful slaveholders were successful in blocking personhood for slaves in order to sustain the enterprise. At the same time, business elites were successful in convincing lawmakers that corporations have a legitimate claim to personhood. In the realm of fetal personhood, advocates for reproductive rights activists have campaigned against fetal personhood while opponents of abortion have lobbied for the fetal personhood. The analysis of fetal personhood demonstrates that the political power struggles over this issue are not fully resolved. So

too, the political struggles concerning personhood for animals is not settled. Animal rights activists have presented cogent arguments for the personhood of great apes, and these arguments have had some mainstream exposure. However, these arguments are so revolutionary that neither the public nor the political elite have endorsed the concept. These political issues are important in understanding the influences contemporary power politics have on the decisions justices and judges render.

Just as the historical and political context is important, so is a review of the scholarship for each of these entities. I have found that each of these entities is usually not considered in relation to the others. The scholarship on corporations does not reference fetuses or great apes, and vice versa. Thus, each of my categories has a vast literature that needs to be considered in order to provide the context for Court decisions. I will assess the relevant scholarship for each of these categories in conjunction with the historical background. The relevant scholarship for each category will be analyzed in conjunction with my broader analysis of the core political theory concerning personhood.

I will analyze the four categories in historical order beginning with the issue of slavery and the history of American ascriptive inegalitarianism that allowed these human beings to be considered property rather than persons in American law. I will analyze various Supreme Court and lower court decisions, as well as Constitutional debates, that speak to the issue of the personhood of slaves. About the same time that freedmen were fighting for the rights guaranteed under the Fourteenth Amendment, corporations entered legal battles asserting their rights as legal persons. I will analyze corporate personality in light of the core theory as corporations pose interesting issues concerning distinctions among persons, humans, and property. Building upon my analysis of slavery, I will also

attempt to discover how the legal system that systematically denied rights to newly freed slaves could quickly grant personhood to corporations.

After studying slavery and corporations, I will turn to the more modern issue of the status of the fetus. The core theory includes a discussion of the mental capacities a person needs in order to qualify as a rational agent and a person. Fetuses do not possess the mental capacities to be rational agents, and yet the Supreme Court acknowledged their potential to become persons. I will also examine the issue from the point of view of the woman whose personhood is arguably diminished when her rights over her body are restricted. This modern issue will be compared to the battles over personhood faced in the contexts of slavery and corporations.

Finally, I will discuss the burgeoning field of animal rights and the possibility of personhood for certain animals such as great apes. Building upon the distinction between persons and property illustrated in the case of slavery, animal rights activists argue that animals are "enslaved." Building upon the distinction between person and human being, great apes have the capacity of a three-year-old and thus have a claim to personhood as rational agents. All the issues of personhood discussed in the core theory culminate in this very current issue of personhood for certain animals.

I examine each of these four entities in turn and devote a chapter to each. Because the political and historical contexts are important for each of the entities, the analysis in each chapter is extensive. Each chapter covers theories of personhood that are particular to the entity as well as the dichotomies of personhood that lend themselves to an understanding of personhood. Further, the particular historical circumstances are reviewed in order to better understand how the concept of personhood developed and

evolved. Finally, relevant political circumstances are analyzed to determine how political power dynamics affects determinations of personhood. After this background analysis, I delve into the judicial opinions that elucidate the legal personhood of the entity. By a careful scrutiny of the court documents, I determine what criteria and circumstances led the courts to bestow or withhold personhood for the entity. While each chapter stands alone in terms of the analysis of personhood for each entity, each chapter is tied together through the common concepts of personhood that are developed in each. This extensive analysis of each entity is necessary to fully understand how the nuanced concept of personhood is applied to each entity. This allows a full comparison of the personhood pertaining to four entities which occurs in the final chapter.

Each of the four case studies will build upon the others, and through assessing the similarities and differences in each of the four case studies, this study will provide insight to the meaning of "persons." After analyzing each of the four categories in turn, I will bring the scholarship together through a detailed analysis of the judicial documents utilized in the four topical chapters. I will analyze the concepts, language, ideas, and theories used and note similarities and differences. In the final analysis, I will assess the consistencies and inconsistencies in Court cases and the understanding of legal personhood they convey.

To facilitate this process, I will conduct a content analysis of the cases I have chosen to analyze to determine if there are certain words or phrases that are common among all these cases concerning personhood.[9] My data set will consist of court

[9] Automated content analysis has been successfully employed by a number of scholars. See Kenneth Benoit, Michael Laver and Slava Mikhaylov, "Treating Words as Data with Error: Uncertainty in Text Statements of Policy Positions," *American Journal of Political Science,* Vol. 53, No. 2 (Apr., 2009): 495-513; Jonathan B. Slapin and Sven-Oliver Proksch. "A Scaling Model for Estimating Time-Series Party

opinions, dissents, appellate briefs, and amici curiae briefs. The most basic analysis will assess the degree to which "person," "personhood," "human being," and "property," are consistently used in all cases. My content analysis will then search for dominant language trends across the cases. Automated content analysis provides an unbiased review of the terms that reoccur among the court documents. By using a statistical program to compare cases concerning slaves, corporations, fetuses, and animal rights, I will discover consistently used words and phrases that I might not otherwise discover manually. It also reveals the frequency with which justices use certain terms across all four types of cases. These frequencies will help pinpoint where the law perceived overlapping issues of personhood. Through careful analysis of court documents, I will be able to better determine if the judicial system followed the concepts in the core theory and if legal constructs reflect the dichotomies between person and human being or person and property. I will also be in a better position to determine how the cases compare across all four categories and how an understanding of personhood is developed in the law.

Through a thorough analysis of judicial decisions concerning personhood combined with a theoretical foundation of the interdisciplinary discussions that inform and affect judicial and moral personhood, this study seeks a more concrete answer to the question, "Who is a person and why?" The comparison of jurisprudence in my four chosen categories will bring to light various factors that have been applied consistently in

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Positions from Texts." *American Journal of Political Science*, Vol. 52, No. 3 (Jul., 2008): 705-722; Kevin T. McGuire, and George Vanberg, "Mapping the Policies of the U.S. Supreme Court: Data, Opinions, and Constitutional Law," Prepared for delivery at the annual meeting of the American Political Science Association, Washington D.C., 2005; Michael Laver, Kenneth Benoit, and John Garry; "Extracting Policy Positions from Political Texts Using Words as Data," *The American Political Science Review,* Vol. 97, No. 2 (May, 2003): 311-331.

a definition of personhood and those that are not used consistently. By the conclusion, a better understanding of the nebulous concept of "person" will be achieved.

As a first step towards this goal, we begin with a review of the relevant literature, from a variety of disciplines, concerning personhood that informs and influences legal thought. While I expect that the jurisprudence is consistent with this core political philosophy, I do not necessarily expect that an opinion will quote Kant or Locke. Instead, the basic language and concepts used in terms of rights, autonomy, and distinctions between persons and things that are found in the political theory provide a foundation for thinking about the personhood of these four diverse entities. The conceptualizations of personhood that are found in the core theory are reflected in the law. Thus, the core theory allows a richer understanding of a complicated philosophical and legal concept and provides the background needed to understand the personhood throughout the study.

Theories of Personhood

The literature pertaining to general personhood is vast and spans the disciplines of philosophy, psychology, and political science. My goal is to review those works that significantly lend themselves to a legal understanding of persons and help tie together these disparate conceptions of personhood. This will form the core political theory that I provides a foundation for understanding personhood. It might be argued that an understanding of the core theory is unnecessary to understanding legal personality. As legal positivist John Dewey famously wrote, "'person' signifies what law makes it

signify."[10] A "legal person" can be understood to mean simply the ability to participate in legal relations. This is the definition favored by legal positivists. This argument is quite common in the literature concerning corporate personhood. Accordingly, there is no difference between a corporation as a legal person and a human being as a legal person – both are subjects of legal relations. With this line of logic, the law could determine that a human, an organization, an idol, or an ape is a person within the law. There is no doubt that the courts can bestow personhood on some entities and deny it to others – they have exercised this power many times.

The problem with this definition of legal personhood is that it is simplistic. It is a formal and abstract definition, a legal construct, designed for legal expediency. It does not include any considerations of moral personhood or humanity which are entwined with the legal understanding of personhood. This conception of personhood cuts the debate short and does not consider the vast ramifications of legal personhood on moral theory. Considerations beyond those of formal legalism are what make the concept of legal personality interesting and important. Judicial decisions are not decided in a vacuum; rather, the dominant moral theories of personhood have a profound influence on judges and justices as they wrestle with subjects such as the beginning of life, who is eligible for rights and duties, and ask the fundamental question of "For whom is the law designed?"

Judicial decision makers must consider more than legal technicalities when trying to decipher "For whom is the law designed?" because the answer to this question involves more than just a legal answer. Judges and justices commonly consult their own understanding of personhood which includes knowledge gleaned from biology,

[10] Dewey, John "The Historic Background of Corporate Legal Personality" *The Yale Law Journal*, Volume 35 Issue 6. (1926): 655.

philosophy, religion, sociology, political science, psychology, and any other disciplinary paradigm with which the judge or justice is familiar. Judicial decision makers consult a wide variety of theoretical conceptions because adjudicating personhood is a weighty matter. Entities that are considered to be persons in the law generally are considered to have moral weight. The legal concept of personhood and the moral concept are closely aligned because what is said to have moral standing is generally thought to have legal standing and vice versa. This is why animal rights activists argue for legal personhood for great apes and abortion foes argue for personhood for fetuses – it is believed that legal standing will allow moral standing.[11] Many of the theories considered in this study concern moral personhood and the implications on the law. Both the moral and legal understanding of personhood are largely based on the idea of a person as a rational agent who is intrinsically valuable in his or her own right. As justices and judges consider important issues involved in personhood, they consider the interdisciplinary discussions of personhood that are part of the core theory. The following chapters will illustrate how the core theory is utilized in judicial decisions.

Dichotomies of Personhood

As I have researched the concept of person in both moral and legal literature, I have discovered two reoccurring themes. First, there is a distinction between being a "human" and being a "person." Human generally refers to a biological entity that is a *Homo sapien* and has the physical attributes commonly associated with such an entity. In contrast, a person generally refers to something more – an entity with an intellectual and

[11] Ngaire Naffine, "Laws Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person," [Hart Publishing, Portland, OR, 2009]: 35.

moral capacity. For example, some philosophers argue that, while someone who is comatose is human, the loss of mental capacities means that this being is no longer a person. This claim is highly controversial. Other scholars claim that all human beings are automatically persons by virtue of their being human. This claim is also controversial because it suggests that fetuses who are biologically human should automatically be considered persons. In ordinary conversations and even in many policy related documents, the words "person" and "human" are used interchangeably as synonyms. This adds to the confusion over the meaning of these terms. Therefore, the core theory will shed light on some of the nuances distinguishing humans from persons.

The second recurring theme in the core theory is the seemingly direct opposition of person and property: i.e. a person by definition cannot be property. Persons, as Kantian ends in themselves, cannot be owned by another person. This argument is the crux of the argument condemning slavery. In order to be free, a person cannot be subjected to the whims of another, and it is considered an abomination for one person to own another. Thankfully, the Congress abolished slavery through the Thirteenth and Fourteenth Amendments, and thus slavery is no longer recognized in the United States. However, the person/property distinction surfaces in other contexts as well. In some sense, a person owns his body and his self. An actress may take out an insurance policy on a body part, and a scientist may copyright his intellectual property. In fact, it is argued that in order to fully be a person, control over and a property right in one's own body is required. Thus, although person and property are in one sense diametrically opposed, in other ways, they are intricately linked. The core theory will illuminate this paradox in order to inform an understanding of this dichotomy in the law.

The dichotomies of personhood, person versus human being and person versus property, are best demonstrated in the works of John Locke and Immanuel Kant whose influential philosophies of personhood form the basis of the core political theory on which many later theorists base their work on personhood. For Locke, a person is a mental entity who is self aware or conscious of his actions and has a memory of the past. Locke defines a person as a "thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness which is inseparable from thinking and, as it seems to me, essential to it: it being impossible for anyone to perceive without perceiving that he does perceive."[12] Locke stresses the distinction between a person and man (or in modern terms "human"). He distinguishes a person from a human whom he categorizes with animals in the sphere of living things. A human is a living entity of a particular shape. In contrast, only reflective, thinking agents can rightly be called persons.

Locke stresses the importance of the mind over the body. The body is a substance and is important as a vessel that houses the person, but the body is not the essence of personhood. Locke argues that a person has a property in his body and limbs so that what is produced by the labor of his body is rightly his. The context in which Locke discusses personhood is his concern for the Last Judgment Day when God will hold all persons accountable for their sins. In this regard, Locke argues that it is just that persons be held accountable only for actions that they remember, because if a person is not conscious of past actions, it is not fair to blame him. By separating man or the physical self from

[12] John Locke, *An Essay Concerning Human Understanding*, Edited by Roger Woolhouse, originally published 1689, [Penguin Books, London, 1997]: Book II, Chapter XXVII, Section 9.

person or the mental self, it is possible for a person to have a different body at resurrection and still be the same person.

Locke's discussion of persons seems incoherent unless it is interpreted within his overall discussion of the Last Judgment. Indeed, Locke himself states that the term "person" is a forensic term. Numerous scholars have pointed out the many inconsistencies in his argument. Despite this, his theories have inspired entire paradigms focusing on the meaning of personhood. Many contemporary scholars have their basis in Locke's theories of psychological continuity, the criteria of self-awareness or second order volitions, and consciousness.

Like Locke, Kant's definition of persons relies upon mental capacity. For Kant, persons are rational agents, and the capacity to reason bestows an absolute value to human persons. "Only rational agents or persons can be ends in themselves. As they alone can have an unconditioned absolute value, it is wrong to use them simply as means to an end whose value is only relative."[13] Thus, every person must be treated as an "end in itself" rather than an instrument in someone else's plans. Because a person cannot be a means, and property is a means to fulfilling ends, Kant reasons that a person cannot be property. "A person cannot be property and so cannot be a thing which can be owned for it is impossible to be a person and a thing, the proprietor and the property."[14] At the foundation of being a person is the ability to own property. To say that a person could own another person contradicts this basic principle. Kant's arguments against commodification of persons are the basis for subsequent arguments that persons and

[13] Immanuel Kant, The Metaphysics of Morals, Translated by Mary J. Gregor, [Cambridge University Press, 1996, originally published in 1785]: (4:428).

[14] Immanuel Kant, *Lectures on Ethics,* Translated by Louis Infield, [Harper and Row, 1965]: 27:387.

property are categorically exclusive of each other. To be a person is specifically not to be property; one concept negatively defines the other.

Locke and Kant set the groundwork for much of the scholarship concerning personhood in philosophy, psychology, and political science. Their concepts center on individual autonomy and mental criteria of consciousness, self-identity, and rationality needed for entities to be considered persons. In contrast to scholars who equate persons with physical human beings, their constructions rely on mental capacity rather than human bodies. They argue that persons are the opposite of things: Locke contrasting persons with substances, and Kant contrasting persons with property.

Human Beings versus Persons

The seeds of Locke's and Kant's philosophies are found in most contemporary theories of personhood that concern the distinction between human beings and persons. The predominant paradigms of personhood in philosophy, psychology, political science, and law retain the individual as the primary actor and stress the importance of rationality and autonomy as criteria for persons. One of the legacies of Locke is his emphasis on the importance of the individual. America's foundation of "liberal individualism" can largely be attributed to Locke's scholarship. America's liberal traditions and their influence on American jurisprudence will be explored in more detail in the next chapter.

However, it is important to note that some early scholars disagreed with the importance placed on rationality and individualism. Perhaps the most influential were Jeremy Bentham and John Stuart Mill whose philosophies of Utilitarianism relied upon sentience rather than rationality and the good of the group rather than the individual. For

Utilitarianism, the happiness of a mentally incompetent is as valuable as the most rational individual. Further, Bentham minimized the distinction between the importance of an animal and a person. He wrote, "The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny…. The question is not, Can they reason? Nor Can they talk? But, Can they suffer?"[15] This argument has been foundational for contemporaries who argue for increased legal rights for animals.

In the late 1800s to early 1900s as issues of corporate personality began to flourish, many theorists made a distinction between natural and artificial persons. For instance, the legal theorist Bouvier, writing in 1880, argued that a natural person was a man who held a certain rank in society in respect to the rights to which he was entitled and the duties these rights imposed. A slave, who was not subject to rights and duties, was not a person. Likewise, he questioned the status of an illegitimate child or an infant. An artificial person was a body of men that the law associates as one and thus confers certain rights and duties to this "artificial person."[16] A unique political and legal theory developed in respect to artificial persons and will be covered in great detail in Chapter Three's treatment of corporate persons.

Many modern theorists have built upon the scholarship of Locke and Kant to construct their own theories of personhood based on rational criteria. One of the most useful theories is that of Daniel Dennett, a noted philosopher of science, biology, and the mind. Following in the footsteps of Locke, Dennett creates a definition of personhood

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[15] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, H.L.A. Hart and J.H. Burns, editors, [Oxford University Press, 1996]: Chapter XVII, note b.
[16] John Bouvier, *Institutes of American Law*, Volume 1, [Boston: Little, Brown,1880].

stemming from six criteria that he argues are necessary in a person who is a thinking, rational being. Dennett's six conditions of personhood, based on mental capacities, are frequently cited by other scholars as criteria for personhood. His conditions include 1) persons are rational beings, 2) they are conscious, 3) they are considered persons by others, 4) they can reciprocate, 5) they have the capacity for verbal communication, and 6) they are self-consciousness or self-aware.[17] Dennett's argument pertains primarily to human beings, but in actuality, apes have shown to possess all but condition four. According to these criteria, the mentally handicapped, comatose, fetuses, and children under the age of two would not be considered persons.

Fellow philosopher of the mind, Harry Frankfurt, relying on Kantian ideas of self awareness, argues that what sets persons apart from other humans and animals is the capacity to be self reflective and evaluate first order desires. A conscious person is able to assess her desires and form preferences about her desires or second-order volitions. He argues that humans have the unique ability to do this, and thus all other animals are precluded from personhood. He also argues that humans who do not have the mental capacity for second-order volitions, including the very young or the mentally incapacitated, do not qualify for personhood. This would rule out fetuses, but leaves open the question of corporations whose rationality is in the form of the collective.[18]

Self-awareness and the ability to evaluate one's actions and motivations allow persons to be the subjects of blame and innocence. This brings a moral component to personhood. Locke argues that only those who remember their actions can justly be held

[17] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177-179.

[18] Harry Frankfurt "Freedom of the Will and the Concept of a Person," *Journal of Philosophy* 68 (1971).

accountable. This prompted scholarship concerning the status of humans with total amnesia or future scenarios when it may be possible to perform brain transplants. Claims of culpability for persons are important for legal scholarship as moral persons, who are subjects of blame and innocence, are also the subjects or rights and duties. As Locke stated, "person" is largely a forensic term. Philosopher S. F. Sapontzis employs this theory to argue that legal persons must be human, moral subjects.[19] However, other legal scholars such as Bryant Smith disagree arguing that any subject that can take part in legal relations qualifies as a legal person even if not a natural person.[20]

Smith's conception would seemingly include corporations but also raises the question of who should be punished when a corporation is found guilty of a crime. Who is to blame for corporate crime – the board of directors, the employees, the shareholders? And, is the subject of blame the same entity who ultimately is punished for crimes? This is one of the most important concerns when considering corporations as persons. Sapontzis argues that only humans can be considered persons. Indeed, it seems strange to blame a lion who attacks and eats a human. If some animals such as great apes are serious contenders for personhood, must they be subjects of moral and legal culpability? To what extent are advanced animals capable of being held accountable for their actions? Some of the most interesting legal personhood issues in terms of culpability arose with slavery. Slaves were denied all human and political rights because they were not considered persons and thus were not subjects of rights. However, when a crime was committed, the courts had to decide if an entity that was not a subject of rights could still be the subject of blame. The courts did not reach a consensus on this issue but instead

[19] S. F. Sapontzis "A Critique of Personhood" *Ethics* Volume 91 (July 1981): 607-618.

[20] Bryant Smith "Legal Personality" *The Yale Law Journal* Volume 37 No. 3 (1928): 283-299.

waffled by sometimes holding the slave owner accountable and sometimes punishing the slave.

Another theory of personhood that relies on human rationality is the argument that persons are those who have the ability to plan, pursue their own projects, and have social relationships with other persons. Libertarian theorist Loren Lomasky uses these criteria to differentiate humans from persons. He finds that small children who are not yet project pursuers do not qualify as persons. However, he contends that these potential project pursuers as well as those on the other side of the developmental spectrum who are no longer project pursuers such as the Alzheimer's patients, still have moral weight. Injuring an infant is harmful to the extent that it diminishes its eventual success as a project pursuer. Lomasky is not so certain in assessing the moral status of fetuses, the comatose, severely retarded persons, and animals.[21] Lomasky's arguments concerning potential project pursuers echo the Supreme Court's dilemma over the status of potential persons in *Roe v. Wade* and other cases relating to abortion.

Individuals of a certain mental capacity have the ability to enter into social relationships with fellow mentally competent individuals. As a collective, they form a society of persons. Dennett's fourth condition is that persons can reciprocate, and his third condition is that persons are accepted by other persons into the community of persons. Indeed, the ability to engage socially and be accepted as a part of the group is one of the most important benchmarks of persons. Acceptability into the community of persons plays a vital role in determining the personhood of all four entities in this study. Political scientist Rogers Smith avers that the importance of the social community played a large role in condoning slavery. For instance, Federalist #2 uses ascriptive conceptions

[21] Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press, 1987].

of American identity – the myth of divinely favored people – to argue that Americans formed one united people from the same ancestors, with the same religion, and with similar customs. This conception excluded Blacks, Indians, and all groups that were considered "other." White citizens considered their exclusive group to form a "peoplehood' and this led many Americans to claim that they were a superior culture and a "master race." It was easier to ignore the atrocities of slavery because Blacks were not included the community of persons. Corporations had a large lobby of prominent business people who convinced lawmakers that corporations should be included in the legal conception of personhood. Some abortion proponents argue women who do not wish to carry their fetus to term do not have a social relationship with their fetus. Thus, the fetus does not fulfill the social relationship criterion and does not qualify as a person.[22] Environmental ethicist Peter Wenz, relying on the criteria of social relationships, argued that animals are obviously capable of forming bonds with humans and other animals and thus satisfy this criterion for personhood.[23]

Scholars following in the tradition of Locke and Kant tend to treat personhood as a condition based upon various criteria that must be met: rationality, ability to communicate, social acceptance, and so on. With this approach, the problem is defining the criteria. What exactly qualifies as a rational agent and what constitutes self-awareness? Who is in the position to decide the members of the "peoplehood" or community of persons? Philosopher David DeGrazia maintains that personhood is a

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[22] Please see: Marjorie Reiley Maguire, *Symbiosis, Biology, and Personalization*, in *Abortion Rights and Fetal Personhood*, ed. Edd Doerr and James W. Prescott [Rapid City, SD: Centerline Press, 1989]; Paul D. Simmons, "A Biblical Perspective," *Abortion Rights and Fetal 'Personhood'* Edited by Edd Doerr and James W. Prescott, [Centerline Press, Long Beach, California, 1989].

[23] Peter Wenz *Environmental Justice,* [State University of New York Press, Albany 1988].

"cluster concept" which consists of complex capacities, but the precise definitions and necessary degrees of capability are unclear. Thus, personhood remains imprecise and difficult to analyze.[24] Further, by analyzing personhood through an atomistic list of parts, it easy to lose sight of personhood itself. For instance, we do not evaluate a work of art by the parts such as the paint, frame, canvas, etcetera without losing the immediacy of "art." So too with personhood. By analyzing a list of criteria, we may lose sight of what a person is in and of itself. When making the jump from an academic exercise to legal jurisprudence and then to human vernacular, the various criteria tend to lose their significance. While someone may agree wholeheartedly with Dennett's list, when faced with issues in life's context, his or her opinion may change. For instance, a study of college students found that a majority believed a clinically brain-dead individual to exist as a person. An ape's cognitive abilities are marvelous, but to consider personhood for these animals is a leap that many citizens cannot make.

Property versus Persons

The preceding scholarship concerning the criteria for personhood primarily distinguishes persons from human beings. Another paradigm, following Kant's idea that persons must never be a means to an end, distinguishes persons from property. Each of the four categories of persons I consider is caught up in the distinction between person and property. Slaves were the property of their masters, yet as rational human beings, they were also persons. The law's treatment of slavery ultimately concerns how to reconcile these competing claims. Corporations, as persons, may own things such as

[24] David DeGrazia, *Taking Animals Seriously: Mental Life and Moral Status* [Cambridge: Cambridge University Press, 1996].

goods, equipment, stock, and even other corporations. At the same time, human beings own the corporation; it is a commodity on the stock market as humans buy and sell shares of it. Thus, the corporation is neither person nor thing, but legally endowed as both. Japanese economist Katsuhito Iwai argues that this dual role is really the heart of the controversy over the status of corporations and why the debate over corporate essence remains unresolved.[25] Fetuses are human beings and yet are not considered persons by the law. One of the arguments in support of abortion is that a woman has a property right to her own body and, as a part of her body, she also has a property right to her fetus. This right allows her to choose abortion. However, if the fetus as a potential person is allowed some protection, this might outweigh any property rights of the mother. Finally, with few exceptions, the law considers animals as property. For the majority of the world's human population, it is acceptable to hunt and eat animals. Thus, animals are seen as a means to an end rather than ends in themselves. It is contrary to common understanding to consider animals, despite their mental capabilities, as anything more than this.

Much of the literature analyzing what it means to be a person considers the concept of property either in opposition to personhood or considers the right of ownership as an essential aspect of personhood. Therefore, property and personhood are often bound together in the literature. However, there is a school of thought arguing that property and personhood need not be linked. In the early 1900s, legal positivists began to assert that property is not instrumental for self-determination within the law. Legal scholar Wesley Hohfeld popularized the notion that property was nothing more than a

[25] Katsuhito Iwai, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance" *The American Journal of Comparative Law* 47, no 4 (1999).

bundle of legal rights and obligations between persons.[26] Thus, property's moral or need-based attachments were irrelevant to the law. Legal positivism receives greater treatment in Chapter Three's section on corporate personality. Despite the arguments of legal positivists, the idea that property is simply a bundle of legal rights under the law is not so simple. The following theorists demonstrate that considerations of the self are often bound to the property one has. Further, traditional theorists such Kant negatively define personhood as that which is not property. The understanding of person and property is complex and requires careful consideration beyond the school of legal positivism.

Just as the literature analyzing the difference between person and human had its basis in the works of Kant and Locke, the body of literature analyzing the separation of person and property also has its basis Kant and Locke. In arguing that a person can never be a means to an end, Kant argues that a person cannot be considered property because property is something that is used as a means to an end. Thus, slavery is unacceptable. While Kant's argument that a person cannot own another person is now almost universally accepted, the remaining question is whether a person has a property interest in himself. Does a person's interest in his body or his thoughts amount to a proprietary interest in himself? Kant argued that a person does not have a property interest in himself because property is a thing and a person cannot be a thing. Kant writes, "Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a subject in whom the

[26] W. N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" *Yale Law Journal* Volume 26, (1917): 710-770.

ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership."[27]

Locke, on the other hand, explicitly argues that we own ourselves. "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no body has any Right to but himself. The Labor of his Body, and the Work of his hands, we may say, are properly his."[28] Hence, while Locke would agree that slavery is wrong because this allows a person to own another person, Locke's interpretation leaves room for a person to claim a proprietary interest in his intellectual capabilities and apply for patents on his ideas, a celebrity to insure her body against harm, or a mother to claim that a fetus, as part of her body, is her property.

Locke emphasizes the importance of property rights throughout his many philosophical treatises and thus his interpretation of a person's rights to her own body as a property right is not surprising. Locke had a great influence on American political culture and law. American political scientist Louis Hartz contends that much of America's political foundation of liberal individualism has its basis in Locke's philosophy.[29] Locke's emphasis on property rights is reflected in the Federalist papers, which repeatedly defend the need for a solid government to protect economic and proprietary interests. Indeed, Federalist #54 states, "Government is instituted no less for protection of the property, than of the persons, of individuals." America's foundation and subsequent political and legal history developed and matured in a society where

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[27] Immanuel Kant, *Lectures on Ethics,* Translated by Louis Infield, [Harper and Row, 1965]: 27:387.

[28] John Locke, *Two Treatises of Government,* Edited by Peter Laslett, [Cambridge University Press, 1960, originally published 1698]: Second Treatise, Chapter V, Section 27.

[29] Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* [New York: Harcourt, Brace & World, 1955].

economic values were ubiquitous. The "American Dream" was and is rooted in economic achievements. People define themselves and relate to each other in terms of property and wealth. It is not surprising therefore, that the concept of property is intimately related to the meaning of the word "person."

Legal theorists Davies and Naffine point out the paradox in modern liberalism. While the immediate distinction between persons and property is that to be a person is precisely not to be reduced to the property of another, yet many liberal thinks have pointed out that a person owns himself which necessitates a view of the person as one's own property. "To be a person is to be a proprietor and also to be property – the property of oneself."[30] Despite this apparent paradox, the person as a self-owning individual is deeply ingrained in Western political culture. Davies and Naffine argue, "The claim of property in oneself is an assertion of self-possession and self-control, of a fundamental right to exclude others from one's very being. It is a means of individuating the person, of establishing a limit between the one and the other: between thine and mine; between you and me."[31] However deeply ingrained, the review of law and politics undertaken in this study will show the extension of this principle beyond white men or to those whose personhood is questioned has been reluctant at best.

While American political society's foundations are based in liberal individualism, an assessment of the relationship between person and property would be remiss without mentioning Karl Marx. Like liberal thinkers, Marx saw the world as socially constructed

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[30] Margaret Davies and Ngaire Naffine, *Are Persons Property: Legal Debates about Property and Personality* [Dartmouth: Ashgate Publishing Company, 2001]: 5.

[31] Margaret Davies and Ngaire Naffine, *Are Persons Property: Legal Debates about Property and Personality* [Dartmouth: Ashgate Publishing Company, 2001]: 5.

in economic terms. However, for Marx, this economic foundation for the world leads to the tyranny of capitalism rather than the prosperity of the free market. Economic activity, in Marx's view, transforms persons into social beings because it requires social cooperation and creative energy. A person laboring to achieve his own projects allows a person to express his humanity and gain dignity as a member of society. In this sense, the work of a person's labor rather than his rationality is instrumental to his self-identity as a person. However, private property alienates a person from himself and the social world because it commodifies labor and thus violates the creative process. By forcing people to work for a wage in uncreative and thus meaningless employments, labor loses its value as a self-constructing activity. Marx's solution of the abolition of property allows people to return to labor as purposive and social activity and restores the humanity of the individual.

Marx's theories did not revolutionize American liberal individualism. Instead, Locke's theories of the importance of private property have maintained their foundations in American thought while Marx's work serves as a framework for critiquing the dominant paradigm. American political culture has retained the idea that private property is essential for personal sovereignty. The person, as an individually self-determining entity, has the right to private property as a way define herself, shape her destiny, and engage in public life. Property, as semantically derived as being properly or belonging to a particular person, allows a person to distinguish himself from others while giving him a means to relate to others in a social and political context. Private property forms a boundary against interference from the state and other people and in this respect is essential for human freedom.

Political philosopher Robert Nozick brings Kant and Locke together in his Entitlement Theory. Nozick agrees with Kant that people must be treated as "ends in themselves" because people are unique entities that have the ability to rationally make decisions about their futures. Thus, persons differ from commodities or animals that do not have this ability and therefore can be treated as ends. Nozick argues that treating persons as ends is equivalent to saying that a person owns himself. Self-ownership requires that neither the state nor another person may use a human being without his consent.[32]

Clearly the importance of property for individual sovereignty has greatly influenced Western political institutions. English scholar of the law William Blackstone defined property as "the sole and despotic dominion which one man claims and exercises over the external things of the word, in total exclusion of the right of any other individual in the universe."[33] Blackstone's definition reflects the importance of property in defining persons as distinct and self-determining individuals.

Margaret Radin, a contemporary legal scholar specializing in property law, argues that property in things other than oneself is essential to personhood. She calls this "property for personhood." She writes, "The premise underlying the personhood perspective is that to achieve proper self-development – to be a *person* – an individual needs come control over resources in the external environment. The necessary assurances of control take the form of property rights."[34] Radin's theory is based on an

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[32] Robert Nozick, *Anarchy, State, and Utopia* [Basic Books, New York, 1974].

[33] William Blackstone, *Commentaries* Book 2, Chapter 1. available from http://avalon.law.yale.edu/subject_menus/blackstone.asp, accessed 8 August 2011.

[34] Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* Volume 34, (1982): 957.

interpretation of Hegel who said that a person only realizes her true self by asserting herself in the external world through the public and social property relationship. Radin argues that in order to achieve self-development and truly be a person, an individual needs a modicum of control over the things in her external environment. Property for personhood is that which a person uses for her self-development and self-identity. Examples of such property are wedding rings, a home, or a portrait – things that are so bound up with a person that they seem a part of the person. Radin sees the body as the quintessential personal property because it literally constitutes personhood. This allows a property theory for the tort of assault or battery. However, she is hesitant to grant too much latitude for the body as property because she recognizes that certain boundaries between the person and thing should not be crossed. For example, she disapproves of surrogacy, the sex trade, the sale of newborns, and the sale of body parts as an inappropriate commodification that threatens the very meaning of the person as separate from a thing.

The social implications of commodification are currently a contested political issue. Commodification, which reduces a person to a thing, allows the market to decide the meaning of personhood. Whoever controls the terms of the sale is able to determine what objects, and in this case which persons, are available for sale. Generally, those who are commodified are the subordinated class of the poor and marginalized. Those who control the terms of commodification secure their position as the political elite. Markets create and reinforce social relations. Davies and Naffine point out that humans have been denied personhood and objectified based on race, gender, and class. They argue that if personhood is enhanced by the ownership of external things, those who own more will

have an enhanced personality. The wealthy will have more personality while the poor are valued less as persons.

The commodification of persons as objects is relevant for an understanding of the law's treatment of persons because contested domains of property versus personhood have become quite common. Several cases concerning surrogacy have hinged upon whether the woman who bears the child or the man and woman who supplied the sperm and egg have an "ownership" right over the child.[35] The Supreme Court of California has heard many cases concerning whether the use of a celebrity's image without permission is a violation of the person's property right in his or her own self.[36] While the sale of plasma is condoned, the sale of other body parts, such as blood, is illegal with few exceptions.

Among the most cited cases concerning the property of one's own person is *Moore v Regents of the University of California* 793 P 2d 479 (Cal 1990). John Moore was treated for hairy cell leukemia at the Medical Center of the University of California. While undergoing treatment, Moore provided extensive amounts of blood, bone marrow aspirate, and other bodily substances. At the recommendation of his physician, David Golde, Moore had his spleen removed and made several follow up visits to the Medical Center where additional blood, skin, and other bodily fluids were taken. While Moore was undergoing treatment, Golde was actively using Moore's body parts for research. Golde knew that Moore's particular blood products had great scientific and commercial value. Without Moore's knowledge or consent to Golde's research, Golde established a

[35] See *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (1988); *Johnson v. Calvert* 851 P2d 776 (Cal. 1993)

[36] See *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979). *Comedy III Productions, Inc. v. Saderup,* 25 Cal. 4th 387 (2001), *Edgar Winter et al v. DC Comics et al,* S108751 (2003)

cell line from Moore's T-lymphocytes and regents from the University of California applied for a patent on this cell line listing Golde and his research partner Quan as the inventors. Golde and the regents then negotiated a commercial agreement with Genetics Institute for exclusive access to the cell line in return for monetary and stock compensation. When Moore learned of Golde's use of his tissues, he brought suit claiming a lack of informed consent and conversion. The court found that Moore did have a fiduciary claim, but his request for conversion was denied because the court found that Moore did not have a property right to his discarded cells nor to any profits from them. Once Moore consented to the medical procedure he lost any rights of self-ownership.

The concepts of person and property are very much intertwined. As Radin argues, persons relate to the world through owning things and thus property is essential for persons. As the *Moore* case illustrates, modern conceptions of property confuse the distinction between person and property. Borderline cases such as disputes over a person's genetic code, body parts, and image are difficult to adjudicate using a strict delineation between person and property. The distinction between person and human is also complex. Children, fetuses, humans with mental disabilities, and animals are in an ambiguous position of having certain rights and immunities but are still subject to the legal control of others. Slaves, despite being undeniably human beings with verifiable mental capacities, were categorized as property while corporations, who are not human beings but simply collectives owned by humans, are deemed persons with many rights including the right to own property.

As can be seen, the concepts of personhood and property are highly intertwined as are the concepts of persons and human beings. The dichotomies between person and property as well as between person and human being add structure to a study of how judicial decision makers interpret "person" and "personhood." A quick glance over some of the most important judicial decision of personhood can give the impression that judges and justices are haphazardly using terms and defining personhood with little awareness of other judicial decisions involving the same issues of personhood. The underlying concepts of personhood are not completely clear until one steps back and reflects on these decisions in light of the core theory of personhood which helps structure and organize the concept of personhood across a variety of judicial decisions. The core theory combined with a rigorous study of how the law has defined personhood in actual practice in four unique entities provides a more comprehensive understanding of personhood in the law and in common practice. My research detailing the law's interpretation of personhood for slaves, corporations, fetuses, and apes will reveal both consistencies and inconsistencies in the law's interpretation of personhood and will highlight the nuanced meanings of "person" in the law.

The following chapter provides an in-depth study of the personhood of slaves beginning with a review of the most influential literature pertaining to the personhood of slaves followed by an analysis of the factors which caused judges and justices to ultimately deny the personhood of the slave. Chapter Three discusses corporate personhood including the theories under which the corporation could qualify as a person and the judicial cases that ultimately granted corporate personhood. Chapter Four investigates the criteria by which a fetus might qualify for personhood as well as the

criteria that would exclude fetal personhood. This leads to a discussion of the law's effort to adjudicate this politically difficult issue. Chapter Five concerns personhood for animals with a focus on great apes to analyze whether there are any circumstances under which a non-human might claim personhood. Chapter Six compares and contrasts the personhood of each of the four entities in order to reveal both consistencies and inconsistencies in the legal bestowal of personhood. The chapter will bring to light the key findings of the study which lead to a more robust concept of personhood..

Chapter Two
We the "Other" People:
Reconciling the Slave's Status as both Person and Property

The Federal Constitution ... decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live.
— "Publius" [James Madison], Federalist No. 54

This quote from Madison accurately describes the legal status of the African slave until the Thirteenth Amendment. The issue of slavery is perhaps the most important example of the conflict between person and property. As rational, moral, decision-making agents, slaves qualify for personhood according to the criteria of person listed by most theorists. Slavery, which subjects one person to the complete domination of another, violates Kant's imperative that a person cannot be used as an end. According to Kant, persons are beings whose interests cannot be sacrificed for someone else's ends and are distinguished from property which is simply a tool. Therefore, Kant argues that slavery violates the basic maxims of a just and moral society. However, in the American chattel slave system, the slave was a human being who was indisputably property. In order to confirm the slave's status as property, the slave was denied personhood. Thus, there was an irreconcilable conflict between the slave's status as both person and property.

Slavery also represents the conflict between human beings and persons. Slaves were irrefutably human beings yet they were denied personhood. An entire "science" tried to prove that blacks were inferior intellectual beings and thus were not worthy as rational, self-aware entities deserving personhood. Further, through a process of social alienation, slaves were denied admittance to the political community of persons, which

made denying slaves' personhood easier to accept. Thankfully, slavery was abolished, and in many respects, this is a dead issue. However, the aftershocks of denying personhood to racial minorities were felt long after the Civil War in the many debates over citizenship, and can still be felt today with the many legitimate claims of racial discrimination.

This chapter will consider the history of American chattel slavery and the debate over the personhood of slaves from its British roots to the writing of the Constitution, the Thirteenth Amendment, the Fourteenth Amendment, and finally through the case law produced at both the state and national level that solidified the slave as human property. The dichotomy between person and property is clearly seen as slave owners used every conceivable method to preserve the property status of their human slaves. The system of slavery completely excluded the slave from the social system and polis. Slaves were not part of the "We the *People*" for whom the American Nation was founded and who had rights and privileges. In most court cases, the courts consistently held that a slave was property and completely denied personhood to slaves. The slave could be sold, traded, and abused just like any other sentient property such as horses or mules. However, even those who supported slavery could not deny the humanity of the slave. The slave was a rational being and met the cognitive requirements of personhood. A systematic examination of case law reveals that the courts did recognize this in certain situations such as when a slave was accused of a crime or negligence. In these circumstances, the court did not hesitate to recognize the rationality of the slave and considered the slave a person.

The legal status of slaves as persons was largely formed through the judicial branch of government as courts tried to fit slaves into a system that did not readily accommodate entities that were neither wholly person nor thing. Within this system, a slave was considered simply a good available for trade. However, because slaves were human and possessed the abilities to reason and express sentiment, as a commodity they posed special problems. The Southern slave system was based primarily on social relations where the master had total control of the slave including religious and family life. Further, deeply engrained feelings of racism dictated that blacks be reduced to the lowest of all social standings. Thus, the Southern courts had to accommodate both the economic and social systems when creating a system of slave law. The economic interests of slaves as property and the sentiments of racism provided the two most important controlling factors as the judicial system struggled to create a legal place for slaves as human objects. In order to appreciate the difficulties faced within the judicial system in deciphering the person and property aspects of the slave, it is helpful to review some of the political theories of personhood and slavery.

Political Theories of Slavery

As Chapter One illustrated, personhood is often defined in contrast to a human being and to property. Although slaves were human, they were not granted full personhood. By the same token, even though slaves were human, they were still considered property rather than persons. A review of some of the prominent political theories concerning slavery sheds light on these dichotomies.

Aristotle, one of the most important Western philosophers to influence modern democracy, incorporated both the dichotomies in his theory of natural slavery. Aristotle

argued that some humans are slaves by nature because they lack the rational abilities to engage in virtuous activity or philosophical contemplation which are necessary activities for eudemonia. In Aristotle's words, "the slave is entirely without the faculty of reason."[37] Because a slave suffered from a deficiency in the reasoning part of his soul which rendered him incapable of autonomy and independence, Aristotle relegated the slave to the lowest rung on the social ladder above only non-human animals. Because the slave did not have full cognitive and rational capabilities, the slave was human but did not qualify for personhood.

According to Aristotle, a slave's best hope in life was to fulfill his potential under a master who would protect him and harness his capacities for household service. In *Politics*, Aristotle wrote, "One who is a human being belonging by nature not to himself but to another is by nature a slave; and a person is a human being belonging to another if being a man he is an article of property, and an article of property is an instrument for action separable from its owner."[38] Therefore, the slave's inability to reason justified treating the slave as property rather than a person. Aristotle provided a foundation that allowed the master to completely strip the slave of his personhood and instead hold the slave as property. He justified the complete control of the master and the absolute degradation of the slave.

In contrast to Aristotle, John Locke believed in political equality and in most of his writing, he was opposed to the idea that a person could be enslaved to another. Locke believed that slavery was contrary to nature and was an extended state of war pitting the

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[37] Aristotle, *Politics,* Translated by Benjamin Jowett , [340 BCE]: Book I, available from http://classics.mit.edu/Aristotle/politics.7.seven.html, accessed February 27, 2010.
[38] Aristotle, *Politics* Section 1254.

conqueror against the conquered. In his First Treatise, he opens with the sentence "Slavery is such a vile and miserable estate of man, and so directly opposite to the generous temper and courage of our nation; that 'tis hardly to be conceived, that an Englishman, much less a gentleman, should plead for't."[39] However, in his Second Treatise, Locke returns to the subject of slavery providing justification for slavery in a just war.[40] He helped write a colonial document called the Fundamental Constitutions of Carolina which had several clauses condoning slavery. Locke was also involved in the African slave trade and profited from the Royal African Company as a stockholder. Therefore, there lies a fundamental contradiction in Locke's personal ideology. How could the architect of natural rights based liberty and individualism be involved in the slave trade? Many scholars have written about this contradiction in Locke's writing.[41]

Enlightenment philosopher Richard Popkin explained that in Locke's reasoning, everyone was created equal and endowed with the natural rights of life, liberty and property. However, Africans (and American Indians) were not properly mixing their labor with the land and not creating property which turned their land into wasteland. The Europeans conquered them in a just war and rightly enslaved any resistors. Locke attributes the personal failings of Africans to a lower level of rationality.[42] Lockean

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[39] John Locke, *Two Treatises of Government,* Edited by Peter Laslett, [Cambridge University Press, 1960, originally published 1698]: First Treatise, Chapter I, Section 1.

[40] John Locke, *Two Treatises of Government,* Edited by Peter Laslett, [Cambridge University Press, 1960, originally published 1698]: Second Treatise, Chapter III, Sections 23-24.

[41] See H.M. Bracken, "Essence Accident, and Race," *Hermathena*, (Winter 1973): 81-96; Richard H. Popkin, "The Philosophical Bases of Modern Racism," in *Philosophy and the Civilizing Arts*, Craig Walton and John P. Anton, eds., [Ohio University Press: Athens, 1974]: 126-165; James Farr, "So Vile and Miserable an Estate: The Problem of Slavery in Locke's Political Thought," *Political Theory,* 14:2, (1986): 263-289,

[42] Richard H. Popkin, "The Philosophical Bases of Modern Racism," in *Philosophy and the Civilizing Arts*, Craig Walton and John P. Anton, eds., [Ohio University Press: Athens, 1974]: 133.

scholar Martin Seliger agrees that Locke justified American slavery by characterizing it as an acceptable punishment in a just war. However, Seliger qualifies this by stating that Locke did not believe that prisoners taken in European wars should become slaves. Seliger argues that it is implied in Locke's writing that only a certain part of mankind is acceptable for human slavery.[43] While neither Popkin nor Seliger accuse Locke of racism or blatant hypocrisy, Leon Poliakov argues that Locke did believe in white superiority and the prejudices that were common in European society during his lifetime. Locke was part of a society that saw Africans as naturally inferior, and Locke likely harbored some of these beliefs while still arguing for natural rights and freedoms.[44]

The reality is that Locke's views on slavery are contradictory. He was a champion of rights and freedoms which influenced the Founding Fathers as they created American's foundation of democracy and liberalism. At the same time, Locke was a participant in the "vile and miserable estate" of slavery. This contradiction is witnessed again when examining the views of American's Founders. Beyond this contradictory evidence, Locke's theories of rationality were influential in determining the status of human slaves. Like Aristotle, Locke adhered to the importance of rationality in distinguishing persons from other beings. According to Locke, what sets persons apart from mere human beings is cognitive capability. Locke's requirement for personhood is "an intelligent being that has reason and reflection."[45] Locke established psychological

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[43] M. Seliger, *The Liberal Politics of John Locke,* Frederick A. Praeger, New York, 1968]: 119.

[44] Leon Poliakov, *The Aryan Myth: A History of Racist and Nationalist Ideas in Europe* [Chatto & Windus Heinemann for Sussex University Press, 1974]: 145-150.

[45] John Locke, *An Essay Concerning Human Understanding*, Peter Laslett, editor, [Penguin Publishing, London, 1997 edition, originally published 1690]: Book II, Chapter 27.

or cognitive criteria for personhood, and this paradigm has been followed by many more scholars within the psychological tradition such as Daniel Dennett, Harry Frankfurt, and G.E. Scott whose theories are reviewed in Chapter One.

Slaves certainly were human beings with the capacity for reason and reflection under Locke's criteria of rational and cognitive capacities. Slaves also satisfied Dennett's conditions of personhood that develop Locke's concept – persons are rational beings, are conscious, can reciprocate, and are capable of verbal communication.[46] Enslaved Africans in the American system of slavery were unquestionably persons in this regard despite any attempts by southern slaveholders to deny the mental capabilities of the African slaves. And there were pseudo-scientific attempts to deny rationality to African Americans.

In the Nineteenth Century, a scientific debate arose around the concept of polygenism that held that there were various lineages of the human race. Some anthropologists used this concept to develop a scientific racism. They argued that polygenism created a hierarchy in the "Great Chain of Beings," and Africans were located between white men and primates due to inferior mental capabilities. Samuel George Morton, the founder of this field, analyzed skulls, cranial capacity, and brain size to determine that the "Ethiopian" was inferior to the Caucasian.[47] Morton's followers continued this work. The United States Sanitary Commission during the Civil War conducted autopsies based on whites, blacks, mulattos, and American Indians. Their

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[46] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177.

[47] Charles A. Lofgren, (1987) *The Plessy Case: A Legal-Historical Interpretation*, [Oxford University Press, 1987]: 99.

findings showed that blacks had physical statures closer to anthropoids with smaller brain weights and weaker physical abilities. Morton attempted to prove that Africans were biologically inferior in rational capabilities which justified denying their personhood.

This school of anthropologists did not deny that the African was a human being. Rather, they argued that Africans were a different type of human belonging to the same genus but belonging to a different species or subspecies. Samuel Cartwright, a prominent Louisiana physician explained,

> It is not intended by the use of the term Prognathous to call in question the black man's humanity or the unity of the human races as a genus, but to prove that the species of genus homo are not a unity, but a plurality, each essentially different from the others – one of them being so unlike the other two – the oval headed Caucasian and the pyramidal headed Mongolian – as to be actually Prognathous, like the brute creation; not that the negro is a brute, or half-man and half brute, but a genuine human being, anatomically constructed, about the head and face, more like the monkey tribes and lower order of animals than any other species of the genus man.[48]

At the time, the scientific rigor of work these anthropologists in Morton's school was universally acclaimed which testifies to the fact that while the humanity of the slave was not necessarily in question, as a different type of human, many people of the antebellum period, both scholars and citizens alike, were able to deny personhood on a scientific basis to a group of humans that did not qualify as persons.

Modern science proved these race-based theories were nonsense. However, Morton's work illustrates the fervor to deny slaves personhood and distinguish slaves as a separate category of beings. Dennett's third condition of personhood states, "Whether something counts as a person depends in some way on an attitude taken toward it, a

[48] Samuel Cartwright, "Natural History of the Prognathous Species of Mankind," New York Day-Book, November 10 1857*;* reprinted in E.N. Elliott*, Cotton is King, and Pro-Slavery Arguments,* [Augusta: Pritchard, Abbot & Loomis, 1860]: 707.

stance adopted with respect to it."[49] Epistemologist Jay Rosenberg agrees with Dennett's third condition arguing that personhood is a bestowed status. He writes, "The existence of persons will be a matter of the existence of a community of beings who regard themselves and each other *as persons*."[50] Rosenberg contends that the crux of personhood is the recognition and acknowledgement by others in the community of persons. When the community of persons acknowledges that a being is a fellow person, that being is granted the rights and privileges of personhood.

Slaves did not qualify as persons in this respect because the rest of white society did not acknowledge slaves as persons. Despite the rational ability of slaves, the Founding Fathers did not include slaves as part of the political community of persons and citizens that they were building with the Constitution. White, slaveholding society in the South did not acknowledge the personhood of slaves and thus denied slaves any rights and privileges. The slave population was socially alienated from the status of persons. Thus, Dennett's third condition – persons are beings who are considered and acknowledged as persons by others – is the critical criterion that dooms the slave population. Because white society did not consider slaves to be fellow persons, they were effectively socially alienated from the realm of personhood.

Orlando Patterson, who has studied slavery in societies throughout the world and in multiple periods, concludes that social alienation is the common phenomenon in almost all slave-holding societies. Patterson finds that a slave is a being that is "socially

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[49] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177.

[50] Jay F. Rosenberg, *Thinking Clearly About Death,* [Indianapolis, IN: Hackett Publishing Company, Inc. Second Edition, 1998]: 173.

dead." A slave has no familial claims to parents, ancestors or descendents, his sexual unions have no binding force, and he can have no custodial or hereditary relationships with his children. His alienation allows the master to deprive him of any social claim to personhood with a legitimate position in any social order. Patterson argues that belonging to a social order and a position in an inherited social reality are necessary for all persons. As an excluded being, the slave is a non-person.[51]

The Southern slave system deliberately alienated the slave in order to deprive him or her of personality. A significant step in this process was renaming the slave with a European and often biblical name.[52] Slaves also could not form family bonds. Slaves could not marry without the express permission of their master and the slave had no claim to his or her children. Slave children belonged to the master as his property. In 1835, Alexis de Tocqueville compiled his observations of American society. Tocqueville observed the social death of the southern slave first hand.

> In one blow, oppression has deprived the descendants of the African of almost all the privileges of humanity. The United States Negro has lost even the memory of his homeland; he no longer understands the language his fathers spoke; he has abjured their religion and forgotten their mores. Ceasing to belong to Africa, he has acquired no right to the blessings of Europe; he is left in suspense between two societies isolated between two people; sold by one and repudiated by the other; in the whole world there is nothing but his master's hearth to provide him with some semblance of a homeland.[53]

In the American social system, the social alienation of the slave led to exclusion of the slave from the social and political community. Even if the slave was conceived of as a "person," he was not a part of the "people."

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[51] Orlando Patterson, *Slavery and Social Death,* [Cambridge, MA: Harvard University Press, 1985].

[52] Oscar and Mary F. Handling, "Origins of the Southern Labor System," *William and Mary Quarterly*, third series, 7 (1950): 217.

[53] Alexis de Tocqueville, *Democracy in America*, edited by J.P. Mayer [New York: Harper Perennial Press, 1969]: 317.

The social position of the slave can be compared to that of the infant. Newborn infants do not have the rational capacities to qualify them as persons. Yet, infanticide is a moral taboo in American society because infants are included within the social community and are looked upon as beings in need of protection. Societal mores mandate that infants receive the care and upbringing they need to flourish. In contrast, although the slave did have rational capacities, the slave was not part of the social community and thus was not protected by the sympathies extended to infants. Southern slaveholders needed a distinguishing factor to justify their exclusion of slaves from the community of persons. The method these slave holders chose was exclusion based on race.

While other slave societies, such as that of the Greeks and Romans, enslaved humans from many ethnicities and races, the American slave system primarily relied on slaves of African descent. Although there is evidence of Native Indian and even white slavery in America, by the mid 1800s, southern slaves were almost exclusively imported from Africa or were descendents of African imports. Their dark skin physically set them apart from their white masters and provided a simple way to alienate an entire subset of the population. The color of one's skin was the badge of slavery. Social alienation based on race was convenient and accepted.

Racism allowed slaveholders to accept the paradox that all men were free and equal as stated in the Declaration of Independence, but as one Louisiana slaveholder put it, "niggers and monkeys ain't."[54] While racism did not owe is existence to the legal process; the law enforced the concept. As legal historian Paul Finkelman states, "If blacks could be perceived as inferior, basically uneducable and inherently venal, it might

[54] Paul Finkelman, *Slavery and Law* [Lanham, MD: Madison House Publishers, 1997]: 12.

be intellectually less self-condemnatory to relegate them because of their 'lower status' to a subordinate role – either for their own good or as one judge had the audacity to express it, for the good of the total society, whites and blacks alike."[55] Pervasive racism plagued all of American society, and was especially dominant in the South. The dividing line between white and black was so stark that race became the most administratively useful classifying device. Many times, the law was not able to create a dividing line between a free black and a slave because whites would not tolerate free blacks being in the same political category as whites. Thus, free blacks, although free, were not included in citizenship and associated rights. They were still treated as "wards" in most cases and as inferior humans in almost all respects. Racism contributed to the exclusion of blacks, both slave and free, from being part of "We the People" as stated in the Constitution's Preamble. Further, it influenced colonial and antebellum law as the courts struggled to reconcile the person and property of the slave.[56]

While slave society could not effectively deny the personhood of slaves based on cognitive criteria, the American slave system was very effective in denying personhood based on inclusion within the community. Social alienation is directly related to the slave's status as property. The master denies the personhood of the slave in order to objectify the slave and place the slave as a commodity on the market. Martin Klein, a historian of West African slavery, argues, "Social death and natal alienation derive from the master's desire to use the slave. The slave is fully exploitable only when he has been

[55] Paul Finkelman, *Slavery and Law* [Lanham, MD: Madison House Publishers, 1997]: 10.

[56] For a detailed account for racism and ascriptive policies in U.S. history, see Rogers Smith, *Civic Ideals*, [Hartford, CT: Yale University Press, 1997].

removed from any existing social matrix."[57] Thus, social alienation was an attempt to erase the personhood of the slave and replace it with an exploitable commodity. Social alienation enabled the dual person and property status of the slave.

According to Kant, a person cannot be property – the two categories are mutually exclusive. Kant spent much of his life's work distinguishing persons from property. Kant wrote, "Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership."[58] Kant's argument stemmed from his belief that persons, as rational beings, have an intrinsic moral worth and dignity that must be upheld. Hence, each person must be treated as an "end in itself" rather than as an instrument to be used for someone else's purposes. As autonomous and rational agents, persons may not considered property.

Slavery violated Kant's imperative to the extreme extent – the slave lost his claim to an "end in itself" and was relegated to a simple piece of property, a chattel, to be used at the master's whim. The process of social alienation which stripped the slave of all human ties, allowed this to happen. Of course, slavery is not the only extreme example of denying personhood in order to justify abuse of a human being. Nazis also denied the personhood of Jews, Slavs, and other victims instead claiming that only Aryans were

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[57] Martin A. Klein, review of *Slavery and Social Death. A Comparative Study* by Orlando Patterson *Canadian Journal of African Studies / Revue Canadienne des Études Africaines*, 19 no. 1 (1985): 250.

[58] Immanuel Kant, *Lectures on Ethics,* Translated by Louis Infield, [Harper and Row, 1965]: 165.

"true persons." This denial helped assuage any emotional trauma and moral guilt felt when subjecting other humans to horrific treatment.[59]

The reality of the southern slave system was that slaves were primarily considered as chattel property to be used at the discretion of the master rather than considering slaves to be persons. As property, the slave was a tool used to further the financial goals of the master and the slave's personhood, stemming from his humanity and rational capabilities, was denied. George Stroud, a judge and prolific legal commentator during the 1800s, analyzed antebellum slave laws in twelve states and published his work from 1827 to 1856 in order to expose the nature of American slavery. According to Stroud, a slave was truthfully considered a thing rather than a person. Stroud wrote, "The cardinal principle of slavery – that the slave is not to be ranked among *sentient beings,* but among *things,* as an article of property, a chattel personal – obtains as undoubted law, in all these [slave-holding] States."[60] Abolitionist writer William Goodell, a contemporary of Stroud, affirms that slaves were treated as articles of property rather than human beings or persons. William Goodell stated,

If slaves were 'deemed, reputed, and adjudged in the law" to be 'sentient beings,' and not 'things,' then their relation to society and to civil government would be the relation of HUMAN BEINGS. But this is directly the opposite of the fact, "Slaves" are 'deemed, *sold* taken, and adjudged in law to be *chattels* personal, in the hands of their *owners* and possessors, their administrators and assigns, *to all intents, construction, and purposes whatsoever."* Their relation to society and to civil government is, accordingly, the relation of BRUTES.[61]

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[59] S. F. Sapontzis, "A Critique of Personhood" *Ethics* 91 (July 1981): 613.

[60] Emphasis his. George Stroud, *Sketch of the Laws Relating to Slavery in the Several States of the United States of America,* [Henry Longstreth Publisher, Philadelphia, 1856]: 35.

[61] Emphasis his. Quoted from William Goodell, (1853) *The American Slave Code* [Arno Press & The New York Times, 1969]: 289.

It is painfully clear that the slave was very seldom regarded as a "person." Instead, the economic value of the slave was upheld repeatedly. Classics scholar Moses Finley emphasizes the fact that a slave's humanity did not prevent the slave from becoming simple chattel property. Finley states,

> Some sociologists and historians have persistently tried to deny the significance of the simple fact, on the ground that the slave is also a human being or that the owner's rights over a slave are often restricted by the law. All this seems to me to be futile: the fact that a slave is a human being has no relevance to the question whether or not he is also property; it merely reveals that he is a peculiar property, Aristotle's 'property with a soul.'[62]

Because the slave was considered property just like non-human animals, in many early legal cases the slave was considered closer in form to a horse than a human being. As Tocqueville observed, "European is to men of other races as man is to animals. He uses them so serve his convenience and when he cannot bend them to his will, he destroys them."[63]

The economic system of slavery placed a dollar value on all types of property including human property. The slave's value became quantifiable even though a human was involved. In fact, the human abilities to emote and reason, which are hallmarks of personhood, instead were often seen as value-added traits of the slave property with intelligent slaves garnering a higher price.[64] Cases involving slaves generally considered only the economic value of the slave as property to the master when adjudicating harms to the slave. The slave, as an alienated being, was not recognized as an agent to be compensated for harm.

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[62] Moses Finley, *Ancient Slavery and Modern Ideology* [Princeton, NJ: Markus Wiener Publishing, 1998]: 73.

[63] Alexis de Tocqueville, *Democracy in America*, edited by J.P. Mayer [New York: Harper Perennial Press, 1969]: 317.

[64] William Goodell, (1853) *The American Slave Code* [Arno Press & The New York Times, 1969]: 43.

The social and economic structures of the American slave system determined the legal structures of slave society. Courts tried to reconcile a slave's non-person status with a criminal and civil code that recognized slave actions. In a court of law, the slave had no claim to dignity and was a nonperson. In most instances, slaves were treated in the same way as cattle because both were the master's property. When a slave was killed or harmed, the master would collect restitution for his property. Nevertheless, at the same time, a slave was treated as a rational, sentient being capable of defending himself and committing crimes. Delicts against slaves were penalized to protect the master's property rather than the dignity of the slave. Thus, the social system of slavery is completely bound to the legal system. Because the slave was both person and property, the courts faced a unique and confusing entity that did not fit within property law or the laws of persons.

Historical Conditions

The American system of slavery and the corresponding judicial code of slavery were not conceived in a vacuum. Slave societies existed throughout the world for millenniums including ancient Greek and Christian societies. Greek philosophy, as a cornerstone of democratic thought, and the Bible as a cornerstone of Christian thought, provided legitimacy for slavery. Both ancient Greek and Christian philosophy and societal values contributed to the American concept of slavery. As previously discussed, Aristotle advocated for a natural system of slavery and condoned slave societies. Most prominent early American scholars and lawmakers would have been familiar with Aristotle's writings and his justification of slavery. However, the average colonists did

not need to study the works of ancient Greece in order to justify slavery. They only needed to reference the very familiar stories of the Bible.

In early Christian times, slavery was an accepted part of the Roman Empire, and therefore the Bible and other Christian writing addressed the subject. Much of the early Christian philosophy addressed slavery metaphorically and did not justify or condemn the legal system of slavery. However, both abolitionists and advocates of slavery invoked Biblical references to justify their arguments.

For early Christian philosophers, slavery was most importantly a condition of the spirit and not of the body. The Evangelist Paul gives a carefully reasoned and relatively thorough treatment of slavery. The important distinction among men was their relationship to God. Paul believed that all men were essentially slaves to God who was master. Thus, true slavery was a state of the soul. Paul wrote, "There is neither Jew nor Greek, slave nor free, male nor female in the sight of God."[65] Many of Paul's Biblical writings reference man's enslavement to God and the rewards to those who are obedient, spiritual slaves. Paul also references legal slavery, which can be confusing because it is difficult to know when Paul is speaking metaphorically. He says that slaves should obey their masters just as if their master was Christ, and their service will be rewarded. Further, slaves should not view their status with resentment because it makes no difference to Christ whether one is slave or free. Masters must be fair to their slaves knowing that they too have a master in heaven.

Although Paul's writing was primarily metaphoric and not a defense of legal slavery, his teaching became important as Christian churches in the South related the

[65] Galatians 3:28

Bible to both slaves and master. Early Christian and Biblical justifications are especially important for those in the American South where their Puritan and Southern Baptist roots would encourage them to seek out Biblical justifications for slavery. Jefferson Davis wrote, "[Slavery] was established by decree of Almighty God...it is sanctioned in the Bible, in both Testaments, from Genesis to Revelation...it has existed in all ages, has been found among the people of the highest civilization, and in nations of the highest proficiency in the arts."[66] Antebellum Biblical scholars, following the paradigm of anthropologists who argued there were various species of humans, discussed whether there was a separate creation of blacks versus whites.[67]

While Roman law provided a detailed slave code, there is little evidence that the colonists utilized it in forming their own slavery codes. In America, slave society evolved into a highly racist system whereas race was not a factor in Rome. Furthermore, slavery as a widespread institution did not exist in seventeenth and eighteenth century England. Therefore, the colonists had very few precedents from which to draw legal expertise.

Although England provided the legal framework for most early American law, England's slave law had limited influence because the situation was vastly different. England did not rely on a plantation system, and boatloads of slaves were never imported into the country.[68] For Americans, slavery was a social and economic fact that became a

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[66] Jefferson Davis, *Constitutionalist: His Letters, Papers and Speeches,* [Jackson, MS: J. J. Little & Ives Company, 1923]: 286.

[67] Arthur Riss, *Race, Slavery and Liberalism in Nineteenth-Century American Literature*, [Cambridge University Press, 2006]: 138.

[68] Drescher, Seymour. (1987) *Capitalism and Antislavery: British Mobilization in Comparative Perspective* Oxford University Press, page 15.

racial fact. For Great Britain, like Rome, slavery was a geographically, not racially, conceived system. In Great Britain it was easier to dismantle slavery because there was a smaller slave labor force, involved less property, and was not encumbered by racial attitudes.[69] England viewed itself as an island of liberty in a world filled with slaves even though England's colonies were heavily involved in plantation slavery.

England's most influential scholar, William Blackstone, addressed the status of slaves as property within English law. Blackstone argued against slavery and criticized those who would deny baptism to a slave in order to prohibit liberation. However, he firmly defended the property right of the master in his slaves. Thus, Blackstone argued in the same breath that the spirit of liberty was deeply implanted in the common law but that a master's right to his former slave's service could continue even after the slave was free.[70]

> And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman; though the master's right to his service may probably still continue.[71]

For Blackstone, preservation of property rights was essential. Blackstone supported the idea of property rights in another person: apprentices, servants, wives, and children were all subject to a property right by their superiors. Thus, although the common law "abhorred" slavery and did not condone the buying and selling of persons, it did support

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[69] Teresa Michals, "That Sole and Despotic Dominion: Slaves, Wives and Game in Blackstone's Commentaries," *Eighteenth Century Studies*, 27 (1993): 197; Seymour Drescher, *Capitalism and Antislavery: British Mobilization in Comparative Perspective* [Oxford University Press, 1987]: 48.

[70] Teresa Michals, "That Sole and Despotic Dominion: Slaves, Wives and Game in Blackstone's Commentaries," *Eighteenth Century Studies*, 27 (1993): 205.

[71] Sir William Blackstone, *Commentaries on the Laws of England,* [Christian, Chitty, Lee, Hovenden, and Ryland Publishers, 1832]: Book 1, Chapter 1.

the more general principle that a person could have a property right to another.[72] Most American lawyers after the 1770s studied Blackstone's *Commentaries* as the basis of their legal education and would have understood his emphasis on property rights.[73]

In England's most important case on slavery, *Somerset v. Stewart* which was decided in 1772, the buying and selling of humans like cattle was one of the strong images invoked against slavery. At issue in *Somerset* was the status of James Somerset, the slave of a British customs official. Somerset, who had been brought to England from Virginia, claimed that by landing on British soil, he was free and could not be returned to Jamaica as a slave. Many Britons were very much against slavery and therefore Somerset had a receptive audience for his complaint. Lord Mansfield, the judge in this case, wrote that slavery "was so odious, that nothing can be suffered to support it, but positive law." He further wrote, "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only positive law" (Lofft 1, 98 E.R. 499, 82). Mansfield decided that because there was no statute in England that expressly allowed slavery, slavery did not exist within Great Britain and Somerset was free. Mansfield's opinion in favor of Somerset gave the impression that any slave in England was permanently freed. Mansfield however seemed to favor permanent ambiguity as the resolution to the dilemma of the slave's status.[74]

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[72] Teresa Michals, "That Sole and Despotic Dominion: Slaves, Wives and Game in Blackstone's Commentaries," *Eighteenth Century Studies*, 27 (1993): 201.

[73] Robert M. Cover, (1975) *Justice Accused: Antislavery and The Legal Process.* [New Haven, CT: Yale University Press, 1975]: 16.

[74] Teresa Michals, "That Sole and Despotic Dominion: Slaves, Wives and Game in Blackstone's Commentaries," *Eighteenth Century Studies*, 27 (1993): 205.

Mansfield's opinion is complicated because it did not rely on statute. Where no statute existed, Mansfield looked to natural law and concluded that common law rested on the liberty that is found in nature. However, Mansfield's *Somerset* opinion did not say that slavery was illegal or that all slaves on British soil were immediately free. A black slave reverted to the status of slave if taken back to the colonies. Despite this, the opinion helped end slavery within Great Britain as slaves left their masters with no enforcement of the master's property rights. Slavery withered away in Great Britain by the beginning of the 1800s.

Mansfield was aware that condemning slavery would call property rights into doubt. However, if Mansfield ruled in favor of Charles Stewart, the master, he would be effectually stating that the American laws of slavery were binding in Great Britain. Mansfield reaffirmed the supremacy of municipal law while upholding the practice of slavery within England's colonies. This opinion highlighted two conflicting versions of liberty within the common law. Blackstone's *Commentaries* stressed the fundamental right to absolute ownership of property. In this sense, a slave's value as property was absolute. At the same time, Mansfield appealed to natural law, the moral demands of a property-less claim to personhood, and the value of humanity. Mansfield does not reconcile the conflict between property rights found in positive law and the value of humanity in natural law. Thus, a legal confusion arose in which slavery was popularly criticized as an insult to humanity but interpreted and attacked in common law courts through real property.[75] Parliament's 1807 decree that banished the slave trade but continued to support slavery in the West Indian colonies furthered this confusion.

[75] Teresa Michals, "That Sole and Despotic Dominion: Slaves, Wives and Game in Blackstone's Commentaries," *Eighteenth Century Studies*, 27 (1993): 215.

This legal confusion was also felt in the colonies as the Founders struggled to reconcile the humanity of the slave with the value of property. *Somerset* was important for its ideological rather than practical effect. Reflecting on the importance of the case, A. Leon Higginbotham praised Mansfield's opinion for its long-lasting effects on American jurisprudence. Higginbotham was a civil rights activist and federal appeals court judge during the 1970s and 1980s, and he felt that Mansfield's opinion influenced the judicial policy making of his contemporaries and of America's Founding Fathers. Higginbotham commented, "He synthesized most of the essential ingredients or rationale for future generations to eradicate slavery. … For his generation he was a giant in the cause of human freedom and a significant contributor to the ultimate abolition process."[76] Decided just four years before the Declaration of Independence, the case reminded judges of the disparity between slave law and the moral principles of legal order. This disparity was very much on the minds of the Founding Fathers as they struggled to reconcile the natural right of liberty for every person and the fundamental right to own property, which included slaves.

The Founding Fathers

The Founding Fathers were in a very difficult position regarding slavery. Philosophically, the Declaration of Independence and the Constitution were testaments of freedom and liberty. However, the economy of the southern states depended on the denial of freedom and liberty to a large percentage of the population. The fledgling

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[76] A. Leon Higginbotham Jr. *In the Matter of Color: Race and the American Legal Process: The Colonial Period.* [Oxford: Oxford University Press, 1978]: 368.

country depended on the plantation economy to purchase diplomacy from other nations. Both the internal and external stability of the nation depended upon the southern slave-based economy.

At the same time that the colonists were using tobacco produced by slave labor to buy favor with other nations, especially France, the colonists were accusing England of treating its colonial subjects as slaves. Colonist and member of the Constitutional Convention John Dickinson of Pennsylvania stated, "Those who are taxed without their own consent, expressed by themselves or their representatives, are slaves. We are taxed without our own consent, expressed by ourselves or our representatives. We are therefore slaves."[77] Ironically, when Dickinson published these words in *Letters from a Farmer in Pennsylvania: To the Inhabitants of the British Colonies,* from 1767 to 1768, his family had a large number of slaves. To his credit, Dickinson did free his slaves in 1777.

John Dickinson's vehement protest of England's treatment of the colonists as slaves while holding slaves himself on his family plantation is indicative of the paradoxes many of the Founding Fathers faced in respect to slavery. The paradoxes faced by the Founding Fathers are the same as those faced by John Locke – a belief in freedom and liberalism but sanction of the slave trade. Despite their protests against England, many colonists did not take the small step of recognizing that they were unjustly treating certain groups of people by perpetrating the evils of slavery within their own societies. Some of the Founding Fathers justified slavery by arguing that they must support the practice in order to keep the union intact although they did not own slaves themselves. However,

[77] John Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* [Philadelphia, 1768]: 38.

other members of the Constitutional Convention such as Dickinson as well as Thomas Jefferson, George Washington, and James Madison, owned slaves themselves. Although the writings of Jefferson, Washington, and Madison reveal inner conflict over the issue of slavery, the fact is that these Founding Fathers did own slaves at one time. Perhaps one of the ways these leaders justified their actions to themselves was by reminding themselves that African slaves were legal property and not persons with rights and immunities. There is a strong argument to be made that some of the Founders simply did not consider the human being as slave to be a person. These political leaders accepted the foundational liberal principle that "persons" are entitled to rights and immunities, but they did not acknowledge that the slave, or in many cases the African in general, was a "person."[78] On the other hand, perhaps they did recognize the evils of slavery but the economic benefits and the stability of the Nation outweighed any guilt they experienced.

As American historian William Freehling states, "The master passion of the age was not with extending liberty to blacks but with erecting republics for whites."[79] The Founding Fathers' primary motivation was to construct a stable union. Thus, whenever abolitionist sentiment appeared that angered southern delegates and threatened the union, southern delegates were placated. The Founding Fathers valued the Union more than abolition, and their inherent racism allowed their commitment to property to prevail over the value of liberty for all humans. In order to further explore irony of slavery and

[78] Arthur Riss, *Race, Slavery and Liberalism in Nineteenth-Century American Literature*, [Cambridge University Press, 2006]: 34.

[79] William W. Freehling, "The Founding Fathers and Slavery" *The American Historical Review*, 77, no. 1 (1972): 83.

America's early leaders, it is worthwhile to explore the philosophies of both James Madison and Thomas Jefferson.

Madison, like his good friend Jefferson, left a troubled legacy in respect to slavery. Many of his speeches deplore slavery as unjust and immoral. Yet, he supported Virginia's right to maintain slavery and held slaves on his estate in Monticello without ever manumitting them. An analysis of Madison's trouble legacy reveals some of the inner conflicts felt by many Founding Fathers.

The quote opening this chapter reveals Madison's true sentiment concerning slavery. "The Federal Constitution ... decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live."[80] Madison agreed that legally, slaves were both persons and property, and he helped broker the Three-fifths Clause agreement in the Constitution to recognize both statuses of slaves. He argued that slaves could not be admitted as "persons" for purposes of representation yet he lamented that the law failed to recognize that slaves were human beings.[81] As a member of Virginia's slave holding elite as well as a man who spent considerable time contemplating the meaning justice and equality, Madison recognized both the slave's status as property and a person.

In order to appreciate Madison's inner conflicts concerning slavery, it is important to acknowledge that during Madison's time the system was entrenched, and Madison was

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[80] "Publius" [James Madison], Federalist No. 54

[81] James Madison, Letter to Joseph C. Cabell, January 5, 1829, printed in "James Madison's Attitude Toward the Negro," *The Journal of Negro History* 6:1, (Jan., 1921): 94; Drew R. McCoy, "The Last of the Fathers: James Madison and the Republican Legacy," [Cambridge University Press, 1989]: 245.

born into the master class of Virginia gentry. Madison's family had a long history of slavery, and slave labor was instrumental to the success of the Madison family plantations. At the same time, he wrote many letters and speeches in which he professed to abhor the practice of slavery. During the Constitutional Convention, Madison said about slavery, "We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man."[82] His wife Dolly came from a family of Quakers, and Dolly's father freed his slaves and moved his family from Virginia to Philadelphia in order to avoid systemic slavery. Madison however was not prepared to go as far as his wife Dolly's family in protesting slavery. Although he spoke out against it, he did not free his own slaves even on his death bed as George Washington did.

At his death, Madison held over 100 slaves which he bequeathed to his wife. Scholars argue over the ethics of Madison's decision to retain his slaves while at the same time working for justice and liberty in the new republic. To many scholars, Madison was hypocritical and his action unforgiveable. However, historian Drew McCoy defends Madison's actions claiming that Madison was worried about the fate of the slaves if they were freed. At the time, Virginia law mandated that freed slaves had to leave Virginia. Perhaps Madison worried about their fate in a society filled with violent prejudice and in a land where the slaves would be hard pressed to survive financially away from the home they had known for generations. McCoy writes,

> But it is also plausible to infer that Madison may have had been more interested in the actual welfare of his slaves than he was either in clearing his conscience or in using them to make a political statement. … Contrary to appearances, by providing for his slaves as he did, Madison may have given greater evidence of his concern and respect for them than

[82] James Madison, speech at the Constitutional Convention, June 6, 1787

> he would have, had he merely released them into a hostile white world, or for that matter, subjected them to involuntary deportation.[83]

To be sure, McCoy gives a very charitable interpretation of Madison's failure to manumit his slaves. However, McCoy may be at least partly correct. Records show that Madison was a very benevolent master. Madison's personal slave, Paul Jennings, wrote in his memoirs, "I never saw him in a passion, and never knew him to strike a slave, though he had over a hundred; neither would he allow an overseer to do it. Whenever any slaves were reported to him as stealing or 'cutting up' badly, he would send for them and admonish them privately, and never mortify them by doing it before others."[84] From the large body of Madison's writing, it does not seem that Madison harbored the deep seated racial prejudices that Jefferson had. However, in his references to free blacks, his writing was often laced with contempt and at one point calling free blacks "idle and depraved."[85] This comment reveals that Madison had some latent racial prejudices but overall, it seems that Madison was benevolent towards slaves and free blacks and did not harbor the vitriolic prejudices that were common with his contemporaries.

However benevolent Madison was towards his slaves, Madison was certainly motivated in his actions by financial concerns as well as compassion. Madison worried about Dolly's fate after his death and knew that she needed labor to run the plantation. Further, Madison truly believed in the financial value of slaves and repeatedly argued at

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[83] Drew R. McCoy, "The Last of the Fathers: James Madison and the Republican Legacy," [Cambridge University Press, 1989]: 319.

[84] Paul Jennings, "A Colored Man's Reminiscences of James Madison," 1799, Electronic Edition provided by University of North Carolina, available from http://docsouth.unc.edu/neh/jennings/jennings.html, accessed April 30, 2010.

[85] James Madison, Answer to Inquiries from Jed H. Morse, January 5, 1829, printed in "James Madison's Attitude Toward the Negro," *The Journal of Negro History* 6:1, (March 24, 1893): 90.

the Constitutional Convention and through his correspondence that if the Federal Government were to free the slaves, then owners had to be compensated for their loss of property. In a letter to Robert J. Evans, Madison explained that any plan for emancipation should be gradual, equitable, and satisfactory to the individuals concerned, and consistent with the existing prejudices of the nature. In respect to equitable and satisfactory, Madison further elaborated that the slave must agree that the state of freedom is preferable to that of bondage. For his part, the master must be compensated for the loss of property as guaranteed by the law and the Constitution.[86]

The reality of Madison's thoughts on slavery was that he was very much conflicted between the status of property and person. He treated his slaves benevolently as appropriate to their status as human beings. However, he did not waver from his views that slaves were legal property and that masters needed to be compensated for any loss of property through manumission. He did not waver from his loyal Virginian views that southern states should be allowed to maintain slavery.

Another critical reason that Madison refrained from calling for the complete abolishment of slavery was that he was very much afraid that the Union would dissolve over the highly contested issue. Although Madison spoke of the moral evils of slavery, he felt that dissolving the Union over the matter was a much greater evil. In a speech at the Virginia ratifying convention, Madison stated, "Great as the evil is, a dismemberment of the union would be worse. If those states should disunite from the other states, not for indulging them in the temporary continuance of this traffic, they might solicit and obtain

[86] James Madison, Letter to Robert J. Evans, June 15, 1819, printed in "James Madison's Attitude Toward the Negro," *The Journal of Negro History* 6:1, (Jan., 1921): 79.

aid from foreign powers."[87] Thus, the problem of slavery for Madison was a seemingly irreconcilable issue. He recognized the moral harm of slavery but was not able to find a way to abolish slavery without violating economic interests and endangering the Union.

Madison's biographers conclude that slavery weighed heavily on Madison's mind. McCoy wrote "The dilemma of slavery undid him."[88] Historian Scott Kester wrote, "The issue of slavery haunted James Madison. Liberty and justice were high on his list of concerns, so how, in a government of the people, could some people own other people? … Madison himself owned many slaves, about one hundred at the time of his death, and the dilemma probably tormented him."[89] Both McCoy and Kester offer sympathetic interpretations of Madison's dilemma – he was a product of his Virginia upbringing, dedicated to the Union, and mindful of the economic benefits of slavery. Yet he understood that the institution was contrary to the very freedoms he authored in the Constitution and the Bill of Rights. The most honest and dispassionate assessment of Madison's legacy comes from Sidney Howard Gay who was an American journalist and abolitionist. Gay lived from 1814 to 1888, and thus was a late contemporary of Madison but was also able to write about Madison's views with some hindsight. In summing up Madison's legacy, Gay wrote, "Madison's responsibility for this result was that of every other delegate – no more and no less. Neither he nor they, whether more or less opposed to slavery, saw in it a system so subversive of the rights of man that no just government

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[87] James Madison, "Slave Trade and Slaveholders' Rights," June 17, 1788, in the Virginia ratifying convention, Papers of James Madison Vol. 11 (7 March 1788-1 March 1789) (U Press of Virginia, 1977): 150-151.

[88] Drew R. McCoy, "The Last of the Fathers: James Madison and the Republican Legacy," [Cambridge University Press, 1989]: 252.

[89] Scott J. Kester, "The Haunted Philsophe: James Madison, Republicanism, and Slavery," [Lexington Books, Lanham, Maryland, 2008]: 99.

should tolerate it."[90] Gay further concluded, "Upon the subject of slavery he thought much and wrote much and always earnestly and humanely. How to get rid of it was a problem which he never resolved to his own satisfaction. Though it was one he always longed to see through, it never occurred to him that the way to abolish slavery was – to abolish it."[91] Gay seems to provide a fair assessment – Madison was indeed a product of his times and did treat his own slaves well. Yet despite his own better moral judgment, he did not take the step of rectifying his actions by freeing his slaves nor did he call for the outright abolishment of slavery. Madison was not able to truly reconcile the slave's dual status as both person and property.

While James Madison is known as the Father of the Constitution and the Bill of Rights, Thomas Jefferson is known as the Father of the Declaration of Independence. However, Jefferson did not believe in a Declaration of Independence for all humans – slaves were decidedly not included within the persons for whom the Declaration was written, and he did not include blacks within his words, "all men are created equal." Jefferson, like many politicians and scholars of his age, deeply questioned whether the word "men" in the Declaration just like "person" in the Constitution included blacks. It was not obvious that it did. Similar to Madison, many of Jefferson's journals speak of the evil of slavery. At the same time, as a plantation owner, he owned many slaves and refused to free them. As Madison's biography illustrated, reluctance to free one's own slaves was not uncommon among the Founders, especially those from the South.

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[90] Sidney Howard Gay, *James Madison*, [Houghton Mifflin and Company, New York, 1884]: 108.

[91] Sidney Howard Gay, *James Madison*, [Houghton Mifflin and Company, New York, 1884]: 320-321.

However, Jefferson's views on slavery go beyond those of Madison revealing deeply entrenched racial prejudices.

Jefferson's position on slavery can be explained by his conception of race and national identity. Jefferson's deeply entrenched racist theories of black inferiority allowed him to view Africans as a separate people. His conception of the American nation did not provide space for an inclusive national identity that included blacks. In the "Great Chain of Being" Jefferson placed blacks next to the orangutan.[92] Further, Jefferson's boundaries were entirely based upon the color of one's skin. He believed that European immigrants could be properly socialized and become a part of the population without "blot in our country" while natural boundaries existed between whites and blacks that would forever prevent their integration.[93] Instead, he favored sending blacks to Africa where they would form their own nation.

While the American Revolution was fought in the name of self-determination for all peoples, blacks were not included in this "people." When explaining his plan for returning blacks to Africa, Jefferson proved that his primary goal was not providing justice for enslaved Africans as individuals. He wrote that to separate a black mother from her infant was "straining at a gnat."[94] Instead, he was preoccupied with preserving the racial purity and the associated national identity of his beloved Virginia and the new nation. Onuf writes, "For Jefferson, all the people *in* Virginia did not constitute the

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[92] Peter Onuf, "To Declare them a Free and Independent People: Race Slavery and National Identity in Jefferson's Thought" *Journal of the Early Republic,* 18, no. 1 (1998): 25.

[93] Peter Onuf, "To Declare them a Free and Independent People: Race Slavery and National Identity in Jefferson's Thought" *Journal of the Early Republic,* 18, no. 1 (1998): 23.

[94] Peter Onuf, "To Declare them a Free and Independent People: Race Slavery and National Identity in Jefferson's Thought" *Journal of the Early Republic,* 18, no. 1 (1998): 33.

people *of* Virginia."[95] Jefferson's attitude was an example of failing to bestow personhood based on Dennett's third condition which is that persons are acknowledged to be persons by others. Because Jefferson and other prominent politicians did not view slaves as part of the "people" of the new nation, they did not feel obligated to bestow the rights and privileges of persons included in the nation.

All the Founders felt the tension Jefferson felt as they struggled to create a national identity for the fledgling country. However, in creating a national identity, Jefferson purposefully excluded slaves and free blacks from the concept of the American people. As property rather than persons, these human beings were not acknowledged. Legal scholar Rogers Smith argues that the most important task for the Founders was to create a civic myth that would unite disparate groups of white settlers. A sense of legitimacy was needed in the new nation, and political elites sought to foster this legitimacy by creating a new and unique civic identity for the American nation. Most of the colonists saw themselves as British subjects, and most believed that only British subjects with certain ethnic, religious, and class traits were entitled to political privileges. However, the Founders needed to go beyond the sense of British identity if the new nation were to survive as a united republic. Smith states, "Beginning with political and religious views of themselves as bearers the 'famous English liberty' they increasingly argued that Americans were a superior new breed, and possibly mankind's 'redeemer nation.' The result was a complex conception of American nationality within which the colonist's seemed for a time miraculously to cohere."[96]

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[95] Peter Onuf, "To Declare them a Free and Independent People: Race Slavery and National Identity in Jefferson's Thought" *Journal of the Early Republic,* 18, no. 1 (1998): 27.

[96] Rogers Smith, *Civic Ideals*, [Hartford, CT: Yale University Press, 1997]: 71.

Knowing that many non-British immigrants from other European countries had settled in the America and forming a cohesive political society might prove difficult, the Founders went even further to argue that America had the best of all European nations and formed a brotherhood of Christians. Thomas Paine encouraged the colonists to unite in their grievances against Great Britain and realize that the colonists formed a new people in the new land. In his influential pamphlets *Common Sense* Paine wrote, "Europe, and not England, is the parent country of America. This new world hath been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. … [W]e claim brotherhood with every European Christian, and triumph in the generosity of the sentiment."[97] Such strong admonishments were needed because the conception of unity and an American people was fragile. Personal attachments to religion, native ties to the home countries of Europe, and even local ties to particular states or region were beloved.

This new identity that Founders were trying to forge excluded women and Catholics from the body politic. Furthermore, this identity absolutely excluded Africans. While the colonists came from various European countries and had different backgrounds, they knew what they were not – they were not black. Higginbotham writes, "So, trapped between the very real memory of the limitations of the Old World and still unfulfilled hope of the possibilities of the New World, the white colonists may not have understood at the time who and what they were as a people. They were, however, at least

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[97] Thomas Paine, *Common Sense*, [Forgotten Books.Org, 2008, originally published in 1776]: 24.

able to say who and what they were not: they were not blacks; they were not inferior."[98] Thus, skin color came to represent a distinguishing and uniting factor. The African was the "other" from whom the superior race could distinguish itself. The African slave was used to unite the white Europeans and enable political cohesion. When the Founders wrote "We the People," most were not including Africans in any sense. Thus, the early history of the Nation reflects the exclusive meaning of the words "people" and "persons." Politically, "We the People" was significant because it was interpreted to absolutely exclude a large sector of humans. Judicially, "persons" is significant because slaves were largely excluded as legal persons. This brief analysis of the historical events leading to the establishment of the Constitution provides necessary background for understanding the inegalitarian origins of America's founding document.

Constitutional Origins

The Constitution provided the foundation for American law, and thus the courts relied on this document to facilitate slave law. However, the Constitution is vague in its references to personhood and slaves. The Constitution uses the word "person" twenty-two times but never uses the word "slave" or "slavery." During the Constitutional Convention, slavery was already a point of moral contention. Thus, the Constitution did not use the word "slave" or "slavery" because the authors were reluctant to tarnish the great document with a word that many of the Founders believed represented an evil institution.[99] James Madison commented, "They had scruples against admitting the term

[98] A. Leon Higginbotham Jr. *Shades Of Freedom: Racial Politics And Presumptions Of The American Legal Process,* [New York: Oxford University Press, 1996]: 12.

[99] A. Leon Higginbotham Jr. *Shades Of Freedom: Racial Politics And Presumptions Of The American Legal Process,* [New York: Oxford University Press, 1996]: 14.

'Slaves' into the Instrument. Hence the descriptive phrase 'migration or importation of persons;' the term migration allowing those who were scrupulous of acknowledging expressly a property in human beings, to view *imported* persons as a species of emigrants."[100]

Slavery is referenced in several key areas of the Constitution, and each instance, slaves are specifically referred to as "persons." However, although the Founders used the word "person," this did not necessarily mean that they chose the word "person" to indicate that the slave enjoyed rights and freedoms. This is clearly evidenced in the fact that each time the word "person" is used in reference to a slave, the word is carefully qualified with a preceding "other" or "such." Qualifying adjectives conveyed the limiting meaning of "persons" in this context and implied a vague enough reference to slavery that the word "person" did not sully the Constitution.

The first reference to slavery is the Three-Fifths Clause, which dealt specifically with slaves within the topic of representation. This was a highly contentious issue during the Convention because if the South were allowed to count their slaves for representation purposes, the population of the Southern states would rival that of the North giving the South much greater power in the federal government. Thus, ironically, in this situation it behooved the South to treat slaves as persons. Some Southerners argued that a government instituted to protect property should account for the value of slaves by allowing slaves to be counted for representation. As a measure of wealth, the slave was

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[100] A. Leon Higginbotham Jr. *Shades Of Freedom: Racial Politics And Presumptions Of The American Legal Process,* [New York: Oxford University Press, 1996]: 70.

extremely valuable.[101] Of course, Northern delegates would not agree to a measure that would significantly weaken their power. Again, ironically in this situation, many North delegates who abhorred slavery argued that slaves were simply property and not persons. William Paterson of New Jersey asserted "Negroes are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, and like other property entirely at the will of the master."[102] In order to pacify both camps, the Three-Fifths Clause was agreed upon.

Under this clause, slaves were referred to as "other" persons and were to be counted as a three-fifths fraction of a "legitimate" person. Although slaves were not considered to be a literal 3/5 fraction of a white man, the qualifying word "other" signifies that the Founders did not consider slaves as "persons" in the full sense of the word. Although some Southern delegates wanted to include slaves for purposes of representation, other Southern delegates saw the potential effects of allowing slaves to be counted as persons for certain circumstances. George Mason of Virginia did not agree because he could not "regard them as equal to freemen and could not vote for them as such."[103] Mason recognized the confusing nature of the dual person/property status and further understood that by allowing slaves to be counted as "persons" for representation, a Pandora's Box would be opened in which slaves could be considered for all rights and privileges accorded "persons." Thus, although Mason was from a slave state, he argued

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[101] Howard A. Ohline, "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *William and Mary Quarterly* 28, no. 4 (1971).

[102] Quoted in A. Leon Higginbotham Jr. *Shades Of Freedom: Racial Politics And Presumptions Of The American Legal Process,* [New York: Oxford University Press, 1996]: xxiv.

[103] Howard A. Ohline, "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *William and Mary Quarterly* 28, no. 4 (1971): 578.

against slaves being classified as persons for representation. The Three-Fifths Clause in its unspoken acceptance of slavery, confirmed the status of the slave as property.

Article 1, Section 9, Clause 1, often called the Migration or Importation Clause, expressly allowed the importation of slaves until 1808. The clause does not use the word "slave" but instead refers to "such persons." Again, the qualifying word "such" clearly separates slaves from the "full persons" within the law. The clause, which was a compromise between pro and anti slavery advocates, allowed the slave trade to continue but provided a potential twenty-year moratorium on the practice. Congress eventually passed a law outlawing the slave trade that became effective on January 1, 1808. Despite this, by 1808, slaves were naturally reproducing at high enough rates that further importation was not necessary to sustain the industry.

The Fugitive Slave Clause is the last explicit mention of slavery in the Constitution. This clause requires states to return escapees to their original state and master. Interestingly, this clause received very little debate in the convention. Passed without contention, it would prove to be highly problematic when states enforced the law. Although in the text of the Constitution the slave is referred to as a person, the clause firmly cemented the slave's status as the property of the master because it mandated that when an owner lost his slave property, his property must be restored.

These three clauses provided the national legal foundation for the laws of slavery. It established that the members of the Constitutional Convention formally sanctioned slavery and considered slaves to be "other" persons who were not bearers of rights and duties. It also established that the Founders were ready to compromise the concept that all men are created equal. General Charles Cotesworth Pinkney, a delegate from South

Carolina and a strong supporter of slavery, summarized the Constitution's stance on slavery saying, "In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad."[104] Indeed, the Constitution did not explicitly mention slavery, but it did give the newly formed government's stamp of approval to stripping some humans of personhood and relegating them to property. Although the first words of the Constitution are "We the *People*" slaves were not considered to be legal "persons" protected under the Constitution, nor were they part of the political "people" who comprised the American nation.

Although slavery was officially sanctioned in the Constitution, the Framers deliberately left the details of slave law unclear. Judges trying to decipher the Constitution's vague references to the slave's place within the law faced a difficult challenge. There was no formal federal law of slavery; indeed, the Constitution even refused to use the words "slave" or "slavery." Instead, slavery was seen as a state-controlled issue. Therefore, judges in each state were largely on their own to create a series of precedents that would serve as a codified slave law. The result was that each state had its own system of slave law with literally thousands of cases concerning slavery throughout the Nation.[105]

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[104] Charles Cotesworth Pinkney, "Speech in South Carolina House of Representatives on January 17, 1788," Edited by Max Farrand, [The Records of the Federal Convention of 1787, 1911]: volume 3, available from http://www.consource.org/index.asp?bid=582&documentid=71560 accessed April 5, 2010.

[105] Wahl found over 11,000 federal and state cases concerning slavery in appellate courts alone. Jenny Wahl, "American Slavery and the Path of Law," *Social Science History,* 20 no. 2, (1996).

ANALYSIS OF CASES

This section provides an analysis of some of the influential cases concerning slavery and personhood. There are thousands of state, district, and federal cases that pertain to slavery and the implications for personhood. An attempt to analyze all of these cases in detail would be too cumbersome a task for this study. Instead, after reviewing hundreds of these cases, I have selected a sampling of cases from colonial time to the start of the Civil War to analyze. The cases I chose are influential cases that set precedents for other courts and specifically speak to the issue of personhood for slaves. These carefully selected cases reveal the ways in which slaves were both denied and granted personhood under the law depending upon the circumstances of the particular case. This sampling of statutes and cases reveals patterns in the ways that slaves were either denied personhood or conceptualized as persons.

In order to reconcile the slave as both human and property, the states needed a unique legal system capable of adjudicating this dual status. As will be seen, in many cases slaves were governed by the same policies as cattle and horses. However, in some cases the slave's humanity was taken into account as the slave's ability to reason and learn were seen as value adding qualities. In most cases, the slave was treated as property and the slave's legal voice was that of his master. The notable exception was within criminal law. When a slave was accused of a criminal offense, his legal personhood was restored in order for the slave to be held accountable for his crimes. Beginning with selected cases from colonial law, these patterns begin to emerge.

Colonial Law

The process of creating a unique legal system to reconcile the status of the slave began before the construction of the Constitution as colonial lawmakers struggled to design a judicial code for slavery. Colonists had very few precedents from English Common Law upon which to rely. The legal system that developed to encompass slaves became extremely complicated as justices tried to reconcile natural law with positive law and economic concerns with social concerns. Therefore, in the very early courts of the colonies, justices began the task of creating a unique system of law that could incorporate both the person and property aspects of slaves. The colonial era saw the emergence of a slave society in America and as social patterns hardened, behavior and laws that were at first tentative and experimental became routine.

In comparison with Spain and Portugal, the English colonies entered the slave trade at a relatively late date. Consequently, laws and cases pertaining to slavery were very few and scattered. From 1619 to 1662, the colonies did not have a clearly articulated rational for black inferiority, but evidence of racial bias existed. Virginia's early cases provide evidence that race was a qualifying factor in admitting evidence. According to Higginbotham, the first case involving a black person in a judicial proceeding was *Re Tuchinge* in 1624. This case concerned Symon Tuchinge who was accused of seizing a Spanish ship. The case considered whether a black man christened in England named Phillip could testify against Tuchinge. The opinion specifically mentioned Phillip's race and religion because his race and religion were material in determining if his testimony would be accepted. Higginbotham argues that referencing Phillip's race was a sign that Virginia had begun the process of institutionalizing black

inferiority.[106] Higginbotham references another case, *Re Davis* (1630), which provides more concrete evidence that colonial Virginia was institutionalizing black inferiority. In this case, Hugh Davis, a white man, was to be "soundly whipt before an assembly of negroes and others for abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro."[107] His public offense was interacting with someone who was inferior and even less than human. His act went beyond fornication to bestiality because the Negro was not considered a human equal. Davis's punishment was public humiliation for the moral and social sin of debasing himself.[108]

In comparison with Virginia, the largely Quaker and German Mennonite population in Pennsylvania experienced a relatively mild system of slavery. In 1688, the Mennonites issued an official protest against slavery revealing a racially inclusive ideology that was unique for that time. The protest stated, "now though they are black, we cannot conceive there is more liberty to have them slaves, as it is to have other white ones. There is a saying that we should do to all men like we will be done ourselves; making no difference of what generation, descent, or color they are."[109] Within the courts, race was not a significant factor in determining judicial procedures such as allowing testimony and trial by jury, nor was race significant in determining punishment for crime. However, research by historian Edward Raymond Turner shows that after

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[106] Higginbotham does not provide the full citation for *Re Tuchinge.* A. Leon Higginbotham Jr. *Shades Of Freedom: Racial Politics And Presumptions Of The American Legal Process,* [New York: Oxford University Press, 1996]: 19-20.

[107] Case number not provided. *Laws of Virginia,* (New York: Henry's Statutes, 1823): 146.

[108] A. Leon Higginbotham Jr. *Shades Of Freedom: Racial Politics And Presumptions Of The American Legal Process,* [New York: Oxford University Press, 1996]: 20.

[109] A. Leon Higginbotham Jr. *In the Matter of Color: Race and the American Legal Process: The Colonial Period.* [Oxford: Oxford University Press, 1978]: 267.

1700, Pennsylvania court documents contain racial disparities in sentencing and level of crime. For instance, in 1700, Pennsylvania passed a law which required blacks to be tried in a special court without juries. A 1726 law forbade the intermarriage of whites and blacks and imposed stiff fines and penalties. Pennsylvania law also tended to impose more severe punishments on blacks who were subject to hanging and branding as opposed to whites who were generally punished with fines or imprisonment for similar crimes.[110] Despite these disparities, Pennsylvania did not have a large slave system and where slavery did exist, masters were prevented from physically attacking their slaves.

By the beginning of the eighteenth century, more and more colonists from various European countries were pouring into the new land. At the same time, slavery was becoming firmly established within the colonies. As second generation masters and slaves were born, slavery became routine instead of tentative, and laws of slavery were beginning to form as precedents. As whites began to form their identity within the new land, second generation slaves were already losing their ties to Africa. Their language and religion were conforming to white society. These slaves were no longer "Africans" but were not part of colonial political society.[111] The process of social alienation, which was instrumental in denying their personhood, was beginning.

After the British won the Anglo-Dutch war in 1667, the British colonies began to enter the slave trade with vigor. Between 1680 and 1770, the estimated proportion of blacks increased from seven percent to forty-four percent in of the total population of Virginia and from seventeen percent to sixty-one percent of the population in South

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[110] Edward Raymond Turner, "Slavery in Colonial Pennsylvania," *The Pennsylvania Magazine of History and Biography,* 35:2 (1911): 145-146.

[111] Peter Kolchin, *American Slavery 1619-1877,* [New York: Hill and Wang, 1993]: 43.

Carolina. In the South in total, blacks increased from six percent of the population to forty percent.[112] Higginbotham argues that from 1662 to 1830 the legal process became defined and ruthlessly enforced racial oppression as the rationale for slavery. This is evidenced in a 1669 Virginia statute that provided that a slave was entirely the master's property, and the master had complete power to handle his own estate to the point that he could kill his own slaves. "An Act about the casuall killings of slaves: 'If a slave resist his master … and by the extremity of the correction should chance to die, that his death shall not be accepted Felony, but the master be acquit from molestation, since it cannot be presumed that the propensed malice should induce any man to destroy his own estate.'"[113] Virginians could beat, mutilate, and kill their slaves without criminal offense because slaves were not persons and thus their killing was not murder.

Virginia's Act of 1680 further cemented the complete submission to the economic system of chattel slavery. This statute granted the master complete domination over the slave. The Virginia Act of 1680 prohibited slaves from gathering for feasts or burials, carrying arms, or leaving the plantation without a certificate of permission from the master. The Act states, "If he absent himself or lie out of his master's service and resist lawful apprehension, he may be killed."[114] In Patterson's terms, the process of transforming the slave into a completely alienated and excluded being, a non-person, was

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[112] Peter Kolchin, *American Slavery 1619-1877,* [New York: Hill and Wang, 1993]: 240.

[113] October 1669 - 21st Charles II, 2:270, Act I. Found in William Waller Hening**,** *The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature in the Year 1619*, [New York: R & W & G. Bartow, 1823]: Volume I.

[114] A. Leon Higginbotham Jr. *In the Matter of Color: Race and the American Legal Process: The Colonial Period.* [Oxford: Oxford University Press, 1978]: 36.

complete. In Virginia, the slave was simply a tool such as a plow horse. The slave was a Kantian means rather than an end.

In New York, the transformation of the African to mere chattel did not occur as quickly. When the Dutch controlled the colony of New Netherlands, blacks could own property, bear arms, and even testify in courts. However, when the land was surrendered to England and the government entrusted to the Duke of York whose finances were closely tied to the Royal African Company, the slave trade was encouraged. By 1702, the slave had been reduced to chattel and the master could treat the slave in any manner without judicial or legislative scrutiny. Slaves were purely property in commercial transactions for bills of sale, mortgages, and credit. After the Revolutionary War, New York officially freed all slaves, but blacks could not vote or hold public office.

In Massachusetts, even though the plantation system did not exist, slaves were identified as chattel in the colony's tax assessments. Until the Revolutionary War, slaves were considered to be property of the same sort as horses, cows, and swine. The Massachusetts Constitution ratified in 1780 allowed slavery and required that slaves be taxed despite strong opposition from the town of Westminster where white citizens protested that the constitution was objectionable because it deprived a part of the human race of their natural rights. This early abolitionist protest found its way into the courts. In *Commonwealth v. Jennison* (Massachusetts, 1781, unreported) the court found that slave Quack Walker was a free man. Chief Justice Cushing declared that the new Massachusetts Constitution granted rights incompatible with the institution of slavery. Cushing wrote, "I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature,

unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract."[115]

South Carolina began with a large population of migrants from the West Indian colonies where slavery was prevalent. Consequently, society in South Carolina was unhesitatingly accepting of slavery without moral or legal argument. Higginbotham reports that there was not a single surviving judicial case challenging the validity of slavery. Furthermore, the plantation economy producing rice encouraged large numbers of slaves to the point that by 1708 a black majority existed in South Carolina. In 1712, an official slave code provided an official statement of the necessity of slavery. Slavery was justified by asserting that Negroes are barbarous, wild, savage and prone to inhumanity. Further, they were unqualified to be governed by laws and customs. Thus, the Negro must know his place as chattel. He must wear certain clothes and abide by curfews. Punishment for runaway slaves included branding and death. South Carolina's judicial system accordingly protected the economic interests of the master allowing the master wide discretion to regulate and punish his slaves. Maiming a slave was the same level of crime as stealing chickens, and was a lesser crime than burning houses.[116] In 1740, South Carolina code stated, "If any slave who shall be out of the house or plantation …shall refuse to submit to undergo the examination of any white person, it shall be lawful for any such white person to pursue, apprehend, and moderately correct such slave; and if such slave shall assault and strike such white person, such slave may be lawfully

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[115] Chief Justice Cushing's verdict comes from his personal notes which were submitted by Chief Justice Gray to the Massachusetts Historical Society in 1783. Procedures of the Massachusetts Historical Society 1783-1785, pages 292-295, provided by LexisNexis, available at http://www.lexisnexis.com/academic/1univ/hist/aa/aas_case.asp, accessed May 20, 2010.

[116] A. Leon Higginbotham Jr. *In the Matter of Color: Race and the American Legal Process: The Colonial Period.* [Oxford: Oxford University Press, 1978]: 181.

killed."[117] The slave's status as property was affirmed in that taxes on slaves were categorized with liquor and other merchandise.

The colony of Georgia began with a ban against slavery. James Oglethorpe, Georgia's best-known trustee, said that slavery was against the Gospel and the fundamental law of England. However, Oglethorpe's reasoning was not purely humanitarian as Oglethorpe himself owned slaves on his land in South Carolina and was an officer of the Royal African Company. Oglethorpe feared conflict with the English poor for whom the colony of Georgia was originally created. If poor whites were forced to perform the same menial tasks as black slaves, social division would arise. Again, whites knew who they were not – they were not black slaves. By disallowing slavery, Oglethorpe hoped to prevent conflict between whites and blacks. This was initially economically feasible because the first Georgian crops were silk and grapes that did not require slaves. However, by 1750, plantation crops were established and slavery was allowed. Within a few years, slaves were almost half the of the colony's population.[118] Georgia's slave code developed to be as harsh as anywhere else in the South.

Colonial laws set the groundwork for the body of cases and precedents that formed the slave laws of the South. These laws firmly established the slave's status as an outsider who did not belong to the community of persons. By upholding the slave's status as chattel property, these laws created the basis for a system of laws that denied the personhood of the slave in order to promote the financial profits of the slave economy. The colonial period set the stage for increasingly harsh court rulings denying the

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[117] Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*, [New York: Garland Publishing, 1992]: 65.

[118] Peter Kolchin, *American Slavery 1619-1877,* [New York: Hill and Wang, 1993]: 26.

personhood of slaves during the antebellum era. From 1800 to the 1860s, the monetary value of slaves rose sharply. Correspondingly, masters became increasingly protective of their property. The master class maintained their political dominance in southern politics and protected their property rights. The southern judicial system followed suit by protecting the master class and abandoning the personhood of slaves.

Antebellum Law

After the Revolutionary War, slavery was gradually abolished in the North and became a way of life in the South. During this antebellum period, slave law in the South was firmly established. Southern justices struggled to create a system of slave law based on the economics of slaves as property combined with the irrefutable humanity of slaves that did not easily fit within a purely economic system. The solution in the South was to create a completely separate slave law. A settled slave law enabled Southern judges to simplify their decisions and gave them precedents upon which to rely.

Judges who created this body of slave law sought to create a law of slavery that was compatible with both natural and positive law.[119] Mansfield's opinion in *Somerset* relied heavily on natural law when he decreed that slavery was too odious to be allowed within England. However, Mansfield did acknowledge that positive law could allow slavery even when the practice of slavery violated values of freedom and equality. Southern justices, who often personally disagreed with slavery, justified their decisions by claiming that positivism prevented the interjection of their beliefs. Many state laws in

[119] Robert M. Cover, *Justice Accused: Antislavery and The Legal Process.* [New Haven, CT: Yale University Press, 1975].

the South explicitly sanctioned slavery. Furthermore, the newly ratified Constitution itself referred to the institution.

By clinging to this justification, Southern justices were able to uphold the abhorrent practices of slavery under a Constitution that claimed liberty and freedom. In the face of antislavery demand, the justice was able to respond, "I cannot" thereby attempting to placate antislavery protestors while still ruling in favor of Southern plantation owners. The Constitution itself provided a remarkably powerful symbol of judicial fidelity to positive law. Justices were able to cite the Constitution as requiring the separation of powers and support of the Constitutional compromise allowing slavery. The separation of powers argument allowed justices to contend that slavery was an issue for the people and the legislatures. If legislative policies, as supported by the electorate, maintained slavery then the judicial branch was powerless to change the law. Further, as was illustrated in the discussion of the Constitution, slavery was specifically acknowledged in the Three-Fifths Clause, the Migration or Importation Clause, and the Fugitive Slave Clause. The Constitution allowed slavery in order to preserve the stability of the union with the southern states. Justices claimed that they were bound to uphold this Constitutional allowance and cited their oath to support the Constitution. Thus, justices did not choose between liberty and slavery. Instead, they chose between liberty and federalism; liberty and the limits on judicial function; liberty and fidelity to public trust; and liberty and support of the social compact in the Constitution.[120]

Because states had the power to regulate their own slave systems, each state's judicial system codified their own slave law. Subsequently, there were thousands of state

[120] Robert M. Cover, *Justice Accused: Antislavery and The Legal Process.* [New Haven, CT: Yale University Press, 1975]: 198.

level cases that concerned the dual status of slave as both property and person. A survey of some of the more interesting cases across a number of different topics within slave law reveals the diversity of the cases across the states and the consistency in which justices affirmed the slave's status as primarily property. Rather than present the cases in a strictly chronological order or by court hierarchy, it is more useful to present the cases organized by topic. This allows a clearer portrayal the patterns and precedents used to adjudicate the personhood of slaves versus their status as property. Each of the topics within the survey of important cases portrays a different aspect of the personhood issue. Within each topic, the cases are presented chronologically to demonstrate the flow of decision making within the Southern states.

To begin this survey, it is helpful to review a few cases that illustrate the conceptual difficulties of reconciling natural law with positive law and the law of the market with slave society. Then the question of the personhood of a slave is addressed directly in various opinions. This leads to a review of cases concerning the murder and injury of a slave. The judicial system's handling of such cases reveals the court's proclivity to view the death of a slave as loss of property to the master. Finally, criminal cases will be discussed. In criminal cases, the slave was often considered to be a person so that the court could hold the slave liable for his own criminal actions. These cases confirm the importance of the slave's dual status as both person and property.

Natural versus Positive Law

The struggle justices faced in reconciling natural law, which forbids human chattel, and positive law, which allows systems of chattel slavery, is clearly seen in a series of cases involving foreign ships carrying slaves. In 1822, a French ship

transporting slaves was seized. The United States brought suit against France claiming libel for violating the slave trade laws of the United States and the general laws of nations. The case reached Justice Joseph Story on the federal circuit court of Massachusetts. Because France did not permit the slave trade, Justice Story determined that the ship was a pirate. Therefore, the seizure was legitimate and the slaves on board were returned to the consular of France to be dealt with "according to his own sense of duty and right" *United States v. La Jeune Eugenie* 26 Fed. Case 832, 851 (1832). In his opinion, Justice Story wrote his personal thoughts on the practice of slavery. "It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted" *United States v. La Jeune Eugenie* 26 Fed. Case 832, 845 (1832).

However, three years later, when another ship carrying slaves was captured hovering off the U.S. coast, a different decision was reached. This case reached Chief Justice Marshal at the Supreme Court who ordered that the Africans be returned to their owners. In *The Antelope* 23 U.S. 66 (1825), the slaves were claimed by Spanish and Portuguese owners. Both Spain and Portugal permitted the slave trade and therefore international law dictated that the slaves be returned. Chief Justice Marshall publicly agonized over his aversion to slavery, but felt compelled to uphold the property rights of nations who approved slavery. He despaired that although slavery was contrary to the laws of nature, it was accepted by the laws of nations. He wrote,

> In examining claims of this momentous importance; claims in which the sacred rights of liberty and property come in conflict with each other; which have drawn from the bar a degree of talent and of eloquence, worthy of the questions that have been discussed; this Court must not yield

> to feelings which might seduce it from the path of duty, and must obey the mandate of the law (23 U.S. 66, 114).

Marshall's opinion was reminiscent of Lord Mansfield's reasoning in *Somerset*. However, unlike the *Somerset* decision, Marshall did not free the slaves on board the Antelope.

Both *La Jeune Eugenie* and *The Antelope* illustrate the personal conflicts the justices felt when trying to follow their own convictions against slavery in the face of positive law that permitted slavery. Because France did not allow the slave trade, Justice Story was able to make a decision that freed the slaves and was able to pen dicta that clearly stated his opinion on the subject. Chief Justice Marshall was not as fortunate. In this case, the positive law of both Spain and Portugal allowed slavery, and Marshall felt compelled to uphold their laws. He claimed that he had a duty to obey the law despite feelings to the contrary. What emerged from *The Antelop*e and *La Jeune Eugenie* was the conclusion that natural law is a source for international law but was subordinate to the constitutions, statutes, and practices of nations.

Sixteen years later, another case involving a slave ship reached the Supreme Court. *The Amistad* 40 U.S. 518 (1841) presented a unique situation in which the African slaves aboard the ship mutinied against their captain. In many philosophical discussions, the ship was considered a microcosm of society and a mutiny on a ship isolated the abstract right of revolution. In *The Amistad,* the Court was faced with the actual situation. During the ship's journey from Africa to Cuba, the Africans managed to overtake the captain and take control of the ship with the intention of returning to Africa. Two Spanish slave holders claimed possession of the slaves. The Africans claimed that they were born free as natives of Africa and unlawfully kidnapped and pirated as slaves.

It was not disputed that slaves could be held as property both within Spain and the United States and therefore were subject to restoration as property. The laws of slaves as property were carefully and irrefutably stated. However, this case involved something different. Various treaties with Spain formally abolished the African slave trade. Therefore, as kidnapped Africans, the slaves on board the ship claimed that they were entitled to freedom.

This time Justice Story was writing the opinion of the Supreme Court and was able to express his anti-slavery sentiments. He wrote, "It is also a most important consideration in the present case, which ought not to be lost sight of, that, supposing these African Negroes not to be slaves, but kidnapped, and free Negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects." The Court allowed the slaves to be returned to their homeland in Africa. In the absence of a positive law against mutiny, natural law controlled and the Africans were not accused of any crime. Further, as victims of kidnapping, they were not subject to a positive Spanish or international law that allowed slavery. Therefore, Justice Story was able to rule in favor of the African slaves. The supremacy of positive law was affirmed, but the appeal to natural law as the residual was also upheld.

The Market Economy versus a Paternalistic Society

Just as slave law posed a seemingly irreconcilable dichotomy between natural and positive law, the issue of slavery also created a conflict between the status of the slave as fungible property and his status as a human. Southern judges wrestled to create a code of

slave law that accommodated the competing pressures posed by the economic designation of the slave as property and the moral concerns inherent to the slave who was a human being. Legal historian Mark Tushnet's argues that Southern judges wrestled to accommodate the prevailing bourgeois economic system with the paternalistic social system of slavery. His compelling argument is worth reviewing because it provides insight into how Southern judges treated human property.

Tushnet contends that the bourgeois economic system, which was the accepted doctrine of the North, was based on employer/employee relations in a capitalistic system. In this system, the employer is unconcerned with the personal life of the employee except to the extent that the personal life affects the employee's productivity. The value of the employee is quantifiable in terms of labor units and all other aspects of the employee's life are inconsequential to the employer. On the other hand, the involvement of a master in the lives of his slaves is total because he is responsible not only for the productivity of slaves but for their wellbeing because problems in the personal lives of slaves could lead to rebellion.[121] Further, as Patterson describes, the slave was stripped of all identity and was natally alienated. Although the slave could be conceived as a person, he was not part of the "people" within the community. Thus, a slave came to be integrated through the master. His only claim to personhood and status came from his master.[122] Although the master used the slave to produce wealth, the relations within the society were social as well as economic. Transactions between the master and slave took into account all belief, feeling, and sentiment between the two parties. This included production, but also

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[121] Mark V. Tushnet, *The American Law Of Slavery, 1810-1860: Considerations Of Humanity And Interest*, [Princeton: Princeton University Press, 1981] 32-33.

[122] Orlando Patterson, *Slavery and Social Death,* [Cambridge, MA: Harvard University Press, 1985]: 45.

included the entire spectrum of the slave's being including family life and religious activity. The master's domination of the slave could not be reduced to simple market terms.

Thus there is a dichotomy. The capitalistic economic system was individualistic, impersonal, and based strictly on the value of labor. The social system of slavery was paternalistic, intimately personal, and encompassed every aspect of life for the master and slave. Southern justices participated in both of these worlds and accordingly had to reconcile the differences. Cotton produced by the South was traded in the market of the capitalistic system which meant that many issues that arose would involve the market economy. Further judges had to abide by the politics of the federal government which in large part were based on the market economy. At the same time, the reality of the Southern slave system was that it was inextricably bound up with the complete social system of slave society. Interpreting slave law in purely economic terms was impossible. Therefore, Tushnet argues that Southern judges referred to both the property and the humanity of the slave within opinions even though it would seem as though these two designations were not compatible. [123]

As Southern courts were forced to assimilate the social system of slavery with the economic system of law, they also faced a societal dilemma of incorporating a non-person into a body of law designed for persons. Because slaves were primarily seen as the property of the master, the courts used commercial law to decide most cases. While a monetary award for damages generally satisfied concerned parties in most cases, slaves posed a significant issue because they were not completely fungible commodities in this

[123] Mark V. Tushnet, *The American Law Of Slavery, 1810-1860: Considerations Of Humanity And Interest*, [Princeton: Princeton University Press, 1981] 36.

sense. Masters developed sentiments toward their human slaves which made them more valuable in the master's estimation. Further, human qualities such as rational ability and intelligence, which were difficult to measure, altered the economic value of the slave. The economic value of the slave as property was not easily reconciled with the rational ability and sentimentality of the slave as a human. While court opinions rarely stated this dichotomy openly, the conflict can be found in many opinions.

The reality is that the law tended to reflect the will of the most politically coherent and determined faction of the ruling class. Because the master class was politically powerful, their economic interests prevailed and the property of the slave was upheld. Even though many masters recognized the humanity of their slaves, the law's sponsorship of the property value allowed masters to treat their slaves as purely property and completely dehumanize their slaves in practice.[124] Human qualities such as intelligence and rational ability were factored into the property value of the slave rather than being acknowledged as criteria for personhood.

The struggle to reconcile the property aspect of the slave within the law and the humanity of the slave within a slave society is clearly illustrated in *Jourdan v. Patton,* 5 Mart. O.S. 615 (1818) heard by the Supreme Court of Louisiana. In this case, a slave who was owned for many years by the plaintiff was injured and blinded by a slave owned by the defendant. The plaintiff sued for damages: $1,200 for the value of the slave, plus the amount of the medical bill for care already given to the slave, plus $25 a month for maintenance of the slave. The slave was to remain forever in the possession of the plaintiff. The Louisiana Supreme Court held that once the full value of the slave had

[124] Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*, [New York: Garland Publishing, 1992]: X.

been paid, title should pass to the defendant because he had paid for the slave property, and the plaintiff was not entitled to funds for maintaining the slave. This decision emphasized the absolute nature of the property involved. The court opinion stated, "The principles of humanity, which would lead us to suppose that the mistress, whom he had long served, would treat her miserable, blind slave with more kindness than the defendant, to whom the judgment ought to transfer him, cannot be taken into consideration, in deciding this case."[125] Deconstructing this sentence, the Court first acknowledges the issues of sentiment. The mistress would most likely provide the best care for the slave since familiar relations connected them. However, the rules of law (based on economics and not sentiment) precluded familiar relations from having any bearing on the case. As a piece of property, the defendant was entitled to the slave once he had paid the market value. The court thus found that there was no room for sentiment within the law.

In Virginia, Judge Brook also acknowledged the effect that a slave's humanity had on the law and on property values. In *Allen v. Freeland* 24 Va. 170 (1825), Brook wrote, "Slaves are not only property, but they are rational beings, and entitled to the humanity of the Court, when it can be exercised without invading the right of property; and as regards the owner, their value is much enhanced by the mutual attachment of master and slave; a value which cannot enter the calculation of damages by a jury." (24 Va. 170, 178-9) Instead of seeing a conflict between property and sentiment, Judge Brook finds an extra economic value in slaves who possess familiar relations with their master. Traits such as loyalty, good behavior, and proper training enhanced the property

[125] Mark V. Tushnet, The American Law Of Slavery, 1810-1860: Considerations Of Humanity And Interest, [Princeton: Princeton University Press, 1981]: 67.

value of the slave. Brooks recognized that as rational beings, slaves should be treated with humanity. However, this humanity can only be exercised without invading the owner's property right; clearly, for Brooks, the property value is much more important than the slave's humanity.

Another Virginia case, *Randolph v. Randolph* 27 Va. 194 (1828), echoes the importance of human qualities in calculating property value. Judge Cabell wrote, "Slaves are rational beings, and, as such, have moral qualities, which are calculated to render them of peculiar value in the estimation of their masters. … Moreover, slaves are human beings; and therefore, I do not think that even their attachments and feelings are to be disregarded" (27 Va. 194, 202). Judge Green concurred arguing that although a jury cannot adequately quantify the personal attachments between the master and a slave, when a slave is sold, the market value measures the value of the slave.

The human qualities of chattel slaves became an important issue in many cases. As is seen in *Randolph*, placing a monetary value on a slave's character meant that even when a slave was viewed as a person, the property aspect intruded. Judge Nott in South Carolina warned that allowing slave buyers to have a warranty on the slave's moral qualities would be "worse than opening Pandora's Box upon the community" *Smith v. McCall* 12 S.C.L. (1 McCord) 220, 224 (1821). Judge Nott wrote this because if the courts considered the character of a slave, they were in effect admitting that the slave was a person and not simple chattel. Thus, this was the opening of Pandora's Box to allow the slave to be a person in other circumstances. In various cases, witnesses told stories about slaves running away from a cruel master or seeking to join their family members. When testimony explicitly recognized human motivations and intentions, the stories were

often weeded out of court transcripts in fear of giving legal recognition to slaves as moral agents with volition.[126]

The antebellum legal system throughout the states was very careful to ensure that the commodity aspect of the slave was upheld and personhood suppressed. For example, the slave had no "right" to representation through an attorney because the slave had no legal identity or legal personhood.[127] Furthermore, slave abduction was a property crime instead of kidnapping. Kidnapping was legally defined as the unlawful abduction of another person. Because the slave was not legally a person, he could not be kidnapped.[128] The case *Neal v. Farmer* 9 Ga. 555 (1851) heard by the Georgia Supreme Court affirmed that by definition, a slave could have no legal protection for rights and liberties because the slave did not have the status of person. "If it [Common Law] protects the life of the slave, why not his liberty? And if it protects his liberty, then it breaks down, at once the *status* of the slave. …It is absurd to talk about the Common Law being applicable to an institution which it would destroy" (9 Ga. 555, 579). The Georgia Supreme Court essentially ruled that if a slave was granted liberties, this would destroy his status as a non-person, and if a slave were acknowledged as a person, then the institution of slavery would de facto be destroyed. Thus, in an effort to uphold the institution of slavery which was part of Georgia's Common Law, the Georgia Supreme Court denied legal protections, rights, and liberties to slaves.

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[126] Ariela Gross, "Pandora's Box: Slave Character on Trial in the Antebellum Deep South," in *Slavery and the Law*, edited by Paul Finkelman [Lanham, MD: Madison House Publishers, 1996]: 310.

[127] Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*, [New York: Garland Publishing, 1992]: 194.

[128] Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*, [New York: Garland Publishing, 1992]: 124.

Even William Goodell agreed with the Georgia Supreme Court. He argued that a slave, by definition, could not have political rights and liberties. "Not being accounted a person, but a thing, he can have no personal rights to be protected–no rights of reputation or character–no right to education–no rights of conscience–no political capabilities or rights–not even the right of petition, as the Federal Congress (very consistently with its recognition of legal human chattelhood) have affirmed."[129] Of course, Goodell was vehemently against slavery, and therefore he sought an end to slavery so that these human beings could enjoy the rights and liberties that Goodell felt should be guaranteed to all humans. Unfortunately, Goodell's views were not commonly shared among judges in the South. Turning to North Carolina, a case decided five years after *Neal v. Farmer* affirms that slaves had no rights in that state.

In 1856, Judge Nash, presiding on North Carolina's Supreme Court, found that a slave did not have the capacity to sign a promissory note. He opined, "Under our system of laws a slave can make no contract. In the nature of things, he cannot. He is, in contemplation of law, not a person for that purpose. He has no legal capacity to make a contract. He has no legal mind. He is the property of his master" (*Batten v. Faulk*, 49 N.C. 233, 233). This judgment unequivocally stated that a slave was not a person under the law who was able to enjoy rights such entering legal agreements. Instead, Nash unambiguously ruled that a slave was property.

Decided the same year that Judge Nash issued his opinion in North Carolina's Supreme Court the most infamous case denying the personhood of the slave was Justice Taney's U.S. Supreme Court opinion in *Dred Scott v. Sanford* 60 U.S. 393 (1856) in

[129] William Goodell, (1853) *The American Slave Code* [Arno Press & The New York Times, 1969]: 291.

which Taney left no doubt that the slave was property and not a person nor a citizen. This case concerned the slave Dred Scott who sued to win recognition as a free man, a citizen of Missouri, and a citizen of the United States. Scott argued that he gained his freedom when his master took him to the free states of Illinois and Wisconsin for two and four years respectively. The Missouri Court and the US Circuit Court for Missouri both heard the case which in itself was significant because as a slave, Scott did not have the right to sue. In fact, this grant of jurisdiction comprises half of Taney's opinion. Taney wrote, "The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?" (60 U.S. 393, 403) Taney answered no.

In a stunning example of using Dennett's third condition of personhood, which states that "Whether something counts as a person depends in some way on an attitude taken toward it, a stance adopted with respect to it," Taney argued that the community did not recognize or acknowledge slaves in the community of persons and citizens.[130] Because his words explicitly deny the status of personhood and citizen to slaves, Taney's statement, although lengthy, deserves to be quoted.

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons

[130] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177.

> described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them (60 U.S. 393, 404-405).

Although Taney conceded that the states had the power to confer citizenship on whomever it thought proper, the states could not bestow national citizenship under the Constitution on a group of persons who were not embraced in the political family when the Constitution was written. Taney repeatedly uses the word "family" to convey his theme of those included and excluded as citizens. His historical exegesis of the Declaration of Independence revealed that slaves were "beings of an inferior order…justly and lawfully reduced to slavery for his benefit" (60 U.S. 393, 407). Thus, enslaved Africans were not included in the Declaration's preamble "all men are created equal." Taney concludes that the esteemed men who drafted the Declaration chose their words carefully and only considered slaves as property rather than persons or citizens. Taney's further analysis of the Constitution confirmed his argument that slaves were simply property and not part of the people of the United States. Slaves were a means to an end rather than persons. Thus, Taney ruled that blacks could not be citizens in any sense, and the Dred Scott was not free.

Justice Daniel concurred with Taney arguing that it was a fundamental truth that the African race did not belong to the "family of nations" and that all of Europe regarded the African race as "subjects of capture or purchase; as subjects of commerce or traffic; … as property in the strictest sense of the term" (60 U.S. 393, 475). Further, Daniel states

that the African was not deemed a political person in the states or the Federal Government.

In his dissent, Justice Curtis argued that free Africans are citizens and persons, but in doing so, he acknowledged that as long as the binds of slavery apply, the slave is not a person. Justice McLean's dissent argued that slaves are explicitly referred to as "persons" in the Constitution and thus must be considered persons. However, he did not elaborate on his argument in favor of full personhood for slaves, and the much louder arguments of Justice Taney and the majority court against African personhood and citizenship won the day.

The Unfettered Right of a Master to his Property

Dred Scott set forth in no uncertain terms that the law considered the slave to be property rather a person. Considerations pertaining to the slave's humanness were not valid concerns when adjudicating a master's right to his property. In fact, the entire system of slavery rested on the assumption that property rights had primacy in the American legal system and therefore, the master had an unfettered right to treat his property in any manner that he or she desired. This assumption was important in the sometimes thorny cases involved when a slave was abused or murdered by the master.

The murder of slaves was directly related to the personhood of slaves because if considered purely property, a slave was not a person who could be murdered. In a very few cases, a master or other citizen who wantonly killed a slave was convicted of murder. However, in many other cases where masters killed their slaves, the law found that either a lesser crime such as homicide was committed or even that no crime at all was

committed. The master had the power to control and dispose of his property as he saw fit – even to the point of killing his slave. Violence against a slave was not a crime against the person of the slave but was a crime against the property of the slave owner.

One unusual case concerning the killing of a slave in Mississippi gave the impression that the personhood of a slave was sometimes considered. In *State v. Jones* 1 Miss. 83, (1820), the master claimed that he was innocent of murdering his slave because slaves were not persons who could be murdered. The Supreme Court of Mississippi disagreed and reasoned that because a slave was rational and could be convicted of crimes based on his rational ability, then the slave was also a person who could be murdered. The court stated, "By the provisions of our law, a slave may commit murder, and be punished with death; why then is it not murder to kill a slave?...Is not a slave a reasonable creature, is he not a human being, and the meaning of this phrase *reasonable creature* is a human being, for the killing of a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not the slave as much reason as a lunatic, an idiot or an unborn child?" (1 Miss. 83, 85)

Although the Mississippi Supreme Court does not phase its argument in terms of personhood, the court is essentially repeating some of the arguments for personhood presented in Chapter One's literature review. The court is saying that rational creatures should have protection under the law because rational creatures are, in essence, persons. Furthermore, the law protects lunatics, idiots, and unborn children even though they are not rational persons. A slave is at least as reasonable as a lunatic, idiot, or unborn child, and therefore deserves protection even if society does not acknowledge the fact that slaves are rational persons. Furthermore, the court recognized that if the slave was

capable of committing murder as a rational person, then the court must also recognize the murder of a slave as a murder of a person.

This opinion by the Mississippi Supreme Court was progressive among southern courts. However, *State v. Mann* 13 N.C. 263 (1829) decided by North Carolina's Supreme Court gives a more accurate picture of the prevailing reasoning of the time. In most states, the master had virtually complete control over the discipline of his slave property to the point of "disposing" of this property. The most infamous and well-studied case declaring the absolute right of the master over the slave was *State [North Carolina] v. Mann*.[131] In this case, Elizabeth Jones hired out her slave Lydia to John Mann. When Lydia tried to escape from Mann, he shot and wounded Lydia. Mann was charged with assault and battery, and Jones demanded 1200 dollars in damage for the value of the slave and sought to retain possession of the slave from Mann.

When Judge Ruffin wrote the North Carolina's Supreme Court opinion, he first expressed deep remorse over the horrors of slavery claiming that a slave was "doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits" (13 N.C. 263, 266). Although Ruffin expressed his remorse, he found that the law declared that the slave had "no will of his own [and surrendered] his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else that can operate to produce the effect. The power of the master must be absolute to render the submission of the slave perfect" (13 N.C. 263, 266). Further,

[131] For further study of *State v. Mann,* please see Stanley Elkins, *Slavery*, New York: Grosset & Dunlap, 1963; Eugene Genovese, *Roll, Jordan, Roll,* New York: Pantheon Books, 1974; Mark Tushnet, *Slave Law in the American South: State v. Mann in History and Literature,* University Press of Kansas, 2003 as well as Harriet Beecher Stowe's novel *Dred: A Tale of the Great Dismal Swamp*.

Ruffin admonished, "The slave, to remain a slave, must be made sensible, that there is no appeal from his master" (13 N.C. 263, 267). Although Ruffin used the word "person" in his opinion, he by no means meant that the slave was a legal person in the sense of a being with rights and duties. Ruffin's definition of the slave is straight from that Immanuel Kant. While Kant opposed slavery because it subjects a human to the total control of another human and therefore denies personhood, Ruffin accepts the condition of slavery as a sad, but undeniable fact.

Ruffin's opinion demonstrates the dichotomy between the requirements of a market economy and the social system of slavery. Jones sought monetary damages and to retain possession of the slave. If Jones considered slave Lydia to be simply property, she would not want to incur the continued expense to maintaining the article of property. For instance, when damaged equipment constitutes a financial drain on the owner, the owner generally is allowed to abandon the equipment to a junk yard. This would not due for human property. Further, Jones would rather incur expenses herself than allow Mann to retain possession of Lydia which signals that Jones feared that Mann would continue to abuse Lydia. Jones believed that Lydia was more than just an article of property and recognized that Lydia was a human who suffered in unique ways. This reveals the sentimental attachments that formed with this unique human property that cannot be captured in purely market terms. Despite the tensions between the economic and social spheres, Judge Ruffin ultimately ruled that Lydia was simply property and that Mann was not liable for injury to a person. Thus the issue of Lydia's retention was moot because she returned to her owner without any compensation.

Over thirty years later, the fact that slavery absolutely denied personhood was still the predominant view. The case *Oliver v. State* 39 Miss. 526 decided by the Mississippi Supreme Court in 1860 echoed the *State v. Mann* decision. "If the Master, in the exercise of lawful authority, in a lawful manner, be resisted by his slave, then the master may use just such force as may be requisite to reduce his slave to obedience, even to the death of the slave, if that become necessary to preserve the master's life, or to maintain his lawful authority" (39 Miss. 526, 540). Interestingly, the circuit court who originally heard the case compared the death of a slave from lawful correction to that of a parent correcting a child. This comparison speaks to the paternalistic treatment of the slave and highlights that children were subject to the control of their "master" without full autonomy granted to persons.

The *Oliver v. State* opinion emphasized the consistent and enduring view across Southern states that the slave was simply property to be disposed of at the master's will. The slave was not a person in any legal or moral sense. The view of most southern state courts was that the relationship between a master and slave was primarily a private relationship based on property that was beyond the scope of the judicial system. The slave could not appeal to the courts in cases of abuse by a master because the slave had no legal right to the judicial system.

A Slight Exception to Unrestricted Use of Slave Property – Third Party Cases

A notable exception to unrestricted use of slaves occurred when abuse by a third party harmed the master's property or when a medical injury to a slave devalued the master's property. In these cases, the slave had some protections under the law, but as

will be seen from the following cases, the true intent of the law was to protect the master's property rather than the person of the slave. Jumping backwards chronologically, there are several cases that illustrate these exceptions. In all of these cases, the slave remained simple property and a non-person within the judicial system with no recourse to the law.

The issue of third party harm was an interesting subcategory of slave property law because, unlike when the master harmed a slave and the slave had to recourse to the law, in third party cases, the laws served to protect the slave but only in order to protect the property element of the slave. Because the slave was property, a third-party hirer of this property was allowed to use this property as needed. However, just as a renter of a house is subject to penalty for destroying the owner's property, a hirer of slave property was subject to penalty when the slave was destroyed. Slaves were extremely valuable property for the master, and masters used their political power to create tougher laws against the physical harm of their slaves by third parties.

In *State v. Hale* (1823) 2 Hawk. N.C. Rep. 582, North Carolina Supreme Court Chief Judge Taylor began his opinion concerning the injury of a slave by equating slaves to animals. Although the master had an absolute right to punish his slave without court interference, just as he could any animal on his land, the master's property must be protected from abuse by a third party. He wrote,

> For all purposes necessary to enforce the obedience of the slave, and to render him useful as property, the law secures to the master a complete authority over him, and it will not lightly interfere with the relation just established. It is a more effectual guarantee of this right to property when the slave is protected from wanton abuse from those who have no power over him; for it cannot be disputed that a slave is rendered less capable of performing his master's service when he finds himself exposed by the law

> to the capricious violence of every turbulent man in the community *State v. Hale,* (2 Hawk. N.C. Rep. 582, 585).

As Judge Taylor carefully explained, third party protection of the slave was simply to protect the master's right to property. The slave himself still had no real recourse for protection from abuse. Thus, although third party protection did protect the slave from harm to a certain extent, the foundation of these laws in protecting the master's property rights truly did not differ from other laws that upheld the master's absolute control over his slave property. Similarly, Judge O'Neall wrote on the South Carolina Court of Appeals in *Tennent v. Dendy* (1837), "slaves are our most valuable property. For its preservation, too many guards cannot be interposed between it and violent, unprincipled men" (23 S.C.L. 35, 36). As O'Neall clearly states, slaves had to be protected from violence due to their property value rather than their human or moral value.

Just as third parties were liable for any damages they inflicted on a master's slave property, third parties were also responsible for taking care of slave property in instances of medical problems. In general, masters took extremely good care of the medical needs of their slave property to ensure that the slaves were productive. In fact, historian Peter Kolchin claims that most slaves received medical care that exceeded most Southern whites, and slaves saw physicians much more frequently than whites.[132] However, a third party hirer, as a temporary user of the slave's services, did not have the long term health of a slave in mind. Therefore, it was not assured that a hirer would provide necessary medical treatment. In order to protect the master's slave property while under the control of a third party, the law held that when a slave became ill while under the care of a third party, the hirer was responsible for all medical costs.

[132] Peter Kolchin, *American Slavery 1619-1877,* [New York: Hill and Wang, 1993]: 43.

The case *Hogan v. Carr & Anderson,* 6 Ala. 471, (1844) decided by Alabama's Supreme Court, aptly illustrates this situation. In this case, a slave injured his leg while under the third party hire of Mr. Carr. Carr did not provide medical care to the slave, and the untreated wound became so infected that the slave's life was endangered. The master, Hogan, retrieved the slave and provided treatment. Carr sued for breach of contract. When the case reached the Alabama Supreme Court, Judge John Ormond found that a hirer had an obligation to treat a slave humanely and provide medical care when needed just as a hirer had an obligation to treat a horse humanely. Ormond's ruling was consistent with other rulings that protected the value of a master's property. Comparing a slave to a horse was an analogy typically used in the antebellum South to describe the property aspect of slavery.

A similar case was heard by Georgia's Supreme Court a few years later. The case *Lennard v. Boynton,* 11 Ga. 109, (1852) involved a third party, Frances Lennard, who was renting the labor of a slave from Thomas Boynton. During the rental period of one year, the slave died from illness. The master, Boynton, claimed that he could still collect the $100 due for entire one-year contract. When the case reached the Georgia Supreme Court, Judge Lumpkin agreed arguing that the death of the slave was not the fault of Boynton and Lennard had entered into the agreement knowing the risk that the slave could succumb to illness. Furthermore, if a third party did not have to assume any risks in a contract, then there would be great temptation for a hirer to abuse a slave and exploit a master's property by allowing a slave to be devalued by poor health. Accordingly, Judge Lumpkin addressed both the obligations of the master and the hirer in his opinion.

> Humanity to this dependent and subordinate class of our population requires, that we should remove from the hirer or temporary owner, all

> temptation to neglect them in sickness, or to expose them to situations of unusual peril and jeopardy. We say to them, go, and they must go; stay, and they must stay; whether it be on the railroads, the mines, the infected districts or any where else. Let us not increase their danger, by making it the interest of the hirer to get rid of his contract, when it proves to be unprofitable. Every safeguard, consistent with the stability of the institution of slavery, should be thrown around the lives of these people. For myself, I verily believe, that the best security for the permanence of slavery, is adequate and ample protection to the slave, at our own hands. *Lennard v. Boynton*, 11 Ga. 109, 113 (1852)

Thus, if hirers were allowed to neglect the slave and allow the slave to die from disease or starvation in order to evade a contract, the system of slavery faced instability. Although he mentions the importance of humanity, Lumpkin's concern was to maintain the southern slave system rather than to acknowledge the human needs of the slave.

Both *Hogan v. Carr & Anderson* and *Lennard v. Boynton* reveal the underlying motives for protecting the slave's welfare. Not only was private property at stake, but devaluing property by allowing slaves to starve and be mistreated threatened the entire institution of slavery. As will be seen in Chapter Five, the motive of most animal welfare laws is to protect the human owners of animals and society at large. In the same way, welfare laws for slaves were predominantly designed to protect the institution of slavery and the welfare of the state rather than the welfare of the slave.

Recognition of Rational Ability

Third party issues were also relevant in wrongful death cases when a slave accidentally died on the job. A number of cases arose when slaves were killed while being hired out to the railroads. When a dispute of negligent homicide occurred, the master's claim of a property loss was countered by the railroad's claim that the slave as a rational person could have avoided injury. In these cases, the courts considered that

although the slave was a valuable piece of property to the master, the slave also possessed volition and mobility as a rational being. Free workers on the railroads generally had difficulty winning wrongful death and personal injury suits because they did not have the means to pursue a lawsuit against powerful corporations such as the railroads. However, plantation owners had both the means and the will to litigate, and slave law in this area was more settled and generally more carefully reasoned than in other areas of law.

The courts often swerved in their favorable treatment of transportation interests in favor of the politically powerful master class.[133] Again, the private property interests of the masters were dominant. Many states required railroads to fence their land in order to avoid injury to livestock, another valuable form of property for plantation owners.[134] In the same way, railroads had to safeguard slave property. Judges borrowed from the laws of livestock and free people to create this new category of legal precedent. Because slaves were property, laws must be upheld to protect the viability of the slave market. Hiring a slave generated the same rights and responsibilities as hiring a work animal such as a horse or mule. However, because slaves were human, they could avoid accidents more easily than animals. Because slaves were expected to behave rationally, owners sometimes failed to win damages for injuries. For instance, a railroad was liable for any cow that was hit on the track. Nevertheless, railroads did not always compensate slave owners for the negligent death of a slave who was hit by a train because the slave was able to sufficiently reason and protect himself from danger. Thus, in these cases, the

[133] Jenny Wahl, "American Slavery and the Path of Law" *Social Science History,* 20, no. 2 (1996): 299.

[134] Jenny Wahl, "American Slavery and the Path of Law" *Social Science History,* 20, no. 2 (1996): 299.

rational ability of the slave was considered in order to rule that the slave was not protected.

A Maryland circuit court ruled that an 1846 statute that compensated owners of stock animals that was injured or killed by trains did not include slaves. "Negroes were intentionally omitted because of their greater capacity to avoid such dangers than stock" (*Scaggs v. R.R.*, 10 Md 268, 278 (1856). North Carolina Supreme Court Justice Battle reasoned that slaves differed from other property such as a cow or even a wooden log in their ability to reason. "In the care which is to be taken of a slave, he is to be considered an intelligent being, with a strong sense of self-preservation, and capable of using the property means for keeping out of, or escaping from, scenes of danger" (*Couch v. Jones* 4 Jones 402, 408 N.C. 1857).

Although the courts found that the rational capacities of the slave set him apart from other animals, this did not affect his status as a non-person. As a human, he was simply a piece of property with special abilities. Thus, although the courts did acknowledge the slave as a rational agent, the courts were very careful to avoid drawing the conclusion that, as rational agents, slaves must be persons. Literary studies expert Arthur Riss argues, '[r]ather than inevitably foregrounding the logical contraction at the heart of slavery, the recognition that the slave is 'not in the condition of a horse or an ox' marks the extent to which the logic slavery does not inevitably shatter when it hits the bedrock of the slave's resemblance to 'persons.'"[135] Although the master did not always win his case, when the master was successful, the victim who was compensated in the lawsuit was always the master, not the slave. The slave's family never received any type

[135] Arthur Riss, *Race, Slavery and Liberalism in Nineteenth-Century American Literature*, [Cambridge University Press, 2006]: 34.

of compensation. Thus, although the slave's ability to reason set him apart from other types of chattel, his status was confirmed as property.

An interesting subset of employment cases includes a set of "lemon laws." The domestic slave market was an important aspect of slave society and maintaining its integrity was essential for economic viability. Slave sellers had the responsibility to guarantee the quality of their merchandise. This responsibility was greater within the slave market than the cattle market because slaves could talk and therefore sellers knew more about the slaves' health and well-being than did owners of cattle. If the slave was not as skilled or productive as the seller guaranteed, the buyer did not have the option of lowering wages or firing the slave. A slave buyer with no legal recourse may have tried to unload the slave on another unsuspecting buyer. This would ultimately undermine the legitimacy of the slave market. Thus the courts did not uphold the "buyer beware" rule in slave cases. Instead, rules shielded buyers and protected them from purchasing "lemon" slaves.

An example of the lemon law is *Kirk v. James* 29 Miss. 206 (1855). A Louisiana law from 1834 allowed a purchaser to recover damages if a slave ran away within two months of sale and there was no evidence of unusual punishment. When Kirk's slave ran away after three days, he effectively sued stating that the slave was defective and had a vice that made him escape. The slave's rational decision to escape was a "defect," and the motivation to run away was not attributed to the master and the horrific conditions of slavery, but was seen as a deficiency in the property. This case illustrated that the law shielded the rights of the masters rather than the slave as a human person. Unlike a horse that could not plot to runaway, the slave's rational ability, when a detriment to the master,

was viewed as a particular problem in his property value rather than a sign of the slave's personhood.

The Criminal Law of Slaves

The law rarely acknowledged the "character" of the slave in fear that Pandora's Box would be opened to acknowledge the personhood of the slave. However, a major exception was within criminal law. For criminal matters, a slave was held culpable for his crimes and deficiencies in character were acknowledged. If a slave was not a person with rational abilities and volition, then logically, society could not hold the slave responsible for his or her crimes. When a slave injured a third party, someone had to be held criminally responsible – either the master or the slave. This problem forced the courts to recognize that slaves as humans could commit crimes and must be considered legal persons who were culpable. Whereas in other types of cases, the real party at interest was the master and not the slave, in criminal cases the master's responsibility could not extend to the *mens rea* or guilty mind of the slave. Thus, the slave had to be held liable. Goodell stated, "The slave, who is but '*a chattel'* on all *other* occasions, with not one solitary attribute of personality accorded to him, become '*a person'* whenever he is to be *punished!*"[136] Orlando Patterson's survey of slave societies throughout the world found that although the slave had no will beyond that of the master, in no slave society was the master held responsible for his slave's criminal actions.[137]

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[136] Emphasis his. William Goodell, (1853) *The American Slave Code* [Arno Press & The New York Times, 1969]: 309.

[137] Orlando Patterson, *Slavery and Social Death,* [Cambridge, MA: Harvard University Press, 1985]: 196.

The Federal Case of *United States v. Amy* 24 F. Case 792 (1859) became one of the most famous cases directly concerning the personhood of the slave. Slave Amy was accused of stealing mail. However, the law stated that if any *person* shall steal or take any letter from the mail, or any post-office, the offender shall, upon conviction thereof, be imprisoned for not less than two but no more than ten years. Thus, the counsel for Amy argued that a slave was not a person but was the property of the master. Because the law only spoke of persons without reference to the property of the master, Amy as a slave could not be punished. Justice Taney, sitting on Virginia's circuit court, found that while a slave was not a citizen entitled to rights and duties, in criminal matters, slaves were persons under the law. After analyzing the Constitutional references to slavery, Taney concluded that in this realm of the law slaves were always referred to as persons. "It is true that a slave is the property of the master, and his right of property is recognized and secured by the Constitution and the laws of the United States; and it is equally true that he is not a citizen, and would not be embraced in a law operating upon that class of persons. Yet, he is a person, and is always spoken of and described as such in the state papers and public acts of the United States." (24 F. Case 792, 809) Taney continued arguing,

> In expounding this law, we must not lose sight of the two-fold character which belongs to the slave. He is a person, and also property. As property, the rights of the owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it; and he may be embraced in the provisions of the law, either by the description of property or as a person, according to the subject matter upon which congress or a state is legislating (24 F. Case 792, 810).

Taney's opinion epitomizes the law's tendency to uphold the character of the slave as a person only when advantageous to white, plantation society and upholding the

value of the slave as property the rest of the time. However, because punishment, and especially capital punishment, deprived the master of his property, owners began to demand greater safeguards for their property. Due process rights such as trial by jury and the right of appeal began to appear in capital cases involving slaves. These due process rights, although invoked for the slave, ultimately were designed to protect the master.[138]

In Alabama, an emancipation case highlighted the dual nature of a slave to be denied personhood to make legal choices but to be treated as persons when guilty of a crime. *Creswell's Executer v. Walker* 37 Ala. 229 (1861) involved John Creswell, who in his will, designated that his slaves could choose freedom or slavery. In choosing freedom, they would be sent to Liberia. In choosing slavery, they would be sent to his daughter Zeuly Walker where they would be treated kindly. The slaves chose freedom, and Zeuly Walker brought the case claiming that slaves did not have the legal capacity to make such a choice and therefore must remain as slaves. Justice Walker for the Alabama Supreme Court stated the question at hand as, "Can a master, by his will, clothe his slaves with the irrevocable power of determining and changing, by an uncontrollable act of their will, their own civil status?" (37 Ala. 229, 233) Justice Walker answered by saying the slaves were unequivocally property and not persons in respect to their civil status. His reasoning is worth extensive quoting.

> So far as their civil status is concerned, slaves are mere property, and their condition is that of absolute civil incapacity. Being, in respect of all civil rights and relations, not persons, but things, they are incapable of owning property, or of performing any civil legal act, by which the property of others can be alienated, or the relations of property, or the legal duties or trusts in regard thereto, in any wise affected (37 Ala. 229, 233).

[138] Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*, [New York: Garland Publishing, 1992]: 181.

> According to the legal conception of slavery, as it exists in the southern States, a human being endowed with civil rights cannot be a slave. The possession of these rights is incompatible with the condition of slavery, and any attempt to confer them upon a slave, *durante servitute*, is an effort to accomplish what is legally impossible (37 Ala. 229, 235).

After ruling that slaves are merely things without the capacity to make civil decisions that comes with personhood, Justice Walker quickly qualifies his argument by conceding that slaves are legal persons when guilty of a crime and thus must be punished as persons. He wrote,

> Being endowed with intelligence, conscience, and volition, they are deemed capable of committing crime; and the same public policy which, so far as the performance of civil acts is concerned, refuses to consider them as persons, gives them a criminal status, and recognizes them as persons in respect of acts involving criminal responsibility. Because they are rational human beings, they are capable of committing crimes; and, in reference to acts that are crimes, are regarded as persons. Because they are slaves, they are necessarily, and, so long as they remain slaves, incurably, incapable of performing civil acts; and, in reference to all such, they are things, not persons. (37 Ala. 229, 236)

Justice Walker cogently summarized the status of slaves. In respect to their civil status and the accompanying rights and duties, slaves were mere property – things not persons. However, as rational beings capable of committing crimes, they were granted personhood so that they could be found culpable and punished for their actions. Thus, the slave was only allowed the status of person when it benefited the master class rather than the slave.

Dawn of a New Era

The same year that the Alabama Supreme Court decided *Creswell v. Walker*, the Civil War broke out largely over the issue of slavery. From the colonial period to the middle of the nineteen century, non-slave holders began to change their conceptualization

of slavery. These Americans stressed that slaves, as human beings, were persons rather than property. This change in mindset from property to person allowed Americans to consider the rights of slaves and blacks in general. Constitutional law professor Earl Maltz writes, "Once blacks were conceptualized as people, then their entitlement to these rights followed ineluctably. Hence, the core of the antebellum Republican position was simply that blacks were people rather than property."[139]

As the Civil War was drawing to a close, Congress passed the Thirteenth Amendment abolishing slavery. Although the specific wording of the Amendment did not mention "persons" or "property," a review of the Congressional debates over its passage reveal that its intent was to abolish the concept of property in a human being. Ever loyal to the concept of slave property, several Senators, in particular Democratic Senators Powell of Kentucky, Saulsbury of Delaware, and Davis of Kentucky, argued that before slavery was abolished, slaveholders in loyal union states must be financially compensated for the loss of their property.[140] This measure was not given substantial consideration in the Congress, but is important to note that the property aspect of the slave was contested right up to the passage of the Thirteenth Amendment.

The end of the Civil War marked a new era for American politics. The North had won the War to preserve the Union and free the slaves. Now the victorious party of President Lincoln could usher in its plan for emancipation and reconstruction. While the South needed to be rebuilt, a primary focus of Republican Congressional leaders was to punish the South for treason. Furthermore, in the short time since the end of the Civil

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[139] Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869*. [Laurence, KS: University Press of Kansas, 1990]: 5.

[140] Congressional Globe, 38th Congress, 1st Session, 1425, 1489-90, 1864.

War, many southern states had enacted the notorious Black Codes that reduced the freedmen to virtual slaves and further enraged the North. After passing the Thirteenth Amendment, Congress began to work on a plan to protect the newly freed blacks and eliminate the Black Codes. This process was complicated, however, by the fact that the members of Congress widely disagreed on the rights and privileges afforded to blacks. Even though most Americans by the time of the Civil War conceded that blacks were persons and no longer property, citizenship for African Americans was widely debated. While many Radical Republicans advocated full political and civil rights for blacks as citizens, many others saw blacks as a separate caste of persons, inferior and degraded compared to the white race. Even though blacks were persons, they were not full persons in the sense of status, rights, or liberties. Thus, although the Fourteenth Amendment ostensibly granted all persons "privileges and immunities" and the right of "life, liberty and property," blacks as a degraded class of persons still faced many of the same injustices that they faced when their status was mere property. Additionally policy makers faced the issue of Federalism, which complicated plans to allow the Federal Government to implement programs in areas that had traditionally been the arena of the states. An examination of the Congressional debates surrounding the Fourteenth Amendment reveals many of the problems facing the framers as they dealt with the new freed "persons" entering into Union for first time.

Although the framers of the Fourteenth Amendment do not often address the topic of personhood directly in the debates, the issue underlies much of the meaning of Section One of the Fourteenth Amendment. Scholar Howard Jay Graham finds evidence of this through his study of Christian leaders such as James Birney, William Ellsworth, and

Theodore Weld who greatly influenced Republican Senator John Bingham, the primary author of Section One. Birney condemned the practice of slavery because it was a denial of government protection to which all human beings were entitled by virtue of their humanity. He argued that no matter the type of blood, Negro or Caucasian, the subject of debate was a human being. Because all human beings owed allegiance to the state, government could not deny protection of natural rights.[141] Human beings were automatically persons in Birney's view. Weld demanded, "persons be treated according to their intrinsic worth irrespective of color, shape condition or what not." [142] He found that it was degrading to other persons that Negroes were denied human status and refused personality. These leaders were among the first to state their theories in terms of broad natural rights, human equality, equal law, reciprocal protection, and the ideal of reason.[143]

Birney argued that slavery denied a person the fruits of government and the attributes of personhood. In fact, Birney went so far as to construct a coherent counter theory to the predominant system of slaves as property rather than persons. This counter theory utilized the wording and the spirit of the Declaration of Independence, the Constitution, and the Bill of Rights to argue that all persons have a right to property and liberty in their own selves. Because the Constitution called slaves "persons" rather than "things," slaves had a right to their selves as property, and no owner could take that property right away. This argument was reminiscent of Locke's argument for property in

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[141] Howard Jay Graham, *Everyman's Constitution*, [Madison, WI: State Historical Society of Wisconsin, 1968]: 178.

[142] Howard Jay Graham, *Everyman's Constitution*, [Madison, WI: State Historical Society of Wisconsin, 1968]: 201.

[143] Howard Jay Graham, *Everyman's Constitution*, [Madison, WI: State Historical Society of Wisconsin, 1968]: 183.

one's self. Utilizing the Bill of Rights, he argued that Article Four, Section Four guarantees the right of people to be secure in their *persons* against unreasonable search and seizure. Because he argued that slaves were persons, they could not be deprived of their earning by seizure. Slavery robbed the person of both his property and person.

This ingenious argument employed the very argument of property rights that slaveholders used, but attributed the property right to the slaves themselves. Birney wrote, "(Congress) should see that every person therein enjoys the right of property. This is the very reason why Congress should abolish slavery. The right of property is sacred. It belongs to every man. Now, shall Congress continue to deprive one-fifth of the people of the District of their property because Virginia and Maryland did so before?"[144]

These powerful arguments by Birney and his colleagues influenced John Bingham to such as extent that in an 1859 speech Bingham stated,

> I invite attention to the significant fact that natural or inherent rights, which belong to all men, irrespective of all conventional regulations are by this Constitution guaranteed by the broad and comprehensive word "person," as contradistinguished from the limited term citizen – as in the fifth article of amendments, guarding those sacred rights which are universal and indestructible as the human race, that 'no person shall be deprived of life, liberty, or property, but by due process of law, nor shall private property be taken without just compensation.[145]

Other leaders in Congress also addressed the issue of personhood directly. Democrat Senator Reverdy Johnson of Maryland noted, "Subject to the same complaints, cured by the same medicines, sustained by the same food, who could deny for a moment that the black man is a man and a human being; and if he be a man and a human being,

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[144] Howard Jay Graham, *Everyman's Constitution*, [Madison, WI: State Historical Society of Wisconsin, 1968]: 220.

[145] Howard Jay Graham, *Everyman's Constitution*, [Madison, WI: State Historical Society of Wisconsin, 1968]: 281.

who can doubt for a moment that he is a 'person?' "[146] However, the status of personhood did not automatically entitle the free man to a bevy of political and civil rights. Although moderate Republican Senator Roscoe Conkling of New York was fervently opposed to slavery, during the debates over the Fourteenth Amendment he stated, "A man, and yet not a man. In flesh and blood alive; politically dead." Now emancipated, "they are not slaves, but they are not, in a political sense, 'persons'"[147]

Constitutional law scholar Earl Maltz argues that Bingham's and Conkling's opinions were typical of the antebellum Republican position which was a commitment to the idea that all men were equally entitled to a limited set of natural rights, whatever their condition or attributes and regardless of race. However, this limited set of natural rights did not include all the legal rights and freedoms granted to white citizens. Personhood for the African American was limited; they were not a part of the political "We the People." As one prominent Republican put it, with respect to natural rights – the rights to life, liberty and property – "it is a question of manhood, not color."[148] However, despite the rights entitled to every man, Republicans were careful to distinguish between limited and absolute equality. Bingham fully supported limited equality for all persons, which included the minimum of protection for life, liberty, and property. However, Bingham and other Republicans were careful to distinguish between a freedman's rights as a person and a freedman's rights as a citizen.

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[146] Congressional Globe, 39th Congress, 1st Session, 574 1866.

[147] Congressional Globe, 39th Congress, 1st Session, 356 1866.

[148] Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869*. [Laurence, KS: University Press of Kansas, 1990]: 4.

Citizenship was a thorny issue complicated by that fact that states traditionally had jurisdiction over granting citizenship. Many post-Civil War leaders were very reluctant to grant citizenship to the freed slaves even though many had fought in the war. The distinction between "person" and "citizen" was very important because Section One of the Fourteenth Amendment protected the life, liberty and property of all "persons" but "citizens" were further guaranteed privileges and immunities. Hence, attaining the status of "citizen" was an important advance in terms of the rights conferred by the Fourteenth. As Maltz explains, "even if no other benefits were conferred, designating a person a citizen meant that person was a member in good standing of political society. Thus Democrats could effectively charge that on an important symbolic level, advocacy of black citizenship was equivalent to an assertion of racial equality."[149]

Issues involving political rights were especially important because while Congress was debating the Fourteenth Amendment, they were also considering the Civil Rights Bill. This bill was designed to ensure the basic rights of the newly freed slaves in the face of the Southern Black Codes, which reduced the status of the freemen to a level at or even below that of slave. As Republican Senator Howard of Michigan argued, the Thirteenth Amendment made the slave a free man and not merely a non-slave. Hence, the Civil Rights Act must protect his rights of property and person.[150] However, the purpose of the Civil Rights Act was to ensure the same and equal benefits of person and property, but again excluded political rights. As Republican House Representative Wilson of Iowa explained,

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[149] Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869*. [Laurence, KS: University Press of Kansas, 1990]: 7.

[150] Congressional Globe, 39th Congress, 1st Session, 504 1866.

> What do these terms mean? Do they mean that in all things, civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Nor do they mean that all citizens shall sit on juries, or that their children will attend the same schools. These are not civil rights and immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.[151]

The majority of the framers of the Fourteenth Amendment were unwilling to confer civil and political rights for two reasons. First, it was argued that the American system of federalism authorized the states to confer this type of right and privilege. For the Federal government to intervene would be a violation of this sacred system. Second, although the African American was now free, the reality was that many of the framers and the public in general were not ready to accept this level of equality. As Republican Senator James Patterson of New Hampshire maintained, "I am opposed to any law discriminating against (blacks) in the security of life, liberty, person, property and the proceeds of their labor. These civil rights all should enjoy. Beyond this I am not prepared to go, and those pretended friends who urge political and social equality …are…the worst enemies of the colored race."[152] Democrat Senator Reverdy Johnson of Maryland also doubted that equality of races and instead believed that differences were ordained by God. He advised the Congress to forgo conferring civil and political rights until the freemen were "ready" to accept this challenge. He stated,

> Leave the blacks as they are, protected by the Constitution of the United States in every right which belongs to a freeman, entitled to claim the benefit of all the guarantees of personal liberty and protection to be found in the Constitution of the United States, as much as the white man. Leave him to work for his living, as the white man works for his living. Leave

[151] Quoted in Raoul Berger, *Government by the Judiciary* [Indianapolis, IN: Liberty Fund Inc., 1977]: 27.

[152] Congressional Globe, 39th Congress, 1st Session, 2699 1866.

> him free to contract, as he is. Leave him under the protection of laws that will enable him to enforce his contracts, as he is. Leave him to educate himself, as far as nature will permit, until he can raise himself to the elevation of the white race, as I think he may; and then, if possible, change your organic law; then, if possible, forget that nature has made the distinction.[153]

Another telling quote, this time from Republican Senator Lodge of Massachusetts, illustrates the fact that many American leaders were not yet ready to embrace full personhood for freed slaves and African Americans. Instead, they clung to perceived biological and psychological differences between whites and blacks as an excuse to deny full personhood.

> We all know it instinctively, although it is so impalpable that we can scarcely define it, and yet it so deeply marked that even the physiological differences between the Negro, the Mongol, and the Caucasian are not more persistent or more obvious. When we speak of a race, then, we mean the moral and intellectual character which in their association make the soul of a race, and which represent the product of all its past, the inheritance of all its ancestors, and the motives of all its conduct. The men of each race possess an indestructible stock of ideas, traditions, sentiments, modes of thought, an unconscious inheritance from their ancestors, upon which argument has no effect. What makes a race are their mental and, above all, their moral characteristics, the slow growth and accumulation of centuries of toil and conflict. These are the qualities which determine their social efficiency as a people."[154]

The debates over the Fourteenth Amendment reveal that although Congressional leaders sought basic civil protections for all persons, even some Republican leaders did not seek full equality. In fact, the quotes from Johnson and Lodge foreshadow the "separate but equal" policies that the Supreme Court would sanction in *Plessy v. Ferguson.*

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[153] Congressional Globe, 39th Congress, 1st Session, 766 1866.

[154] Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation*, [Oxford University Press, 1987]: 99.

Native Indians were another group specified as inferior to the Caucasian race. Like the Chinese and the Africans, Native Indians were not accepted as full persons. Republican Senator Trumbull of Illinois asked, "What does that phrase 'excluding Indians not taxed' mean? … It is a constitutional term used by men who made the Constitution itself to designate, what? To designate a class of persons who were not a part of our population. That is what it means. They are not counted in the census. They are not regarded as part of *our people.*"[155] Trumbull's comment is very revealing because he phrased his argument deliberately to reference personhood. Being one of "our people" had a clearly different meaning than being simply a "person." Although Trumbull was one of the authors of the Thirteenth Amendment, his attitude toward other races was not completely inclusive. Trumbull's attitude was typical of many U.S. leaders who sincerely wanted to end slavery and grant personhood to all humans, but who did not see non-whites as equal to whites. To these leaders, blacks, Native Indians and the Chinese, while indisputably persons, were not included in "our people." They were a separate and degraded caste of persons. This caste system based on race included limited political rights and a solid system of segregation to prevent various races from integrating as the American People. It would be close to one hundred years before the Supreme Court was finally able to start dismantling the caste system.

The Fifteenth Amendment was pushed through Congress by the end of 1869. This Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color of previous condition of servitude." Although this Amendment was negative in that it only prevented

[155] Emphasis mine. Congressional Globe, 39th Congress, 1st Session, 572 1866.

discrimination and did not confer the right to vote to anybody, the Amendment was important in preventing states from blatantly depriving blacks of the vote because of race. The Enforcement Act of 1870 was an attempt to stop terror toward black political involvement and criminalized official and private interference with voting.

The abolition of slavery destroyed the legality of human property and allowed freedmen to gain the status of "person." However, by the end of the Civil War, the battle for freedmen involved something more. Although freedmen were seen as "persons", their status as such was lower than whites as "persons." As a separate caste of persons, freedmen did not have access to the full array of civil and political rights enjoyed by whites. Two important Supreme Court cases, the *Civil Rights Cases* and *Plessy v. Ferguson* signaled a step backwards in the fight of African Americans to attain full rights and freedoms as persons.

A Step Backwards

While *Plessy v. Ferguson* is considered the monumental case concerning segregation, at the time, the *Civil Rights Cases* of 1883 were a turning point for black Americans. This cluster of suits concerned the very meaning of racial caste and racial degradation in ordinary life as blacks and whites lived together in every city and town. The cases received intense public debate, and future president Benjamin Harrison, then a leading senator, was in the galley.[156] The case reaching the Supreme Court (109 U.S. 3) encompassed five cases involved with discrimination in public accommodations from Sections One and Two of the Civil Rights Act of 1875.

[156] Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation*, [Oxford University Press, 1987]: 124.

Justice Bradley, writing for the Supreme Court, found that Sections One and Two were unconstitutional because the Fourteenth Amendment affected state law, and Congress had no authority to intervene in private matters. Furthermore, private discrimination was not a badge of servitude and therefore not covered under the Thirteenth Amendment. Bradley stated, "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater or deal with in other matters of intercourse or business" (109 U.S. 3, 24-25). Bradley further contended, in an argument that would again be made one hundred years later against affirmative action, that the freedman should cease to be the "special favorite of the laws." Bradley wrote, "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or as a man, are to be protected in the ordinary modes by which other men's rights are protected" (109 U.S. 3, 25). Surely Justice Bradley did not think that African Americans had attained full rights as persons considering the widespread discrimination and violence blacks faced. Rather, it seems that Bradley felt that African Americans should be satisfied with their place in society as a degraded caste and should not ask for more.

Justice Harlan sharply disagreed with this conclusion. In his dissent, Harlan wrote, "I am of the opinion that such discrimination is a badge of servitude, the imposition of which congress may prevent under its power, through appropriate

legislation, to enforce the thirteenth amendment; and consequently without reference to its enlarged power under the fourteenth amendment the act of March 1, 1875, is not, in my judgment, repugnant to the constitution" (109 U.S. 3, 43). Additionally, Harlan discussed the degradation and limited rights possessed by black Americans. He stated, "It (the Fourteenth Amendment) introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the 'People of the United States.' They became, instantly, citizens of the United States of their respective states" (109 U.S. 3, 46). This statement is important because many of the delegates debated whether racial minorities were part of "our people." (Recall the statement by Trumball concerning Native Americans.)

Harlan's dissent was a bold statement in light of the status quo of treating blacks as a degraded class of persons. However, as a dissent it had little power. News of the Supreme Court opinion, which overturned the Civil Rights Act of 1875, was met with outrage and despair in the black community. Thousands of blacks and white sympathizers marched in the Nation's Capitol. Bishop Henry Turner, an early Civil Rights leader, remarked, "Nothing has hurt so much since the day we were emancipated as the decision of the Supreme Court." Frederick Douglass said, "When a colored man is in the same room or carriage with white people, as a servant, there is no thought of social equality, but if he is there as a man and a gentlemen, he is an offense."[157] This is a telling statement of the reality for blacks in America. As men and gentlemen, or simply persons, they were an offense against society.

[157] John R. Howard, *The Shifting Wind*: *The Supreme Court and Civil Rights from Reconstruction to Brown*. [State University of New York Press, 1999]: 131.

Plessy v. Ferguson 163 U.S. 537 (1896) is the landmark decision that made separate but equal the official legal and political doctrine for the next fifty-eight years. The statute at issue in *Plessy* was the Louisiana Separate Car Act, which mandated that no person should be permitted to occupy seats in coaches other than the ones assigned to them by race. Conductors for passenger trains were required to assign passengers to the proper cars and faced fines or jail if they made incorrect assignments. At the Louisiana State Supreme Court hearing, James C. Walker, Plessy's lawyer, argued that the separate car law:

> [E]stablishes an invidious distinction and discriminates between citizens of the United States based on race, which is obnoxious to the principles of national citizenship, perpetuates involuntary servitude as regards citizens of the colored race under the merest pretense of promoting comfort of the passengers on railway trains and in further respects abridges the privileges and immunities of the citizens of the United States and rights secured by the Thirteenth and Fourteenth amendments of the Federal Constitution.[158]

Walker was arguing that segregation created a caste system in which blacks were not fully free persons, but instead suffered from the perpetuation of involuntary servitude. Regardless of Walker's passionate speech, neither society nor the courts were ready to concede this fact.

Justice Brown's opinion for the Court illustrates a difference between racial distinction and racial discrimination. He stated, "A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races, and must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or to reestablish a state of involuntary servitude" (163 U.S. 537, 541). The Louisiana statute

[158] Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation*, [Oxford University Press, 1987]: 48-49.

did not create an inequality simply by reasonably distinguishing between races. Brown fell short of explaining the reasonableness of legal distinctions based on color, but rather assumed this as common knowledge. Brown assumed that racial differences exist like physical differences and are rooted in man's nature. They cannot be altered through legal schemes. "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane" (163 U.S. 537, 552). Justice Brown therefore validated segregation and the separate but equal doctrine by ruling that racial differences are real and can be acknowledged. Separating the races did not create an inequality if the available public service is provided to both races on an equal basis.

Again, Justice Harlan provided a stinging dissent. He argued that railways were a public means of transportation and distinguishing by race was unconstitutional because a law that prevented blacks and whites from voluntarily choosing to occupy the same conveyance was a violation of liberty. If Louisiana's statute were upheld, the state could next mandate separate sides of the street for races and prevent interracial private vehicles. If a state could segregate races, it would not be a stretch to isolate Protestants from Catholics. For Justice Harlan, segregation reinforced America's caste system and excluded blacks from the "people" of the United States.

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race (163 U.S. 537, 561).

However powerful his statement against the Court opinion, his dissent did not overturn the official doctrine of separate but equal. That would have to wait fifty-eight years until *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

This review of cases reveals the judicial system's consistency in maintaining the slave's legal status as property for most areas of law and conceding personhood only when slaves were involved in criminal activity. The slave as property was simply a tool to be used by the white, master class or a means to an end. The master class ensured that the law sustained the slave's inferiority. Tocqueville wrote, "What could ever be more fictitious than a purely legal inferiority! What more contrary to human instincts than permanent differences established between such obviously similar people! Nevertheless, these differences have lasted for centuries, and they will persist in very any places; everywhere they have left traces which, though imaginary, time is hardly able to obliterate."[159]

We the People

The United States Constitution was formed for and by "We the People." The third word of the founding document, a variation of the word "person," testifies to the importance of understanding who this word includes and who it does not include. As the review of cases showed, slaves were definitely not included as part of the "people." Even after the Thirteenth Amendment abolished slavery and slaves gained the status of "persons," their membership as part of the "We the People" was still very much contested by the politicians who ratified the Fourteenth Amendment, individuals who refused to

[159] Alexis de Tocqueville, *Democracy in America*, edited by J.P. Mayer [New York: Harper Perennial Press, 1969]: 342.

acknowledge African Americans as full citizens, and people who harbored racial prejudice against persons of a different skin color.

Slavery left a nearly indelible mark on American society that caused African Americans to be treated as inferior. This inferiority was felt as African Americans were excluded from the political realm of "We the People." Constitutional law scholar Mark Brandon writes,

> Who "we" are is sometimes problematic, and therein lies the original failure of the Constitution: it failed to constitute slaves. That is not to say that the Constitution failed to *account for* slaves, nor even that it failed to *bind* them in some (literal) sense of the word. But it did not bind them *in a constitutional sense*. Put somewhat differently, although slaves were certainly not free in the constitutional world, they were in a theoretical sense free from that world.[160]

Brandon was correct that slaves certainly were *accounted for* – the thousands of cases arbitrating their fate attest to this fact. Brandon is also correct that slaves were "free from that world" but this freedom was not a positive value. It was a deliberate exclusion based on ascriptive and inegalitarian policies based particularly on race. Rogers Smith's argument of creating civic myths illustrates the profound ways Africans were deliberately excluded from the political sphere.

Rogers Smith studies the problems facing political leaders who are trying to create a "people." Creating a "people" requires civic myths of common identity and goals. Leaders then use these myths to create the legal structure that governs this "people." The civic myth is used to legitimate government and create unity in following the laws and political leadership. While American political leaders may have strong liberal democratic intentions and may offer personal freedom for all citizens, these

[160] Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* [Princeton, NJ: Princeton University Press, 1998]: 28.

leaders may resort to ascriptive policies to differentiate a distinct "American People." Smith shows that these two contrary ideals emerged and persisted throughout colonial and antebellum American history because of the deliberate intentions of the political elite who truly believed in liberalism and democracy as well as racial and sexual domination.

Furthermore, building a "people" requires unity and cohesion among constituents. Political leaders need to make their constituents feel as though they are a distinct and special group with common loyalties and bonds. This group must feel that its leaders and laws are legitimate. In early America, these constituents were white males. As was discussed earlier, these individuals knew who they were not – they were not black. This notion served to unite disparate individuals and therefore political leaders encouraged (or at least did not resist) ascriptive policies which would instill a sense of legitimacy for the fledgling government. Although the colonists saw themselves as British subjects, only British subjects with certain ethnic, religious, and class traits were entitled to political privileges. This excluded non-whites, women, and Catholics. Smith states, "Beginning with political and religious views of themselves as bearers the 'famous English liberty' they increasingly argued that Americans were a superior new breed, and possibly mankind's 'redeemer nation.' "[161]

In Federalist #2, John Jay speaks of the dangers of foreign powers and seeks to convince his readers that the "American People" are a cohesively knit group able to resist foreign dangers. He writes,

> With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of

[161] Rogers Smith, *Civic Ideals*, [Hartford, CT: Yale University Press, 1997]: 71.

> government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.

Jay's conception of a united people uses ascriptive tactics as he claims that the "people" descended from the same ancestors. He has no regard for Africans or even Europeans of descent other than Anglo-Saxon.

Paul Finkelman argues that freedom for whites did not exist in a vacuum; it was contrasted to slavery. He comments,

> Developing a racist precept is very much like colonizing a nation or, perhaps more to the point, enslaving its people. One needs to go about these tasks with the enthusiastic devotion and single-minded determination of a zealot. One must hear only the call of one's crusade and not he cries of one's victims. In short, one needs to be totally convinced of the righteousness of one's task, while not being too troubled by one's own conscience or the reasoning of those who disagree.[162]

Early American leaders were quite successful in their goal: they successfully excluded slaves and free blacks from being included in "We the People" and they successfully promoted the slave's status as property over the status of person. Thus, law followed politics as the personhood of the slave was denied and the slave was reduced to chattel in absolute terms.

Black chattel slavery in America successfully reduced human slaves to property rather than persons. In order to sustain this system of human property, early Americans employed various arguments including that slaves did not possess the rational and cognitive capabilities to qualify as persons, and as social outcasts, they were not included within the community of accepted "persons." Thus although slaves were acknowledged

[162] Paul Finkelman, *Slavery and Law* [Lanham, MD: Madison House Publishers, 1997]: 28.

human beings, they did not qualify for a bestowal of personhood. They were simply Kantian means to an end.

Chattel slavery is a dark mark on American's history. Although slavery has been abolished in American law, the issues of personhood still exist in other arenas. Arthur Riss argues that the problem of personhood raised with the issue of slavery still exists today. He contends,

> For, as arguments over fetal "personhood," animal rights, and genetic engineering drastically demonstrate, modern liberal culture continues to be riven by controversies over this identity category. And what makes these debates continuous with debates over slavery is the logic they share: these debates recruit the very notion at the heart of such debates (the "persons") as the primary means to solve all debate. That we regularly turn to the "person" as if it could serve as the unequivocal orbiter of justice reveals the extent to which we depend upon the "person" as an identity category external to any specific juridical, social, historical, or cultural framework. Indeed, the fact that we still debate the notion of the "person" in multiple political spheres suggests that the concept that we summon to once and for all explain and establish liberal practice is more contingent and less definitive than we hope.[163]

Riss in correct that personhood as an identity category was at the heart of the slavery debate and remains central in the debates over the status of corporations, fetuses, and animal rights. A review of what this chapter gleaned from the debate on slavery, allows comparisons with the other entities in this study to determine if the slavery debate has features in common with other legal struggles for personhood.

Hypothesis Testing

From this thorough study of personhood in slavery, I can review the hypotheses laid out in the first chapter to determine the degree to which they are supported by the

[163] Arthur Riss, *Race, Slavery and Liberalism in Nineteenth-Century American Literature*, [Cambridge University Press, 2006]: 25.

slave cases. My first hypothesis is that the core theory, with its roots in the liberal tradition, would influence the law. Much of the core theory builds upon the works of Locke and Kant. Kant argued that slavery violates the maxims of a just and moral society in which one person cannot be used as an end for another person's purposes. While glimpses of this liberal theory can be found in opinions where justices described their own moral objections to slavery, most judicial opinions involving slavery did not follow Kant's liberal foundation that opposed slavery. Instead of reflecting Kant's theories, the law was more aligned with Locke whose theories spoke against slavery even though Locke was involved in the American slave system. Justices often lamented the fact that slavery violated the maxims of a liberal democracy but still upheld the economic institution of slavery.

While some decisions acknowledged that an entity could not be both person and property as is demonstrated in Kant's theory, the majority of judicial decisions concluded that the slave was decidedly property rather than a person. By denying the personhood of slaves, justices could rule in favor of slaves as property. In contrast to the teachings of the core theory, most justices during the antebellum slavery era ignored the fact that slaves were rational agents. Generally, justices included slaves in the same property classifications as cattle and horses and disregarded the cognitive abilities of human slaves. The exception was in cases involving crimes committed by the slave. In these instances, the rational agency of a slave to knowingly violate the law was acknowledged and the slave was punished accordingly.

Overall, the concept established in the core theory that an entity could not be both person and property and the concept that a rational agent is a person were understood by

most justices involved in slave cases. However, these concepts were largely ignored in order to uphold the slave system based upon property rights. The American judicial system tended to deny the slave personhood stemming from the criteria of rational, intelligent agents. Further, the judicial system disregarded Kant's admonition that a person could never be used as a means to an end as a piece of property. Early American law is fairly consistent in denying the personhood of the slave and upholding the slave as property.

How then, does the study of slavery fare against the hypotheses presented at the beginning of this study? In respect to my first hypothesis that the core theory would influence the law, it seems as if the liberal theories of Kant had very little influence on judicial opinions while the contradictions apparent in Locke's theories were more in line with judicial reasoning. Therefore, the core theory is reflected in the law, but it is not the liberal tradition that is generally attributed to Locke and Kant.

My second hypothesis is that justices would tend to define "person" in opposition to human being and to property. This hypothesis is strongly supported by the slave cases. In almost all the cases I analyzed, justices carefully considered the human qualities of the slave but ultimately decided that a slave was property. Many decisions provided elaborate justifications as to why a slave should be considered property rather than a person. Holding that the slave was property rather than a person was by and large consistent among the cases. Thus, slave cases did define the slave in relation to the "other" as justices consistently held that slaves could not be fellow persons with white Americans.

My third hypothesis holds that the there should be consistencies in how justices adjudicate personhood for slaves and other entities such as corporations, fetuses, and great apes. Thus, in order to reveal the consistencies and inconsistencies, it is necessary to delve into an analysis of the personhood in respect to corporations, fetuses, and animals to see how their struggle for personhood compared to that of slaves. With the lessons learned concerning personhood for slaves, I turn to an analysis of the next entity to vie for personhood which is the corporation.

Chapter Three
Corporate Persons

When a human is born, this new person is given a social security number. When a corporation is born, this new person is given a Federal Employer Identification Number. The corporate person is not male or female, is not black or white, does not eat, drink or sleep, and cannot be imprisoned or executed if found guilty of a crime. The corporation can have multiple residences, can live forever, and change its identity in a matter of minutes. It cannot be enslaved, but it can sell itself. The corporation cannot give birth, but it can cut off parts of itself and turn them into new "persons." The corporate person is not human but composed of groups of humans united for the purpose of commerce. Further, the corporation, as an entity that is bought and sold, is categorized as property. Despite its non-human, property status, the Supreme Court has granted the corporation personhood and thus the corporate person has many of the same rights and privileges as the human person. This chapter explores the history, theory, and law of corporate persons to discover how this non-human property was granted personhood.

The discussion of corporate personhood has features in common with the chapters concerning slaves, fetuses, and great apes. Like the other chapters, the personhood of a corporation straddles the gulf between property and person. Just like the preceding chapter on slaves pointed out that the slave was a human being that was the legal property of another person, so too the corporation is owned by human persons while at the same time the entity of the corporation can own property on its own accord. The discussion of corporate personality also features a discussion of the cognitive criterion of rationality that features prominently in the other chapters. However, in this discussion, the study of

corporate personality takes a unique turn. The rationality of the persons who combine to form a corporation is not in question. Instead, theorists must determine if a corporation, as a separate person, has its own capacity for rational agency apart from its members. The analysis of the corporation differs from the other chapters in that the analysis revolves around the status of the group rather than an individual. As the chapter illustrates, determining the legal and moral status of a group-person in a political system that is built on an individualist foundation poses unique quandaries.

This chapter argues that the bestowal of legal personhood to the corporation resulted in far reaching legal and moral consequences for corporations, individuals, and the political process. Some of the confusion surrounding the status of the corporation is in large part due to use of the term "person" to apply to both corporations and human beings. By using the general term "person," the law has failed to note the important distinctions between a corporation as both the subject and object of property rights; the distinctions between a corporation as a "person" and a human being as a "person;" and the distinctions between humans as individuals and as organized associations. As famed political scientist Westel Woodbury Willoughby argued, "It is unfortunate that the word 'person' as a technical term, should have found lodgment in jurisprudence, for the idea connoted by it is quite distinct from the meaning attached to it by the moralist or psychologist, and, the difference not being steadily kept in mind, much confusion of thought has resulted."[164] Law professor Bryant Smith concurred saying "most of the confusion of thought with respect to the subject comes from the disposition to read into

[164] Westel Woodbury Willoughby, *The Fundamental Concepts of Public Law*, MacMillan, New York, (1924): 34.

legal personality the qualities of natural human personality."[165] Willoughby and Bryant are correct in stating that the meaning attached to "person" by the moralist or psychologist, or even the average citizen who is accustomed to thinking about a natural person is quite different from a legal definition, and the difference must be kept in mind. John Dewey, one of the most famous legal scholars of the early twentieth century argued, "The root difficulty in present controversies about 'natural' and associated bodies may be that while we oppose one to the other, or try to find some combining union of the two, what we really need to do is overhaul the doctrine of personality which underlies both of them."[166] Unfortunately, even though numerous scholars cited in this chapter have argued that the concept of corporate personality should be overhauled, corporate personality remains a mainstay of legal thought and moral thought. This chapter will examine the ramifications of corporate personality.

In the simplest terms, the corporate charter was ostensibly granted by the state in order to ease the difficulty of doing business for individuals working as a group. The group, as the corporate entity, has the ability to buy, sell, or exchange property because the corporation provides a unified source of control over the collective property owned by the corporation's members. The corporation can also develop, produce, and promote products under the corporate name with the corporation acting as a legitimate and autonomous economic actor in the market place. The corporate charter also lends expediency to legal matters involving the corporation. While the case of *John Doe v. AT&T* can be docketed and decided in a reasonable time, John Doe v. millions of

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[165] Bryant Smith, "Legal Personality" *The Yale Law Journal* 37, no. 3 (1928): 291.

[166] John Dewey, "The Historic Background of Corporate Legal Personality" *The Yale Law Journal*, 35, no 6 (1926): 657-8.

stockholders each designated by name, is not reasonable in terms of time and resources. Furthermore, by treating the corporation as a person, the courts can more easily prosecute corporate criminal activity by addressing and punishing the corporation directly through fines or dissolution (though not usually imprisonment.) For the members of the corporation, the primary benefits of the corporate charter are limited liability for shareholders and the unlimited life of the corporation to conduct business. Thus, the application of corporate personality is largely a matter of convenience and practicality for the purpose of conducting business transactions. However, while granting personality may save many legal resources, it is argued by many scholars that granting the status of "person" to the corporation has actually caused more complications than it has resolved.[167]

Corporations were granted the status of person in the introductory notes to a Supreme Court decision in 1886. This case is discussed in great detail later in the chapter, but for now, it is suffice to point out that the decision conferred the legal status of personhood but did not imply that corporations had any claim to moral personhood akin to individual human beings. In fact, members of the legal positivist school argue that the ascription of legal personhood to the corporation is a simple cut and dry matter of assigning a particular legal status without any connections to ethics or morality. They effectively ended legal debate on the matter of corporate personhood. However, the matter is not so simple. With the bestowal of legal personhood, it became conceivable to

[167] See: Christopher Stone, *Where the Law Ends: The Social Control of Corporate Behavior*, [New York: Harper & Row Inc., 1975]; Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* [Berkeley, CA: University of California Press, 1986]; Bryant Smith, "Legal Personality" *The Yale Law Journal* 37, no. 3 (1928); John Dewey, "The Historic Background of Corporate Legal Personality" *The Yale Law Journal*, 35, no 6 (1926).

many theorists that corporations may have a claim to moral personhood as well. Thomas Donaldson, a business ethicist, argues that most of the general public perceives the corporation to be a moral entity because the public recognizes an irrefutable characteristic of morality in the corporation – the duty to acknowledge and abide by norms and laws.[168] Within general understanding, corporations are the subjects of blame in a moral context. For example, the general public blames British Petroleum for the massive oil spill in the Gulf and demands recompense from the corporation rather than blaming the individual stockholders, the workers on the oil well, or the management. (Although there was a large amount of public outcry against British Petroleum CEO Tony Hayward who was perceived to be too cavalier in his statements about the oil spill.) By the same token, other corporations have been praised for their contributions to a healthy environment or for their charitable giving programs. As large, influential entities that can make significant impact on the course of human events, corporations are perceived as moral agents just like individual persons who are moral agents.

The recognition of a corporation as a moral agent causes anger among people who feel corporations are too influential, and some activists who argue that corporations are too influential as moral actors blame the enormous power of corporations on their status as persons. They argue that granting legal personhood effectively grants corporations all the rights and privileges that should only be granted to individual, human persons under the Constitution. In fact, there is a small but vocal grassroots movement to revoke the corporation's legal status as a person as a first step in controlling the power of large companies. One such organization, "Reclaim Democracy," claims that by calling

[168] Thomas Donaldson, Corporations and Morality, Prentice-Hall, Inc. Englewood Cliffs, New Jersey, 1982, 3.

corporations "persons," the public has been deceived into believing that corporations are legitimate contenders for the status of person with rights. They argue, "Granting corporations the status of legal 'persons' effectively rewrites the Constitution to serve corporate interests as though they were human interests."[169] William P. Meyers, an activist who argues against corporate personhood among other issues, argues that corporate personhood allows corporations to escape regulation and government control. According to Meyers, the lack of corporate regulation allows corporations to unjustly increase their power in government at the expense of the individual citizens for whom the Constitution was designed.[170]

One of the further complications of granting corporate personhood has been that the bestowal of this status has led many corporate actors to demand additional rights and protections granted to persons. Although the corporate charter was originally granted by the state to ease the difficulty of doing business for individuals working as a group, corporations began to challenge the Supreme Court that as persons, they had a right to further privileges granted to persons by the Constitution and the Bill of Rights. The legal battle began in the late 1800s when railroad corporations began to swamp the Court with demands for immunities as persons under the Fourteenth Amendment. In more recent legal battles, corporations have sought protection as persons under the First Amendment's guarantee of free speech, the Fourth Amendment's protection from unreasonable search and seizure, and Fifth Amendment's right to remain silent in

[169] Reclaim Democracy, "Corporate Personhood, available from http://reclaimdemocracy.org/personhood/, accessed 26 September 2010.

[170] William Meyers, "The Santa Clara Blues: Corporate Personhood Versus Democracy," November 13, 2000, available from http://www.iiipublishing.com/afd/santaclara.html, accessed 26 September 2010.

criminal cases. In Hong Kong, the government has taken the personhood of the corporation to what many critics consider an extreme level by effectively granting some corporations the right to vote. Under Hong Kong's 1997 revised constitution as part of the People's Republic of China, sixty seats in the Hong Kong legislature are elected by voters, ten are elected by a committee from Beijing, and thirty are elected by "functional constituencies" including some of Hong Kong's most prominent corporations.[171]

The legal status of personhood has caused complicated problems of corporations seemingly overreaching in their limited legal status as persons to attain further rights and privileges that have been traditionally perceived as limited to individual, human persons. Despite this problem, however, legal and moral issues concerning the status of the group are not recent issues. The concept of the group as opposed to the concept of the individual person is a natural concept that has been in existence for as long as human beings have formed social units. Freedom of association and the right to form groups are generally considered to be basic tenets of personal liberty. Arguably, the freedom to form a corporation is part of this natural right of association. Further, once a group is formed, it is natural to consider the group as a separate entity from its component members. It is common to consider organized groups such as the Catholic Church, University of Maryland, the State of Kansas, or the Roman Empire as unique entities. Each of these organizations is composed of individual members, but once the organization is formed, the group is considered as separate from the individual members. The University of Maryland employs professors; the Catholic Church owns the Vatican; the State of Kansas issues bonds; and the Roman Empire conquered Europe. Each of

[171] Ted Nace, Gangs of America, Berrett-Koehler Publishers, Inc. San Francisco, 2003, 187.

these statements is universally accepted and demonstrates that collectivities are an accepted part of everyday life.

So too is the business corporation. Walmart Corporation hired 1000 new employees. Walmart was convicted of unfair labor practices. Walmart bought stock in McDonald's Corporation. Walmart contributed 10 million dollars to the Sam Johnson for Senate campaign. While these statements are common in normal conversation, there are tremendous implications in each statement. Does Walmart have certain rights in the respect to the way it hires and fires its employees? Further, does Walmart have duties to its employees such as guaranteeing safe working conditions? What does it mean to say that a corporation owns another corporation? Finally, can a corporation participate in the democratic process? These are important questions in today's society where corporations are ubiquitous and control a large part of the global economy. Each of these questions is discussed in the analysis of corporate personhood. However, before delving into the various theories of moral and legal personhood and their applications to corporations, it is necessary to briefly review some of the history leading to the rise in power of corporations and how that evolution shaped philosophical and legal thought.

Historical Review of the Corporation

As the corporation grew in scope and power, theories of corporate personhood also evolved and changed. The history of the corporation is intertwined with the theoretical basis for corporate personhood and unraveling them is difficult at best. However, because understanding the moral and legal justifications for corporate personhood is a complicated matter, it is wise to first review a bit of history and then

plunge into a more detailed account of a corporation's status as a person. A review the evolution of the business corporation will put the theories within their historical context.

As has already been pointed out, humans have been relating to each other as part of groups since the dawn of human social interactions. Therefore, the concept of the collective is not new, and the corporation, as a special type of collective for business purposes, was not a revolutionary idea. The collective spirit for economic transactions has a foundation in early Greek philosophy. According to Plato, collectives arise naturally as individuals realize that they cannot survive independently but instead must rely on a division of labor to provide all the necessary goods and services in a community.[172] However, Plato was not an advocate of private property and entrepreneurism because he believed that private property would corrupt individual virtue through selfishness and self-aggrandizement. In fact, his revered Guardians were not allowed private property in order to maintain their virtue. Although some scholars trace Plato's theory of the Organic State to modern theories of corporate personhood, because Plato did not advocate private property as part of a virtuous state, it is not clear that Plato's teaching provides a foundation beyond illustrating the importance of the collective.[173]

The roots of corporate personality are more readily found in early European history. Pope Innocent IV, who led the Catholic Church from 1243 to 1254, taught that "The Church" was the body of Christ and was considered as a whole. Parishes, convents,

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[172] Plato, *The Republic,* Book II.

[173] For scholarship tracing Plato to modern corporations see Peter French, "Inference Gaps in Moral Assessment: Capitalism, Corporations, and Individuals," *International Social Science Journal* (2005); Lisa H. Newton, "The Internal Morality of the Corporation," *Journal of Business Ethics*, Vol. 5, No. 3 (Jun., 1986).

monasteries, and the like did not exist on their own, but drew their strength and purpose from the entire Christian Church. As a whole, "The Church" could be understood as a person, albeit a fictitious person, acting as an individual actor for certain purposes under the law such as owning property.[174] Pope Innocent IV effectively introduced the fiction theory of corporate personhood which in its simplest terms holds that corporations are legal fictions created by the state and endowed with an artificial personality for the sake of convenience. This theory will be discussed in great detail in the next section of this chapter.

Although the Church provided an early example of corporate personality, the Church's activities were tied to titles and parishes, not business in the modern sense. It was the unchartered joint-stock companies of late Seventeenth Century England that resembled the form of modern corporations complete with centralized management, transferability of shares, limited liability, and legal personality. Because voyages to the New World were tremendously expensive and risky ventures, very few wealthy individuals had the resources to finance voyages to the Colonies. Instead, individuals needed to pool their resources and share the risk of these expensive voyages. When the voyages were successful, the shared payoff was worth the investment and risk. In 1600, Queen Elizabeth chartered the East India Company with monopoly trading power in the Colonies. The East India Company, having gained its corporate charter directly from the Queen and to serve the pleasure of the Queen, was an example of what corporate theorists would consider concession theory because the Queen had conceded to grant a corporate title.

[174] Paul Vinogradoff, "Juridical Persons," *Columbia Law Review* 24 no. 6 (1924): 601.

Joint-stock companies such as the East India Company grew in number as the concept proved to be successful. Investors grew rich as did the British Government which was entitled to a share of the profits. Through lobbying the Queen for laws that directly benefited the company, the East India Company set a precedent in the late 1680s that is still followed by modern corporations today. In return for its efforts, the East India Company was rewarded with a law that required a license to import anything into the Colonies, thus strengthening their monopoly privileges. Later, they were also awarded the Townsend Acts of 1767 and the Tea Act of 1773. These laws increased profitability to stockholders, which included the Crown, and the Company was able to undercut small, local importers and drive them out of business.[175]

Although the East India Company was able to gain a monopoly in the Colonies, it was continually challenged by independent colonial entrepreneurs who ran small trading ships and from independent retailers who bought from Dutch trading companies rather than the East India Company. In fact, the East India Company caused much of the colonial anger that led to the Revolutionary War. In the newsletter *The Alarm*, the author who called himself Rusticus warned,

> Are we in like Manner to be given up to the Disposal of the East India Company, who have now the Assurance, to step forth in Aid of the Minister, to execute his Plan, of enslaving America?…They have levied War, excited Rebellions, dethroned lawful Princes, and sacrificed Millions for the Sake of Gain…Fifteen hundred Thousands, it is said, perished by famine in on year, not because the Earth denied its Fruits; but (because) this Company and their Servants engulfed all the Necessaries of Life, and set them at so high a Rate that the poor could not purchase them."[176]

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[175] Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. [Emmaus, PA: Rodale Press, 2002]: 51-52.

[176] Letter on the tea tax attributed to Rusticus, November 27, 1773 found in *Memoirs of the Historical Society of Pennsylvania*, Historical Society of Pennsylvania, (1895): 459.

In a letter from Jefferson to Adams on October 28, 1813, Jefferson also warned of the problems caused by this large corporation. "The artificial aristocracy is a mischievous ingredient in government, and provision should be made to prevent its ascendancy."[177]

Some of the strongest anti-corporate sentiment is found in the writings of John Adams. He wrote, "Increasingly, it would seem, the average American works for a corporation, trades with corporations, owns stock in corporations. Yet for all this he traditionally has viewed the corporation with misgivings, often-downright antagonism. Emotionally, our attachment still is to small enterprise and individual proprietorship." Further, Adams wrote, "We obviously have during a good share of our national history, thoroughly mistrusted, feared and at times hated and reviled a partner we have been neither able nor willing to live without."[178] At the Constitutional Convention, James Madison proposed putting the federal government in control of corporations when a corporation was required for the public good, but the authority of a single state was incompetent.[179] Madison's proposal failed because many of the delegates feared that granting this potentially enormous power to the federal government would open the doors for an American version of the East India Company. These delegates believed that the best preventative measure against these large and powerful corporations was to keep the

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[177] Thomas Jefferson letter to John Adams, 1813 found in *The Writings of Thomas Jefferson Memorial Edition,* Volume 13, available from http://www.constitution.org/tj/jeff.htm accessed October 20, 2010.

[178] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 372-3.

[179] Madison Papers, Constitutional Convention, August 18, 1787, available from the Avalon Project, Yale Law School, http://avalon.law.yale.edu/18th_century/debates_818.asp, accessed September 27, 2010.

corporate charter at the state level.[180] The final text of the Constitution did not mention corporations. Still fearful of the rise of monopolies such as the British joint-stock companies, Jefferson and Madison went so far as to propose an eleventh amendment which would ban monopolies in commerce and would prohibit corporations from owning other corporations. This proposal also did not gain traction with the other delegates.

The colonial fear of joint-stock corporations carried over to an early American fear of all types of large corporations as corruptors of civic virtue. The American ethos was largely built upon rugged individualism. However, corporations represented the emergence of collectivist institutions in which an association of wealthy and powerful people could unite to subvert the efforts of individuals. In a constitutional convention to revise the state constitution of Michigan, corporations were called, "soulless, heartless, remorseless, and conscienceless…regardless of the dying or the dead." During the 1837 convention to revise Pennsylvania's constitution, the subject of corporations arose. A report from this convention portrayed corporations in an equally unflattering light. "All corporations… are unrepublican and radically wrong…a compromise of the principle of equality with that of property." "These 'legislative monsters' which had 'no souls to damn, and no bodies to whip' certain Ohio democrats complained, were permitted the 'easy virtue' of operating without concern for 'energy and economy…careful circumspection and wise frugality."[181]

In these early years, while the corporation's profit motive was acknowledged, the business corporation was thought to serve the needs of the state and not simply the

[180] Ted Nace, Gangs of America, Berrett-Koehler Publishers, Inc. San Francisco, 48.

[181] Found in the *Niles Weekly Register*, June 3, 1837, volume LII. Published in Baltimore, digitized copy, page 217.

private profit of the stockholders. The state was empowered to alter or rescind corporate charters and privileges when public welfare was in jeopardy. American historian Rowland Berthoff reports that many early Americans required assurance that the corporation would not endanger liberty, and in the early 1830s through the 1850s, many people still called corporations unrepublican monopolies that unequally favored certain individuals. In Indiana, it was briefly considered to disqualify corporate officers and perhaps stockholders from public office. Although the stockholders and corporate officers had individual rights, Indiana lawmakers challenged, "who could pretend that the rights of the individuals incorporated and unincorporated are equal?"[182]

The fear that early American citizens exhibited in respect to corporations was symptomatic of the individualist economic theory that was the foundation of early American thought. Closely resembling Adam Smith's theories, the predominant economic unit was the individual who produced goods for sale in the market and the individual who bought the goods for consumption. Other than the few joint-stock companies that so riled the Colonists, very few other businesses took the corporate form. The individualist perspective undergirded the law and theories of the corporate form. Some theorists who disagreed with fiction theory espoused group theory which held that human beings are the true bearers of rights and duties. As such, humans have the right to do business as a group, but the group is not a legal person in itself. The law only protects individuals. It was in the tradition of individualism that fiction theory and group theory of corporate law arose. The influential English jurist William Blackstone found that corporations could be included within the definition of legal persons arguing that legal

[182] Rowland Berthoff, "Conventional Mentality: Free Blacks, Women, and Business Corporations as Unequal Persons, 1820-1870" *The Journal of American History*, 76 no. 3 (1989): 775.

persons included both natural and artificial persons. He wrote, "Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."[183] Blackstone put into writing what was slowly becoming a reality – although the Founding Fathers feared the rise of corporations such as the East India Company, corporations were on the rise and were beginning their assent as legal persons as the fledging American nation came of age.

As the Industrial Revolution brought increased production and profitability in the manufacturing and agricultural sectors, the number of corporations began to steadily increase. From 1776 to 1800, about three hundred companies incorporated through state governments with the majority forming in the New England states. These companies formed to take advantage the limited liability for investments and the unlimited life of the corporation.[184] One well-known corporation of the early 1800s was the Boston Manufacturing Company which incorporated in 1813. The corporation had a large investment pool of $400,000 which it used to consolidate the various elements involved in textile manufacturing. The Boston Manufacturing Company owned the Waltham mill which produced the waterpower to power looms in the Appleton textile mill which it also owned. It also sold textile machinery.[185] The corporation was one of the early examples

[183] Sir William Blackstone, *Commentaries on the Laws of England,* [Christian, Chitty, Lee, Hovenden, and Ryland Publishers, 1832]: Book 1, Chapter 1.

[184] Mansfeld G. Blackford and K. Austin Kerr, *Business Enterprise in American History*, Houghton Mifflin Company, Boston Massachusetts, 1986, 145.

[185] Mansfeld G. Blackford and K. Austin Kerr, *Business Enterprise in American History*, Houghton Mifflin Company, Boston Massachusetts, 1986, 100.

of horizontal integration in which a corporation takes over all the various elements of production.

While the Boston Manufacturing Company was breaking ground in the manufacturing industry, railroads were becoming increasingly powerful corporations as they forged alliances with one another and dominated the transportation industry. The capital required to build railroad networks was vast and therefore required investments by a large number of people. As more and more individuals invested in the railroad corporations, the corporations were transformed from small, closely managed firms to large mega-firms requiring an extensive management system. Railroads began a managerial revolution by creating bureaucracies of business professionals to manage the myriad railroad operations including management of funds, capital investments, pricing and advertising, and finally, the operation of the trains. The railroad corporations, with their large management structures complete with bureaucracies of middle management, were the predecessors of the modern day corporations as we understand them.[186] Indeed, it would within the railroad industry that the law would adjudicate the fate of the corporation as a legal person.

When the colonists and early American citizens acquiesced to the state's granting corporate charters to a select and limited number of companies, these citizens expected that the corporation would serve the public interest as well as make a profit. England's joint-stock companies, although they made enormous profits, also had the parallel directive to increase the strength of England. Universities, church organizations, and civic groups which acquired a corporate charter had a clear public purpose. However, as

[186] Mansfeld G. Blackford and K. Austin Kerr, Business Enterprise in American History, Houghton Mifflin Company, Boston Massachusetts, 1986, 9.

the nineteenth century progressed and the number of commercial corporations rose, the public service aspect of the corporation dissipated while the profit motive rose. Correspondingly, as more and more businesses demanded a corporate charter, state legislatures facilitated the process by enacting general state incorporation laws that made the incorporation process swift and inexpensive.[187]

Relaxing the incorporation process was a significant milestone because it altered the understanding that incorporation was a privilege granted by the state for both public and private purposes. Free incorporation suggested that incorporation was not a special privilege but a right available to any group of people seeking to do business with a purely profit motive. The process of incorporation became administrative as the state was simply a rubber stamp on the paperwork rather than a sovereign granting a special status to a company. As incorporation became routine, corporations did not have the same obligation to serve the public interest and the needs of the state.[188]

As states modified their incorporation laws, theorists began to reconsider the social reality of the firm. Corporations were increasing in strength and number, and were playing a role in political affairs. Theorists began to consider the reality of the corporation as a separate entity from its members and as a very real legal person in its own right. The legal fiction and concession theories were brought into question, and the real person theory promulgated by Otto Gierke and Maitland which came to dominate theories of the firm, began to take hold. The real person theory holds that a corporate

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[187] Mansfeld G. Blackford and K. Austin Kerr, Business Enterprise in American History, Houghton Mifflin Company, Boston Massachusetts, 1986, 146.

[188] Gregory Mark, "Comment: The Personification of the Business Corporation in American Law," *University of Chicago Law Review,* 54 (1987), 1454

person, just like a human person, has legal and even moral rights and responsibilities. The evolution of these theories in considered in-depth in the next section. As theories of the firm began to change, theorists also began to waver in their commitment to individualism. The management structures of the railroads in which groups of middle managers and investors, rather than individual actors, were the main players was in stark contrast to the traditional individualistic conception of the firm. Stockholders refrained from taking an active role in the management of the corporation as ownership and the means of production began to separate.[189] The turn of the Twentieth Century ushered in the era of management structures and correspondingly management theories of corporations.[190]

By 1904, corporations accounted for three-quarters of all of America's industrial production. As wealth and power began to be concentrated in the hands of fewer large businesses, American's industrial landscape became increasingly an oligopoly. For example, in 1909, six or fewer companies accounted for half of the production in the following industries: food processing, electrical machinery, primary metals, petroleum, rubber, and tobacco.[191] Correspondingly, the government found that they needed a way to control the rising power of large corporations. During the Gilded Age, which lasted from approximately the 1870s to the 1920s, government sought a cooperative relationship with business and labor in the hopes that cooperation would result in general economic

[189] William W. Bratton, Jr., "The New Economic Theory of the Firm: Critical Perspectives From History," *Stanford Law Review,* 41 no 1471 (1989).

[190] Mansfeld G. Blackford and K. Austin Kerr, Business Enterprise in American History, Houghton Mifflin Company, Boston Massachusetts, 1986, 10.

[191] Mansfeld G. Blackford and K. Austin Kerr, Business Enterprise in American History, Houghton Mifflin Company, Boston Massachusetts, 1986, 10.

prosperity. Legal historian Gregory Mark argues that during this time, the scope of the corporation shifted from being able to do things specifically allowed by its charter to having the latitude to do anything not specifically prohibited in the charter. Mark attributes this shift to the general incorporation laws that made incorporation seem unexceptional and the wave of regulatory measures enacted by state legislatures that reified the autonomy of the corporation. Mark states, "The state had once been the source of a corporation's purpose and power. By the beginning of the Gilded Age the state supplied only a corporation's robes and, for some businesses, a subsidy."[192]

It was during this time that many of the initial corporate personhood cases reached the Supreme Court. These cases are discussed in great detail in the second half of this chapter. As a prelude to that portion of the chapter, railroads corporations led the demand for corporate personhood. The Supreme Court acquiesced and in 1886 granted legal corporate personhood to protect the life, liberty, and property of a corporation. However, although corporate personhood was debated within the Court, this concept did not garner much debate within the other branches of government. Instead, the legislature and executive branches accepted corporate personhood and chose to control the power of corporations through regulatory measures.

As part of the managerial revolution, businessmen began to see themselves as trustees for society with responsibility for philanthropic pursuits. Corporations began to contribute to various public welfare programs such as hospitals, universities, and private charities. While these donations contributed to public welfare, they also increased the corporation's public image and contributed to profitability. Theorists began to consider

[192] Gregory Mark, "Comment: The Personification of the Business Corporation in American Law," *University of Chicago Law Review,* 54 (1987), 1456.

the purpose of the corporations – was it simply to make a profit or did the corporation have a responsibility to society? What were the moral requirements of the corporate person? Further, could businesses unduly influence American politics and values through their participation in the public sphere and were the interests of the shareholders adequately represented when philanthropic decisions were made by a group of professional managers? [193] All of these considerations contributed to the evolving understanding of the corporate person.

By the end of the Gilded Age, the real person theory, which taught that the corporate person should be considered in the same light as a natural person for legal matters, was firmly accepted by the courts and legal theorists. The debate over legal corporate personhood largely withered away while new scholarship provided by economist Gardiner Means and lawyer Adolf Berle turned the study of corporations in a new directions. Berle and Means published *The Modern Corporation and Private Property* in 1933 as a textbook explanation of the corporation drawn from the view of corporate finance. Unlike previous scholarship, Berle and Means assumed the power and permanence of the corporation and did not bother to explain the political and social justification of the corporate autonomy.[194] Instead, Berle and Means focused on the structure of the corporation explaining that the corporation is composed of various groups including the board of directors, professional managers, and the stockholders who are the owners. According to Berle and Means, the hallmark of the modern corporation was the

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[193] Mansfeld G. Blackford and K. Austin Kerr, Business Enterprise in American History, Houghton Mifflin Company, Boston Massachusetts, 1986, 298; Alfred D. Chandler, Jr. *The Visible Hand of the Managerial Revolution in American Business*, [Harvard University Press: 1993].

[194] Gregory Mark, "Comment: The Personification of the Business Corporation in American Law," *University of Chicago Law Review,* 54 (1987): 1482.

fragmentation of accountability and legal liability among these groups. This led to the conclusion that there is no discernable mind or conscience within the corporation. This was a startling conclusion for moral theorists who were beginning to take note of the rising power of the corporate person. Although legal theories of the corporate personhood were dormant, the work of Berle and Means ignited scholarship by philosophers concerned with the moral justification of the corporate person.[195]

In the Twentieth and into the Twenty-first Centuries, the reality was that corporations had become major institutions rivaling the U.S. government in wealth and power. It is now common place for large corporations to have public relations teams working for them to boost their public image and guide management in social and political affairs. Most large corporations are concerned with more than just profit maximization and take an active role in politics through activities such campaign contributions, lobbying, and influencing regulatory agencies. By engaging in such activities, the corporation has proven to be a powerful agent beyond the limited realm of finances and into the sphere of politics and the community. The actions taken by corporations affect many aspects of everyday life. Thus, the modern corporation is a significant actor whose moral agency must be considered. On that note, we turn to a

[195] See Richard A. Sabatino, "The Responsible Corporation," *American Journal of Economics and Sociology*, Vol. 25, No. 3 (Jul., 1966), pp. 255-266; Forest G. Hill, "Veblen, Berle, and the Modern Corporation," *American Journal of Economics and Sociology*, Vol. 26, No. 3 (Jul., 1967), pp. 279-295; Walter Werner, "Management, Stock Market, and Corporate Reform: Berle and Means Reconsidered," *Columbia Law Review*, Vol. 77, No. 3 (Apr., 1977), pp. 388-417; David Vogel, "The Corporation as Government: Challenges & Dilemmas," *Polity*, Vol. 8, No. 1 (Autumn, 1975), pp. 5-37; Thomas Donaldson, Corporations and Morality, Prentice-Hall, Inc. Englewood Cliffs, New Jersey, 1982, 54; Peter French, *Collective and Corporate Responsibility*, Columbia University Press, New York, 1984: 78. Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* [Berkeley, CA: University of California Press, 1986].

comprehensive review of the various moral and legal theories that arose throughout history.

Theories of Corporate Personhood

The preceding section outlining the rise of the corporation foreshadowed some of the important legal theories concerning corporate personhood. As the corporation grew in size and power, theories evolved from viewing the corporation as a simple fiction to considering the corporation to be a legal person in much the same way as a natural person. Although some scholars argue that a legal conception of personhood does not involve an ethical debate, there are implications for moral philosophy when a collective entity is granted personhood with associated rights and duties. Since "person" is a value laden term, bestowing personhood on the corporation ties the corporation into a moral and ethical debate as the corporation is seen as an agent whose actions have moral consequences. It seems to be impossible to separate the purely legal use of the term from the commonly understood ethical implications of the term. Corporate personhood illustrates a dichotomy between a moral person and a legal person, and theorists must determine both the legal and the moral status of the corporation.

Because the corporation involves a dichotomy between a moral and a legal person, there are two separate but related theoretical paradigms that must be explored. The first is the traditional theories of personhood have their basis in Locke and Kant and analyze what it means to be a person in the traditional sense. Within this debate, the corporation's status as both person and property comes into clear focus. Kant's differentiation between means and ends shows that a corporation straddles this divide by being both the subject and the object of property rights. The theories put forth by Locke

and Kant of a person as a rational agent also illustrate the problematic matter of determining whether a collective, which is composed of rational agents, can be considered an agent in and of itself. These foundational theories produced a host of more modern theories of corporate personhood that analyze whether the collective entity can qualify as a moral person. There are theorists who argue both for and against corporate moral personhood.

Because corporate personhood developed largely through the courts as a legal device, there is a substantial body of theory discussing what it means for a corporation to be a legal person. The historical review mentioned the most common models of fiction theory, group theory, and real person theory. These models developed primarily in the legal paradigm and isolated from moral theory. However, there are important connections between moral and legal theory which can be seen in a review of the important court cases adjudicating corporation personhood.

One of the common threads between the moral and the legal theory is their basis in individualism. America's ethos of individualism had a great impact on how the collectivity of a corporation was conceived. From the founding of the nation and into modern times, individualism has remained a primary tenet of American political thought. As the corporation grew in prominence, American theorists, politicians, and legal scholars struggled to fit the concept of the collectivity within the individualistic model. As theorists forced a square peg into a round hole by forcing the idea that the corporation could be considered a person just like an natural human being, many problems arose.

America's Founding Fathers constructed the Constitution with a strong foundation in individualism which emphasizes the rights and privileges of the individual

person as opposed to the group. The Founding Fathers, who were influenced by works of individualist philosophers such as John Locke, Adam Smith, and the Barron De Montesquieu, wrote the Constitution in the spirit of individualism. Thus, the Constitution's references to "person" or "citizen" refer to an individual and the rights or duties of the group are not fully delineated. As corporations entered the legal domain as actors, the framework of individualism in the Constitution did not change to accommodate the collective. Rather, the concept of the corporation was made to fit within the individualism framework. The corporation was deemed a "person" so that the law could manage the collective within the same body of law that it adjudicated cases regarding human persons.

Legal scholar and moral philosopher Meir Dan-Cohen argues that equating the corporation to the individual person suited neoclassical economic scholarship just as it did legal scholarship. The corporation was likened to the individual actor and the firm's production frontier was equated to the individual's utility frontier. The firm was seen as having the singular goal of profit maximization which drives all decision-making. The leader at the top of the corporation's hierarchy was equated to the individual economic actor. The firm could easily be replaced by the individual manufacturer with little consequence for the economic theory. This simplistic view, however, glosses over many of the important characteristics of the modern corporation.

Profit maximization is not necessarily the singular goal of modern corporations as many firms engage in political and charitable pursuits. Advocates of corporate social responsibility claim that a corporation serves many constituencies including shareholders, employees, customers, the state, and even the public. Each of these constituencies has

different demands and the corporation's goals vary in an effort to meet these demands. Profit maximization for the shareholders is one of many goals. Another complication to the collective-individual analogy is that the size and complexity of a corporation's decision-making structure differs significantly from that of an individual actor. The traditional economic model preserves at least one individual at the top of the firm's hierarchy who was the human locus of responsibility. In modern corporations, control is split among senior managers, middle managers, the board of directors, labor union officials, and so on. Bargaining and complex decision-making processes are the norm rather than a president who makes important decisions. Further, collective decision-making differs from individual decision making. Collective choice scholars such as Kenneth Arrow have proven that processes used to aggregate individual preferences do not necessarily result in a decision that accurately reflects the preferences of the members.[196] By manipulating the agenda or order of votes, different outcomes can be attained. Therefore, the corporate decision may not necessarily reflect the true preferences of the composite members. Finally, in modern corporations it is difficult to even find the individual persons on whom the corporation is based. As the discussion of the holding company demonstrated, the importance of the individual shareholder is on the decline as much of the investment capital of a corporation is supplied by other collectives such as banks, insurance companies, or other corporations.

Despite the problems in comparing a corporation to an individual, the law does not clearly recognize these differences. According to Dan-Cohen, instead of recognizing the difference between individuals and organizations, the corporation was made to fit

[196] Kenneth Arrow, *Social Choice and Individual Values,* [John Wiley and Sons, New York, Second edition, 1963].

within an individualistic framework that uses the ambiguous term "person" to apply to both individuals and organizations. The classical conception of the economy as a system of transactions among individuals was transposed on the legal foundation of individual property rights. Corporations as associations of persons were made to fit into the individualistic framework by assuming an artificial personhood that allowed them to act as individual persons. Although corporations as a group-person do share some characteristics with the individual-person, the relationship is not exact. While equating the corporation to an individual simplified matters for justices working within the individualist tradition, the analogy was not perfect and created problems as will be seen in the legal section of this chapter.[197]

As the law contemplates the analogy between an individual person and a collective person such as a corporation, many issues are at stake. The bestowal of personhood generally implies the bestowal of certain rights and duties. Do these rights and duties extend beyond narrowly construed legal claims to rights and duties as moral agents? Some legal scholars argue that legal personhood does not imply moral personhood and the two concepts must remain distinct. However, in practice this is next to impossible. It is very common to hear the British Petroleum Corporation deceived the public in its efforts to clean up the Gulf oil spill or that Nike Corporation engaged in unjust labor practices. These statements attribute moral agency to corporations by showing that a corporation is responsible for actions and is the subject of blame. Corporations engage in activities that individuals do such as participating in contracts, making public statements, apologizing for actions, etcetera. Further, it seems that there is

[197] Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* [Berkeley, CA: University of California Press, 1986]: 14-20.

something to the notion that the collective is more the sum of its individual members. While the individual rational agents within the corporation certainly have rights and duties, it is meaningful to say that the corporation itself, as a separate entity, also has rights and duties. There seems to be a strong prima facie case for granting corporation moral agency. However, with acknowledging the possibility of moral agency in a corporation comes many thorny subjects such as determining if a corporation can have a guilty mind and how to adequately punish a corporation for its misdeeds. Theorists have pondered these issues and a review of some of the most prominent theories of corporate personhood reveals just how complex the issue is.

The chapters concerning slaves, fetuses, and great apes utilize a core theory of personhood supplied by John Locke and Immanuel Kant as a foundation for determining if these entities qualify as persons. In the case of corporations, the theories of Locke and Kant are more difficult to apply because both of these theorists base their models of personhood on the individual rather than the collective. The individual as a rational and autonomous person is declared a person. Certainly corporations and other associations are composed of these rational and autonomous persons, but neither Locke nor Kant analyze the group itself as a candidate for personhood. When Locke and Kant were writing their treatises, corporations were not widespread and were not a dominant part of the political or social landscape. Therefore, there was not a pressing need to address corporations in their accounts of personhood. Because neither Locke nor Kant specifically address the status of corporations, it is difficult to infer what these scholars would have said about the collectivities. Thus, when studying the works of Locke and Kant in respect with corporate personhood, care must be taken not to presume what these

theorists would say on the subject. However, it is possible to make some general inferences using their arguments about individualism as applied to collectives.

Locke's theories involve the social contract, and in many ways, corporations can be seen in light of a social contract agreed to by various individual persons. As such, corporations are the products of human ingenuity just as other human-created agreements. In fact, the corporation can be seen as a series of contracts in which the state agrees to grant a corporate charter in exchange for certain public benefits from the corporation; investors agree to supply the corporation with capital in exchange for a return on their investment; employees agree to work in the factories in exchange for wages; and so on. According to business ethicist Thomas Donaldson, comparing the corporation to a social contract is a useful way of assessing the moral performance of a corporation – when the corporation has fulfilled its terms of the contract, it has done well. If the corporation fails in the contract, then society is justified in condemning the corporation.[198] Donaldson may provide a way of assessing the outcomes of a corporate body, but he does not argue that the corporation is itself a moral agent under Locke's theories. Using the social contract theory, the corporation is the project that individuals pursue but the corporation is not a project pursuer.

The term "project pursuer" is used by Lockean scholar Loren Lomasky to describe his understanding of a Lockean person.[199] According to Lomasky, persons are those who have the rational ability and autonomy to choose a certain course of action and

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[198] Thomas Donaldson, Corporations and Morality, Prentice-Hall, Inc. Englewood Cliffs, New Jersey, 1982, 54.

[199] See Chapter 1 for an exposition of Lomasky's argument in Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press 1987].

then follow through to pursue those plans. For Lomasky, commitment to certain projects is a part of a person's identity. Some projects are facilitated by a group effort in which cooperation and specialization are critical. Forming a corporation can facilitate attaining the goals of a project, or forming the corporation could even be the project itself. The critical point is that the corporation itself is not the "project pursuer" with the rational ability and autonomy of an individual person. Thus, under Lomasky's criteria for personhood, it would seem that a corporation, as a separate and unique entity apart from its constituting members, would not qualify.

A noteworthy contemporary of John Locke was Adam Smith whose *Wealth of Nations* became a foundational treatise in the field of economics. Like Locke, Smith based his work on the individual, and argued that the individual should pursue his own self-interest which would result in profit maximization and greater economic results than if the state were to guide commerce. Smith also promoted the division of labor as a concept that would yield greater economic benefits through specialization. Although his theories on the invisible hand and specialization of labor could be applied to the corporation, it is difficult to deduce what Smith would have thought of modern corporations. He addressed joint stock companies, the predominant corporate form in his day, with skepticism as being mismanaged, inefficient, and prone to becoming monopolies.[200] Thus, it is unclear if Smith would defend the corporation as a legal and/or moral person.

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[200] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edited by Roy H. Campbell and Andrew S. Skinner; Oxford: Clarendon, 1776 Original, 1976 Reprint, 750-6. For a different interpretation of Smith as amenable to joint-stock corporations see: Gary M. Anderson and Robert D. Tollison, "Adam Smith's Analysis of Joint-Stock Companies," *The Journal of Political Economy*, Vol. 90, No. 6 (Dec., 1982).

Like Locke and Smith, Immanuel Kant was an individualist and did not speak to the personhood of the group or the corporation in his teachings. For Kant, the whole can never be greater than the sum of its parts, so he likely would be willing to assess the moral capabilities of the individuals who comprise the corporation, but not the corporation itself. In the Kantian tradition, the corporation as a collective cannot be a moral agent. There has been some interesting scholarship applying Kantian ethics to the business ethics of the corporation such employing the Categorical Imperative to argue against corporations who use people as a means to an end through deceptive advertising and exploitative working conditions.[201] However, these studies analyze how management should treat employees or how leaders should treat stockholders. They do not speak to the moral agency of the corporation as an autonomous and rational actor in its own right.

In terms of the Categorical Imperative, Kant argued that persons must be treated as ends in themselves rather than a means to be used for another's purposes. Because a person cannot be a means, and property is a means to fulfilling ends, Kant reasons that a person cannot be property.[202] In these terms, a corporation would be a means that human individuals use to attain any number of ends such as financial profits, social camaraderie, scientific progress, and so on. The list of possible goals that individuals hope to attain through forming a corporation is practically endless. Corporations exist for a purpose designed by those who created the corporation. It does not make sense for a corporation to exist without a purpose. Corporations are therefore the means to be used for an end.

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[201] See Norman Bowie, *Business Ethics: A Kantian Perspective,* Wiley-Blackwell Publishers, Malden, Massachusetts, 1999.

[202] Immanuel Kant, *Lectures on Ethics,* Translated by Louis Infield, [Harper and Row, 1965]: 165.

This is how Kant separates a person from property. Kant would consider the corporation to be simply property while the individuals who make up the corporation are the persons.

This is a good launching point for the discussion of person versus property that is reoccurring in each of the chapters. The corporation is at the same time both the subject and object of property rights. As a subject of property rights, a corporation may own goods, equipment, stock, and even other corporations. At the same time, human beings own the corporation; it is a commodity on the stock market as humans buy and sell shares of it. In this respect, the corporation is the object of property rights. Traditionally, the subject of property rights is considered a person while the object of property is considered a thing. Because the corporation is both the subject and the object, the corporation is considered both person and thing and is legally endowed as both.[203]

This is an anomaly according to Kant's teaching because an entity cannot be classified as both person and thing. If persons own persons, we have a slave economy, and if things own persons were are in a world of science fiction. The strict divide between these two classifications is what determines ownership relations and allows market exchanges. The concept of corporate personality suffers from confusion between humans and property in much the same way that the concept of slavery suffers. A slave was undoubtedly human, but his status as property put his personhood in question. A corporation is undoubtedly property, but because this association of humans has the capability to act as one united individual, the corporation claimed personhood. Once again, we are reminded that being human does not automatically require a grant of personhood, and being property does not necessarily require a denial of personhood.

[203] Katsuhito Iwai, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance" *The American Journal of Comparative Law* 47, no 4 (1999).

In a famous passage, Kant distinguishes between entities that either have a price or a dignity. He writes, "In the kingdom of ends, everything has either a price or a dignity. If it has a price, something else can be put in its place as an equivalent; if it is exalted above all price and so admits of no equivalent, then it has a dignity….Morality, and humanity as far as it is capable of morality, is the only thing which has dignity….Autonomy is…the ground of the dignity of human nature and of every rational nature."[204] For Kant, only individual human persons can have dignity or an intrinsic worth. All other entities can only have a price. Dan-Cohen argues that Kant would include a corporation as an entity with a price rather than see a corporation as a moral person with dignity because the corporation is a means to be used by humans. According to Dan-Cohen, as a means, a corporation is similar to a machine to be used for human purposes.[205] He uses this foundation to argue that individuals and corporations are entitled to different rights.

Dan-Cohen contends that individuals, who have Kantian dignity or are ends in themselves, are entitled to autonomy rights which are bestowed upon moral agents and outline the sphere in which an individual can act without interference from the state and must be respected by other individuals. An organization such as a corporation cannot have this type of autonomy right. Instead, organizations have derivative rights that come from the individuals within the organization. Thus, the organization can invoke the rights of individuals to claim a harm and can even win lawsuits based on derivative

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[204] Immanuel Kant, The Moral Law: Kant's Groundwork of the Metaphysics of Morals, pp. 96-97

[205] Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* [Berkeley, CA: University of California Press, 1986]: 61.

rights. But the rights remain derivative because the organization is simply a means to an end and therefore does not have autonomy rights of its own.[206]

While these arguments are plausible, the modern corporation stretches this conception dividing means versus ends and persons versus property. The corporation, as an object of property rights, is also the subject of property rights. The corporation can own shares in other corporations. For instance, corporation A owns corporation B as a means to an end. To complicate the scenario, suppose that at the same time that corporation A owns all the stock in corporation B, corporation B owns all of the stock in corporation A. Essentially, the two corporations own each other and indirectly each owns itself. This leads to an infinite regress when trying to determine the means and the end of the corporate relationship. It also allows corporations to essentially eliminate human beings as the dominant owners.[207] This scenario is similar to that of a holding company which is a corporation whose purpose is to hold stocks in other corporations – a corporation that owns other corporations. When assessing the means and ends, ownership tends to regress to those human beings who have shares in the holding company. However, given the complicated tangle of corporate finances, it is often difficult to sort through the various holding companies to find the human stockholders. In general terms, it is the corporation itself which is considered to be the property holding entity. In this respect, a holding company does serve as an end of sorts while the various other corporations which it owns are the means. However, just because a corporation can

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[206] Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* [Berkeley, CA: University of California Press, 1986]: 61-68.

[207] Katsuhito Iwai, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance" *The American Journal of Comparative Law* 47, no 4 (1999): 587.

hold property does not mean that the corporation is a Kantian person. Holding property is not the essence of personhood according to Kant. It is the individual as an autonomous, rational agent who is an undisputed end. The ability of a corporation to hold property in other corporations complicates the situation but does necessarily bestow status of Kantian person to a corporation.

According to ethicist Stephen Wilmot, corporations cannot be ends in themselves. But the complicated status of corporations as collectives of individuals and as property owners does give corporations a claim to personhood that must be defined as separate from the personhood as individuals. Wilmot argues that a critical difference between humans as persons and corporations as persons stems from the means versus ends dichotomy. Because corporations exist for a specific purpose, Wilmot contends that actions taken by a corporation that are outside of its purposes and requirements should not be permitted. Wilmot states that corporations as collectives have second-order autonomy that stems from the individuals who comprise the corporation. Therefore, it is permissible to state that a corporation itself made a decision in some cases. He uses the example of the management of Ford Motor Company using its resources to create a military force to subvert the U.S. Government. If the managers, shareholders, and all other relevant parties agreed to create a military force, Ford Motors would be responsible for the wrongdoing. However, the punishment would be difficult to apply. Individuals, who are ends in themselves and have autonomy to choose their actions, can be punished by a restriction in pursuing their goals. Punishment of a corporation by restricting second-order autonomy is much more difficult.[208]

[208] Stephen Wilmot, "Corporate Moral Responsibility: What Can We Infer from Our Understanding of Organizations?" *Journal of Business Ethics*, Vol. 30, No. 2 (Mar., 2001); 161-169.

This is the dilemma in applying Kantian ethics to a corporation. Kant designed his theory to apply to individuals who, as rational and autonomous beings, could use reason to choose their ends and identify their duties towards others. Therefore, individuals can make moral judgments and can be judged by others for their moral actions. The ability of a collectivity such as a corporation to act as a rational and autonomous being and therefore a moral agent is very much debated within philosophy. Therefore, the discussion must turn to whether a corporation can be considered a moral agent.

The other chapters discuss the dichotomy between person and biological human being by means of a detailed account of the abilities of rational agents to qualify for personhood. In these accounts, the important criteria, stemming from the philosophies of Locke, Kant, and Daniel Dennett, is the presence of a rational mind and the capability of volition. In the case of the corporation, the discussion is different because the individuals who make up the corporation are agreed to be persons with rationality and volition. The question is whether the corporation itself, as a separate entity, also has rational abilities that would qualify for personhood. Is there a collective rational mind and collective will that could qualify for personhood?

Most studies of corporate personhood do not spend much time analyzing the conditions of natural personhood as they apply to corporations. There is a paucity of scholarship that utilizes Kant's criteria of rationality or Dennett's conditions for personhood as applied to corporations. However, when comparing and contrasting claims to personhood made by the various entities in this study, such an analysis is necessary and yields interesting results.

The preceding paragraphs outlined Kant's definition of a person as a rational, autonomous individual who cannot be used as a means to an end. Locke's account of personhood is also based on the individual who is self-aware and has a memory of his or her past. Locke defines a person as a "thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness which is inseparable from thinking and, as it seems to me, essential to it: it being impossible for anyone to perceive without perceiving that he does perceive."[209] Locke set the precedent that a person should be considered a rational agent who can make decisions and is culpable for those decisions. Building on Locke's foundation, philosopher Daniel Dennett designed six criteria for personhood: 1) persons are rational beings, 2) they are conscious and they are intentional, 3) they are considered persons by others, 4) they can reciprocate, which refers to the ability to formulate second order intentions or to have a belief about a belief, 5) they have the capacity for verbal communication, and 6) they are self-consciousness or self-aware.[210] The question is whether a corporation, apart from its constituent members, can qualify as a person according to these criteria.

According to legal scholar Arthur W. Machen, the corporation does not qualify as a person according to criteria one, two, four, and six. While he agrees that the persons who compose the corporation qualify according to such criteria, Machen states that a corporate entity is not a rational being who can understand the law and decide to follow

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[209] John Locke, *An Essay Concerning Human Understanding*, Peter Laslett, editor, [Penguin Publishing, London, 1997 edition, originally published 1690]: Book II, Chapter 27.

[210] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177.

the law. The law can only speak to the human beings underneath the corporate veil, and punishment to a corporation must also reach the human beings within the corporation. Thus, he argues that to consider the corporation a person according to rationality criteria is a fictitious personification of a non-person entity. When considering corporate personhood a fiction, the law can then treat the corporation *as if* it were a rational being with volition and cognition. The comparison is a metaphor to portray that fact that a corporation bears some resemblance in the law to a rational being. But for Machen, the collective is not a person in the moral sense.[211]

Dennett's social recognition criterion number three offers an avenue for corporations to claim personhood. According to this condition, in order for an entity to be a person, the community must recognize it as a fellow person. While Dennett does not claim that criterion three is sufficient for personhood, the idea of social acceptability has been important for corporate personhood. The Supreme Court recognized corporate personhood in 1886 and has never rescinded this status. Although there is a small contingent of pundits who protest corporate personhood on various websites, for the most part, the general public has accepted the legal personhood of corporations or is apathetic to the issue. Very recently, protests on Wall Street have brought some public attention to the issue of corporate personhood. It remains to be seen if a sizeable number of people are able to address the issue and convince the social community that corporations should not be included.

[211] Arthur Machen Jr., *Corporate Personality*, Harvard Law Review, XXIV, no. 4, 1911, 262.

Recently, when replying to a protester at a political rally, Republican presidential candidate Mitt Romney responded "Corporations are people, my friend."[212] Romney was explaining that in his taxation plan, corporations could be included within the "people" taxed. Romney did not further explain his views on corporate personhood and it appears that he did not consider the implications of corporate personhood beyond his response to a noisy protester. However, the statement caught the media's interest which brought it to the attention of the American public. In response, Debbie Wasserman Schultz, a chairwoman of the Democratic National Committee called Romney's statement a "shocking admission" stating "Mitt Romney's comment today that 'corporations are people' is one more indication that Romney and the Republicans on the campaign trail and in Washington have misplaced priorities."[213] However, Romney's statement is not a "shocking admission," it is a legal reality. Neither Romney nor Schultz seems to be well versed in the actual implications of corporate personhood. While the story made national news for a couple days, public interest in the story soon faded. The issue of corporate personhood is sometimes mentioned in association with the current "Occupy Wall Street" movement protesting the power and wealth of corporations. Thus far in the protests, the argument seems to be fueled by a perception of corporate audacity and arrogance to even claim personhood. However, the movement has not yet spawned an academic debate on the legal intricacies of corporate personhood. Yet, the issue seems be gaining some public notice through this movement which will perhaps lead to a more robust academic

[212] Philip Rucker, "Mitt Romney Says 'Corporations are People' at Iowa State Fair," *The Washington Post* 11 August 2011, available from http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html, accessed 23 November 2011.

[213] Philip Rucker, "Mitt Romney Says 'Corporations are People' at Iowa State Fair," *The Washington Post* 11 August 2011, available from http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html, accessed 23 November 2011.

debate over corporate personality. It remains to be seen if the "Occupy Wall Street" and associated movements can raise public awareness of the issue of corporate personhood to point where it becomes a contested political issue and part of the national public agenda.

While most of the general public seems to be ambivalent about the issue, even many mainstream political theorists seem to have accepted the concept. One of the most important modern political philosophers, John Rawls, seems to have tacitly accepted corporate personhood in his treatise *A Theory of Justice.* When Rawls lists the nature of the parties who participate in the original position, he adds item c which includes "associations (states, churches, or other corporate bodies)."[214] Unfortunately, Rawls does not elaborate on this inclusion anywhere else in the book. It seems that Rawls considered associations in his general understanding of persons, but either did not think that this point was worth further explanation or decided not to delve into the complicated task of explaining the nature of corporate persons.

The other avenue for corporations to claim personhood under Dennett's theory is the criterion of verbal communication. Most large corporations have an official spokesperson who is authorized to speak for the corporation as a whole. When the spokesperson announces the "corporation's" official policy or official viewpoint, she is not verbalizing the opinion of laborers, or the marketing team, the view of stockholders or the personal view of any one person within the corporation. Rather, she is verbalizing what corporate decision makers, including the board of directors, CEO, stockholders, and other interested parties, have concluded is the "corporate" view resulting from the corporation's decision making process. There seems to be solid ground to conclude that

[214] John Rawls, *A Theory of Justice,* The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1999: 126.

the corporation itself can speak through its designated spokesperson. Surprisingly, there is little to no theoretical scholarship concerning the corporate voice even though the corporate voice is exceptionally loud as most corporations employ intense marketing tactics to promote their products. Although the scholarship on the corporate voice is limited, a few contemporary theorists who analyze the strength of corporations argue that just as corporations have their own voice, they also have their own rational decision making mechanisms that would qualify them as Lockean and/or Kantian persons.

Linguistic specialist Sanford Schane examines the intersection of language and law and argues that in normal linguistic usage the corporation is considered a person because the corporation shares the mental capacities of an individual. He argues that cognitive states such as rationality, intelligence, and volition can be attributed to corporations. Additionally, many action verbs of intentionality, guilt, and malice can be used with both individuals and corporations. He even conjectures that it is possible to give corporations the right to vote. His conclusion is that it is not simply metaphor to attribute agency to corporations.[215]

Ethicist Kenneth Goodpaster argues that corporations have certain capabilities that are very similar to the rational individual. First, the corporation has perception in that the corporation gathers information about resources, risks, and the impacts of alternative courses of action before making a decision. Corporations monitor the environment, gather marketing data, produce financial data, and follow government regulations as they make decisions. Further, Goodpaster argues that corporations can take part in moral reasoning if moral norms are used in decision-making and when moral

[215] Sanford A. Schane, "The Corporation is a Person: The Language of a Legal Fiction" *Tulane Law Review* 61 (1987).

principles are part of corporate ethical codes and official corporate policies. Goodpaster concludes that there is a corporate mind, but he puts "mind" in parenthesis so it is not clear if he truly believes that a corporation has a rational mind just as an individual does.[216]

The most prominent advocate of the proposition that corporations should be treated as rational, decision making agents who are part of both the moral and legal community is ethicist Peter French. French argues "corporations can be full-fledged moral persons and have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons."[217] In order to support this claim, French develops a detailed analysis of a corporation's internal decision-making structure to conclude that a corporation itself, apart from its constituent members, can make moral decisions. The internal decision-making structure utilizes two important components. First is an organizational flow chart of responsibility that designates which persons or offices have input on what decisions and the pecking order of these persons when making a decision. French likens it to the grammar of corporate decision-making. The second element is the set of corporate policies or rules that guide decision-making. This delineates the overarching corporate mission and beliefs so that when a decision is made that is motivated by a corporate desire and is consistent with the corporate policies, it can be said that the decision is corporate intentional. French contends that a corporation can have intentions because they have reasons for doing things to realize corporate goals.

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[216] Kenneth E. Goodpaster, "The Concept of Corporate Responsibility," *Journal of Business Ethics*, Vol. 2, No. 1 (Feb., 1983): 1-22.

[217] Peter French, "The Corporation as a Moral Person," *American Philosophical Quarterly*, Vol. 16, No. 3 (Jul., 1979): 207.

These corporate goals are not reducible to the self-interested desires of directors or managers.

In order to act on its corporate intentions, French says that the corporation uses its decision making process to choose a course of action, and this demonstrates the corporation's rationality as a moral agent. When the decision-making process is activated, it incorporates all the inputs from the various biological humans within the organization and synthesizes a corporate decision that is consistent with corporate policies. He argues that it truly is a corporate decision because not one human actor made the decision and the corporate intentions cannot be reducible to the intentions of any one individual human member.[218] French further argues that through this process, a corporation itself can be shown to be rational and intentional just like any individual human person.

This is a significant departure from the traditional individualist teaching that only individual rational agents could have moral worth. In a modern, large corporation, the CEO does not have the sole authority to make significant decisions such as joining a cartel or violating environmental policy. Rather, these decisions are the result of the internal decision-making process that incorporates the intentions of a host of corporate players as well as corporate policy. Thus when corporations are accused of polluting the environment or praised for community service projects, there is truth to these statements because the corporation should be treated as a moral agents. As a moral person, the corporation is subject to the laws of criminal liability because the corporation can be

[218] Peter French. Inference Gaps in Moral Assessment: Capitalism, Corporations, and Individuals. International Social Science Journal (2005); Peter French, "The Corporation as a Moral Person," *American Philosophical Quarterly*, Vol. 16, No. 3 (Jul., 1979).

shown to have intent and culpability. French uses the example of Ford Motor Company to illustrate his point.

In 1978, a Ford Pinto was rear-ended and burst into flames killing the passengers. The Elkhart Indiana Superior Court indicted Ford on three counts of reckless homicide. Ford filed a motion to dismiss arguing that the homicide statutes cannot be applied to corporations because the statutes were intended to keep people from killing each other. "People" in this case applied to human beings, and because a corporation was not a human person, the statute did not apply. The judge in the case disagreed ruling that corporations themselves are members of the class of intentional actors and thus are subject to criminal law.[219]

The idea that as rational, intentional, moral actors the corporation is subject to criminal law raises the debate over a corporation's culpability for wrong doing. Does the corporation have a *mens rea* or a guilty mind? French would conclude yes. However, traditionally moral and legal theorists have concluded that a corporation is not a moral agent and does not have a *mens rea*. As early as 1612, famed English jurist Sir Edward Coke reasoned "Corporations cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls."[220] Over one hundred years later, another famed English legal scholar William Blackstone declared "a corporation cannot commit treason or felony or other crime in its corporate capacity; though its individual members may, in their distinct individual capacities."[221] Both Coke and Blackstone based their

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[219] Peter French, *Collective and Corporate Responsibility*, Columbia University Press, New York, 1984: 78.

[220] Edward Coke, Notes in The Case of Sutton's Hospital, (1612) Michaelmas Term, 10 James I.

[221] Sir William Blackstone, *Commentaries on the Laws of England,* [Christian, Chitty, Lee, Hovenden, and Ryland Publishers, 1832]: Book 1, Chapter 1.

reasoning on the fact that a collective such as a corporation has no mind or mental state that would make it capable of contemplating and committing a crime. Only the individuals who compose the corporation could be found guilty of a crime.

Machen points out that another difficulty in enforcing criminal penalties against corporations is that to punish a corporation could unjustly impose a penalty against innocent corporate members who took no part in the corporate decision. Finding a guilty person within a corporation is sometimes impossible, as has been pointed out. A factory worker may have knowingly participated in a process that created a faulty widget, his supervisor was negligent in imposing factory standards, and the board of directors had suspicions that the widget was faulty but did not want to bear the financial imposition of a recall. Therefore, blame is shared and no one person is responsible. But to impose a financial penalty on the corporation would unjustly hurt the investors who had no knowledge of wrongdoing. Machen concludes that the problem of imposing corporate punishment boils down to a practical problem of finding the guilty human individuals who deserve punishment.[222]

To many theorists, the problem of punishing a collective is more than just a practical problem. Corporate acts can cause real harm to others and without a satisfactory way to punish the corporation, there is a fear that the corporate person will act with impunity. The notion that a corporation can pay a fine to survivors of a homicide victim seems to be an affront to justice by many people who believe that a loss of life cannot be compensated financially. However, there are very few other

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[222] Arthur W. Machen, Jr., "Responsibility for Crime by Corporations," *The Reform of the Criminal Law and Procedure*, Vol. 1, No. 4, (Jul., 1911), pp. 590-599.

punishments that are appropriate for a corporation beyond fines, business restrictions, or the loss of the corporate charter. This becomes a significant issue in the legal section of this chapter.

French's theory that a corporation should be treated as a rational, intentional, and culpable moral agent, while thought provoking, has many critics. One of the most compelling critiques comes from fellow business ethicist Patricia Werhane who also examines the moral personhood of the corporation but comes to much different conclusions. While French argues that a corporation has intentions of its own, Werhane points out that the only way to discover the corporation's goals is to ask employees and to observe the behavior of the employees. Thus, it is the members of the corporation that have common goals rather than the organization itself. Further, she argues that French is wrong in asserting that corporations appear to think about goals. Rather, it is the members within the corporation that contemplate courses of action. She uses the example of Dow Chemical manufacturing napalm. The Dow Chemical board of directors debated manufacturing napalm and the employees did the manufacturing. Because these individuals were acting as agents of the corporation, Dow Chemical was held responsible. But that is not to conflate the corporation with the individual agents within the corporate umbrella.[223] Werhane subscribes to a variation of group theory which is discussed in detail in the following pages.

Werhane does not, however, ascribe to the view that the corporation is simply an aggregation of its members. She admits that when a corporation commits a wrongdoing such as polluting a river, there are a variety of individual members within the corporation

[223] Patricia Werhane, *Persons, Rights, & Corporations,* Prentice Hall Inc. (1985): 37.

from the management, to the chemists, to the actual people who dump the pollutant, who are involved in the action. In these cases, it does make sense to speak of the corporation as a unit. She states, "We cannot because not all actions of corporations are redescribable merely as individual actions. There is such a phenomenon as collective corporate action even though the actors are themselves all individuals who contribute to the collective activity."[224] In order to account for the moral actions of collectivities, Werhane develops an alternative theory to French which involves what she terms secondary moral agents.

She argues that although it seems that a collective exhibits intentional behavior, a collective does not really think, desire, believe, or intend because there is no psychological entity to have such intension. Rather, she contends, a corporation's decision-making procedures combines the intents of the boards of directors, stockholders, managers, employees, as well as the advice from outside agents such as lawyers, accountants, and public relations firms. Together all of these agents form the collective intentions that are exhibited in corporate action and goals. As opposed to the individual agents who are primary moral agents, Werhane concludes that a corporation is a secondary moral agent because the agency is a composite of the moral agents within it. As secondary moral agents, collectives can act as moral agents and therefore are morally responsible for actions and they have moral rights. She qualifies this statement by stating that these moral rights are secondary in that individual moral rights must be given primacy but a corporation does have a moral right to freedom and should be treated equally among other corporations.[225] In cases of corporate free speech, the corporation

[224] Patricia Werhane, *Persons, Rights, & Corporations,* Prentice Hall Inc. (1985): 51.

[225] Patricia Werhane, *Persons, Rights, & Corporations,* Prentice Hall Inc. (1985): 56-61.

must recognize the free speech rights of its employees to exercise their rights just as a corporation does. Because corporations generally have more financial resources at their disposal to amplify their messages, they unjustly overpower individual voices. Thus she concludes that corporations exceed their rights as secondary moral agents.[226]

Werhane is critical of French's approach, but she does not completely dismiss the idea that corporations can function as moral agents albeit in a limited way. Other scholars are not so charitable. For instance, economist Milton Friedman argues that a corporation is not a moral agent and does not have any type of social responsibility. He argues that a corporation is simply a tool to maximize profits for its shareholders. It is a Kantian means to achieve the end of profit maximization. Friedman maintains that the duty of corporate managers is to fulfill their fiduciary duties to the profit seeking investors and to do so without fraud or deception. To not use the stockholders' money wisely would be tantamount to stealing, and therefore the corporate managers have a moral duty to maximize profits.[227]

Friedman takes a very limited view of a corporation's moral duties. However, other scholars agree with Friedman that a corporation cannot be a moral agent. Ethicist and Kantian scholar Matthew C. Altman argues against French saying that collectives cannot be moral agents because only individuals can fulfill this role. From a perspective of Kantian ethics, Altman argues that viewing the corporation as a person or a moral agent is not appropriate because Kantian ethics cannot apply to collective intents. He argues that apart from its members, the corporation does not have moral obligations or

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[226] Patricia Werhane, *Persons, Rights, & Corporations,* Prentice Hall Inc. (1985): 63-64.

[227] Milton Friedman, "The Social Responsibility of Business to Increase Its Profits," *New York Times Magazine,* 13 September 1970.

moral agency. In order to have moral agency in Kantian ethics, an entity must be able to act according to right moral principles. Only rational individuals are able to engage in this type of reasoning to determine right principles and act accordingly. A corporation itself has no rational nature or consciousness in the sense the Kant understands it. Corporate policies that guide the ethical behavior of its members are not set by the corporation itself – they are established by the shareholders and directors. Further, corporations do not have desires, predispositions, or moral principles. A company does not have a profit motive any more than the state desires tax revenues. Rather, it is the members of Congress who may want money to spend. The state itself cannot desire anything. Similarly, the shareholders of a corporation may have a profit motive but the corporation itself does not have any motives itself because corporations, like other collectives, do not have self-interest. A corporation cannot create its own Kantian ends. In other words, there is a difference between the goals for a corporation as intended by the individuals composing the organization and asserting that the corporation as goals itself.[228]

In common practice, corporations are often said to have made value judgments based on moral principles because businesses use their decision-making procedures to act in ways that are morally relevant. This is argued by both Goodpaster and French. For example, Syngenta Corporation, which manufactures herbicides for the farming industry, has been blamed for polluting water systems in the Midwest. When casting blame, there is no one individual who can be said to be entirely at fault. The chemists who made the product understood that some of the chemicals were environmentally harmful. The

[228] Mathew Altman, "The Decomposition of the Corporate Body: What Kant Cannot Contribute to Business Ethics," *Journal of Business Ethics,* vol. 74 (2007): 254.

Syngenta management also realized the harm but continued to manufacture the product; the marketing team promoted the product, and sales teams sold it. In casting blame, the easy method is to just blame Syngenta Corporation as the person at fault. Altman claims that although responsibility cannot be assigned to any particular agent, it is incorrect from a Kantian perspective to assign blame to the corporation itself. Again, the corporation as a collective is not a moral agent. Similarly, Johnson & Johnson is sometimes praised for issuing a full voluntary recall of Tylenol when some capsules were found to be laced with cyanide. Tylenol itself did not have virtuous motives – the executives who issued the recall were the agents who had motives which could have been inspired by virtue, long-term profits, or company reputation. Altman's point is that these corporations, as corporations, did not have motives apart from the individuals within the corporations. Stemming from its individualist foundation, Kant's ethics apply to individuals. Thus, Altman reasons that we can only judge businesspeople not businesses. Altman contends that we cannot attribute moral personhood to a corporation without illegitimately anthropomorphizing it.

Altman brings the debate over the moral personhood of corporations full circle from the initial Lockean and Kantian perspective that only individuals can qualify as moral agents, to arguments from French and Werhane that a type of collective moral agency is possible, and back to a Kantian perspective that corporate collectives cannot be considered moral agents on their own accord. The theories of moral personhood for corporations lead into a review of legal theories of corporate personhood. Theorists generally consider legal corporate personhood to be a separate issue from moral

personhood, but as the next section explains there is significant intersection of the theories.

Legal Theory Section

While moral theory concerning corporate personhood calls into question whether or not a corporation can be considered a rational agent, legal theory concerning corporation personhood has observed these questions but has largely developed its own conceptualizations of corporate personhood that are largely separate from moral theory. Legal theorists do not spend much energy studying the conditions of natural personhood or theories such as Kantian end and means or Dennett's conditions for rational agency. Instead, legal theorists spend more time debating the legal requirements for an entity to qualify as a person for juridical purposes. The paradigms of legal personhood and moral personhood do intersect in a few scholarly works, but not often. However, this study examines various types of natural and legal persons and thus the intersection of moral and legal personhood is important for drawing comparisons among the various entities vying for personhood. Therefore, in the analysis of corporate personhood, it is necessary to review the prominent legal theories that influence court decisions.

Moral theories of personhood as applied to corporations have been in circulation since the rise of the corporation in the 1800s and experienced revitalization in the 1980s. In contrast, legal theories of corporate personhood have had a relatively short lifecycle in the United States. The prominent legal theories surrounding corporate personality developed mostly in Continental Europe, especially France and Germany, in the late 1800s. European scholars debated the essence of corporate personhood and whether the bestowal of personhood was simply a legal shortcut, a manifestation of the personhood of

the individual members of the corporations, or whether the corporation should be considered a person just as a human being. In the United States, some scholars examined these questions as well, but not with the fervor of their European counterparts. American debate took place from 1890 to 1930, but largely vanished after John Dewey's 1926 article in the *Yale Law Journal*. In his article, Dewey presented a legal positivist argument that the law was not dependent upon moral, psychological, or social definitions of personhood. Arguing that theory is indeterminate, Dewey concludes that the law sets its own standards for personhood and states, "for the purposes of the law, the conception of 'person' is a legal conception; put roughly, "person" signifies what law makes it signify."[229] Dewey dismisses the inherent theoretical problems of using the word "person" for the corporation and contends that the subject of legal personality is a right-and-duty-bearing-unit, and this includes man, corporations, and any other units the courts determine have rights and duties. Thus, Dewey concluded that scholars should not concern themselves with theories, but should focus their studies on the entities that have rights and duties before the law.

Dewey's argument was convincing for many scholars of corporate personhood, and American publications concerning the essence of corporate personhood waned after 1930.[230] Perhaps the lack of theoretical discussion has increased the confusion surrounding legal personality. At any rate, it has not helped clarify the term.

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[229] John Dewey, "The Historic Background of Corporate Legal Personality" *The Yale Law Journal*, 35, no. 6 (1926): 655.

[230] J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985). Please see also William W. Bratton, Jr., "The New Economic Theory of the Firm: Critical Perspectives From History," *Stanford Law Review,* 41 no 1471 (1989); Katsuhito Iwai, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance" *The American Journal of Comparative Law* 47, no 4 (1999).

Contemporary legal theorist Margaret Davies remarks, "Whereas modern legal theorists have sought, at length, to elucidate the concept of property, comparatively little time has been expended on the companion concept of legal personality. This is remarkable given the importance of the concept to our daily lives as citizens and as legal actors."[231] While property law is regarded as fundamental in most law schools, it is very rare to find the "Law of Persons" on the curriculum. Because scholarly debates over legal personhood were limited in the United States, it is difficult to ascertain whether Supreme Court justices were explicitly operating within a particular theory and knowingly applying well-defined sets of principles in order to reach their decisions. However, these theories are useful as explanatory models for interpreting decisions. Because the corporate person does not neatly fit into the individualistic model upon which the Constitution and Bill of Rights was based, legal theories help bridge the gap between the individualist structure of the law and the reality of the corporate collective. They provide a conceptual background as well as bring coherence and structure to an attempt to trace the evolution of American corporate personality.[232]

Three major theories have emerged around the subject of corporate personality and are commonly referred to as fiction theory, group theory, and person theory.[233] The earliest theory was fiction theory which Pope Innocent IV proposed to explain the

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[231] Margaret Davies and Ngaire Naffine, *Are Persons Property: Legal Debates about Property and Personality* [Dartmouth: Ashgate Publishing Company, 2001].

[232] Jess M. Krannich, "The Corporate Person: A new Analytical Approach to a Flawed Method of Constitutional Interpretation," *Loyola University Chicago Law Journal* 37.1 (2005): 61-110; Sanford A. Schane, "The Corporation is a Person: The Language of a Legal Fiction" *Tulane Law Review* 61 (1987): 32-33.

[233] Sanford A. Schane, "The Corporation is a Person: The Language of a Legal Fiction" *Tulane Law Review* 61 (1987): 563.

corporate body of the Catholic Church. This theory maintained that a corporation is a distinct social entity and its personality is a mere fiction created by the state. This theory dominated most early American legal thought because it was based on the foundation of individualism. True to a Lockean model, corporations are simply formed by rational individuals with individual property rights who join together through a social contract in order to pursue their economic self interest in an efficient manner. The law confirms the unique status of the individual, and fundamental legal relations take place between one human and another human. If individuals enter into an association, the resulting group does not have an independent existence on its own, and has no preexisting rights. Only in contemplation of the law does the entity acquire its legal personality and thus it becomes a legal fiction. The state bestows the status of person to the corporation and the state can also revoke this status.

This theory helps clarify some the confusion surrounding legal personality because it carefully distinguished between "natural persons" who are human beings and "artificial persons" who are created by the law such as corporations. Edward Coke, an early subscriber to fiction theory, distinguished the two types of person by what God made and what the King made. For Coke, a corporation was "artificial" because a royal charter or the state gives it status, rather than the natural event of birth that provides the status of person to a human.[234]

[234] Sutton's Hospital Case, 10 Co. 32 (1612) Cited in Max Radin, "The Endless Problem of Corporate Personality," Columbia Law Review 32, no. 4 (1932): 644.

One of the strongest American advocates of fiction theory was Chief Justice Marshall. In his definitive opinion, Marshall utilized fiction theory to explain the status of corporations.

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual *Trustees of Dartmouth College v. Woodward* 17 U.S. 518, 636 (1819).

In Marshall's view, the corporation is not a natural person and has no ability to formulate and pursue goals. Its only purpose is to fulfill a need for humans. Thus, Marshall's argument is functionalist – the corporation is a means to an end. Returning to Kantian theories, if a corporation is simply a means to an end, then it cannot be a person in a moralistic sense. Although Marshall does not directly invoke Kant in his opinion, this seems to coincide with Marshall's argument because Marshall carefully stipulates that the corporation is simply a person in the law and not in any other sense. Granting corporate legal personhood is simply a means to achieve economic ends set by humans. Marshall's fiction theory does not stretch beyond the legal into political or moralistic theories of personhood. Marshall's argument also stresses the importance of the individualistic framework of the law in the fact that corporate personality allows the corporation to assume the form of an individual for the purposes of doing business.

A variant of fiction theory is entitlement or concession theory. In this model, the right to incorporate is a special privilege granted by the sovereign. The corporation exists

only as a creation of the state. Its powers are only those spelled out in its charter, and all other acts are *ultra vires* and therefore void. Entitlement theory is prominent in Marshall's conception of the corporation. He argues, "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases the sole consideration of the grant. …The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created" *Trustees of Dartmouth College v. Woodward* 17 U.S. 518, 638 (1819).

Dewey explains that fiction/entitlement theory was exhibited in decisions by early American judges who were influenced by the individualistic age. When it is difficult to identify the single persons who are said to be the "real" persons, it is very convenient to do business as a fiction. Although a fictitious person has a clear title to property and contract, its liabilities and burdens outside of property are not so clear.[235] While entitlement theory was prevalent in the early 1800s, during the Jacksonian era, special charters were denounced as examples of political favoritism, legislative corruption, and monopoly. Consequently, "free incorporation" laws were constructed which made the corporate form universally available and undermined concession theory. Incorporation was no longer a state or sovereign conferred privilege but a regular mode of conducting business.[236]

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[235] John Dewey, "The Historic Background of Corporate Legal Personality" *The Yale Law Journal*, 35, no 6 (1926): 668.

[236] J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 181.

As corporations as collectivist legal institutions grew in power, fiction theory clung to its individualist foundations. The corporation stood in clear contradiction to a legal culture dominated by Lockean ideas of pre-social, natural rights. Rather than the individual being the powerful actor, associations of persons were rapidly becoming dominant. As separate economic entities, corporations diluted individual moral and legal responsibility among those in the group. Thus, fiction theory sought to retain "methodological individualism" or the view that the only real starting point for political and legal theory is the individual. In this view, corporations were simply artificial aggregations of individuals. Legal historian Morton Horwitz argues that in Western countries, theories of corporate personality were associated with a crisis of legitimacy in liberal individualism arising from the recent emergence of powerful collective institutions.[237]

While the fiction theory had many advocates, critics argued that a corporation was no more fictitious than any other individual or group of individuals.[238] Thus, to call the corporation a "fiction" is misleading because the corporation is real; it certainly exists. Arthur Machen argues that if a corporation is created, it is real and therefore cannot be purely fictitious having no existence except in legal imagination.[239] Bryant Smith states, "The legal personality of a corporation is just as real as and no more real than the legal

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[237] J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 181.

[238] Please see Max Radin, "The Endless Problem of Corporate Personality," Columbia Law Review 32, no. 4 (1932); Chief Justice Marshall, Trustees of Dartmouth College v. Woodward 17 U.S. 518, 636 (1819).

[239] Arthur Machen, "Corporate Personality," *Harvard Law Review*, 24, no. 4 (1911); 257.

personality of a normal human being. In either case it is abstraction, one of the major abstractions of legal science, like title, possession, right and duty."[240]

Another criticism of fiction theory arises when trying to adjudicate the culpability of a corporation. A fictitious entity cannot be capable of motives or malice, and therefore cannot commit injury. If a malicious tort is committed, a flesh and blood being who is capable of malice must be the person who committed it. This person may be a director, an agent or a shareholder in the corporation, but the important point is that an actual person, not a fictitious entity, commits the tort. Thus, if an individual is wronged by a malicious tort committed by a corporation, is there no path for recompense? There are many instances of wrongs committed by a corporation, and even if the motivation behind the injury was from a flesh and blood human being within the corporation, it is the corporation as a whole that must make restitution. As famed legal historian Paul Vinogradoff argued, "*Character* and *motive* can be attributed to corporate entities and it has come to be recently a more or less established doctrine that corporations are responsible, similarly as are individuals, for crime or tort. Law, as it were, goes behind the pure abstraction of the artificial entity."[241]

As corporations began to dominate the economy, fiction theory receded as a popular legal theory. Fiction theory's attempt to force corporations into an individualist mold created more confusion among legal scholars than it resolved. Thus, scholars looked for alternative theories that better fit reality. A second theory of corporate personality that seemed to better fit the collective nature of the corporation is group theory. Within this theory, human beings are the original bearers of rights, and among

[240] Bryant Smith, "Legal Personality" *The Yale Law Journal* 37, no. 3 (1928): 293.
[241] Paul Vinogradoff, (1924) "Juridical Persons," *Columbia Law Review* 24 no. 6. (1924): 603.

these rights is the ability to join together to do business under a separate name. The group does not become a separate entity to be treated as a legal person. Rather, it is the humans under the corporate name who are entitled to the same rights and protection of the law as guaranteed to them as single individuals. Although it is convenient to think of the rights of a corporation as a legal unit, corporate rights are nothing other than those of the component members. Persons conducting business under a corporate name are entitled to the same rights and protections guaranteed to them as individuals. A corporate name is simply a useful name for identifying the members of a group but the corporation is not considered a person itself.

This theory is very much related to fiction theory because although a corporation is frequently spoken of as a person, the existence of a corporation independently of its shareholders is a fiction. The rights and duties of a corporation are really the rights and duties of the persons who compose the corporation, and not of an imaginary or fictitious being. Group theory's preservation of the rational human beings who form the corporation is the most pronounced of the three theories.

One of the benefits of retaining importance of the rational individuals within the corporation is that when a corporation is found guilty of a crime, group theorists look to the flesh and blood human beings for responsibility and punishment. Humans are not allowed to hide behind the corporate veil and shirk blame. However, in the modern complex corporation where decisions are the result of numerous actors, group theory does not provide a solution for pinpointing who among the many agents should be held accountable.

Group theory starts to break down when considered in light of Michel's Iron Law of Oligarchy. Michel's work is in respect to political parties, and he argues that the party as an entity is not necessarily identifiable with all of its members. The party is created as a means to an end. However, having been formed, the party becomes an end in itself with its own aims and interests that are detached from the individuals which it represents. "By a universally applicable social law, every organ of the collectivity, brought into existence through the need for the division of labor, creates for itself, as soon as it becomes consolidates, interests peculiar to itself."[242] The corporation acts in much the same way.

Although individuals create it as a means to conduct business, the corporation often takes on a "life of its own" as its own person. The bureaucracy that runs a corporation may have interests that do not necessarily reflect all the interests of the individual members. Thus, although the rights and duties stem from the individual members within the corporation, the corporation acts as its own entity. British legal scholar A.V. Dicey reiterated Michel's Law when he pointed out that individuals belonging to corporations, trade unions, or political parties tend to act differently when part of the group. He wrote, "when a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of but by the very nature of things, differs from the individuals of whom it is composed."[243] Thus, rather than being a mere association of individuals, the corporation itself becomes a unique entity apart from its

[242] Robert Michel, *Political Parties,* [New York: Crowell-Collier Publishing Company, 1962] 353.

[243] A.V. Dicey, "The Combination Laws as Illustrating the Relation between Law and Opinion in England during the Nineteenth Century," *Harvard Law Review,* Vol. 17, no. 8, (1904): 513.

members. It no longer derives all of its characteristics from the members of the group. Goodpaster argues that this phenomenon is particularly true for modern corporations that are large and heavily bureaucratic. He argues that corporations are not unstructured groups of people like passengers on a train nor are corporations completely hierarchical in their decision making structure with the CEO making the important decisions. Rather, the corporation reflects the decision making process involving many individuals with varying levels of authority. Taken as a whole, Goodpaster argues that the corporation takes on traits such as competence, intelligence, innovativeness, and aggressiveness that are generally afforded to human persons. Thus, Goodpaster presents a case that the essence of a corporation is similar to that of a natural person.[244]

Legal theorists who agree that corporations should be considered in the same way as natural human individuals subscribe to person theory. The primary proponent of this theory was German historian Otto Gierke who argued that groups were as "real" as the persons who formed them. In contrast to group theory, Gierke argued that the corporation is more than just an expression of the sum its members. It acquires a common will and pursues its own goals, makes decisions based upon those goals, and its life may continue indefinitely, regardless of changes in membership. Frederic Maitland, a student of Gierke, summarizes Gierke's position in his introduction to Gierke's treatise. Maitland writes, "A *universitas* (or corporate body)…is a living organism and a real

[244] Kenneth E. Goodpaster, "The Concept of Corporate Responsibility," *Journal of Business Ethics*, Vol. 2, No. 1 (Feb., 1983), 10.

person, with a body and members and a will of its own. Itself can will, itself can act…it is a group-person, and its will is a group will."[245]

In short, the corporation has many of the criteria of rational agents that are needed to qualify for personhood. Within this framework, a corporation can still be referred to as an artificial person when one needs to distinguish them from natural persons. However, in fiction theory, the legal person is created by the law while in person theory, the corporation is a legal person naturally just as any human being. Legal realists generally do not consider the moral agency connected to corporate personhood because most legal scholars limit their theoretical inquiries to the legal world and conceive of a juristic person as the subject of rights. However, it is readily apparent that there is a connection because to talk of rights and duties implies agency and consciousness. Peter French recognizes this and he is critical of legal scholars for this limitation. He challenges the legal realist tradition to consider the corporation as a moral as well as juristic person.[246]

As corporations grew in number and size, and theorists realized that the individual members of the group no longer had direct control over corporate actions, theorists began to move from group to theory to person theory. Person theory better reflected the fact that corporate decisions were made by numerous managers using decision-making processes rather than a single individual or by the shareholders. The corporation was taking on a life of its own. In order to fit this collective entity within the individualistic

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[245] Otto Friedrich von Gierke, *Political Theories of the Middle Age*. Introduction by Frederick Maitland, [Cambridge University Press, originally published 1900, 1987 reprint]: xxvi.

[246] Peter French, "The Corporation as a Moral Person," *American Philosophical Quarterly*, Vol. 16, No. 3 (Jul., 1979): 210.

framework of the legal system, theorists recognized the corporation as a real juristic person with profit maximizing motives and agency.

Person theory acknowledges the importance of the group, but unlike group theory, it allows the corporation itself to be the bearer of rights and duties. The legitimacy of the corporate person does not reflect the rights of the individual members. Rather the corporate person has legitimacy in its own right. The legal personality of the corporation is just as real as the legal personality of a human being. As Maitland summarizes, a corporations "is no fiction, no symbol, no piece of the state's machinery, no collective name for individuals, but a living organism and a real person with a body and members and a will of its own."[247]

Person theory is the most contentious conception of corporate personality in that the corporate personality does not depend upon the human beings who formed the corporation, nor does it apologize for elevating the property of a corporation to that of a legal person. Person theory disregards the importance of the rational, property-owning individual and thus challenges Locke's emphasis on individualism. Person theory even more flagrantly violates Kantian notions of means and ends because the corporation, which is a property to be used for the convenience of human beings, suddenly becomes a person in its own right without reflection of the humans who formed it. The corporation as a tool or a "means" for furthering economic progress, suddenly becomes the "end" and is a person in and of itself.

We will find that each of the three theories can be found in the legal reasoning of the Supreme Court, but ultimately, person theory emerged to meet the changing needs of

[247] Otto Friedrich von Gierke, *Political Theories of the Middle Age*. Introduction by Frederick Maitland, [Cambridge University Press, originally published 1900, 1987 reprint]: xxvi.

American legal jurisprudence. Schane argues, "The fiction theory emphasized the power of the sovereign, the group theory emphasized the contractual rights of individual persons, and the person theory emphasized the economic freedom of formal organizations."[248] As the corporation grew in strength and number during the turn of twentieth century, many legal scholars and justices realized that the person theory best fit the real power held by corporations. Because person theory treated the corporation as an entity independent of its members, it could have its own property and debts, it could delegate power to agents, and could be the bearer of rights and duties. The person theory freed corporations from the restrictions of both fiction and group theory. Many legal scholars agree that after 1930, person theory was the dominant paradigm.[249]

Despite its popularity, person theory has its flaws because it tends to elevate the corporation to the status of or even above the humans it was designed to serve. As noted legal scholar Max Radin argues, "The law exists for, by and through actual human beings. Any statement that cannot be resolved into one about living human beings is not a legal statement. The 'personality,' then, which is the ultimate object of our consideration, … is after all and in spite of all, a man."[250] Although the corporation is composed of human beings, the association in and of itself is not human, and although

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[248] Sanford A. Schane, "The Corporation is a Person: The Language of a Legal Fiction" *Tulane Law Review* 61 (1987): 569.

[249] Please see Sanford A. Schane, "The Corporation is a Person: The Language of a Legal Fiction" *Tulane Law Review* 61 (1987): 563; J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 173; Katsuhito Iwai, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance" *The American Journal of Comparative Law* 47, no 4 (1999); Margaret Davies and Ngaire Naffine, *Are Persons Property: Legal Debates about Property and Personality* [Dartmouth: Ashgate Publishing Company, 2001].

[250] Max Radin, "The Endless Problem of Corporate Personality" *Columbia Law Review*, 32, no. 4 (1932): 651.

the corporation resembles a human in some ways, it is not exhaustive in its attempt to include all the movements and relations of the flesh and blood beings who are involved.

Person theory also presents a problem with corporate liability. Unlike in fiction theory, person theory has an advantage in that the corporation as a person can be found guilty of a crime. However, when the corporation is to be punished for the crime, there is a problem in who really suffers. When a corporation's property is taken, it is the shareholders who ultimately suffer the punishment. Thus, it is the living and breathing human beings who pay the price for the crimes of their corporation. If a corporation is dissolved as a punishment, the stockholders can reorganize their business under a different name to gain the same benefits as before. Dissolution is therefore futile. Consequently, in sentencing and punishing a corporation, the attempt is always to reach the actual, living human beings. If they cannot be reached, there is no punishment even if punishment has been mandated.

As demonstrated, each of the three theories is useful as a guideline for analyzing corporate personality, but each also has significant flaws. Person theory dominated legal theory until approximately 1928 when legal realist John Dewey asserted that the law could signify person to mean whatever the law wanted. Dewey's proclamation signaled to fellow scholars that the debate over personhood was futile and they should move on to other topics. Many legal scholars took Dewey's advice and focused on the reduction of legal personality to simply right-and-duty bearing units. However, despite the seemingly attractive simplicity of this legal reduction, this paradigm entails its own set of problems. Right and duty relations are not necessarily the ultimate units of the law. Excessive

reliance on the claim-duty relation obscures the fact that other relations such as privileges and capacities, are every bit as important.[251]

Machen, the noted proponent of person theory, also disagrees with Dewey's argument for reducing personality to legal relationships. For Dewey, "person" is a technical term in law, and does not mean a human being but a group of legal relationships. For Machen, the term "person" in reference to the corporation is not arbitrary. The corporation is called a person because one treats it as a person. Machen ascribes the human capacity to reason to the corporation and argues that the corporation can be guilty of particular crimes involving mental states such as malice and fraud. For Machen, it is not a purely legal matter in which human beings are removed. Instead, the human qualities that can be attributed to the corporation are the important factors in conferring legal personality.[252]

By the 1930s, Dewey's call to end the debate over corporate personality coincided with the publication of the Berle and Means textbook on the corporation with a focus on management structures. For the next fifty years, corporate theorists focused their attention to management theories and corporate personality ceased to be a subject of debate.[253]

In the early 1980s as corporate scandals involving huge, international companies erupted, corporate personality again entered debate circles as scholars tried to determine

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[251] Max Radin, "The Endless Problem of Corporate Personality" *Columbia Law Review*, 32, no. 4 (1932): 650.

[252] Arthur Machen, "Corporate Personality," *Harvard Law Review*, 24, no. 4 (1911); Arthur W. Machen, "Responsibility for Crime by Corporations," *Proceedings of the Academy of Political Science in the City of New York,* 1, no 4 (1911).

[253] Jess M. Krannich, "The Corporate Person: A new Analytical Approach to a Flawed Method of Constitutional Interpretation," *Loyola University Chicago Law Journal* 37.1 (2005): 61-110.

the proper legal and moral status of the corporation. One legal theorist who reinvigorated the debate over corporate personhood was Phillip Blumberg who posited that fiction, group, and person theories were all outdated and a new approach was needed.

Blumberg argues that the reality of large multinational corporations with complex, multi-tiered structures and thousands of public shareholders across the globe present new legal problems that cannot be accommodated with current theory. Traditional theory was based on the corporation as a simple and primarily singular unit designed to conduct business. However, modern corporate economics is dominated by large parent companies and holding companies that are involved with many, diverse subsidiary corporations. Further, the CEO of Corporation A likely serves on the board of directors for Corporations B, C, and D and is the primary supplier for Corporation E of which it also owns stock. Corporate economics are no longer simple – rather corporate economics characterized by complex webs of intersecting ownership relations. The law no longer looks behind the corporate veil. Instead, the law must look behind layers of veils, webs of relations, and cloaks that hide the true decision-making humans within the corporation.[254]

Blumberg argues that a new concept of corporate personality is needed to reflect the reality of a complex corporate world. He contends that the law must recognize corporate groups or conglomerates as legal units. Blumberg argues that the parent company and all its affiliated subsidiaries and linked companies must be considered as one legal unit in order to hold complex corporations liable. Otherwise, complex corporations are able to shirk blame by hiding behind the complex webs of fragmented

[254] Phillip I. Blumberg, The Multinational Challenge to Corporation Law, The Search for a New Corporate Personality, Oxford University Press, 1993

corporate ownership. Thus, Blumberg concludes that a new corporate person is needed that encompasses the entire corporate conglomerate and reflects modern corporate economics.[255] Despite convincing arguments that this new concept is needed, Blumberg does not fully deliver on providing the details of how this new corporate person would fit into the legal and moral framework of personality. Blumberg leaves this task for future scholars of corporate personality.

Blumberg's unfinished attempt to create a new concept of corporate personality is one of many attempts by legal scholars to fit the corporation into the pre-existing individualistic framework of the American legal tradition. The problem is that the corporation does not fit neatly into this framework because the corporation is not a "person" in the ordinary sense of the word. The corporation is a group rather than an individual, and the corporation is property to be used as a means by humans. Therefore, although the various legal theories are useful in providing some understanding of what it means to say that the corporation is a person, none of the theories fully justify personhood in either a legal or a moral sense. The Supreme Court, which has had to adjudicate the essence of corporate personhood, has utilized these theories to help reach decisions. In fact, in some cases the Court invokes two or even three legal theories in the same case in an attempt to explicate corporate personhood. Although, the theoretical underpinnings of legal personality seem to raise as many questions as they try to answer, this foundation is necessary as we turn to an examination of the Supreme Court's decisions involving corporate personality.

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[255] Phillip I. Blumberg, The Multinational Challenge to Corporation Law, The Search for a New Corporate Personality, Oxford University Press, 1993.

ANALYSIS OF CASES

Turning now to the concept of corporate personality as developed by the Supreme Court, we find that the Court struggled to find proper theories to suit the collective within an individualistic legal framework. A review of some of the most important cases concerning the corporate person reveals that the Court employed all of the various legal theories at various times, but did not necessarily employ them consistently to create a firm legal conception of corporate personhood. The Court also struggled to justify the moral ramifications associated with the term "person" when applied to the corporation. Most moral theories of personhood apply to natural persons. It was difficult for the Court to decipher how to adjudicate the moral requirements of personhood in respect to an artificial person. Further, the dual status of person and property raised unique problems for determining the rights and obligations of a corporation.

Unlike the previous chapter on slavery where some of the most telling opinions on the personhood of slaves came from lower courts and state court opinions, the case law on corporate personhood was primarily developed by the Supreme Court. Although there are some relevant lower court opinions, there are thousands of Supreme Court cases concerning corporations, so I have primarily contained my pool of cases to the Supreme Court with the exception of a few cases where personhood arguments were influential for later Supreme Court decisions. I have further selected those cases that are most relevant to the issue of corporate personhood and best exemplify how the Court developed the concept in the last 200 years.

The review of cases begins in the early nineteenth century, when fiction/concession theory dominated thinking on corporate personality by legal theorists

and influenced the Supreme Court. However, as the number of applications for corporate charters rose in the late nineteenth century, there was increasing mistrust of the special charter granted by the state. State charters were argued to foster political corruption, political favoritism and monopolies. Thus free incorporation, which allowed associations to incorporate automatically, fostered the rise of group theory. Consequently, in the Court opinions of the 1800s, there is a mixture of both fiction/concession theory and group theory.

The first major Supreme Court Case concerning the corporation was *Bank of the United States v. Deveaux* 9 U.S. 61 (1809). In this case, the Bank which was chartered in Pennsylvania, was suing Deveaux, a tax collector from Georgia, for taking taxes that the Bank claimed it did not owe. The Bank preferred that a federal court rather than a State of Georgia court hear the case. However, the defendant claimed that there was no federal jurisdiction because the corporation was not a citizen of Pennsylvania, and moreover was not a citizen at all. Because Article 3 of the Constitution refers to "controversies between citizens of different states," the Court was forced to consider the nature of corporations. The Court's decision in this case fits within fiction theory because the Court, borrowing from Blackstone and Coke, stated, "That invisible, intangible, and artificial being that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States" (9 U.S. 61, 8).

Furthermore, the Court argued, "a corporation aggregate is an artificial, invisible body, existing only in contemplation of law. It has no analogy to a natural person. It has no organ but its seal. It cannot sue, or be sued, for a personal injury. It cannot be outlawed. It never dies. … For all these reasons it cannot come within the description of

those who are entitled to sue in the circuit courts of the United States" (9 U.S. 61, 86). In this argument, the Court was implicitly referring to the moral qualities of a human person. The Court reasons that since the corporation is not mortal and does not have a human body, the analogy to a human person is weak and cannot have bearing on the case.

However, the Supreme Court did not to completely deprive corporations of access to the federal courts. The opinion continues to discuss the legal rights of the individuals within the corporation, and switches to a group perspective. "What is a corporation aggregate? It is a collection of many individuals united into one body, under a special name, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting in several respects as an individual" (9 U.S. 61, 65). This statement utilizes group theory to argue that although the corporation is artificial, the members who compose it, "a mere collection of men having collectively certain faculties," (9 U.S. 61, 66) are persons within the law and do have the legal right to sue as citizens. "A (corporate) name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character…and the individual against whom the suit may be instituted" (9 U.S. 61, 87). Thus, if one lifts the corporate veil, one sees the true members of the corporation who are entitled to the Court's protection. The interests of the corporation become the interests of the members, and consequently, both cannot be deprived of access to the law simply because the individual members chose to join together to conduct business under a corporate name. As a result, the Court did not grant the corporation any rights as its own entity. "For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to

describe the real persons who come into court, in this case, under their corporate name" (9 U.S. 61, 91).

Ten years later, the Court was again faced with the subject of corporate personality in the case *Trustees of Dartmouth College v. Woodward* 17 U.S. 518 (1819). This case concerned the charter of Dartmouth College, which granted corporate privileges and powers to a twelve-person board of trustees. The New Hampshire legislature amended the original charter in 1816 to enlarge the board of trustees and to create a board of overseers who included several members of the New Hampshire state government. The original board of trustees brought suit alleging that the 1816 changes to the charter were invalid. This case is noteworthy because it contains Chief Justice Marshall's definitive opinion using fiction theory in which he states, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law" (17 U.S. 518, 636). Agreeing with Marshall in his concurring opinion, Justice Story reminds his readers that a corporation, because it is composed of fallible human beings, is subject to deviate from its original charter. Although Story does not delve into the moral implications of a corporation committing crimes as a person, he hints that the behavior of a corporation must be monitored just as laws monitor the behavior of natural persons (17 U.S. 518, 674).

In addition to employing fiction theory, Marshall uses entitlement theory to state, "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases the sole consideration of the grant. … The benefit to the public is considered as an ample compensation for the faculty it

confers, and the corporation is created" (17 U.S. 518, 638). Marshall holds true to traditional doctrine that a corporation should benefit the public and the government. However, Marshall decided that even though the state created the corporation, it could not dispose of the corporation without sufficient reasons. Thus, Marshall limited the state's authority of a corporation and opened the doors for an expansion in corporate autonomy.[256] In James Willard Hurst's analysis of this case, he concludes that the Court was very concerned to respect state control of corporate activity and thus took pains to deny that a corporation was a citizen of the chartering state so that the corporation would not have access to the Constitution's privileges and immunities clause."[257]

Thirty-five years later, in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* 43 U.S. 497 (1844), the Supreme Court delivered an opinion which was radical in terms of corporate personhood. In the opinion, Justice Wayne stated that the corporate person was for all legal intents and purposes the equivalent of a natural person and should even be considered a citizen. At issue was a breach of contract by Letson, a citizen of New York against the Cincinnati & Charleston Railroad in the federal circuit court for South Carolina. The railroad, wishing to avoid federal jurisdiction, argued that because two of the shareholders were citizens of New York, the overlap of citizenship warranted jurisdiction in New York.

In the notes of the case, Legare, an attorney for the defendant, argued, "They (corporations) stand in this respect precisely in the same category with minors, lunatics and idiots" (43 U.S. 491, 522). Legare is essentially arguing that just as minors and

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[256] Jess M. Krannich, "The Corporate 'Person': A New Analytical Approach to a Flawed Method of Constitutional Interpretation," *Loyola University Chicago Law Journal*, Vol. 37, 2005: 70.

[257] James Willard Hurst, (1970), *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970*, University Press of Virginia, Charlottesville: 142.

lunatics do not have rational and autonomous capabilities but are still respected as persons, so too should corporations be extended personhood even though they may fail to qualify by certain criteria. This argument is profound because in the 1840s, there is very little evidence that other scholars were using moral philosophy to draw comparison between different categories of persons and there is also very little evidence that moral philosophers in the 1800s were studying corporate personhood. Legare then cited *Bank of the United States v. The Planters' Bank of Georgia* 9 Wheat. 962 in which Chief Justice Marshall declared that when a state was a stockholder in a private company, that state was a citizen. Using this reasoning, Legare argued that if a state, the greatest corporation of all, can be sued as a citizen in legal contemplation, why should not other corporations be considered citizens for judicial purposes? (43 U.S. 497, 525)

Legare's arguments must have been convincing, because the Supreme Court ruled in his favor. In the Court opinion, Justice Wayne argued, "a corporation, created by a state, though it may have members out of the state, seems to us to be a *person*, (emphasis mine) though an artificial one, inhabiting and belonging to that state, and therefore for the purpose of suing and being sued, to be deemed a citizen of that state" (43 U.S. 497, 555). Wayne criticized the precedent in *Deveaux* arguing that *Deveaux* went too far in denying the citizenship of the corporation for jurisdictional purposes. He argued, "it is, that corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person" (43 U.S. 497, 559). Thus, Wayne overturned *Deveaux* and included the corporation as both a legal person and a citizen.

While in *Deveaux*, the corporation was an "artificial being" and a "creature of the law," in *Letson,* the corporation was explicitly a person deserving the same treatment as a natural person. This opinion marks an abrupt foray into person theory, and in fact, in his influential arguments Legare quotes Savigny, one of the founders of person theory. In *Letson,* the Court granted the corporation personhood due to its residency within a particular state. The Court said that a corporation that has been created in a particular state and is conducting business there resembles a person born in that state and living there because both belong to and inhabit the state.

Schane argues that the Supreme Court, in declaring that a corporation was a citizen in fact created a new legal status and bestowed upon corporations both personhood and citizenship. In this analysis, both personhood and citizenship are essential. Article 3 of the Constitution explicitly refers to "controversies of different states" and thus refers to citizens and not persons. However, for a corporation to be considered a citizen, it must first be granted both personhood and residency.[258] Although the term "person" may blur differences between corporations and human beings, granting corporations citizenship was a radical decision. This case did not change the course of Supreme Court jurisprudence to employ person theory and declare the corporation a moral and legal person. Rather, it seems to be an aberration and the Court soon returned to more conservative theory. However, the case is noteworthy because it marked the start of litigation which would dominate the latter half of the 1800s on behalf of railroad corporations seeking personhood. Cases soon followed on the heels of *Letson* that

[258] Sanford A. Schane, (1987) "The Corporation is a Person: The Language of a Legal Fiction" *Tulane Law Review* 61 (1987): 579.

demonstrated that the Court was not willing to abide by a broad bestowal of corporate personhood just yet.

In 1852, the Court heard *Rundle v. Delaware Raritan Canal Co.* 5 U.S. 80. At issue was a canal constructed by the Delaware Raritan Canal Corporation which was commissioned by the state of New Jersey to improve navigation along the Delaware River. George Rundle sued claiming that the canal harmed his business along the river because it diverted the water he needed to power his mill. Justice Grier gave the opinion of the Court and ruled in favor of the Delaware Raritan Canal Corporation. Grier's opinion does not delve into corporate personhood. However, Justice Daniel's dissent provides a lengthy argument against the corporate personhood that was affirmed in *Letson.*

Justice Daniel was a member of the Court in 1844 when *Letson* was decided, but for an unrecorded reason, he did not participate in the *Letson* decision. Therefore, he had to wait until *Rundle* to state his opposition to broad grants of personhood and citizenship. In his dissent, Justice Daniel took issue with the *Letson* ruling that a corporation can be considered a citizen. He wrote, "A corporation, therefore, being not a natural person, but a mere creature of the mind, invisible and intangible, cannot be a citizen of a State, or of the United States..." (5 U.S. 80, 44). Daniel provides a lengthy judicial history referring to Blackstone and the Swiss jurist Emmerich de Vattel to defend his argument that only natural, human persons can be citizens. Daniel explains that citizens have certain rights and duties such as the right to vote, run for office, and the like that are essential properties of citizenship. If an entity is to be considered a citizen, it must be able to perform these functions. Thus, Daniel contends that if a corporation is a citizen, then "it

must be treated to all and intents and purposes" and should be able "to aspire to the Office of President of the United States" (5 U.S. 80, 51). Actions such as aspiring to be President are functions of a rational and autonomous agent or a person in the traditional sense of the word. Daniel is inferring that true citizens are rational and autonomous persons who have duties and rights within the government. As an artificial-group person, a corporation is not able to perform such functions, and neither was Daniel seriously implying that a corporation should. Rather, this statement was an exaggeration and sarcasm meant to bring attention to Daniel's point that, in his opinion, only human beings were the sort of moral agent who could be citizens and could hold the rights and privileges of citizens.

One year later, in *Marshall v. Baltimore & Ohio Railroad Co.* 57 U.S. 314 (1853), the decision in *Letson* was found too radical and its application of personhood and citizenship was repudiated. This case involved state court jurisdiction for the railroad which was incorporated in Maryland. The Court noted, "A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'cannot be a citizen' is a logical conclusion from the premise which cannot be denied" (57 U.S. 314, 327). The Court returned to group theory and argued that a person who has a controversy with a corporation did not deal with a metaphysical abstraction, but the natural persons comprising the corporation. However, the Court did make clear that corporations were covered under Article 3 of the Constitution, and declared that the place of incorporation decided the citizenship of the shareholders. Strangely, the corporation was no longer a citizen on the merits of its state of incorporation, but the individuals

within the corporation had citizenship based upon the state where the corporation filed for its charter. "The persons who act and use (the) corporate name may be justly presumed to be resident in the State which is the necessary habitat of the corporation…and should be estopped from averring a different domicil" (57 U.S. 314, 328). Schane characterizes this decision as a hybrid of the person and group theories because the Court embraced the legal fiction of the corporation in order to give corporations the rights of citizens, but at the same time was reluctant to attribute citizenship directly to them. In both *Letson* and *Marshall,* the place of incorporation had become decisive in the determination of citizenship.[259]

The case *Dodge v. Woolsey* 59 U.S. 331 (1855) involved a tax levied by the State of Ohio against a bank incorporated in Ohio. The Court restated the claim that a corporation exists by the permission of the government to serve the good of the citizens. If the corporation does not fulfill its duties for the good of the commonwealth, or oversteps its boundaries, the state has the right to revoke its charter. The Court then looked at the issue of legal jurisdiction and found that the bank, as a corporation, was an artificial person but had a real existence within the State of Ohio. However, since the bank stockholder bringing suit was a citizen of Connecticut, the stockholder could appeal to a federal court. In the matter of the tax discrepancy, the Court found that the newly enacted Constitution of Ohio that imposed greater taxes on the bank was unconstitutional because it violated the charter agreement between the State and the bank. Finally, the Court found that John Woolsey, a stockholder in the bank, did have the right to sue for breaches of duty that hurt the stockholder's interests.

[259] Sanford A. Schane, (1987) "The Corporation is a Person: The Language of a Legal Fiction" *Tulane Law Review* 61 (1987): 582.

The Supreme Court opinion in *Dodge v. Woolsey* is notable for affirming that the state does maintain some control of a corporation's conduct through charter revocation and for determining that a stockholder can bring suit to rectify violations by a corporation. However, for the subject of corporate personhood, the dissent provided by Justice Campbell is of greater importance. Campbell disagreed that a stockholder could challenge the actions of a corporation. He argued that only the state could monitor corporations, and the United States in particular must take action to curb corporate abuses. Campbell also disagrees that the new Ohio Constitution that violates the original corporate charter is unconstitutional because he argues that citizens have the right to amend their laws. Campbell then launches into a stinging warning of the danger posed by granting corporations legal privileges which corporations are prone to abuse.

In his dissent, Campbell argues that corporations will come to dominate the legal and political system with government and especially the court system having no control (59 U.S. 331, 374). His opinion is reminiscent of the arguments against the East India Company by the colonists who feared the growing power of corporations. He argues that corporations "display a love of power, a preference for corporate interests to moral or political principles or public duties, and an antagonism to individual freedom, which have marked them as objects of jealousy in every epoch of their history" (59 U.S. 331, 376). This argument is notable because Campbell is implying that the corporate person has the moral capacity for good or evil, and Campbell contends that the corporation is more likely to do evil. Although Campbell would argue vehemently against granting corporate personhood for the practical reason that harm will come, his argument implies that he

agrees that at least according to the criteria of rationality and autonomy, the corporation would seem to qualify as a person.

In the 1870s, a new point of contention arose in regards to the status of the corporation. In 1866, the Fourteenth Amendment passed, and many litigators for corporate rights argued that the Fourteenth applied to corporations as persons. The Fourteenth Amendment stated,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The ratification of the Fourteenth was revolutionary for those involved in the struggle to gain corporate personhood because if proponents could successfully argue that corporations were persons, albeit artificial persons, then they could optimistically argue that as a person, the corporation was entitled to protection under the Fourteenth Amendment. This protection would guarantee Due Process and Equal Protection. Furthermore, The Fourteenth Amendment extended the other Amendments to the states, and thus corporate litigators could argue that 1) corporations must be protected from state laws and 2) the other amendments, such as the First Amendment's guarantee of free speech and the Fourth Amendment's protection against search and seizure, must also protect corporations. Thus, the passing of the Fourteenth Amendment opened a new battleground for corporate litigators.

It is important to note that the Fourteenth Amendment speaks of both persons and citizens. In *Marshall v. Baltimore & Ohio Railroad Co.* the Court decided that

corporations were not citizens. Lower courts followed this precedent and set the standard that because corporations could not be born or naturalized they could not be citizens. Circuit Judge Woods stated the argument against corporate citizenship eloquently in his opinion for *Insurance Co. v. New Orleans* 13 F. Cas. 67 (1870). He argued, "No words could make it clearer that citizens of the United States, within the meaning of this article, must be natural, and not artificial persons; for a corporation cannot be said to be born, nor can it be naturalized. I am clear, therefore, that a corporate body is not a citizen of the United States as that term is used in the 14th Amendment" (13 F. Cas. 67, 68). Thus, as corporate litigators considered the ramifications of the newly passed Fourteenth Amendment, the claim for privileges and immunities as citizens was shaky.

However, persons were guaranteed life, liberty and property. Because the Amendment's wording distinguished between citizens and persons, corporate litigators argued that this was purposefully done in order to include corporations. However, persons are guaranteed life and liberty, and it is not clear that corporations can possess either of these traits. Judge Woods explains,

> The complainants claim that this last clause applies to corporations – artificial persons. Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word "person," where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons (13 F. Cas. 67, 68).

Despite Judge Wood's opinion on the Circuit Court that the word "person" in the Fourteenth Amendment applies only to natural persons, the subject would continue to come before the Court. It is noteworthy that although Judge Woods denied corporations protection under the Fourteenth Amendment, when he became Justice Woods on the Supreme Court, he concurred in *Santa Clara* which granted corporations personhood. It was not extensively argued that corporations possessed life, but the qualities of liberty and property were very much open to debate.

The Railroad Industry

It was the advent of the railroad industry that brought the most sweeping changes to the Court's doctrine on corporate personality. Railroads broke down some of the individualist economic doctrine that had prevailed in the 1800s. Groups of managers and investors rather than individual actors become the key economic players as ownership and the means of production began to separate.[260] Collectivist institutions rather than the individual entrepreneur were successful in managing large businesses with many shareholders. Although large corporations were very successful, many corporate strategies of this period were completely at odds with the popular sentiment of the period. While most people were in favor of natural rights arguments as applied to humans, they were not in favor of granting immunities and privileges to corporations. Protests against the growing influence and legal privileges of the railroad culminated in nation-wide strikes and riots in the late 1870s. Furthermore, even though laissez faire was popular,

[260] William W. Bratton, Jr. "The New Economic Theory of the Firm: Critical Perspectives from History" *Stanford Law Review* 41 no. 1471 (1989): 1487.

citizens were still highly in favor of strong state rights to control commerce.[261] While large corporations were still feared by many, the awe and the promises of successful railroad companies who were able to unite a vast region and promote commerce at a level never seen before overwhelmed most public fear and won favor with politicians and the courts. Even during the Jacksonian period, when there was growing popular hostility towards corporations, the number and importance of corporations increased and judges indicated their willingness to stretch meanings of key words and ignore phraseological limits.[262]

Even the young Abraham Lincoln could be found in 1854 defending the Illinois Central Railroad against state regulation. The before the Illinois Supreme Court was *Illinois Central Railroad Company v. the County of McLean and George Parke*, *Sheriff and Collector* 17 Ill. 291 (1856). Lincoln noted that the Illinois Constitution required uniform taxation of all "persons using and exercising franchises and privileges." He argued that the railroad was a person and thus non-uniform taxation of different railroad projects was unconstitutional.[263]

Lincoln won the case and secured uniform taxation for the railroad, but the Illinois Supreme Court rejected his personhood argument. Nonetheless, the personhood argument resonated with other attorneys for the railroads across the country who

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[261] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 71.

[262] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 117.

[263] Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. [Emmaus, PA: Rodale Press, 2002]: 106.

repeatedly filed suit against local and state governments arguing that corporations had historically been referred to as artificial persons and thus should be considered persons under the Fourteenth Amendment and enjoy the protections of the Constitution. They sued claiming that railroads should not have to pay local taxes because different railroad properties were taxed in different ways and this created unconstitutional "classes of persons."[264]

At the same time that railroads were beginning their legal battle, a sweeping personnel change occurred on the Supreme Court bench. Between November of 1877 and March of 1882, Justices Harlan, Woods, Gray, Matthews and Blatchford succeeded Justices Davis, Strong, Swayne, Clifford, and Hunt. Legal historian Howard Jay Graham argues that this change in personnel helped turn the tide in favor of corporate personality.[265]

While the railroad cases were gaining momentum in the lower courts, insurance companies became the first industry to seek corporate personhood rights from the Supreme Court. Insurance companies were subject to strict state control and were treated as foreign corporations in other states in terms of licenses and taxes. However, insurance companies sought relief through the Comity Clause rather than Due Process.[266] From 1865 to 1871, the efforts of insurance companies largely failed. Although Congress was

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[264] Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. [Emmaus, PA: Rodale Press, 2002]: 91.

[265] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 397.

[266] See *Commonwealth v. Milton* 12 V. Mon. 212, (1851); *People v. Thurber,* 13 Ill. 554 (1852); *Tatem v. Wright*, 3 Zab. 429.

petitioned to enact just and equal laws for interstate insurance companies, Congress showed little interest in their plight.[267]

In *Paul v. Virginia* 75 U.S. 168 (1869), several insurance companies incorporated in New York brought suit against the state of Virginia over Virginia's license and bond requirements for foreign insurance companies. In their arguments for the State of Virginia, attorneys Robinson and Bowden argued, "Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a State in the sense in which that word is used in the Constitution of the United States, and the averment was rejected because the matter averred was simply impossible." Justice Field agreed that corporations were not citizens under Article Four, Section Two of the Constitution which declares, "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Field argued that "the term citizen as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed" (75 U.S. 168, 178). Thus, the Supreme Court held that corporations were not citizens and insurance was not commerce therefore effectually denying the insurance company's claim under the Comity Clause.

The insurance companies did not make much headway, and thus it was the railroads that created the real stir in the Supreme Court. In 1876, four major cases came before the Court where railroads claimed the benefits of personhood and were subsequently denied: *Chicago, B. & Q.R. Co. V. State of Iowa* 94 US 155 (1876),

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[267] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 383.

Chicago M. & St. P.R. Co. v. Ackley 94 US 179 (1876), *Winona & ST. P.R. Co. v. Blake* 94 US 180, (1876) and *Peik v. Chicago & N. W. R. Co.* 94 US 164, (1876). In *Peik v. Chicago,* the Court used a concession theory argument to deny railroads protection under the Fourteenth Amendment. The Court declared,

> The creation of corporations is a prerogative of sovereignty, to be exercised or not, as the legislature shall see fit; and at such times, in such manner, and subject to such conditions and reservations as it shall determine, regard being had only to the restrictions which the Constitution imposes upon the lawmaking power. The latter, therefore, by statue, or the people, by fundamental law, may reserve the absolute control over these artificial persons; and there is no authority lodges elsewhere to interfere with or prevent the exercise of this sovereign right. The government which creates may reserve the power to destroy them, or to prescribe the constitution upon which their future or continued existence shall depend (94 U.S. 164, 174).

Although the Court took a conservative approach in these four cases, the stage was set for the largest corporate personality case to reach the Supreme Court. In 1882, the California Supreme Court upheld assessment and mortgage deduction provisions that applied to railroads. The California Court based its opinion on the Due Process provisions of the Fourteenth Amendment and the ruling in *Insurance Company v. New Orleans* (1 Woods 85). The railroads appealed their case to the Supreme Court and hired Roscoe Conkling as their lead counsel – the San Mateo case was born.[268] *San Mateo County v. Southern Pacific R.R.*, 116 U.S. 138 (1882)

Fascinatingly, although this case was perhaps the singularly most influential case in establishing corporate personality, the Supreme Court did not ever decide the case. Before a decision was made, a settlement was reached and the Southern Pacific Railroad

[268] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 398.

paid its taxes. However, the arguments for personhood before the Court set the stage for subsequent cases.[269]

The lead counsel for the Southern Pacific Railroad, Roscoe Conkling, was also a former Senator and member of the Joint Congressional Committee of 1866 who drafted the Fourteenth Amendment. In his argument, he contended that the drafters of the Fourteenth Amendment had intended the word "person" to include corporations. He produced a journal from the Committee, which he quoted to prove his point. His argument was successful in that it convinced many legal scholars of the day as well as Supreme Court justices and it affected the *Santa Clara* case four years later. Historians who were convinced of Conkling's argument deduced that the word "citizen" had been used in clauses that applied to political rights, and the word "person" had been used in clauses that applied to property rights. Perhaps shrewd Republican Congressmen had manipulated the language of the Fourteenth Amendment to give business more judicial protection against state legislatures. The fact that successful railroad lawyer and Ohio Congressman John Bingham had been a member of the committee that drafted the Fourteenth Amendment added fuel to the fire. Bingham was notorious for his success in defending the railroads, and the fact that he had been instrumental in drafting the Fourteenth Amendment gave plausibility to this argument.

Conkling's argument and his alleged journal ignited a colossal controversy that was most famously put forth in Charles and Mary Beard's "Conspiracy Theory." Although a brief account of the Beard Thesis is a bit off track from the study of legal

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[269] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 428.

corporate personhood, it is important in that it shows how controversial and heated the debate was over the rights of corporations and their standing under the Fourteenth Amendment. Even if formal theories of corporate personality were not debated within Washington, there certainly was a heightened debate over the constitutionality of corporate personality. The Beards argued that Republican Congressional leaders and especially John Bingham, had deliberately constructed the Fourteenth Amendment to give legal power and protection to the corporations that were aligned with his own interests. While the Beards did not expressly state that Bingham was guilty of conspiracy, this conclusion was implied. Their theory suggested that a conspiracy existed from the powerful railroad corporations, to lawmakers in Washington, and all the way to the Supreme Court.[270]

The Beards alleged that former Senator and railroad lawyer Roscoe Conkling, when helping write the Fourteenth Amendment in 1868, had deliberately written "person" instead of "natural person." Former representative and railroad lawyer John A. Bingham did the same in the House. Then both leaders left Congress to litigate on behalf the railroads to argue for corporate persons. Conkling and Bingham, as paid witnesses of the railroads, both testified that they had purposefully used the word person to someday ensure that corporations would receive civil rights. The Beards write,

> In this spirit, the Republican lawmakers restored to the Constitution the protection for property which Jacksonian judges had whittled away and made it more sweeping in its scope by forbidding states, in blanket terms, to deprive any person of life, liberty or property without due process of law. By a few words skillfully chosen, every act of every state and local government which touched adversely the rights of persons and property was made subject to review and liable to annulment by the Supreme Court

[270] Charles Beard and Mary Beard, *The Rise of American Civilization* [New York: MacMillan Publishing, 1942].

> at Washington, appointed by the President and Senate for life and far removed from local feelings and prejudices.[271]

The Beard's argument was coined the "Conspiracy Theory" even though they had not named it such or even precisely formulated or documented the theory. Howard Jay Graham, a noted Constitutional scholar who has spent many years studying the "Conspiracy Theory" has concluded that there is no real proof in the theory.

Graham argues that the word "person" instead of "citizen" was chosen for the Fourteenth Amendment because it was modeled after the Fifth Amendment, which uses the word "person." At the time, "person" was a generic term that was inclusive of African Americans whereas "citizen" implies a different set of rights and duties that were troublesome if inclusive of African Americans.[272] Furthermore, Graham argues that there is no record of the word "citizen" being used in the Due Process and Equal Protection clauses; the word is always "person."[273] Thus, Graham concludes that Conkling deliberately misused the facts when arguing that the Fourteenth Amendment had been written purposively to include corporations as persons.

However, Graham does admit that at the time of the drafting of the Fourteenth Amendment, corporate personhood cases were being tried in state courts within the insurance industry, and the concept was not new to lawyers. In fact, during the drafting of the Fourteenth, various insurance companies submitted over two hundred petitions to

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[271] Charles Beard and Mary Beard, *The Rise of American Civilization* [New York: MacMillan Publishing, 1942]: 113.

[272] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 35.

[273] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 42.

Congress asking for just and uniform laws pertaining to interstate insurance companies.[274] This certainly caught the attention of those drafting the Amendment. It is likely that the insurance corporations (among other corporations) were paying attention to the drafting of the Fourteenth in the event that its protections and rights could be applied to them as well. Additionally, while the Fourteenth Amendment was being drafted, many conflicts were being waged within Congress over various railroad issues such as right of ways, freight taxes, and state monopolies. Members of the drafting committee such as Thaddeus Stevens, Reverdy Johnson, Bingham, and Conkling were all aware of and involved to various degrees in these matters.[275]

Furthermore, it is quite possible that Bingham could have regarded corporations as persons although there seems to be no evidence that this was explicitly on his mind during the drafting. Reverdy Johnson, who also served on the joint drafting committee, had worked as a lawyer for the Cleveland and Mahoning Railroad in federal courts, and had himself used a denial of Due Process as his argument for his clients. Hence, he must have understood that a federal guarantee of due process rights would be valuable in protecting corporate interests.[276]

Thus, it can be concluded that the Fourteenth Amendment was not drafted in a vacuum; the members of the committee were very aware of issues surrounding corporate

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[274] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 84.

[275] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 87.

[276] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 87.

personality; and some of the members were personally involved in the railroad cases. Despite this, Graham argued that the corporate problem may have come up incidentally, but the Fourteenth was not "*designed* (emphasis his) to aid corporations nor was the distinction between 'citizens' and 'persons' conceived for their benefit."[277]

Returning now to the *San Mateo* case, Justice Field accepted the argument that the Fourteenth Amendment could include more than recently freed slaves in its interpretation of the word "person." Justice Field wrote the *San Mateo* opinion for the circuit court of California. Field would later become a justice for the Supreme Court, and would be very influential in subsequent cases concerning corporate personality. In his circuit opinion, Justice Field wrote,

> It is sufficient to add that in all text writers, in all codes, and in all revised statutes, it is laid down that the term "person" includes, or may include, corporations; which amounts to what we have already said, that whenever it is necessary for the protection of contract or property rights, the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name. All the guaranties and safeguards of the constitution for the protection of property possessed by individuals may, therefore, be invoked for the protection of the property of corporations.[278]

Field admitted that corporations were artificial persons, "they consist of aggregations of individuals united for some legitimate business." He further relied upon group theory to argue that aggregations of individuals should be protected under the Fourteenth Amendment. "It would be a most singular result if a constitutional provision, intended for the protection of every person against partial and discriminating legislation by the

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[277] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 94.

[278] *San Mateo v. Southern Pac. R.R.,* 13 F. 722, 748 (C.C.D. Cal. 1882).

States, should cease to exert such protection the moment the person becomes a member of a corporation."[279]

This interpretation using group theory is much safer than taking a person theory stance that would fully grant corporate personality. Field further states, "On the contrary, we think it is well established by numerous adjudications of the Supreme Court of the United States, and of the several states, that whenever a provision of the Constitution, or of a law, guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting them, the benefits of the provision extend to corporations, and the Courts will always look beyond the name of the artificial being to the individuals whom it represents."[280] Thus, Field's ruling does not categorically state that corporations are full persons under the Fourteenth Amendment as is held in person theory, but he does give a very strong argument in favor of corporate personhood.

While Justice Field's argument using group theory is somewhat cautious in advocating full corporate personality, his colleague on the circuit court bench, Justice Sawyer wrote a concurrence that forcefully argues for full corporate rights as a person. His introductory argument is one of the strongest arguments ever made for the corporate person, and was influential when the case came before the Supreme Court. Sawyer wrote,

> In my judgment, the word "person," in the clause of the Fourteenth Amendment to the national constitution, "No state shall deprive any person of life, liberty, or property without due process of law, nor deny to any *person* the equal protection of the law," includes a private corporation.

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[279] *San Mateo v. Southern Pac. R.R.,* 13 F. 722, 745 (C.C.D. Cal. 1882).

[280] *San Mateo v. Southern Pac. R.R.,* 13 F. 722, 745 (C.C.D. Cal. 1882).

> It must, at least, through the corporation include the natural persons who compose the corporation, and who are the beneficial owners of all the property, the technical and legal title to which is in the corporation in trust for the corporators. The fact that the corporators are united into an ideal legal entity, called a corporation, does not prevent them from having a right of property in the assets of the corporation which is entitled to the protection of this clause of the constitution. Nor does the intervention of this artificial being between the real beneficial owners and the state, for the simple purpose of convenient management of the business, enable the state, by acting directly upon the legal entity, to deprive the real parties beneficially interested of the protection of these important provisions.[281]

Both Field and Sawyer were strongly influenced by Mr. John Norton Pomeroy, council for the railroads, who was one of the strongest and most eloquent advocates for corporate railroads. Pomeroy was a highly esteemed professor of law at Hasting University turned railroad lawyer. In fact, Pomeroy was an influential player when the *Santa Clara* case was decided.

When the *San Mateo* case reached the Supreme Court, the arguments from the council again stressed the personality of the corporation. Pomeroy argued that "'the grand object' of the Fourteenth Amendment had been to protect life, limb and liberty of all natural persons, and the property of all persons, whether natural or legal."[282] Conkling contended "…but equally with the States, they (the United States) are prohibited from depriving persons *or corporations* of property without due process of law." Sanderson, yet another lawyer for the railroad argued that because the second and third clauses of the Fourteenth Amendment do not say born or naturalized, persons can include corporations. All three in the counsel argued that corporations were included with persons but they

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[281] *San Mateo v. Southern Pac. R.R.,* 13 F. 722, 758 (C.C.D. Cal. 1882).

[282] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 401.

were careful to refrain from delving into person theory in which corporations are fully legal persons. Nor did they insinuate that corporations could have any qualities of moral persons.[283]

The opinion from the circuit court and the arguments before the Supreme Court were influential enough to be noted by the popular media. The New York Tribune commented, "If these positions shall be permanently established…the results may be to give corporations a resort to Federal Courts wherever they think that State laws operate unequally against them, and give a like privilege to taxpayers complaining that a State system of taxation is not equal and uniform."[284] Interestingly, as has been noted, the Supreme Court did not reach a decision in the *San Mateo* case because a settlement was reached, and the case was moot. However, the arguments from this controversial case were fresh in the minds of the justices when the next case concerning this topic reached the Court.

In 1886, the Supreme Court heard *Santa Clara County v. Southern Pacific R.R.* 118 U.S. 394. This case is remarkable in that the issue of corporate personality is not discussed as part of the court opinion. In the beginning of the clerk's notes for the case, Chief Justice Waite is quoted as saying, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." There is no elaboration of the point, and in fact, the declaration is not an official part of the Court's

[283] Ibid. 421 At Note 172, Graham argues that a better prepared counsel with more resources for the railroad was very important in this case.

[284] "Civil Rights of Corporations, New York Tribune, Dec 19, 1882 p. 4 col. 3

opinion. However, this simple statement at the beginning of the case effectually granted corporations the status of persons and has been the precedent since that time.

The authoritative judicial justification for corporate personality is found in Justice Field's and Sawyer's opinions in the *San Mateo* circuit court as discussed above. These opinions as well as the arguments of the counsel in *San Mateo* and *Santa Clara* provide the reasoning behind this declaration.

In *Santa Clara*, the Southern Pacific Railroad refused to pay taxes of $30,000 on a property with a $30 million dollar mortgage. When the state of California assessed the property, they inadvertently included the value of certain fences that were county domain. As a result, the Southern Pacific Railroad refused to pay all the taxes on its property, and the case when to court. The Supreme Court decided in favor of the railroad on the issue of the fences and ordered the railroad to pay the remaining tax. The essential aspect of this case is the argument of personhood under the Fourteenth Amendment, which was argued by the railroad's defense. Although the Court didn't rule on the personhood argument, this defense crept into the written record and became part of the history-altering decision that granted corporate personhood.

At the heart of the railroad's defense was the simple argument that the state unfairly prohibited the railroads from deducting the value of their mortgage from their property value as individuals are allowed to do. They argued that this was a violation of the equal protection of persons. Sanderson, a lawyer in the *San Mateo* case, again argued for the railroads. He argued that the Fourteenth Amendment leveled the field between artificial and natural persons. This argument hinged on person theory. John Norton Pomeroy also reappeared representing the railroad. In his brief, he claimed that the

Fourteenth Amendment protected the rights of the individual shareholders and thus protected the corporation as well. Using a line of reasoning that centered on group theory, he argued that provisions of state and federal constitutions "apply . . . to private corporation, not alone because such corporations are 'persons' within the meaning of the word, but because *statutes violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons.* In applying and enforcing these constitutional guaranties, *corporations cannot be separated from the natural persons who compose them."*[285] (Emphasis in original.) Pomeroy continued his claim using group theory, but concluded his argument by straying slightly into person theory in order to make his claim stronger. He stated,

> The truth cannot be evaded that, *for the purpose of protecting rights, the property of all business and trading corporations* IS *the property of the individual corporators.* A State act depriving a business corporation of its property without due process of law does in fact *deprive the individual corporators of their property*. In this sense, and within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons or corporations, and natural persons."[286] (Emphasis in original)

Despite the strong arguments from Sanderson and Pomeroy, Attorney Delphin M. Delmas, attorney for Santa Clara County, countered with strong arguments against corporate personhood. His argument is long, but is worth stating in full due to the eloquent refutation of Pomeroy's argument and the strong claims against corporate personality. Delmas stated,

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[285] Quoted in J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 177.

[286] J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 178.

> To my mind the fallacy, if I may be permitted so to term it, of the argument lies in the assumption that corporations are entitled to be governed by the laws that are applicable to natural persons. That it is said, results from the fact that corporations are (artificial) persons, and that the last clause of the Fourteenth Amendment refers to all persons without distinction. The defendant has been at pains to show that corporations are persons, and that being such they are entitled to the protection of the Fourteenth Amendment…the questions is, does that amendment place corporations on a footing of equality with individuals. Blackstone says, 'persons are divided by law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.' This definition suggests at once that it would seem unnecessary to dwell upon, that though a corporation is a person, it is not the same kind of person as a human being, and need not of necessity – nay, in the very nature of things cannot – enjoy all the rights of such or be governed by the same law. The equality between persons spoken of in the Fourteenth Amendment obviously means equality between persons of the same nature of class, and not equality between persons whose very natures are absolutely dissimilar – equality between human beings, if the rights of natural persons are involved; equality between corporations of the same class, if the rights of artificial persons are involved.[287]

Delmas is appealing to a common understanding of the word "person" that is a human being and based criteria such as rationality and autonomy. As rational and autonomous human being, "persons" are able to enjoy the benefits of governance. Delmas argues to equate these natural persons with artificial persons is a mistake and confuses the very nature of personhood.

Despite the eloquent arguments for and against corporate personality, the Supreme Court did not rule on this subject at all, and instead dealt only with the simple tax matter at hand. However, as stated earlier, the significance of the decision comes from the notes at the beginning of the case in which Justice Waite remarked that the word

[287] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 101.

"person" in Fourteenth Amendment included corporations. Because this introductory statement effectually changed the course of corporate law, the *Santa Clara* case has been the subject of controversy ever since the opinion was published. At the time, the court reporter was J.C. Bancroft Davis, a well-studied lawyer in his own right. Graham argues that Davis may have been part of a conspiracy to insert that statement in the introductory notes without knowledge of the Justice Waite, who was off the bench by the time the decision was published.[288]

Regardless of the controversy over the opinion, the *Santa Clara* case effectively granted corporate personhood and has been cited ever since in cases referring to Fourteenth Amendment rights for corporations. Legal historian J. Morton Horwitz argues that the real significance of *Santa Clara* is that it went beyond the narrow *Slaughterhouse* ruling in confining the Fourteenth Amendment to the African American race.[289] *Slaughterhouse* 83 U.S. 36 (1873) was one of the first Supreme Court cases involving the Fourteenth Amendment and the Court ruled that the Fourteenth applied to the newly freed slaves. In his opinion, Justice Miller stated, "By any person was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color" (83 U.S. 36, 129). Because corporations have neither race nor color, it was presumed to apply only to humans and therefore exclude corporations. Together, *San Mateo* and *Santa Clara* implied that the Fourteenth Amendment applied to newly freed slaves as well as corporations. Graham concludes, "Viewed in perspective, the argument

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[288] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 113.

[289] J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 117.

is one of the landmarks in American constitutional history, an important turning point in our social and economic development."[290] Horwitz concurs with assessment and maintains, "After Santa Clara and more importantly, after New Jersey passed their open incorporation act of 1889 which allowed one corporation to own stock in another, thus legalizing the holding company and ending any serious law to regulate corporate consolidation, many legal thinkers realized that in fact as well as theory, corporations could do virtually anything they wanted to. They were not an artificial entity but a powerful legal reality."[291]

Two years after the Justice Waite's unorthodox proclamation that corporations were persons, the Court heard *Pembina Mining Co. v. Pennsylvania* 125 U.S. 181 (1888). In this case, a mining company incorporated and doing business in Colorado maintained an office in Pennsylvania. Pennsylvania assessed the corporation a tax for an office license. The mining company subsequently sued claiming a violation of the privileges and immunities clause of the Fourteenth Amendment, and because domestic corporations were exempt from the tax, they also claimed a violation of the equal protection clause.

Again the Court affirmed that corporations were not citizens under the Constitution. Justice Field wrote the opinion, and referred to his previous judgment in *Paul v. Virginia* in which he held that a corporation was not a citizen. Again he reiterated, "The term citizen applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and

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[290] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 31.

[291] J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 217.

possessing only such attributes as the legislature had prescribed" (125 U.S. 181, 187-88). The Fourteenth Amendment specifically qualifies citizens as those who are "born or naturalized," so it would have been difficult to include corporations in the privileges and immunities. However, the equal protection and due process clause, which refers to persons, could include corporations. On this account, the Court concluded, "Under the designation of person there is no doubt that a private corporation is included" (125 U.S. 181, 189). The Supreme Court did not unequivocally rule that corporations are persons. Rather, they used the more subtle language of "included under" the designation of person, which is not synonymous with "is." The Supreme Court used group theory to argue that corporations are "merely associations of individuals united for a special purpose, and permitted to do business under a particular name" (125 U.S. 181, 188-89).

Although a state has a right to regulate corporate entry, once it has recognized a corporation and that corporation has complied with requirements for admission such as obtaining necessary licenses, then the state must give equal treatment to that of domestic corporations because to treat a foreign corporation differently would discriminately single out a class of persons – those who were corporate members. Interestingly, the opinion was written by Justice Field – the same person who boldly argued for corporate personhood in the *San Mateo* case for the circuit court of California. Now on the Supreme Court, his enthusiasm for corporate personality seems to be somewhat tempered as he reminds his readers that corporations are not citizens and can only claim personality based on the rights of the shareholders.

This cautious statement of corporate personality was the official statement on the subject for the next twelve years. (The legitimacy of the *Santa Clara's* statement is

debatable since it did not occur in the actual opinion.) In 1910, another case concerning a railroad reached the Supreme Court. In *Southern Railroad Co. v. Greene* 216 U.S. 400 (1910), a railroad company, which was chartered in Virginia but had a network of lines in Alabama, was charged a franchise tax by the state of Alabama. Alabama imposed the franchise tax based on the amount of capital stock on all foreign corporations authorized to operate within the state. Alabama did not levy a similar tax on domestic corporations. The railroad sued claiming discrimination under the Fourteenth Amendment's Equal Protection Clause. The Supreme Court said, "That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion" (216 U.S. 400, 412). In his opinion, Justice Day quotes *Pembina* saying "The inhibition of the Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of 'person' there is no doubt that a private corporation in included" (216 U.S. 400, 413).

Justice Day, who delivered the Court opinion, omitted the section of *Pembina* which clarifies that a corporations were "merely associations of individuals." Furthermore, the Court refers to the railroad as the "corporation plaintiff" rather than the members of the corporation. Calling the corporation the plaintiff implied that a corporation had the will and rationality to bring suit in a court of law – just as a rational and autonomous person theory. The corporation is treated as a person in its own right with assets, rights and duties. The Court had at last unequivocally proclaimed that the corporation was a person, and had used the person theory to make this claim. Group

theory was pushed to the wayside as corporations were increasingly seen as equivalent to human persons. From the early decision in *Bank of the United States v. Deveaux* 9 U.S. 61 (1809) in which "a corporation aggregate is an artificial, invisible body, existing only in contemplation of law. It has no analogy to a natural person" (9 U.S. 61, 86), the Court had come full circle to granting the corporation full protection to the property rights of a corporation as a person.

In *Santa Clara* and its progeny, the Supreme Court ruled that a corporation as a person under the Fourteenth Amendment but did completely address why the corporation is a person. The Court relied on metaphors to illustrate that a corporation was similar to a human person but does not provide either strong legal reasoning or robust moral theory to support this claim. This lack of solid theory behind corporate personhood compelled legal scholar and lawyer Jess Krannich to conclude, "This lack of reasoning and analysis is troubling given that *Santa Clara* has proven to be a fountainhead for all other corporate constitutional rights. This suggests a foundational issue for later adjudications of corporate personhood."[292] The Court seems to accept corporation personhood as a matter of *stare decisis* without every challenging the concept. Indeed, cases following *Santa Clara, Pembina,* and *Southern Railroad Co. v. Greene* all presume that a corporation is a constitutional person but do not have a solid foundation in constitutional analysis. This leads to incoherence and instability in corporate jurisprudence as the Supreme Court adjudicated future cases concerning personhood.

[292] Jess M. Krannich, "The Corporate 'Person': A New Analytical Approach to a Flawed Method of Constitutional Interpretation," *Loyola University Chicago Law Journal*, Vol. 37, 2005: 70.

Legal Repercussions of Corporate Personhood

Santa Clara and the cases in its wake set the standard that a corporation should be treated as a legal person in future cases. Graham argues that the decisions in *Santa Clara, Pembina,* and *Greene* were tantamount to two constitutional amendments. First, it granted corporations the freedom to challenge any governmental action opposed to their interests. Second, it empowered the Supreme Court to review all state and federal action pertaining to corporations and to veto any action the Court deemed arbitrary or unreasonable. It presumed that all laws were hostile to corporations unless the Court ruled otherwise.[293] If Graham is correct, this a broad grant of power to corporations and gives corporations immense opportunity to increase their influence through the legal process. Many scholars, politicians, and legal actors have agreed with Graham's assessment of these decisions and have sought to reduce the power of corporations within government. Most of the criticism of these two decisions from the Supreme Court bench has come from dissenting opinions. Although these dissents do not have the precedent-setting influence of a Court opinion, they do keep the debate alive and the subject of corporate personality open to question.

The first influential dissent was from Justice Brandeis in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933). In this case where J.C. Penney was a party, Florida had created various licensing fees depending upon the number of stores within and outside each county. The effect of the law was to charge chain stores more for having multiple stores in the county and in the state. Justice Roberts's Court opinion stated that while this

[293] Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* [Madison, WI: State Historical Society of Wisconsin 1968]: 379.

particular law was within the state's powers, "corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons" (288 U.S. 517, 537).

Justice Brandeis, dissenting in part, returned to fiction/concession theory to argue that a state has the power to create corporations for ends that the state deems desirable as well as the power to deny incorporation where the state deems the corporation will harm public welfare. Since the state has the power to regulate and tax intrastate commerce, the corporation is free to accept or reject the terms of the state. The state grants the privilege of intrastate commerce to corporations and may set and change the terms of this privilege at any time. He further argues that most Americans have been to led to believe that the privilege of forming corporations was inherent and thus they must accept "the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and hence, to be born with resignation" (288 U.S. 517, 549).

Brandeis reminds his readers that for a greater part of American history, corporations were feared as encroachments upon individual liberty and opportunity, and corporate privileges were granted sparingly and only for the community benefit. General incorporation was not a sign that people no longer feared corporate domination. Rather, it was to promote equality of opportunity to create a corporation and limit scandals associated with government grants. (288 U.S. 517, 550-1)

Brandeis does grant that a corporation is entitled to protection under the Equal Protection Clause, but warns that corporations have become so powerful that they are dominating society. "Through size, corporations, once merely an efficient tool employed

by individuals in the conduct of private business have become an institution – an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state" (288 U.S. 517, 566). "Such is the Frankenstein monster which states have created by their corporation laws" (288 U.S. 517, 568).

Hugo Black's dissent in *Connecticut General Life Insurance Company v. Johnson* 303 U.S. 77 (1938) is one of the most well-known refutations of corporate personhood. The case involved California's right to tax an out-of-state corporation. The Court ruled that a corporation may enter another state to do business and can claim the protection of the Fourteenth Amendment against subsequent application of state law just as an individual may claim this protection. Justice Black disagreed that a corporation can claim the same protections as an individual. Justice Black directly confronted the issue of personality and categorically denied that corporations could qualify as persons.

> I do not believe the word "person" in the Fourteenth Amendment includes corporations. The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. This Court has many times changed its interpretations of the Constitution when the conclusion was reached that an improper construction had been adopted. … I believe that this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations. Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection (303 U.S. 77, 86).

Black then addresses some of the history of the Fourteenth Amendment and challenges that at the time of ratification, the general public did not realize that the Fourteenth would protect more than humans (303 U.S. 77, 88).

Black's second argument is one of the most powerful and logical arguments against corporate personality, and has been used since by those who want to rein in the

power of corporations. Corporate personality relies on the first section of the Fourteenth Amendment. However, there are two more sections that address representation. In the second section, representatives would be apportioned "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Black argues that it is inconceivable that persons in this instance would include corporations because this section is clearly referring to human persons. Section three states "no person shall be a Senator or Representative in Congress or elector of President and Vice President, or hold any office, civil or military, under the United States…" Again, it is quite unlikely that "person" in this case meant a corporation because corporations cannot serve in Congress. Black concludes that again, "person" refers to human persons with autonomy and rationality (303 U.S. 77, 90). Thus, a very logical argument can be made that if "person" did not include corporations in the second and third section, why would corporations be included in the first? It would be inconsistent to change the meaning of the word from one section to the next.

In *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949), Justice Douglas (with Justice Black concurring) uses the same line of reasoning for his dissent. This case again involved taxation of an out-of-state corporation, and the Court ruled that the tax violated the Equal Protection Clause as it applied to the corporate person. Douglas protested that the corporation was not a person to whom the Equal Protection Clause applied. He states, "It requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause. It means, in my opinion, a substantial revision of the Fourteenth Amendment" (337 U.S. 562, 581). Douglas goes

on to criticize the *Santa Clara* decision and urges the judiciary to restrain itself in this area. He wrote,

> But now that the question is squarely presented, I can only conclude that the *Santa Clara* case was wrong and should be overruled. One hesitates to overrule cases even in the constitutional field that are of an old vintage. But that has never been a deterrent heretofore and should not be now. We are dealing with a question of vital concern to the people of the nation. It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation (337 U.S. 562, 581-2).

Brandeis, Douglas, and Black all urged the Supreme Court to overturn *Santa Clara's* precedent that corporations are persons. Brandeis worried about corporate corruption of the political arena; Black cited the history and the wording of the various sections of the Fourteenth; and Douglas argued that the citizens, not the courts, should make this type of decision.

Even though the Court declared in *Santa Clara* that corporations were persons, the debate over this issue is far from over. Since *Santa Clara*, other types of issues have arisen concerning the corporation as a person. For instance, as a person, does the corporation have rights of free speech or immunity from illegal search and seizure? What is the extent of a corporation's criminal liability and who should be punished when the corporation is found guilty of crime? These are some of the questions that arose in the aftermath of the *Santa Clara* decision and continue to face the Supreme Court. The next sections analyze corporate personhood in cases pertaining to issues of corporate culpability for crime, protections from search and seizure, and corporate freedom of speech.

Criminal Law

One of the arenas in which corporate personality becomes problematic and incites further debate is the area of criminal law. Because corporate personhood creates difficulty in pinpointing the perpetrator of a corporate crime, problems easily arise. For example, the National Crime Index lists crimes by human persons, but excludes corporate persons even if the corporations have been convicted of felonies. As was addressed in the theoretical discussion, there is much debate concerning the criminal liability of corporations. The primary issue remains finding culpability and tracing it back to a flesh and blood human being. For instance, if a chemical manufacturing corporation illegally dumps toxins into a river, who is to blame? The person who physically dumped the chemicals into the river? The shift supervisor who approved the dumping? The board of directors who turned a blind eye to the issue? The chemists who knew the chemicals were toxic?

Generally when assigning blame for a wrongdoing, an agent must have malicious intent, and because corporations cannot have intent apart from their human members, culpability is difficult. The autonomy and rationality to commit a crime are moral attributes of personhood, and corporations are not fully recognized as moral persons. Yet, the courts have found that corporations are criminally liable in certain cases thus corporations are guilty. In criminal cases, corporate persons cross the divide from legal to moral persons. An act of conspiracy requires intent yet corporations have been found

guilty of conspiracy.[294] A corporation has no hands to commit a murder, yet corporations have been found guilty of negligence which resulted in death.[295]

For some scholars who adhere to person theory, this is not an anomaly because they argue that the corporation has a mind and thus may have malicious intent. As British political theorist Harold Laski claims, "Just as we have been compelled…to recognize that the corporation is distinct from its members, so too we have to recognize that its mind is distinct from their mind. By admitting the existence of the corporate mind, that mind can be a guilty mind."[296] However, if the corporation can be guilty of a crime, then there must be a means to punish the corporation. Yet, the corporation cannot be imprisoned or sentenced to death. The primary means of punishing a corporation is through fines. The problem here is that pecuniary punishment harms the stockholders, not the corporation as a person.

The problem of punishment came up in *New York Central R.R. v. United States* 212 U.S. 481 (1909). The case involved illegal rebates provided by the railroad to several sugar refineries. The Supreme Court had to determine how to find blame for the corporation's actions which amounted to lifting the corporate veil and finding the human persons who authorized or took part in the criminal behavior. The Court wrestled with the argument that punishing a corporation was to deprive the stockholders of their property without due process of the law when, in fact, the stockholders did not take part

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[294] See No. 186 F2d 562, 1949, recent examples of notorious corporate conspiracy include Enron, Martha Stewart Corporation, Quest Communications.

[295] Numerous hospitals and nursing homes have been found guilty of this type of negligence as have automobile factories and other types of industrial corporations.

[296] The Pluralist Theory of the State: Selected writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski, Edited by Paul Q. Hirst, "The Personality of Associations," Rutledge Press: London, 1989: 173.

in the decision to issue the illegal rebates. In this case, the Supreme Court determined that neither the stockholders nor the board of directors authorized the illegal behavior, and thus they could not be charged.

The defense argued that since the Court could not assign blame to any particular person, the corporation could not commit the crime. "As no action of the board of directors could legally authorize a crime, and as, indeed, the stockholders could not do so, the arguments come to this: that, owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case" (212 U.S. 481, 493). However, the Supreme Court could not ignore the fact that although corporate criminal offenses seem to be an anomaly, corporations do in fact commit crimes.

Thus, the Court concluded that corporations must be responsible for their actions despite the difficulty of finding the human beings at the heart of the offense. Quoting Bishop's New Criminal Law § 417 in his opinion, Justice Day writes, "Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously" (212 U.S. 481, 493). Justice Day found that a corporation, just as a moral human person, has the capacity for intentions and for virtuous action. Relying on person theory, he rules that a corporation can be guilty of a crime. The Court's opinion states, "to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take

away the only means of effectually controlling the subject-matter and correcting the abuses aimed at" (212 U.S. 481, 497).

The problem is further complicated by that fact that while the corporation cannot be imprisoned, an individual may be both fined and imprisoned. Thus, any law that has penalties for both the corporation and individuals can be claimed a violation of Equal Protection. If the corporation is fined, the shareholders suffer while the officers and/or employees of the corporation who were the actual offenders may not suffer any real punishment. Further, an employee of a large corporation may commit an offense as a part of the corporation without the directing officers being cognizant of the employee's actions. Are these officers, who may be very far removed from day to day operations, responsible for these actions? Again, issues of Equal Protection and Due Process arise.

There are countless cases of corporate criminal acts, and the various courts have assigned blame to shareholders, officers, and employees throughout history. One recent case that illustrates the continuing problem of culpability is *Meyer v. Holley* 537 U.S. 280 (2003). In this case, a suit was filed against a real estate agent for racial discrimination. The plaintiff filed suit against the president of the real estate company claiming that he was responsible for his representative's action. Thus, the Supreme Court was left to decide if the Fair Housing Act imposed liability upon the owner of a real estate corporation for the fault of one the independent agents. The Court ruled that in this case, the FHA does not impose vicarious liability on the owners or officers of this type of corporation.

Another issue that emerges under corporate criminal law is attorney-client privilege. Corporations can sue and be sued; they are punishable for their crimes; and

they need legal advice. Thus it is logically contended that corporations should be granted attorney-client privilege. Corporations benefit from legal assistance as much as any individual and should not be denied simply because of their power or wealth – they are "persons" after all. However, once again, the same problems associated with punishment surface. Who is the client? In some cases it may be the board of directors; in other cases it may be the stockholders or even the employees. Another issue arises when the counsel is the in-house-attorney and serves as both an employee and privileged counselor.[297] *Hickman v. Taylor* 329 U.S. 495 (1947) established that employees cannot be considered the client under the attorney-client privilege. They are witnesses and third parties. However, *United States v. United Shoe Machinery Corp.* 89 F. Supp. 357 (1953) decided that information furnished to an attorney by an officer or employee of the corporation in confidence was privileged. More issues arise when working with shareholders who are not truly corporate insiders or outsiders. Once again, there seems to be no definitive precedent to handle these types of problems, and the issue is managed on a case-by-case basis.

One issue that seems to be resolved to some extent is the corporation's Seventh Amendment right to a trial by jury. In the case *Ross v. Bernhard* 396 U.S. 531 (1970), stockholders in an investment company brought suit on behalf of a corporation against the directors and brokers for what they alleged were excessive brokerage commissions. The stockholders demanded a trial by jury. Traditionally, the stockholders, who had a derivative claim through the corporation, would not be entitled to a trial by jury.

[297] See: David Simon, "The Attorney-Client Privilege as Applied to Corporations" *The Yale Law Journal* 65 no. 7 (1956).

However, the Court found that a claim did exist for the corporation itself and based on the corporation's claim, the stockholders also had a claim for a trial by jury.

As I am finalizing this study, another case concerning the criminal liabilities of a corporation is on the Supreme Court docket for 2012. The case involves an accusation of crimes against humanity leveled against Royal Dutch Petroleum and its subsidiaries. Plaintiffs from Nigeria claim that Royal Dutch Petroleum authorized and promoted the torture of Nigerians who were protesting against the environmental damage caused by the company's oil exploration. The plaintiffs brought suit under a little known law called the Alien Tort Statute which allows the federal courts to hear cases by an alien filing a civil suit for crimes in violation of the law of nation. When the Second Circuit Court of Appeals heard *Kiobel v. Royal Dutch Petroleum* (621 F.3d 111, 2010), one of the primary issues was whether the Royal Dutch Petroleum Corporation could be found guilty of a criminal act against humanity just as an individual, natural person could be found guilty. The case revolved around the dichotomy between person and human being and questioned whether the corporation, as a collective of rational persons, could possess a *mens rea* in the same way that an individual person. In his circuit opinion, Judge Jose Cabranes ruled that within international law, the corporation is not considered a person capable of committing grave criminal acts even though the individuals who comprise the corporation can commit crimes that violate human rights. Cabranes therefore he dismissed the case. However, his opinion was hotly contested by Judge Leval who argued that a corporation should be responsible for crimes in which it participated just as any other rational person. The US Supreme Court agreed to hear the case in order to settle this unchartered territory of corporate personhood in the international sphere. This

case promises to be momentous for this study of personhood because the Court will need to decide just how far to extend corporate personhood in terms of the corporation's ability to act rationally and be responsible for its crimes. The following sections detail the many privileges the Supreme Court has extended to corporations based on the claim of personhood. It will be interesting to see if the Court is consistent in saying that while corporations have the privileges of persons, they also have the responsibility and culpability that goes along with personhood.

Search and Seizure

Related to problems of criminal law are issues regarding the protection of corporations under the Fourth Amendment. The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Because the corporation has been declared a person, it has been successfully argued that the corporation should be protected from unnecessary search and seizure. This is an interesting argument because it essentially asserts that the corporate person, just as a human person, has an autonomy and privacy that should not be violated by the state.

Protection from search and seizure raises a host of related issues. Using the reasoning of entitlement theory, the corporation is a creature of the state, and thus the state has the power to regulate it. Limiting search and seizure rights hinders the government's control over its creation. Further, many government agencies are

authorized to regulate the working conditions and environmental standards of corporations. Without the ability to search the company's premises, their capability to monitor the corporation is compromised. Despite these problems, the Supreme Court's history shows a willingness to grant the corporate person protection under the Fourth Amendment.

The first case broaching this subject is *Boyd v. United States* 116 U.S. 616 (1886). The case involved a law that authorized the courts to require a defendant in revenue cases to produce his books, invoices and papers. The plaintiff sued claiming that this requirement violated the Fourth Amendment's protection against search and seizure even though his home or business was not physically searched. The Supreme Court agreed and Justice Bradley wrote, "Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the true atmosphere of political liberty and personal freedom" (116 U.S. 616, 632).

In this case the Court looked at the man who is the owner of the business and considered his right to protect his private papers from government inspection. The notes to the case indicate that this was a sole proprietorship and therefore the Court did not consider the issues surrounding the search of a corporation. However, this case is important because the Court set the standard of associating an individual's business with his right to privacy. This became a central issue when corporate officers and employees

refused to offer evidence or allow searches of the company's premises claiming that this violated their personal protection against search and seizure.

Hale v. Henkel 201 U.S. 43 (1906) is the first and most important case concerning the corporation's Fourth Amendment rights. In this case, the Court directly examined the corporation's right of protection and held that the corporation is included under the Fourth Amendment. The case concerned Mr. Hale, the secretary/treasurer of MacAndrews & Forbes Company, who refused to answer questions about the company before a grand jury claiming that there was no specific charge against any particular "person" because the issue was with a corporation, not a human being. Further, he stated that the answers would incriminate him. Hale sought protection under both the Fourth and Fifth Amendments. The Court ruled, "The question of whether a corporation is a 'person' under the meaning of this amendment (Fifth) really does not arise." The Court stated that the Fifth Amendment protects a person from being a witness against himself, but does not protect a third party from protection. Thus, Hale could not claim Fifth Amendment protection because he would be incriminating the third party corporation even though he was a spokesperson for the corporation. Furthermore, Hale could not claim protection under the Fourth Amendment for the same reasons. Although Hale could refuse to submit his personal papers, he must acquiesce to providing the corporation's papers.

The Court's opinion simplifies this very complicated issue. By declaring the corporation a third party, the Court ignores the fact that arises in criminal law – namely that there is no flesh and blood person to represent the corporation. If Hale was claiming to be the human behind the corporate veil, he had a valid claim that testifying against the

corporation is testimony against himself. In addition, by *Boyd's* standard, he had a legitimate claim to refuse to surrender the corporation's papers since they are part of his business. The Court however, does not address this deeper issue and thus leaves the door open for further debate and confusion.

Justice Brown's opinion then addressed the Fourth and Fifth Amendment rights of the corporation. Brown began by harkening back to entitlement theory to argue that because the corporation is a creation of the state and incorporated for the benefit of the public, its powers are limited by the law. The legislature has a right to investigate corporate contracts in order to determine if the corporation has exceeded its powers. "It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose" (201 U.S. 43, 76).

Brown's opinion then makes an abrupt about face when he states, "we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against unreasonable searches and seizures. … In organizing itself as a collective body it waives no constitutional immunities appropriate to such body" (201 U.S. 43, 77). Brown explains that while a government search is merely a "quest," a seizure is a "forcible dispossession" of the owner. Brown references the *Boyd* case as the precedent protecting private papers. However, he expands *Boyd's* ruling to state that a person's papers are protected whether that person is a human person or corporate person (201 U.S. 43, 77). This bold statement effectively grants corporations protection under the Fourth Amendment, and corporations seeking to avoid government regulations have

continued to employ this precedent. Brown concludes his opinion by weakly stating that an authorized act of Congress might not constitute unreasonable search and seizure. Despite Brown's seemingly waffling opinion, the central idea to emerge from *Hale v. Henkel* is that the corporate person is protected under the Fourth Amendment.

Concurring and dissenting opinions by several justices illustrate that this Fourth Amendment protection was a matter of hot contention. Justice Harlan, although he concurs with Brown's result, disagrees vehemently the bestowal of Fourth Amendment protection to the corporation. In his concurring opinion, Harlan argues that giving the corporation this protection greatly curtails the government's ability to monitor a corporation's activities. Harlan then makes a very interesting statement regarding the meaning of the word "person." He writes, "In my opinion, a corporation – 'an artificial being, invisible, intangible and existing only in contemplation of the law' – cannot claim the immunity given by the Fourth Amendment; for it is not part of the 'people,' within the meaning of that Amendment. Nor is it embraced by the word 'persons' in that Amendment" (201 U.S. 43, 79). Harlan is echoing the reasoning of moral philosopher Daniel Dennett whose criterion three states that a person is an entity that other persons consider as a fellow person. Harlan argues that a corporation is not part of the Constitutional understanding of "people" and "persons" and failing this criterion, should not be included in the Fourth Amendment. Although Harlan contends that the Fourth Amendment's definition of "person" does not include the corporation, others who disagree could present an equally compelling case that the Fourth Amendment does include the corporation.

Justice Brewer makes exactly that argument. He wrote, "If the word 'person' in that amendment (Fourteenth) includes corporations, it also includes corporations when used in the Fourth and Fifth Amendments" (201 U.S. 43, 86). It seems that Brewer recognizes the importance of Harlan's statement and wants to assert that the meaning "person" must have some consistency throughout the Constitution, or at least throughout the Amendments. He then makes a person theory argument to say that a corporate person must be treated in the same manner as a natural person under the Fourth and Fifth Amendments. "The corporation of which the petitioner was an officer was chartered by a state, and over it the general government has no more control than over an individual citizen of that state. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments…" (201 U.S. 43, 87). The opposing arguments of Harlan and Brewer concerning the meaning of "person" under the Amendments illustrate that the meaning of "person" is far from settled.

Between 1906 and 1967 numerous cases came before the Supreme Court concerning the Fourth Amendment rights of commercial businesses. (See *Go-Bart Co. v. United States* 282 U.S. 344, *Silverthorne Lumber Co. v. United States* 254 U.S. 385, *United States v. Cardiff* 344 U.S. 174) Jumping ahead through history, *See v. City of Seattle* 387 U.S. 541 (1967) presented a case in which a government agency seeking to inspect and correct safety issues is barred from surprise, routine inspections without a warrant. Cases involving safety and public health present a pressing political issue because the corporation's Fourth Amendment rights must be weighed against the right of the employee and general public to work and conduct business in a safe environment.

The next set of cases demonstrates that even when public safety is an issue, the Supreme Court has steadily ruled in favor of protecting the corporation from search and seizure.

In *See v. City of Seattle* 387 U.S. 541 (1967), the Seattle Fire Code authorized the fire chief to enter any building except private dwellings whenever necessary to inspect the premises for violations of safety. When the fire department sought to conduct a routine inspection of a commercial warehouse without a warrant, the appellant refused access and was then arrested. The Court cited *Camara v. Municipal Court* 385 U.S. 808 (1967) which held that routine code inspections of a personal residence require a warrant. The Supreme Court therefore reasoned in *See v. City of Seattle* that the Fourth Amendment safeguards should be extended to commercial premises. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property" (387 U.S. 541, 544). Accordingly, a government agency must have a warrant to conduct searches of a commercial business.

Justice Clark's dissent criticizes the Court's decision because it may jeopardize public health and safety. "It prostitutes the command of the Fourth Amendment that 'no Warrants shall issue, but upon probable cause' and sets up in the health and safety codes area inspection a newfangled 'warrant' system that is entirely foreign to Fourth Amendment standards" (387 U.S. 541, 547). Clark argues that agencies do not violate the probable cause standard of the Fourth Amendment, and routine inspections are not unreasonable. Thus, there is no reason for the Court to create an entirely new warrant process for government agencies.

One of the most influential decisions concerning government regulation of corporate activity was *Marshall, Secretary of Labor et.al. v. Barlow's, Inc.* 436 U.S. 307 (1978). Mr. Barlow, a businessman, refused to allow an inspector from the Occupational Safety and Health Administration (OSHA) to conduct a search of his business without a warrant. OSHA claimed that surprise visits were necessary in order to thoroughly check the working conditions of factories and ensure employee safety. Barlow countered that the Fourth Amendment protected his corporation from warrant-less search, and thus the OSHA laws violated the Constitution. Justice White wrote the opinion of the Court and ruled in favor of Barlow. He concluded that a government inspector without a warrant is in the same position as a member of the public, and may not violate the privacy of the business. Employees are free to report any health and safety violations to OSHA, but a federal agent must still obtain a warrant in order to conduct a search (436 U.S. 307, 315). The Court does allow that the "probable cause" requirement of the Warrant Clause may be relaxed when the category of searches outweighs the interests protected by the Fourth Amendment. However, for most OSHA searches, the Court ruled that the agent must first obtain a warrant even if the element of surprise or timeliness is lost. This decision continues the reasoning of *See v. City of Seattle*, and holds that the Fourth Amendment protections of corporations outweigh a government agency's need to conduct surprise inspections to monitor public safety concerns.

Interestingly, in 1985, the Supreme Court allowed a government agency to conduct a controversial search of a corporation from the air. The case is *Dow Chemical Co. v. United States by and through Administrator, Environmental Protection Agency* 476 U.S. 227 (1985). Dow Chemical operated a 2,000-acre chemical manufacturing

plant that was heavily secured but exposed to visual observation from the air. The EPA contracted a commercial airline photographer to take photos using an aerial mapping camera in order to check the company's emissions. Dow sued claiming a violation of the Fourth Amendment. The Court held that aerial photographs were not a search prohibited by the Fourth Amendment, and the EPA did not exceed its authority under the Clean Air Act. Although the aerial mapping camera enhanced human vision, the Court decided that this did not raise Constitutional issues. This decision is surprising given the past precedent in favor of corporations. Because the EPA agents did not forcibly enter the premises, the Court could rule that there was no violation. However, Justices Powell, Brennan, Marshall, and Blackmun dissented from this holding citing a violation of past precedent.

These decisions represent a clash of interests between two sets of "persons" – the corporate person and the human persons who are employees and customers of the corporation. While business operations are private to some extent, when safety and environmental issues arise, the government agencies have a legitimate claim to inspect the corporate operations. The Court's trend has been to protect the corporate person to the greatest, reasonable extent by requiring government agencies to acquire a warrant to conduct search and seizures even if the element of surprise and timeliness is lost. Except for *Hale v. Henkel*, the Court has tended to view these issues from the vantage of the infringement of a human person's liberty to conduct business rather than the corporation's protection as a person under the Fourth Amendment. This pattern is also evident in cases concerning a corporation's protection of free speech under the First Amendment.

In March 2011, the Supreme Court decided *Federal Communications Commission, et al., Petitioners v. AT&T* 562 U. S. ____, (2011). The case involves the question whether AT&T, as a corporate person, can prevent the government from releasing its information to law enforcement agencies based on a claim of personal privacy. The conflict involved the Freedom of Information Act which required agencies to make records and documents publicly available upon request. An exception to this rule was for law enforcement records if the disclosure could "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (5 U.S.C. §552(b)(7)(C). AT&T construed the word "personal" to include all persons of which corporations should be included. Chief Justice Roberts, writing for the Court, disagreed. Roberts wrote, "'Personal' ordinarily refers to individuals. We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities. This is not to say that corporations do not have correspondence, influence, or tragedies of their own, only that we do not use the word 'personal' to describe them" (562 U. S. ____). Therefore, Roberts ruled that AT&T did not have "personal privacy" and the Fourth Amendment were not at issue in this particular instance. Roberts did not further expound the concept of corporation personhood.

Free Speech

One of the effects of treating corporations as legal persons for purposes of Due Process and Equal Protection under the Fourteenth Amendment is that when the Fourteenth Amendment is extended to include the rights of other Constitutional

Amendments to the states, corporations can make a claim for these rights as well. The most noted example of this is the extension of free speech rights of the First Amendment to corporations. A corporation is not a human being and physically has no mouth, vocal cords, and etcetera; thus a corporation technically cannot speak. However, corporations do speak through spokespersons as well as a host of mediums to include advertising through the mail, telephone, newspaper, radio, television, signs, circulating fliers or pamphlets, door-to-door solicitation, political campaign contributions, allowing the use of facilities and equipment for political events, sponsoring political advertising and articles, publishing political articles in employee newspapers or company fliers, as well as many other venues. This list of corporate speech, although long, is not even conclusive. As was discussed in the theoretical section this ability has given some theorists grounds to argue that a corporation possesses the ability to communicate which is a criterion of moral and legal personhood. Corporations, through their leadership and financial resources, do have the de facto ability to speak, and this ability causes numerous problems when adjudicating their protection under the law.

There are basically two types of corporate speech: commercial and political. While most of corporate speech is commercial – the advertisement of products or services – it is political speech that is most interesting in a study of corporate personality. When a corporation is allowed into the political arena, two crucial problems arise. First, there is a dangerous threat of political corruption as corporations are able to use their vast economic resources to influence the democratic process. (For instance, Microsoft gave over 2.5 million in soft money during the 2002 election cycle.[298]) In order to combat

[298] Available from http://www.opensecrets.org/softmoney/softcomp1.asp?txtName=microsoft Last accessed on 7/30/2004

corporate influence in the political arena, numerous state and federal laws have been enacted. These laws include the Tillman Act of 1907 (34 Stat. 864), the Federal Corrupt Practices Act of 1925 (43 Stat. 1070), the McCain-Feingold Act of 2002 (2 U.S.C. § 441b)and the Federal Election Campaign Act of 1971 (86 Stat. 3, 2 U.S.C. § 431), which has been updated several times, among others.

The second problem with corporate political speech is that when a corporation speaks, it is in effect speaking for the stockholders it represents. However, corporate management and not the individual stockholders make most decisions concerning political contribution and expenditures, and therefore many stockholders are likely to disagree with management's political decisions. While the stockholders likely bought stock in the corporation for economic reasons, they are now becoming a party to political decisions that may not reflect their personal views. Thus, the stockholders are being forced to participate in political decisions in which they had no influence and with which they may not agree. Permitting corporate funds to be used to influence government forces a stockholder seeking profits from market transactions, for which he must delegate decision making power, to relinquish political power as well. His assets may now be used to support views that he does not endorse.[299] Thus, the stockholder has given up more than control of his assets in a volatile market; he has relinquished a portion of his own political power. While government has an interest in protecting the speech of corporations, it also has a First Amendment concern to ensure that citizens are not coerced by management's political views.

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[299] Victor Brudney, "Business Corporations and Stockholders' Rights under the First Amendment" *Yale Law Journal,* 91 no. 2 (1981): 264.

A study of the Court cases affecting corporate speech shows the Court increasingly providing First Amendment protection to corporate speech despite the serious dangers associated. Through their status as persons, the corporation has managed to claim rights and protections originally meant for human beings. "The courts," wrote corporate lawyer and scholar William W. Cook in his 1894 treatise on corporate law, "are becoming more liberal, and many acts which fifty years ago would have been held to be *ultra vires* would now be held to be *intra vires.* The courts have gradually enlarged the implied powers of ordinary corporations until now such corporations may do almost anything that an individual may do, provided the stockholders and creditors do not object."[300] Cook's observation was a premonition of the leeway corporations would gain through the Courts. However, even Cook did not predict that a corporation would eventually be allowed to speak even if the stockholders and creditors did object.

Supreme Court doctrine concerning First Amendment rights for the corporation was largely shaped by early cases concerning commercial speech, and therefore a brief review of this case law is necessary. Historically, commercial speech was not protected. In *Valentine v. Chrestensen* 316 U.S. 52 (1942), the Supreme Court held that purely commercial advertising is not entitled to protection under the First Amendment. However, in 1964, the Court began to back away from this precedent. In *New York Times Co. v. Sullivan* 376 U.S. 254 (1964), the New York Times ran a full-page editorial advertisement describing local police action in Alabama. Sullivan, Commissioner of Public Affairs in Montgomery, Alabama, sued for libel. Sullivan contended that the First Amendment did not protect this speech because it was a commercial advertisement.

[300] J. Morton Horwitz, "Santa Clara Revisited: the Development of Corporate Theory" *West Virginia Law Review* 88. (1985): 187.

However, the Court held that because the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern," the advertisement was not purely commercial and could therefore be protected.

This opinion was based on the notion that the First Amendment protects a "system of freedom of expression" and protects the right of the listener to hear and receive information regardless of the source of the information. This argument is largely derived from Alexander Meiklejohn's influential book, *Free Speech and Its Relation to Self-Government.*[301] According to Meiklejohn,

> The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen take part in public debate…What is essential is not that everyone speak, but that everything worth saying shall be said…No speaker may be declared "out of order" because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process.[302]

This doctrine became the basis for subsequent decisions concerning corporate speech. Rather than contending with the rights of a corporation as a person protected under the Constitution, the Supreme Court focused on the rights of citizens as listeners to receive every possible opinion from any possible source. In *Red Lion Broadcasting Co. V. FCC,* 395 U.S. 367 (1969), the Court stated, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (395 U.S. 67, 390). Thus, the Meiklejohn

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[301] Edwin P. Rome, and William H. Roberts. *Corporate and Commercial Free Speech*: *First Amendment Protection of Expression in Business*, [Westport, CT: Quorum Books, 1985]: 36

[302] Quoted Edwin P. Rome, and William H. Roberts. *Corporate and Commercial Free Speech*: *First Amendment Protection of Expression in Business*, [Westport, CT: Quorum Books, 1985]: 203 - from Meiklejohn, Alexander *Free Speech and Its Relation to Self Government* (1948): 25-27.

doctrine became the precedent for adjudicating corporate speech whether commercial or political.

One of the most famous corporate speech cases is *Bigelow v. Virginia* 421 U.S. 809 (1975). In this case, a controversial advertisement for abortion services was printed in a Virginia newspaper, and the state of Virginia claimed that this violated the law that prohibited such advertisements. The Court protected the advertisement saying it provided public information to readers that the state had no right to withhold. This case was important because the speech in question was undoubtedly an advertisement, but the topic was very controversial and the Court had just legalized abortion three years earlier. By protecting the advertisement, the Court was either solidly cementing the Meiklejohn doctrine and providing blanket protection for corporate commercial speech, or the Court was waffling in its decision based on content. In fact, Justice Rehnquist's dissent addresses this dilemma. He criticizes Court for the failure to firmly clarify if commercial speech is protected, and accuses the Court of providing protection based on content. He argues that the subject matter of the commercial advertisement should make no difference in its protection under the First and Fourteenth Amendments. He charges the Court with carving out a special results-oriented case rule. However, one year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 749 (1976), the Court cemented its decision when it held that a Virginia Statute banning advertisement of prescription drugs violated the First Amendment. The Court set the precedent that the public had a right to receive information, and commercial speech is protected based on the listener's right to hear product information.

A fairly recent case involving commercial speech was *Nike v. Kasky,* 593 U.S. 654 (2003). Nike Corporation conducted a large public relations campaign to publicize the fact that it was improving the sweatshop labor practices of its subcontractors throughout the world. Consumer advocate Marc Kasky researched Nike's claims and found that some of the statements were not true. Kasky sued under a California law that prevents corporations from intentionally deceiving customers in their commercial statements as false advertising. Rather than deny the charges, Nike argued that its statements were not advertisements but civil speech adding to an ongoing public political debate. As such, Nike claimed that it had the same free speech rights as a natural person to say whatever they wish in their campaign slogans. Nike's lead lawyer, Laurence Tribe, cited *Bellotti* as evidence that a corporate person has free speech rights. The case stimulated a considerable amount of interest, and both the AFL-CIA and The New York Times filed briefs in favor of Nike.[303]

The California Supreme Court heard the case in 2002. *Kasky v. Nike* 02 C.D.O.S. 3790. In a 4-3 decision, the California Supreme Court ruled in favor of Kasky stating that if Nike could issue false statements in a press release calling it political speech, then consumers would lose their protection against false advertisement. The California Court declared because Nike's statements were directed to a commercial audience and concerned promotion of its products, the speech was commercial in nature and therefore not fully protected. Corporate moral philosopher Mary Lyn Stoll argues that if the court had ruled in favor of Nike it would have set a precedent that corporations could say patently false statements about their products under the First Amendment. For example,

[303] Mary Lyn Stoll, "Corporate Rights to Free Speech?" *Journal of Business Ethics,* 58 (2005): 261.

Proctor Gamble could issue a press release claiming that it does not test on animals even if they did. Phillip Morris could state that tobacco is not addictive even though this is scientifically untrue.[304]

While some scholars like Stoll saw the merit in limiting Nike's speech rights, other scholars such as Thomas C. Goldstein who is a lawyer and noted Supreme Court commentator, disagreed with the decision. Goldstein argues that Nike's speech was not commercial because it targeted consumers who boycotted certain goods for noneconomic reasons. Further, Nike was not promoting a specific product but was engaging in an ongoing debate over third-world working conditions. Goldstein employs a Meiklejohn argument to say that Nike had a right to engage in the political and social debate on public issues so that the debate is uninhibited and all views are heard.[305] Even the California Supreme Court was divided on the issue. Justice Chin wrote a lengthy dissent and argued, "Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate" (02 C.D.O.S. 3790). Several newspapers wrote *amicus curiae* briefs on behalf of Nike defending free speech rights. New York Times columnist published an article shortly after the California Supreme Court decision criticizing the decision saying, "In a real democracy, even the people you disagree with get to have their say."[306] This column was met with ire

[304] Mary Lyn Stoll, "Corporate Rights to Free Speech?" *Journal of Business Ethics,* 58 (2005): 261.

[305] Thomas C. Goldstein, "*Nike v. Kasky* and the Definition of Commercial Speech*," Cato Supreme Court Review,* (2003): 73.

[306] Bob Herbert, "Let Nike Stay in the Game," *New York Times*, May 6, 2002: A21.

with advocates against corporate personhood because, they argued, Nike was not "people."

In 2003, the case came before the U.S. Supreme Court. Unfortunately for this study, although the Court originally planned to hear the case, they later dismissed it on procedural issues and sent the case back to the California courts. However, Justice Kennedy disagreed with the Court's decision to dismiss the writ of certiorari. Kennedy believed the case presented an opportunity for the Supreme Court to clarify the freedom of speech rights of corporations. Kennedy characterized Nike's speech as a mix of commercial and public about matters that were of public interest. Kennedy concludes that if the Court were to hear the case on its merits, it would likely rule in favor of Nike's right to free speech. The Supreme Court was not given the opportunity to hear the case again. After dismissing it, the two parties settled out of court and the Supreme Court did not have another opportunity to adjudicate Nike's free speech protections as a corporate person (539 U.S. 654,596).

In summary, the cases concerning commercial speech lay down the rule that the First Amendment's primary purpose is to protect the listeners – those who hear the speech and receive the information. The Supreme Court managed to avoid the question of the corporate personhood and its relation to First Amendment Protection. However, this subject would come up again in relation to political speech. Political speech encompasses the same concerns of the rights of the listener and the corporate speaker, but also includes the problems of potential corruption of the democratic processes and the compulsion of the stockholder. Legal scholar and federal judge Loren Smith comments, "This all raises the question that if commercial speech of corporations, speech about the

sale of drugs, or property, or widgets, is to be protected against the states by the due process guarantee of liberty in the Fourteenth, how much better claim do corporations have to this liberty when their topic is political? After all, political speech is that type of speech most clearly recognized by the Court as the target of First Amendment protections."[307]

Theodore Roosevelt once said, "All contributions by corporations to any political committee for any political purpose should be forbidden by law; directors should not be permitted to use money for such purposes; moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts."[308] Roosevelt was addressing the corruption resulting from corporate influence in politics. Congress and state legislatures responded to this corruption by passing a series of political campaign financing laws. When various corporations began to violate the restrictions in these laws, the issue came before the Supreme Court. Two of the most famous of these cases are *Buckley v. Valeo,* 424 U.S. 1 (1976) and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). We will rely on these two cases to analyze the Court's position. However, a short review of some earlier cases is necessary as background.

Corporations have been granted rights and protections primarily through applications of the Fourteenth Amendment. Thus, when corporations sought free speech protection, they again relied upon the Fourteenth Amendment's Due Process guarantees to apply the First Amendment. However, an important case in 1925 created a setback for

[307] Loren Smith, "Business Buck$ and Bull: The Corporation, The First Amendment & The Corrupt Practices Law," *Delaware Journal of Corporate Law* 4 (1978): 83.

[308] Quoted in *United v. United Auto Workers* 352 U.S. 567, from the 40 Congressional Record 96.

corporations. In *Pierce v. Society of Sisters Hill Military Academy* 268 U.S. 510 (1925), the Court held that while the property of corporations is protected by the Fourteenth Amendment, corporations cannot claim liberty. Furthermore, in *Hague v. CIO* 307 U.S. 496 (1939) the Court held that right to distribute printed matter under the Privileges and Immunities Clause applies only to natural persons. However, despite their judicial rhetoric seemingly against free speech protections for corporations in both *Pierce* and *Hague*, the Court ruled in favor of the corporation and granted their respective free speech request. Loren Smith argues, "At least since *Santa Clara,* when the property or liberty interests of corporations have been challenged or threatened by state action, the Supreme Court has given such rights or interests the full protection of the due process and equal protection clauses."[309]

These cases concerning corporate political speech set the stage for later cases heard by the Supreme Court. The Court was grappling with the dilemma that on one hand, speech, no matter its source, must be protected so that all citizens have a chance to hear a variety of messages. On the other hand, the liberty to speak freely is granted to natural persons. Corporations, as artificial persons, do not necessarily have this liberty. Furthermore, the size and financial strength of a corporation allow the corporation's voice to be louder than the typical natural person. These issues came to a head in the issue of corporate campaign contributions. On the one hand, the corporation should be allowed to "speak" through endorsements of money or advertisements in favor of a particular candidate. However, the corporate voice is so powerful that they overwhelm

[309] Loren Smith, "Business Buck$ and Bull: The Corporation, The First Amendment & The Corrupt Practices Law," *Delaware Journal of Corporate Law* 4 (1978): 75.

the other players in the political arena. The Court faced this dilemma in *Buckley v. Valeo.*

Buckley v. Valeo, 424 U.S. 1 (1976), which was one of the major political cases of the twentieth century, was made even more pivotal because it was decided during an election year and all the 1976 federal political campaigns were affected by its outcome. The litigants came from a wide political spectrum and included conservative Senator Buckley as well as liberal ex-Senator and presidential candidate Eugene McCarthy. All were challenging the Federal Election Campaign Act of 1971. They disputed the contribution limits and the expenditure limits (including a ban on corporate and union contributions and expenditures), levels of required contributor disclosure, the constitutional status of the independent agency the Federal Election Commission, and the use of federal funds for some presidential and presidential primary campaigns. The central issue at hand was the limitations on individual and group contributions and expenditures in federal elections as well as the ban on corporate and union contributions and expenditures.

Underlying the Court's opinion is the question of when speech is protected expression and when it is unprotected conduct. The Court said: "Some forms of communication made possible by giving and spending money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment" (424 U.S. 1, 17). Thus, the fact that money is being spent does not change nature of its being speech which is protected.

The Court distinguished between money expenditures on political expression such as articles, newspapers, and fliers and money spent for campaign contributions. A restriction on the amount of money that can be spent for political expression necessarily reduces the quantity of expression. Such limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached" (424 U.S. 1, 19). Thus, the Court ruled against restrictions on expenditures for political expression.

However, the Court held that limitations on campaign contributions are only a marginal restriction on free communication, and the quantity of money spent on contributions does not necessarily equate with the quantity of communication. Hence, campaign contributions could be limited. Furthermore, contribution limits were justified in light of the need to control corruption from large campaign donations.

In this decision, the Court does not directly address the constitutionality of the federal prohibition on corporate expenditures for political purposes. However, the Court affirmed basic First Amendment principles in the area of corrupt practices. If a $1000 expenditure limitation is unconstitutional, an outright prohibition on corporate expenditures would be very difficult to justify. The Court was opening the way for corporate political speech. The Court used the Meiklejohn argument once again to rule that the rights of the listener are paramount. Therefore, although it can be argued that corporations are creatures of the state and do not enjoy rights such as free speech, this

argument becomes irrelevant because the protection of the First Amendment is rooted in the right of citizens to hear information instead of the speaker. The *Buckley* Court failed to address the important issue of stockholder political coercion. This issue rears its head again three years later in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

In *First National Bank of Boston v. Bellotti,* a group of banks and corporations wished to expend corporate funds to oppose a Massachusetts referendum to enact a graduated personal income tax. A Massachusetts criminal statute prohibited business corporations from making expenditures to influence the vote on any question that did not affect the property, business, or assets of the corporations. Specifically, the law stated that "no question submitted to the voters solely concerning the taxation of the income, property, or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation."[310]

In the Massachusetts Supreme Court the question was framed in terms of the right of corporations to be protected under the First Amendment in the same manner as natural persons. Because the Fourteenth Amendment applies the First Amendment to the states, and the Fourteenth Amendment speaks of persons, the Massachusetts Court looked to the Due Process Clause for the application of the First Amendment.[311] The Massachusetts Court cites *Hague* 307 U.S. 496 and *Pierce* 268 U.S. 510 to show that the liberty referred to under the Fourteenth is of natural persons not artificial. The Massachusetts Court noted,

> It seems clear to us that a corporation does not have the same First Amendment rights to free speech as those of a natural person, but whether

[310] Clerks notes from *First National Bank of Boston v. Bellotti* 435 U.S. 765.

[311] Edwin P. Rome and William H. Roberts. *Corporate and Commercial Free Speech*: *First Amendment Protection of Expression in Business*, [Westport, CT: Quorum Books, 1985]: 60.

> its rights are designated "liberty" rights or "property" rights, a corporation's property and business interests are entitled to Fourteenth Amendment protection. It is also clear that, as an incident of such protection, corporations possess certain rights of speech and expression under the First Amendment. Thus, we hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech and other activities entitling it to communicate its position on that issue to the general public (359 N.E. 2d, 1270).

Because both *Hague* and *Pierce* specify that only property (not liberty) is protected by Due Process, the Massachusetts Court found that a corporation's speech is only protected when its property interests are at stake. Thus, they held that the Massachusetts's statute was constitutional

When the case was appealed to the Supreme Court, the Court again focused on the rights of the listener under the Meiklejohn doctrine and ignored the question of corporate rights. Justice Powell's opinion stated,

> We believe that the (Massachusetts) court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question is not whether corporations "have" First Amendment rights and, if so, whether they are co-extensive with those of natural persons. Instead, the question must be whether Section 8 abridges expression that the First Amendment was meant to protect. We hold that it does (435 U.S. 765, 776).

Corporate attorneys Edwin Rome and William Roberts argue, "*Bellotti* represents the final and complete triumph of the modified Meiklejohnian conception of the First Amendment. The Court rejected in resounding terms the argument that corporations, as creatures of state law, have only those rights granted them by the states, and rejected as well, the entire analysis presumed by the argument."[312] Indeed, Justice Powell wrote,

[312] Edwin P. Rome and William H. Roberts. *Corporate and Commercial Free Speech*: *First Amendment Protection of Expression in Business*, [Westport, CT: Quorum Books, 1985]: 61.

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual" (435 U.S. 765, 778).

In his argument, Powell acknowledges that natural and artificial persons may have different sets of rights under the law. However, because Powell's motive is protecting the rights of the listener, he upholds the corporate person's right to speak even if that person is artificial.

The Court then turns to the problem of potential corruption of the democratic process if corporations are allowed full entry. However, the Court seems to dismiss this argument as not terribly significant. The Court writes, "According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record of legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration" (435 U.S. 765, 790). At this point, it seems that the Court is backpedaling by saying these concerns are not important, but if they were to become critical, then the Court might have a reason to limit corporate speech. The Court does not define a firm precedent for corporate speech: either it is corruptive or it is not. By waffling, the Court fails to articulate a clear policy for future cases.

The Court also fails to safeguard shareholder rights. Although the Court recognizes that there may be many instances in which shareholders may not agree with the political decisions of the corporate management, the Court argues that shareholders

can voice their dissatisfaction through the election of the board of directors. Furthermore, minority shareholders have judicial remedy for improper corporate actions (435 U.S. 765, 795). Victor Brudney, a scholar of corporate law, argues that despite the need to protect the audience's interest in receiving communication and the free interchange of information, the state's effort to protect the investors from management's political spending does not thwart "societal interest."[313] He further argues that even if the corporation is a person and its speech fully protected, it does not solve the dilemma for the stockholders. Rather, it leaves the crucial problem of deciding *who* within the corporation may authorize *it* to utter that speech, and in light of the answer to that question, what types of political speech may or may not be protected.[314]

The dissent in *Bellotti* by Justice White, (with Justices Brennan and Marshall joining) recognizes the problems of the corporation as a speaker in terms of a huge, wealthy entity corrupting politics and a select few in management coercing the speech of the shareholders. Justice White writes,

> There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values that the corporation expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech 435 U.S. 765, 805.

[313] Victor Brudney, "Business Corporations and Stockholders' Rights under the First Amendment" *Yale Law Journal,* 91 no. 2 (1981): 245.

[314] Victor Brudney, "Business Corporations and Stockholders' Rights under the First Amendment" *Yale Law Journal,* 91 no. 2 (1981): 248.

White's opinion calls attention to the fact that a corporation's primary motive is economic, and the state grants a corporation a charter in order to confer special advantages to the corporation for furthering its economic goals. With the liberal granting of corporate speech rights, the corporation is able to use its amassed wealth to acquire unfair political advantages in the political process. This unfair advantage actually weakens the speech rights of individual citizens competing to be heard in the political arena. The Court's decision, while purporting to further free speech, in some respects has reduced expression in the political arena.

White also addresses the problem of shareholders who become compulsory supporters of the corporation's political speech and therefore lose some of their own speech-related efficacy. The Court's proposed remedy through the election of the corporate board of directors does not address the concern that these elections are based upon share, not by person. Hence, the political power of the individuals with a large number of shares is magnified to the extent that they can control the use of the assets of minority stockholders. Thus, this proposed solution is not viable under democratic auspices. As Brudney argues, "a government concerned with protecting First Amendment values could reasonably believe it important to free those citizens from bondage to management's political views, even if the bonds are seen as no more than restrictions on their investment opportunities."[315]

Justice Rehnquist wrote a separate dissent for *Bellotti* in which he directly addressed the issue of the corporate person and the related rights and protections. Rehnquist begins his challenge of corporate rights by tracing the origin of corporate

[315] Victor Brudney, "Business Corporations and Stockholders' Rights under the First Amendment" *Yale Law Journal,* 91 no. 2 (1981): 238.

personality all the way back to *Dartmouth College v. Woodword* where it was decided that corporations are artificial entities. He then admonishes the Court for not directly addressing the issue of corporate liberty even though the issue has been raised numerous times. He argues that although the Supreme Court refuses to address the issue of corporate political speech, The General Court of the Massachusetts, the Congress of the United States, and the legislatures of thirty of other states have considered the issue and have concluded that restrictions on the political activity of corporations is both desirable and constitutional. Given this broad consensus, he reproves the Court for its lack of deference for the myriad laws limiting political contributions and expenditures (435 U.S. 765, 823-824).

> A State grants to a business corporation the blessings of potentially perpetual life to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that the liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed. I think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation (435 U.S. 765, 826-827).

However, Rehnquist's opinion was a dissent from the primary opinion and hence did not set a precedent that allowed limitations on corporate political speech.

Two years later, the Court affirmed *Bellotti* with its decision in *Consolidated Edison Co. v. Public Service Commission* 447 U.S. 530 (1980). The Consolidated Edison Company, a electrical utility company serving New York, placed inserts in its billing

envelopes promoting the benefits of nuclear energy. The National Resources Defense Council, Inc. (NRDC) requested that Consolidated Edison also enclose a rebuttal in its next billing envelope. When Consolidated Edison refused, the NRDC asked the Public Service Commission of New York to intervene and open the billing envelopes to include literature on controversial issues. The Public Service Commission refused to open the billing envelopes but did enact a rule to prevent utility companies from using bill inserts to discuss political issues. Consolidated Edison then brought suit again the Public Service Commission for a violation of First Amendment free speech rights.

In the Supreme Court opinion, Justice Powell affirms *Bellotti* stating that as a corporation, Consolidated Edison cannot be denied freedom of speech. Powell then discusses the authority of the Public Service Commission to regulate the utility company. Consolidated Edison was an authorized monopoly commissioned by the State of New York to provide utility services. As such, it was subject to New York State regulations. Thus, the Public Service Commission argued that as part of the State's plenary control, it could regulate what was placed in its billing envelopes. Powell disagreed saying that New York State could not violate free expression because there was not a compelling reason to do so. Free speech in this instance trumped state authority. Powell's decision was in direct contrast to concession theory which would allow state regulation of a corporation based on the fact that the state granted the charter for the corporation's existence. Rome and Roberts argue, "Read together, *Buckley v. Valeo, First National Bank of Boston v. Bellotti,* and *Consolidated Edison* raise a serious doubt whether a flat

prohibition on corporate political expenditures will be held consistent with the First Amendment."[316]

In 1986, the Supreme Court heard a case very similar to *Consolidated Edison.* In *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986), the public utility Pacific Gas and Electric Company refused to insert a rebuttal message supplied by a public interest group in its billing envelopes. Justice Powell, again writing for the Court, confirmed that forcing the utility to comply was a violation of the company's freedom of speech protections. The interesting part of the case for the issue of corporate personhood came in Justice Rehnquist's dissent. He states that natural persons enjoy negative free speech rights or the right to remain silent on an issue as a component of a natural person's freedom of conscience. Corporations, on the other hand, do not have a freedom of conscience because corporations are not rational, autonomous agents as are human persons. Rehnquist writes, "Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality" (475 U.S. 1, 34). Rehnquist refutes the idea that a corporation has the rational mind that is necessary for personhood. Therefore, Rehnquist argues that a corporation fails on this criterion and should not be considered persons in the same way as natural, moral persons. He argues that *Bellotti* and *Consolidated Edison* are based on the Meiklejohn theory of broadening the forum of information available to listeners. Therefore, Rehnquist dissents in *Pacific Gas* urging the Court to return to a more constrained view of corporations as artificial persons.

[316] Edwin P. Rome, and William H. Roberts. *Corporate and Commercial Free Speech*: *First Amendment Protection of Expression in Business*, [Westport, CT: Quorum Books, 1985]: 237.

Four years later, the Supreme Court did return to a more restrained view of corporate speech rights in the case *Austin v. Michigan Chamber of Commerce,* 494 U.S 652 (1990). This case is important for two reasons. First, the Court upheld a Michigan law that curtailed a corporation's ability to fund political candidates. Second, the Court focused on the corporation as a speaker rather than focus on the listener's right to receive information. The case involved Michigan's Campaign Finance Act which prohibited corporations from using treasury money to support candidates. Michigan applied this law to the Michigan Chamber of Commerce because the Chamber of Commerce, which accepted payments into its general treasury, could be a conduit for corporations to influence elections and bypass regulations. The Michigan Chamber of Commerce brought suit arguing that the restrictions violated the First and Fourteenth Amendments.

The Court opinion, written by Justice Marshall, upheld the Michigan law and limitations on corporate political speech. Marshall relied on *FEC v. Massachusetts Citizens for Life, Inc. (MCFL),* 479 U.S. 238 (1986). Although this decision involved an organization, not a corporation, Marshall argued that many of the principles remained. In *FEC v. MCFL,* the Court stated, "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas" (479 U.S. 238, 258). Based on this, Marshall argued that corporations, because of their size and resources, could have an unfair advantage in the political arena. Marshall wrote, "…the State's decision to regulate only corporations is precisely tailored to serve the

compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations" (494 U.S. 652, 666). Based on this potentially corrosive effect that corporations could have, Marshall upheld the Michigan law. Marshall's opinion points out the potential dangers of corporate personhood when the corporation is allowed to use its resources to over shout the other natural persons in the political arena. Justice Brennan concurred pointing out that an individual stockholder might oppose the use of corporate funds, which are drawn from stockholder contributions, to support a particular candidate. Brennan's opinion is based on a group perspective in which the corporation is simply a conglomeration of the stockholders, and the political opinions of management may not reflect those of everyone else in the corporation. Justice Scalia provided a stinging dissent which he began with the following declaration: "Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: ___." Scalia continued, "In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe" (494 U.S. 652, 679). Scalia's point with this perhaps overly dramatic introduction is that the government should not censure certain speakers who are involved in political debates. Scalia maintains that just because corporations may have a vast number of resources, their speech rights should not be suppressed. Similarly, the state cannot limit wealthy individuals from speaking politically. Further, Scalia disagrees with Justice Brennan's

group theory argument. Scalia argues that a stockholder becomes a part of a corporation with the objective to make money. If corporate management decides that certain political speech is part of the corporation's strategy to make money, then the stockholder has de facto authorized it. If the stockholder disagrees with a political decision, he can either try to convince the majority to reverse the decision or sell his stock.

Justices Kennedy and O'Connor also disagreed with majority opinion. Kennedy, with O'Connor and Scalia joining, argued that the decision was a form of censorship based on the speaker's identity. He states that the decision creates "second-class speakers" who are corporations (494 U.S. 652, 697). Kennedy's use of the phrase "second-class speakers" was likely carefully crafted to avoid the phrase "second-class citizens" because corporations are not citizens and to call them citizens would incite a new legal battle. At the same time, "second-class speakers" invokes the discriminatory connotations of the phrase "second-class citizens" among those who are accustomed to thinking of the corporation as a fellow legal person. *FEC v. MCFL* proved that the battle over corporate personhood was still very much a hot button issue.

Twenty years later Justices Scalia and Kennedy (O'Connor was off the bench by this time) got their opportunity to overturn *Austin v. Michigan Chamber of Commerce* in the landmark case *Citizens United v. Federal Election Commission,* 130 S.Ct. 876, (2010). This case was considered a landmark because of its far-reaching consequences for both free speech rights and corporate personhood. Explaining that the decision would impact elections at all levels if the Court gave corporations increased First Amendment

rights, Erwin Chemerinsky, the dean of the University of California, Irvine law school called the decision, "one of the most important First Amendment cases in years."[317]

The case involved the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b, also known as the McCain-Feingold Act, which prohibited corporations and unions from using funds from their general treasuries to pay for election related speech. The Act did not prevent corporations and unions from forming political action committees (PACs) to fund campaign speech. During the 2008 presidential campaign, a nonprofit corporation called Citizen United paid for television commercials to promote a film called "Hillary: the Movie" which was a critical documentary of candidate Hillary Clinton. The U.S. District Court for the District of Columbia found that the commercials violated the Act's restriction on electioneering communications thirty days before the primaries. When the case reached the Supreme Court, the justices heard the case and then decided to rehear the case again in order to determine if they needed to overrule *Austin v. Michigan Chamber of Commerce.*

Upon reargument, the majority found that Act's prohibition of independent expenditures by corporations and unions was an invalid violation of the First Amendment. *Austin v. Michigan Chamber of Commerce* was overruled and much broader free speech rights were granted to the corporate person. Justice Kennedy's opinion merits close analysis because he has much to say about the corporate person. Kennedy's addresses the harm of limiting certain "speakers" which includes corporations. By again using the term "speaker," Kennedy avoids the discussion of corporate personhood, but because a person is generally considered a moral, rational, and

[317]Adam Liptak, "Sotomayor Faces Big Workload of Complex Cases," *The New York Times,* 6 August 2009, available from http://www.nytimes.com/2009/08/07/us/politics/07scotus.html, accessed 10 August 2009.

communicative agent, personhood can be implied by the term "speaker." Kennedy reaffirms his analogy of the corporation to a moral person saying, "Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials" (130 S.Ct. 876, 91). Kennedy is subtly arguing that a corporation has the ability for rational thoughts and the volition to use that rational ability to influence other persons. Kennedy also argues, "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice" (130 S.Ct. 876, 53). This is a very important argument in terms of moral personhood for corporations because Kennedy is implying that a corporation has worth, standing, and respect, all of which are considered moral qualities that are generally accorded to natural persons. Referring to the *Belotti* decision, Kennedy argues that "political speech does not lose First Amendment protection simply because its source is a corporation" (130 S.Ct. 876, 53).

Kennedy then addresses the argument made in *Austin* that corporate campaign spending compels stockholders to fund political speech with which they might not agree. Kennedy contends that if was a truly valid argument, then Congress would have to ban political speech at any time rather than the 30 or 60 day timeframe that is specified in the Campaign Reform Act. Kennedy asserts that the remedy to this problem is not in contravening the First Amendment. Rather Congress should explore other regulatory measures (130 S.Ct. 876, 88).

Justice Stevens filed an opinion which concurred in part and dissented in part. The focus of Stevens' dissent was corporate personhood. He wrote, "The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case" (130 S.Ct. 876, 143). Stevens goes to the heart of the corporate personhood issue arguing that although corporations make contributions to society, they are not members of society. He points out that unlike natural persons (who are rational and moral agents), corporations cannot vote or run for office. Further, because corporations can amass huge financial resources and can be controlled by nonresidents, their role in the electoral process is subject to suspicion which lawmakers have a constitutional and democratic duty to monitor (130 S.Ct. 876, 143).

Stevens then takes a historical look at view the Constitutional Framers took of corporations. Stevens asserts that the Framers had human, individual Americans in mind when they designed the First Amendment. He claims that the idea that a corporation could invoke First Amendment rights would probably have been a "quite a novelty, given that at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign" (130 S.Ct. 876, 206).[318] Stevens concludes that this historical examination attests to the fact that Constitutional history does not dictate that corporations be given First Amendment rights.

Stevens then considers the question of "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate (130 S.Ct. 876, 275). He argues that is it not customers or employees speaking because these

[318] Stevens cites David Shelledy, "Autonomy, Debate and Corporate Speech," Hastings Constitutional Law Quarterly. 541, 578 (1991).

individuals usually have no say in such decisions. Nor is it the shareholders who are removed from day-to-day decisions. He concludes that "who" must be among the mangers or officers who decide to place the advertisements, but they cannot be said to be speaking for the whole of the corporation. He argues that part of the decision in *Austin* was based on the need to protect shareholders from this type of coerced speech. The *Citizens United* decision undermines the political convictions of such shareholders.

Justice Scalia joined Kennedy's opinion but wrote his own concurrence primarily to refute Justice Steven's dissent. He begins by refuting Stevens' discussion of the Framers intent in respect to corporations. Scalia argues that Stevens does not present sufficient evidence to prove that the Constitutional Framers did not intend associations such as corporations to have speech rights. In opposition, Scalia demonstrates that colleges, religious institutions, guilds, and other recognized corporations actively petitioned the government and expressed opinions in newspapers and pamphlets (130 S.Ct. 876, 133). Scalia then criticizes Stevens' personhood argument saying, "The dissent says that 'speech' refers to oral communications of human beings, and since corporations are not human beings they cannot speak. This is sophistry." Scalia's scathing refutation of Stevens' dissent matched the public debate that erupted with the Supreme Court announced its decision.

Constitutional law scholar Laurence Tribe criticized the decision saying, "Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people's money to support candidates they have

made no decision to support, or to oppose candidates they have made no decision to oppose."[319] Legal scholar Ronald Dworkin also criticized the decision by pointing out that a corporation that has vast resources will overpower other, individual speakers, and will create a monopoly in the marketplace of ideas. Dworkin argued that the decision was ultimately a threat to democracy as corporations now had the authority to greatly influence the political process.[320]

With the most recent case of *Citizen's United,* confirming that the corporate person has the right to speak, it seems that in the realm of the First Amendment, the Supreme Court has accorded corporate persons rights that are on a par with those accorded to human persons. Although the First Amendment lacks any reference to persons, corporations have been given this right and are presumed to "speak" as rational and autonomous agents. Perhaps the continuing confusion of the word "person" has encouraged the Court to equate these two types of persons even though allowing corporations to speak on political matters could subvert the democratic process. Or perhaps, the corporation, as a composite of citizens whose financial concerns carry over into political concerns, should have the right to influence political matters to promote the goals of the corporation. Either way, *Citizen's United* was a large step forward in recognizing the legal, and to some extent, the moral personhood of a corporation because the Court decided that a corporation has the right to express its thoughts and opinions in the political arena. It will be interesting to see if the Court continues this expansive view

[319] Laurence Tribe, "Laurence Tribe on Citizens United v. Federal Election Commission," 25 January 2010, available from http://www.law.harvard.edu/news/spotlight/constitutional-law/related/tribe.on.citizens.united.html, accessed 20 January 2011.

[320] Ronald Dworkin, "The Decision the Threatens Democracy," *The New York Review of Books,* available from http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/?page=1, accessed 20 January 2011.

of the corporate person when deciding *Kiobel v. Royal Dutch Trading* in 2012 which concerns a corporation's responsibility for criminal actions.

The Corporation as a Unique Type of Person

This analysis of corporate personhood has demonstrated that the corporation is a unique type of person because it displays some of the criteria for personhood but lacks other criteria. Therefore, the debate over whether the corporation is truly a person is still very much alive in both moral and legal paradigms. In *Citizens United,* Justice Stevens argued "It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established" (130 S.Ct. 876, 274). In referring to conscience, beliefs, feelings, and desires, Stevens was referring to the moral sense of personhood. He argues because the corporation does not function as a rational, autonomous being, the corporation should not be considered a person. Further, he argues that corporations are not part of the community of recognized persons – "We the People" – and therefore do not qualify as person with this criterion either. Despite Stevens' insistence that corporations should not be considered moral persons, there are some grounds for considering corporations as moral persons.

Some moral and legal scholars do believe that corporations are part of "We the People" and are part of the community of persons. Recall Peter French's argument in the theoretical analysis or the words of Justice Field in *Paul v. Virginia* "Under the designation of person there is no doubt that a private corporation is included" (125 U.S.

181, 189). As a collective person, a corporation is able to use its decision making processes and networks of managers to reach decisions that are separate from the decisions of the individual members. Further, corporations generally have spokespeople who speak on behalf of the corporation. Thus, it seems that there are some valid justifications for considering a corporation to be a person.

Legally, the Supreme Court has maintained that the corporation is a person since 1886 and although this declaration has been debated by the Court since that time, the precedent remains that corporations are persons. Some of the justification for legal personhood draws upon the arguments for moral personhood. A corporation is the subject of legal rights and duties stemming from the rights and duties of the individuals underneath the corporate veil. Therefore, it is fitting that the legal system would recognize the corporation as a right and duty bearing entity. Further, once incorporated, the corporation takes on a life of its own which the Court has recognized in the form of a legal person. However, the corporation as a legal person is not without controversy as *Citizens United* proves. The bestowal of legal personhood to the corporation has resulted in far reaching legal and moral consequences for corporations, individuals, and the political process. The corporation as an entity becomes more than the sum of its parts and has the potential to become extremely politically powerful.

Since the beginning of incorporation laws in the United States reaching back to colonial times, the law has struggled with how to adjudicate culpability for corporate crimes. Punishment of corporate malfeasance is extremely difficult because the corporate veil must be lifted to find the individual humans responsible for the crime. However, it is often a chain of actions by multiple individuals that leads to the wrongdoing and finding

someone upon whom to fix the blame can be nearly impossible. Thus, the corporation is able to commit legal crimes but is not culpable as an individual human person is considered culpable. Thus, scholars who criticize corporate personhood argue that corporations are able to commit crimes with impunity.

Scholars also argue that corporate personhood has gone beyond its original charter to facilitate business transactions as corporations are increasingly seeking increased political rights such as the right of privacy, the right to remain silent, and freedom of speech. Corporations have been fairly successful in their bids for protection as persons under the Bill of Rights. The idea that a corporation can claim personal privacy or speech rights might come as a shock to the average citizen who is not accustomed to thinking about the term "person" being extended to a corporation. However, *Citizens United* and the recent case involving AT&T demonstrate that corporate personhood has many implications as corporations can claim privileges such as the right to political speech through campaign funding as well as immunities such as privacy protections. According to the citizens group Reclaim Democracy, which was formed to advocate against corporate personhood, "Granting corporations the status of legal persons effectively rewrites the Constitution to serve corporate interests as though they were human interests."[321] Activist Ted Nace is even more critical of corporate personhood. In his widely read book, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy,* Nace writes, "Like a myopic Dr. Frankenstein, the Court had worked piecemeal and haphazardly, grafting a finger here, an eyebrow there,

[321] Reclaim Democracy.Org, "Introduction to Corporate Personhood," available from http://reclaimdemocracy.org/personhood/, accessed 3 January 2011.

until the result was a full-fledged legal superperson."[322] He goes on to criticize the Supreme Court for failing to compose an explicit explanation of corporate personhood in the numerous Court opinions that address the issue.

Critics such as Nace argue that slaves and corporations were both granted their personhood at approximately the same time but the struggle for rights and freedoms for corporations was won much more easily. Indeed, it seems that the Court was more willing to grant personhood to the fictional group-person than it was willing to accede to personhood for freed slaves who were rational, autonomous human beings. Comparing the struggle of slaves for personhood to that of corporations, it is possible to compare and contrast the means by which the law adjudicated the two different types of personhood. It is also possible to see if my hypotheses hold up for corporations.

Verification of Hypotheses

Cases concerning corporate personhood followed on the heels of slavery cases, and therefore, the precedents established concerning personhood for slaves should influence those of corporations. The corporation, like the slave, faces the dual status as both property and person as it is an entity that is owned by other persons and yet at the same time, is considered a person in and of itself. A corporation's status also involves the concept of being a person in the sense of a rational agent who can make decisions and is culpable for his actions. This is not to say that an African American had the same moral weight as a corporation or to equate these struggles for personhood as morally equal. Rather, a comparison is useful to elucidate the meaning of personhood.

[322] Ted Nace, Gangs of America, Berrett-Koehler Publishers, Inc. San Francisco, 2003, 170.

With these similarities between the personhood of the slave and the corporation, we can analyze whether justices relied upon the core theory in corporate personality cases to a greater extent than they did in the slave cases. We can also examine whether justices have defined the corporate person as it relates to the status of property and human being. Finally, we can determine what influences the slave cases had on the corporate cases and what consistencies or inconsistencies arise in the determination of personhood with these two types of entity.

The chapter on slavery illustrates that the core theory is reflected in some opinions concerning the status of human property, but by and large, judges and justices adjudicating the issue of slavery tended to ignore the liberal teachings of Locke and Kant who denounced slavery. Instead, justices found that the slave was property rather than a person. The foundational theories provided by Locke and Kant are utilized in a different way in the corporation cases. In these cases, the personhood and rational agency of the individuals who form corporations is not in question. Rather, the courts must decide if a group that is acting as an individual can claim personhood. Thus, the analysis revolves around determining the legal and moral status of a group-person in a legal system built upon an individualist foundation. Neither Locke nor Kant analyzes the group as a candidate for personhood. However, building upon their theories of a person as a rational agent, theorists have tried to determine if a group can act as a single rational agent with volition and accountability.

Neither Kant nor Locke directly speaks to the personhood of the corporation or the group because their theories were based on the rational individual. Locke speaks of the social contract, and in some ways, a social contract is similar to a corporation in that

it is a covenant agreed upon by the individual members, but it is the members who are the true persons. Similarly, it is likely that Kant would consider the personhood of the individuals who comprise the corporation but would not consider the personhood of the corporation itself. The corporation can be considered a means to achieve human ends, such as wealth, scientific progress, status, and other goals.

My analysis of cases reveals that justices did not spend much time evaluating whether the corporation could be both person and property, but they did spend a great deal of effort analyzing whether a corporation could be considered a person based on rational capacity. Although the corporate person is a group, it is common understanding to think of corporate negligence, deception, or even good will. It is also understood that a corporation can speak through its spokesperson. The corporation has many of the qualities of Locke's and Kant's rational agent. The cases analyzed in this chapter illustrate how justices wrestled over whether a person could also include a collective, or a person should be limited to the rational agents within the corporation.

The intense discussion of the rational abilities of corporations in respect to personhood prove that the core theory does play a role in these cases, thus supporting my first hypothesis that the core theory would influence the law in these cases. In fact, in his dissent in *Citizens v. FEC,* 130 S.Ct. 876, (2010), Justice Stevens cites Locke when arguing that the ability to utter speech is an ability afforded only to individual human persons and corporations do not technically have the ability to speak in the sense protected by the Constitution (130 S.Ct. 876, 207). This very recent case illustrates that justices are still looking to the works of great scholars to find answers to an issue that has been problematic for years.

My second hypothesis is that justices will define corporate personhood in opposition to human beings and to property. This certainly seems to be true in respect to human beings, as the previous analysis demonstrates the many debates that occurred and continue to take place regarding whether a collective entity can qualify as a person under the same criteria of an individual human being who has rational capacity and volition. However, the corporation cases show little concern about the fact that the corporation is property and yet is still vying for personhood. The dichotomy between person and property did not prevent the law from granting personhood to the corporation. This echoes the slave cases. Although many of the slave cases consider and even agonize over the fact that a human being could be considered property, ultimately most justices agreed that the slave was foremost property, even if the slave's personhood was recognized in some instances such as when guilty of a crime. In the corporation cases, the law easily grants that corporations are both persons and property; in the slave cases the law struggles with this dual status, but emphasizes the property status while acknowledging in some part that the slave may also be a person.

My final hypothesis is that there should be consistencies in how justices adjudicate various entities vying for personhood. The first corporation cases concerning personhood occurred at about the same time that the justice system was parceling out the rights and responsibilities of slaves and freed Blacks as persons and citizens. However, the corporation cases rarely mention the personhood of slaves. In fact, only one of the cases I analyzed mentioned slavery, and that case did not occur until 1938. In his dissent for *Connecticut General Life Insurance Company v. Johnson* 303 U.S. 77, Justice Black

argues that the Fourteenth Amendment concerned the rights of newly freed slaves and was not meant to grant personhood to corporations.

Given the parallels between the quests for personhood by both former slaves and corporations under the Fourteenth Amendment, it is surprising that the opinions do not overlap to a much greater extent. It seems that justices were not concerned that the precedents and legal theories they developed in respect to the personhood of slaves and freed Blacks were consistent with those they developed for corporations. The legal debate over personhood for slaves primarily centered on confirming the slave's status as human property. The legal debate over corporations centered on whether a collective had the same status as a thinking individual. It seems as though the parallels between the two types of cases were not recognized or were ignored. Given the political influence and considerable resources corporations are able to expend to advocate for their interests, it is not surprising that corporations were able persuade justices to grant corporate personhood while slaves were denied this status. Corporations were able to gain personhood much more quickly and with fewer struggles than slaves. Despite the theoretical similarities between the two petitions for personhood, there are few consistencies between the two types of cases as the law recognized the business interests of corporations but ignored the moral interests of slaves. My third hypothesis is not correct because the law did not create a coherent system of precedent and theory to construct a better overall understanding of what it means to be a person in the law.

The next chapter addresses the personhood of the fetus. The fetus has the potential to be a moral and legal person, but inside the womb, it has not actualized any of the criteria for personhood. Further, in some respects the fetus is considered to be the

property of the mother. The fetus represents the issues of person versus human being and person versus property albeit in a different manner than the issues in the slave and corporations cases. Thus, the fetus presents the Supreme Court, as well as legal and moral theorists, with another questionable situation of personhood, and a careful examination of this entity will reveal any parallels or dissimilarities with slaves and corporations.

Chapter Four
Personhood for the Fetus

To some scholars within the religious and philosophical community, fetal personhood begins at conception. To other religious leaders and philosophers, fetal personhood is a much more nebulous concept with no real defining moment. Within the medical community, the beginning of human life is acknowledged from conception, but other considerations such as physical and mental capacities are also part of the equation when determining personhood. Within the medical community as in the religious community, the exact moment when a fetus should be granted personhood is very much open for debate. Within the law, legal personality is also the subject of intense debate. The law takes cues from both the moral and biological paradigms but also fashions its own conceptions of the legal meaning of personhood for the unborn.

In *Levy v. Louisiana* 391 U.S. 68 (1968) the Supreme Court defined "person" with respect to illegitimate children. The Court stated, "They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment" (391 U.S. 68, 71). According to the criteria "live and have their being," fetuses would seem to qualify for personhood. Five years later, the Supreme Court considered fetal personhood directly in *Roe v. Wade* 410 U.S. 113 (1973) and concluded that fetuses were not persons. "In short, the unborn have never been recognized in the law as persons in the whole sense" (410 U.S. 113, 162). Beyond *Roe,* many lower courts have found that fetuses do qualify as persons when the issue is an injury or wrongful death sustained *in utero*. Although the Supreme Court denied personhood for the fetus in the context of abortion, in other realms of jurisprudence, fetal personhood is very much open for debate.

The personhood of the fetus is perhaps the most controversial section in this study given its implications for abortion. As a human being, the fetus has a potential claim to personhood. However, this claim is in contention with the woman whose right to control her body is a component of her rights as a person. In *Roe v. Wade*, the Supreme Court found that the fetus is not a person protected under the Fourteenth Amendment. The Court stated that if the fetus is a person with a corresponding right to life, abortion would necessarily be first degree murder and illegal. However, the Court's ruling that abortion is permissible and that the fetus is not a person under the Fourteenth Amendment did not completely resolve the issue. The Court also found that the state has a legitimate interest in protecting the "potential" life of the unborn and that this interest grows as the woman approaches full term. Once the compelling point of viability is reached, the state's interest in protecting potential life can override the woman's right of bodily integrity. It seems as if the Court was willing to accept a notion of the fetus as a (limited) person after it had reached viability. After all, a third trimester fetus is extremely similar to a born baby in terms of its development. However, designating a specific point in development as compelling raises continuum problems. The fetus is growing and developing from the moment of conception until birth and then through childhood. Can the fetus be a nonperson at the beginning of its time in the womb and a person at the end? On the other hand, once the fetus reaches viability and merits state protection, the pregnant woman somehow loses her right of bodily integrity. Can an acknowledged person lose a constitutionally guaranteed right such as the right to privacy? In *Roe v. Wade*, the Court declared that the fetus was not a person in the whole sense, but it did recognize that the fetus can be treated as a person in some contexts after it reaches viability.

This decision outraged those who supported the concept that life begins at conception and who felt that personhood should be granted to the fetus immediately upon conception. The decision was equally offensive to those who took issue with the viability standard arguing that the fetus should not be recognized as a person in any sense and therefore, the woman's rights over her body should not be violated in favor of a fetus who has no legitimate claim to any rights. As can be seen, much of the controversy over abortion really concerns a debate over personhood. While the fetus is an entity that, as a biological human being, may deserve a certain amount of respect and protection, the mother is also a person whose rights must be upheld. The Supreme Court's decision in *Roe* did not resolve the issue because it did not completely decide the status of the fetus. By holding that the fetus is not a person under the Fourteenth Amendment, but a "potential life" and a legitimate interest for the state once viability is reached, the Court's decision raises as many questions as it answers.

This chapter will examine the meaning of personhood in respect to unborn humans – the fetus. The initial scholarship addressing the meaning of persons in Chapter One comes into clear focus in this chapter. The question of personhood for the fetus presents the dichotomy of person versus human being in stark contrast. The fetus is certainly a biological human being, but it lacks many of the criteria needed for personhood such as rationality, language, and second order volitions. In reality, a human does not develop the cognitive capacity for language and rational decision making until well into infancy and childhood. Therefore, even the personhood of young children can be called into question. However, the fetus has the potential to develop these rational capacities, and indeed has brain activity in as few as eight weeks. Further, while the fetus

is not a rational agent, neither are Alzheimer's patients nor the comatose, and society is extremely reluctant to strip these humans of personhood. Another criterion often used to designate a moral agent is sentience. Scientists continue to research the point at which the fetus is able to feel pain or is sentient. Current estimates range from as early as six weeks to twenty-six weeks.[323] Using the conservative estimate of six weeks, the fetus could have moral standing at about the time a woman is discovering her pregnancy. This chapter will demonstrate that using criteria such as rationality and sentience to distinguish humans from persons is problematic at best.

Fetal personhood also demonstrates the dichotomy of the person versus property. Some scholars argue that a person has a property right to his or her own body. Is the fetus living within the woman's body a part of her body? If so, the idea that a woman "owns" her fetus and then her subsequent child is fraught with potential moral issues involved with one person owning another. The concept echoes the discussion of slavery. On the other hand, if a woman has a property right over her body, she has the right to make decisions concerning her body. As part of her body, this property right would seem to include the right to evict the fetus living within her body. Conversely, if the fetus is seen as a separate entity, then the fetus too has a property right to his or her body which the woman cannot violate. While the woman may be able to evict the fetus, she does not necessarily have the right to terminate the fetus's life. The state may have the obligation to step in and try to save the life of the fetus born prematurely. Right now, technology

[323] The British House of Lords conducted an inquiry into fetal sentience and concluded that the earliest point at which a fetus could feel pain was six weeks when parts of the nervous system begin to function. "Human Sentience Before Birth: The Commission of Inquiry into Fetal Sentience," CARE (Christian Action Research & Education) and The House of Lords. (June 26, 2001). The Royal College of Obstetricians and Gynecologists estimates that the fetus is able to feel pain at after twenty-six weeks and recommends that physicians administer analgesia or anesthesia to the fetus when carrying out diagnostic procedures after 24 weeks gestation. Jacqui Wise, "Fetuses Cannot Feel Pain Before Twenty-six Weeks," *British Journal of Medicine*, 315, (November 1997): 1111-1116.

has not advanced to the point at which the fetus is able to live outside the womb at a young age. However, there may soon become a time when artificial wombs can sustain a fetus at young ages of gestation. As can be seen, the moral issues involved with personhood and property are brought to the fore with the discussion of the fetus.

These moral issues set the stage for examining important court decisions concerning the fetus in which these personhood issues must be adjudicated. The discussion of abortion related cases encompasses a large portion of the chapter because the abortion debate has come to monopolize much of the modern discussion of fetal personhood, and the relevant literature is vast. While abortion is the most obvious issue caught up in fetal personhood, other legal issues are involved as well. For instance, the law has long recognized that the fetus has rights to inherit given that it is subsequently born alive. A more pressing issue is involved when a crime is committed against the mother and subsequently harms the fetus resulting in death or injury. At least thirty-six states currently have fetal homicide laws and fifteen of these laws apply during early stages of development. Some of these laws imply and others explicitly state that for the purpose of the statute, the fetus is a person.[324] These criminal statutes raise the possibility that a mother who knowingly harms her fetus can be held liable for her actions. Several cases have affirmed the fact that a fetus who is harmed *in utero* and is subsequently born alive can file a tort claim against the mother or other third party. In other cases, the state has forced a mother to undergo medical procedures such as blood transfusions and caesarians in order to save the fetus. This chapter will address these types of cases in light of the literature concerning personhood. To begin such a complex

[324] National Conference of State Legislatures, available from http://www.ncsl.org/programs/health/fethom.htm, accessed on 1 April 2007.

discussion, it is best to start with the foundation grounding Chapter One, and study what foundational scholars such as Aristotle, Locke, and Kant have to say on the subject before moving into more modern theorists whose scholarship examines the subject of the fetus directly.

Theoretical Foundation

Abortion and the status of the fetus were not critical moral topics for early philosophers although there is evidence that the topic was discussed. Evidence in ancient Greek society points to relatively liberal abortion policies as well as infanticide policies in an effort to control the population. Greek philosophers such as Plato and Aristotle believed that the fetus was formed and had life at approximately forty days for a male and ninety days for a female. Plato acknowledged that the fetus was a living being, but did not believe the fetus had moral standing.[325] Similarly, Aristotle advocated abortion for population control and to ensure that the fittest humans occupied Greece. In *The Politics,* Aristotle wrote "As to the exposure and rearing of children, let there be a law that no deformed child shall live, … but when couples have children in excess, let abortion be procured before sense and life have begun."[326] By cautioning that abortion should take place "before sense and life have begun," Aristotle presumably meant that abortion should take place before the forty day mark for males or the ninety day mark for females. While Aristotle had no moral qualms with abortion, he did believe that the fetus was

[325] Michael J. Gorman, *Abortion & the Early Church : Christian, Jewish & Pagan Attitudes in the Greco-Roman World*, [Downers Grove, IL: InterVarsity Press, 1955]: 21.

[326] Aristotle, *The Politics,* Translated by Benjamin Jowett , [340 BCE]: Book VII, available from http://classics.mit.edu/Aristotle/politics.7.seven.html, accessed February 27, 2010.

affected by the mother's actions "just as growing plants are by the earth."[327] Therefore, Aristotle thought that the state should take charge of the wellbeing of pregnant women to monitor their exercise, diet, and mental activities to ensure the wellbeing of the developing fetus so that the subsequent child was healthy. It is reasonable to conclude that Aristotle would find that a crime is committed when third party causes injury to a fetus that affects a child or adult later in life.

Although Plato and Aristotle did not see abortion as morally wrong, not all Greek philosophers agreed. Contrary evidence exists in the Hippocratic Oath which is believed to have been formulated in the Fourth Century B.C.E. The Hippocratic Oath explicitly prohibits abortion: "I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan; and similarly I will not give a woman a pessary to cause an abortion." As a foundational document of medical ethics, the explicit condemnation of abortion puts into question the widespread moral acceptability of abortion in ancient Greek societies.

The Roman Empire condoned abortion and infanticide in one of the earliest Roman codes of law, the Twelve Tablets, which allowed a father to order his wife to undergo an abortion if he had sufficient reason and allowed the father to kill a female or deformed infant through exposure. Religious scholar Michael Gorman writes, "That the fetus is not a person was fundamental to Roman law. Even when born, the child was valued primarily not for itself, but for its usefulness to the father, the family, and especially the state, as a citizen 'born for the state.'"[328]

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[327] Aristotle, *The Politics,* Translated by Benjamin Jowett , [340 BCE]: Book VII, available from http://classics.mit.edu/Aristotle/politics.7.seven.html, accessed February 27, 2010.

[328] Michael J. Gorman, *Abortion & the Early Church: Christian, Jewish & Pagan Attitudes in the Greco-Roman World*, [Downers Grove, IL: InterVarsity Press, 1955].

Other ancient societies provide an alternative to the predominantly liberal abortion regulations in ancient Greek and Roman societies. In ancient Assyria, the most serious crime committed by women was abortion which was seen as an offense against the state because it was feared that innocent blood shed within a family would pollute the entire state and cause calamity. The punishment for a woman convicted of abortion was death without burial.[329] In contrast, the ancient Jewish tradition did not condemn abortion, but neither did it universally condone the practice. In most early Jewish societies, deliberate abortion was relatively rare while accidental or therapeutic abortions were allowed in certain cases. Although Jewish texts called the fetus "human," the fetus was not legally regarded as a person. Instead, the fetus was regarded as part of the mother.[330] The Jewish scholar Philo of Alexandria compared the unborn to a statue that an artist had not yet revealed, and he considered abortion to be murder.[331] While early Jewish societies did not universally condone abortion, when the mother's life was at stake, the Jewish tradition clearly viewed the woman's life as primary. The Mishnah, a code of ancient Jewish law, required abortion when the woman's life was in danger.[332]

Early Christian, and in particular, early Catholic doctrine has a complex history of abortion-related philosophy, but in general, abortion was not acceptable. The Didache, an early Christian catechism, condemned abortion as did the "Epistle of Pseudo

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[329] Elisabeth Meier Tetlow, *Women, Crime, and Punishment in Ancient Law and Society: Volume 2: Ancient Greece*, [New York, NY: Continuum International Publishing Group, 2004]: 138.

[330] Michael J. Gorman, *Abortion & the Early Church : Christian, Jewish & Pagan Attitudes in the Greco-Roman World*, [Downers Grove, IL: InterVarsity Press, 1955]: 41.

[331] Michael J. Gorman, *Abortion & the Early Church : Christian, Jewish & Pagan Attitudes in the Greco-Roman World*, [Downers Grove, IL: InterVarsity Press, 1955]: 36.

[332] Leslie J. Reagan, *When Abortion was a Crime: Women Medicine, and the Law in the United States, 1867-1973,* [University of California Press, 1998].

Barnabas," and Athenagoras's "Plea for Christians."[333] Early saints Saint Basil the Great and Saint John Chrysostom both condemned abortion calling it murder. The philosophy of Saint Augustine relied on the concept of ensoulment which is the point at which some Catholic theologians believed a soul animated the human body. Augustine held that this point was generally at forty days for males and ninety days for females. Therefore, he held that aborting an embryo prior to ensoulment should be punished by a fine, while abortion after ensoulment should be punished by death.[334] Catholic theologian and philosopher Thomas Aquinas agreed with Augustine that abortion before ensoulment was morally wrong while abortion after ensoulment was homicide.

Thomas Aquinas's account provides an informative account of thoughts during the Middle Ages concerning the status of the fetus. Writing from approximately 1244 to 1274, Aquinas's treatises informed much of Catholic doctrine as well as influencing John Locke who studied classics at Christ Church College. Aquinas maintained Aristotle's theory that a soul develops through various successions until the rational soul is infused at forty days for men and ninety days for women at which point Aquinas believed that the fetus had moral import.[335] Before the time of ensoulment, destroying the fetus would be wrong in that it is contrary to nature but not homicidal. Destroying a fetus after ensoulment would be killing a human being and would be murder. Referring to Exodus 21:22 which concerns causing a pregnant woman to miscarry, Aquinas wrote, "He that

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[333] Edward J. Furton and Noëlle Lenoir, "Historical Views on the Human Embryo," Science, New Series, 288:5465, (Apr. 21, 2000): 439; Athenagoras, *A Plea for Christians,* originally written in approximately 743, [Kessling Publishing, 2004]: 43.

[334] John T. Noonan, Jr., "An Almost Absolute Value in History," in *The Morality of Abortion: Legal and Historical Perspectives*, ed. John T. Noonan, Jr. [Harvard University Press, Cambridge, MA, 1970] 11-18.

[335] Thomas Aquinas, Commentary on the Book of Sentences, Bk. III, dist. 3, q. 5, a. 2, Resp. 266

strikes a woman with child does something unlawful: wherefore if there results the death either of the woman or of the animated fetus, he will not be excused from homicide, especially seeing that death is the natural result of such a blow."[336] Aquinas concludes that a fetus that has reached the point of ensoulment has moral worth and therefore killing the fetus, either with abortion or third-party injury, is a sin.[337]

It is difficult to discern what John Locke would have said about abortion because he did not address the subject. After examining his treatises, there is evidence to support a theory that Locke would have supported abortion as well as evidence to suppose that Locke would have been against abortion. Therefore, it is challenging to draw even tentative conclusions. On the one hand, Locke believed that a person was a "thinking intelligent being, that has reason and reflection."[338] With this definition, a fetus would not qualify as a person, and so it is questionable if Locke would believe that the fetus had moral worth. On the other hand, an infant would not qualify as a person either, and Locke does not indicate the humans who are not persons are beings that can be disposed. On the contrary, Locke devoted a considerable portion of his writing, in particular *An Essay Concerning Human Understanding* and *Some Thoughts on Education*, to the education of children indicating that he did believe that children had moral value. Thus, the evidence is inconclusive concerning Locke's moral considerations of the fetus.

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[336] Thomas Aquinas, *Summa Theologica,* Translated by Fathers of the English Dominican Province, [Benziger Bros. edition, 1947]: Question 64, Article 7, Reply to Question 2, available from http://www.ccel.org/ccel/aquinas/summa.i.html, accessed February 27, 2010.

[337] For complete discussions on Aquinas's teachings in respect to abortion, please see John Haldane and Patrick Lee, "Aquinas on Human Ensoulment, Abortion and the Value of Life." *Philosophy,* 78:304, (April 2003): 255-278; and Robert Pasnau, *Thomas Aquinas on Human Nature,* [Cambridge University Press, 2002].

[338] John Locke, *An Essay Concerning Human Understanding*, Peter Laslett, editor, [Penguin Publishing, London, 1997 edition, originally published 1690]: Book II, Chapter XXVII, Section 9.

Locke's views on the body as private property seem to indicate that Locke would allow a woman to have control of her body which is rightfully her property. With embryology at such a primitive state during the 1600s, it is likely that Locke would have viewed the fetus as part of a woman's body, at least before quickening. If the fetus is considered a part of the woman's body, it seems that Locke would agree that a woman has the right to end a pregnancy and terminate a fetus. On the other hand, Locke argues that persons cannot cause harm to themselves. Although a person owns herself, Locke believes that a person is still ultimately God's property, and thus a person cannot cause harm or kill herself. Locke cautions that a person is "bound to preserve himself," and if a fetus is part of the self, a woman would be bound to preserve the fetus as well.[339] Therefore, it is unclear if the woman's right to control her own body would take precedence or if Locke would consider abortion an unlawful harm to the self.

Locke does not believe that all of morality is tied up in rights. He claims that there are some moral duties that obligate persons such as the duty Locke says parents have to care for their children. The duty to sustain a fetus may fall within this type of moral duty. Locke was a physician as well as a philosopher, and as such, would have taken the Hippocratic Oath which forbade performing abortion.[340] Locke may have concluded that even though persons have rights to their own bodies, abortion was immoral and thus should not be performed. All this is speculation because we do not

[339] John Locke, *Two Treatises of Government,* Edited by Peter Laslett, [Cambridge University Press, 1960, originally published 1698]: Second Treatise, Chapter II, Section 6.

[340] See Bradford William Short, J.D., "The Healing Philosopher: John Locke's Medical Ethics," *Issues in Law & Medicine,* 20:2, (2004): 103-154.

have Locke's own views on the fetus and thus must conjecture. It seems Locke's theories could support both the prohibition and authorization of abortion.

Deciphering Kant's views on the fetus is much easier because he asserts in several of his writings that a fetus is a person with moral worth. In The Metaphysical Principles of Virtue, Kant asserts that if a pregnant woman commits suicide, she takes the life of another person as well as her own.[341] Further, in his discussion of the duties parents have towards their children, Kant specifically states that a child is a person from the moment of procreation. His opinion is worth quoting at length.

> [C]hildren, as persons, have from procreation an original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have this right directly by law (*lege*), that is, without any special act being required to establish this right. For the offspring is a *person*, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation. So from a *practical point of view* it is a quite correct and even necessary idea to regard the act of procreation as one by which we have brought a person over into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can. They cannot destroy their child as if he were something they had *made* (since a being endowed with freedom cannot be such a thing) or as if he were their property, nor can they even just abandon him to chance, since they have brought not merely a worldly being but a citizen of the world into a condition which cannot now be indifferent to them even just according to concepts of right.[342]

Thus, if the time of procreation is meant conception, Kant argues that the fetus is a person. Even though Kant argues that persons are rational beings, he seems to make an exception for fetuses and children who are not yet in possession of the rational faculties but will develop them in the course of human growth. He also directly states that a child

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[341] Immanuel Kant, The Metaphysical Principles of Virtue, Translated by James Ellington, [Merrill Inc, New York, 1964, originally published in 1785]: (Part I, 6:422).

[342] Immanuel Kant, The Metaphysics of Morals, Translated by Mary J. Gregor, [Cambridge University Press, 1996, originally published in 1785]: (6:280-281).

is not the property of the parents even though they created a child – this would seem to apply to the fetus as well since a fetus is created by the parents.

Even though Kant asserts that fetus is a person, there are still conflicts within Kant's theories of autonomy and self governance on one hand and the dignity and inner worth of human beings, including the fetus, on the other.[343] If a human has autonomy over herself, then it seems that the law cannot force a woman to continue an unwanted pregnancy. Kant argues that man must not be used as a means to an end. Denying abortion reduces the woman to a fetal container and thus reduces her to a means for reproducing. This devalues her worth as a person. According to Kant's categorical imperative, people should act as though their actions could become a universal law. It is unlikely that Kant would allow a universal law that would force all women into enduring pregnancies that interfere with their goals and well-being.

On the other hand, it is equally unlikely that Kant would allow completely open abortions as a universal law. In asking whether or not society would like all women to have an abortion in the face of a difficult pregnancy, it is unlikely that most people would agree that abortion should be the rule. Further, Kant believes in the dignity of all persons including the fetus which he argues must be preserved. The evidence in Kant's writing indicates that Kant thought that the fetus had moral worth and therefore would not approve of abortion.

Locke's and Kant's groundwork on the subject of personhood inspired numerous scholars who study individual autonomy and the mental criteria of consciousness and rationality for personhood. They also set the groundwork for scholars analyzing

[343] See M. Häyry, "The Tension between Self Governance and Absolute Inner Worth in Kant's Moral Philosophy," *Journal of Medical Ethics*, 31:11, (Nov., 2005): 645-647.

personhood as the antithesis of property and what it means to say that a person can or cannot have a property right in his or her own body. Locke's and Kant's foundational work in this field took on a new importance in modern scholarship as theorists began to contemplate the moral and legal ramifications of abortion. Scholars revisited what distinguishes a person from a human being according to the mental capacities of autonomy, rationality, and culpability for one's actions. A fetus does not have the capacity for rationality, autonomy, or culpability and therefore fails to qualify by these criteria. However, the fetus, just as an infant, will develop these capabilities with time and thus is a *potential* person. In contrast to mental criteria, some scholars argued that social recognition as a member of the community of persons is the key component for bestowing the status of personhood. If a mother welcomes her pregnancy, she acknowledges that her fetus is a person, but if the pregnancy is not desired, the woman does not include the fetus in the category of persons. Finally, abortion and modern issues of surrogacy and fetal tissue research caused scholars to revisit the distinction between person and property. A woman is not property and thus should not be considered a means to an end for carrying a fetus. However, can a woman claim a property right in her body and subsequently her fetus? All of these issues are involved in the modern scholarship of fetal personhood and will be discussed thoroughly in turn.

One of the lasting legacies of Locke and Kant was their emphasis on rational capacities as a defining characteristic of persons. Locke's "thinking, intelligent being" and Kant's emphasis on autonomy have led many modern philosophers to emphasize psychological criteria as the defining characteristics of persons. Rational beings or entities who are capable of reason, reflection, and autonomy are generally considered to

be persons. This is in contrast to a biological definition that relies on criteria such as human parentage or DNA evidence. Undoubtedly, the fetus is biologically and genetically a human being from the point of conception with a unique genotype.[344] Further, the zygote or the fertilized egg is the first step in the biological process in which the zygote becomes a fetus, and then an infant, child, teenager, adult, and finally an elder. Just as certainly as the fetus is biologically human, the fetus is certainly alive. Thus, there should be no question that the fetus is a live, human being. However, as previous chapters illustrated, classifying an entity as a human being does not automatically guarantee personhood.

According to Locke, Kant, and many modern philosophers whose theories will be examined in following section, personhood is not a biological category; rather it is a bestowed status given to entities that possess certain mental capacities. While granting that the fetus is biologically a human being is a significant status above that of an individual organism, it does not automatically imply personhood. Amidst the passion of abortion debates, this important distinction is often obscured when the terminology used is "human life" as it is in the *Roe* opinion. Biologically, the fetus is a "human life." However, if "human life" is employed to connote a being who has the intellectual ability to reason and reflect, then the fetus as a "human life" is in question.[345] Thus, although the fetus is a member of the human species and a human being, the significant question is whether the fetus deserves membership in the community of persons. In contrast, most

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[344] Please see Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press 1987]; Robert T. Francoeur, "Summing Up the Linchpin Question: When Does a Human Become a Person, and Why?" in *Abortion Rights and Fetal Personhood*, ed. Edd Doerr and James W. Prescott [Rapid City, SD: Centerline Press, 1989].

[345] Tom L. Beauchamp, "The Failure of Theories of Personhood," *Kennedy Institute of Ethics Journal* 9 no. 4 (1999).

adult women do have rational abilities allowing them to evaluate their actions, make reasoned decisions, and act with autonomy. It can be argued that the *sine qua non* of personhood is autonomy and the freedom to choose one's own destiny. Thus, some theorists argue that abortion prohibitions strip a woman of her freedom and autonomy and therefore devalue her as a person. When reflecting on psychological criteria for personhood, both the capacities of the fetus and the woman must be examined. Because the personhood of the woman is more firmly established than that of a fetus, it is a logical place to begin.

A Woman's Autonomy as a Person

As a recognized moral and legal person, a woman has rights of privacy, autonomy, and bodily integrity. For many women, reproductive rights are absolutely essential for their own moral personhood. As a self-possessive individual, the woman must have the autonomy to make decisions concerning her own body. Kantian ethicist Jeffrey Reiman argues that privacy is a precondition of personhood. "Privacy is a social ritual by means of which an individual's moral title to his existence is formed….To be a person, an individual must recognize not just his actual capacity to shape his destiny by his choices. He must also recognize that he has an exclusive moral right to shape his destiny."[346] Thus, under Reiman's conception of personhood, a woman must have the ability to shape her destiny which includes the right to terminate a pregnancy.

Much of the passion on the pro-abortion side of the debate stems from this determination to defend the bodily integrity and self determination of women. The body

[346] Jeffrey Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs,* (1976): 26-44.

is the fabric of personhood and to take away a woman's right to make decisions about her body is a violation of her personhood. Using Kant's moral philosophy, a woman cannot be used as a means for an entity that is not clearly deserving of protection. The use of the term "fetal container" has become a popular way to protest using women as a means for reproduction. In fact, a compelling argument can be made that forcing a woman to carry a fetus to term is a violation of the Thirteenth Amendment which prohibits slavery and involuntary service. It the woman does not want the pregnancy, forcing her to do so could be seen as a type of coerced labor. A pregnancy entails hardship on the woman's body and a great deal of pain. For those who fervently believe in abortion rights, a forced pregnancy is a form of servitude in violation of the Thirteenth Amendment.[347]

Those who support abortion rights argue that a woman is not required to be a Good Samaritan by allowing the fetus unfettered use of her body for nine months. While it may be morally commendable for a woman to carry a fetus to term, the fetus does not have a right to a woman's body. In order to understand this argument more clearly, it is helpful to compare the conditions of pregnancy to those of organ donations. Since the courts do not require people (male or female) to provide organs or even blood to those who may need them to live, women cannot be asked to donate their bodies as the organ to carry fetuses to term. A Pennsylvania case, *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (1978), illustrates the issue. Robert McFall was suffering from bone cancer and his cousin, David Shimp, was a match for a bone marrow transplant that could save his life.

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[347] Anne E. Simon, Counsel of Record, Nadine Taub, Rhonda Copelon, Center for Constitutional Rights, Brief Amici Curiae of the Center for Constitutional Rights, the Committee for Abortion Rights and Against Sterilization Abuse, the National Emergency Civil Liberties Committee, the National Lawyers Guild, and the National Tay-Sachs and Allied Diseases Association, *Thornburgh, Governor of Pennsylvania v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

However, Shimp refused to donate his marrow. When McFall sought a court order to compel the donation, the judge ruled that although he found Shimp's action "morally indefensible," he could not compel Shimp to comply. The court found that, except for very limited circumstances, a person should not be forced to undergo medical procedures for the benefit of another. Similarly, although some may think it morally indefensible for a woman to deny her body to her fetus, the law is limited in its power to compel a woman to serve as a life support. For instance, a developing fetus depends upon the woman's blood and circulatory system. Yet, the law does not require a parent to give a blood transfusion to a born child. The law cannot force a woman to donate her body to the fetus. In short, the law cannot mandate that women be Good Samaritans.

However, some scholars mount significant challenges to this line of reasoning. Biomedical ethicist Baruch Brody admits that a person does not have an obligation to be a Good Samaritan, but he disagrees that a prohibition of abortion forces a woman to be a Good Samaritan or that it reduces a woman to a means to an end. He concedes that person X does not have a duty to save person Y's life through use of X's body, financial assets, home, and so forth. A right to life does not guarantee the use of another person's body. However, person X is not relieved of his duty not to take person Y's life or in other words, X does not have the right kill Y. Similarly, a fetus conceived in a laboratory will die unless implanted in a woman's body, but that fetus has no right to any woman's body. However, the woman who is pregnant does not have the right to take away the fetus's life because to regain her body, she must kill the fetus. The duty not to save a life

is not the same as the duty not to take a life. If the only way a woman can take back the use of her body is to kill the fetus, then she does not prima facie possess this right. [348]

At the heart of the matter is the problem of conflicting rights between the pregnant woman and the fetus. A proposed resolution to this dilemma is that the woman, as a rational agent and a fully recognized person, has rights that supersede those of the fetus whose rights are questionable. In other words, a potential person's rights may not supersede those of an acknowledged person. Even if the fetus were granted personhood, there would still be a conflict between the person of the fetus and the person of the woman. Both have strong claims and it is by no means a given that the fetus's right to life would supersede the woman's right of bodily integrity.

This resolution is not satisfactory for theorists who argue that a fetus is a person. If the fetus is a person, then abortion effectively kills a person. A pregnant woman does not have to raise a child after she gives birth – she can give the child up for adoption and continue to pursue her goals. Thus, abortion opponents argue that the nine months of inconvenience a woman faces during a pregnancy before she can deliver and give the baby up for adoption do not outweigh the harm that is caused by an abortion that effectively kills a person. Life and death outweigh the suffering of pregnancy. This line of reasoning hinges on the assertion that a fetus is a person. This is an assertion that must be carefully examined. Using psychological criteria of rationality and autonomy, we can consider whether or not a fetus qualifies as a person.

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[348] Baruch Brody, *Abortion and the Sanctity of Human Life: a Philosophical View* [Cambridge, Mass.:MIT, 1975]: 213.

Psychological Criteria for Personhood

In order to systematically analyze whether a fetus should qualify for personhood using psychological criteria, it is useful to return to Daniel Dennett's six conditions of personhood as discussed in Chapter One. Dennett bases his conditions on his understanding of Locke's "thinking, intelligent being with reason and reflection." Although the details of Dennett's criteria are debatable, they provide a solid starting point for analyzing personhood and have been employed by many scholars who study issues of personhood.[349] If a fetus can qualify as a person under all six conditions, there is a very strong case to be made that a fetus is indeed a person. Recall Dennett's six conditions of personhood:

1) Persons are rational beings.
2) Persons are beings to which states of consciousness are attributed, or to which psychological or mental or intentional predicates are ascribed.
3) Whether something counts as a person depends in some way on an attitude taken toward it, a stance adopted with respect to it.
4) The object of this personal stance is capable of reciprocating and having second order volitions.
5) Capable of verbal communication.
6) They are self-conscious.[350]

Excluding criterion three, the fetus does not meet the criteria for personhood. (I will discuss the significance of criterion three a bit later.) A fetus is not rational in that it has the capacity to process complex thoughts and desires. Nor is a fetus intentional in that it has beliefs and desires and is able to act to reach those goals. A fetus cannot meet the

[349] Numerous scholars have referenced Dennett's article detailing the conditions of personhood. Some of the articles that I found most intriguing are Lynne Rudder Baker, "Instrumental Intentionality," *Philosophy of Science*, 56:2, (Jun., 1989): 303-316; Jens David Ohlin, "Is the Concept of the Person Necessary for Human Rights?" *Columbia Law Review*, 105:1, (Jan., 2005): 209-249; Daniel N. Hoffman, "Personhood and Rights," *Polity*, 19:1, (Autumn, 1986): 74-96; Marina A. L. Oshana, "Wanton Responsibility," *The Journal of Ethics*, 2:3, (1998): 261-276.

[350] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177-179.

criteria for condition four which is the ability to reciprocate when other persons act intentionally towards you, nor can a fetus reflect upon goals and evaluate the morality of certain actions before choosing to act. According to condition six, a fetus must be self-conscious of his goals and actions; a fetus is able to react to stimuli and eats and sleeps to fulfill bodily requirements but is not able to set life plans and intentions. Finally, a fetus is not capable of verbal communication and therefore fails condition five. Dennett argues that infants as well as fetuses do not meet these criteria. He also excludes the insane and mentally handicapped.[351] Dennett's conditions of rationality and consciousness along with the mental capabilities to reciprocate and communicate verbally have been lauded by many scholars as the necessary bundle of capabilities needed for a being to be considered a person. Legal scholar Ronald Dworkin provides one of the best known arguments for personhood based on mental capabilities.

Dworkin, who subscribes to his own version of natural law theory, argues that a fetus cannot have interests of its own from the moment of conception because without mental capacities, there are simply no thoughts or interests to be had. Therefore, the fetus cannot have an interest to stay alive. Dworkin finds that most people agree with him that an immature fetus without any brain functioning cannot have an interest in survival. Instead, he finds that most people object to abortion because they believe that life in and of itself has an intrinsic or sacred value. Thus, just like a priceless work of art should not be destroyed whimsically, abortion should not be used with caprice. Similarly, most people agree that endangered species, whose lives are valuable based upon their rarity, should not be slaughtered with caprice. A work of art or an endangered non-human

[351] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 175.

animal has no interests of its own and thus it is not a harm to *it* to be destroyed. Similarly, a fetus lacking a developed brain has no interests of its own and thus abortion is not a harm to the fetus itself. Dworkin contends that people who believe in the intrinsic value of human life at all stages must not impose their views on all of society, and thus Dworkin argues that abortion, at least until the age of development where the fetus gains the mental capacity to feel pain, must remain legal.[352] Dworkin finds that twenty-six weeks is a compelling threshold because this is the biological point at which the fetus is able to feel pain. Since twenty-six weeks roughly coincides with the age of viability, Dworkin agrees with *Roe's* judgment.[353] Dworkin's threshold is the ability of the brain to register pain, and therefore he does not adhere to Dennett's more rigid criteria that would seemingly exclude fetuses as well as young children. However, some scholars such as Michael Tooley would agree that both fetuses and infants can be excluded from personhood based on psychological criteria.

Epistemologist Michael Tooley argues that newborns are not persons because they lack higher mental capacities for rational thought, deliberation, and self-consciousness. After examining neurophysiological and bioelectrical evidence, he concludes that the earliest age an infant could be considered a person is approximately three months. Thus, Tooley concludes that infanticide of newborns under the age of three months, just like abortion, is not morally wrong.[354] He states that as an infant develops,

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[352] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, [New York, NY: First Vintage Books Edition, 1994].

[353] Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, [New York, NY: First Vintage Books Edition, 1994]: 16.

[354] Michael Tooley, *Abortion and Infanticide,* [Oxford: Clarendon Press, 1983]: 407-411.

"their destruction becomes more and more seriously wrong, until eventually, it is comparable in seriousness to the destruction of a normal adult human being."[355]

Tooley's argument is very controversial and ignited outrage within the general public and the academic community. However, if the criteria for personhood were based solely on Dennett's conditions, Tooley is not wrong. Tooley's argument sparked controversy because modern society accepts birth as the event that marks the beginning of acceptance in the community of persons. Other societies, such as early Inuit communities allowed infanticide, and thus birth was not necessarily the event that guaranteed personhood.[356]

If mental capacities are the standard for bestowing personhood, then perhaps humans up to age three months are "potential persons" and adults with Alzheimer's or the comatose who have lost their mental abilities are "former persons." Robert Larmer, who studies ethics and the philosophy of the mind, invites scholars to participate in a thought experiment in order to analyze the personhood of the comatose in comparison to the fetus. Imagine that a person is in a serious accident and goes into a coma as a result of her injuries. Her doctors determine that she will heal, but she will be in a coma for nine months after which time she will become conscious. Unfortunately, when she awakes, she will have complete amnesia with no knowledge of her past plans. In fact, the amnesia will be so complete that she will need to develop motor skills and learn how to use a language. In essence, she will be like a newborn. Her next of kin, who is also her power of attorney, requests that she be taken off all life support and not be allowed to

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[355] Michael Tooley, *Abortion and Infanticide,* [Oxford: Clarendon Press, 1983]: 411.

[356] Joan B. Silk, "Adoption Among the Inuit," *Ethos*, Vol. 15, No. 3, September 1987.

regain consciousness. Does her next of kin have this right or does society have an obligation to protect the life of this patient? Larmer argues that her life must be protected not because she previously had consciousness and rationality but simply because she has the potential to become conscious. He further argues that a fetus, no less than the comatose patient, has the potential for consciousness and rationality and thus is deserving of protection.[357]

Although the fetus does not meet the requirements as formulated by Dennett, the fetus (as well as infants and children) will develop these capacities with time. Thus, the fetus is a "potential person" or as the *Roe* Court said, a "potential life." The issue of potentiality raises the subject of psychological continuity. If I am a person now, and at one point I was a fetus, and the person I am now is psychologically identical to the fetus, then it appears that there is an inconsistency in saying that the fetus is not a person.[358] However, this apparent inconsistency is resolved to some extent by recalling that personhood is a bestowed status and that this status can be granted and taken away. A human being may not be granted personhood until he or she reaches a certain mental maturity and similarly, if mental capacities are lost, personhood may be taken away. Although the fetus is psychologically identical to the adult person, the fetus has not yet received the designation of person. Although this reconciles problems of psychological continuity, this line of reasoning does not explain the significance of viability as the compelling point signifying that the fetus now is a "potential life."

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[357] Robert Larmer, "Abortion, Personhood, and the Potential for Consciousness," *Journal of Applied Philosophy*, 12, no. 3, (1995).

[358] Please see Eric Olson, "Was I Ever A Fetus?" *Philosophical and Phenomenological Research*, LVII no. 1, (March 1997); Lynne Rudder Baker, *Persons and Bodies: A Constitution View"* [Cambridge University Press, 2000].

Viability signifies that the fetus has the capacity to survive outside of the womb. However, the fetus acquires other potentialities much earlier. At conception, the zygote has the potential for life in that it will develop into a human being through the normal course of growth. A six-week-old fetus has all its major organs. At eight weeks, the fetus has brain activity. For some scholars who rely heavily on cognitive abilities as the criterion for personhood, this eight week point is a significant milestone because the brain, although not able to process rational thoughts, is beginning to function and has the capacity to develop until all rational faculties are present. Another critical milestone is sentience which, as mentioned earlier, is between six and twenty-six weeks. Historically, quickening, or the age at which the mother first feels the fetus move, has been an important milestone. Although the fetus is able to move long before the mother feels it, at quickening the mother receives a dramatic signal that her fetus can move on its own and therefore is a being in its own right. Quickening generally occurs around eighteen weeks. Finally, for scholars who argue that a person is a rational, communicative, self-conscious agent, the fetus does not reach any compelling points while in the womb, and in fact, does not reach rational agency until several years into childhood.

This discussion demonstrates that there are several significant developmental points that can be taken into consideration. If bodily continuity is part of the criteria, then logically, one cannot go back further than conception as the starting point of a person. Neither the sperm nor the egg on its own can be a human being, but once fertilization occurs the new organism immediately begins to grow and develop – it has potentiality. Thus, the conservative argument that life begins at conception makes logical sense. Does this also mean that personhood begins at conception? After all, the Declaration of

Independence begins with the phrase, "all men are *created* equal" implying that personhood begins with creation. On the other hand, there is a danger of over inferring backwards and employing a slippery slope argument. As it is often said, an acorn is not an oak tree although it develops into one. A fetus is not necessarily a person although it develops into one.[359]

Community Based Criteria for Personhood

Thus far, the personhood of the fetus has been considered from the point of view of developmental capacities and has been based primarily on the entity's capacity for rational thought. However, rational capacity is not the only way to evaluate personhood. As discussed in the previous chapters, an alternative to personhood based on rational capacity is to bestow personhood according to those individuals who are socially recognized as part of the community of persons.

A fundamental critique of personhood based on mental capacity is that it is guilty of discrimination based on mental characteristics. Epistemologist Jay Rosenberg is one such philosopher who argues that personhood based simply on rationality is too exclusive. He argues that newborns, the comatose, and the brain-damaged should still be considered persons even though they do not have rational capacities because they have a "special relationship" to rational beings. Infants are potentially rational beings while the brain-damaged and comatose are formerly rational beings. More importantly, in his view, these individuals are the offspring of rational persons. Thus, Rosenberg returns to a biological basis for personhood. He further argues that functional capacities are a

[359] Judith Jarvis Thomson, "A Defense of Abortion" Reprinted from *Philosophy and Public Affairs* 1 (1971): 47-66.

matter of degree – humans possess varying levels of intelligence, various competencies, and abilities to communicate – thus choosing a qualifying point on this continuum and withholding rights based on this qualifying point is morally arbitrary. From this line of reasoning, it can easily be concluded that the fetus of at least eight weeks who has a heartbeat and brain functioning qualifies as a person. Otherwise, those who bestow the status of personhood are discriminating based upon mental capacity.

Quickening is a sign of social recognition on the part of the mother, and if the woman allows it, others who can feel the baby moving within her. By placing her hand on her stomach, a woman often marvels at the movement within her. Advancing medical technology allows the woman, doctors, and others in the examination room to view the fetus at even earlier stages. Using internal ultrasounds and three-dimensional technology, a fetus can be viewed throughout all of the pregnancy. Even the first cells of the embryo are visible within two to three weeks after conception. By twenty weeks, an amniocentesis can reveal the gender of a fetus, and the fetus takes on the identity of "he" or "she" rather than an "it." Some parents even name the fetus when they discover the gender. The rite of naming is a powerful sign of personhood.[360]

Sociologist Nicole Isaacson did a quantitative analysis of the text of *Williams Obstetrics* which is a leading obstetrics text for gynecologists and obstetricians. Her analysis of the changes in text from 1960 into the 1990s revealed that as technology advanced to better examine the fetus *in utero*, the fetus was increasingly differentiated as a separate patient from the woman who carried it. Further, the fetus *in utero* and the baby *ex utero* were blurred into the single category of "infant" or –"fetus-infant." She argues

[360] Arnold Van Gennep, *The Rites of Passage,* originally published in 1909, [University of Chicago Press, 1960]: 62.

that the medical community is increasingly personifying the fetus as technology allows earlier viewing and medical treatment of the fetus.[361]

According to political scientist Robert Blank, advanced technology has increased a fetus's social recognition as an individual entity and as a person before birth.[362] This appears to be very true in the case of baby Olivia Maize who was born in 1994. When Olivia's mother, Sherrie Maize, was five months pregnant, she discovered that her fetus had a profound heart defect requiring a transplant immediately upon birth. The chances of finding a donor were remote, and the fetus had a slim chance of survival. Sherrie and her husband Lonnie decided to start searching for a donor immediately and to enjoy every moment they had with their baby – even while she was *in utero*. They named their fetus Olivia, talked to her, and bought her clothing. Even the community of Murphy, North Carolina welcomed Olivia by speaking to Sherrie's stomach, sending music to be played *in utero,* and sending gifts. According to social recognition standards, Olivia was a person long before she was born. Sadly, Olivia rejected her transplant and died a few months after birth, but according to her parents, she had been a person much longer.[363]

Although advanced technology allows social recognition of a fetus in some cases, birth remains the most significant and celebrated event in terms of social standing. Libertarian theorist Loren Lomasky argues before birth, the fetus primarily exists in anonymity rather than as a unique individual within the community of persons. He

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[361] Nicole Isaacson, "The Fetus-Infant – Changing Classifications of In Utero Development in Medical Texts," *Sociological Forum,* 11:3 [September, 1996]: 460.

[362] Robert H. Blank, Mother and Fetus: Changing Notions of Maternal Responsibility, [Greenwood Press, 1992]: 105.

[363] CBS Special, "A Heart for Olivia," John Klein, producer, aired January 17, 1995.

argues, "Birth is the transition of anonymity to public standing."[364] He contends that the only person with whom the fetus can form social relationships is the mother whose body responds to the pregnancy and who can feel the movements of the fetus. He concludes that permissive abortion policies are based on the unique relationship between mother and fetus with the final discretion regarding abortion residing in the mother who has a relationship with the fetus.

Marjorie Reiley Maguire, who is a scholar of religion as well as holding a J.D., agrees with Lomasky's conclusions concerning permissive abortion policies. She argues, "What makes a being a person is membership in the human community. The touchstone of personhood is sociality. It is not our brain capacity, or the proper number of chromosomes, but our personal relatedness to others that makes us a person."[365] Children as well as the mentally impaired have a certain publicity and are part of a network of social relations. However, Maguire argues that the fetus is socially recognized and hence part of the community of persons only if the mother recognizes it as such. She contends that a woman who willingly and happily consents to continuing a pregnancy marks the beginnings of her fetus's personhood. A woman who does not consent to a pregnancy and desires an abortion has not recognized her fetus as a socially constructed person. Thus, this fetus is not ascribed personhood. Maguire asserts that if society grants personhood to a fetus when the woman does not recognize it, society then denies the

[364] Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press, 1987]: 197.

[365] Marjorie Reiley Maguire, *Symbiosis, Biology, and Personalization*, in *Abortion Rights and Fetal Personhood*, ed. Edd Doerr and James W. Prescott [Rapid City, SD: Centerline Press, 1989]: 13.

personhood of the woman because it violates the woman's bodily integrity and her personal autonomy.[366]

Lynn Morgan, an anthropologist specializing in feminist studies, contends that personhood is not a natural category, but instead is socially constructed by the society that recognizes certain individuals as persons. Morgan's international ethnographical study revealed that there were no universal criteria nor a universal consensus on what constitutes a person. For example, she found that in the 1950s a death of a newborn in Korea would not receive much more attention than the death of an animal because that culture did not recognize newborns as people. Similarly, until the turn of the Twentieth Century, Inuit communities practiced female infanticide when food resources were scarce and therefore, newborns were not fully recognized into the community of persons. American society tends to recognize persons at biological birth, yet this is not a guarantee of personhood as scholars such as Tooley points out.[367]

Personhood based on social recognition helps explain criminal statutes for third party homicide. When an acknowledged and wanted fetus is killed by a third party, the mother (and father) feels a tremendous loss for her fetus and this loss must be compensated by punishing the perpetrator. The law compensates parents for their loss. This differs from a mother who voluntarily ends the life of her own fetus because the

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[366] Marjorie Reiley Maguire, *Symbiosis, Biology, and Personalization*, in *Abortion Rights and Fetal Personhood*, ed. Edd Doerr and James W. Prescott [Rapid City, SD: Centerline Press, 1989]; see also Paul D. Simmons, "A Biblical Perspective," *Abortion Rights and Fetal 'Personhood'* Edited by Edd Doerr and James W. Prescott, [Centerline Press, Long Beach, California, 1989]: 23. Simmons asserts that a woman who senses the "otherness" of her fetus and feels protective and nourishing toward the life inside of her has accepted the fetus as a person.

[367] Lynn M. Morgan, "When Does Life Begin? A Cross-Cultural Perspective on the Personhood of Fetuses and Young Children," in *Abortion Rights and Fetal Personhood*, ed. Edd Doerr and James W. Prescott [Rapid City, SD: Centerline Press, 1989]: 105.

mother who undergoes an abortion has not bestowed personhood on her fetus and thus the fetus's death via abortion is not the death of a person.

A dilemma associated with the argument that personhood is a socially bestowed status involves the mother as the sole moral judge able to bestow or withhold the status of person for the fetus. Should the mother, even though it is her body in which the fetus resides, have sole determination in this important matter? The *Roe* decision appears to say that until the point of viability, the woman is the sole arbitrator. However, history has shown that many injustices have been committed by exclusionary measures that exiled certain human beings from the status of person. Recalling the earlier discussion of slavery, we find that many masters and supporters of slavery argued that slavery was not unjust because slaves had no rights – they were not members of the "We the People" of the Constitution. Slaves were considered human animals on a par with livestock and other property. At that time, slavery was socially acceptable because slaves were simply not members of the community of persons. Slaves received their personhood from their masters. Similarly, the Nazi regime believed that Aryans were the only true persons and thus atrocities against Jews, Slavs, and other individuals were not crimes against humanity. Clearly, women who cannot cope with a pregnancy and seek an abortion are not on a par with Nazis or slaveholders. However, allowing one sector of the population the sole responsibility for determining the community of persons is a tenuous proposition. Such exclusion could lead to euthanizing infants born with disabilities or even euthanizing certain genders, a practice that is not discouraged in China. History teaches that caution must always be employed when deciding who is included and excluded in the community of persons. As meta-ethicist Roger Wertheimer cautions, "Men of good

will have often failed to recognize that a certain class of fellow creatures were really human beings just like themselves."[368]

Thought experiments conducted by Wertheimer reveal that people often think differently about the fetus when asked to imagine unusual social circumstances. Wertheimer asked his subjects to imagine that the womb of the mother was transparent so that if the mother wore mid-drift bearing clothing, the development of the fetus would be in full view. He also asked them to imagine that science had advanced so that a fetus could be taken out of the uterus, observed, fondled, and then put back in the mother. These thought experiments alter the social dimensions of the fetus and, through public exposure, bring the fetus much closer to the relationships within the human community. While Wertheimer does not argue that these thought experiments justify a person's opinions concerning the status of the fetus, they do often move his subjects to see the object from a different angle.[369]

In fact, some medical doctors who specialize in prenatal care and are intimately familiar with the development of the fetus view the fetus as their patient and as part of the community of persons. For instance, Sir Albert Liley, a pediatric neurophysiologist who perfected the technique to transfuse blood from the mother to the fetus, was dedicated to viewing the fetus as both a person and a patient. In a 1972 article on fetal personality Liley wrote,

> We may not all live to grow old but we were each once a fetus ourselves. As such we had some engaging qualities which unfortunately we lost as

[368] Roger Wertheimer, "Understanding the Abortion Argument" *Philosophy and Public Affairs* 1 no. 1 (1971): 83.

[369] Roger Wertheimer, "Understanding the Abortion Argument" *Philosophy and Public Affairs* 1 no. 1 (1971): 91-93.

> we grew older. We were physically and physiologically robust. We were supple and not obese. Our most depraved vice was thumb sucking, and the worst consequence of drinking liquor was hiccups not alcoholism. … Is it too much to ask therefore that perhaps we should accord also to fetal personality and behavior, rudimentary as they may appear by adult standards, the same consideration and respect?[370]

Liley's work offers an alternative to the argument that only the mother can grant personhood to the fetus. As a physician who was intimately familiar with the fetus, Liley felt strongly that this entity should be granted access to the community of persons.

Medical technological advances in internal ultrasound are allowing a woman (and whomever else accompanies the woman into the exam room) to view the fetus at all stages of pregnancy. An internal ultrasound can be performed throughout pregnancy and allows a woman and her doctors to monitor the development of the fetus. These technologies strengthen the emotional bonds between the woman and fetus and also further the social recognition of the fetus as a person. The woman also receives photographs of the developing fetus that she can show to others further strengthening the communal acceptance of the fetus.

Using community based criteria for personhood makes sense when considering the practical implications for the fetus. It allows us to speak of a fetus as a person and a patient when the mother wants the fetus and is undergoing medical treatment to save the fetus's life. It also explains why society is horrified for a fetus as well as the woman when a pregnant woman is battered and miscarries, and why society demands criminal punishment for many instances of "fetuscide." On the other hand, it explains why most people do not feel that criminal punishment is appropriate for a woman who aborts her fetus. A woman who does not desire her pregnancy has not accepted her fetus into the

[370] A.W. Liley, "The Foetus as a Personality," *Australian and New Zealand Journal of Psychiatry* 6 (1972): 99.

community of persons and therefore, society does not have protective measures for the unwanted fetus.

The Fetus and Property Concerns

Thus far, the analysis has considered the rational and social acceptability criteria that distinguish a human being from a person. As has been demonstrated, there is a sharp divide between those who believe that a fetus is simply a biological human being but not person and those who argue that the fetus meets certain criteria that allow a fetus to be considered a moral and legal person. Just as the issue of the fetus invokes the human being versus person debate, it also requires an examination of property issues. Locke argues that persons have a property right to their own bodies. Thus, a woman can exercise her rights in respect to her body and expel an unwanted fetus. This argument can be taken even further to argue that as a part of her body, a fetus is a woman's property. Conversely, considering a human body to be simply property raises the issue discussed earlier of whether a human body can be simply used as a means to an end. Is the human body sacred and beyond commodification? If the body is property, perhaps someone could rent a woman's body such as in the case of surrogacy. A surrogate mother is in many ways a "fetal container," albeit a willing container. These concerns require an examination of the property aspects involved in a discussion of fetal personhood.

The concept of the body as property illustrates the conflict between a woman and a fetus in respect to abortion. It seems that both a woman and a fetus cannot both be possessive individuals. If the woman is a possessive individual, the fetus becomes her

property. If the fetus is the possessive individual, the woman is the housing for the fetus. Although Locke argues that a person has a property right in his or her own body, a property right in one's own body does not give a woman the right to kill someone found on her property; in fact the law generally holds that a person is liable for injury to others while on his or her property. However, if the woman cannot control her body, her autonomy as a person is diminished.

The idea that the body could be commodified is fraught with moral peril according to property law scholar Margaret Radin. Radin studies the inextricable links between property and personhood and worries that over commodifying certain things, such as body parts, causes harm to human dignity and allows for economic exploitation. She argues that some goods, such as the body, are market-inalienable – i.e. are not to be bought and sold on the market. She fears that people who are destitute will be forced to sell their bodies or body parts in order to survive when they otherwise would not choose to do so. This leads Radin to question the wisdom of surrogacy. She contends that parent-child relationships are closely connected with the personal identity of personhood.[371] She does not condone the concept of baby selling because she argues that "conceiving of any child in market rhetoric wrongs personhood" because it commodifies a personal attribute and fosters an inferior conception of human flourishing.[372] She finds the issue of surrogacy more difficult to adjudicate.

If a surrogate mother is paid for selling her gestational services, her womb can be considered her property and therefore alienable. This does not assume that the fetus/baby

[371] Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review*, 100:8, (June 1987): 1849-1937.

[372] Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review*, 100:8, (June 1987): 1927.

is also her property – the baby cannot be objectified as property and sold to the prospective parents who are paying for the gestational services. However, Radin cautions that surrogacy could lead down a slippery slope to thinking of a child as property. It could also lead to further commodification of women who would be valued for their genetic traits such as height, race, and intelligence by prospective parents who seek a specific genetic history for their child. Radin sees additional potential problems with surrogacy in that it may be destitute women who unwillingly resort to surrogacy and further, commodifying the womb could lead reinforcing oppressive gender roles that portray women as breeders. She concludes that surrogacy cannot be prohibited but appeals to her Aristotelian conception of human flourishing to encourage society to limit the scope of commodification.[373]

Political philosopher Richard Arneson finds Radin's scholarship compelling but finds some fault with her theories of personhood which ultimately compel Arneson to argue that surrogacy should be permitted. Arneson argues that the counterposition to Radin's view that commodification reduces personhood is to acknowledge that the market is a mechanism for humans to form their values and preferences and thus the market enhances individuality and personhood.[374] Further, he argues that there are distinct benefits of surrogacy that outweighs the costs. Infertile and homosexual couples who are not able to have children have an opportunity with surrogacy. Although there are objections that surrogacy implies a property in personhood, Arneson finds that surrogacy does not assume an ownership in the born child. Against objections that

[373] Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review*, 100:8, (June 1987): 1937.

[374] Richard J. Arneson, "Commodification and Commercial Surrogacy," *Philosophy and Public Affairs*, 21: 2, (Spring, 1992): 139.

surrogacy degrades women by turning the womb into a piece of property, Arneson argues that surrogacy cannot be seen as degrading when a woman altruistically agrees to be a surrogate for a couple who cannot conceive. Finally, although it is unfortunate that indigent women may reluctantly become surrogates in order to make money, Arneson argues that the remedy for this problem is not to further restrict the options of poor women. He contends that no matter how restricted a person's options are, to narrow the range of option even further is unacceptable. After evaluating these objections and many other benefits and costs of surrogacy, Arneson concludes that from a Utilitarian perspective, the benefits outweigh the costs and thus surrogacy should be permitted.[375]

On the other side of the spectrum from Radin is judicial behaviorist and judge for the U.S. Seventh Circuit Court of Appeals Richard Posner whose radical pragmatism has led him to advocate a free market for buying and selling babies should replace regulated adoptions. He concedes that allowing a market for babies would lead to baby breeding as the market created incentives for a good "product" with desirable genes. However, he argues that the benefits would outweigh these problems. Posner and his colleague Landes contend that adoption agencies have created a shortage of Caucasian children for adoption and adults who want a child have resorted to a black market to buy children. Further, there is an oversupply of African American children in welfare facilities due to the state removing children from homes where the parents cannot adequately care for them. The reason for this problem, according to Posner, is that the market is not operating efficiently because adoption agencies are not charging a market clearing price for their services. He argues that if adoption regulations were relaxed and prospective

[375] Richard J. Arneson, "Commodification and Commercial Surrogacy," *Philosophy and Public Affairs*, 21: 2, (Spring, 1992): 132-164.

parents were allowed to bid on children for adoption and pay a market price, the market would return to equilibrium and both the shortage and oversupply of adoptive children would decline. Posner rebuffs what he calls "symbolic" objections to his proposal that persons should not be commodified. He argues that there should be a property right in children because it would encourage foster parents to take good care of their investment.[376] To be sure, Posner and Landes present a radically capitalistic view of personhood and property. However, their claims are not as outlandish as may initially seem when considering that there are active legitimate markets and black markets for human body parts including fetal tissue.

The question of whether or not the fetus is the woman's property and can be sold is highly relevant for medical research where fetal tissue is in high demand for its research and therapeutic value. Fetal tissue has extraordinary potential for growth, can differentiate, and is less likely to be rejected by a transplant recipient than adult tissue. Currently, scientists are focusing on the potential of fetal tissue to assist Parkinson's and diabetes patients, but the list of diseases that could benefit from fetal research is extensive. If the woman has an alienable property interest in her fetal tissue, she may be persuaded to abort her fetus for financial compensation from medical research companies. The *Moore v Regents of the University of California* 51 Cal. 3d 120 (1990) decision, mentioned in Chapter One which concerned property rights in body parts used for commercial research, is broad enough to cover fetal tissue.[377] The California

[376] Elisabeth M. Landes and Richard A. Posner, "The Economics of the Baby Shortage." *The Journal of Legal Studies*, 7:2, (Jun., 1978): 323-348.

[377] Nancy E. Field, "Evolving Conceptualizations of Property: A proposal to De-Commercialize the Value of Fetal Tissue," *The Yale Law Journal* 99 no. 1 (1989).

Supreme Court ruled in *Moore* that a person does not have a property right in his own tissue. However, in other cases, a person does have a property right to bodily parts such as plasma, sperm, or hair which can be sold for profit. Therefore, the issue is not completely settled, and there is room for future cases to litigate whether a woman can sell the tissue from an aborted fetus. Allowing a woman to profit from research on her fetus introduces a whole bevy of problems in that commodification can undermine the human dignity of both the woman and the fetus.[378]

However, if the woman decides carry her fetus to term, does she then have the responsibility to treat her fetus as a socially recognized person rather than a piece of her bodily property? From the previous discussion, it is implied that once the decision to carry to term is made, the woman has recognized her fetus and thus there is a state interest in ensuring the health of that fetus. A growing recognition that the fetus is not the property of the woman has led to the recent legal phenomenon of successful tort cases brought by individuals who were harmed by their mother *in utero*. A New Jersey statute allows the Bureau of Children's Services to intervene on behalf of an unborn child who is not receiving proper care. The problem is that in order for Children's Services to take the fetus into custody, the mother must be taken into custody as well. Several courts have allowed the state to mandate a caesarian surgery in order to preserve the life of the fetus even though this violates the mother's rights of autonomy.[379] Medical professionals who view the fetus as a patient rather than simply a body part of the mother endorse the

[378] For a full explanation of this argument, please see Margaret Jane Radin, "Property and Personhood" *Stanford Law Review,* 34 no. 5, (1982).

[379] Nancy K. Roden "Cesareans and Samaritans" *Law, Medicine and Health Care* 15 no. 3 (1987).

personhood of the fetus.[380] Cases concerning the selling of fetal tissue and tort cases against the mother are further judicial quandaries in the making.

Considering a fetus as simply another body part of the woman oversimplifies the issue. As feminist scholar Catharine MacKinnon writes,

> In my opinion and in the experience of many pregnant women, the fetus is a human form of life. It is alive…More than a body part but less than a person where it is, is largely what it is. From the standpoint of the pregnant woman, it is both me and not me. It "is" the pregnant woman in the sense that it is in her and of her and is hers more than anyone's. It "is not" her in the sense that she is not all that is there.[381]

As MacKinnon correctly points out, the issue is more complex than comparing the fetus to a pint of plasma that can be donated or sold. While the fetus is part of the woman's body, it is also a unique entity. Thus, although the woman considering an abortion is certainly a person with rights and immunities, the status of her fetus cannot be determined simply and easily. This is why the personhood of the fetus in cases such as abortion is an agonizing issue for some citizens.

The concept that there is a property right in the womb and in the fetus raises all types of moral dilemmas and new courses for the law to chart. Among both scholars and the public there is an intuition that some entities such as the body or fetal tissue are simply too personal to be fungible property. However, there are legitimate reasons why the body and bodily tissue should be considered property in some situations. The ability to rent the womb, sell fetal tissue, and have control over one's body all raise issues over the distinction between personhood and property. Just as with the distinction between

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[380] Monica J. Caspar, "At the Margins of Humanity: Fetal Positions in Science and Medicine," *Science, Technology, & Human Values,* 19 no. 3, (1994).

[381] Catharine MacKinnon, "Reflections on Sex Equality Under the Law," *The Yale Law Journal*, 100 no. 5, (1991): 1316.

human and person, it is not likely that the law will come to clear distinctions between property and person in respect to issues involving the fetus.

Alternative Ways to View the Abortion Debate

Of course there are alternative ways to view issues concerning the fetus beyond the dichotomy between human and person and the dichotomy between property and person. In fact, many well-known scholars cogently argue that personhood is not necessary to the debate. This study is primarily concerned with the legal formation and consequences of fetal personhood, but a quick review of two of the most well-known abortion related arguments is beneficial for understanding alternative theories.

Ethicist Rosalind Hursthouse makes a persuasive argument based on virtue theory that biological or psychological milestones are not critical factors in adjudicating the morality of abortion. She argues that abortion is a serious matter because it involves ending life and therefore cannot be compared to other surgeries such as an appendectomy. She writes,

> to think of abortion as nothing but the killing of something that does not matter, or as nothing but the exercise of some right or rights one has, or as the incidental means to some desirable state of affairs, is to do something callous and light-minded, the sort of thing that no virtuous and wise person would do. It is to have the wrong attitude not only to fetuses, but more generally to human life and death, parenthood and family relationships.[382]

However, Hursthouse does not argue that abortion is necessarily wrong. Rather, she argues that the gradual development of the fetus is relevant for moral decisions. Just as a miscarriage at a late stage of pregnancy when the fetus is well developed is considered much more tragic than a miscarriage at an early stage of pregnancy, an abortion at a late

[382] Rosalind Hursthouse, "Virtue Theory and Abortion," *Philosophy and Public Affairs* 20 (1991): 237-238.

stage is considered a greater moral difficulty than that one at an early stage. Hursthouse does not look to a milestone such as viability as the determining point in the moral decision. Rather she looks at the mother's health, life plans, and other aspects of her life as well as the fact that the fetus is a developing human life. This seems to correspond with much public opinion and comments such as, "I believe it would be morally wrong for me to have an abortion, but I can understand that the decision to abort might be correct for a woman in more difficult circumstances."

Libertarian theorist Lomasky's theory of the importance of "project pursuers" is similar. A woman has projects she intends to pursue and these are interrupted with an unplanned pregnancy. Lomasky's definition of project pursuer also includes infants. He believes that a harm to an infant is an injury committed to the child itself even though an infant is not in full possession of her rational capacities because the child has moral standing as a future project pursuer. "To damage an infant is to damage the project pursuer that it will be. Indeed what counts as damage or benefit for an infant is determined by what will likely further or diminish its eventual success in living as a project pursuer."[383] Lomasky's theory breaks down when it comes to the fetus. He admits that he cannot come to a solid conclusion concerning the fetus and inconclusively decides that "fetuses are neither clearly in nor clearly out of the moral community."[384] If the fetus, as a "potential life" is also a potential project pursuer, then damage to the fetus could be an injury to the fetus itself rather than an injury to the parents.

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[383] Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press 1987]: 160

[384] Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press 1987]: 192

This is essentially the argument of ethicist Don Marquis who contends that even if the fetus is not granted personhood, it is *prima facie* wrong to kill a fetus because a fetus, just like any other human being, has a "valuable future like ours."[385] He argues that the loss of life deprives a human of all future experiences, projects, and activities. This loss is what makes killing *prima facie* morally wrong. Fetuses, just like children and adults, have future projects and thus it is morally wrong to kill a fetus just as it is wrong to kill any child or adult. For Marquis, the fact that the fetus is a human being and a potential person is enough to justify the prohibition of abortion. The difficult conflict in abortion is that the woman also has future experiences, projects, and activities that an unwanted child will disrupt. Hence, the mother's rights as a person must also be taken into consideration.

The preceding discussion of personhood as it pertains to women and fetuses creates a context in which to examine the history behind the status of the fetus. This brief review is necessary to set the context for analyzing court cases adjudicating the personhood of a fetus.

History

A brief look at the evolution of American abortion statutes and judicial rulings provides some insight on the status of the fetus and how a woman's right to abort was viewed. Justice Blackmun felt that this history was so important for his ruling in *Roe* that he devoted a considerable amount of his opinion to a historical overview. Unfortunately, Blackmun relied in large part on the work of Cyril Means, a law professor and legal

[385] Don Marquis, "Why Abortion is Immoral," *Journal of Philosophy* vol. 86 (April 1989): 189.

counsel for the National Abortion Rights Action League (NARAL). Although much of Means's scholarship is accurate, it is nevertheless prone to biases based upon his affiliation with NARAL. Blackmun's opinion has come under harsh criticism from both anti and pro-abortion scholars who question the validity of his sources.[386] Fortunately, the history of abortion rights is a well researched topic, and many unbiased sources exist.

Early English and American legal documents make very little reference to abortion statutes. However, there is evidence of literature pertaining to infanticide by parents which seemed to be much more widespread than abortion.[387] In 1648, Sir Edward Coke stated that abortion was a "great misprision and no murder."[388] Although it was not a murder punishable by death, a misprision was still a grave offense similar to that of a modern felony. According to legal scholar William Blackstone, by the thirteenth century, abortion of a quickened fetus was prohibited in common law. He wrote,

> Life is the immediate gift of God, a right inherent in every individual, and it begins in contemplation of the law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beats her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor.[389]

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[386] Joseph W. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts*, ed. Dennis Horan, [Georgetown University Press, 1987].

[387] Joseph W. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts*, ed. Dennis Horan, [Georgetown University Press, 1987]: 145.

[388] Sir Coke, 3 Third Institute 50 (1648).

[389] Sir William Blackstone, *Commentaries on the Laws of England,* [Christian, Chitty, Lee, Hovenden, and Ryland Publishers, 1832]: Book 1, Chapter 1.

Notably, Blackstone's summary of common law made a third party assault against a fetus which resulted in death a common law misdemeanor of the same caliber as an abortion. However, it is difficult to find record of anyone being punished for abortion before the 1800s.

In one particular set of circumstances, the fetus did seem to have a claim to life. When a pregnant woman was sentenced to execution, the punishment was generally delayed until she gave birth.[390] In *Botsford v. Union Pacific Railroad*, 141 U.S. 250 (1891), which was one of the cases cited in *Roe v.* Wade as a example of personal privacy law, the Supreme Court stated that a woman's right to privacy was superseded when she was quick with child to prevent "taking of the life of an unborn child for the crime of the mother" (141 U.S. 250, 253). Many times, pregnant women were released from prison so that prison officials did not have to provide medical support to the woman and the offspring.[391]

In approximately 1750, new abortion techniques that involved inserting instruments into the uterus to induce abortion replaced herbal and poison methods. Although these techniques were still dangerous to the woman's health, they were less dangerous than herbs and had the same approximate mortality rate as other surgeries of the time. These innovations increased the popularity of abortion over that of infanticide. In the early decades of the 1800s, abortion grew in visibility.[392] As incidents of abortion

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[390] David A. Gordon, "The Unborn Plaintiff," *Michigan Law Review* 63, no. 4 (1965): 582.

[391] L. Mara Dodge, "One Female Prisoner Is of More Trouble than Twenty Males: Women Convicts in Illinois Prisons, 1835-1896" *Journal of Social History* 32, no. 4 (1999): 915.

[392] J Mohr, Abortion in America: The Origins and Evolution of National Policy (1978), Quoted in Brief of 281 American Historians as Amici Curiae Supporting Appellees Clyde Spillenger, Jane E. Larson, Powell, Goldstein, Frazer & Murphy, *Webster v. Reproductive Health Services* (492 U.S. 490).

rose, laws regulating the practice also rose.[393] In 1803, Lord Ellenborough's Act provided a comprehensive list of crimes against the person in English and American law. It included prohibitions of abortion punishable by death if the fetus was quick. Joseph Dellapenna argues that this act was followed by other statutes prohibiting abortion until approximately 1861 when most abortions were criminal.[394]

Beginning in the mid 1800s, the American medical profession began to reconsider the morality and legality of abortion. Although the sperm was discovered in 1677, the mammalian egg was not discovered until 1827, and the fact that the egg and sperm were the structural beginnings of organisms was not recognized until 1839. These new discoveries called into question the scientific importance of quickening.[395] As the science of embryology grew, many physicians began to consider the welfare of the unborn fetus as a patient in its own right.

Doctor Hugh Hodge from Pennsylvania advocated the criminalization of abortion in an 1869 lecture explaining that the fetuses as well as the mother were his patients. He stated, "He must regard the infant, as well as the mother, from the period of conception to delivery."[396] Other anti-abortion physicians such as Doctor Horatio Storer of Boston published tragic accounts of injury to women after botched abortions. He and likeminded

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[393] Joseph W. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts*, ed. Dennis Horan, [Georgetown University Press, 1987]: 146-147.

[394] Joseph W. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts*, ed. Dennis Horan, [Georgetown University Press, 1987]: 146.

[395] Dennis J. Horan and Thomas J. Balch, "Roe v. Wade: No Justification in History, Law, or Logic" in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts*, ed. Dennis Horan, [Georgetown University Press, 1987]: 67.

[396] N.E.H. Hull and Peter Charles Hoffer, *Roe V. Wade: The Abortion Rights Controversy in American History*, [Lawrence, KS: University Press of Kansas, 2001]: 28.

physicians called upon the American Medical Association to demand stricter laws against abortion.[397] Despite political action by physicians calling for increased restrictions on abortion, physicians during the mid 1800s were not united in this movement. Some doctors remained sympathetic to women seeking abortion; others were concerned to protect the health and life of the mother facing unprofessional or unregulated abortions, and others were interested in protecting the life and health of the fetus.[398] Still other doctors resented the fact that midwives and other paraprofessionals were profiting from the abortion business and felt that by regulating abortion, the trade could be limited to physicians within the American Medical Association.[399]

In his *Roe* opinion, although Justice Blackmun acknowledges that some opposition to abortion arose from advocates of the fetus, Blackmun cited the dangers to the health and life of the mother as the primary reason for restrictive abortion laws. However, careful research shows that both the welfare of the mother and concerns over the fetus along with other societal and financial concerns compelled stricter abortion regulations.

Much of the furor over abortion stemmed from declining birth rates among middle and upper class white Protestants. Many politicians felt that abortion was the culprit for the declining birth rates among the elite race. African American and Native

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[397] N.E.H. Hull and Peter Charles Hoffer, *Roe V. Wade: The Abortion Rights Controversy in American History*, [Lawrence, KS: University Press of Kansas, 2001]: 29.

[398] Simone M. Caron, *Who Chooses? American Reproductive History since 1830*, [Gainesville, FL: University Press of Florida, 2008]: 7.

[399] J. Mohr, *Abortion in America: The Origins and Evolution of National Policy* (1978), Quoted in Brief of 281 American Historians as Amici Curiae Supporting Appellees Clyde Spillenger, Jane E. Larson, Powell, Goldstein, Frazer & Murphy, *Webster v. Reproductive Health Services* (492 U.S. 490).

American were the most worrisome racial competitors although high fertility rates among Irish Catholics were also a problem. Anti-abortion advocates hoped to force white, Protestant women to fulfill their national duty to preserve the Anglo Protestant population.[400]

In 1821, Connecticut passed the first comprehensive antiabortion law which punished abortion after quickening. Missouri followed in 1825, Illinois in 1827, and New York in 1828. By 1860, all but thirteen states had some kind of antiabortion legislation. In 1873, the Comstock law forbade the importation, mailing, and interstate transport of literature concerning abortion and contraceptives.

The discussion over abortion legislation in the states took place within the same time period that the Fourteenth Amendment was being discussed and ratified. While the subject of abortion was not brought up within the context of the Fourteenth Amendment, members of Congress were undoubtedly familiar with the issue. Just as the intentions of the framers can be surmised concerning the personhood of corporations, scholars have attempted to infer whether persons also included the unborn. It is not at all clear that the framers of the Fourteenth Amendment intended to include the fetus within its scope. On the other hand, it is not clearly evident that the framers meant to exclude fetuses. Given the wide latitude of the word "person" in respect to corporations, and its eventual extension to women and children, it is conceivable that the framers of the Fourteenth Amendment could also include the unborn in their definition of "person." The *Roe* Court did not consider the fact that state abortion laws were becoming decidedly stricter during the same time period that the Fourteenth Amendment was debated and ratified, nor did

[400] Simone M. Caron, *Who Chooses? American Reproductive History since 1830*, [Gainesville, FL: University Press of Florida, 2008]: 7.

the *Roe* Court venture into the possible ramifications of these simultaneous events. We are left to wonder if the framers of the Fourteenth Amendment had chosen the word "human" rather than "person," would the abortion debate have evolved in a completely different direction. On that note, we turn to an examination of judicial decisions concerning the status of the fetus.

ANALYSIS OF CASES

It is tempting to begin the review of cases concerning fetal personhood with *Roe v. Wade* since this case definitively declared that fetuses were not persons. The decision in *Roe v. Wade* engendered the modern, very heated debates over personhood. However, beginning the discussion with *Roe v. Wade* glosses over some the very important earlier cases that discuss fetal personhood and set the stage for the *Roe v. Wade* decision. There are many cases dealing with injuries to fetuses, wrongful death of fetuses, and the ability of a fetus to inherit property. However, most cases do not address the issue of personhood directly. In choosing which cases to analyze, I picked Supreme Court and lower court cases that directly spoke to the issue of fetal personhood and set precedents regarding personhood that were then followed by other courts. Leading up to *Roe v. Wade*, I chose influential cases that confirmed the personhood of a fetus up until the 1950s when the courts recede from this trend and begin to rule that the fetus is not a separate agent. This leads to *Roe v. Wade* which was the landmark case in which the Supreme Court ruled that the fetus was not a person. Following *Roe v. Wade*, the Supreme Court and lower courts continued to debate the status of the fetus, and I reviewed cases where the courts reflected on the personhood of the fetus for both abortion cases and other emerging issues involving a fetus.

Most of the state and federal cases concerning the status of the fetus from the late 1800s to the 1960s did not concern abortion. Instead, they dealt with issues such a third-party injury and wrongful death of the fetus, medical malpractice suits where the fetus was injured or died, the mother's negligence, and the right to claim monetary benefits as a dependent. These early cases initiated discussions of legal fetal personhood.

In the late 1800s when the study of embryology was just beginning, courts had a difficult time proving that injury to a fetus *in utero* caused subsequent injury or death. The fetus was generally considered a part of the mother and not able to claim wrongful injury on its own account. Further, the courts were wary of fraudulent claims of injury to the fetus. Thus, most claims, especially those before quickening or viability, were denied. As science progressed and scientists and doctors gained greater understanding of the development of the fetus, the effects of *in utero* injury were proven. Thus, the courts gradually changed their stance and began to award damages for injury and wrongful death of the fetus. As doctors began to prove that significant damage to the fetus and subsequent born child can occur during the first trimester, many courts even granted relief before the fetus was viable. These courts explicitly stated that, in these cases, the fetus was a person from the time of conception. By the 1900s, most jurisdictions began to grant relief for personal injury to a child born alive with fetal injuries. Wrongful death claims were often granted to fetuses who died *in utero* due to injury or died upon birth from injuries sustained in utero. Many courts, but not all, required that the fetus be viable at the time of injury.[401] Courts usually granted recovery for medical and burial expenses

[401] Timothy Stoltzfus Jost, "Rights of Embryo and Foetus in Private Law," *The American Journal of Comparative Law* 50, no. 3 (2002): 642.

as well as recovery to the parents for their potential child's future earnings or for mental anguish for the loss of their unborn child.[402]

Awarding damages to the pregnant woman and expectant father when third-party injury causes the death of their fetus reflects the need to protect the rights of prospective parents and compensates them for their loss while deterring and punishing tortuous behavior against pregnant women. Holding a third party responsible for negligent or criminal behavior is consistent with the protection of the pregnant woman.[403] In these cases, unlike abortion cases, the fetus and the mother are not in conflict and protecting the rights of one is beneficial to both. This is important to note because in the vast majority of pregnancies, the woman desires her unborn child and thus injury to the fetus is an injury to her.

However, a debate remains as to whether the third party destruction of a fetus against the will of the pregnant woman is simply a tort against a woman or is also committed against the fetus. If the fetus is not a person with rights and protections, then the tort cannot be committed against the fetus *qua* fetus. Rather, the tort is against the mother and recovery is only to compensate the parents for the loss of their desired child. However, if the court recognizes the personhood of the fetus in criminal cases and rules that the tort is also against the fetus, the court is thereby recognizing the rights and claims of the fetus. Opponents of abortion fear that this type of recognition for fetal personhood could bleed into abortion cases. With this overview, a review of some court decisions in

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[402] David Gordon warns that courts must be careful when granting pecuniary compensation for the sentimental loss of the fetus. He cautions that granting monetary rewards could be a return to viewing the child as a chattel capable of monetary exchange.

[403] Dawn E. Johnson, "The Creation of Fetal rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," *The Yale Law Journal* 95, no. 3 (1986): 602.

early cases will illuminate issues of fetal personhood before abortion took over the discussion.

Early Cases Concerning Fetal Personhood

In the chapter on slavery, the case *State v. Jones* was analyzed (1 Miss. 83, 1818). Although this case did not concern the personhood of the fetus, the court famously said,

> By the provisions of our law, a slave may commit murder, and be punished with death; why then is it not murder to kill a slave?...Is not a slave a reasonable creature, is he not a human being, and the meaning of this phrase *reasonable creature* is a human being, for the killing of a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not the slave as much reason as a lunatic, an idiot or an unborn child? (1 Miss. 83, 85)

The Mississippi court grouped the fetus with humans whose rational capabilities were questionable but were nevertheless protected from deliberate homicide. This early case helps set the stage for later cases concerning fetal injury and wrongful death.

The most famous case from the 1800s concerning prenatal injury was *Dietrich v. Inhabitants of Northampton* which was tried in Massachusetts in 1884 (138 Mass. 14). In this case, a pregnant woman slipped and fell on a defect in a highway. She suffered a miscarriage, and although her fetus was born alive, it died within ten to fifteen minutes due to immaturity. Judge Oliver Wendell Holmes, Jr. delivered the opinion for the Supreme Court of Massachusetts and decided that the fetus was not a separate entity apart from the mother and thus had no claim as a separate person. Holmes stated that there was a lack of precedent upon which to rely for this case, but Lord Coke's rule that the woman must be "quick with child" required that the fetus had reached some degree of independent life at the time of the injury. In this case, Holmes decided that the fetus was

still part of the mother and thus any injury to the fetus was too remote to be recovered other than by the mother. Holmes's opinion set the precedent for the next sixty years. An injury to an unborn child was simply an injury to the mother just as an injury to the mother's head, heart, or leg.

In 1900, the Supreme Court of Illinois adjudicated a case concerning an injury to a fetus just ten days from birth. In *Thomas Edwin Allaire v. The St. Luke's Hospital et al.* (184 Ill. 359; 56 N.E. 638), a pregnant woman admitted to the hospital before giving birth was injured in an elevator accident. The fetus's left arms and legs were withered as a result of the accident leaving him permanently crippled upon birth. Even though the fetus was near term, the Illinois court rejected the claim in fear that awarding damages might set a precedent for a child to sue the mother for injuries. The Court relied upon the *Dietrich* precedent that the fetus was part of the mother and could not claim a separate injury.

The influential opinion in this case however, was Judge Boggs's dissenting opinion. He argued that a new principle should be established that after viability, the fetus had an independent life from the mother and could make legal claims. Boggs wrote,

> The law should, it seems to me, be, that whenever a child *in utero* is so far advanced in pre-natal age as that…such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterwards born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother. (184 Ill. 359; 56 N.E. 638, 374)

Other courts picked up on this dissent and began to view the fetus as a separate existence. Some jurisdictions began to find an inconsistency in that a fetus's property and contract

rights were legally protected while personal rights were not. The growing medical literature concerning the development of the fetus as separate from the mother also helped bring a change in legal thinking. The medical findings of the causes of congenital damage helped courts find a proof of causation in prenatal injury cases.[404] Although Boggs probably did not use the word "person" to convey a special significance of personhood, his argument that the fetus was a separate entity apart from the mother was compelling. This was one of the first legal arguments for fetal personality.

The Fetus Gains Some Recognition as a Person

In 1872, California adopted a law which stated, "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."[405] Thus, California was the first state to explicitly legislate that the fetus, regardless of stage of development, was a person. This law engendered the following three cases in the Supreme Court of California that dealt with the subject of fetal personhood.

Daubert v. Western Meat Co. 139 Cal. 480; 73 P. 244 (1903) involved a man who was killed on the job due to the company's negligence. At the time, his wife was pregnant. She successfully brought a suit for damages, and when the child was born, the child also brought suit for the wrongful death of her father. The court ruled against the minor child finding that at the time, the wife was the only heir in actual existence who could bring suit because the child, as a fetus at the time of the father's death, was a part

[404] Robert H. Blank, *Mother and Fetus: Changing Notions of Maternal Responsibility*, [Westport, CT: Greenwood Press, 1992]: 55.

[405] California Civil Code Section 29, 1872

of the mother. However, in his dissent, Judge Beatty invoked the Civil Code stating that the unborn child was a person. Beatty argued that a posthumous child was an heir to the father just as a born child. Thus, and according to the Civil Code, Beatty argued that the now born child had a claim.

Thirty years later, in 1931, *The People v. Don Yates* (114 Cal. App. Supp. 782; 298 P. 961) was argued before the California Supreme Court. This was an especially interesting case because it essentially was a child support claim against the father for the welfare of the fetus. Again relying on the California Civil Code that the unborn child was a person, the appellant pregnant woman charged that the father of the fetus omitted to furnish food, clothing, shelter, and medical assistance to the unborn child of five months gestation. The California court agreed with her claim arguing that an unborn child, just as a born child, needed sustenance. Although the fetus could not receive food, clothing, and shelter directly, it did require these necessities indirectly through the mother. Impairment to the life of the mother would affect the growth and development of the fetus. The court ruled, "In the somewhat analogous case of a nursing infant, it has been held that it is dependent on its father for food, clothing and shelter, and he is subject to criminal prosecution for failing to furnish them" (114 Cal. App. Supp. 782; 298 P. 961, 787). Thus the father was responsible for furnishing basic necessities to his unborn child through the mother.

Finally, the most well-known case resulting from California's grant of fetal personhood was *Scott v. McPheeters*. 33 Cal. App. 2d 629; 92 P.2d 678 (1939) In this case, a mother brought suit on behalf of her eleven-year-old child who claimed medical malpractice by the physician who delivered her. The negligent use of metal clamps and

forceps damaged the child's brain and spine causing permanent paralysis. The court ruled that even though the child was still a fetus in the process of being born at the time of the injury, the child was a person under California law. Thus, the child had the right to sue for injuries sustained. Judge Thompson wrote, "The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding" (33 Cal. App. 2d 629, 633). The California Court's insistence that the fetus was a legal person influenced other American courts.

Seven years later, the US District Court for the District of Columbia heard a similar case in *Bonbrest et al. v. Kotz et al.* 65 F. Supp. 138 (1946). Bette Bonbrest sustained critical injuries during the birthing process, and her father, as her guardian, brought suit against her physician, Dr. Kotz. Because Bonbrest was clearly viable at the time of injury, the court found that she had an independent existence apart from the mother. "True, it is in the womb, but it is capable now of extra-uterine life - and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element - as that term is generally understood" (65 F. Supp. 138. 140). The court further reasoned that if recovery for prenatal injuries is denied, then the child must endure life with a wrong for which there is no remedy. Thus the court essentially overruled *Dietrich* and found that an injury to a viable fetus that is subsequently born alive is recoverable in a court of law.

Other courts picked up on this opinion. For example, in a 1949 negligence case in Ohio state court, the judge ruled that a child could recover for injuries sustained when a fetus. Judge Matthias wrote, "If the common law protects the rights of the unborn child and if every intendment in the law is favorable to him, the inference is inevitable that such unborn child is a person and possesses the rights that inhere in a person even though he is incapable himself to assert them" (*Williams, An Infant, v. The Marion Rapid Transit, Inc.* (152 Ohio St. 114; 87 N.E.2d 334; 1949).

While the *Bonbrest* precedent was becoming the standard for many courts seeking to provide protection for *in utero* injury to the fetus, another type of case was about to find its way through the judicial system. This time, the mother, Josephine Chavez, was accused of homicide. The defendant woman gave birth to a child in 1945 in her bathroom. She cut the umbilical cord and left the newborn under the bathtub to conceal it. The next day, her mother found the dead body of the newborn, and an autopsy revealed that the baby bled to death because the umbilical cord was not tied off. In the case *The People v. Josephine Chavez* (77 Cal. App. 2d 621; 176 P.2d 92; 1947), the court found Chavez guilty of homicide. The court ruled that a child in the process of being born, whether or not that process is complete, is a person and thus could be the victim of homicide. Although it may not have caused a stir at the time of the decision, the case set an important standard for modern cases dealing with partial birth abortion where the live fetus is partly delivered in the birth canal before being destroyed. It also set a standard that mothers could be guilty of negligence to their own fetuses which would become important in later cases concerning drug abuse by pregnant women.

Cases following *Dietrich* began to stretch the boundaries of wrongful injury, viability, and born alive policy for fetal cases. In 1949, the case *Verkennes v. Corniea* (229 Minn. 365; 38 N.W.2d 838), was unique because in this wrongful death case, the fetus was stillborn. In previous cases of injury the fetus, the courts allowed compensation when the child was subsequently born alive. Most wrongful death laws required a "person" who had died, and since the status of the fetus as a "person" was questionable, it was hard to recover for the death of the fetus. Further, with limited knowledge of embryology and fetal growth, it was sometimes difficult to pin down causality for an injury. The Minnesota court relied upon the capacities of the fetus and ruled that because the fetus was viable at the time of injury, the fetus had the potential to live and grow. The court found it appropriate to treat the fetus as a newborn infant and ruled that the injury was to the child itself and not just to the mother. *Verkennes v. Corniea* was the first court to allow recovery for prenatal death under a wrongful death statute. Other courts followed this development and held that a live birth requirement was logically indefensible. To deny a right of action for a stillborn child leads to the inconsistent outcome that a tortfeasor could be held liable for injuries for a fetus born alive but not for more severe injuries to a fetus who is stillborn. In effect, the tortfeasor is rewarded for killing rather than injuring a fetus.

In a 1953 New York case of prenatal injury, the court ruled that from the moment of conception, the fetus was a separate being able to recover for injury. In *Kelly v. Gregory,* Judge Bergan stated, "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and fetal development now than when some of

the common-law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception" (282 A.D. 542; 125 N.Y.S.2d 696). This case helped set the precedent that although important, viability was not necessary for a fetal claim. Legal scholar Carol A. Simon argues that the trend toward eliminating the viability criteria is correct because a fetus can sustain an injury before or after viability. She writes, "Once the child is born alive, it is a separate human being deserving of compensation, regardless of whether it was a separate legal entity at the time the injury was originally inflicted. At birth, and throughout its life, the child exhibits the injury which was caused by the prior negligent act."[406] In fact, injuries inflicted during the first trimester are likely to produce the most severe congenital deformities.[407]

The Fetus Begins to Lose Recognition

Although the New York court in *Kelly v. Gregory* ruled that a fetus was a separate agent and a child could claim injury for harms committed while still a fetus, this decision did not mean that New York set a precedent for granting fetal personhood in all legal instances. New York also set precedents that for personal property matters, the fetal person was simply a legal fiction with no claim to inheritance. In the case *In re Peabody*, 5 N.Y.2d 541; 158 N.E.2d 841 (1959), the court found that the fetus could not become beneficiary of a trust until birth when the then born child became a person in fact.

Again in New York, the court ruled against parents seeking recompense for a wrongful death claim when their twins were stillborn following an automobile accident.

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[406] Carol Ann Simon, "Parental Liability for Prenatal Injury," *Columbia Journal of Law and Social Relations* 14 (1978): 55.

[407] Robert H. Blank, *Mother and Fetus: Changing Notions of Maternal Responsibility*, [Westport, CT: Greenwood Press, 1992]: 58.

In the case *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901 (1969), the court ruled "before there may be a 'decedent,' there must, perforce be birth, a person born alive" and thus ruled that since the fetuses were stillborn, there was no case beyond the damages to the parents in their own right. Relying on *In re Peabody*, the court held that a "child *en ventre sa mere* is not a person 'beneficially interested' in an irrevocable trust" and further, even though the law has recognized a theological or biological separate existence apart from the mother, "the law has never considered the unborn foetus as having a separate 'juridical existence'" (24 N.Y.2d 478, 485).

In 1970, a case involving a pre-viable fetus was again denied a wrongful death decision. This case was heard in the Supreme Court of California, the same court that in the first half of the century broke new ground by allowing compensation for harm done to fetuses. In this case, a husband met his estranged wife, who was in an advanced state of pregnancy from another man, on a mountain road and beat her until she miscarried. The woman filed charges for assault on her and for the murder of her fetus. In the decision *Keeler v. Superior Court of Amador County*, 2 Cal. 3d 619 the court ruled against the charge of murder deciding that an unborn fetus did not meet the definition of "human being" within California's homicide statutes. This ruling was a setback for fetal recognition, but also was a major setback in the crusade to end battery against women. Unhappy with the California Supreme Court's decision, the California legislature responded by creating a new category of murder that included fetuses. The California Penal Code Section 187(a) which concerned homicide added the fetus to the list of possible murder victims. Despite the amendment to the California law, the trend of the courts was toward denying any claims of personhood to the fetus. As this trend was

developing, the issue of abortion was gaining steam and would inevitably end up in the U.S. Supreme Court.

Roe v. Wade: The Landmark Case

The previous review of cases leads up to an examination of *Roe v. Wade* and subsequent abortion related cases which defined modern debate concerning fetal personhood. *Roe v. Wade* is the seminal case where personhood is directly addressed; however before delving into the details of that case, a brief look at *Byrn v. New York City Health & Hospitals Corp.* helps set the stage because this case essentially outlines many of the arguments concerning personhood that would surface in *Roe* and in its wake.

In *Byrn v. New York City Health & Hospitals Corp.* 31 N.Y.2d 194; 286 N.E.2d 887 (1972), the plaintiff, as a guardian of unborn children, sought to declare New York's 1970 abortion liberalization statute unconstitutional. This is immediately striking because the plaintiff claimed to represent fetuses. Advocates against abortion have often protested that Supreme Court cases fail to adequately represent the interests of fetus through a third-party or guardian representative.

In his opinion, Judge Breitel went straight to the heart of the matter and said that the real debate turns on whether a "human entity , conceived but not yet born, is and must be recognized as a person in the law" (31 N.Y.2d 194, 200). Breitel stated that although religion and philosophy could regard the fetus as a person at any stage, the law does not necessarily correspond to this. As an example, Breitel referred to the slave who was denied personhood and the monk who is sometimes regarded as civilly dead when he enters the monastery. He then finds that a fetus in the womb is not a legal person with rights; instead, granting personhood to the fetus when it benefits a born child is a legal

fiction. He concludes by finding that the Constitution does not confer legal personality for the unborn, and the legislature may confer protection short of conferring legal personality.

Dissents by Judge Burke and Judge Scileppi provide the opposing arguments employed by those in favor of fetal personhood. Burke found that the majority opinion was irrational and conflicted with natural justice. Burke stated that the most basic right is the right to live, and this should be guaranteed to the fetus which is a live human being and furthermore is defenseless (31 N.Y.2d 194, 206). Judge Scileppi argued that classifying living, human beings as nonpersons is a constitutionally suspect classification. He continued that it was his moral and legal belief that life begins at conception because at that moment the fetus gains existence both in fact and in legal contemplation. "To conclude otherwise is to countenance genocide" (31 N.Y.2d 194, 213). The arguments of the judges in *Byrn* would again be echoed as advocates on either side of the abortion debate readied themselves for *Roe v. Wade*.

Roe v. Wade, 410 U.S. 113, decided in 1973, involved an unmarried, Texas woman who was prevented from seeking an abortion by Texas's criminal abortion laws. The case immediately attracted worldwide attention, and *amicus curiae* briefs poured in to the Supreme Court supporting both sides of the debate. Anti abortion briefs generally argued that an unborn child was a human being and a person deserving of state protection. Pro-abortion briefs generally argued that the fetus was not a person in the law, and that the constitutional rights of the woman to bodily integrity, personal liberty, and freedom of choice must be protected.

Justice Blackmun wrote the opinion of the Court which established a Constitutional right to an abortion. The opinion is long and wide-ranging, but this analysis will focus on the portions of the opinion concerning fetal personhood. Blackmun began with a historical review of abortion policies similar to the review in the previous section. He concluded this section by finding that throughout much of history the fetus was not regarded as a person, and women had a far broader right to terminate a pregnancy than they do in modern times. However, as the previous historical section demonstrated, Blackmun's historical conclusions have been criticized by many historians, and Blackmun was probably incorrect in assuming that abortion rights were as liberal as he assumed.

Blackmun then turns to the issue of personhood and states that if the fetus had personhood, the appellant's case collapses because the fetus's right to life would be guaranteed by the Fourteenth Amendment. However, as explained earlier, this is not necessarily true. Even if the fetus were a person, the rights of the fetus would be in conflict of another person – the woman carrying it. The rights of the fetus would not automatically outweigh those of the woman. If Blackmun had not made this argument, perhaps the Court would have more leeway to rule that the fetus is a person, but still maintain that the right of a woman over her body and personal choices outweighs the fetus's right to life.

Blackmun looks to the Constitution for an explication of the word "person" and finds that the Constitution does not define the word. After looking at the uses of the word "person" in the Fifth, Twelfth, Fourteenth, and the Twenty-second Amendments; the listing of qualifications for Presidents, Senators, and Representatives; as well as the

Migration and Importation provision, the Extradition provisions, and the Fugitive Slave Clause, Blackmun finds that in all these cases, the word is only applied post-natally. He concludes that this means there is not a pre-natal application for the word. However, Blackmun is not entirely correct that this precludes a pre-natal application. Each of these instances restricts a broad class of persons for the particular purpose of the specific provision. These instances do not define "person" as a pre-natal or post-natal individual. For example, the qualification for being a Representative is a person twenty-five years of age, but this does not mean that individuals under twenty-four are non-persons nor does it mean that when an individual turns twenty-five he suddenly becomes a person.[408] Carrying Blackmun's argument that the Constitution applied post-natally to its logical conclusion, it can further be argued that the Constitution only applied to adult, white males since that is whom many of the framers originally had in mind when they discussed "persons." The use of the word "person" within each of the Constitutional contexts does not offer any evidence for adjudicating at what particular age or stage in development a human being becomes a person. The simple fact is that the Constitution does not define the parameters of "person."

Blackmun then points out that exceptions exist in every state abortion law for the purpose of saving the life of the mother. If the fetus was a person under the Fourteenth Amendment, then these types of exceptions would not be allowable. However, Blackmun does not take into account self defense provisions that would allow the mother to defend against threats to her life.

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[408] For an in-depth discussion of Justice Blackmun argument, see John B. Gorby "The Right to an Abortion, the Scope of the Fourteenth Amendment 'Personhood, and the Supreme Court's Birth Requirement" 4 S. Ill. U. L. J. (1979).

Blackmun correctly points out that most abortion laws charge the physician with the crime of abortion. If the fetus was a person, the woman must also be charged as a principal or accomplice to murder. Further, if fetuses were persons, then the penalties for abortion should be equivalent to the penalties for murder. Although Blackmun does not address this issue, Texas is a death penalty state and if a woman were convicted of multiple murders of a fetal person, she could conceivably be sentenced to death. Blackmun's arguments in this vein are strong, and if the fetus was granted personhood and abortion made illegal, it seems that a woman violating abortion prohibitions would need to face penalties for murder.

Blackmun concludes his exegesis of fetal personhood by concluding, "All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn" (410 U.S. 113, 158). A bit later in the opinion, he again states, "In short, the unborn have never been recognized in the law as persons in the whole sense" (410 U.S. 113, 162).

Characterizing fetuses as not recognized "persons in the whole sense" creates a list of rebuttals. Many categories of human beings have not been recognized as "persons in the whole sense" in that they did not have the full panoply of rights guaranteed by the Constitution. Examples in American history include women, slaves, and the mentally or physically handicapped. However, the law still protected the lives of these beings even if not everyone agreed that they were "persons." Thus, just because fetuses are not

"persons in the whole sense" does not mean that their existence can be ended through abortion.

After concluding that the fetus is not a person, Blackmun goes on to state his case for legality of abortion concluding that the state cannot override the rights of a woman concerning her pregnancy. Blackmun argues that the right to privacy can be extended to cover a woman's decision in abortion which is a private matter. In this regard, the privacy right to abortion is a penumbral right stemming from the Fourteenth Amendment. Ironically, the right to life for the fetus can also be seen as a penumbral right extending from the Fifth and Fourteenth Amendment's right to life, liberty and property. However, Blackmun did not agree with this argument and thus extended the right to abortion through viability.

The Supreme Court needed to come to a decision as to when the state could intervene in a woman's decision to abort in order to protect the fetus. The Court chose viability and hence viability has become an important milestone. Blackmun contends that viability has both logical and biological justification and is the point at which the fetus has the capability for meaningful life outside of the womb. As the previous review of cases illustrated, viability also has justification in a long line of precedents. However, viability is not a developmental milestone that is set in stone – some fetuses reach viability earlier than others, and advancing medical technology has also allowed earlier points of viability.

As constitutional law scholar Jed Rubenfeld points out, "To be sure, viability can be viewed as a point in which a 'potential life' comes an important step closer to actuality; but a pre-viable fetus is no less a potential human being just because current

medical technology is not yet sufficiently advanced to allow it to continue its development outside the womb."[409] In fact, there may come a time when artificial wombs are sufficiently developed so that all fetuses can be extracted from the human womb and placed in an artificial womb until the fetus is developed. Already, doctors are able to perform artificial conception and grow a conceptus until the stage of blastocyst which is a mass of about 150 cells and occurs about five days after conception.[410] If technology advances to the point that fetuses are viable outside the human womb throughout pregnancy, the Court may have to rethink its decision.

Further, the right to abortion recognized in *Roe v. Wade* was a right to empty the womb of the fetus, but necessarily to ensure that the fetus will die in the process. If artificial wombs become a reality, it is conceivable that a woman would have the right to empty her womb but would then need to surrender the fetus to an artificial womb (or even a human surrogate womb) until the gestational process is finished. Fellow constitutional law scholar Laurence Tribe points out,

> Once the fetus can be severed from the woman by a process which enables it to survive, leaving the abortion decision to private choice would confer not only a right to remove an unwanted fetus from one's body, but also an entirely separate right to ensure its death. Apart from the problematic character of any claim in behalf of the latter right, its recognition and enforcement would be indistinguishable from recognizing and enforcing a right to commit infanticide, a crime nowhere mentioned by the Court in *Roe*.[411]

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[409] Jed Rubenfeld, "On the Legal Status of the Proposition that 'Life Begins at Conception,'" *Stanford Law Review* 43 (1991): 607.

[410] In vitro fertilization, now a somewhat common form of infertility treatment, involves growing an embryo to the stage of blastocyst and then implanting it in a woman's uterus.

[411] Laurence H. Tribe. "The Supreme Court 1972 Term," *Harvard Law Review* 87, no. 1 (1973): 27.

Thus, the right to abortion in the sense of removing the woman's burden must be distinguished from the right to kill the fetus. Many state laws allowing abortion do contain a clause concerning saving the fetus if possible. Although Blackmun granted women the right to an abortion, he does concede that the state has an interest in protecting the potentiality of human life, and this interest grows as the fetus develops. In his discussion of the state interest in protecting the fetus, Blackmun creates a new category of being called "potential life" which is the fetus *in utero*. Because Blackmun argues that those trained in medicine, philosophy, and theology cannot agree when life begins, Blackmun concludes that the Court does not need to resolve the issue. Therefore, Blackmun invents "potential life" to refer to beings that are assuredly human life. However, "potential life" as a new category created a whole new point of contention within the abortion debate. As was argued earlier, the human fetus is a biological human life from conception. However, if "life" is used to mean something more, such as a rational being in Dennett's criteria, then the fetus is a potential life. Introducing "potential life" seems to muddy the already contested terms of the debate. It would have been better if Blackmun would have said "potential person" since "person" is already a contentious category in respect to fetuses and signifies the same debate.

Although *Roe v. Wade* was the seminal abortion case, when the Supreme Court adjudicated the case, they also included its companion case *Doe v. Bolton*, 410 U.S. 179 (1973). This was a case from Georgia where an impoverished, married, pregnant woman and twenty-three others including physicians, nurses, clergy, and social workers brought suit seeking a declaratory judgment against Georgia's abortion statutes. The Georgia law forbade abortion except for cases of rape, fetal deformity, or severe injury to the mother.

It also required three physicians and a committee of the staff of the hospital performing the abortion to approve of the procedure.

In his majority opinion, Justice Blackmun found that the Georgia law was unconstitutionally vague because the physician was not allowed to perform an abortion except when it was "based upon his best clinical judgment that an abortion is necessary." The word "necessary" was vague because the physician could not be certain when an abortion was allowed. Blackmun further ruled that a medical judgment could be made in light of the following factors: "physical, emotion, psychological, familial, and health" (410 U.S. 179, 192). Blackmun's opinion essentially left the door open for the physician to perform an abortion for a very broad range of reasons because almost any type of hardship could fit into one of those categories. Thus while *Roe v. Wade* opened the door to legal abortions, the companion case *Doe v. Bolton* created very liberal grounds for abortions.

In a concurring opinion, Justice Douglas addressed the issue of fetal personhood arguing that "to say that life is present at conception is to give recognition to the potential, rather than the actual" (410 U.S. 179, 217). He continued explaining that the development of life takes time, and until it is present it cannot be destroyed. He also pointed out that the rites of Baptism are not performed and death certificates are not required when a fetus dies in a miscarriage. In an interesting side note, both Sandra Cano who was "Doe" and Norma McCorvey who was "Roe" later regretted their abortion cases and became activists for the anti-abortion movement.

The Supreme Court chose to hear *Roe v. Wade* and *Doe v. Bolton,* but another case concerning abortion was also presented to the Supreme Court. *Doe v. Scott* 321 F.

Supp. 1385 (N.D. Ill. 1971) was a unique case because a Chicago physician had been appointed *guardian ad litem* to represent the interests of the unborn. Because standing for the fetus was recognized through a guardian, the fetus was able to "participate" in the lawsuits. Unfortunately for this study, the Supreme Court chose to hear *Roe* and *Doe v. Bolton* and passed over *Doe v. Scott*. It would have been fascinating from the perspective of fetal personhood to hear the opinion of the Court in a case where the fetus was a direct party. It is possible in future cases that a court could allow a legal guardian to be appointed for a viable fetus.

Beyond Roe v. Wade

The decision in *Roe v. Wade* stimulated debate in both academic circles and the general public concerning fetal personhood. The decision also set a precedent for fetal cases beyond issues of abortion. In 1975, the Michigan Court of Appeals heard *Toth v. Goree*, 65 Mich. App. 296; 237 N.W.2d 297. In this case, a woman who was three months pregnant suffered a miscarriage after an automobile accident. The Michigan Court ruled that a nonviable fetus was not a "person" under the wrongful death act. Although the *Roe* Court did not extend the condition of viability to cases unrelated to abortion, the decision set a new precedent of considering the criterion of viability even though past courts had often overlooked viability in wrongful injury or death cases. In fact, in his dissent, Judge Mahar argued precisely that the *Roe* decision was not applicable to the wrongful death act.

Again in 1976, the California Court of Appeals denied a wrongful death charge because the fetus was only thirteen weeks along. In this especially brutal case of spousal abuse, a husband said he did not want the fetus to live, and then kicked his pregnant wife

in the stomach and back while repeating "bleed, baby, bleed" (*The People v. Smith,* 59 Cal. App. 3d, 751). The Court of Appeal held that a nonviable fetus under 24 weeks did not qualify for a murder charge even though the California legislature had amended the criminal statutes to include fetuses. Citing *Roe v. Wade,* the court found that until the capacity for independent life is attained, there is only a potential human life. Judge Fleming wrote,

> The underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a nonviable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person. (59 Cal. App. 3d, 757)

However, the *Roe* Court did not imply that it necessarily follows that a nonviable fetus cannot be the victim of a wrongful death and that the woman cannot claim recompense on behalf of her fetus. In this case, there was no conflict between the mother and fetus, and thus a harm to the fetus was also a harm to the mother who desired to give birth to her child. Abortion cases and wrongful injury and death cases do not necessarily fall within the same category. In fact, *Roe v. Wade* specifically noted that the unborn have certain legal rights. The court's ruling in this case was a setback for battered women and for the protection of the fetuses that women intend to carry to term.

This problem is addressed by theorists such as Maguire who adhere to a personhood through social recognition.[412] As explained in the previous sections, when a woman recognizes her fetus as part of the social community, the woman acknowledges that the fetus is a person and desires life for the fetus. The brutal death of the fetus by a

[412] Marjorie Reiley Maguire, *Symbiosis, Biology, and Personalization*, in *Abortion Rights and Fetal Personhood*, ed. Edd Doerr and James W. Prescott [Rapid City, SD: Centerline Press, 1989].

third party is a loss to the mother who has a right to recompense through punishing the perpetrator. Applying *Roe*'s decision that the fetus is not a person to cases not pertaining to abortion had deleterious effects for women who sought justice after an injury that caused miscarriage.

Other courts did not apply *Roe v. Wade* in fetal cases not involving abortion, but instead held to precedents of fetal injury cases that a pre-viable fetus could make a claim for injury *in utero*. In *Renslow v. Mennonite Hospital* 67 Ill. 2d 348; 367 N.E.2d 1250, (1977), the Supreme Court of Illinois awarded damages to a minor child who was injured by medical negligence to her mother. In this interesting case, the mother, Renslow, was given a blood transfusion when she was thirteen years old. The hospital gave her Rh-positive blood when Renslow was Rh-negative which sensitized her blood. Renslow did not know about the improper transfusion and first discovered the mistake when receiving prenatal care before giving birth to her child. The sensitization caused prenatal damage to the fetus and caused the premature birth. The minor child was born jaundiced and suffering from hyperbilirubinemia. After two complete blood transfusions, the child had damage to various organs, brain, and nervous system.

Relying on Boggs's dissent in *Bonbrest v. Kotz*, the Illinois court found that an infant had a separate existence from the mother, and even though the fetus was not viable at the time of the injury, she still had a claim for her sustained injuries. The decision is unique because not only was the fetus not viable, she was not even contemplated when the mother was injured at age thirteen. This case expanded the ability of an individual to claim an injury as a fetus and even before conception.

In the wake of *Roe*, another question concerning fetal injury is certain to arise. There are instances where an abortion fails and the fetus is subsequently born alive but with grave injuries or retardation. Does the fetus who is subsequently born alive have a claim for its injuries? It seems certain that the line of precedent would allow the person who was the fetus to sue the physician and the medical establishment for medical mistakes. However, does the person also have a claim against the woman who authorized and underwent the failed abortion? This is an issue that is yet to be settled.

Although some courts following *Roe* have limited the application of wrongful death statutes to viable fetuses, since the 1970s almost all states do have some type of protection for the fetus within their wrongful death statutes. Other courts have taken a path similar to *Renslow* and have found that a fetus at all stages of development should be included under a wrongful death law. The Rhode Island Supreme Court in *Presley v. Newport Hospital* 117 RI 177 (1976) found that the old precedent of *Dietrich* no longer applied and a fetus, whether viable or previable, was a person under the Rhode Island wrongful death statute. Similarly, the Louisiana Supreme Court allowed compensation for the wrongful death of a six month fetus killed in an automobile accident, 402 So.2d 633 (1981).

The Abortion Debate Continues

Soon after hearing *Roe* and *Doe,* the Supreme Court faced other cases concerning abortion. Just three years later, in 1976, the Court decided *Planned Parenthood v. Danforth* (428 U.S. 52) which challenged Missouri's restrictions on abortion that included a requirement for married women to seek their husband's consent before an abortion, for minors to have parental consent, and other women to provide their own

written consent; a requirement that the attending physician certify that the fetus was not viable; and a standard of care provision requiring the physician to take care to preserve the life and health of the fetus among other requirements. Finally the Missouri law prohibited abortions using a saline amniocentesis.

In his opinion, Justice Blackmun found that the viability requirement was constitutional since it did not violate the allowed state regulations of abortion, but the first sentence of Missouri's standard of care provision was unconstitutional because requiring a physician to preserve the life and health of the fetus at all stages of pregnancy was unconstitutional. The restriction on saline amniocentesis was also unconstitutional because it failed to provide for the protection of the mother and was instead viewed as an unreasonable or arbitrary regulation. The Court also found that requiring the pregnant woman's consent was not unconstitutional, but requiring spousal consent and parental consent were unconstitutional.

A dissent by Justice White argued, among other things, that the standard of care provision was constitutional because the law simply required that in cases where the fetus was capable of surviving outside of the womb, the physician had a duty to try to preserve the life of that fetus. This argument is similar to Tribe's contention that although the woman has a right to empty her womb through an abortion, she does not have the corresponding right to kill the fetus. If the fetus is able to survive after the womb is emptied, then the physician must try to preserve it.

In *Colautti v. Franklin* 439 U.S. 379 (1979) the Supreme Court again upheld the viability criterion and ruled that Pennsylvania's law requiring a physician to determine that a fetus "is viable" or "may be viable" was unconstitutionally vague. The Court also

ruled that neither the legislature nor the courts could proclaim a certain measure of viability such as weeks of gestation or fetal weight as a determining factor for viability – the decision must be left to the physician. In an important change in word choice, Justice Blackmun said, "the state has a compelling interest in the life or health of the fetus" as opposed to the potential life of the fetus. Further, Blackmun stated that viability meant that the fetus had a "reasonable likelihood of…sustained survival" while Roe used the phrase "potentially able to live" (439 U.S. 379, 288). To speak of "surviving" implies that life exists in the womb. This was a claim that Justice Blackmun was not willing to make in his *Roe* opinion and was a possible signal that Blackmun was reconsidering, in small part, his views on the fetus as being a potential human life.[413] The state's interest in a being that is alive is stronger than its interest in a being that is potentially alive. In his dissent, Justice White argued that the Supreme Court had rescinded the state's police powers to regulate abortion and protect fetal life.

In *City of Akron v. Akron Center for Reproductive Health* 462 U.S. 416 (1983) the Supreme Court struck down Ohio's law that mandated that all second trimester abortions be performed in a hospital and also struck down a provision that required informed consent, a twenty-four hour waiting period, and "humane disposal" of the fetus were unconstitutional. In her dissent, Justice O'Connor argued that the viability standard be replaced with an "unduly burdensome" standard and argued that Ohio's regulations were not unduly burdensome. Writing that the viability criterion was unworkable and *Roe v. Wade* was "on a collision course with itself," O'Connor said,

[413] Eugene Griffin, "Viability and Fetal Life in State Criminal Abortion Laws" *The Journal of Criminal Law and Criminology* 72, no. 1 (1981): 330.

> The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. Although the Court refused to "resolve the difficult question of when life begins," id., at 159, the Court chose the point of viability – when the fetus is capable of life independent of its mother – to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy. (462 U.S. 416, 460-461)

After *Coullati v. Franklin,* Pennsylvania passed a new abortion regulation law that required informed consent of the woman, dissemination of information concerning the risks of abortion, and the presence of a second physician for post-viability abortions among other regulations. An organization of gynecologists and obstetricians filed suit in the case *Thornburgh, Governor of Pennsylvania v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). The issues involved were very similar to those in *City of Akron,* and Justice Blackmun's opinion followed the same line of reasoning that he used in the *Akron* opinion. He found unconstitutional mandated standards of care when the fetus was viable and a requirement that a second physician be present without a medical-emergency exemption. He also ruled that the informed consent requirement that mandate that a woman be given specified information before seeking an abortion was an unconstitutional barricade to her rights. It is noteworthy that Blackmun found the informed consent provision unconstitutional because the clause only required that the doctor inform the patient that the procedure would likely destroy the fetus. The doctor did not need to refer to the fetus as "unborn child" or "person," nor did the doctor need to

describe fetal development or fetal death. The provision did require that the woman be advised of possible medical assistance for childbirth, the father's responsibility for child support, and the possible psychological and physical detriments of an abortion. Overall, Blackmun ruled that the Pennsylvania regulations obstructed a woman's right to abortion and therefore were unconstitutional. He wrote, "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in Roe – whether to end her pregnancy. A woman's right to make that choice freely is fundamental" (476 U.S. 747, 772).

In a concurring opinion, Justice Stevens reasoned that the state's interest in the fetus "increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings." In effect, Justice Stevens argued that the state's interest began when the fetus had the capacity to experience some of Dennett's criteria for personhood – consciousness and the ability to reciprocate. According to the *Roe* Court, the state's interest began when the fetus had just one capacity – the capacity to survive independently. Stevens's criteria differ in an important way because embryology has proven that the fetus has the capability to react to surroundings before viability although it is still unknown if the fetus can feel pain before twenty-four weeks which is the general consensus for viability age.

In his dissenting opinion, Chief Justice Burger argued:

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that

> there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. (476 U.S. 747, 792)

Burger's argument also employs biological criteria but he bases his reasoning on the continuum approach that a fetus is biologically and psychologically the same throughout the stages of human growth and development. Burger boldly argued, "In my view, the time has come to recognize that Roe v. Wade…departs from a proper understanding of the Constitution and to overrule it" (476 U.S. 747, 788).

Chief Justice Burger's dissenting opinion signaled that the Supreme Court's view on abortion was starting to depart from the earlier stance of *Roe v. Wade*. In the same year that the Court decided *Thornburgh*, the Court decided *Bowers v. Hardwick* 478 U.S. 186 (1986) which concerned Georgia's prohibition of sodomy. In this case, the Court ruled that the right of privacy did not include homosexual sodomy because such a right was not "deeply in this Nation's history and tradition" (478 U.S. 186, 192).[414] The privacy right to abortion was not "deeply rooted" either and therefore vulnerable to restriction or even complete reversal.

In 1989, the Court heard *Webster v. Reproductive Health Services* (492 U.S. 490) and began to allow more restrictions on abortion rights. This case involved a Missouri law with several unique provisions. First, the preamble stated that the life of a human being begins at conception and that the fetus had interests in life, health, and well being that were protected by the law. It also required that Missouri's laws be interpreted to provide fetuses with the rights, privileges, and immunities of other persons, citizens, and residents of Missouri subject to the Federal Constitution and the precedents of the Supreme Court. Another section prohibited the use of public employees or facilities for

[414] Quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

abortions not necessary to save the life of the mother. Further, public funds could not be used to encourage or counsel a woman to have an abortion not necessary to save her life. Another provision required the physician to try to determine if the fetus was viable using medical examinations and tests if the woman was believed to be 20 or more weeks pregnant.

Five health care professionals who worked at public facilities along with two nonprofits groups that provided abortions brought suit claiming that act violated the Constitution. In the plurality opinion of the Court, Chief Justice Rehnquist stated that abortion was a liberty interest rather than a fundamental right, and that the Missouri law "permissibly furthers the state's interest in protecting potential human life" 492 U.S. 490, 519.

In a significant change from *Roe v. Wade*, the Court found that a compelling state interest began at conception rather than viability. Because the *Roe* Court recognized an interest in protecting *potential* human life, the *Webster* Court reasoned that a pre-viable fetus was also a *potential* human life, no less than a viable fetus. Again, if the *Roe* Court had used the words "potential person" rather than "potential human life," the *Webster* Court might not have had the opportunity to alter *Roe's* doctrine of viability. The *Webster* Court did not state that the fetus was a person at any time before birth.

In his dissent, Justice Blackmun criticized this change in doctrine and said that after viability the fetus becomes a person with protected legal rights. This is even a more abrupt about face because until this dissent, the Supreme Court had never insinuated that the fetus, at any time, was a legal "person." Even the conservative Justices White and Scalia did not argue for fetal personhood. Although Blackmun was defending abortion

rights, by arguing that a viable fetus was a legal person, through his own *Roe* argument that abortion of a person would not be permitted, Blackmun effectively argued that late term abortions of viable fetuses were not permissible.

Webster v. Reproductive Health Services was an important turning point for abortion rights, but despite the Court's approval of Missouri's restrictions and Blackmun's implication that a viable fetus was a person protected from abortion, the *Webster* opinion did not overturn *Roe v. Wade*. Nor did the opinion explicitly grant fetal personhood. According to the *Webster* plurality, the fetus, at all stages of development, remained a potential human life and not a person.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court again affirmed its commitment to the right of abortion set forth in *Roe v. Wade*. In the Court opinion, Justice O'Connor stated that the abortion right derived from the liberty interest in the Due Process Clause's protection of life, liberty, or property. This was a substantial change from the original position in *Roe v. Wade* that the right to abortion stemmed from a privacy right. While in her *Akron* dissent O'Connor spoke of "compelling" state interests in potential life, in this opinion O'Connor used the less powerful words "substantial" and "profound" to describe the state's interest.

A dissent by Justice Stevens pointed out that since *Roe v. Wade*, no member of the Court had ever questioned *Roe*'s holding that the unborn are not persons in the whole sense. He describes a third-trimester fetus as approaching personhood. (This differs from Blackmun's dissent in *Webster* where he calls viable fetuses "persons.") Stevens quoted a 1992 University of Chicago Law Review article by Ronald Dworkin to drive home his point that fetuses are not persons. In the article, Dworkin argued,

> The suggestion that states are free to declare a fetus a person…assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others. …If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.[415]

Justice Stevens then reasons, taking into account Dworkin's arguments against fetal personhood, that the fetus is not a person with a right to life within the Fourteenth Amendment. He argues that this premise remains a fundamental premise of our constitutional law governing reproductive autonomy (505 U.S. 833, 914).

This line of argument has come under attack particularly from African American anti-abortion groups such as Texas Black Americans for Life who compared Dworkin's arguments to the infamous *Dred Scott* opinion. In his opinion, Taney wrote,

> It is very clear, therefore, that no State can, by any Act or law of its own, passed, since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it. (60 U.S. 393, 406)

The Texas group finds that Dworkin's argument hauntingly familiar to that of *Dred Scott* which limited the personhood of slaves. Further, the group argues that even the Dred Scott Court recognized that those who are not persons within the meaning of the Constitution could have certain rights under state law that the federal courts had to

[415] Ronald Dworkin, "Unenumerated Rights: Whether and How *Roe* Should be Overruled," University of Chicago Law Review 59, (1992): 400-401.

respect. They argue that the Fourteenth Amendment did not give the federal government the power to take away personhood from those who may have been conferred this status under state law.[416]

Planned Parenthood of Southeastern Pennsylvania v. Casey and the other abortion cases that came before the Supreme Court after *Roe v. Wade* illustrate that fetal personhood was a far from settled issue.

More Fetal Issues

While the Supreme Court was facing cases concerning abortion, many state-level cases were being heard concerning other fetal issues. In Georgia, the state supreme court adjudicated a case concerning a pregnant woman who refused to have a cesarean section on religious grounds. This was not the first time such a case had come through the judicial system. In an earlier New Jersey case, *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421 (1964) the court granted the hospital authority to administer blood transfusions to a pregnant woman who refused medical treatment on religious grounds. In this case, the court stated that both the life of the unborn child and the mother were at stake, and thus the forced transfusion was merited.

Georgia was facing the same type of suit in the case *Jefferson v. Griffin Spaulding Hospital* 247 Ga. 86; 274 S.E.2d 457 (1981). The pregnant woman, who was thirty-nine weeks pregnant, refused to have the cesarean even though without it, the survival rate for the fetus was less than one percent and her own survival rate was less than 50 percent. The Georgia Supreme Court, relying on *Roe v. Wade*, upheld the standard of viability and

[416] Texas Black Americans for Life and L.E.A.R.N. (the Life Education And Resource Network) Filed for *Stenberg v. Carhart* (530 U.S. 914).

decided that a fetus in the third trimester had a legal right to the preservation of life that overrode the religious freedom of the mother. The court opinion stated, "the Court concludes and finds as a matter of law that this child is a viable human being and entitled to the protection of the Juvenile Court Code of Georgia." The Georgia court also decided to award temporary custody of the fetus to the Georgia Department of Human Resources until the child was born or until it died in the childbirth process.

This case is important because there was clearly a conflict between a viable fetus's right to preservation of life and the woman's right to religious freedom. The court could have decided that when these two rights come in conflict, the rights of the mother take precedence. Instead, the court decided that the woman had a legally enforceable duty to protect the life of the fetus at the expense of her constitutional rights. This case transcends the boundaries of *Roe v. Wade* which said nothing about a duty on the part of the woman to protect the life of the fetus after viability.

In the late 1980s, a case came before the District of Columbia Court of Appeals that caught national and even international attention. Angela Carder was a terminally ill patient with cancer who was twenty-six weeks pregnant. Hospital attorneys sought a court ruling to clarify if the hospital had a duty to attempt to save the fetus's life when Carder's death was imminent. A cesarean could hasten her death, but gave the fetus a fifty to sixty percent chance of surviving. In 1987, a superior court judge ordered Carder to undergo a cesarean against her wishes and against the wishes of her physician. A hastily convened panel of three judges from the District of Columbia Court of Appeals denied a stay. The cesarean was performed, and the fetus died two hours later and Carder died two days later.

The American Civil Liberties Union requested a review, and the District of Columbia Court of Appeals issued a new *en banc* decision in 1990 for the case *Re A.C.* 573 A.2d 1235. Even though Carder and fetus were both deceased, the court reversed the original decision and held that patient has a right to make informed decisions concerning her health. If the patient is incompetent, the judge must examine previous statements of the patient and views of family members and family physicians to ascertain what the patient would want. Although the court did not say that the state could never prevail over a pregnant patient's interests, it emphasized the need to take care in overriding a patient's interests.

The issue of forced medical intervention on behalf of a fetus is still an open subject in the law. The courts have not established clear boundaries to guide when and under what circumstances the state can intervene in opposition to the woman's wishes. In cases where the woman objects upon religious grounds, the courts have been more willing to override her wishes. On the other hand, when the mother's and the fetus's lives are involved, the courts have been more hesitant. If the courts can order a woman to undergo a cesarean, they may also be able to order a woman to undergo other types of surgeries on her fetus. As fetal surgery becomes more sophisticated and reliable, this is a significant issue of adjudicating the interests of the woman and the interests of the fetus.

Forcing a woman to undergo medical procedures on behalf of her fetus is one way that the state can dictate the behavior of pregnant women. A related situation is when a mother engages in behavior such as drug abuse that has harmful effects on the fetus. If, as many courts have ruled, the viable fetus has a separate claim against prenatal injury and wrongful death from a third party, it seems logical that a pregnant woman can be

charged with harming her fetus. Some of the most deleterious injuries to the fetus *in utero* stem from legal and illegal chemical substances in the body. If a woman uses illegal drugs knowing that they could profoundly affect the fetus, it seems logical that the woman should be liable for that damage. In fact, some courts have been willing to disregard parent-child immunity and allow causes of action on behalf of fetuses and born children who were injured by negligence *in utero*. These cases tend to fall within child abuse statutes.

The Supreme Court of South Carolina has heard two such cases that serve as initial precedents in this developing area of case law. The first, *Whitner v. South Carolina* 492 S.E.2d 777 (1997) involved a charge against Cornelia Whitner for criminal child neglect when her child was born with cocaine metabolites due to Whitner's use of crack cocaine during the third trimester. The South Carolina court maintained that viable fetuses were persons with legal rights and privileges. Thus, the court held, "It would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse" (492 S.E.2d 777, 8). The court upheld Whitner's conviction of child abuse of her viable fetus.

In 2002, the Supreme Court of South Carolina heard another case involving crack cocaine, but this time the fetus was stillborn due to the ingestion of the drugs. In the case *State v. Regina D. McKnight* Opinion No. 25585 (2003), the court upheld a homicide conviction against McKnight citing *Whitner v. South Caroline* and a 2000 statute that stated the term "child" included viable fetuses.

These cases raise new questions about the nature and extent of society's interest in fetal life. They also illustrate a powerful claim of the fetus against the pregnant woman

stemming from the viable fetus's recognition as a separate being. Although a woman does not have an obligation to allow a fetus to remain in her body and thus has a right to abort a fetus, once a woman forgoes the option of abortion, she assumes obligations and duties to the fetus that can limit her freedom and autonomy. If a woman aborts the fetus, no subsequent child will be born that will suffer the consequences of her potentially harmful actions. But if a woman injures the fetus *in utero* so that it is subsequently born with serious medical problems, there is a separate individual who suffers from her harmful actions. Legal scholar John Robertson, who specializes in bioethical issues, argues,

> The mother has, if she conceives and chooses not to abort, a legal and moral duty to bring the child into the world as healthy as is reasonably possible. She has a duty to avoid actions or omissions that will damage the fetus and child, just as she has a duty to protect the child's welfare once it is born until she transfers this duty to another. In terms of fetal rights, a fetus has no right to be conceived or, once conceived, to be carried to viability. But once the mother decides not to terminate the pregnancy, the viable fetus acquires rights to have the mother conduct her life in ways that will not injure it.[417]

If a woman takes actions that might be harmful to her fetus such as substance abuse, she may decide to abort the fetus rather than face criminal prosecution. Although many states are prosecuting women for drug abuse while pregnant, in *Ferguson v. City of Charleston* 532 U.S. 67 (2001), the Supreme Court held that a state hospital that routinely tested the urine of pregnant patients for drugs violated the prohibition against unreasonable searches. This has not seemingly slowed the number of prosecutions of women for *in utero* drug abuse of the fetus. The state's ability to compel women to undergo medical procedures on behalf of the fetus and to refrain from certain harmful

[417] John A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth," *Virginia Law Review* 69, no. 3, (1983): 438.

behaviors on behalf of the fetus signify some of the ways in which a fetus is gaining rights and protections under the law. This expansion of fetal rights may indicate an expansion of fetal personhood in arenas other than abortion.

In 1992, the Supreme Court of Tennessee heard a case that speaks to new legal issues that arise from the rapidly growing medical progress in embryology and fertility medicine. The case involved in vitro fertilization (IVF). Junior Lewis Davis filed for divorce against Mary Sue Davis, and they were able to agree to dissolution terms except for who was to have "custody" of their seven frozen embryos stored at a fertility clinic. Extra embryos beyond those needed to induce a pregnancy are a common occurrence with IVF, and most fertility clinics store these embryos in a cryogenic safe for future use. Mary Sue Davis originally asked for control of the frozen embryos with the intent to try for a pregnancy after the divorce. Junior Davis objected saying that he did not want to become a parent outside of marriage. The trial court ruled that the embryos were human beings from the moment of fertilization and awarded them to Mary Sue Davis and directed that she be allowed to bring the children to term through implantation.

When the Supreme Court of Tennessee heard the case *Davis v. Davis,* 842 S.W.2d 588 (1992), one of the fundamental issues was whether the frozen embryos were persons or property in the law. The court reasoned that one extreme view was that the embryos were human subjects that required the rights of a person. The opposite extreme view was that the embryo's status was no different than any other type of human tissue and no limits should be placed on actions with the embryos. However, the court agreed with an intermediate position that the frozen embryo deserved greater respect than that given to human tissue because it had the potential to become a person and had symbolic value.

But the frozen embryo did not have the status of an actual person because it did not have any of the features of personhood, was not a developed individual, and may not ever develop biologically. Thus, the court stated, "We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." (842 S.W.2d 588, 29)

This case truly was new ground for the judicial system. The laboratory conceived embryo did not pose the bodily integrity issues of a woman seeking an abortion – the embryo in the Petri dish was certainly not a part of any woman's body. However, as the biological product of a woman's egg and a man's sperm, there were issues of possession belonging to both the woman and the man. If possession were translated to mean ownership and thus the embryo was interpreted as property, the philosophical issues concerning human property arise. There is a fine line between granting property rights in potential persons and reverting to property rights in adult persons which is essentially slavery. Commodification of any human life is questionable.

On the other hand, an embryo in the very early stages before uterine attachment cannot easily be considered a full fledged person. At this stage, the stem cells are unspecialized and still have the potential to develop into any body part or to split through a process called twinning. Those who argue for a biological continuum view that personhood should begin at the moment of conception might find that these embryos have a claim to personhood. However, using Dennett's criteria for personhood or Rosalind's virtue theory of personhood, the claim of the early embryo is not very strong.

This is an issue of fetal personhood that is very much undecided within the law because the technology is relatively new and very few cases concerning frozen embryos have come through the courts.[418] After *Davis v. Davis,* most fertility clinics began requiring couples to sign legally binding cryopreservation agreements that would dictate the disposition of unused frozen embryos should a couple divorce and disagree on the fate of their embryos. In the few cases decided after *Davis,* the courts generally scrutinized the terms of the agreements based on contract law rather than delve into the issue of whether or not the embryos should be considered persons or property. In *Kass v. Kass* (696 N.E.2d 174,1998), the New York Court of Appeals followed the *Roe* decision to determine that the embryos in question were not Constitutional persons but did not delve into the ontological issues revolving around the status of an embryo. Instead, the Court simply enforced the cryopreservation agreement stating that unused frozen embryos would be donated to research if the couple separated or divorced.

Two cases following on the heels of *Kass v. Kass* maintained the precedent that an embryo was not a person while avoiding an extensive discussion of the embryo's status. In *A.Z. v. B.Z.*, (725 N.E.2d 1051, 2000) the Supreme Judicial Court of Massachusetts relied on *Kass v. Kass* to hold that an embryo was not a person. In this case, the couple signed a cryopreservation contract which stipulated that if the couple should separate, the embryos would be returned to the wife for implant. However, rather than upholding the contract, the Massachusetts Court determined that the respect for

[418] To the best of my knowledge, only a few cases have been tried concerning the status of frozen embryos: *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989), *Davis v. Davis, Kass v. Kass* (696 N.E.2d 174,1998), *A.Z. v. B.Z.*, (725 N.E.2d 1051, 2000), *Cahill v. Cahill*, (757 So.2d 465, 467 Ala. Civ. App. 2000), *J.B. v. M.B.*, (783 A.2d 707, 2001), *Litowitz v. Litowitz,* (48 P.3d 261, 2002), *In re Marriage of Witten*, (672 N.W.2d 768, Iowa 2003); *Roman v. Roman* (193 SW3d 40, 50 Tex App, 2006), *Dahl v. Angle* (222 Or App 572, 2009), *Karmasu v. Karmasu*, (2009-Ohio-5252) and *In re* Marriage of Nash, 150 Wash. App. 1029 (2009).

liberty and privacy accorded to an individual meant that the Court could not compel an individual to become a parent against his or her wishes. Therefore, the Court permanently enjoined the wife from ever thawing and using the embryos. The result of *A.Z. v. B.Z.* was influential in a similar case where the wife wanted to discard the embryos and the husband wished to donate the embryos to another couple. Although the cryopreservation contract stipulated that in the event of a divorce the embryos would be donated to the clinic, in *J.B. v. M.B.*, (783 A.2d 707, 2001), the New Jersey Supreme Court ruled that the right to refuse procreation should not be violated even though the wife would not be raising the child herself. In both of these cases, the courts relied on an individual's right to refuse procreation as opposed to allowing the other party to thaw and develop the embryos to term.[419] Both cases stated that an embryo was not a person but did not go into a detailed discussion of nuanced dichotomies of personhood and property. In 2002, a case in Washington State raised these dichotomies.

David Litowitz and Becky Litowitz used donated eggs and a surrogate mother in an IVF procedure that successfully produced a daughter. Soon after, the couple separated and disagreed on the disposition of their remaining frozen embryos. David wanted to place the remaining frozen embryos up for adoption while Becky wanted to use a surrogate mother to implant the embryos and then raise the resulting children as her own. Their cryopreservation contract stipulated that if the couple did not retrieve their embryos within five years, the embryos would be thawed and but not developed which would effectively destroy the embryos. It also stipulated that in the event of a divorce, if the couple could not reach a consensus concerning disposition, the conflict would be

adjudicated in court. The case reached the Washington State Supreme Court in *Litowitz v. Litowitz,* (48 P.3d 261, 2002).

The cryopreservation agreement stated that the "legal ownership of any stored pre zygotes must be determined in a property settlement" which effectively classified the embryos as property rather than persons (48 P.3d 261, 524). However, in her petition to the court, Becky denied that embryos were property and used the term "child" to refer to the embryos claiming that she had a constitutional right to custody and companionship of a child (48 P.3d 261, 531). Thus the Washington Supreme Court was directly faced with the dilemma of classifying the embryos as property or person. Instead, the Court sidestepped the issue claiming "whether a pre-embryo is a 'child' is not a logical or relevant inquiry under the record now before this court. Besides, Petitioner has not cited sufficient authority to support her argument" (48 P.3d 261, 531).

The Washington Supreme Court did not discuss the property classification of the contract and instead enforced the section of the contract that stated that unclaimed embryos would be thawed and not developed. The effective destruction of the embryos was contrary to the wishes of both David and Becky neither of whom wanted to destroy the embryos but wanted the embryos to be developed albeit in different manners. In his dissent, Judge Chambers criticized the decision saying that the ruling "calls for the destruction of unborn human life even when, or if, both contracting parties agreed the pre-embryos should be brought to fruition as a living child" (48 P.3d 261, 530). Chambers likened the decision to the Biblical story of Solomon who, when faced with a disagreement over the true parentage of a child, ruled that the baby should be cut in half to appease both parties. Becky Litowitz vehemently disagreed with the decision and tried

to take her case to the U.S. Supreme Court. The Supreme Court denied Becky Litowitz's petition for a writ of certiorari (*Litowitz v. Litowitz*, 537 U.S. 1191, 2003). The denial was unfortunate for this study because it would have given the Supreme Court an opportunity to clarify the personhood status of an embryo in a new context and would set the precedent for cases related to IVF procedures that will certainly rise in number as IVF becomes more popular with infertile couples.

In the last five years, several cases have confirmed the property value of frozen embryos. In *Roman v. Roman* (193 SW3d 40, 50 Tex App, 2006), the Texas Court of Appeals ruled that frozen embryos were community property and that they should be destroyed according to the wishes of the husband, Randy Roman, who could not be forced into procreation. Again the U.S. Supreme Court denied the petition for a writ of certiorari (553 U.S. 1048, 2008). In *Dahl v. Angle* (222 Or App 572, 2009), the Court of Appeals of the State of Oregon found that frozen embryos were marital property subject to contractual rights. Writing for the court, Judge Armstrong explained, "We acknowledge that there is some inherent awkwardness in describing these contractual rights as 'personal property,' as we discuss in more detail below. However, we nonetheless conclude that the right to possess or dispose of the frozen embryos is personal property that is subject to a just and proper division under ORS 107.105" (222 Or App 572, 838). The court followed the precedent of ruling in favor of the party that did not want to procreate, however the decision was groundbreaking in its categorization of the frozen embryo as property.

These cases represent the few IVF related opinions that concern the personhood status of frozen embryos. However, IVF is becoming increasingly popular for couples

facing fertility problems and thus will soon become a mainstream issue for the courts. While *Dahl v. Angle* suggests that the embryo is property, some state legislatures have disagreed. Louisiana has already passed a law stating that non-implanted embryos are juridical persons that cannot be destroyed. As the courts adjudicate more cases involving frozen embryos, the rights of biological parents, surrogate mothers, and the medical laboratories the produced the embryos, many issues concerning personhood and property will arise. The courts will have to revisit the issue of whether the frozen embryo is marital property or has an elevated status based on the criteria of personhood. This issue portends to create controversy on the level of *Roe v. Wade*.

The Continuing Issue of Abortion

While the state courts were navigating uncharted territory such as IVF cases, the U.S. Supreme Court was also entering new territory in the arena of abortion. At issue was a Nebraska law that banned intact dilation and extraction, commonly known as partial birth abortion, without exception for the health of the mother. Partial birth abortion is a controversial procedure in which the physician delivers the body of the fetus, except for the head, into the birth canal. The head is then pierced with scissors and the brain matter is suctioned out causing the skull to collapse. The dead fetus is then removed from the woman's body. This procedure was contentious because a live fetus is partially born – thus the name partial birth abortion – and it usually involves late term fetuses. Although the scientific community has differing opinions on the subject, there is a possibility that if the procedure is performed late enough in the pregnancy, the fetus will be able to feel pain during the abortion. This possibility raises the philosophical

question of whether the procedure might end the life of a person. Those who oppose the procedure liken it to infanticide.

Nebraska was one of many states that had some type of restriction on this procedure. Proponents of Nebraska's restrictions pointed out that Nebraska's laws governing human treatment of animals made it a criminal act to mistreat animals through maiming, disfiguring, torturing, and mutilation. These proponents of Nebraska's restrictions compared the laws against animal mistreatment to that of partial birth abortion which they claimed was a similarly offensive procedure.[420] Critics of the ban on partial birth abortion pointed out that a very small percentage of abortions actually use this method, so the ban would not save the life of any fetuses – physicians would just use another method that might be more dangerous to the mother. Critics saw the Nebraska law as another attempt to narrow abortion rights.

Leroy Carhart, a Nebraska physician who specialized in late term abortions, brought suit claiming that the Nebraska law violated the undue burden test in *Akron* and *Planned Parenthood v. Casey*. The federal district court and the U.S. Court of Appeals sided with Carhart, and in the year 2000, the case came to the Supreme Court as *Stenberg v. Carhart* (530 U.S. 914). In the Supreme Court opinion, Justice Breyer, citing *Planned Parenthood v. Casey,* found that the Nebraska law imposed an undue burden on the woman and thus was unconstitutional. Breyer also objected to the fact the Nebraska law failed to contain an exception for the health of the mother. Justice O'Connor joined the majority opinion, but wrote a separate concurring opinion which argued that a ban that

[420] John W. Whitehead, Counsel of Record, Douglas R. McKusick, David B. Caddell, Amicus Curiae Brief of the Rutherford Institute in Support of Petitioner, *Gonzales v. Leroy Carhart* (550 U.S. 124)

only proscribed the dilation and extraction procedure and included an exception for the life and health of the mother would be constitutional.

The Court opinion was joined by five justices, although O'Connor's concurrence was somewhat shaky. The four justices who dissented wrote vehement and passionate opinions denouncing the Court decision and the *Planned Parenthood v. Casey* decision. Justice Kennedy argued that the dilation and extraction method killed the fetus outside of the woman where the fetus then had "an autonomy which separates it from the right of the woman to choose treatments for her own body" (530 U.S. 914, 963). Justice Scalia wrote that an opinion that stated partial birth abortion is "a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today's majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed" (530 U.S. 914, 955).

After the *Stenberg v. Carhart* decision, the U.S. Congress became involved in the debate and passed the Partial Birth Abortion Act in 2003. This law was a federal ban on the dilation and extraction procedure with an exception to save the life of the woman. Opponents of the law argued that this was a backdoor way for the Republican Congress to press for personhood rights for the fetus. American public opinion seemed to back the new legislation. Although most Americans thought that abortion should be legal in at least some instances, a 2007 Pew Research poll found that seventy-five percent of those

surveyed thought that partial birth abortion should be illegal. A 2007 Gallup poll mirrored these results with seventy-two percent saying the procedure should be illegal.[421]

The opinion polls came on the heels of a Supreme Court challenge to the federal Partial Birth Abortion Act. Leroy Carhart again brought suit claiming that the law was unconstitutional. The case *Gonzales v. Leroy Carhart* and the companion case *Gonzales v. Planned Parenthood* were decided by the Court in 2007. (550 U.S. 124) By 2007, Justice O'Connor, whose support for the majority opinion in *Stenberg v. Carhart* was shaky, was replaced by John Roberts whose political leanings were thought to be more conservative than O'Connor's. Thus, it was not surprising that the Court decided to uphold the federal law.

The Court opinion, written by Justice Kennedy, stressed the holding of *Casey v. Planned Parenthood* that the state had a legitimate interest in protecting the health of the mother and the life of the fetus throughout pregnancy. The Court found that the federal law did not present an undue burden to women and thus was a legitimate exercise of the state's power to protect the health of the mother and the life of the fetus.

Justice Kennedy then opined about the nature of the fetus subject to that type of abortion procedure.

> Unborn children are thus in a uniquely unprotected position. Most other living beings in our society, from rabid animals to serial murderers, are protected from this manner of death by torture or cruelty laws. For example, drawing and quartering, a method of execution eerily similar to D&E abortions, was banned over a century ago as inhumane for a civilized society to inflict on criminals. Because unborn children do not have lives recognizable in a court of law, however, they are not granted Eighth Amendment or any other protections against cruel and unusual treatment. (550 U.S. 124, 27)

[421] "Abortion and Birth Control," available from http://www.pollingreport.com/abortion.htm, accessed 12 October 2008.

Justice Kennedy considered the fact that in a dilation and extraction abortion, the fetus is to some extent born which makes the deliberate killing of such an organism questionable. He argued that the line between being *in utero* and being outside the womb was the line separating abortion from infanticide. His use of the term "unborn children" was significant because it signaled his acceptance that a fetus, at least in the late stages, was a person.

Antiabortion advocates heralded the decision. Because dilation and extraction involved bringing the fetus outside of the uterus, there was some argument that once the fetus left the uterus it had a claim to personhood because it was no longer "attached" to the woman. These "unattached" fetuses, as persons, would have government protection and the right to health benefits and protective custody. However, very few fetuses that are removed from the uterus are able to survive independently. Others who opposed partial birth abortion argued that the method was particularly brutal and that the fetus may be able to feel the pain of the procedure. They argued that if the fetus was a sentient being, then it could not be disposed of in this manner – even if the fetus were not granted full personhood status. On the other hand, defenders of abortion saw the decision as a significant curtailment of a woman's rights. They argued that the dilation and extraction method was very seldom used and banning the procedure did not save the lives of any fetuses. They viewed the banning of the particular procedure as an underhanded way to limit abortion rights in general.

Unresolved Issues Remain

The decision in *Gonzales v. Leroy Carhart* (2007) demonstrates that the debate over abortion was just as volatile as it was in 1973 when *Roe v. Wade* was decided. Since

the *Roe* decision, the Supreme Court has never overruled its initial decision that the fetus is not a person. However, the *Gonzales v. Carhart* decision which compares the dilation and extraction procedure to infanticide comes closer to recognizing at least partial personhood rights for the fetus. After thirty-four years, the issue of fetal personhood is still very much open for debate.

Since *Roe*, the Supreme Court has denied the status of person for the fetus in relation to abortion, and it seems unlikely that the Court will overrule that precedent. However, even though the Court has not granted personhood to the fetus, this does not necessarily mean that abortion is morally permissible. There is still a legitimate argument that a being does not need to be a "person" in order to have its life protected. In other words, personhood is not the prerequisite for a guarantee of life under the Constitution. Slaves were freed under the Thirteenth Amendment in 1865, but African Americans were not granted personhood until the Fourteenth Amendment was ratified in 1868. Thus, for over two years, African Americans had some constitutional protections such as the right to life without being persons. Similarly, the lives of some animals are protected under the law even though they are not considered persons. The law could certainly grant protection of life to fetuses based on non-personhood criteria and still maintain that fetuses do not qualify as full persons under the law.

An opposing argument can also be easily argued. If the law were to deem fetuses to be persons, this does not necessarily mean that abortion would be illegal. This argument was made in the *Roe* section and bears repeating. Abortion involves the rights of a woman to her bodily integrity and control over her destiny – in short the rights necessary for her personhood. The rights of the woman come in conflict with those of

the fetus, and even if the fetus were a person under the law, the law would still need to adjudicate the conflict between these two opposing interests. The courts may very well side with the woman and grant a right to abortion. Given the precedent of freedom to abortion before viability, even if the pre-viable fetus was a person, the courts might still rule in favor of the woman's rights as a person.

While a precedent has been established of denying personhood to the fetus in cases of abortion, in cases concerning fetal injury and wrongful death, this is not the case. In this area of the law, there is a long line of precedent granting fetal personhood. In these cases, unlike the abortion arena, there is usually not a conflict between the woman and fetus. Thus, an injury or wrongful death to the fetus is a harm that is also felt by the woman who desires a live, healthy child. Because this primal conflict does not exist, it is easier for judges to rule in favor of the fetus and the mother. Advances in medical knowledge have also contributed to the injured fetus's claim because physicians now better understand how ingested substances, environmental toxins, and other potential threats can make a lasting impact on the life of the fetus once born. In short, medical advances have helped the court prove a line of causality from *in utero* stimuli to *ex utero* effects. The courts have concluded that born children who have suffered injury *in utero* due to negligence or deliberate injury must have some recourse through the law. Thus, the courts are willing to grant personhood to the fetus for the purposes of seeking recompense for *in utero* damage.

Personhood for the fetus seems most likely to be granted in non-abortion contexts. Precedents establishing personhood in these contexts do not need to bleed over into the abortion arena. Robert Blank, a political scientist who specializes in biomedical ethics in

New Zealand, argues, "The courts should define the fetus as a 'person' with protectable rights, at least in those cases where the fetus's rights will not conflict with the constitutional rights of other persons. In cases where the mother and fetus are both victims – for instance, if someone commits a violent act on a pregnant woman – the rationale underlying abortion considerations no longer apply because the rights of the mother and the fetus are parallel, not conflicting."[422] However, as the review of cases indicates, law concerning fetal personhood does sometimes become mixed even when the claims involved are vastly different. For abortion advocates, there is a fear that granting personhood in injury and wrongful death cases will spill over to abortion law and jeopardize the right to abortion. For those against abortion, there is a hope that spillover will indeed occur. This need not occur. Careful jurisprudence can maintain separate bestowals of personhood depending upon the context of the situation and the Constitutional rights and protections at hand. However, if a goal of the judicial system is consistency, then the bestowal of fetal personhood should apply to the various legal situations involving the fetus.

This analysis has focused on the role of the judicial branch in granting or denying fetal personhood. While the court system has been particularly active in this policy arena, the legislative branch at both the national and state levels have proposed and debated various bills concerning fetal personhood. Immediately after *Roe v. Wade* was decided, Congressional leaders in both the House and Senate proposed various Human Life Amendments that defined the terms "human being" and "person" as applying to all humans from the moment of conception. Constitutional Amendments that extend

[422] Robert Blank, *Fetal Protection in the Workplace*, [Columbia University Press, 1993]: 146.

personhood to fetuses have been proposed numerous times since 1973 but have never gained enough support for passage.

The various Human Life Amendments were primarily directed against abortion. However, violent crimes against pregnant women prompted legislation to include the fetus as a victim of violent crime. In these instances, the fetus can be considered a person in order to classify the wrongful death of a fetus as a murder. A majority of states have some type of legislation to this effect. The issue of fetal murder gained national attention in 2002 when a California woman, Laci Peterson, who was seven and a half months pregnant, went missing. Four months later, a couple walking their dog discovered the corpse of a well-preserved fetus in the San Francisco Bay. Laci Peterson's body was discovered the next day. Laci Peterson's husband was convicted of murder in the first degree for Laci and in the second degree for the unborn fetus.

The fury over this well known case increased support for a national law to protect pregnant women and their fetuses. In 2004, President Bush signed the Unborn Victims of Violence Act which is commonly known as Laci and Connor's Law. This piece of legislation includes a child *in utero* as a legal victim when injured or killed by any of over 60 federal crimes of violence. The law defines a child *in utero* as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." Some supporters of abortion opposed the legislation arguing that the fetus is not a "person" and the legislation comes dangerously close to recognizing fetal rights that might obstruct abortion rights.

Fetal personhood was a key issue in several recent elections. In 2008, Colorado citizens voted on Amendment 48 which states "The term 'person' or 'persons' shall

include any human being from the moment of fertilization." In November 2011, a similar ballot initiative was presented to Mississippi voters which stated, "The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof." If passed, these amendments would have wide ranging ramifications such as a ban on abortion and in vitro fertilization which both involve the fetus and embryo. It could also result in more restrictions on the behavior of pregnant women during pregnancy and the actions of attending physicians in their treatments. However, both the Colorado and the Mississippi measures were defeated.[423]

These legislative issues illustrate that fetal personhood is still very much a controversial subject within American political society. American citizens remain deeply divided on the issue. On the one hand, a fetus is a living human being who, through the course of life, will become a child, adult, and finally an elder. Proponents of fetal personhood argue that the fetus is no different from a human at any other stage of life, and thus must be considered a person. Detractors of fetal personhood argue that the fetus does not have the mental and rational capacities that qualify a being to be bestowed the status of person. As this chapter demonstrates, the debate over fetal personhood is more than just a philosophical exercise – it affects many of the rights and immunities guaranteed by the Constitution. Abortion law, as well as wrongful injury, homicide, and murder law, all hinge on the outcome of the debate. Further, new political controversies such as in vitro fertilization and cloning will be affected by decisions regarding fetal personhood. The status of the fetus seems to be an issue with no definitive resolution in sight.

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[423] Mark Barna, "Personhood Measure Tops Ballot Controversies," *The Gazette*, 18 October 2008, available from http://www.gazette.com/articles/ballot_42097___article.html/amendment_personhood.html, (accessed 18 October 2008).

Analysis of Hypotheses

While the status of the fetus remains unresolved, perhaps by looking to the core theory for guidance and then comparing the personhood of fetuses to that of slaves and corporations, some possible resolutions can be found. Even though fetuses, slaves, and corporations are vastly different types of entities, there are some similarities in the core theory and in the legal analysis. My first hypothesis was that the core theory of personhood would influence the law. Locke and Kant as well as theorists who follow their liberal tradition are often cited in discussions over fetal personhood. Both the literature and cases involving fetuses reference the works of Locke and Kant to a much greater degree than do the chapters on slaves and corporations perhaps reflecting the moral and legal significance of this controversial subject.

Locke views the human body as the private property of a person and he argues that a person must protect the health of his body. Some scholars have used these arguments to contend that Locke would have condoned abortion as a legitimate exercise of one's property right over the body and an important step in preserving the health of a woman. In an *amicus curiae* brief for the case *Webster v. Reproductive Health Services* (492 U.S. 490), the American Public Health Association cites Locke's argument that an individual is sovereign over his own health and body, and government cannot impose health risks on its citizens by limiting abortion.[424]

However, these arguments can be turned around. Locke argues that a person is bound to protect her health and cannot cause harm to herself. If the fetus is part of the

[424] Amicus Curiae Brief of the American Public Health Association in *Webster v. Reproductive Services*, 492 U.S. 490, 3.

self, then a woman would be obligated to protect the fetus as well.[425] Further, much of Locke's writing concerns the parental obligation to care for and educate children which indicates that he believed that children had moral value. An *amicus curiae* brief for *Roe v. Wade* on behalf of the Association of Texas Diocesan Attorneys quotes Locke's theories of rearing offspring to argue that the fetus, as human offspring, has moral worth that must be respected.[426] As can be seen, both sides of the abortion argument have directly cited Locke as support for their argument demonstrating the influence of the core theory on the central legal issues in this line of cases. However, since Locke has been used on both sides of the debate, we cannot conclude that Locke's works support personhood or non-personhood.

Kant specifically writes that children, from the time of procreation, are persons with an innate right to the care of their parents.[427] Therefore, it can be concluded that Kant considers the fetus, from the time of procreation or conception, to be a being that must be protected and cannot be aborted. Surprisingly, given the large number of *amicus curiae* briefs for each of the Supreme Court abortion cases, these Kantian theories, which are strong argument against abortion practices, have not been cited in any case to date.

Although Kant has not been directly cited in any of the briefs or opinions I analyzed, the themes of distinguishing between person and property, as well as person and human being, which have their roots in Locke and Kant, are repeated many times in the fetal cases. The criteria of rational acceptability and social acceptance are used to

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[425] John Locke, *Two Treatises of Government,* Edited by Peter Laslett, [Cambridge University Press, 1960, originally published 1698]: Second Treatise, Chapter II, Section 6.

[426] Amicus Curiae Brief of the Texas Diocesan Attorneys in *Roe v. Wade*, 410 U.S. 113, 16.

[427] Immanuel Kant, The Metaphysics of Morals, Translated by Mary J. Gregor, [Cambridge University Press, 1996, originally published in 1785]: (6:280-281).

separate the fetus as a human from the fetus as a person. The potential property status of the fetus as a part of the woman's body versus the fact that a fetus, as a potential person and a human being, should not be used as a means to an end, also have their roots in the core theory. In comparison to slaves and corporations, the cases concerning the fetus have the most direct ties to the core theory. Therefore, my hypothesis that the core theory influences the law is strongly supported.

My second hypothesis is that fetal personhood will be discussed in terms of the dichotomy between person and human being, as well as person and property. The analysis of cases finds support for this hypothesis as well. The dichotomy between person and human being has been thoroughly analyzed by the Supreme Court justices as they adjudicate abortion. Cases concerning the fetus quite often recount the biological progression a fetus goes through as the brain develops and organs grow culminating in viability and then birth. The core theory however does not heavily rely on overall biological development but instead focuses on cognitive development.

Several of the Supreme Court opinions addressing abortion mirror the core theory and examine the development of the fetus to see if there is a compelling point at which the fetus gains cognitive capabilities such as sentience, ability to interact with surroundings, and capacity to think in a rational manner. However, the Court takes into consideration other milestones beyond cognitive capabilities as well. For instance, in the *Roe v. Wade* 410 U.S. 113 (1973) decision, viability was the significant milestone. In his dissent in *Webster v. Reproductive Health Services* 492 U.S. 490 (1989) Justice Blackmun speaks of the capacity to feel physical pain as an important milestone. Sentience is an early capacity of the developing brain, and viability depends upon both

mental and physical abilities. Although sentience and viability are not criteria of a rational person as described by Locke or Dennett, both of these milestones for bestowing personhood depend upon a level of cognitive capacity and are part of the sequence of developmental events that eventually lead to rational agency. Overall, it seems as though the Court has considered the dichotomy between person and human being, and has based some of its important reasoning on the cognitive capabilities set forth in the core theory.

The courts have also adjudicated the property aspects involved with a fetus although this subject has not been discussed in a forthright manner. A careful analysis of the text of the fetus cases reveals that justices are reticent to directly analyze the reasons why a fetus could be deemed property. This reticence likely stems from an unwillingness to compare any human entity to property in fear of resurrecting the concerns of slavery. However, although justices are reluctant to discuss some of the property aspects of the fetus, many of the *amicus curiae* briefs in the abortion cases discuss the issue.

The person versus property distinction is important in the abortion cases because, if the woman owns her body, and a fetus is part of her body, then a woman can decide to remove a part of her body that she no longer desires. *Byrn v. New York City Health & Hospitals Corp.* 31 N.Y.2d 194; 286 N.E.2d 887 (1972) was the only fetal case in my data set that directly addressed the property issue. In Judge Burke's dissent, he argues that even if a woman's body is her private property, the fetus within her body is not part of that property and thus she may not destroy the fetus (31 N.Y.2d 194, 212).

Roe v. Wade and the subsequent Supreme Court opinions concerning abortion do not directly say that if the fetus is not granted personhood then the fetus can be classified as property. The Court avoids the touchy issue of calling a human being a type of

property because the issue echoes America's troubled past with slavery. Although the Supreme Court avoids the issue, many of the *amicus curiae* briefs issued in the abortion cases use the analogy to slavery to argue that a fetus cannot be considered property and thus must be a person. For example, in an *amicus curiae* brief on behalf of the National Legal Foundation for *Webster v. Reproductive Health Services* (492 U.S. 490), the attorneys argued that the *Roe* Court implicitly classified a fetus as property when it denied the status of personhood. *Roe* does not mention the fetus as property, but the National Legal Foundation argues that the converse of person is property and therefore if the fetus is not a person it must be property. This argument is not valid because the *Roe* court classifies the fetus as a potential person rather than property. The National Legal Foundation makes this faulty argument in order to draw parallels to slavery and generate support for its argument against abortion. Other *amici* echo the National Legal Foundation brief, contending that a fetus is not the property of a woman and to argue otherwise resembles slavery.[428]

Beyond the issues of fetal injury and abortion, the matter of the fetus and the embryo as property is central in disputes over frozen embryos that remain after an in vitro fertilization (IVF). In the case *Davis v. Davis,* 842 S.W.2d 588 (1992), Judge Daughtrey's opinion was that an embryo and a fetus cannot be considered property. This issue is bound to arise again however as IVF becomes more widespread and custody battles continue over frozen embryos.

[428] See Amicus Curiae Brief of the American United for Life in *Planned Parenthood v. Danforth*, 428 U.S. 52; Amicus Curiae Brief of the National Legal Foundation in *Webster v. Reproductive Services*, 492 U.S. 490; Amicus Curiae Brief of the Texas Black Americans for Life in *Stenberg v. Carhart,* 430 U.S. 914; Amicus Curiae Brief for the Thomas More Law Center, in *Gonzales v. Carhart,* 550 U.S. 124.

In summary, the analysis of cases also supports my second hypothesis that fetal personhood is discussed in terms of the dichotomy between person and human being, as well as person and property. The law has not reached a firm conclusion on how to classify the fetus within these dichotomies. In the abortion cases, the Supreme Court decided that, although the fetus is human, it does not qualify as a person because it is not yet a rational agent. The Supreme Court has not gone so far as to classify the fetus as property, but the argument that a fetus could be property will continue to come before the law as cases concerning frozen embryos are adjudicated.

The courts have referred to the core theory and accompanying dichotomies as they have wrestled with the difficult issue of fetal personhood. The core theory has helped clarify some of the issues and has led to decisions in abortion and fetal injury cases. However, the courts have not come to an absolute resolution on the issue of fetal personhood. The fact that a firm resolution on personhood has yet to be obtained is demonstrated when the fetus cases are compared to the slave and corporation cases. My third hypothesis is that cases I analyze should be consistent in their bestowal of personhood. However, a comparison of personhood for slaves, corporations, and fetuses demonstrates both consistencies and inconsistencies in adjudicating personhood.

There are apt comparisons that can be made between the property status of the fetus and the property status of the slave. Both are subject to the control of another human being and the personhood of both is diminished due to its property status. As explained, most justices and judges are very hesitant to affirm the property status of the fetus because they do not want to resurrect the issues of slavery where one person could

hold a property right in another. Despite the care taken by the legal system to avoid comparisons with the slavery issue, there are academic parallels.

As a part of a woman's body, there is a sense in which the woman owns her fetus just as she has a type of ownership in herself. Therefore there is a sense in which the fetus can be considered the property of the mother carrying it. Although the law is reluctant to directly verify this property status, it is underlying the argument that the woman has a right to make decisions about her body and her fetus. The fetus is also a human being with the potential to develop into an autonomous and rational person in the course of normal growth. The fetus has the dual status of both property and person/potential person. This dual status has similarities to the slave who was both property and person.

As property, the slave's life was subject to the control of the master. So too, the fate of the fetus is at the hands of the mother who can decide to carry it to term or end the pregnancy. So in a real sense, both the slave and the fetus have been considered human property. The slave's status of person was denied so that the status of property could be upheld. There was no doubt that the slave was a rational, autonomous individual. Instead of acknowledging that the slave was a person, antebellum American society denied the slave's personhood because the slave was not socially accepted as part of "We the people" or the community of moral and legal persons. The status of person was wrongly denied to the slave.

This differs from the fetus whose status as a person is questioned because the fetus does not qualify for personhood based on the criteria of autonomy and rationality. The fetus, who has the potential to develop into an autonomous and rational individual, is

deemed a potential person. There is another parallel between the slave and the fetus in terms of being socially accepted. Social acceptance for the fetus depends upon the pregnant woman who carries the fetus and can accept or reject her pregnancy. Women who acknowledge their fetus and decide to carry it to term have socially accepted their fetus as a member of society. Women who do not desire a pregnancy and terminate, have not acknowledged the fetus as a member of the community of persons. Again, pointing out the similarities between slaves and fetuses along the social acceptance criterion does not say that women who choose to abort are on a moral par with slave owners. Nor does it mean that a slave has the same moral status as a fetus. If the fetus is not considered to qualify as a legal and moral person based on a host of criteria, then there may be valid reasons for not accepting a fetus into the social community of persons while the slave was wrongly denied acceptance. However, for those who believe that the fetus has moral importance, the denial of personhood is akin to the denial in slave society. Social acceptance is a common criterion when adjudicating the personhood of both entities.

Demonstrating the parallels between personhood for slaves and for fetuses evokes the passion that exists within the fetal debate and still exists from the past mistake of slavery. The parallels drawn in this study are academic and not designed to illustrate that abortion is a moral offense on a par with slavery. However, some advocates who believe passionately that a fetus should be considered a person despite its lack of capabilities draw parallels to the slave debate arguing that just as slavery wrongly denied personhood to a subset of humans, so too does legalized abortion deny personhood to the unborn. In many *amicus curiae* briefs for abortion cases, the subject of slavery and the *Dred Scott* case are mentioned by advocates for fetal protection. An *amicus curiae* brief in *Gonzales*

v. Carhart states, "There is no more basis to hold that a negro is not a person under the Constitution as there is to hold that an unborn child is not a person under the Constitution."[429] Similar arguments have appeared in *amicus curiae* briefs for every Supreme Court cases concerning abortion since *Roe v. Wade*.[430]

In the abortion cases, the Supreme Court rejected the argument that a fetus should have personhood simply because a fetus is human. During the slavery debates, the Supreme Court also rejected the argument that a slave qualified for personhood simply because the slave was human. In the same vein, the Supreme Court has granted personhood to other entities that are not human such as corporations as well as ships and other non-human entities. Thus, it seems that the Supreme Court has been consistent in holding that humanity is not a decisive criterion for personhood. The fact that corporations, which are not human, are granted personhood and fetuses, which are human, are denied personhood has been a point of contention for fetal advocates. Numerous *amicus curiae* briefs call attention to this fact and argue that if a corporation is granted personhood, a fetus should also be granted this status.[431]

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[429] Amicus Curiae Brief of Ronald W. Meyer in *Gonzales v. Carhart*, 550 U.S. 124, p. 7.

[430] For more examples of amicus curiae briefs that reference the denial of personhood in slavery cases, see Amicus Curiae Brief of Dr. Eugene Diamond and Americans United for Life, Inc, in *Planned Parenthood v. Danforth*, 428 U.S. 52; Amicus Curiae Brief of Legal Defense of Unborn Children in *Stenberg v. Carhart*, 530 U.S. 914; Amicus Curiae Brief of The American Center for Law & Justice And The Thomas More Center For Law & Justice in *Stenberg v. Carhart*, 530 U.S. 914; Amicus Curiae Brief of Texas Black Americans for Life and L.E.A.R.N. in *Stenberg v. Carhart*, 530 U.S. 914; Amicus Curiae Brief of Legal Defense of Unborn Children in *Thornburgh, Governor of Pennsylvania v. American College of Obstetricians and Gynecologists*, 476 U.S. 747; Amicus Curiae Brief of Birthright in *Webster v. Reproductive Health Services*, 492 U.S. 490; Amicus Curiae Brief of Holy Orthodox Church in *Webster v. Reproductive Health Services*, 492 U.S. 490; Amicus Curiae Brief of Free Speech Advocates in *Webster v. Reproductive Health Services*, 492 U.S. 490.

[431] Amicus Curiae Brief of Right to Life Advocates, in *Gonzales v. Carhart*, 550 U.S. 124, p. 23. Amicus Curiae Brief of Right to Life Advocates, in Webster v. Reproductive Health Services, 492 U.S. 490, p. 21; Amicus Curiae Brief of Knight of Columbus, in *Webster v. Reproductive Health Services*, 492 U.S. 490, p. 12, quoting East and Valentine, "Reconciling Santa Clara and Roe v. Wade: A Route to Supreme Court Recognition of Unborn Children as Constitutional Persons" in *Abortion and the Constitution,* Horan, Grant,

The Supreme Court decided that while a fetus is a human being, it does not qualify as a person. This parallels the slave cases in which the Supreme Court confirmed that a human being does not automatically qualify as person. The decision to exclude slaves from personhood was primarily based on the fact that slaves were property and thus could not be persons and on the fact that slaves were not accepted into the community of persons. The decision to exclude fetuses was primarily based on the fact that fetuses have not yet qualified for personhood based on criteria such as sentience and rational capability. A secondary reason for denying personhood to the fetus is that it is not completely accepted into the community of persons. In comparing the two entities, the law realized that slaves were rational agents and yet still denied personhood. On the other hand, the law found that fetuses were not rational agents and therefore denied personhood. This is an inconsistency. Rational capability was not a strong determining factor for slaves, but by the time the fetal cases arose, rational capability was a significant determinant of personhood. The consistency lies in the fact that social acceptability is an important criterion for both slave cases and fetal cases.

The parallel between the corporation cases and the fetal cases is that personhood for both entities revolved around rational capabilities. The corporation, as a collective of rational individuals, was allowed to qualify as a collective person based on the capacities of its components. Because the fetus is not a rational agent, personhood was denied.

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and Cunningham eds. (Georgetown University Press, 1987); Amicus Curiae Brief of United States Catholic Conference in *Colautti v. Franklin*, 439 U.S. 379, p. 8; Amicus Curiae Brief of Birthright Inc., in *Webster v. Reproductive Health Services*, 492 U.S. 490, p. 11; Amicus Curiae Brief of the Knights of Columbus, in *Stenberg v. Carhart*, 530 U.S. 914, p. 16; Amicus Curiae Brief of United States Catholic Conference, in *Planned Parenthood v. Danforth*, 428 U.S. 52, p. 15.

There seems to be some consistency here because the Court has relied upon rational agency for both entities.

My final hypothesis was that there should be consistencies in how justices adjudicate various entities vying for personhood. The analysis reveals both consistencies and inconsistencies. Rational capability was a decisive factor for granting personhood to corporations and denying personhood to fetuses. However, the courts did not use rational capacity for the slave cases. Another consistency is that social acceptability into the community of persons was important for the slave, corporation, and fetal cases. With some consistencies and inconsistencies, it seems that the criteria of property status, rational capacity, and acceptance as a person by other persons are taken into consideration when the law adjudicates cases involving personhood, but these are not concrete standards.

The next chapter concerns another entity whose status is unresolved – the great ape. Using the psychological criteria of rationality and autonomy used to analyze the fetus, the great ape, which has advanced cognitive capacities among other animals, seems to qualify as a person. However, just like the fetus, the great ape is not completely accepted into the realm of fellow persons. Therefore, the legal and moral status of the great ape is open to question. With that in mind, the next chapter considers the personhood of this non-human but intelligent creature.

Chapter Five
Where to Draw the Line – Are Non-human Animals Persons?

Nim Chimpsky was born on November 19, 1973 at the Institute for Primate Studies in Oklahoma. He was the son of Carolyn, a full-grown chimpanzee, but was soon adopted by a human family who would raise the chimp and teach him sign language. Nim Chimpsky was part of a large experiment to prove that chimpanzees could master sign language and therefore communicate with the human race. The name Nim Chimpsky was a gibe at Noam Chomsky who argued that only humans had the capability to master human language structure and grammar. Nim's trainers sought to prove Chomsky wrong by establishing that a chimp could indeed participate in a form of human communication. One of the most significant dividing lines between humans and animals has traditionally been drawn at the ability to communicate through language. An animal's silence is often interpreted as an inability to think or reason which is further used to justify categorizing animals as property rather than persons. If Nim Chimpsky could learn human sign language, Nim would demonstrate his ability to relate his thoughts and feelings and in this respect meet a criterion for personhood.

Soon after he was born, an affluent couple adopted Nim into their family of seven human children. They planned to raise Nim just like any other human child. Tellingly, as the family was driving home after receiving Nim, his "sister" Jenny asked if Nim was a new baby or a pet. The response was silence – the answer to this question haunted Project Nim and all other studies examining the personhood of great apes.[432] In some respects, Nim seemed to thrive with his adoptive family, and he mastered a large

[432] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 76.

vocabulary of signs. He was even able to string three to four words together to request his favorite foods and often initiated conversations with humans. Nim also had the self-awareness to realize when his behavior was unacceptable in human terms – he would admonish himself when he had disobeyed rules and signed "I'm sorry." Nim even played jokes on his caretakers such as hiding utensils while helping prepare dinner.[433] Nim also experienced great sadness and loneliness as his human trainers entered and exited his life. When his chimp friend Sally died, Nim grieved for months. When Nim was given a stack of photographs of chimps, including himself, as well as pictures of humans, Nim put his picture in the pile with humans indicating that he self-identified with humans rather than his own species. One trainer remarked, "I don't think Nim had any concept that he was a chimp."[434]

In many ways, Nim was like a person capable of expressing his desires, emotions, and frustrations. However, Nim was not human and therefore not accepted as a person. Nim was very much the property of his human trainers and this made him subject to a series of experiments and grueling training sessions. When his human family decided that they could no longer care for Nim in their New York home, Nim was moved around the country and placed in a series of laboratories where Nim lived in a cage and lacked minimal comfort items. Each displacement was upsetting to Nim, and he signed his longing to return to a human home and to rejoin a family. However, Nim was simply

[433] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 129.

[434] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 313.

animal property and thus was not entitled to anything more than the protections of a lab animal even though he had extraordinary abilities.

Nim Chimpsky proved that he could communicate rudimentary thoughts and feelings, but his project managers were not completely convinced that Nim had mastered human language. Project director Herbert Terrace concluded that although Nim could sign a large number of words, his comprehension was relatively low.[435] Even if Nim could prove a rudimentary understanding of sign language, mastering a human language was only one criterion of personhood. Nim did not exhibit other capabilities such as the ability to form long-term plans or consider the ethics of his actions. By the end of the experiment, the scientists concluded that Nim had extraordinary abilities for a non-human animal, but he did not reach the levels of rationality and consciousness possessed by humans.

Even though Nim's trainers did not come to a conclusion on whether or not Nim should be considered a person, the very nature of the experiment called into question the property and personhood status of great apes. The idea that an experiment would remove an ape from the traditional laboratory cage was a radical concept – even more radical was raising the chimp as a human child. The experiment opened the eyes of many observers to the similarities between great apes and humans and endeared the chimp to humans.[436] When Nim was sold to a laboratory for medical experiments, his first adoptive mother told a reporter, "It's like seeing your child sold for medical experiments. I just don't

[435] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 242.

[436] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 245.

think Nim is going to survive."[437] Indeed, the story about a chimp that was raised as a human child and could communicate with humans in a familiar manner caused people to consider that chimpanzees were sentient beings that were very closely related to humans. The New York Times ran a story about Nim and asked, "Do animals suffer needlessly?"[438] Nim became the "poster child" for those protesting the use of animals in experiments. Although the public wanted safe vaccines for diseases such as hepatitis B, testing the vaccines on a chimp that grew up with an affluent family in New York and could communicate with sign language pushed the limits of what much of the public would tolerate in terms of animal experimentation.

Nim's story raised the issue of whether advanced creatures such as Nim and other great apes should have legal rights or at least legal protections. Upon hearing Nim's story, Attorney Henry Herrmann offered to represent Nim in court against New York University which had sold Nim to be used in medical experiments. Herrmann declared that Nim was *sui generis* or in a class by himself due to his abilities and thus could not be treated in the same manner as other research animals. Herrmann prepared a *habeas corpus* petition asking, "Does Nim feel cruelly treated?" and hoped to bring Nim into the courtroom to answer the question. Although sign language interpreters were common in the courtroom, an ape in the courtroom was not common! Herrmann planned to exact testimony from Nim's project director Herbert Terrace to bear witness that Nim's IQ was higher than that of many mentally disabled humans who had been given their day in

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[437] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 266.

[438] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 266.

court. Rather than requiring Nim to take the oath, Herrmann found a nineteenth-century precedent where a judge had personally deemed a witness reliable and waived the oath. Nim was prepared to have his day in court. However, before the case was heard, opposing counsel called Herrmann and said, "Tell your client he can walk."[439] This was fortunate because the judge was reportedly overheard telling a clerk, "If you think I'm going to be the first judge in the U.S. to hear testimony from an ape – you are fucking crazy."[440]

Nim was rescued before he was injected with hepatitis B and he retired to an animal sanctuary in Texas. However, even at the sanctuary, Nim suffered from loneliness as he was the only chimp and none of the human caretakers could speak American Sign Language (ASL). Nim desperately signed to visitors hoping that someone would be able to reciprocate and engage him in conversation. After realizing that Nim needed companionship, the sanctuary brought in several other chimps to keep him company. It appeared that Nim lived out the rest of his life in relative comfort, but he died at a very young age of twenty-six from a heart attack most likely caused by the amount of stress he endured in his life.

The story of Nim Chimpsky raises many of the questions involved in a discussion about personhood for non-human animals. The fundamental question is where we draw the line when distinguishing persons from all other beings. Traditionally, persons are human beings and human beings are persons. However, experiments such as Nim

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[439] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 271.

[440] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 271.

Chimpsky which illustrated the cognitive abilities of non-human animals brought the traditional definition of persons into question. Humans are part of the biological family Hominidae which also includes chimpanzees, gorillas, bonobos, and orangutans. The family Hominidae is commonly referred to as great apes, and humans are included in the classification of great apes. This chapter focuses on the personhood of non-human great apes, and for simplicity, great apes will refer only to non-human Hominids. Further, again for simplicity, non-human animals will from here out be referred to simply as animals.

The analysis of personhood for animals begins by laying some groundwork exploring the similarities between humans and our closest relatives, the great apes. Great apes are the focus of much of this chapter because great apes have cognitive abilities similar to humans and therefore have a strong claim for personhood. A review of foundational theories such as those of Aristotle and the Bible, as well as Locke and Kant, reveals that traditionally animals have had no claim to personhood and were simply property. However, there were exceptions to the rule such as Bentham who argued that all beings that were sentient had moral worth and Darwin whose research questioned the absolute superiority of humans.

The discussion then moves to modern scholarship to determine how the debate over personhood for animals has evolved. The debate over animals has intensified as modern scholars have challenged whether all or some animals should receive greater protections, rights, and even personhood. As sentient beings, many scholars argue that animals are morally significant beings and thus should have certain rights and protections. However, other theorists disagree, arguing that animals do not have the

rational capacity to form preferences or life plans, and thus animals do not have any interests that must be protected, there is nothing for the law to guard, and creating rights for animals is nonsensical. The claim that animals do not have rational capability is called into question by the numerous studies of great apes that demonstrate that these primates have cognitive skills that are not often recognized by humans.

Numerous scholars working with great apes have discovered that these primates have sophisticated cognitive abilities that rival the abilities of some humans. Using Dennett's six criteria for personhood from Chapter One, the chapter analyzes whether great apes qualify for personhood. There is a significant body of literature that defends the status of animals as simply property while a growing body of literature challenges that animals, and especially great apes, should be considered as more than just objects. Each side of this debate is explored in detail in the upcoming pages.

Finally, the chapter turns to the law. There are several statutes that provide animal protection and these statutes are evaluated to see if they provide any type of recognition for animals as persons or rights-bearing-units. In the legal realm, the courts have been reluctant to grant rights or bestow the status of person to animals. The law has been fairly consistent in affirming the property status of animals. A review of relevant cases pertaining to the legal standing and personhood of animals reveals that human advocates acting on behalf of animals have made little progress in securing legal personhood for non-humans.

Non-human Persons

There are significant biological and psychological ties between humans and their next of kin, the great apes. The DNA of humans and other great apes is more closely

related than African elephants and Indian elephants. The DNA of a chimpanzee is 98 percent identical to that of humans. Does this information mean that humans and chimpanzees are extraordinarily similar in biological terms or that a two percent difference in a DNA sequence is tremendously significant? Customarily, metaphysical abilities such as the capacity to reason, emote, and plan are significant in distinguishing humans from all other animals. Should great apes such as Nim Chimpsky, who are intelligent, able to communicate, and feel pain, be included within the realm of personhood? If some animals were to be included in the realm of persons, this would have serious consequences because as previous chapters have illustrated, persons have moral and legal rights and obligations.

Instead of classifying animals as persons, all animals are classified as property under the law. The words "cash," "capital," and "chattel" are all derived from the word cattle which calls attention to the property aspect of animals. Because animals are classified as property, humans can own animals as pets, hunt them for food and pleasure, and in short, treat them as ends to meet human needs. This has serious consequences because entities that are property do not have moral or legal considerations which humans must recognize. Many animal activists charge that unless animals can overcome the status of property, they will never be afforded any protections or rights under the law.[441] The debate concerning animals essentially involves weighing the attributes of animals that lend themselves to personhood and those that lend themselves to property and then drawing a controversial line between those who might qualify for personhood and those that do not.

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[441] See Tom Regan, *The Case for Animal Rights,* [University of California, 2004], Tom Regan, *Defending Animal Rights*, [University of Illinois Press, 2001], Steven Wise, *Drawing the Line*, [Perseus Publishing, Cambridge, MA, 2002], Steven Wise, *Rattling the Cage,* [Perseus Publishing, Cambridge, MA, 2001].

In this respect, drawing the line for the personhood of animals is similar to that of slaves, corporations, and fetuses. The plight of the slave was that the law classified a slave as property. Many animal rights activists compare the property status of animals to that of slaves to argue that animals are unjustly treated. The corporation is another murky entity that qualifies as both a person and property under the law. While the fetus is recognized as a human, because it does not have full cognitive abilities and the capacity to survive independently outside of the womb, it is not granted personhood. Many great apes have the cognitive ability of a three to four-year-old child. If children are granted the status of person, some animal rights advocates argue that great apes should also be persons based on their ability to reason.

Comparisons among great apes, slaves, corporations, and fetuses makes sense when studying meaning of personhood. Animal rights activists have picked up upon the similarities in their movement and other human rights orientated movements. However, comparisons between rights for animals and the movements to secure rights for African Americans, women, the disabled, and children are often perceived as reducing these groups to the level of animals. The animal rights movement has met severe backlash for such comparisons. The animal rights movement also has some features in common with the pro-life movement which seeks greater rights and recognition for human fetuses. Many activists within the animal rights movement eschew these comparisons because it could likely displease animal activists who are also in favor of abortion. In terms of personhood, there are apt comparisons to be made among animals, slaves, corporations, and fetuses. This is not to argue that African Americans are comparable to animals or that fetuses should be protected as pets. The study of these entities within the context of

personhood simply points out the similarities and differences as each of the categories of beings struggle to gain legal recognition as persons.

The debate over the personhood of animals is unique precisely because these animals are not human. To many scholars, personhood implies that the entity is human although there is no reason that this should be so – the law can deem any entity to be a person such as corporations and ships. However, in general understanding there is a connection between being a human and a person, and this connection makes recognizing personhood in other animals almost fantastical. Persons are often defined against what they are not; and persons are not animals. However, animals and humans share many traits in common that would seemingly qualify some animals for personhood. As Nim Chimpsky and other experiments with great apes prove, some animals have a highly developed ability to reason, are self-aware, have emotions, and can communicate in a manner recognized by humans. Animals can feel pain which makes their use in many experiments questionable. However, if animals are simply property with no consideration for any of these traits, then perhaps all types of animal experiments are justified in their benefits to humans. Further, although animals do have some ability for higher order reasoning, they do not have the capability to reach that of humans. While an infant and a chimp may have similar abilities when they are young, an infant soon surpasses the chimp who has already met his potential.

The issue of personhood for animals also calls into question how humans treat animals. Can animals be used solely as means for human ends? Is it justifiable to eat animals to fulfill the dietary needs of humans? Most animals are active and intelligent at some level. Is it therefore objectionable to deprive animals in a zoo of any type of

stimulation that is needed to thrive? Libertarian legal scholar Richard Epstein argues that in some respects, animals have more benefits than some humans. He claims that when it comes to medical care, it is better to be a sick cat in a middle class U.S. household than a sick pauper in a Third World country.[442]

It is important to note that the expression "animal rights" is often used indiscriminately to describe any position thought to reduce animal suffering. Most "animal rights" proposals are simply regulatory or animal welfare measures and do not truly seek to confer rights to animals. For example, a regulation to increase the minimum size of chicken cages seeks to increase the welfare of chickens, but does not grant chickens rights and actually assumes the legitimacy of treating animals as property. The intention of the regulation is to control human ownership of animals although advocates may claim that the regulation is advancing the rights of animals.[443] Similarly, "animal law" is not equivalent to "animal rights law." Animal law regulates the use of animals as property and is important for commerce. Animal rights law protects the animals themselves and seeks to establish certain rights and immunities for animals as sentient, and in some cases, rational beings. The reality is that animal law and animal rights law are not strictly distinct areas of law, and the laws pertaining to animals tend to blend the motivations within each category.[444]

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[442] Richard A. Epstein, "Animals as Objects or Subjects of Rights," in Animal Rights: Current Debates and New Directions, Cass R. Sunstein and Martha C. Nussbaum editors, [Oxford University Press, London, 2004]: 148.

[443] Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* [Temple University Press, Philadelphia, 2000]: xxxi.

[444] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 5.

Animals are not mentioned in the Constitution, nor do they have a Bill or Rights, Declaration of Independence, or an Emancipation Proclamation. Thus, it is not readily apparent that animals are rights holders at all. Many of the laws that seemingly protect animals really are designed to protect their value as property or human interests. For instance, the law requires that all dogs are vaccinated for rabies. Rabies is a debilitating and ultimately fatal disease for the animals that contract it. However, environmental ethicist Jordan Curnutt argues that the intent of the rabies law is to promote human safety to ensure humans do not contract the disease and to protect the property value of a dog. The concern for the animal is a minor element.[445]

Despite the seemingly lack of concern for animals themselves in many federal and state regulations, in the last forty years there has been an increased awareness of the sentience and cognitive abilities of animals. This has led many people to argue that animals should have some, albeit limited, legal rights that must be respected by humans. These rights should protect the animal itself rather than human desires connected to animals as property. Deciphering just what those rights would entail is a substantial task. In terms of legal rights, to what types of rights would animals be entitled? Certainly, they cannot vote or participate in the political process. (And if they could, animals certainly outnumber humans which would be to human disadvantage in a majority rule system.) However, perhaps animals could have their day in court if represented by a human guardian. The possession of rights and duties as a person implies that the person is culpable for his or her actions. In the case of animals, it is difficult to prove guilt when a lion murders a deer for food. Further, if included in the class of persons, would the state

[445] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 26.

owe some types of protection to animals such as basic health care? Should highly intelligent animals such as great apes have at least rudimentary protections from harm and suffering? These are all questions this chapter seeks to answer in the study of personhood for animals. In order to delve into the subject, it is wise to start with the foundation grounding the previous chapters and examine the history of personhood for animals as well as what theorists such as Locke and Kant have to say about the subject.

Foundational Theory

In the European tradition, following that of the Greeks and Romans, great apes have not been recognized for their cognitive abilities until very recently. Instead, great apes have been grouped with all other animals as brutish creatures meant for the use of humans. Ancient Greeks and Romans were familiar with monkeys but had no contact with apes. Therefore, they were not aware of the advanced capabilities of these nonhumans who used tools much like primitive humans. Therefore, philosophers such as Plato and Aristotle were able to draw a bold line between reasoning humans and the rest of the animal kingdom.[446] In this tradition, humans were the only creatures suited for personhood.

In other cultures where great apes were prevalent, a very different tradition developed which recognized the abilities and status of great apes. Many African tribes included chimpanzees in their creation mythology. The Oubi people of the Ivory Coast refer to chimpanzees in their language as the "ugly human beings" and believe that chimpanzees are humans who disobeyed God's command to work and were subsequently

[446] Roger Fouts, *Next of Kin*, [William Morrow and Company, Inc. New York, New York, 1997]: 48.

banished to the jungle. The Oubi prohibit the killing of chimpanzees who they consider to be their relatives. The Mende people of Guinea and Sierra Leone refer to the chimpanzee as *numu gbahamisia* or "different persons" because they believe that humans and chimpanzees came from the same group of forest dwellers while the Baoulé people refer to the chimpanzee as the "beloved brother" of man.[447] A similar phenomenon arose in Indonesia whose people were very familiar with orangutan. In the Malay languages, "orangutan" has been translated as "reasonable being of the woods" or "old person of the forest" indicating the respect the Indonesian people have for the intellect of the orangutan and their understanding that the orangutan could be included in the category of persons.[448]

In addition to African and Indonesian traditions, Eastern philosophies, especially the Hindu and Buddhist traditions, hold animals in a place of high esteem and have great concern over animal suffering. These traditions did not spread to Europe and American, and Western tradition lacks a significant concern for animals. European people clung to their established views of great apes as unfeeling, unthinking objects to be used by humans. That animals should have rights under the law was an absurd idea for many early philosophers. Basing their ideas on biblical passages giving human dominion over animals, Locke, Kant, and Descartes made strong arguments for human superiority over animals. Our current understanding of the cognitive abilities of animals is much greater than it was in the time of Locke, Kant, and Descartes, and thus there is reason to revisit

[447] Roger Fouts, *Next of Kin*, [William Morrow and Company, Inc. New York, New York, 1997]: 48.

[448] H. Lyn White Miles, "Language and the Orang-utan: The Old 'Person' of the Forest," in The Great Ape Project: Equality beyond Humanity, Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993] 43.

their philosophies in order to determine if animals received short shrift. On the other hand, the fundamentals of animal behavior, including the fact that animals feel pain, were well known to the people who fashioned the moral and legal order. Despite the knowledge of an animal's capacity for physical and emotional suffering, animals were still denied personhood and firmly categorized as property.

The lack of regard for animals is rooted in both Greek philosophy and biblical teachings. Aristotle studied and dissected many types of animals and chronicled his observations ranging from the anatomy of marine animals to the embryological development of chickens to the social organization of bees. Aristotle taught that the world was based on a hierarchy of beings in which humans were at the top of the ladder and animals were considered lesser beings. Although Aristotle thought that animals had sensitive souls, he believed that animals lacked a rational soul which set them apart from humans. After reviewing the various types of animals and the ways in which humans use animals in occupations such as shepherding, fishing, and hunting, Aristotle concluded that it was justified that that humans use lesser animals as ends to gain food and clothing and therefore treat animals as property. He wrote, "It is evident then that we may conclude of those things that are, that plants are created for the sake of animals, and animals for the sake of men; the tame for our use and provision; the wild, at least the greater part, for our provision also, or for some other advantageous purpose, as furnishing us with clothes, and the like."[449] In Aristotle's "Great Chain of Being," some men are slaves by nature and should serve free men while animals are lesser beings by nature existing solely for the use of humans. Notably, Aristotle's teachings were in direct

[449] Aristotle, "A Treatise on Government," Book 1, Chapter VIII, paragraph 1256 b.

contrast to those of Pythagoras who believed that humans and animals had similar souls and human souls could be reincarnated in an animal. There is evidence that Pythagoras was a vegetarian or at least refrained from eating some parts of animals and encouraged his followers to treat animals with respect.[450] However, Aristotle rather than Pythagoras was the dominant school of thought, and later philosophers followed the paradigm that humans were superior to animals and could use animals for their own means.

Animal sacrifice was common in ancient Roman culture and the spectacle of animal suffering was a form of entertainment for Roman citizens. The historian W.E.H. Lecky recounts that in their attempt to stimulate interest in the displays of suffering, the Romans invented ever more elaborate and barbaric spectacles. Emperor Caligula killed four hundred bear in a single day while Emperor Claudius killed another three hundred. Under Emperor Nero, four hundred tigers battled with bulls and elephants, and Nero's soldiers killed hundreds of bear and tigers. The Romans did not limit themselves to animal sacrifices. Any being outside of the sphere of moral concern, including criminals and military prisoners, was subject to sport of sacrifice.[451]

The Romans were also innovators in using animals as research subjects. Galen of Pergamon, physician to Emperor Marcus Aurelius, dissected pigs, goats, and apes in an attempt to better understand respiration, circulation, and the nervous system. Galen's discoveries influenced medical studies well into the Nineteenth Century. However, even Galen noted the deleterious effects of operating on live animals, and he recommended

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[450] Stanford Encyclopedia of Philosophy, "Pythagoras" First published Wed Feb 23, 2005; substantive revision Fri Nov 13, 2009, http://plato.stanford.edu/entries/pythagoras/ accessed 16 February 2010.

[451] W.E.H. Lecky, "History of European Morals from Augustus to Charlemagne," Volume 1. Kessinger Publishing, LLC, (2003): 280.

that live dissection not be performed on primates because their expression during operations was "unpleasant." Galen's work, however, was not forbidden because Roman law recognized animals only as property to be used any way that the human owner desired.[452]

Because the Romans saw animals as beings without the capacity to reason or exercise free will, they classified animals as *res* (things) rather than *personae* (persons.) Under Roman law, legal title to an animal arose when a person took possession of a wild animal not already belonging to someone else. Under Justinian law, domestic animals and their offspring were passed down from one generation of person to the next under the legal rules of property.[453]

The Old Testament of the Bible provided the most influential argument in favor of human dominance over animals. In Genesis, the Bible states:

> Then God said, 'Let Us make man in our image, according to our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth." So God created man in His own image; in the image of God He created him; male and female He created them. Then God blessed them, and God said to them, "Be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth."[454]

The fact that the Bible specifically gave humans dominion over all other animals was convincing evidence to most philosophers that animals could be considered property to be used to fulfill human needs. For Locke and Kant who were fervent Christians, this

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[452] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 433.

[453] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 27.

[454] Genesis 1:26-28.

evidence was compelling. In numerous places, the Old Testament gives permission for man to use animals for food and even for sacrifice. The Old Testament also cautions humans to treat animals with care. For instance, Genesis forbids humans from eating live animals, while Proverbs states, "A righteous man cares for the needs of his animal."[455] However, these admonitions are mild compared to the many instances where the Bible acknowledges man's right to use animals as he desires and even encourages man to brutally sacrifice animals in order to please God.

Christianity brought to biblical teachings the view that humans were special and above all other species because the human had an immortal soul destined for life after death. The idea of the sanctity of human life was a uniquely Christian concept. While human life was exalted, the New Testament does not provide any protections for animals. For example, in the Gospel of Mark, Jesus exorcises demons and casts themselves into a herd of two thousand swine that then drown themselves in a lake.[456] The Gospel of Matthew proclaims that God knows when even a sparrow falls to the ground, but goes on to say that humans are worth much more than sparrows.[457]

The theologian Thomas Aquinas took his cue from both Aristotle and biblical teachings when he wrote that there is an order of things in life, and beings in higher orders may use lower beings for their benefit. Thus, Aquinas taught that plants are to be used by animals, and animals are to be used by man. In respect to biblical passages forbidding cruelty to animals, Aquinas interpreted these passages for the benefit of

[455] Genesis 9:4, Proverbs 12:10.

[456] Mark 5:11-13

[457] Matthew 10:29

humans. He wrote that their purpose was to "turn man's mind away from practicing cruelty on his fellow-men, lest from practicing cruelties on dumb animals one should go on further to do the like to men…"[458] Thus, according to Aquinas, the real intent in preventing cruelty to animals was to ensure that man's heart did not become hardened to the point where man would inflict cruelty on fellow men.

In the 1500s, several prominent scholars proposed an elevated conception of animals. Sir Thomas Moore published *Utopia* in 1516 and proposed a world that lacked hunting and animal sacrifice. However, Moore did allow animals to be eaten as food and envisioned that slaves would have the unpleasant task of butchering animals.[459] Montaigne, in 1580, asserted that the difference between humans and animals was a matter of degree rather than kind. He pointed out that animals have the ability to communicate and humans were impudent for considering themselves superior.[460] Although these scholars argued that animals should be given more moral concern, the dominant paradigm set in the Greek, Roman, and biblical tradition continued.

John Locke was one of the most important liberal thinkers to base his understanding of the proper place of animals in society on this dominant paradigm. Locke accepted that humans had dominion over all the earth and because God made humans in his image, Locke claimed that humans could not subordinate each other or destroy one another for one's own use. In contrast, Locke argued that humans could use "inferior ranks of creatures" as needed because he believed that God had created these

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[458] Thomas Aquinas, "Summa Contra Gentiles," Book III, Chapter 112, Translated by Joseph Rickaby, S.J., available from http://www2.nd.edu/Departments/Maritain/etext/gc3_112.htm, accessed 10 January 2010.

[459] Sir Thomas More, "Utopia," originally published 1895 [Adamant Media Corporation, Boston, 2005]: 78.

[460] Hassan Melehy, "Montaigne and Ethics: The Case of Animals," *L'Esprit Créateur* 46.1 (2006): 96-107.

creatures for human use as part of their grant of dominion.[461] Humans enjoyed rights over all the earth including animals because God ordained it.

Locke established the idea that animals were the property of humans based on his biblical understanding of human domination over animals. Locke acknowledged that God gave the natural world to all of mankind and that animals were "produced by the spontaneous hand of Nature."[462] Locke therefore needed to justify why animals could be claimed as property. Locke argued that humans needed to appropriate animals in some way in order to have an exclusive property right in an animal. Through a person's labor, such as hunting or raising livestock, a person appropriated an animal from the state of nature and thus acquired a property right in that animal. Again, this property right was justified by God's will.[463]

Locke categorized animals with all other natural resources such as plants, trees, and the earth. Therefore, Locke did not consider that animals may have any rights of autonomy or property rights in their own bodies even though he acknowledged that some animals had sophisticated cognitive abilities. Animals, as inferior creatures, had no rights or protections that humans needed to observe. Like Aquinas, Locke advocated the humane treatment of animals for the sake of humans, not the animals themselves. Locke maintained that "the custom of tormenting and killing beasts will, by degrees, harden their minds [children] even towards men; and they who delight in the suffering and

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[461] John Locke, *The Second Treatise of Civil Government*, Peter Laslett, editor, [Cambridge University Press, 1988 edition, originally published 1764]: Chapter 2, Section 6.

[462] John Locke, *The Second Treatise of Civil Government*, Peter Laslett, editor, [Cambridge University Press, 1988 edition, originally published 1764]: Chapter 5, Section 26.

[463] John Locke, *The Second Treatise of Civil Government*, Peter Laslett, editor, [Cambridge University Press, 1988 edition, originally published 1764]: Chapter 5, Section 27.

destruction of inferior creatures will not be apt to be very compassionate or benign to those of their own kind."[464] Locke even went so far as to argue that butchers should not be jurors in capital crimes cases because their livelihoods of killing animals would harden their hearts towards humans.[465] Thus, in order that humans have gentle and compassionate demeanors, Locke discouraged wanton torture of animals although he did not advocate vegetarianism. Locke's views that inflicting unnecessary suffering on animals was wrong because of the harm that it does to humans and that humans should avoid wasting animals is reflected in modern legal regulations.

Kant's view on the place of animals was very close to that of Locke. A deeply religious person, Kant also took his cue from Genesis and believed that humans were superior entities. Like Aristotle, Kant argues that humans alone are rational and self aware and this is what sets them apart from other animals. Animals, which are not rational, do not have moral value because they cannot understand or consciously choose to follow moral precepts.[466] Kant argues that animals are not self-conscious. In his analysis of rational beings, he does not consider the fact that animals feel physical pain, experience fear, loneliness, anger, and a number of other psychological states. Further, he does not consider that some animals make plans and carry out those plans – a dog understands what a bone is, the dog buries it in the ground for future use, and then later digs up that bone so he can chew it. This type of planning does not qualify in a Kantian

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[464] John Locke, "Some Thoughts Concerning Education," [Cambridge University Press, 1892]: Section XV, 116, paragraph 5.

[465] John Locke, "Some Thoughts Concerning Education," [Cambridge University Press, 1892]: Section XV, 116, paragraph 10.

[466] Immanuel Kant, "Anthropology from a Pragmatic Point of View," Edited by Robert Louden, [Cambridge University Press, 2006]: Book I, section 127.

analysis. The critical criterion is that moral agents must be able to make rational decisions using Kant's categorical imperative. Because animals are not capable of this level of rational thought, they are excluded from consideration.[467] Because animals are not included in Kant's analysis, he permits humans to use animals as a means to an end.

Kant wrote, "Beings whose existence depends, not on our will, but on nature, have nonetheless, if they are non-rational only a relative value and are consequently called things."[468] Animals are such beings that are simply things that moral agents (rational human beings) may use as means for their ends. Because animals do not have value in and of themselves, humans do not have a direct duty to treat them in the same way as humans must treat fellow humans. Humans are free to eat animals, wear their skins, and use animals for whatever other purposes humans may desire. In his analysis, children are not moral, rational agents or rights bearers because they are yet capable of moral decision making. Does that mean that we can experiment on children or even eat them? Surely not, but because the subject of animal rights was not an issue considered in academic circles during the 1700s, Kant does not address this issue.[469] However, this is not beyond the realm of consideration. Nazis subjected Jewish children to horrendous medical experimentations and justified their actions because Jewish children were not part of their moral community.[470]

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[467] Immanuel Kant, *Foundations of the Metaphysics of Morals*, Translated by Lewis White Beck, [Prentice Hall Inc, New Jersey, 1997, originally published in 1785]: 428.

[468] Immanuel Kant, *Foundations of the Metaphysics of Morals*, Translated by Lewis White Beck, [Prentice Hall Inc, New Jersey, 1997, originally published in 1785]: 428.

[469] Immanuel Kant, *Foundations of the Metaphysics of Morals*, Translated by Lewis White Beck, [Prentice Hall Inc, New Jersey, 1997, originally published in 1785]: 428.

[470] Tom Regan, *Defending Animal Rights*, [Chicago: University of Illinois Press, 2001].

Although Kant argues that humans do not have direct duties to animals, he does allow indirect duties to beings that are not moral agents. Just like Aquinas and Locke, Kant believes that humans should abstain from cruelty to animals because it is harmful to the character of the human and would lead humans to be cruel to one another. Kant writes that cruelty to animals "dulls his sympathetic participation in their pain and so weakens and gradually destroys a natural disposition most useful to morality in one's relation to other men."[471] Thus, humans do not have any direct duties to animals themselves; rather the duty is to protect the human character. Kant uses the example of a family's dog. If the dog has served his master faithfully, when the dog grows old, the master should keep him until he dies. However, if the man shoots the dog when the dog is old, the man does not fail in his duty to the dog because a dog does not have any moral claims. The man who shoots the dog damages his own humanity that he shares with his fellow humans – "tender feelings toward dumb animals develop humane feelings toward mankind."[472] Kant states, "Man can have no duty to beings other than man…his alleged duty to other beings is really a duty to himself."[473] Therefore, cruelty to animals is not directly prohibited in Kantian ethics because animals are not included in the category of rational, moral agents. If cruelty to animals did not result in cruelty to fellow humans, then Kant would allow humans do to anything they wished to animals.[474]

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[471] Immanuel Kant, *The Doctrine of Virtue*, Translated by Mary J. Gregor, [New York: Harper and Row, 1964]: 109.

[472] Immanuel Kant, *Lectures on Ethics,* Translated by Louis Infield, [Harper and Row, 1965]: 241.

[473] Immanuel Kant, *The Doctrine of Virtue*, Translated by Mary J. Gregor [New York: Harper and Row, 1964]: 99.

[474] Philosopher Charles Landesman claims that this argument leads to moral absurdity. Landesman argues that animals belong to the moral community to the extent that they can suffer, and humans should have a

Kant was not alone in his argument that cruelty to animals is not morally unacceptable due to the effects on animals; Curnutt argues that many Enlightenment thinkers agreed that because animals lacked rationality and a soul, animals had no moral importance. For example, Nicholas Malebranche, a philosopher in the rationalist tradition as well as Antoine Arnauld, a theologian from the Jansenist movement were leading scholars who encouraged vivisection as the path to scientific discovery. They saw experimentation on animals as a viable alternative to using humans and encouraged animal experimentation for furthering scientific exploration despite any physical suffering animals might feel.[475] Although Malebranche and Arnauld were well known for their views promoting animal experimentation, the greatest advocate among Enlightenment thinkers was Rene Descartes.

Rene Descartes strongly argued that animals had no moral importance. Because Descartes believed that animals did not have a God-given soul which was required for consciousness, and because they did not have linguistic capability, Descartes argued that animals were not rational, sentient beings with moral standing. Descartes compared animals to moving machines rather than sentient beings. Thus, Descartes and his colleagues performed experiments on living animals without using anesthesia. Descartes claimed that the cries of the animals were similar to the noise of a malfunctioning machine rather than the screams of sentient beings experiencing pain. According to Descartes' reasoning, if animals are not sentient or conscious, they cannot have any

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direct duty to avoid cruelty to sentient beings. Charles Landesman, "Against Respect for Persons," *Tulane Studies in Philosophy*, (Vol. 31, 1982): 37.

[475] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 434.

interests of their own and it is nonsensical to claim that humans have any moral or legal obligations to them.[476] Descartes' extreme views that animals had no consciousness or ability to feel pain gradually lost support among philosophers. However, the view that God made animals expressly to serve man remained the dominant theory.

Locke, Kant, and Descartes argued that animals do not have interests that need to be protected. Thus, there is no need for the law to even consider rights and protections for animals. However, other philosophers disagreed. One philosopher who challenged the dominant theory was Utilitarian Jeremy Bentham who maintained that animals do feel pain and suffering and thus deserve moral consideration. Bentham argued that the ability to feel pain and suffering was the only requirement for moral status, and because animals could feel pain, they had moral worth. In his famous passage Bentham wrote, "[A] full-grown horse or dog is beyond comparison more rational, as well as a more conversable animal than an infant of a day, week, or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, can they reason? Nor, can they talk? But, can they suffer?"[477] Bentham believed that because animals were sentient, humans at least had an obligation, directly to the animal itself, to refrain from causing unnecessary pain and suffering to animals. Bentham included the pain and suffering of animals in his utilitarian calculus. Although Bentham did not believe that animals should be classified as things, he did not challenge the dominant theory that animals were the property of humans. Thus, Bentham agreed with Kant that animals were a means for human ends. He believed that animals, because they were not rational and self-aware,

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[476] Rene Descartes, "Discourse on Method," in Philosophical Writings of Descartes, Translated by John Cottingham, [Cambridge University Press, 1985] 141.

[477] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, H.L.A. Hart and J.H. Burns, editors, [Oxford University Press, 1996 originally published in 1780]: Chapter XVII, note b.

did not have an interest in their continued existence. Therefore, it was permissible for humans to kill and eat animals. Animals could be used as a means for human ends as long as they did not suffer at the hands of humans.

Finally, Charles Darwin began a revolution in the way humans understood their relationship to animals, and especially to great apes. Until Darwin, humanity was often defined in relation to the negative – humans were the opposite of animals. Darwin proved that humans and animals were not opposites but rather were part of an ongoing evolution of species. Darwin saw the potential opportunities for scientific progress in studying man's closest relatives. The theory of evolution taught that the differences between humans and animals were differences of degree rather than kind. In his book, "The Expression of Emotions in Animals and Man," Darwin studied the similarities in emotion and expression among a number of mammals. Humans were simply evolved animals and not necessarily divinely ordained by God as deserving of a privileged status. In "The Descent of Man," Darwin wrote, "We have seen that the senses and intuitions, the various emotions and faculties, such as love, memory, attention and curiosity, imitation, reason, etc., of which man boasts, may be found in an incipient, or even sometimes in a well-developed condition, in the lower animals."[478] Because humans are close relatives to their fellow great apes, some theorists interpreted Darwin's theories as a need to protect these closely related animals and provide some rights and obligations to animals. At the same time, however, some theorists interpreted Darwin's theories in a very different light.

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[478] Charles Darwin, *The Descent of Man and Selection in Relation to Sex. With a New Introduction by Richard Dawkins*. [London, Gibson Square Books, 2003]: 126.

Evolution taught that humans were indeed superior to other animals because humans had reached the pinnacle of evolution. Even though humans may not be divinely superior, they were certainly biologically superior and at the top of the animal hierarchy which justified the maltreatment of animals. Survival of the fittest justified the exploitation of inferior animals for the use and benefit of humans. During the early 1900s, Americans went so far as to put a human pygmy from the Belgian Congo named Ota Benga on display next to the chimpanzees in the Bronx Zoo as an example of an inferior, sub-human race. Human pygmies were viewed as genetically inferior beings incapable of abstract thought. Because pygmies were seen as not sufficiently evolved to comprehend complex systems of laws and property, they were thought to be further down on the evolutionary chain, and thus more akin to an animal than a human.[479] Similarly, members of other races such as Africans and Chinese were believed to be not as highly evolved as whites and thus were subject to subjugation. It seemed as if exploitation of the "other" knew no bounds. Consequently, while Darwin caused a revolution in human understanding of animals in some respects, humans were able to retain their belief in their own superior position which justified treating animals as property.

In 1863, biologist Thomas Henry Huxley who was a follower of Darwin, published "Evidence as to Man's Place in Nature," which studied the close anatomical relationship between African apes and humans. Huxley argued that African apes should be placed in the same taxonomic family as humans. Huxley was widely ignored and it was not until nearly a century later that Morris Goodman, a professor of anatomy at Wayne State University, confirmed that humans and chimpanzees belonged to the same

[479] Sue Savage-Rumbaugh and Roger Lewin, *Kanzi the Ape at the Brink of the Human Mind,* [John Wiley and Sons, Inc. New York, 1994]: 13.

genus using molecular studies. Goodman again proposed a reclassification of man and ape into the same genus Homo but was again rebuked for proposing such a close relationship between apes and humans.[480] The world was not yet ready to accept the data linking humans and great apes.

The theories of Locke, Kant, Descartes, and Darwin form much of the basis of modern political theory on the status of animals. Modern theorists, basing much of their work on these early pioneers, passionately debate the status of animals as rational, sentient beings that may or may not have a claim to personhood.

Modern Theory

The theories of Locke and Kant had a profound influence on modern theory surrounding the personhood of animals in that it established the paradigm that humans are superior creatures, while the place of animals is to be used by humans. Most modern scholars have moved beyond Descartes' teaching that animals are unfeeling autobots with no moral worth, scholars generally agree that animals must count for something; yet their moral worth is still largely debated. On one side of the spectrum, scholars such as utilitarian Peter Singer charge that those who distinguish among creatures based on different species and discriminate against animals in favor of humans are guilty of "Speciesism." Speciesism, according to Singer, is analogous to racism based on arbitrary and unjust discrimination. Most scholars do not go to this extreme, but concede that some type of middle ground must be found that protects the interests of animals while upholding the use of animals for human needs. Yet, very few scholars are ready to grant

[480] Sue Savage-Rumbaugh and Roger Lewin, *Kanzi the Ape at the Brink of the Human Mind,* [John Wiley and Sons, Inc. New York, 1994]: 23.

personhood to animals. Nonetheless, based on the criteria for personhood as covered in previous chapters, there is solid evidence that at least some species of animals could be included in the realm of persons.

Much of the criteria for moral personhood are based upon mental capacities such as rational thought, the ability to communicate, the capability to consider one's actions and desires, and social aptitude. Although most animals do not possess all of these capacities, animals such as great apes do seem to fulfill these requirements giving pause to scholars who do not consider non-humans candidates for personhood. Great apes have mental capabilities comparable or above those of young children, the mentally disabled, and comatose humans. However, science has not proven that animals are self aware in a moral sense. Although animals can act altruistically and even virtuously, it does not seem that animals are able to evaluate the ethics of their options and then deliberately choose to act morally. In this sense, animals are not culpable for their actions and thus cannot be held accountable in the same way that humans are culpable. This raises problems for including animals in a legal definition of personhood. All of these issues are part of the modern theoretical foundation for animal personhood.

Although deontologist and libertarian Robert Nozick was not an animal rights scholar by profession, his work provides a good starting point for delving into modern theories because he based his philosophy of animals on Locke and Kant. In *Anarchy, State, and Utopia*, the subject of animal rights comes up as Nozick is explaining the importance of side constraints on individual rights. In the course of setting an example of side constraints, Nozick sets forth a lengthy discussion on the status of animals.

Nozick doubts Locke and Kant's theories that harming animals will have a spillover effect on humans making them more likely to harm fellow humans. Nozick presumes that harming animals is wrong in itself, and although animals do not have the same moral status as humans, animals must at least count for something. However, Nozick admits that this is a difficult assertion to prove.[481] The difficulty is in determining which animals count, how much an animal counts, and to what extent must humans modify their behavior so as not to violate animals. For example, he questions the justice of using animals for food given the availability of healthy, inexpensive vegetarian options. He does not conclude that carnivores are wrong, but merely suggests that a person should reflect on these considerations when deciding where to draw the line in respect to animals. He does not conclude that animals have any moral significance that society must respect. Instead, he holds true to his individualistic approach and advocates that each person must come to an individual decision whether or not to protect the interests of animals.[482]

Nozick proposes a theory he calls "utilitarianism for animals, Kantianism for people." Under the utilitarian tenet, we should maximize the happiness of all living beings. However, some living beings, namely humans, hold a special moral weight. Thus, under the Kantian tenet, we must place stringent side constraints on what humans can do to each other. For instance, although animals may be sacrificed for the benefit of people if the benefits are greater than the suffering inflicted, humans may never be sacrificed. After some consideration, Nozick concludes that utilitarianism is not a

[481] Robert Nozick, *Anarchy, State, and Utopia*, [Basic Books, New York, 1974]: 35.

[482] Robert Nozick, *Anarchy, State, and Utopia*, [Basic Books, New York, 1974]: 35-37.

sufficient doctrine for animals, but he does not offer an alternative solution. (Nozick is not an advocate of utilitarianism as any form of moral philosophy, not just in respect to animals.) Instead, he raises a number of vexing questions concerning the status of animals. Nozick writes,

> How much does an animal's life have to be respected once it's alive, and how can we decide this? Must one also introduce some notion of a nondegraded existence? Would it be all right to use genetic-engineering techniques to breed natural slaves who would be contented with their lots? Natural animal slaves? Was that the domestication of animals? Even for animals, utilitarianism won't do as the whole story, but the thicket of questions daunts us.[483]

Indeed, Nozick's questions concerning the level of respect humans must give to the lives of animals are at the heart of personhood for animals. Should animals be given the full respect of persons whose lives, liberties, and pursuit of happiness must be protected? Or do animals warrant the status of simply objects with little to no protection? Or do animals warrant some status in between? How should humans adjudicate this question and determine the appropriate status of animals?

Because a "person" has moral significance, it is important to define persons with care. Persons have a moral worth and a right to life. If animals are not included as persons, then animals do not have a claim to moral worth and life that must be respected by humans. Libertarian theorist and deontologist Tibor Machan argues that animals are not moral actors and thus do not have claims or rights. He contends that humans and animals are categorically different and bestowing "animal rights" is an error of treating two different types of entities as if they are the same. Just because humans sympathize with animals does not mean that they are deserving of rights as humans are. It is cruel

[483] Robert Nozick, *Anarchy, State, and Utopia*, [Basic Books, New York, 1974]: 42.

and inhumane to treat animals badly, but that behavior does not violate their rights because animals do not have rights that must be respected.[484]

The proposal to grant rights to animals has many critics. Another critic who agrees with Machan is fellow deontologist Carl Cohen who argues that the very essence of having a right involves the capacity for autonomy and the ability to make moral decisions based on free will and the ability to tell right from wrong. This ability is essentially human. Although animals have cognitive abilities and can reason, communicate, show emotion, and suffer, animals do not have the capacity to act morally. For instance, a wolf is not capable of considering the moral consequences of killing a sheep. Cohen writes, "A being subject to genuinely moral judgment must be capable of grasping the maxim of an act and capable too of grasping the generality of an ethical premise in a moral argument. Similarities between animal conduct and human conduct cannot refute, cannot even address, the proud moral differences between humans and rodents."[485] Emphasizing the similarities between humans and monkeys or humans and any other animals only obscures the critical fact that animals cannot be members of a moral community. Cohen contends that to say that a great ape, rat, pig, or rabbit has rights is to confuse the moral world of humans with the amoral world of animals.

Therefore, Cohen vehemently argues that justice demands that animals be used in medical experiments to help humans who are moral beings. The vast number of medical advancements that have come from the use of animals in laboratories justifies their use.

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[484] Tibor Machan, *Putting Humans First: Why We Are Nature's Favorite,* [Rowman & Littlefield Publishers, Inc. Lanham, MD, 2004]: 10.

[485] Carl Cohen and Tom Regan, *The Animal Rights Debate*, [Rowman & Littlefield Publishers, Inc. New York, 2001]: 38.

Because animals are sentient, they must be treated with care but they do not have rights that protect them from being unwilling participants in experiments. Animals do not have the capacity to exercise autonomy and refuse to participate in experiments.[486] Despite Cohen's arguments that animals cannot exercise autonomy, the fact that many animals will try to escape the laboratory signifies their refusal to participate. Similarly, although a cow cannot verbally refuse to be branded, most cows will try to flee when they smell burning flesh and hear the cries of their fellow bovines. Great apes that have been taught sign language do have the capacity to inform humans that they do not wish to participate in various projects. Some animals such as great apes might be able to exercise some rights in a limited capacity.

Political philosopher and animal activist Elizabeth Anderson maintains that humans and animals have their own place in the natural order based on their capabilities as a species. While parrots are capable of learning a human language and seem to enjoy speaking a human language when rewarded with food, there is no moral obligation to teach parrots to speak because they do not need language to survive in their natural habitat. Capacity does not necessitate a moral right. Conversely, humans must learn a language in order to survive in society and so there is a moral obligation to teach human children to speak. Dogs naturally eat their meals from a bowl on the floor and there is no obligation to set a place for the family dog at the dinner table. Further, if we were to dress the dog up in human clothing, we would be making a mockery of the animal. However, if we were to witness an Alzheimer's patient eating from a bowl on the floor, we would we outraged because she is being treated like an animal rather than a person in

[486] Carl Cohen and Tom Regan, *The Animal Rights Debate*, [Rowman & Littlefield Publishers, Inc. New York, 2001]: 38.

society. Humans have a place within the community of persons that must be respected. Anderson contends that humans and animals all have their place in society and to treat species differently is not Speciesism but rather following the natural order of the world.[487]

British philosopher and self-proclaimed polemicist Roger Scruton argues against animal rights contending that rights imply duties and animals do not have the capacity to fulfill duties. Humans alone understand concepts such as rights, duties, justice, and responsibility. He argues that the capacity to engage in rights and duties is what is unique about the human condition and to enlarge the scope of rights beyond humans jeopardizes the dignity of humans as moral beings. Scruton regards the animal rights movement as the "strangest cultural shift within the liberal worldview."[488] Similarly, libertarian legal scholar Richard Epstein questions whether rights for animals entails corresponding duties to animals by humans. While he acknowledges that certain animals such as chimpanzees have considerable rational abilities, he questions whether or not humans have obligations to animals to keep them healthy, fed, and happy. If a pill is invented to cure a disease plaguing both humans and chimpanzees, is there a duty to assist chimps to the same extent that we assist humans? This is especially critical if the pill was in short supply or prohibitively expensive. Epstein doubts that that there is an affirmative duty to put chimpanzees above humans. He concludes saying, "The blunt

[487] Elizabeth Anderson, "Animal Rights and the Values of Nonhuman Life," in Animal Rights: Current Debates and New Directions, Cass R. Sunstein and Martha C. Nussbaum editors, [Oxford University Press, London, 2004]: 281.

[488] Roger Scruton, "Animal Rights," *City Journal (Online)* Summer 2000, available from http://www.city-journal.org/html/10_3_urbanities-animal.html, accessed 21 January 2010.

point is that we have had and will continue to have different moral obligations to members of our own species than we do to chimps or members of any other species."[489]

Even if some animals are granted a basic right to the means for survival such as food, shelter, and medical care, the idea that animals have a panoply of rights is arguable. Taking animal rights one step further and considering legal personhood for animals is even more questionable within a society that has not truly considered such a proposal. If animals are granted legal personhood, then animals would likely be granted certain rights such as the ability to bring suit with a human guardian. Of course, the concept of rights for animals engenders some problems within the public perception which generally conceives of rights as only applying to humans. The public often equates animal rights to human rights such as the right to free speech, exercise of religion, and the right to vote. Applying these rights to animals is absurd because they do not have the capacity for such rights. This transitive type of association gives the entire movement the appearance of ridiculousness. Further, the idea of rights for animals often leads to the perception that human rights and animal rights are in competition. The animal rights movement is generally opposed to using animals for food, clothing, and experimentation which limit human options to use animals as they please. This conflict of interest tends to give the perception that animal activists are human haters rather than animal lovers.[490]

On the other side of the issue, scholars who support increased respect, recognition, rights for animals argue that as sentient and rational creatures, animals

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[489] Richard A. Epstein, "Animals as Objects or Subjects of Rights," in Animal Rights: Current Debates and New Directions, Cass R. Sunstein and Martha C. Nussbaum editors, [Oxford University Press, London, 2004]: 155.

[490] Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement,* [University of Michigan Press, Ann Arbor, 1996]: 234.

deserve to be treated with care and justice. Humans cannot exploit animals simply because humans see themselves as superior beings. To do so is unjust discrimination against animals. The leading scholars advocating for animals are deontologist Tom Regan and utilitarian Peter Singer.

Tom Regan argues that animals do have rights that humans must respect. Basing his theories on Kant who taught that humans have individual value, Regan extends Kant's philosophy and maintains that all animals have value because they all are "subjects of a life." In his "subjects of a life" theory, he proposes that any organism that is capable of having a life that is meaningful to that particular organism has moral value. Regan rejects criteria based on rationality for moral consideration because he argues that cognitively inferior creatures still are capable of having meaningful lives. Creatures who qualify under the "subjects of a life" theory have perceptions, feelings of pleasure and pain, preferences, memory, and a sense of their own future. These beings must have an understanding of their own individual welfare and must be able to initiate action in pursuit of their preferences and goals. Thus, dogs, apes, and humans all qualify as "subjects of a life," and it is morally impermissible to use them as a means to an end. Regan concedes that humans are cognitively superior to other animals, and thus death is a greater harm to humans than animals. Humans are justified in saving the life of a fellow human over the life of an animal in the case of an emergency. However, if an animal's moral rights are to be overridden, the human must present valid, moral grounds for taking such action rather than just appealing to favorable consequences that would result.

Val Plumwood, an ecofeminist, criticizes Regan for not explaining when and why humans should intervene when animals use each other for food. She questions whether a

human is obligated to intervene when a wolf attacks a sheep. Regan claims that the wolf is a moral patient rather than a moral agent and thus the wolf cannot violate or respect another creature's rights because the wolf is not a responsible agent. But Regan does not explain why a human, who is a responsible moral agent and can recognize a violation of the sheep's rights, does not have a duty to stop the wolf. Surely, the human would need to intervene if the wolf was attacking a human baby – why is there a difference for a sheep? However, if the human does not intervene, there is a possible violation of the wolf's right to its natural food.[491] Because Regan elevates the moral worth of animals to that of humans, he is faced with this type of dilemma. If humans and animals have equal moral worth, then problems arise when carnivores pursue their natural food source or when parasites feed off of their host. The problem of animal destruction is not limited to humans destroying animals for food, clothing, and research.

Regan criticizes those who take a utilitarian approach to animal rights because he finds that most utilitarians do not fully consider the moral importance of animals who are "subjects of a life." He charges that this is a direct result of animals being classified as property because humans do not consider the moral importance of their property and do not recognize that moral beings should not be included in such a classification. As "subjects of a life" with intrinsic value, Regan argues that animals have moral value and rights that cannot be violated. Therefore, Regan opposes medical research on animals because it violates the rights of unconsenting animals. No matter how beneficial the research may be for humans, humans must respect animals' rights to life and well-being.

[491] Val Plumwood, "Nature, Self, and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism," *Hypatia*, 6:1, (Spring 1991): 8.

Another animal rights scholar who demands increased respect for animals is Peter Singer. As a utilitarian, Singer essentially argues that humans must take animal interests seriously when using a utilitarian calculus. He does not advocate that animals have rights, but he does argue that animals should not be treated poorly based on their species membership. He argues that treating animals differently and poorly based on the animal's species is "Speciesism," and he goes so far as to charge that treating animals differently is akin to racism. Just as African Americans were enslaved and not considered persons, animals too are victims who are not recognized as moral beings. In much the same way that racism led to torturous experiments on different races under the Nazi regime, he argues that Speciesism is to blame for the painful experiments humans perform on animals.[492] In his opinion, an experiment on animals cannot be justified unless the experiment is so important that the use of a brain-damaged human would also be acceptable. Since very few people would consent to the use of brain-damaged humans for experimentation, animal experiments would also be unacceptable. Singer does not argue that humans and other animals should be given equal moral weight. He does say that when the interests of a human and an animal are of a similar type, such as a interest in life, there is no reason to favor a human over the animal – to do so would be speciesism.

Singer maintains that humans fail to recognize the importance of animal society. Just as humans experience love during a marriage and loss after a death, some animals pair for life and experience similar emotional states. However, humans tend to attribute animal relationships to instinct and do not hesitate to separate paired animals when

[492] Peter Singer, *Animal Liberation*, [HarperCollins, New York, 2002]: 83.

capturing and hunting animals. Nor, do we acknowledge the sadness animals experience when they are separated from their mothers at birth. For example, when Nim Chimpsky was taken from his chimp mother Carolyn as an infant, Carolyn grieved, holding Nim close to her chest and then searched for her child after she was tranquilized in order to remove the chimp. Stephanie, the human caretaker who came to take Nim and raise him, recalled looking into Carolyn's eyes "mother to mother" and seeing rage in Carolyn's eyes, Stephanie whispered, "She knows."[493] Such evidence of the emotional pain experienced by animals is part of Singer's argument that animals must be considered as morally significant beings.

Animals have morally significant interests in not suffering and preserving their lives that humans must consider according to Singer. He does not argue that it is just as wrong to kill a dog as it is to kill a human in full possession of her faculties. However, humans cannot draw the line for the right to life strictly along the lines of the human species. He concludes that all barriers that stand in the way of respect for all morally considerable beings, including barriers based on race, gender, and species, must be obliterated. Deontologist Gary Francione challenges Singer's conclusion contending that the only way Singer can avoid charges of speciesism is to concede that under certain circumstances it would be permissible to use humans as well as animals for the benefit of others.[494] Singer concedes that if experiments on unconsenting animals are permissible, then experiments on unconsenting humans should also be allowed. Instead of this radical conclusion, Singer advocates that testing on animals and humans be prohibited.

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[493] Elizabeth Hess, *Nim Chimpsky: The Chimp Who Would be Human,* [Bantam Dell, New York, New York, 2008]: 62.

[494] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 255.

Although Singer the utilitarian and Regan the deontologist come from very different philosophical paradigms, their arguments are often lumped together in the popular, non-academic understanding of the "animal rights movement" because both theorists seek to end animal suffering and premature death at the hands of humans. Both theories share the convictions that consumption of animal products for food and clothing is morally wrong and that the use of animals in experiments is unacceptable. Singer and Regan are often praised together by those who agree with their outcomes or criticized together by those who disagree.

One criticism aimed at Singer and Regan is that they place humans and animals on the same playing field and ignore the many differences among the various types of animals. To even consider animal personhood offends human dignity. In some respects, humans gain their elevated status as persons by comparison to lower animals who do not qualify for personhood. To include animals that do not have the cognitive abilities of humans within the category of persons lessens the import of the classification. Indignation over equating the status of animals to humans is most noticeable when comparisons are made between racism and Speciesism or when the Holocaust is compared to "animal holocausts."

In 2003, PETA (People for the Ethical Treatment of Animals) launched a campaign called "Holocaust on Your Plate" in order to draw attention to factory farms and slaughterhouses. The advertisements featured scenes from Nazi concentration camps next to pictures from slaughterhouses. For example, a picture of a starving Jewish prisoner was juxtaposed against a starving cow. According to a PETA statement, the advertisement campaign was designed to "stimulate contemplation of how the

victimization of Jews, Gypsies, homosexuals, and others, characterized as 'life unworthy of life' during the Holocaust, parallels the way that modern society abuses and justifies the slaughter of animals."[495] However, the campaign went too far in trying to raise awareness of animals as "subjects of a life" in Regan's terminology. The PETA campaign drew widespread criticism including a statement from the Anti-Defamation League. In a press statement, Anti-Defamation League Director Abraham Foxman said, "The effort by PETA to compare the deliberate, systematic murder of millions of Jews to the issue of animal rights is abhorrent. PETA's effort to seek approval for their 'Holocaust on Your Plate' campaign is outrageous, offensive and takes chutzpah to new heights."[496] The outrage at the advertising campaign illustrated that much of the public does not view animals as the moral equals of humans, nor do they equate animal suffering with the atrocities committed during the Holocaust. Although many humans feel sorry for the plight of animals, they do not subscribe to a full theory of Speciesism as advanced by Singer and Regan.[497]

Libertarian Loren Lomasky takes issue with comparisons to racism and sexism by animal rights scholars. He writes, "The denial of rights to animals is thoroughly disanalogous to the denial of rights to blacks, women, and other oft-discriminated against classes of human beings."[498] Lomasky contends that animals cannot be discriminated

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[495] AR-News: 'Personhood' Redefined: Animal Rights Strategy Gets at the Essence of Being Human, EnvironLink, November 26, 2003, available from http://lists.envirolink.org/pipermail/ar-news/Week-of-Mon-20031124/011299.html, accessed 21 February 2010.

[496] ADL Denounces Peta for its "Holocaust On Your Plate" Campaign, Anti-Defemation League, Press Release, February 24, 2003, available from http://www.adl.org/PresRele/HolNa_52/4235_52.htm, accessed 22 February 2010.

[497] Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press 1987]: 222.

[498] Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press 1987]: 224

against as rights holders because animals, unlike humans, do not have the capacity to be project pursuers and they will never be able to develop such a capacity. Humans make life plans such as to bear children, have careers, live peacefully, and so forth. Animals do not live this way – instead animals focus on basic needs such as shelter, food, and companionship. Lomasky argues that the advanced capacity to be project pursuers is what sets humans apart and gives humans a claim to rights that cannot be violated. Lomasky acknowledges that sentience and self-awareness are important traits for animals, and it is morally wrong to cause needless suffering to an animal. However, according to Lomasky, sentience and self-awareness do not warrant rights.[499]

S.F. Sapontzis, whose philosophy borrows from both utilitarianism and deontology, agrees with Lomasky that animals are not moral agents. Sapontzis finds that animals do many actions that might be considered moral by humans such as a Seeing Eye Dog showing responsibility and restraint, or other dogs that show courage and loyalty to humans even to the point of risking their lives to save the life of a human. However, Sapontzis questions whether animals recognize the morality of their actions. Can animals reason about the morality of their actions and then choose to act accordingly or are their actions based on some type of instinct? Sapontzis concludes that animals do not act entirely on instinct yet they are not truly capable of moral behavior based on reasoning. Animals, he concludes, adjust their actions based on their environment. They can be trained and disciplined but they cannot self-direct themselves to be trained and act ethically. Humans, on the other hand, try to control their environments and reconstruct their world and themselves. This is akin to Lomasky's theory of project pursuers.

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[499] Loren E. Lomasky, *Persons, Rights, and the Moral Community*, [Oxford University Press 1987].

Because animals do not have the capability to control and direct their own actions, Sapontzis presumes that they are not moral agents.[500]

Although Sapontzis concludes that animals cannot be moral agents and thus cannot be persons, he argues that animals are moral recipients and should be treated with respect. He argues that beings that can act virtuously should be treated as ends in themselves. He argues that the expression "animal rights" should really be changed to "sentient rights" and "animal liberation" to "interest liberation" in order to reflect the fact that all beings that are sentient and have interests should be protected. He does admit that changing these slogans would be practically detrimental to the animal rights movement.[501] Sapontzis believes that animals should not be used in experiments because they cannot give an informed consent and to coerce animals into research violates the respect they deserve as sentient, moral recipients. He also calls for greater moral and legal protections for great apes. Even though he states that great apes do not have a moral claim on personhood, he argues that emphasizing the human-like qualities of great apes is an astute way of securing greater protections for such animals. He finds that people tend to characterize the world as "us versus them" in black and white terms. If humans see the similarities between great apes and humans and feel empathy for animals they perceive as kin, it might help great apes secure more legal protections from exploitation. Therefore, Sapontzis argues for personhood for great apes as a shrewd method to protect the species rather than morally obligatory.[502]

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[500] S.F. Sapontzis, "Are Animals Moral Beings?" *American Philosophical Quarterly,* 17:1, (January 1980): 52.

[501] S.F. Sapontzis, *Morals, Reason, and Animals,* [Temple University Press, Philadelphia, 1992]: 74.

[502] S.F. Sapontzis, "Aping Persons – Pro and Con" in *The Great Ape Project,* Paola Cavalieri and Peter Singer, editors, [St. Martin's Griffin Press, New York, 1993]: 277-278.

One of the reasons some scholars and animal rights activists call for greater rights and protections especially for great apes is that great apes have demonstrated impressive cognitive and rational abilities. These capacities are similar to those of humans, and scholars who work with great apes argue that these capacities warrant considerations of personhood. An assessment of some the more prominent great ape studies demonstrates these cognitive abilities.

Cognitive Abilities of Animals

Until the 1960s, anthropologists continued the tradition of emphasizing the unique mental capabilities of humans and downplaying the abilities of non-human animals such as great apes. Typical of scholars during his time, Leslie White, an extremely influential anthropologist at the University of Michigan stated, "Because human behavior is symbol behavior and since the behavior of infra-human species is non-symbolic, it follows that we can learn nothing about human behavior from observations upon or experiments with lower animals."[503] Most anthropologists followed White's lead and limited their studies of non-human animals to simple observations designed to confirm human superiority. It was not until scientists in the field began to publish reports of their interactions with great apes that the dominant paradigm was challenged. The most well-known scientist to begin tearing down walls between humans and great apes was Jane Goodall who spent forty-five years observing chimpanzees in Tanzania. Goodall documented chimpanzees making tools and interacting in a social environment. Unlike other researchers who assigned numbers to their ape subjects, Goodall gave the animals human names in

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[503] Leslie White, *The Science of Culture*, [Grove Press, New York, 1949]: 31.

recognition of their human-like capacities. Goodall revolutionized the world of anthropology, biology, and language studies with her studies of great apes.

Great apes are a unique family of animals because their cognitive abilities are such that they can think rationally, communicate in a method understandable to humans, and according to some researchers, are capable of second order volitions. In short, great apes seem to qualify for personhood according to metaphysical criteria. Once again returning to the six conditions of personhood from Daniel Dennett, great apes meet five of the conditions and possibly meet the sixth condition as well. According to Dennett, the six conditions are: 1) persons are rational beings, 2) they are conscious and they are intentional, 3) they are considered persons by others, 4) they can reciprocate, which refers to the ability to formulate second order volitions or to have a belief about a belief, 5) they have the capacity for verbal communication, and 6) they are self-consciousness or self-aware. If a being meets these conditions, Dennett contends that the being is a conscious, intelligent agent who can make independent decisions and is culpable for the consequences of those decisions.[504] The being is a person.

Scientists who study and train great apes have found that these animals readily meet conditions one, two, and six. Many great apes have mastered American Sign Language which is an accepted form of human communication. Condition three, being accepted as a person by other persons is more difficult to meet. Although not many persons are willing to consider animals such as great apes as persons, there is a small minority of people who are pressing for legal personhood for great apes and thus great apes fulfill condition three with at least a small number of fellow persons. Great apes

[504] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177.

seem to be able to meet all conditions except condition four, and scholars continue to debate whether great apes are capable of second order volitions. Conditions one, two and six, that persons must be rational, conscious, intentional, and self-aware are rather easily affirmed for great apes. Numerous scholars have studied the abilities of great apes and have concluded that that these animals have cognitive abilities that are far superior to what is commonly recognized.

Researchers who study the behavior of great apes tend to study these animals because they appreciate the abilities of the animals. This leads to some bias in the analysis as these researchers seek to prove the skills of great apes rather than approach the studies in a completely unbiased manner. Many researchers form warm and even family-type attachments to their primate subjects which prevent the objective detachment that is typically required in a scientific discipline. These researchers typically avoid potentially more scientifically rigorous experiments that might be less humane.[505] This is certainly true of the famous research conducted by Roger Fouts who worked with the chimpanzee Washoe. By his own account, Fouts is now as much or more an activist for the protection of chimpanzees as he is a scientist. His close bond with Washoe and other chimpanzees along with his compulsion to convince the public of the human-like status of chimpanzees compels Fouts to highlight the achievements of great apes rather than their failings. However, despite the apparent bias in his work, the results of many years of study are compelling evidence that chimpanzees are rational agents and can learn human skills such as sign language.

[505] Adam Kolber, "Standing Upright: the Moral and Legal Standing of Humans and Other Apes," *Stanford Law Review,* 54:163, (2001): 170.

Animal studies present a difficult methodological issue in that the research designs usually involve a single or very small number of subjects due to the difficulty in caring for a large group of animals. This prevents proper control procedures. Further, maintaining standard environmental variables is difficult due to the costly nature of maintaining these types of animals. Very few animal laboratories exist that have the caging systems needed to provide a hospital living environment, and these laboratories and the caretakers do not have standardized methods.[506] Despite these methodological problems, numerous scientists have conducted cognitive and language studies in the last thirty years, and their research overwhelmingly points to the advanced abilities of great apes.

Examining Dennett's conditions one, two, and six, researchers have found that great apes are indeed rational, conscious, and intentional and have the capacity for self-awareness and intentionality – all higher order cognitive abilities. As stated previously, Goodall documented chimpanzees making tools and employing the tools to solve problems which are indications of rationality and intentionality. She also observed that chimpanzees could recognize the mental capacity of fellow chimpanzees within the social community and could also reflect on their own experiences. The ability to recognize that others have mental states and the capacity to reflect demonstrates self-consciousness and self-awareness.[507] Further proof that chimpanzees are self-aware came from experiments first done by biopsychologist Gordon Gallup in which he demonstrated that chimpanzees

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[506] Herbert Roitblat, Heidi Harley, and David Helweg, "Cognitive Processing in Artificial Language Research," in *Language and Communication: Comparative Perspectives,* Herbert L. Roitblat, Louis M. Herman, and Paul E. Nachtigall, [Lawrence Erlbaum Associates, Publishers, Hillsdale, New Jersey, 1993]: 3.

[507] Lee Hall and Anthony Jon Waters, "From Property to Person: The Case of Evelyn Hart," *Seton Hall Constitutional Law Journal*, 11 (Fall 2000).

could recognize themselves in a mirror. Most animals react to their images in a mirror as if the image were another animal rather than recognizing themselves. Gallup sought to prove that chimpanzees could recognize their reflection as their own. After placing a mirror in the cage, Gallup soon observed the four chimpanzees using the mirrors to groom themselves in areas that were difficult to see such as the teeth and nose. Next, Gallup marked the animals with an odorless red dye over one ear and above the opposite eye when they were asleep. When the animals awoke, they used the mirrors to examine the painted areas. They even inspected the fingers that touched the painted areas. The experiments demonstrated that chimps had the capacity for self-recognition and self-directed behavior.[508]

A chimpanzee's capacity for long-term memory was observed by Gloria Grow who ran the Fauna Foundation sanctuary for fifteen chimpanzees who were released from a New York laboratory. On one particularly compelling occasion, Grow used a trolley from the laboratory to haul a shipment of wood pellets to her gas stove. When chimpanzees Tom and Pablo saw the trolley, they both started to shriek. Within seconds, all fifteen chimpanzees were clinging to the bars of their cages, rocking back and forth and screaming aggressively at Grow. Grow then recalled that the New York laboratory used this trolley to transport unconscious chimpanzees from their cages to the surgery room. The chimpanzees remembered the piece of equipment and associated it with the trauma they endured earlier in their lives. This was startling evidence of a chimpanzee's

[508] Gordon G. Gallup Jr., "Chimpanzees: Self-Recognition," *Science,* 167:3914, (January 1970): 86-87.

capacity for memory and emotion.[509] Nim Chimpsky demonstrated his ability to remember past caretakers when they returned to visit him. Nim sometimes reacted with pleasure but other times reacted with anger towards caretakers who had abandoned him. The silverback gorilla Koko used sign language to communicate her memories of past emotions. For example, she signed "sad" when her pet cat died and also signed "sad" again when asked to recall how she felt about the loss.[510]

Washoe the chimpanzee seemed to demonstrate the ability for strategic planning when her trainers put a new doormat in front of her trailer. Washoe spotted the doormat and jumped back in terror while issuing alarm calls. Then Washoe grabbed one of her toy dolls and threw the doll on top of the mat. After watching the doll for several minutes to see what would happen, she crept up to the doormat and snatched the doll to safety. Washoe then inspected the doll to see if she was harmed, and upon seeing that the doll was intact, Washoe started to calm down. She then approached the doormat with hesitation but without fear. After a couple of days, Washoe was entering and exiting her trailer without a problem.[511] Using the doll to test the waters was a strategic move that required foresight and cunning. Rational abilities of this level contradict the teaching of Descartes that animals did not possess cognitive abilities beyond instinct.

Anthropologist Mary Lee Abshire even demonstrated that chimpanzees have the capacity to engage in imagination. She found that chimpanzees would treat their toys as

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[509] Lee Hall and Anthony Jon Waters, "From Property to Person: The Case of Evelyn Hart," *Seton Hall Constitutional Law Journal*, 11 (Fall 2000).

[510] Lesley J. Rogers and Gisela Kaplan, All Animals are *Not* Equal: The interface between Scientific Knowledge and Legislation for Animal Rights, in *Animal Rights: Law and Policy,* Cass Sunstein and Martha Nussbaum (eds.), [Oxford University Press, Oxford, 2004]: 183.

[511] Roger Fouts, *Next of Kin*, [William Morrow and Company, Inc. New York, New York, 1997]: 44.

if they were alive. Her videotape captured a chimpanzee playing Peek-a-boo with a teddy bear. In all, Abshire recorded six instances of imagination during her fifteen hours of videotape.[512] Imagination is a higher cognitive capability generally thought to only occur with humans. The capacity of great apes to engage in this activity sheds light on their mental faculties. Great apes seem to have mental capacities that far exceed other species of animals although elephants have demonstrated strong memory skills and the capacity to experience strong emotions. Research indicates that elephants mourn their dead and remember deceased family members for years after a death.[513] However, these animals do not seem to have the general mental acuity of great apes such as the ability to deliberate and be introspective. One animal whose mental abilities come close to those of apes is the dolphin. Studies of dolphins reveal that these animals also have superior cognitive abilities. Dolphins build sophisticated social networks, teach skills to their young, and seem to pass on forms of culture. In experiments, dolphins are able to match shapes through vision and echolocation. They also pass the same mirror experiments that chimpanzees complete and are able to recognize their own reflection. Finally, dolphins, like great apes, are capable of sophisticated communication and learning human sign language.[514]

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[512] Roger Founts and Deborah Fouts, "Chimpanzee Use of Sign Language," in *The Great Ape Project: Equality beyond Humanity,* Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993]: 36.

[513] PBS Nature, "What is the Depth of Elephant Emotions," PBS Segment, Date Unknown, available from http://www.pbs.org/wnet/nature/unforgettable/emotions.html, accessed 20 February 2010.

[514] William Sutherland, "Exceptional Cognitive Abilities of Dolphins," EZine Articles, available from http://ezinearticles.com/?The-Exceptional-Cognitive-Abilities-of-Dolphins&id=1907342, accessed 22 February 2010.

Dennett's fifth condition for personhood is the capacity for verbal communication. Linguist and philosopher Noam Chomsky is perhaps the most vocal critic of studies linking language skills with non-human animals. Chomsky argues that language is a capacity apart from all other forms of communication and thought. Humans, he argues, have the unique ability to form the syntactical structure in language. He believes that the same underlying structure is found in all human languages and it derives from a uniquely human intelligence that is biologically inherent in humans.[515] Thus, Chomsky scoffs at the idea that other animals such as dolphins or great apes might be able to engage in human language.

Neither dolphins nor great apes are able to speak an audible human language. However, both families of animals are able to learn sign language. Humans who are deaf or mute are still considered fully rational and communicative persons if they can express themselves through sign language. Therefore, sign language is an accepted human language and form of communication. Dolphins use whistles as their primary form of communication with other dolphins and use pulsed sounds to convey emotional states such as pleasure or distress. Studies by psychologist Louis Herman and the Dolphin Institute reveal that dolphins are able to learn some symbols and hand gestures from an artificial sign language that trainers created to test the dolphins' abilities. Their experiments revealed that dolphins could comprehend the meaning of the words taught and understood proper sentence structure including syntax and semantics. The dolphins understood commands from two to five words in length.[516] While dolphins exhibit basic

[515] Sue Savage-Rumbaugh and Roger Lewin, *Kanzi the Ape at the Brink of the Human Mind,* [John Wiley and Sons, Inc. New York, 1994]: 25.

[516]The Dolphin Institute, "Understand Language," Date Unknown, available from

skills for understanding simple human sign language, many great apes have mastered American Sign Language and can communicate at sophisticated levels.

Numerous studies of various types of chimpanzees and orangutans have shown that these animals can learn and use human sign language. A quick review of some of the more notable language studies of great apes reveals both successes and questionable results. The bonobo Kanzi is one of the most successful studies of language comprehension. The bonobo was trained by primatologist Sue Savage-Rumbaugh, head scientist at the Great Ape Trust in Iowa. Savage-Rumbaugh used a keyboard to train the bonobos, and Kanzi began his journey of learning language by watching fellow apes rather than direct instruction.

After recognizing the learning potential of the bonobo, Savage-Rumbaugh assimilated the animal into an everyday living environment rather than use classroom teaching. Soon, Savage-Rumbaugh claimed that Kanzi could understand human language and was responding accordingly. To test her claims, Kanzi took several scientific language tests during which Savage-Rumbaugh wore a mask so Kanzi could not pick up clues from her facial expressions and did not gesture. She asked Kanzi to perform strange tasks such as putting pine needles in the refrigerator – Kanzi understood almost every task. Kanzi also used language creatively. Kanzi was anticipating a visit from a visiting research Par Segerdahl who was supposed to bring Kanzi bread to eat. Because his keyboard did not have a symbol for Par Segerdahl, he had to improvise. He pointed to the symbol "bread" and the symbol for the fruit "pear." When questioned about the use of "pear," Kanzi pointed to Par. Kanzi had made a logical substitution for

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http://www.dolphin-institute.com/our_research/dolphin_research/understandinglanguage.htm, accessed 26 February, 2010.

Par Segerdahl by using a word with a similar human pronunciation. This showed advanced rational skills as well as mastery of his symbolic language.[517]

Psychologist and primatologist Roger Fouts tested his chimpanzee Washoe using a double blind examination to ensure that his results were not the consequence of unintentional cueing. Washoe sat behind Plexiglas while a researcher placed objects such as a brush, bib, or soda can in a box in front of her without allowing Washoe to see the researcher presenting the objects. A second observer, who did not know what the object was, asked Washoe to name the object. Washoe managed to give correct answers approximately 86 percent of the time. At the height of her training, Washoe had a large vocabulary of over 250 signs and demonstrated the capacity to string these signs together to make explanatory phrases. Other chimpanzee language studies reveal that chimpanzees also engaged in private signing which researchers compare to overt human thought or thinking out loud. Fouts claims that the language abilities of chimpanzees, orangutans, and gorillas are at the level of a two to three-year-old human child.[518]

However, some scientists remain skeptical of a chimpanzee's ability to use human language. One such scientist was Nim Chimpsky's project director, Herbert Terrace. Although Nim mastered approximately 125 signs, Terrace concluded that Nim could not understand human grammar. Nim could string together numerous signs to make rudimentary "phrases" or sequences of signs such as "me hug cat" or "eat drink eat drink." However, Nim's lengthy sequences did not have the syntactic structure of the

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[517] Jon Hamilton, "A Voluble Visit with Two Talking Apes," July 8, 2006, available from http://www.npr.org/templates/story/story.php?storyId=5503685, accessed 22 February 2010.

[518] Roger Founts and Deborah Fouts, "Chimpanzee Use of Sign Language," in *The Great Ape Project: Equality beyond Humanity,* Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993]: 36.

human language, and he did not develop this capability over time unlike a human child who begins language development uttering simple words but gradually learns to string sentences together using proper syntax. Therefore, Terrace concluded that Nim could not form actual sentences and his abilities were well below those of a child. Moreover, Nim did not use sign language to express his thoughts or ideas. Most of his signs were demands to attain some type of reward such as food. Nim did not learn to participate in the give and take of a conversation which is a skill that most human children learn relatively early in their development. Nim's trainers concluded that Nim's language was purely pragmatic and they also questioned Washoe's ability to "speak."[519]

Terrace argued that Washoe's ability to construct sentences and novel phrases was exaggerated, and he criticized Fouts and the other Washoe trainers for excessive prompting rather than allowing Washoe to independently sign. For example, Fouts claimed that Washoe invented a novel combination of signs to describe a swan upon seeing it for the first time. Washoe signed "water bird" which Fouts argued was meaningful and creative. Terrace contested this claim arguing that Washoe was not trying to say "bird that inhabits the water." Rather, Washoe saw a body of water and a bird and in response to the question "what that?" Washoe simply responded by identifying the water and the bird in that order. Terrace argues that there is no evidence that Washoe understood syntax and semantics and therefore truly had a grasp of the English language.[520]

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[519] H.S. Terrace, L.A. Petitto, R.J. Sanders, T.G. Bever, "Can an Ape Create a Sentence?" *Science*, 206: 4421, (November 1979): 898, 900.

[520] H.S. Terrace, L.A. Petitto, R.J. Sanders, T.G. Bever, "Can an Ape Create a Sentence?" *Science*, 206: 4421, (November 1979): 898.

While Terrace may have been correct in that Washoe did not truly understand syntax, Washoe certainly did use sign language to communicate and even taught her adopted son Loulis to sign without any instruction from human trainers. In videotapes, Fouts observed Washoe, Loulis, and the three other chimps in the sanctuary signing to each other without prompting from humans. The chimpanzees even signed to each other when arguing which Fouts claimed demonstrated the extent to which the chimps used sign to communicate.

Terrace was a well-known expert in chimpanzee language studies, and his pessimistic assessment of their capabilities was especially hard hitting for those who claim that great apes have language abilities. However, although great apes may not be able to construct elaborate sentences to express complex thoughts and ideas, great apes have proven that they can express simple emotions and desires. Great apes can communicate at a rudimentary level and this level is more than the capacity of some humans with brain damage or other afflictions. The fact that great apes can communicate with humans in their own language, even though at a rudimentary level, is arguably grounds for qualifying for personhood based on Dennett's fifth condition of communication.

Dennett's condition assumed that communication would be in a form of human language. Ludwig Wittgenstein famously wrote, "If a lion could speak, we could not understand it."[521] Wittgenstein was referring to the fact that humans understand the language spoken by their own kind and because lions are radically different, humans would not understand them. Wittgenstein's quote has been used to argue that the natural

[521] Ludwig Wittgenstein, *Philosophical Investigations*, Third Edition, [Prentice Hall, New Jersey, 1973]: 190.

sounds of lions are valid forms of speech within the lion community, but not within the human community nor within the community of persons. Deontologist Gary Francione disagrees with Wittgenstein's quote and argues that to deny the significance of natural animal communication is inherently biased because it assumes that human language is superior. He points out that many animals can communicate in sophisticated ways with members of their own species, and it is incorrect to assume that using human words and symbols is the only method that counts for moral worth or personhood. He claims that the fact that many animals can "speak," albeit in their own "language," should carry weight when assigning personhood.[522] Francione's argument in favor of granting great apes personhood is explored in detail in the next section.

Even though animals do have the capacity to "speak" in their own "language," the fact that animals have a "language" that is completely different and unintelligible by humans is important when assigning personhood. Dennett's third condition is that beings are persons when they are considered persons by other persons. The fact that animals communicate in ways that are completely foreign to human beings is an important factor in why most persons do not consider animals to be fellow persons. Animals are generally not accepted by most human persons into the category of fellow persons. However, as humans learn more about the capabilities of great apes, there seems to be some movement toward greater acceptance of great apes as deserving of personhood.

The fact that great apes can experience emotion and even perhaps empathy towards animals of their own kind gives pause to the consideration that these animals should be part of the community of persons. In an experiment conducted by Jules

[522] Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* [Temple University Press, Philadelphia, 2000]: 118-119.

Masserman, et.al, rhesus monkeys were allowed to earn food by pulling one of two chains. However, when the operator rhesus monkey pulled one of the chains, a second stimulus monkey, who was hidden behind one-way glass, would receive a painful shock. The operator monkey could witness the physical pain experienced by the stimulus animal, and after a few tries, the operator would generally stop pulling the chain that produced the painful shock. Masserman concluded that a "majority of the rhesus monkeys will consistently suffer hunger rather than secure food at the expense of the electroshock to a conspecific. One possible interpretation of the results is that rhesus monkeys can appreciate the points of view of conspecifics."[523]

Great apes have also demonstrated the ability to empathize with humans. Fouts reported a profound incident of social understanding and compassion. Washoe gave birth to two chimpanzees that did not survive, and Fouts reported that Washoe felt the loss deeply. When another trainer miscarried her own child, she explained to Washoe that her child died. Washoe looked into the woman's eyes and signed "cry." When the trainer prepared to leave for the day, Washoe signed, "please person hug."[524]

The ability to put others needs before one's own desires and to sympathize with the pain of others, is powerful evidence that great apes may be able to empathize. Empathy is a critical component for group membership. It seems that chimpanzees feel a bond with their human trainers and accept these humans into their social groups. However, if humans do not reciprocate with empathy or at least an affinity for great apes, there is little chance that humans will include animals in their bestowal of personhood.

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[523] Jules H. Masserman, Stanley Wechkin, and William Terris, "Altruistic Behavior in Rhesus Monkeys," *The American Journal of Psychiatry* 121, (Dec. 1964): 585.

[524] Roger Fouts, *Next of Kin*, [William Morrow and Company, Inc. New York, New York, 1997]: 291.

History has shown that humans are usually reluctant to include new categories of beings when conferring personhood. For instance, during our nation's founding and through the period of slavery, White Americans had ascriptive conceptions of personhood that excluded Blacks, Indians, and all other groups that were considered "other." Fetuses are another category of beings that are not fully accepted into the community of persons. Pregnant women who gladly anticipate the birth of their child socially accept their fetus as part of the community of persons. On the other hand, women who do not desire their pregnancy and seek abortion reject that the fetus should be included as a person with the right to live. As a being that is hidden from sight until birth, it is difficult for the community of persons to recognize the growing and developing fetus as a viable person until the fetus emerges upon birth.

Great apes suffer from a similar problem of non-inclusion in the community of persons which makes it difficult for great apes to meet the criterion of social recognition. Animals are considered to be the "other" and the converse of human persons. It is inconceivable to many humans that a great ape, or any other animal, should be considered a person. However, inclusion within the community of persons is a controversial matter and various societies have included animals within their protections while excluding certain humans. A prime example of this was in Nazi Germany where the Nazi party enacted numerous animal welfare statutes to protect animals from pain and suffering. Among these statutes was a prohibition against animal vivisection as well as endangered species protection measures.[525] A thorough analysis of Nazi views of the moral,

[525] Note: Recent accounts show that Nazis continued animal experimentation continued despite the prohibition. "Nazi Germany and Animal Rights," World Future Fund, available from http://www.worldfuturefund.org/wffmaster/Reading/Germany/Nazianimalrights.htm [accessed 21 March, 2010].

biological, and legal status of animals versus humans is beyond the scope of this study. Boria Sax and Arnold Arlucke, who study the contradictions of human treatment of animals and Nazi theories, offer a summary of Nazi views on the status of animals. Nazis saw human and animal life as part of a larger biological order where humans were a type of animal without moral distinctions setting humans apart. Aryans were seen as the highest order of animals while other animals such as dogs and horses were valued for their loyalty, strength and fearlessness – qualities upheld for the Aryan race. Because there were no moral distinctions between humans and other animals, it was possible to treat certain animals considerably better than many devalued humans such as Jews, gypsies, and other humans who were persecuted by Nazis while animals were protected. Once animals were protected, the German scientists needed new subjects for their medical research. The Nazis looked to the bottom of the chain of beings and offered Jews, gypsies, and prisoners-of-war. Within Nazi society, these humans did not qualify for the community of persons and thus were subject to horrendous experimentation.[526]

Nazi Germany is an example of ascriptive policies towards humans and rather liberal policies towards animals. Generally, the opposite is true – societies have inclusive grants of personhood to humans but are restrictive of animals. Most Americans would agree that animals of any kind are not included in the "We the People" of the Constitution. Although the animal rights movement is growing and humans are becoming more environmentally conscious, including an animal within the community of persons is still too farfetched for many American citizens. On the other hand, there is a

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[526] Arthur Arluke and Boria Sax, "The Nazi Treatment of Animals and People," in *Reinventing Biology: Respect for Life and the Creation of Knowledge,* Lynda A. Burke and Ruth Hubbard, editors, [Indiana University Press, 1995]: 248-253.

growing movement in a few European countries to include great apes in the community of legal persons.

In 2008, the Association Against Animal Factories based in Vienna petitioned the Austrian court to grant legal personhood to a chimpanzee named Matthew Hiasl Pan. His advocates insisted that they had formed bonds of friendship with the animal that qualified Hiasl as a member of community of persons. In their opinion, Hiasl was so similar to humans that he deserved protection as a person, and they argued that a large portion of the Austrian public agreed with their assessment. Hiasl's lawsuit was rejected by the Austrian Supreme Court which declared that a chimpanzee cannot be a person. However, the case raised awareness of the issue, and as of 2009, the Association planned to take their case to the European Court of Human Rights.

Environmental ethicist Peter Wenz argues that the strong social bonds that animals form with humans and other animals are important to consider. He contends that these bonds are a type of social recognition and could satisfy the criterion for personhood.[527] The numerous people who worked with Nim Chimpsky developed deep empathetic bonds with the chimp. If asked, some of these trainers might be willing to consider Nim as a fellow person. Dennett does not specify that recognition must be unanimous – perhaps if a segment of the population were willing to grant personhood, then great apes would qualify.

Great apes face the biggest challenge in meeting Dennett's condition four which is the ability to have second order volitions or to reciprocate. Recalling Chapter One's discussion, Harry Frankfurt argues that what sets persons apart from animals is the

[527] Peter Wenz *Environmental Justice,* [State University of New York Press, Albany 1988].

capacity to be self reflective and evaluate first order desires. A person is able to assess his or her desires and then form preferences about these desires – in other words, the person can reflect and rank her volitions which is equivalent to a second order volitions. For example, a person might desire to eat meat but is able to realize that eating that particular food might violate ethical concerns about harm to animals and so he chooses not to eat meat. Conversely, a lion does not stop to evaluate the consequences of killing a deer to eat. Scientists who study animal behavior are still trying to determine if great apes or any other animals have the capacity for second order volitions.

Dennett assumes that most animals do not have this capacity. He gives the example of his friend's dog that wants to sit in the chair her owner is currently occupying. The dog "pretends" that she needs to go outside by scratching on the door. As soon as the owner reaches door, the dog races back to the room and climbs into the vacated chair. Dennett argues that the dog did not have a sophisticated thought pattern of trying to deceive her owner so that she could steal the chair. Rather, the dog believes that scratching on the door will condition the owner to go to the door. After applying the stimulus and getting the response, the dog takes the chair. Similarly, a low-nesting bird will feign a broken wing in order to lure a predator away from the nest. Dennett contends that this is not an ingenious display of deception. Rather, it is an instinctual behavior that is genetically wired in the bird's brain and is not learned or invented.[528] Perhaps Dennett is correct in that dogs and birds are not capable of reciprocity. But what about animals with more sophisticated capacities such as great apes?

[528] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 274-276.

Scientists have not found any evidence that apes living in the wild have any ethical systems. Further, there is no evidence that apes have any understanding concerning the beliefs and mental processes of animals of their own kind – they do not have a theory of the mind. Instead, apes in their natural habitat tend to be opportunistic, egocentric and pragmatic instead of empathetic.[529] Great apes in the laboratory seem to be an entirely different matter. Silverback gorillas Koko and Michael, who communicated through sign language, exhibited basic forms of self-awareness in their ability to use personal pronouns and convey emotional states such as humor, deception, and embarrassment.[530] Washoe signed "dirty monkey" to a rhesus monkey who bared his teeth and threat-barked when Washoe came near. Soon, Washoe used the word "dirty" as an adjective to describe any person who threatened or resisted Washoe's demands. She even signed "dirty Roger" when Fouts refused to let her go outside after Washoe signed "Roger out me."[531] Another chimpanzee Fouts trained, Lucy, also used the word "dirty" to signify her own bad behavior. After Fouts caught Lucy defecating in the living room, Fouts had the following conversation with Lucy:

> Roger: What that?
> Lucy: What that?
> Roger: You know. What that?
> Lucy: Dirty dirty.
> Roger: Whose dirty dirty
> Lucy: Sue (A graduate student)
> Roger: It not Sue. Whose that?

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[529] H. Lyn White Miles, "Language and the Orang-utan: The Old 'Person' of the Forest," in The Great Ape Project: Equality beyond Humanity, Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993] 53.

[530] Francine Patterson and Wendy Gordon, "The Case for the Personhood of Gorillas," in The Great Ape Project: Equality beyond Humanity, Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993] 70.

[531] Roger Fouts, *Next of Kin*, [William Morrow and Company, Inc. New York, New York, 1997]: 157.

Lucy: Roger!
Roger: No! Not mine. Whose?
Lucy: Lucy Dirty Dirty. Sorry Lucy.[532]

This conversation demonstrated that not only did Lucy recognize that certain actions were socially unacceptable, but she was able to evaluate her own actions and try to blame her bad behavior on someone else. If Fouts is correct, Lucy was able to reflect on her actions, admit her guilt, and apologize. This seems to be an instance of a second-order-volition. The orangutan Chantek, trained by anthropologist Lyn Miles, also demonstrated elementary self-reflection. Chantek learned that some forms of behavior are unacceptable to his trainer, and signed "bad" after such behavior. He was even observed signing "bad" to himself, which Miles found particularly interesting because it suggested that Chantek was reflecting on his simple values. Miles conceded that Chantek's ability for self-reflection was nascent and immature, but she argued that Chantek had been able to internalize and exhibit some of the "morals" of his foster culture.[533]

However, neither Miles nor Fouts proved that Chantek and Lucy truly understood why certain behaviors are morally unacceptable. Signing "bad" after an action that the trainer has repeatedly taught is unacceptable could simply be awareness that a certain action has the label "bad." It does not demonstrate that the chimpanzee understands why a behavior is bad, the ethical standards that a certain behavior violates, and why violating such ethical standards is unacceptable. Self-reflection of this higher order is what

[532] Roger Fouts, *Next of Kin*, [William Morrow and Company, Inc. New York, New York, 1997]: 156.

[533] H. Lyn White Miles, "Language and the Orang-utan: The Old 'Person' of the Forest," in The Great Ape Project: Equality beyond Humanity, Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993] 51-54.

Dennett seems to imply in his third condition. Mirror tests, expressing emotions, and labeling actions are too simplistic to truly qualify as second order volitions.

Psychologist Robert Mitchell disagrees that great apes have the capacity to truly self-reflect in a meaningful way. Although apes can pass simple mirror tests and seemingly use sign language to convey when they have engaged in disapproved behavior, Mitchell doubts that great apes can truly evaluate their behavior based on their own self-assessment. He argues that apes do not form an ideal image of themselves that they strive to achieve in order to be morally sound beings. Nor do apes consider how other moral beings perceive of the morality of their behavior. He argues that humans alone "can ponder past and future and weigh alternative courses of action in the light of some vision of a whole life well lived."[534] According to Kant's criterion for moral agency, persons must be able to make rational decisions using the categorical imperative, "Act only according to that maxim whereby you can at the same time will that it should become a universal law." So far, scientists have not found that great apes are capable of this level of evaluating their actions, and thus according to Kant's criterion, must be excluded from personhood. Great apes can formulate a plan to use a tool in the future and can even teach tool using skills to their offspring which demonstrates some future vision. However, great apes cannot formulate a master plan or ethic to guide their entire lives. Or, in Lomasky's terms, great apes are not project pursuers.

The capacity for self-reflection and second order volitions allows beings to make choices and be responsible for actions and life plans. The ability to self-reflect upon one's actions and intentions is necessary for a being to be culpable for his or her

[534] Robert W. Mitchell, "Humans, Nonhumans, and Personhood" in The Great Ape Project: Equality beyond Humanity, Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993] 242.

actions.[535] Since animals do not have this ability, they are not culpable for their actions. A lion is not guilty of an offense when he attacks and eats the deer. The ability to self-reflect and form second-order volitions is the essential component needed to be a moral actor. The ability to reflect on one's actions, decide the morality of those actions, and then refrain from engaging in unethical behavior is what qualifies a being as a moral agent. It seems that animals do not have this ability. Even great apes do not have the ability to self-reflect at this level. This is the heart of the arguments made by Lomasky, Machan, and Cohen. Great apes are not project pursuers in Lomasky's terms, and thus they are not moral actors who have claims and rights that must be respected by humans. For scholars such as Lomasky, Machen, and Cohen, this inability effectively excludes great apes from personhood.

The previous chapter pointed out that young children face the same dilemma in that they are not the subjects of blame or innocence, and thus they are not moral agents and their personhood is questionable. Because they are not capable of second order volitions, many scholars are reluctant to confer personhood on children who are not moral agents in the full sense. These scholars only acknowledge children as potential persons. Similarly, the early U.S. court system had a difficult time deciding if slaves, who were not considered persons, could be culpable for crimes. Usually, the courts did find the slave accountable, but in a handful of cases, the courts held the slave owner responsible for his human property.

This section has shown that great apes have impressive mental capacities. Great apes are rational, self-aware, and able to communicate with humans. Their abilities rival

[535] G.E. Scott, *Moral Personhood: An Essay in Philosophy of Moral Psychology* [Albany, NY: State University of New York Press, 1990].

those of young children, and surpass the cognitive abilities of humans who are comatose or Alzheimer's patients. Because of these abilities, some scholars claim that great apes should be given consideration as persons or at least potential persons. However, great apes are not moral agents because they cannot evaluate the morality of their actions and choose to act according to an ethic. Thus, they are not culpable for their actions. Animals, including great apes, can learn certain behaviors and can act altruistically, but they cannot truly act morally. Therefore, their claim to personhood is questionable.

Even though many animals have remarkable intellectual abilities, because animals are not legal persons with moral standing, they do not have any rights of persons under the law that humans must respect. Instead, humans have classified animals as property to be used to satisfy human needs. Humans can buy, sell, use, and destroy animals as they see fit with very little protection for these sentient beings under the law. The status of property has also prevented animals from being plaintiffs in lawsuits, a crucial requirement to increase their protections under the law. Humans who advocate for animals have had to adopt creative strategies to include animals within the legal realm because animals, as objects of property, do not currently qualify for legal standing.

Animals as Property

The classification of animals as property resurfaces the dilemma discussed in previous chapters – that which is property cannot be a person under the law. Slaves were bought, sold, and abused because their claim to personhood was overridden by their classification as property. The fetus is often categorized as the property of the pregnant woman and therefore is not considered as a person with rights or protections. Many animal rights activists argue that as long as animals are classified as property, they will

never receive the protections they need and deserve as sentient, thinking, social beings. However, animals have been classified as property throughout much of recordable history, and changing that status would be extremely difficult.

A shift from property to person would require a wholesale paradigm shift in the way society views animals as objects. As discussed previously, persons tend to define themselves in relation to that which is other. White, male colonists who designed the American system of government defined their personhood in comparison to what they were not – they were not slaves who were seen as primitive and intellectually inferior.[536] Adult persons also define themselves in comparison to what they are not – they are not the developing fetus that is hidden away in the womb and is not part of the active community of person. Similarly, human persons know what they are not – they are not unthinking, brutish animals. Overcoming this mentality and accepting that animals, or at least some animals such as great apes, should be granted personhood will be difficult at best.

Under the law, humans own animals just as they own cars, furniture, and corporations. Humans own animals for the purposes of food, clothing, beasts of burden, entertainment, experiments, and product testing among many other uses. The human owner is entitled to the exclusive use of the animal for economic gain, can make contracts with other persons with respect to the animal, and can use the animal as collateral for a loan. The human can sell, loan, bequeath, or give the animal away. The human can also kill the animal at will. In short, human ownership over animals is complete. Wild animals are generally considered as owned by the state and held in trust for the benefit of

[536] Derek W. St.Pierre, The Transition From Property to People**:** The Road to the Recognition of Rights for Non-Human Animals, *Hastings Women's Law Journal*, (Summer 1998): 255.

the people, but humans can take ownership of animals through hunting, taming, or confining.[537]

Deontologist Gary Francione argues that to classify an animal as chattel property is saying that in the law, the animal has no value and no interests apart from the value accorded to the animal by the individual property owner. In other words, the animal is simply a Kantian means to an end. Francione contends that animals are different from other forms of inanimate property because they are thinking, sentient beings, and he claims that most of the public agrees that animals should be treated humanely and have some protections under the law. However, he argues that the law does little to provide protections or rights to animals. Although there are criminal and civil laws that regulate animal use, these laws do not create rights for animals in the same way they create rights for human persons because articles of property cannot have rights of their own. This is similar to the situation of slaves who could not have rights of their own apart from the rights of the master. As in the case of slaves, any rights under the law primarily serve to facilitate the property's use for the owner. Because Francione believes that animals should have rights under the law, Francione is one of the most vocal contenders for abolishing the property right in animals.[538]

Francione blames the theory of legal welfarism for allowing the law to treat animals as property without recognizing any rights that humans must acknowledge to protect the well-beings of animals. According to Francione, legal welfarism is the doctrine that laws are created to maximize wealth and this includes maximizing the use of

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[537] Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* [Temple University Press, Philadelphia, 2000]: 54.

[538] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 14.

animal property. Therefore, the law only proscribes uses of animals that decrease the overall social wealth of humans or uses of animals that are inefficient. If infliction of great pain and suffering on animals is necessary to maximize wealth, then exploitation of animals is permitted. Property owners may not inflict gratuitous suffering on animals because this has no social benefit and does not increase wealth. For example, ranchers are allowed to castrate and brand their animals without any pain relief because these practices are considered necessary and facilitate the use of animals for food which increases social benefit and wealth. However, the rancher is not allowed to starve his animals simply because he does not wish to feed them. This treatment of animals does not exploit animals for food or any other purpose and therefore is against the law.[539]

According to Francione, legal welfarism subscribes to the idea that the welfare of animals should be understood as the level of care that maximizes the value of the animal as property. The law can best assure this interpretation of welfare by deferring to the property owner to determine what will maximize the value of the property.[540] In short, legal welfarism with respect to animals generally holds that all interests of animals, no matter how painful or injurious to the animal, can be overridden if the consequences are sufficiently beneficial to human beings. Even a trivial human interest can override an animal's fundamental interest in avoiding pain and death.[541]

Francione argues that the crux of the problem for animals under legal welfarism is the absolute classification of animals as chattel property. When determining what is

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[539] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 26.

[540] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 5.

[541] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 26.

inhumane, the interests of the animals are balanced against the interests of the human property owners. Unnecessary pain and suffering and the requirement to treat animals humanely are interpreted in light of the importance human society places on maximizing property. The result is that animals are rarely given priority over human interests.[542] He uses the federal Animal Welfare Act as an example to illustrate that the primary source of regulation for laboratory animals is by the researchers who own and use the animals. Because they have the greatest interest in producing solid scientific data, the law presumes that they will be motivated to ensure an appropriate level of animal wellbeing is provided. However, what laboratories consider appropriate can differ significantly from what the general public interprets as appropriate animal wellbeing. Hence, the public is often shocked and abhorred when laboratory conditions are revealed.

Francione maintains that just as eighteenth and nineteenth century courts decided slavery cases without discussing the underlying issue of the justice of the institution of slavery, today's courts do not examine the fundamental issues of justice underlying the exploitation of animals. The difference between animals and humans is one of degree rather than kind, and animals are sentient beings just as humans. However, as property, animals are treated as simply a means to an end with their worth measured in their usefulness to humans. Animals are not considered as beings with values and interests. The law does not address the fact that statutes and regulations affecting animals are applied by an empowered group (human owners) to a disempowered group (animals.) The disparity in power is manifested in the law which does not adequately protect animals. If these issues were recognized, Francione contends there would be a paradigm

[542] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 5.

shift. He advocates replacing the paradigm of legal welfarism with a new theory that abolishes the property right in animals and allows animals to claim rights under the law.[543] He argues that as long as animals are classified as property to be used by humans, they will not have any true rights because the so called rights will always be balanced against human interest and subject to overrule by human needs. Abolishing the property status of animals would allow the law to recognize the inherent value of animals rather than just the instrumental value. However, Francione admits that his proposal is radical because much of the present world economy depends on the exploitation of animals. To fundamentally alter this paradigm would involve dramatic consequences.[544] Challenges from scholars who deny that animals can have rights, such as Tibor, Cohen, and Scruton, raise a host of questions that Francione does not address. Should an animal's rights be limited in accordance to the ability to act upon these rights? Children do not have the ability to exercise all rights that adults have. Thus, children do not enjoy the full spectrum of rights until they reach adulthood. If animals were granted rights, these rights would need to be limited based upon the capacities of each type of animal. Adjudicating this would be very difficult.

Law professor David Favre offers an alternative to abolishing the property right in animals by proposing a new legal paradigm in which animals have property rights to themselves while humans retain a legal title to animals. This concept asserts that an animal should have the right of self ownership. Favre envisions a status for animals much like that of newborn humans. Although parents have obligations to their infants,

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[543] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 25.

[544] Gary L. Francione, Animals, Property, and the Law, [Temple University Press, Philadelphia, 1995]: 261.

parents do not own their children – they cannot sell or trade their children nor can they kill or enslave their offspring.[545] Favre proposes that animals could have a similar type of limited self-ownership right as newborn humans.

Favre uses the example of a housecat names Zoe. Title to Zoe rests in her human owner Mr. Willard. Mr. Willard is liable for any harm that Zoe may cause to other persons and property, and Mr. Willard is responsible for obeying anti-cruelty laws. Zoe has self-interests which can be attached to a concept of self-ownership. Currently Mr. Willard's duty to avoid cruelty to animals is a duty owed to the state. If Zoe had self-ownership, then the obligation would be both to the state and Zoe herself.[546] This would bring additional protections to the animal in instances such as abuse. For instance, if Mr. Willard abuses the cat by putting out cigarettes on Zoe's skin, the state can currently bring a criminal action against Mr. Willard, but any punishment he receives would not help pay for the veterinary bills incurred during Zoe's recovery. If Zoe had a legal self-ownership right, Zoe could sue to obtain an injunction against batter and to recover damages for veterinary care, emotional distress, pain, and suffering.[547]

Favre's concept is ground-breaking in that he is asserting that animals should be considered legal persons. Included in the right of legal persons, Favre asserts that animals should be able to sue and be sued in cases arising from injury. In addition, animals should be able to hold assets. Favre proposes that an animal would be able to

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[545] David Favre, "Equitable Self-Ownership for Animals," *Duke Law Journal*, 50:473, (November 2000): 483.

[546] David Favre, "Equitable Self-Ownership for Animals," *Duke Law Journal*, 50:473, (November 2000): 484, 495.

[547] David Favre, "Equitable Self-Ownership for Animals," *Duke Law Journal*, 50:473, (November 2000): 500.

have an equitable interest in a bank account, could collect earnings from personal labor, and inherit property or other assets through a will.[548] Favre's concept stimulates a huge number of further questions concerning animals as legal persons. For instance, how would an animal demonstrate standing? How would an animal exercise its right to bring suit; who would voice the need on behalf of an animal? Would a legal guardian be appointed and is so, would animals be entitled to a legal guardian in all cases? Would an animal have unlimited property rights? How would the relationship between animal and human owner change? To what other legal rights would animals be entitled beyond those listed by Favre? These are just a few questions that immediately come to mind with Favre's proposal of legal personhood for animals. Favre acknowledges that his proposal will require the writing of many books to iron out the details. However, Favre is not alone in asserting that animals, or at least some animals, should be considered legal persons.

Constitutional and environmental law scholar Cass Sunstein agrees that the rhetoric of property in animals does mask the fact that animals are sentient, rational, and communicative beings that should not be treated as a mere means for human ends. However, he questions whether the property right in animals should be abolished. He disagrees with Francione that the status of property destines animals to be treated as disposable, unfeeling objects subject to domination by humans. He points out that some inanimate objects such as houses or fine art have protections against destruction under the law. Likewise, although animals are legal property, they do have some protections under the law. It is possible to further modify the law to create more protections from injury,

[548] David Favre, "Equitable Self-Ownership for Animals," *Duke Law Journal*, 50:473, (November 2000): 502.

abuse, neglect, and death without completely abolishing the status as property. On the other hand, the property right in animals could be abolished and animals could have a status similar to that of children – humans would still have a great deal of control over them just as parents have control over their children. He concludes that the debate over whether or not animals are property really involves a set of specific issues concerning the rights and protections needed for animal welfare and this debate could be settled without resorting to completely overhauling the concept of property in animals.[549]

Sunstein believes that animals cannot be given full legal rights as persons because clearly animals cannot vote or run for office. However, Sunstein believes that animals should be granted a limited legal personhood so that animals can be party to a lawsuit in cases of torture, battery, and undue confinement. Because animals do not have the capacity to file a lawsuit or testify on their own accord, human representatives would have to act on their behalf. Sunstein argues that animals should be granted legal personhood to help enforce existing statutes protecting animal welfare such as the Animal Welfare Act (AWA).[550] Sunstein further argues that statutes such as the AWA must be overhauled because these statutes have odd patterns of inclusion and exclusion of various animals and are irregularly enforced.[551] In order to fully understand the protections animals currently have under the law and the potential to grant further rights such as legal

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[549] Cass R. Sunstein, "Standing for Animals (With Notes on Animal Rights)," *UCLA Law Review*, 47:1333 (June 2000) 1366; Cass R. Sunstein, "Introduction: What Are Animal Rights," in *Animal Rights: Current Debates and New Directions,* [Oxford University Press, Oxford, 2004]: 11-12.

[550] Cass R. Sunstein, "Introduction: What Are Animal Rights," in *Animal Rights: Current Debates and New Directions,* [Oxford University Press, Oxford, 2004]: 11.

[551] Cass R. Sunstein, "Can Animals Sue," in *Animal Rights: Current Debates and New Directions,* [Oxford University Press, Oxford, 2004]: 255.

standing and personhood, it is necessary to briefly review existing animal welfare regulations.

ANIMAL WELFARE STATUTES

Laws protecting animal welfare are a relatively new occurrence. Early writers such as William Blackstone and James Kent subscribed to the Roman and biblical concept that animals were legal property and had no rights or protections. Early laws involving animals were designed to protect the property rights of owners and cruelty to animals was generally not a criminal offense except in situations where property values were at stake. If a person abused an animal owned by someone else, the person could be prosecuted for damaging property, and the owner could receive financial compensation. Little to no concern was given to the animal itself that suffered. The animal laws imposed indirect legal duties to treat animals a certain way, but the real subjects of the law were the owners to whom a direct obligation was owed.[552]

On the other hand, an elaborate structure of liability laws governed an owner's liability for wrongs committed by his animals. When deciding cases of liability due to injury caused by animals, the court often tried to adjudicate the mental states of both the animal and the owner. Whether the animal committed a deliberate or accidental injury or if the animal was provoked or acted in self-defense were critical factors in a case.[553] Although animals were considered strictly property, their cognitive abilities were taken into consideration in cases where it suited human plaintiffs much like the slave cases

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[552] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 28.

[553] Richard A. Epstein, "Animals as Objects or Subjects of Rights," in Animal Rights: Current Debates and New Directions, Cass R. Sunstein and Martha C. Nussbaum editors, [Oxford University Press, London, 2004]: 146.

discussed in Chapter Two where the rational abilities of non-person slaves were considered when it suited the court. Early malicious mischief statutes were intended to protect the property value of animals rather than protect animals from suffering.

Based on a Western and biblical tradition of little regard for the wellbeing of animals, the U.S. did not enact comprehensive statutes to protect animals until relatively recently. Because early Americans considered animals to be simply chattel property, there was no need to enact anti-cruelty laws to protect animals from their human owners. According to animal law scholars David Favre and Murray Loring, society had little desire to interfere with the property rights of owners. The only time animal protection became a societal concern was when an animal was of economic value to the community as well as the owner. Animals that were deemed valuable, such as livestock, received the most consideration, whereas dogs which were deemed economically worthless received little to no protection.[554] Such concepts as anti-cruelty protection were heterodox and rarely voiced. A notable exception to mainstream consideration of animals was a Puritan law enacted by Reverend Nathanial Ward who compiled a list of statutes to govern colonial Massachusetts called "The Body of Liberties." Under Liberty 92, Ward wrote, "No man shall exercise any tirrany of crueltie towards any bruite creature which are usuallie kept for man's use."[555] However, Ward's law did not gain popularity with the other colonies and anti-cruelty laws were not considered.

In 1791, a lesser-known American writer Herman Daggett proposed a bold assertion – that animals have rights just as humans. He wrote, "I know of nothing in

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[554] David S. Favre and Murray Loring, *Animal Law*, [Greenwood Press, Westport Connecticut, 1983] 122.

[555] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 70.

nature, in reason, or in revelation, which obliges us to suppose that the unalienated rights of a beast, are not as sacred, as inviolable, as those of a man; or that the person, who wantonly commits an outrage upon the life, happiness, or security of a bird, is not as really amenable, at the tribunal of eternal justice, as he who wantonly destroys the rights and privileges or injuriously takes away the life of his fellow creatures of the human race."[556] Although Daggett argued passionately for animal rights, his argument was radical for his time and did not gain acceptance with fellow scholars or the general public.

About this time, the Industrial Revolution was beginning, and steam powered machines began to replace animals in agriculture, manufacturing and transportation. As animals became less necessary for economic progress, attitudes toward the treatment of certain species, especially horses and cattle, began to soften. England began to consider a limited body of laws to protect certain animals. In 1822, Parliament passed Martin's Act or the "Ill Treatment of Horses and Cattle Bill" which prohibited the beating, abuse, or ill-treatment of animals such as horses, mares, ox, cows, steer, sheep, and other cattle. Punishment was a fine not to exceed forty shillings. This law was widely considered to be the first animal protection law in the world.[557]

After the passage of Martin's Act, a concerted effort took shape in England to advance the wellbeing of animals. Numerous publications critiqued the prevalent cruelty to animals including the sport of cock throwing and mistreatment of cattle and horses.

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[556] Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement,* [University of Michigan Press, Ann Arbor, 1996]: 41-42.

[557] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 71.

Writers advanced the idea that humans had a duty to treat animals with kindness. By the 1860s, the movement in England expanded its focus from domesticated animals to animals used in scientific experimentation. In 1867, England passed a bill to safeguard laboratory animals, and by the turn of the century, antivivisection groups began to form across Europe.[558] Despite the progressive nature of England's anticruelty statutes, enforcement of these statutes often failed to live up to the intent of the law. For example, in 1887 the English court heard the case *Lewis v. Fermor* (18 Q.B. 532, 534) which involved a veterinarian named Fermor who was prosecuted for performing a hysterectomy on sows without painkillers. The court found that although Fermor likely caused the sows tremendous pain and possibly even torture, he did not violate the anticruelty statute because his intention was to benefit the owners of the sows by increasing their weight and development. Thus, the court ruled that inflicting extreme pain was legitimate when it increased the property value of the animal.[559]

Animal protection was a minimal concern in the U.S., but as fervor increased in England, momentum began to pick up within the states. In 1866, New York passed an anticruelty statute which was proposed by animal activist Henry Bergh. The law made it a criminal offense to treat animals cruelly, regardless of ownership. However, the law limited the list of animals that were protected under the law and qualified the provisions of the law so that malicious intent had to be proven before violations could be prosecuted. Still, the passage of the New York law was a significant event for animal advocates.

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[558] Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement,* [University of Michigan Press, Ann Arbor, 1996]: 31.

[559] Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* [Temple University Press, Philadelphia, 2000]: 60.

Henry Bergh went on to form the New York Society for the Prevention Cruelty to Animals which later became the American Society for the Prevention of Cruelty to Animals (ASPCA).[560]

Another concern prompted further animal protection statutes. By the turn of the twentieth century, U.S. lawmakers realized that many animal species, and in particular the bison, were in danger of extinction due to over hunting. California and New Hampshire both enacted conservation statutes in 1878 to control over hunting and provide sustained yield. Soon other states followed suit and began to require licenses for hunting in order to pay for administrators, law enforcement, and development of animal populations and their habitats.[561] National laws such as the 1929 Migratory Bird Conservation Act and the 1940 Bald Eagle Protection Act similarly protected endangered species. These laws were not enacted to protect the lives and welfare of animals however. Instead, their purpose was to maintain the economy of animal hunting, preserve certain species that were symbolic to the United States, and secure a future of animals for food, sport, and aesthetics. The state's initiative to control animals in the wild also signified that even wild animals are property with the state acting as the owner until another person assumes ownership through hunting. The purpose of early American conservation laws was clearly to serve human interests of property ownership.

With the advent of the two World Wars and rapid industrialization, attention was drawn away from animal protectionism. The humane activism in England and the U.S.

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[560] David Favre & Vivien Tsang, The Development of the Anti-Cruelty Laws During the 1800's, *Detroit College of Law Review*, Vol.1, (1993): 1.

[561] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 193.

weakened, and antivivisection movements lost momentum. It was not until the 1960s that concern for animals resurfaced.[562] In 1966, Congress passed the Endangered Species Preservation Act which authorized the Fish and Wildlife Service to spend up to $15 million per year to protect endangered wildlife and fish listed by the Secretary of Interior. Federal land agencies were directed to preserve habitats for endangered animals, while other agencies were encouraged but not required to protect endangered animals. This first protection act was limited in scope and only protected native animals. While the federal government began protecting endangered animals, the public began to notice the abuse of commercial and laboratory animals.

The February 4th, 1966 edition of *Life* magazine featured an exposé of the conditions at dog dealerships. Titled, "Concentration Camps for Dogs," the article contained graphic photographs of the animals destined for scientific laboratories. The article ignited outrage. More than 80,000 letters of protest flooded Congress, eclipsing the volume of mail received over issues of civil rights and the Vietnam War. Other publications, including *Sports Illustrated, Reader's Digest,* and prominent newspapers jumped on the bandwagon covering animal abuse.[563] Along with the public awareness generated by these articles, Dr. Frank Mulhern, then Director of the Animal Health Division, contended that the humanization of animals by Walt Disney characters played a

[562] Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement,* [University of Michigan Press, Ann Arbor, 1996]: 31.

[563] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 440-441.

role in increasing empathy for animals.[564] By the 1960s, animal welfare had become a political issue.

Goaded into action by the public outcry at the abuse of animals, especially dogs, Congress passed the Laboratory Animal Welfare Act in 1966. This first animal protection act was limited in its funding and covered only cats, dogs, primates, guinea pigs, hamsters, and rabbits. It also limited its coverage to animal dealers and research programs that crossed state lines and involved government funding.[565] Although limited, this first statute was important in making animal welfare a public issue under governmental control. Throughout the 1970s, the statute was amended to increase the number of animals covered to include all warm-blooded animals used in research, exhibition, or as pets in a wholesale market. Further, jurisdiction no longer depended on animals crossing a state line which increased the USDA's responsibility for monitoring animal commerce. The 1976 amendments added control over transportation of animals after several graphic incidents of animal death were reported due to a lack of ventilation and extreme temperatures. Further the 1976 Animal Welfare Act (AWA) prohibited dog fights and other types of animal fighting for sport after public outrage over the welfare of dogs mangled in these brawls.[566]

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[564] Frank J. Mulhern, D.V.M, **"**Government Perspective on Regulations," Animal Welfare Act: Historical Perspectives and Future Directions Symposium Proceedings, September 12, 1996, available from http://www.nal.usda.gov/awic/pubs/96symp/awasymp.htm#1966, accessed 10 February 2010.

[565] Dr. Dale Schwindaman, Deputy Director, APHIS, "1970 Amendments to the Animal Welfare Act," Animal Welfare Act: Historical Perspectives and Future Directions Symposium Proceedings, September 12, 1996, available from http://www.nal.usda.gov/awic/pubs/96symp/awasymp.htm#1966, accessed 10 February 2010.

[566] Dr. Robert D. Whiting, Chief, Veterinary Services, Animal Industry Services, Virginia Department of Agriculture and Consumer Services, "1976 Amendments to the Animal Welfare Act," Animal Welfare Act: Historical Perspectives and Future Directions Symposium Proceedings, September 12, 1996, available from http://www.nal.usda.gov/awic/pubs/96symp/awasymp.htm#1966, accessed 10 February 2010.

In 1985, the AWA was amended again, and some of the noteworthy changes included new standards for research facilities, limits on survival surgeries, psychological well-being programs for primates, exercise for dogs, and a public information center at the National Agricultural Library. In 1990, the law was supplemented by the Pet Theft Act which attempted to prevent dealers from stealing cats and dogs for sale to research facilities. The amendment required that all cats and dogs be held at shelters for at least five days before they are sold to laboratories. In 2002, the AWA was again amended, but this time it was not expanded. The AWA did not cover rats, mice, and birds, and thus the USDA was sued because it did not protect all warm blooded animals. The 2002 amendment redefined the word "animal" to officially exclude birds, mice, and rats so that these animals were exempt from protection. Finally, in 2007, the Animal Fighting Prohibition Act amended the AWA to prohibit the selling and transporting of any knife or sharp instrument that is attached to a bird's leg for animal fighting.[567]

In 2000, Congress passed the Chimpanzee Health Improvement, Maintenance, and Protection Act (CHIMP) which authorized the Secretary of Health and Human Services to establish federally supported sanctuaries for the care of chimpanzees formerly used in federal research facilities. The law also prevented euthanasia of chimpanzees except when afflicted with an intractable illness. However, the law was limited be the fact that federal laboratories had complete discretion to decide when a chimpanzee was ready for retirement without a set of objective criteria. The laboratories could also pull a "retired" chimpanzee back into service. A 2007 amendment prohibited returning retired

[567] Benjamin Adams and Jean Larson, "Legislative History of the Animal Welfare Act," United States Department of Agriculture, available from http://www.nal.usda.gov/awic/pubs/AWA2007/intro.shtml, accessed 1 February 2010.

chimpanzees to the laboratory. Despite these limitations, CHIMP was a step forward for animal rights activists seeking better treatment of laboratory animals.

The history of animal welfare regulations demonstrates progress but also highlights much needed reform. In forty years since the AWA's passing, the law has made some steps forward in protecting animals, but still leaves much to be desired by animal advocates. The law regulates the housing and maintenance standards for laboratory animals but does not prohibit any type of experiment no matter how painful. There are no regulations that control the conduct of an experiment, and laboratories can withhold anesthetics whenever "scientifically necessary" which gives experimenters wide latitude to determine if anesthetics would interfere with the results of an experiment. The AWA does not apply to farm animals used for food or fiber, nor does it apply to entertainment events such as rodeos, state and county fairs, and cat and dog shows. Even more importantly, the law excludes retail pet stores.[568] The Humane Methods of Slaughter Act (HMSA) was passed in 1958 in response to overwhelming public outcry at the treatment of slaughter animals. The law mandates that animals be unconscious before slaughter to ensure a painless death. However, since its passing more than fifty years ago, the law still excludes chickens which are the most common slaughter animals. Nor does it cover the branding, dehorning, or roping of other animals.

The final problem with both the AWA and HMSA is that enforcement by the USDA is very weak. The one comprehensive assessment of the USDA's role in monitoring research facilities was done more than twenty years ago in 1985 by the General Accounting Office (GAO). Already then, the report found problems with facility

[568] PETA Factsheet, "The Animal Welfare Act," Peta Media Center, available from http://www.peta.org/mc/factsheet_display.asp?ID=80, accessed 2 February 2010.

oversight testifying that the USDA was lax in its role as inspector of animal research facilities. The GAO reported that many inspectors were not adequately trained, and the USDA did not have the resources to inspect all facilities, nor were they able to follow the prescribed inspection timeline.[569] A 2008 GAO report found problems with the USDA's implementation of the HMSA, specifically citing ineffective stunning of animals making them vulnerable to pain during slaughter.[570]

Anticruelty laws were designed to protect and benefit animals as sentient beings and as such are important in their recognition of animals as beings of worth. It sets a standard that humans have at least some limited obligations owed directly to animals to refrain from imposing unnecessary suffering.[571] However, the AWA does not imply an elevated status for animals and certainly does not even hint that animals could be considered legal persons for any reason. Francione contends that the shortcomings of the AWA reflect the fact that the law still considers animals as simply the property of humans and therefore subject to exploitation. For instance, there are very few regulations on farm animals used to provide meat and clothing for humans. The courts have followed this pattern and read into the laws exemptions for most animals that are used by humans. The law presumes that human owners will keep their own economic interests in mind and will not inflict more suffering on an animal than necessary because to do so

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[569] US GAO, Report To The Chairman, Subcommittee on Agriculture, Rural Development and Related Agencies
Committee On Appropriations United States Senate, The Department Of Agriculture's Animal Welfare Program, (May 16, 1985), Cass R. Sunstein, "Standing for Animals (With Notes on Animal Rights)," *UCLA Law Review*, 47:1333 (June 2000) 1339.

[570] US GAO, Humane Methods of Handling and Slaughter: Public Reporting on Violations Can Identify Enforcement Challenges and Enhance Transparency: Statement of Lisa Shames, Director Natural Resources and Environment, (April 17, 2008).

[571] Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* [Temple University Press, Philadelphia, 2000]: 8.

would diminish the monetary value of the animal. However, this is not necessarily the case, and humans may have extreme views on the extent of suffering acceptable for their property. Finally, Francione argues that there is a social stigma against imposing criminal liability on property owners for what they do with their own property. Instead, the norm is noninterference in what is considered a private matter.[572]

The reality is that animal activists have limited avenues to legally ensure the well-being of animals. As was already explained, regulations such as the AWA have weak enforcement measures and are not aggressively pursued by agencies such as the USDA. Police and local enforcement agencies are often too busy with other matters involving humans or are uninterested in pursuing violations of animal cruelty laws. Thus, private parties such as animal activists may try to step in and invest their own resources to bring suits on behalf of animals. The next section traces the ways animal activists have tried to use the judicial system to gain increased rights and protections for animals through a detailed analysis of the important cases pertaining to animals and personhood.

ANALYSIS OF CASES

Humans acting on behalf of animals face a significant obstacle when trying to adjudicate animal welfare through the judicial system. Constitutional and statutory limits based on legal standing often limit their access to the courts. *Locus Standi* or simply standing is the ability to demonstrate that the party is directly harmed by a law or controversy. Since private parties acting on behalf of animals often cannot demonstrate a

[572] Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* [Temple University Press, Philadelphia, 2000]: 56.

personal injury, the courts deny their standing. Standing has become a huge obstacle preventing humans from acting as guardians for animals in court. The largest and arguably impenetrable obstacle preventing animals from entering the legal system is that animals simply are not humans and thus are not granted access.

The legal system was designed for and utilized by humans; animals are not considered subjects of the law. Legally, animals are considered property, and disputes concerning these beings are generally considered simple property claims. The courts generally do not consider the sentience or familial attachments many people have to animals. Therefore, most court cases concerning animals are cut and dry property matters that do not discuss personhood in any way. There are countless cases pertaining to property disputes concerning animals. There are extremely few, however, that concern the possibility that animals might have rights or might be considered as persons.

Although there are thousands of cases concerning animals, very few discuss the personhood of animals or the possibility of standing for humans who represent animals. Since there are so few, an analysis of these relevant cases is possible. The first three cases in this section are property disputes, but in each case the judge addressed the issue of animals as sentient beings capable of forming relationships with humans. These opinions are important because they offer an alternative paradigm to animals as simply property. Unfortunately for animal rights activists, these cases are the rare exception. The next set of cases involves humans seeking to protect animals through the legal system and the struggle to prove that humans have standing when animal welfare is at stake. Finally, the last four cases covered are rare instances where the courts have specifically addressed the personhood of animals. The Hawaiian case *Palila v. Haw.*

Dep't of Land & Natural Res. (853 F.2d 1106, 1988) proposes that an animal might be able to be party to a lawsuit just as a human is. However, the cases following *Palila* firmly squash this idea, effectively ending the debate over animal personhood until a future case boldly raises the issue again.

Animals are More than Property

Historically, the courts have awarded damages for the loss of an animal based on fair market value and have ignored the intrinsic value of an animal as a sentient, rational creature or the emotional distress an owner feels when a pet dies. A case in point was the circumstances of two teenage boys who broke into an animal shelter in Iowa and brutally beat sixteen cats to death with baseball bats. The jury found the boys guilty of offenses against the animal shelter and criminal trespass, but because the market value of the cats was less than $500, the boys were not convicted of a felony. The boys argued that the cats in a shelter had no market value because no humans wanted them, and the jury accepted that argument. The case prompted outrage, and many citizens expressed indignation that the cats were regarded as worthless.[573] However, the decision was consistent with the characterization of animals as property.

A few cases have gone beyond the simple market value of animals and have taken into account the loss of companionship and distress experienced by human owners. In most respects, *Corso v. Crawford Dog and Cat Hosp., Inc*. was a typical personal property dispute regarding a pet dog (415 N.Y.S.2d 182; 1979). However, this case is unique in that when the judge was evaluating the damages sustained by a pet owner, he

[573] "Teens Convicted of Killing 16 Cats at Iowa Animal Shelter," *Los Angeles Times Online,* November 9, 1997, available from http://articles.latimes.com/1997/nov/09/news/mn-51921, accessed February 23, 2010.

opined that a family pet is much more than property and occupies a special status above ordinary property. Kay Corso brought her poodle to the Crawford Dog and Cat Hospital for treatment, and the veterinarians recommended that the dog be euthanized. Corso asked the hospital give the corpse to Bide-A-Wee, an organization that performed funerals for dogs. Corso planned an elaborate funeral with attendance by several people as well as burial with a headstone. The hospital did not follow Corso's orders and instead delivered a casket with the body of an unknown dead cat. Corso sued for compensation of the elaborate funeral she planned as well as the mental anguish she experienced when finding the corpse of another animal.

Overruling years of past precedent that established a pet as an object, Judge Friedman stated, that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property" (415 N.Y.S.2d 182, 531). Although past precedent allowed certain pieces of property such as heirlooms to be treated differently than ordinary property, Friedman argued that classifying the pet as an heirloom was not appropriate either. Instead, Friedman pointed out that animals were animate creatures that respond to humans and have a special place in the emotional lives of humans. Based on this reasoning, Friedman ruled that Corso was entitled to more than the market value of the poodle and should be compensated for her mental suffering.

Another case which has become well-known for pointing out that animals should be treated differently than ordinary personal property is *Bueckner v. Hamel* (886 S.W.2d 368; 1994). In this case, a hunter, Bueckner, witnessed two dogs chasing some deer, and he shot the two dogs. Bueckner was charged with cruelty to animals and order to pay $325 in restitution for destruction of Hamel's property. Hamel then filed a civil lawsuit

against Bueckner for damages both to his property and his mental wellbeing. The court acknowledged that Hamel suffered financially due to the value of dogs and the value of future puppies. Further the court granted that Hamel suffered a loss of companionship and the loss of loved pets. Thus, the value of the dogs must be both personal property and intrinsic worth. The concurring opinion by Eric Andell is noteworthy because he elaborated on the intrinsic value of domestic animals. He argued that the general rule of market value for lost pets was inadequate. He wrote, "A domestic pet with no breeding potential might be worth only $10 in the market to someone else who wants it as a pet. But the animal could be a highly valued companion whose loss would be deeply felt. People who love and care for animals should not be forced to accept as compensation for their loss the amount that the animal would bring in the market" (886 S.W.2d 368, 374). Since the publication of this opinion, animal law books frequently cite this case as setting the precedent that some animals have both pecuniary and intrinsic value. Lawyer and activist Derek W. St.Pierre applauds decisions such as *Corsco* and *Bueckner v. Hamel* as questioning the *status quo* of animals as property. He says that recognition of the intrinsic value of animals under tort law can help drive legal discourse forward toward recognition of the rights and personhood.[574] Despite St.Pierre's optimism, a decision that recognizes that pets have value to their owners does not go the next step and recognize that all animals have a value beyond their simple market value as property.

Finally, the case *Petco Animal Supplies, Inc v. Schuster* (114 S.W. 3d 554, 2004) is not noteworthy for the decision which confirmed the personal property value of a pet. Rather, the case is significant for the *dicta* that describe the intrinsic importance of a

[574] Derek W. St.Pierre, "The Transition From Property to People**:** The Road to the Recognition of Rights for Non-Human Animals," *Hastings Women's Law Journal*, (Summer 1998): 270.

family pet. In this case, Carol Schuster successfully sued the store Petco after her miniature schnauzer ran away from a groomer and was killed by traffic. The trial court awarded Schuster replacement costs for the dog, costs for training and microchip implantation, lost wages while searching for the dog, and damages for mental anguish, emotional distress and counseling as well as damages for the loss of companionship. Petco appealed the awards for counseling, mental suffering, and intrinsic damages.

Schuster as well as an *amicus* brief from the Animal Legal Defense Fund (ALDF) urged the court to refer to *Bueckner v. Hamel* as precedent for awarding damages for intrinsic value. Instead, Judge Pemberton, writing for the Texas Court of Appeals, affirmed Petco's claim that Texas law only classifies dogs as personal property for damage purposes and not as persons or any extension of their owners. Further, there was no precedent in Texas law for awarding mental anguish damages. Thus Pemberton reversed the award for mental anguish and counseling expenses. In his opinion, Pemberton spends some time recounting the closeness many Americans feel towards their dog. After recounting the results of several public opinion polls in which Americans reveal that they would be likely to risk their lives for their pets, Pemberton concludes, "These statistics indicate that companion animal owners view their pets as family members, rather than personal property" (114 S.W. 3d 554, 564). Despite Pemberton's conclusion that many Americans view their pets more as persons than property, Pemberton decided that he must follow Texas precedents and only consider the pet as personal property. Consequently, he reversed the award for the intrinsic value of companionship.

These cases are among the very few that recognize the intrinsic value of animals beyond their replacement cost or market value. Yet, as *Petco v. Schuster* illustrates, courts are still reluctant to award damages for the emotional distress owners experience when their animal property is injured or killed. These three property cases involved circumstances where the owner was trying to win damages for his or her own suffering. Far more complex issues arise when humans are trying to protect animals from suffering. As has already been mentioned, humans have a difficult time proving standing when they are trying to prevent harm to animals or the environment. Because it is the animal or the environment that suffers, the human who is bringing the suit has a difficult time demonstrating an injury in fact. This next section covers lawsuits involving standing.

Standing to Protect Animals

Numerous lawsuits have been initiated by animal rights groups against the government and other institutions for violations of the AWA. Although many times the violations against the AWA are egregious and there is concrete evidence of illegal animal suffering, the animal rights groups do not succeed. The merits of the case are sufficient, but the groups fail due to jurisdictional challenges to third parties. Animal rights groups lack standing.

According to the Supreme Court, the rules of standing are "threshold determinants of the propriety of judicial intervention."[575] Thus, if the plaintiff cannot prove standing, the case must be dismissed. The plaintiff must prove that he or she has a case or controversy under Article III of the Constitution. In addition, the plaintiff must show that there is a causal relationship between the illegal action and the alleged injury, and that a

[575] *Warth v. Seldin*, [422 U.S. 490, 518, 1975]

court decision can redress the injury. If an animal was allowed to enter the court as a plaintiff, it would be relatively easy to prove how a violation of the AWA or similar statute is causing an injury in fact to the animal. However, because animals are not persons with the right to be plaintiffs in a lawsuit, humans must initiate the lawsuits to rectify violations of AWA. The problem is proving that an injury to an animal or the environment is also a concrete harm to the human is very difficult. Humans have resorted to claiming aesthetic and educational injuries. This section traces how animal activists have sought standing in some key court cases dealing with animal issues.

The first important case decided by the Supreme Court in respect to standing did not involve animal rights or the personhood of animals. Rather, *Sierra Club v. Morton* 405 U.S. 727 (1972) concerned a controversy over environmental issues involved with developing a parcel of land in Sequoia National Forest. The case is important because it was one of the first major cases to argue that humans have an interest in protecting the environment including land and animals, and thus should have standing to sue to protect that interest. The Court ruled that although an environmental group did not have standing to sue for general interests, individuals who had a particular interest in a natural entity did have standing to sue to protect their interest. Moreover, in his dissent, Justice Douglas used arguments made famous by Christopher Stone in his paper "Should Trees Have Standing," to maintain that the natural entities such as trees, parks, and streams have interests of their own and should be considered juridical persons in cases concerning direct harm to the environment. Although Justice Douglas's argument did not gain much traction, the idea, put forth by a Supreme Court Justice, that natural entities could be considered persons was groundbreaking for animal rights activists who picked up on the

argument to contend that animals should also be considered juridical persons with human guardians when issues concerning animals were at stake.

In the case *Sierra Club v. Morton,* the conservation group the Sierra Club brought suit to stop the Disney Corporation from developing a large ski resort within the Mineral King Valley of the Sequoia National Forest. Members of the Sierra Club sought an injunction to restrain federal officials from approving the development claiming that a development within a national park would adversely change the land's aesthetics and ecology. When the Supreme Court heard the case, Justice Stewart found that the Sierra Club did not sufficiently prove that the development would affect activities of the club or specifically harm its members. Because the Sierra Club did not prove that its members would be adversely harmed in a concrete way, Justice Stewart ruled that the Sierra Club lacked standing to sue and dismissed the case. However, Justice Stewart held that the individual members of the Sierra Club did have standing to sue if the development affected their aesthetic or recreational interests. This set an important precedent that persons with a particular interest in a natural resource did have an injury in fact and thus had standing to bring suit in environmental cases. By the time the Sierra Club re-filed their complaint to prove injury to specific members, Congress had passed the Environmental Policy Act which required Disney to file an environmental impact statement (EIS). The EIS found that the development would severely impact the environment, and the project was cancelled.

Justice Stewart's ruling that persons who are impacted by environmental issues had standing to sue was significant for future cases involving persons suing based on harm caused to animals and natural entities. However, Stewart ruled that the person

himself must be personally harmed in a concrete way – a person cannot sue on behalf of the forest itself claiming that the harm to the forest is an injury in fact. The forest itself had no claim of injury or right to sue with a human representative or guardian *ad litem*. Justice Douglas wrote a compelling, and now famous, dissent arguing that the forest itself should have standing to sue.

Justice Douglas picked upon Christopher Stone's article in a Southern California Law Review, published just before the *Sierra Club* decision was reached. In his article, Stone argues that just because trees, forests, and streams do not have a human voice to speak their concerns that does not mean that these natural objects should be excluded from the judicial system. He contends that corporations, infants, incompetents, and universities cannot speak, but human lawyers are allowed to speak for them. In the same way, Stone advocates for guardians for natural objects that are endangered.[576] Justice Douglas agreed with Stone's argument in his influential dissenting opinion. He argued that just as a ship or a corporation has legal personality as a legal fiction, inanimate natural objects too should be granted legal personality in order to protect these objects from harm (405 U.S. 727, 743). He wrote that these objects must be protected "before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard" (405 U.S. 727, 749). He further opined, "Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological

[576] Christopher D. Stone, "Should Trees Have Standing: Toward Legal Rights for Natural Objects," *Southern California Law Review*, 45:450 (1972).

community" (405 U.S. 727: 750-2). In fact, Justice Douglas suggested that the Mineral King Valley itself, as a tract of public wilderness, had legally protected interests that would be harmed by the development, and the Mineral King Valley should have standing to protect those interests.

Justice Douglas's opinion was groundbreaking in its suggestion that the environment could be represented by a guardian *ad litem* and that natural beings could be artificial persons for judicial purposes. However, this argument did not catch on with fellow justices or with the lower courts, and this opinion was the first and only time such a concept was seriously considered. The opinion did not set a precedent extending legal rights and standing beyond human persons to other animals or natural objects. Even though the opinion did not gain momentum, it resounded with environmental advocates who feared that, without a broader definition of injury in fact and standing, natural entities would be in grave danger. For instance, in their *amicus curiae* brief, the Wilderness Society, Izaak Walton League of America, and Friends of the Earth argued that, if only persons with direct use of natural resources are granted standing, there is no way to protect entities such as animals in danger. Because humans have no direct use for eagles in the wild, humans cannot bring suit to prevent chemical poisoning of these animals that occurs with many pesticides.[577]

The majority opinion in *Sierra Club* confirmed that animals remained at the mercy of the court only able to be helped when human litigants proved they had standing to bring suit. Interestingly, *Sierra Club v. Morton* and *Roe v. Wade* were originally brought before the court during the same term. If *Roe* had not been postponed for re-

[577] Bruce J. Terris, Brief for the Wilderness Society, Izaak Walton League of America, and Friends of the Earth as Amicus Curiae, *Sierra Club v. Morton* [405 U.S. 727].

argument until the next term, the Supreme Court may have been faced with both issues of personhood at the same time. Could the concept of personhood for natural objects influence the decision on personhood for unborn humans? Both cases employed arguments demonstrating that other entities such as corporations had legal personhood. Since the Court denied personhood to both natural objects and the unborn, it is likely that hearing the two cases back-to-back would not have influenced the Court. However, spectators and scholars of the judicial process may have drawn many more parallels.

The courts used *Sierra Club v. Morton* as the model for deciding cases concerning standing for animals. In 1977, the Washington D.C. Court of Appeals heard *The Animal Welfare Institute v. Kreps* 561 f.2d 1002. This was an important case because the Court of Appeals followed the reasoning of *Sierra Club* and further explained the conditions under which humans could claim an injury for environmental harms. At issue was a U.S. government decision to waive a moratorium on sealskin importation from South Africa. A coalition of animal protectionist groups challenged this decision claiming that it was a violation of the Marine Mammal Protection Act (MMPA) and that the members of the groups had a personal interest in the protection of seals. At the district court, the suit was dismissed because the organizations lacked standing. However, on appeal the Court of Appeals reversed the decision and agreed that following the precedent of *Sierra Club*, the organizations did have standing and that the government had violated the MMPA.

The plaintiff protectionist groups claimed that their interests lay in a safe and productive environment for marine animals for the recreational, aesthetic, scientific, and educational interests of their members. The higher court agreed. In Judge Wright's opinion, he outlined three requirements for standing in the absence of a statutory grant: 1)

there was an injury in fact; 2) there was a causal connection between the injury and the defendant's action; and 3) an injury within the zone of interests protected by the statute. Wright found that the environmental groups did have an injury in fact because they submitted affidavits proving that members traveled to South Africa to observe, photograph, and learn about the seals. The defendants claimed that there was a no causal connection between the challenged act and the alleged injury because the MMPA did not have a direct effect on the actions of South Africa and an importation ban would not stop South Africa from killing seals. However, Judge Wright disagreed, citing evidence that South Africa did respond to strict enforcement of the MMPA. Finally, Wright ruled that the MMPA was enacted in response to public outcry against the exploitation of young seals. Violations of the MMPA impaired the members' interests in ensuring that the provisions of the MMPA were followed. Judge Wright wrote, "Where an act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defining their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of court in enforcing the statute" (561 F.2d 1002, 1007). Wright opened the doors for humans to take up the interests of animals within the legal system.

The Washington D.C. Court of Appeals again followed the *Sierra Club* precedent when deciding *Humane Society of the US v. Hodel* 840 F.2d 45 (1988). In this case, the Humane Society challenged the Department of Interior's decision to allow hunting on national wildlife refuges. The district court denied standing to the Humane Society arguing that the emotional injuries suffered by members of the Humane Society were not constitutionally recognizable and that recreational interests were not germane to the

mission of the organization. On appeal, the D.C. Court of Appeals reversed and granted standing to the Humane Society. Judge Wald upheld the district court's ruling that emotional distress is not a recognized injury and a "strong interest" in enforcing environmental statutes is not sufficient for standing. On the other hand, Wald followed the precedents of *Sierra Club* and *The Animal Welfare Institute v. Kreps* to rule that recreational and aesthetic interests could be the basis for standing.

The court then adjudicated the germaneness test associated with the Humane Society's claim. The court ruled that an organization had standing to bring suit on behalf of its members when the members would otherwise have standing to sue on their own, the interests it sought to protect were germane to the organization's purpose, and the neither claim asserted nor the relief requested required the participation of the individual members. Judge Wald found that the district court had mistakenly classified the Humane Society's interests as recreational when, in fact, the injuries suffered were to their aesthetic interests, which are recognized injuries under *Sierra Club*. Wald ruled that the members of the Humane Society had a germane interest in preventing hunting on protected land and that the goal of both the Humane Society and of the lawsuit were to protect the lives of animals and birds. This ruling was important because the review of germaneness further opened the gates for environmental groups to assert an interest in protecting animals.

While the D.C. District Court was adjudicating these claims by environmental groups, the Supreme Court was also immersed in a similar lawsuit. In the early 1980s, the international community set quotas to control whale harvesting. The U.S. enacted several policies that allowed U.S. officials to impose sanctions on nations who violated

international fishing quotas. Because the sanctions would cost Japan millions in fishing revenue, Japan negotiated an executive agreement with the U.S. Secretary of Commerce to a limited level of whaling without being reported as violating the international agreements. The American Cetacean Society along with several other conservation groups brought suit claiming that the Secretary of Commerce should have certified that nationals in Japan were violating the International Convention for the Regulation of Whaling. The Supreme Court's opinion in *Japan Whaling Association v. American Cetacean Society* 478 U.S. 221 (1986) revolved around the authority of the Secretary of Commerce and only tangentially covered the conservation of wildlife. However, in footnote four, Justice Byron White provided insight on the standing of environmental groups. White acknowledged that the American Cetacean Society would suffer injury in fact, because continued whale harvesting hurt the members' ability to engage in whale watching and study.

These three cases set a standard for cases involving animal protection organizations. First, the courts did not even consider the possibility that the animals themselves might have standing to claim injury. The courts were only willing to entertain the possibility that humans who belong to environmental organizations could suffer an injury when harm was done to an animal. Although the courts took a narrow view in not even considering the harm done to the actual animal, the courts took a more expansive view when outlining what constitutes harm to humans. Aesthetic interest in wildlife is legally protected and therefore humans or organizations of humans can sue when the government violates these interests with improper hunting. Overall, the courts were willing to protect the interest humans have in avoiding the death of animals but the

courts were not willing to protect the interests of the animals themselves.[578] These cases set the stage for important cases in the next decade.

The Supreme Court case, *International Primate Protection League v. Administrators of Tulane Educational Fund* 500 U.S. 72 (1991), is interesting for this study primarily due to the irony surrounding the determination of "persons" with standing. The case involved the International Primate Protection League's attempt to rescue several monkeys from the National Institute of Health and the Tulane Educational Fund. The Primate Protection League claimed that they should gain custody of the monkeys and act as legal guardians for the animals who were being abused and had no voice in the legal system. The district court granted a preliminary injunction barring the National Institute of Health (NIH) from euthanizing or performing any more research on the monkeys. The Court of Appeals vacated the injunction and dismissed the case finding that the Primate Protection League lacked standing. At the Supreme Court, the matter of the NIH's ability to remove the case from a state court to a federal court was also at issue. The NIH claimed to be a corporate "person" and thus able to remove a case to federal court under 28 U.S. Code § 1442. The irony of this case was that the real issue at hand was the fate of several monkeys who were in danger of abuse and death but had no recourse to the legal system because they were not persons. However, the case barely touched on the plight of the monkeys. Instead, it revolved around the standing of both the Primate Protection League and the personhood of the NIH to remove the case to federal court.

[578] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 45.

At the level of Circuit Court, the majority found that the Primate Protection League did not have standing to sue on behalf of the monkeys even if the monkeys were left unprotected. Quoting *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982), the court said, "The assumption that if respondents have no standing to sue, 'no one would have standing, is not a reason to find standing…'" (895 F.2d 1056, 1061). Supreme Court Justice Thurgood Marshall delivered the opinion of a unanimous Court. Marshall's opinion revolved around the narrow jurisdictional issue of removing the case to the Federal District Court, and the Court found that the Primate Protection League did have standing to challenge the removal of the case because their injury was the loss of the right to sue in the forum of their choice. Further, the language of the U.S. Code did not imply that the NIH could remove the case. The Supreme Court held that the case must be remanded to the state court. Despite the publicity of a Supreme Court ruling, the Silver Spring monkeys were largely left out of the decision. The welfare, rights, and any claim to standing or personhood of the monkeys was not considered by the Court. By the time the Supreme Court issued its decision, all of the Silver Spring monkeys had died from injuries sustained during the experiments or were euthanized.

In 1992, the Supreme Court heard *Lujan v. Defenders of Wildlife* 504 U.S. 555 which involved a controversy over the Endangered Species Act of 1973. This statute required the Secretaries of Interior and Commerce to ensure that government agencies do not jeopardize the habitats of endangered or threatened species. While the Secretaries initially agreed to a joint regulation extending the statute's coverage to foreign nations, a subsequent ruling confined the statute's scope to the U.S. and high seas. In response, the

Defenders of Wildlife and other organizations brought suit seeking a declaratory judgment that the new regulation erred in limiting the scope of the Endangered Species Act. Secretary of Interior Manual Lujan objected that the environmental organizations lacked standing.

This case provided the Supreme Court opportunity to adjudicate what conditions must be met for an organization to claim standing in respect to a harm done to animals or the environment. Justice Antonin Scalia, writing for the majority, clarified what must be established in order to claim an injury in fact. He held that an injury must be concrete and particularized as well as an actual or imminent invasion of a legally protected interest. The party must have evidence of the injury to support the claim. Further, there must be a causal relationship between the claimed injury and the actions of the accused – i.e. the person named in the lawsuit must be the individual responsible for the injury. Finally, there must be a high probability that a favorable decision for the plaintiff would remedy the harm.

In this case, Scalia found that the plaintiff environmental organizations did not have an injury in fact. They did not show that their members would be directly affected. Affidavits from members claiming to visit foreign nations with endangered species sometime in the indefinite future did not constitute an imminent injury. Scalia opined that a plane ticket proving that one of its members had planned to visit an affected area would have been sufficient to prove injury in fact. Further, Scalia wrote that general grievances about the government should not be adjudicated in a federal court – rather that is the role of Congress and the President

Scalia's decision was considered a defeat for animal advocates who hoped to use a broad definition of standing to protect animals who had no hope of entering the courtroom themselves. Again, the possibility that animals themselves may have standing was not considered. The Defenders of Wildlife organization decided to defend their own human rights rather than the riskier proposition of defending the animals involved. In Justice Stevens's concurring opinion, he wrote that humans do have standing to protect the animals and the habitat of animals that they enjoy observing and plan to observe in the future. Stevens wrote, "Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" (504 U.S. 555, 585). This statement is powerful in what it does not say – Congress has not found that endangered species have value on their own accord. According to this statement, Congress decided to protect certain living beings due to their usefulness to humans. Additionally, in a reply brief for the petitioner, the Departments of Justice and Interior argue that it is "quite odd" to recognize a risk to animals as an actual injury to a human. Further they argue that expanding the class of plaintiffs able to bring suit beyond the normal strictures of Article III is a "bizarre view of injury."[579] These federal agencies suggest that the only true value of animals was their use to humans and to suggest including them as plaintiffs in a lawsuit was "bizarre." This did not bode well for animals to gain personhood.

The setting for *Animal Legal Defense Fund, Inc. v. Espy* 23 F.3d 496 (1994) was again the D.C. Circuit Court. In 1994, the Animal Legal Defense Fund (ALDF) and the

[579] Kenneth W. Starr, Solicitor General, Department of and Thomas L. Sansonetti, Solicitor Department of the Interior, "Reply Brief for the Petitioner," *Lujan v. Defenders of Wildlife* [504 U.S. 555] October 3, 1991.

Humane Society brought suit against the Secretary of Agriculture because they felt that the department was allowing an unduly narrow definition of "animal" under the AWA. The AWA's definition excluded birds, rats, and mice which meant that research facilities did not have to report laboratory conditions for these animals. The plaintiffs asserted that this exclusive definition undermined their attempts to gather and disseminate information concerning the wellbeing of these animals for the education of their members. Further, an ALDF member, Dr. Patricia Knowles, claimed that as a researcher working with rats and mice, the agency's failure to define these creatures as animals rendered her unable to control the wellbeing of the rats and mice and that inhumane treatment impaired her ability to perform her work duties. The District Court held that the ALDF was stretching the imminence requirement "beyond the breaking point" with their request for standing for Knowles. Notably, Judge Williams dissented with this part of the decision. Williams argued that following the spirit and principles of *The Animal Welfare Institute v. Kreps*, *Humane Society of the US v. Hodel,* and *Japan Whaling Association v. American Cetacean Society*, there was a recognizable aesthetic interest in seeing animals treated humanely. Therefore, Williams argued that Knowles did have standing to claim an injury in fact.

Despite the disagreement over standing for Knowles, the Circuit Court unanimously agreed that that the ALDF and the Humane Society did not have standing based on an informational injury because an informational injury did not fall within the zone of interests for the AWA. Because the organizations were simply trying to educate their members but not protecting the members' legal rights, they did not have an injury. The District Court suggested that Congress could explicitly grant humans standing to

receive information about animal welfare, but until Congress did so, the organizations did not have standing.

For the last and arguably most interesting case concerning standing, we remain with the D.C. Circuit Court which heard *Animal Legal Defense Fund v. Glickman* 154 F.3d 426 in 1998. In this case, Marc Jurnove, a member of the ALDF, claimed that he was injured due to having to witness the inhumane living conditions of the primates at the Long Island Game Farm Park and Zoo. The ALDF, having learned from the previous cases concerning standing, took a strategic approach to this case. Jurnove really was seeking relief for injuries suffered by the animals at the Long Island Zoo. However, the ALDF knew that litigating on behalf of animals was futile; therefore, they brought a case on behalf of a human who empathized with the animals.

Jurnove was also an employee and volunteer for rescue organizations and could have claimed that he was injured during the course of his work. Again, however, the ADLF realized that their best chance for gaining standing was to claim that Jurnove suffered an aesthetic injury during his regular visits to the zoo as a customer. Jurnove's injuries truly were more morally or ethically based rather than aesthetic in the traditional meaning of aesthetic referring to beauty. Moral and ethical harms had not been attempted and proven successful whereas aesthetic injury had a line of precedents to support standing. Thus, the ALDF took the proven route of claiming aesthetic injuries to a patron. This strategy proved successful.

The court was sharply divided on whether the ALDF could claim standing, but the majority decided in favor of Jurnove and his fellow plaintiffs. Judge Wald followed the line of precedents from the D.C. District Court that an aesthetic injury is an injury in fact,

and Jurnove suffered from the quality and condition of the environmental area. Because USDA failed to enact standards to meet the guidelines of the AWA, Jurnove's injury was due to government inaction and therefore Jurnove had causation. More stringent regulations would redress the issue and relieve Jurnove's suffering and thus Jurnove also satisfied redressibility requirements. Because Jurnove's aesthetic interest was legally protected under the AWA, the majority found that Jurnove did have both standing and causation.

The dissent, led by Judge Sentelle, found issue with granting the ALDF standing. Sentelle argued that standing on aesthetic grounds was limited to "diminution of the species" and Jurnove's injury was "a matter of individual taste." Jurnove's claim would allow standing for anyone seeking to view animals in a way that does not comport with his or her individual taste. The dissent reasoned that "a sadist with an interest in seeing animals kept under inhumane conditions" would also have standing to sue (154 F.3d 426, 448).

Jurnove claimed a personal injury in order to bring a lawsuit ultimately designed to change the way animals were treated. His aesthetic injury of observing the ill-treated primates was really secondary to the primary injury to the animals. Jurnove had to resort to this strategy because direct victims, the primates at the Long Island Zoo, were not able to bring a suit on their own behalf. Obviously, primates do not have the mental and physical capabilities to articulate rights and initiate a lawsuit independently. But it is conceivable that primates could be party to a lawsuit if a human such as Jurnove acted as a guardian and initiated the lawsuit. As previous chapters have illustrated, this is quite common in cases involving children, the mentally incompetent, and even slaves.

Currently, U.S. policy does not allow court-appointed guardians to initiate lawsuits on behalf of animal subjects for violations of the AWA, ESA, or any other animal protection act. Francione argues that it is unlikely that Congress will amend current policy and allow animals to be represented by guardians. He claims this is because as property, animals are the object of legal claims and not the subject. Children and the mentally incompetent are not property and therefore are subjects of legal claims rather than objects. They have legal rights whereas animals, as property, do not have legal rights that a guardian can help protect.[580]

Another option to gain some legal protections for animals that does not conflict with the status of property is to allow animals to be considered persons as legal fictions in situations where their well-being is at stake. This would be similar to the status of corporations which are still considered property but are persons under the law in certain situations. As legally fictitious persons, animals would be allowed to enter a lawsuit in their own name (with a guardian) but would not necessarily gain all the rights and privileges of human persons. If a legal person is defined as simply what the law says it is, then there is no real obstacle for allowing animals, or at least primates, to be considered legal persons for limited issues. This was suggested by Justice Douglas in the *Sierra* case. Despite the options of allowing guardians or granting personhood through fictions, there does not seem to be much movement toward either of these alternatives. The final, and most radical option, is to allow animals to enter a lawsuit just as human persons do. The next section explores the few cases that entertain that option and then ultimately reject granting personhood to animals.

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[580] Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* [Temple University Press, Philadelphia, 2000]: 69.

The Concept of Animals as Persons

Humans face an extremely difficult challenge in gaining standing to sue in cases concerning injury to animals. The preceding cases represent the very rare exceptions to the rule where human standing was considered. In the vast majority of cases, the issue of standing for humans is not even considered or is denied. Further, because standing is difficult to prove, most injuries to animals do not even reach the court system because the battle seems futile. If humans cannot gain standing to represent animals it is even more unlikely that animals themselves will ever have their day in court. Although animals sometimes appear in the names of cases as plaintiffs, it is very rare that the animals are truly considered as a party to the case. Even if represented by human guardians, the idea is simply too farfetched for most courts. However, there are a handful of cases that represent exceptions. These cases present claims under the Endangered Species Act (ESA) and are brought forward with the species of animals itself as the plaintiff. Cases such as *Northern Spotted Owl v. Hodel* 716 F. Supp. 479 (W.D.Wash. 1988), *Mt. Graham Squirrel v. Yeutte* 930 F2d 703 (1991), *American Bald Eagle v Bhatti* 9 F.3d 163, (1993), and *Loggerhead Turtle v. County Council of Volusia County* 307 F.3d 1318 (1995) involved violations of the ESA to the specified animal. Although each of these cases had a species of animal as the plaintiff, the courts did not address the legality of an animal as plaintiff or the issue of standing for the animal. There are, however, four notable cases that directly address the issue of a species of animals serving as a party in a case and the related issue of legal personhood. Because these cases are so rare, it is worth examining them in some detail.

One of the most well known cases involving animal personhood is *State of Hawaii v. Kenneth LeVasseur* 1 Haw. App. 19, (1980). Kenneth LeVasseur was an undergraduate student at the University of Hawaii who worked as a research assistant in the university's marine laboratory. His job was to repair and clean the dolphin tanks as well as feed and swim with the dolphins. After two years of working with the dolphins, LeVasseur determined that the dolphins were in danger due to their confinement in the laboratory tanks. LeVasseur and several other people decided to "rescue" the dolphins and release them into the ocean. LeVasseur was arrested and convicted of first-degree theft.

LeVasseur appealed his conviction claiming a choice-of-evils defense under Hawaiian law which allowed that certain criminal actions can be justified if the actor believes the conduct will avoid a greater harm or evil to another. According to the court, LeVasseur "contended that he chose to commit the lesser harm of theft in the first degree in order to avoid greater harm either to the dolphins or to the statutorily expressed policy (AWA) of the United States" (1 Haw. App. 19, 24). LeVasseur's defense hinged on the word "another" in the choice-of-evils defense. LeVasseur claimed that dolphins should be included in the term "another." The appellate court rejected this argument, saying that the Hawaiian legislature specifically defined "another" as a person which included natural persons, corporations, and unincorporated associations. Under this definition, dolphin was not "another."

LeVasseur also claimed that "another" included the United States as a corporate person, and his actions were designed to protect the laws of the United States under the AWA. The court agreed that the AWA was designed to protect animals such as

laboratory dolphins, but found that LeVasseur still acted improperly because he did not contact the federal government to report conditions before taking action. In the choice-of-evils defense, the court had to adjudicate whether the crime of theft was a greater evil than the evil LeVasseur sought to prevent – violation of U.S. policy for the protection of laboratory animals. The court decided that the crime of theft committed by removing the dolphins and releasing them into the ocean was as great an evil as the violation of the AWA. Therefore, the court upheld LeVasseur's conviction. Francione argues that the court's decision is understandable because the fundamental premise of the AWA and other legislation is that "nonhumans are the property of humans and can exploited for human benefit."[581] The researchers at the university were simply exercising their right of private property in keeping the dolphins in the tanks. LeVasseur's attempt to stop the evil of inhumane treatment of animals was not a greater evil than the violations of the university's property rights.[582]

The next case concerning personhood also comes from a Hawaiian court. In 1988, the Ninth Circuit Court of Appeals heard a case involving the endangered bird called the palila which is only found on the slopes of Mauna Kea on the Island of Hawaii. The Hawaiian Department of Land and Resources allowed feral sheep and goats to also occupy Mauna Kea, causing the destruction of the palila's habitat. The Sierra Club, Audubon Society, and other environmental groups brought suit against the Department of Land and Resources under the ESA. Circuit Judge O'Scannlain delivered the opinion in

[581] Gary L. Francione, "Personhood, Property, and Legal Competence in The Great Ape Project: Equality beyond Humanity," Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993]: 251.

[582] Gary L. Francione, "Personhood, Property, and Legal Competence in The Great Ape Project: Equality beyond Humanity," Paola Cavalieri and Peter Singer, Editors, [St. Martin's Press, New York, 1993]: 251.

the case *Palila v. Haw. Dep't of Land & Natural Res*., 853 F.2d 1106, (1988). The case is important for this study due to a striking opening statement by Judge O'Scannlain:

> As an endangered species under the Endangered Species Act ("Act"), 16 U.S.C. § 1531-43 (1982), the bird (Loxioides bailleui), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right. The Palila (which has earned the right to be capitalized since it is a party to this proceeding) is represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties who obtained an order directing the Hawaii Department of Land and Natural Resources ("Department") to remove mouflon sheep from its critical habitat. (853 F.2d 1106, 1107)

O'Scannlain affirmed the district court's finding that habitat degradation was a harm that could result in extinction and that the sheep were taking the habitat from the palila. He sustained the order to remove the sheep. While the decision was a victory for the palila, the broad victory was for animal advocates who saw O'Scannlain's opening statement as a breakthrough in allowing animals to be represented in court. Although this case did not shift the paradigm, and very few cases allowing animals as litigants followed, the case is often cited by advocates seeking increased legal protections for animals.

The next noteworthy case involving a species of animal as a party to a case also originated in Hawaii. *Hawaiian Crow ('Alala) v. Lujan* 906 F. Supp. 549 (D. Hawaii, 1991) involved the 'Alala bird which was also protected by the ESA. As of 1991, approximately twenty-one 'Alala birds survived on the Hawaiian Islands, and nine of those birds lived in the wild on property known as the McCandless Ranch. Audubon Society adopted an "Alala Recovery Plan" which required the owners of the McCandless Ranch to take active steps to preserve the 'Alala. When the McCandless Ranch refused entry to the land, the Audubon Society took legal action. In their suit, the Audubon Society named the 'Alala as the plaintiff. The McCandless defendants then took action

under Federal Rule of Civil Procedure 12(b)(6) claiming that because the ʻAlala was not a person, the bird did not have standing to sue, could not be a plaintiff, and must be removed from the title of the case.

District Judge David Ezra adjudicated whether the ʻAlala could be a plaintiff. The ESA authorized enforcement by "any person" and specified that "person" was an individual, corporation, partnership, trust, association, or any other private entity. Ezra was breaking new ground because no court had expressly ruled on whether an animal could be considered a private entity and thus a person under the ESA. The Audubon Society relied on O'Scannlain's opening statement in *Palila* to argue that the ʻAlala should be considered a person. However, Judge Ezra pointed out that this statement was dictum and *Palila* did not truly address the issue of standing for an animal. Ezra ruled that the ʻAlala was not a person with standing to sue under the ESA and therefore he granted the McCandless defendants' motion to dismiss the ʻAlala as a plaintiff and strike ʻAlala from the name of the case. However, the court declined to impose sanctions against the Audubon Society for improperly naming the ʻAlala in the case.

Two years after the Hawaiian court handed down the *ʻAlala* decision, the District Court for Massachusetts affirmed the decision that only "persons" could bring lawsuits and animals did not qualify as persons. The case *Citizens to End Animal Suffering & Exploitation v. New England Aquarium* 836 F. Supp. 45 (1993) was brought by Citizens to End Animal Suffering and Exploitation (CEASE), the Progressive Animal Welfare Society, Inc., (PAWS) the ALDF, and a dolphin named Kama. The defendants moved for dismissal and summary judgment on several grounds including the argument that Kama the dolphin lacked standing. On the issue of standing, the plaintiffs again relied on

O'Scannlain's statement in *Palila* to argue that Kama was a legitimate plaintiff. However, Judge Mark Wolf followed the precedent of *'Alala* that O'Scannlain's statement was just dictum and that animals were not "persons" that could be party to a lawsuit. Wolf wrote,

> The MMPA (Marine Mammal Protection Act) does not authorize suits brought by animals. … This court will not impute to Congress or the President the intention to provide standing to a marine mammal without a clear statement in the statute. If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly. (836 F. Supp. 45, 49)

Judge Wolf effectively ended the hope of animals gaining standing in their own right. In November 2011, PETA initiated another suit designed to secure more rights for animals as persons. PETA claimed that five whales owned by Sea World marine parks were enslaved and that their treatment represents a violation of the Thirteenth Amendment. Even though the whales were not human, PETA charged that the text of the Thirteenth Amendment does not refer to human beings or persons and therefore slavery does not depend on species any more than it depends on gender, race or religion.[583] PETA planned to present their case to a California judge. The critical questions will be whether the Thirteenth Amendment only applies to humans or if it is broad enough to encompass other animals. David Steinberg, a professor of law at the Thomas Jefferson School of Law contends that the Amendment was never intended to apply to animals and it was so obvious that slavery meant humans that it was unnecessary to explicitly state. However, because it is not explicit, there may be room for PETA to argue on behalf of the whales. This will be an interesting case to watch in terms of animal personhood.

[583] Mark Yates, "Whales are Persons Too," *ABC News,* November 5, 2011, available from http://www.abc.net.au/correspondents/content/2011/s3357035.htm, accessed 29 November 2011.

Where to Draw the Line?

Although there is a large body of law addressing the personhood of slaves, corporations, and fetuses, as these cases illustrate, the law has very rarely dealt directly with the issue of personhood for animals. The law addresses issues concerning persons and because the law generally only accepts humans and certain groups of humans such as corporations as persons, animals have not had their day in court. Further, when humans attempt to address animal exploitation through the court system, they often are rebuffed because they do not have standing to sue. Within the law, an animal as property is firmly established while an animal as a person is radical. With these obstacles, it is very difficult to find an answer from the judicial system to the question "where to draw the line" when deciding which humans and animals qualify for personhood.

Making the move from moral rights to legal rights is an even thornier proposition. The Constitution and Bill of Rights do not mention animals and give no indication that these creatures were intended to be part of the political community. There were however numerous laws during the founding of the nation pertaining to animals as simple property. The legal tradition in respect to animals remains that they are simply property that humans should treat with appropriate care in respect to their economic value. Francione seems to be correct that the property classification of animals is the biggest obstacle in granting animals more protections, rights, or claims to personhood. Property does not have rights or claims – it is something to be used to advance human interests.

Even laws such as the AWA or ESA that endeavor to protect some types of animals are often loosely enforced or are allowed exceptions for animals that are

important in human economic commerce. For instance, poultry are excluded from the AWA and Humane Slaughter Act even though approximately 9 billion birds are slaughtered each year in the U.S. for human consumption. The review of the very few cases that mention animal rights or claims to personhood reveals that animals do not have standing and cannot even be represented by a human guardian *ad litem* in order to claim injury. This leaves very little room for animals to be protected under the law. Granting animals full legal personhood is an even more radical proposal that would require more than just procedural laws that affect standing. It would require changing the substantive laws concerning how humans may treat animals who are fellow persons. Concerns such as utilizing animals for food, clothing, experimentation, amusement, and so on would be challenged.

It seems that most humans have a mixed conception on how humans should treat animals. Most people profess to be against animal torture and have tender and even loving feelings towards animals. On the other hand, the majority of Americans support animal experimentation, hunting, and eating animals. A 2003 Gallup poll revealed that fully 96 percent of Americans felt that animals deserve some protection from harm and exploitation while only 3 percent felt that animals do not need protection "because they are just animals." Twenty-five percent of those surveyed even said that animals deserve "the exact same rights as people to be free from harm and exploitation."[584] However, of those surveyed who called for giving animals the exact same rights as humans, 44 percent opposed banning medical research on animals and 55 percent opposed banning all types

[584] David W. Moore, "Public Lukewarm on Animal Rights," Gallup News Service, May 21, 2003, available from http://www.gallup.com/poll/8461/Public-Lukewarm-Animal-Rights.aspx, accessed February 2, 2010.

of hunting.[585] This reveals that Americans have mixed and even confused views on how they feel animals should be treated. Further, despite claiming to have tender feelings towards animals, only about 2.5 percent of Americans are vegetarians regardless of the fact that a vegetarian lifestyle is not more expensive and arguably healthier than a carnivorous lifestyle.

If animals truly have a claim to personhood that humans must respect, animals cannot be used as a food source. In civilized society, humans do not allow cannibalism because humans cannot eat other entities that have moral worth and moral rights. If animals were persons, they too would have moral worth that would prevent their consumption by fellow persons. This does not seem to be a step humans are willing to take. Experimentation on animals is another area that is fraught with difficulty. Only about 52 percent of the public supports animals in scientific research, but among scientists, an overwhelming 93 percent favor animal experimentation.[586] There is little doubt that research on animals has led to medical breakthroughs that have saved millions of lives. Advances in fighting diseases such as Alzheimer's, polio, childhood leukemia, and diabetes were all made due to research on animals.

The large majority of research subjects are rats and mice, and because humans do not feel an affinity towards these animals, there is very little protest when rats and mice must suffer for human benefit. On the other hand, some treatments must be tested on primates such as strains of the HIV-AIDS virus that are tested on chimpanzees due to

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[585] David W. Moore, "Public Lukewarm on Animal Rights," Gallup News Service, May 21, 2003, available from http://www.gallup.com/poll/8461/Public-Lukewarm-Animal-Rights.aspx, accessed February 2, 2010.

[586] Pew Research Center for the People and the Press, "Public Praises Science; Scientists Fault Public, Media," Pew Charitable Trust Media Center, July 9, 2009, available from http://people-press.org/report/528/, accessed February 2, 2010.

their genetic similarity to humans. Humans must adjudicate whether they are willing to forgo potentially life-saving treatments in order to protect animals that are their next of kin. This is a difficult situation and the debate concerning primates in research is intense.

A focus of this chapter was chimpanzees and other great apes that have cognitive abilities that rival those of humans. Numerous studies prove that great apes can communicate in a human language, are rational, and are emotive. However, the lynchpin seems to be the ability for second order volitions or the ability to evaluate first-order desires and then choose to engage in these desires. This is what sets moral beings apart from all others. A human can choose to act in accordance to set of ethical principles rather than wantonly following his or her desires. Apes in the wild do not seem to have a set of principles that they follow in order to guide their society. More research remains to be done on laboratory great apes to see if their cognitive abilities surpass simple emotions and self-chastisements to truly understanding a moral code. The present research seems to indicate that humans are the only beings who are self-legislative and morally autonomous agents. Thus, under most philosophical criteria for personhood, humans are the only beings who qualify.

The problem with this argument is that it allows humans carte blanch to be classified as persons but still subjects animals to a cognitive screening test. Why must animals prove their qualifications? Further, great apes are so close to passing the screening test that a valid argument could be made that they should be given the benefit of the doubt and granted some rights and protections. Some humans recognize that certain animals such as great apes are beings so similar to humans that they too deserve protections. Fouts found that of all the people who visited the chimpanzee Washoe, deaf

children were the first to recognize the chimpanzee as next of kin. He writes, "To see a deaf child, who struggles daily to be understood by follow humans, talking animatedly in sign with a chimp is to recognize the absurdity of the age-old distinction between "thinking human" and "dumb animal." When deaf children look at Washoe, they don't see an animal. They see a person."[587]

This story illustrates the fact that what counts as a person is often a matter of perception. The deaf children recognized that the chimpanzees were similar to them and they felt a kinship to the animals. Many of the scientists working with great apes also develop bonds with the animals and begin to identify great apes as persons. However, most humans do not have this type of affinity with great apes and thus do not see the need to include these animals within the realm of persons. Despite the numerous studies that reveal the capabilities of great apes, they remain elusive animals that are sometimes hauntingly similar to humans but not persons. When humans draw the line for personhood, animals are excluded.

Analysis of Hypotheses

The animal rights movement to bestow legal personhood upon animals is a relatively new cause in the American political sphere. Although the matter of animals holding legal rights is a relatively new topic for discussion, the issue of whether animals have moral rights has been debated by theorists for centuries. The review of ancient Greek, Roman, and Biblical views on animals reveals that the majority these ancients viewed animals as simple property to be used at will by humans. Aristotle believed that

[587] Roger Fouts, *Next of Kin*, [William Morrow and Company, Inc. New York, New York, 1997]: 353.

animals had sensitive souls, he did not believe that animals had rational souls. Because animals were not rational, Aristotle concluded that animals were property to be used to fulfill human needs. Similarly, under Roman law, animals were classified as things rather than persons because animals did not have the ability to reason or exercise autonomy. The most influential statements on the status of animals came from the Bible which specifically gave humans dominion over animals and provides many examples of humans using animals as property for human needs.[588] Prominent theorists such as Locke and Kant followed this tradition and believed that humans were divinely superior to animals, injury to animals was wrong because it harmed the sensibilities of persons, and humans were justified in using animals as a means for human ends.

The core theory defends the concept that animals are property with little to no claim to personhood. My first hypothesis is that the core theory will be reflected in the cases concerning animals. A text analysis of the animals cases reveals no instances in which Locke or Kant are mentioned in opinions or in *amicus curiae* briefs. However, the concept of animals as property is confirmed repeatedly in the law. Very few cases consider personhood for any animals and to date, no case has allowed any type of personhood or potential personhood for a nonhuman. Therefore, my first hypothesis is supported, as the core theory which traditionally considers animals to be property is reflected in the law.

My second hypothesis is that the dichotomies distinguishing persons from property and persons from human beings will be reflected in the core theory and the law. These dichotomies are discussed to a great extent in modern theory as theorists and

[588] Genesis 1:26-28.

researchers try to determine if the cognitive qualities of certain primates can qualify them as persons. The dichotomy between person and human being does not truly arise in respect to animals because animals are not human beings. Instead, animal rights scholars have tried to prove that some animals have the same capacities as human beings and therefore should be treated as if they are human beings and persons. The courts, however, have rejected this argument and have not contemplated the fact that animals such as great apes should qualify as persons based on their capacities. Animal anticruelty laws such as the AWA designed to benefit animals as sentient beings. However, the AWA does not challenge the property status of animals and does not consider that animals could be legal persons in any sense.

In fact, the concept of animals as property is so entrenched in the law that animals do not have standing to bring suit for violations of animal anticruelty laws. If animals were able to bring suit as a plaintiff, it would be fairly easy to prove violations of animal welfare acts. Animals, with perhaps the exception of great apes, do not have the cognitive capacity or ability to communicate to initiate legal action, but human guardians could do so on their behalf. However, the legal system does not recognize animals as litigants and has not granted standing to animals with a human guardian. The review of cases demonstrates that even human persons usually are not allowed standing because humans cannot prove that harm to an animal is an injury to the human. Therefore, although the courts have heard thousands of cases involving animals in some ways, there are very few cases that speak to the personhood of animals or the possibility of animals being represented by a human guardian. As beings outside the sphere of human persons, the status bestowed upon animals remains that of property.

In respect to my hypothesis that the dichotomies would be reflected in the law, I have not reached a definitive conclusion because the law has not yet truly considered the dichotomies between person, human, and property. The law holds animals to be property with very little argument otherwise. These dichotomies will not be analyzed in the law until animal personhood is truly considered by judges and justices.

If the concept of personhood for animals gains credibility in the law, judges and justices will be able to draw upon some of the lessons learned from the debates concerning slaves, fetuses, and corporations. Singer and Wise point out the similarities in denying personhood to slaves and animals. Slaves were regarded as chattel property and therefore had very few rights and protections under the law. Their owners had fairly wide latitude to treat their human property as they wished. This analogy points out that as a class of beings, animals like human slaves, are a class that is discriminated against by unjustly denying personhood. Critics of this argument point out the fact that animals simply are not humans despite their capacities. Only humans qualify as persons and thus to compare animals to an unjustly discriminated against class of persons is nonsensical.

Although Singer and Wise point out the parallels between denying personhood to slaves and animals, the law has not recognized the similarities in the debates. My text analysis revealed no references to slaves or slavery in any of the documents for the animal cases. The reasoning within the law has been fairly consistent however. In antebellum America, judges and justices were fairly consistent in ruling that slaves were property rather than persons. In modern debates over animals, the law has been even more unswerving. The law has declared that animals are property and the legal battle has not progressed much further.

The fact that animals are not human sets them apart from the other entities, but there are still similarities between the arguments for fetal personhood and animal personhood. Much of the abortion debate revolves around when a fetus gains sentience and when it has rational capacity. These criteria have been extensively used to determine when the life of a fetus should be protected. Animal rights activists use the same strategy to demonstrate that great apes are sentient, rational, and communicative and therefore should have the same rights and protections as human persons. Currently, animal welfare laws protect some animals from pain and injury at the hands of humans. The fetus, as a sentient being, may have a similar claim to the avoidance of pain and injury. The previous chapter pointed out that the fetus has brain activity by eight weeks of gestation and may be able to feel pain as early as six weeks. The timeframe for fetal sentience ranges from six to twenty-six weeks.[589] If animals are protected from undue pain by legislation, then the fetus, even though not a person, has a claim as well. Certainly, if late-term abortion methods can be proven to cause pain to a sentient fetus, then these methods could be ruled unlawful under a fetal welfare law. Further, many the lives of some species of animals are protected through various endangered species laws. An argument could be made that the life a fetus should also receive some protection. Like the fetus, most animals are not rational agents and therefore do not qualify for personhood through cognitive criteria. However, scientists who work with great apes argue that some primates have cognitive abilities that rival those of young children. If young children qualify as persons, so too they argue, should great apes. The similarities

[589] Jacqui Wise, "Fetuses Cannot Feel Pain Before Twenty-six Weeks," *British Journal of Medicine*, 315, (November 1997): 1111-1116.

among some animals, fetuses, and children are germane and could be called upon for greater protections for both animals and the fetus.

Another criterion that is common among slaves, fetuses, and animals is social acceptability as persons. Slaves were not considered part of "We the People" and therefore were not included in the community of persons. Similarly, a fetus is not yet an active part of the community of persons and therefore is excluded by those who do not feel that the fetus is an accepted person. The divide between animals and humans is arguably the greatest of all. Human persons know what they are not – they are not slaves, they are not fetuses, but most certainly, they are not animals.

Because the law has not seriously considered the possibility that certain animals could be anything more than property, the personhood of animals has not been adjudicated by the law. My third hypothesis is that the law should be consistent in adjudicating the personhood of slaves, corporations, fetuses and great apes. This is very hard to prove in respect to great apes because there is no personhood law to compare to that of the other entities. If and when the courts begin to consider personhood for animals, I will be able to compare those decisions for consistency. However, a comprehensive analysis of the four entities in this study does reveal some consistencies as well as inconsistencies in both the core theory and the law of personhood. The next chapter brings the analysis together to determine what can be concluded about personhood from this study.

Chapter Six
Conclusion

This study concerns a fundamental contest of ideas about what it means to be a person, what qualifies an entity as a person, and what role the law plays in bestowing this status. It is about who and what the law should recognize as a legal person, who or what should be excluded from this status, and why. Thus, I have conducted an in-depth study of four diverse entities vying for personhood to determine what criteria are associated with the confirmation of personhood and what criteria are associated with the exclusion of personhood. In order to understand the nuances of each entity's pursuit of legal personality, a core body of political theories and philosophical ideas of personhood was applied to each entity to determine the extent to which they measured up to established concepts. The history of each entity's bid for personhood was also examined to trace the development of the laws and political thought pertaining to the entity. Finally, the study completed a detailed analysis of the important court decisions concerning personhood that effectively established or denied that entity's personhood.

After this detailed examination, this final chapter brings the analysis together by comparing and contrasting the entities to develop a more robust concept of legal personhood. A comparison of the pursuit of personhood for each entity reveals both consistencies and inconsistencies in the bestowal of personhood. It also brings to light fundamental concepts that are common in the understanding of personhood. Finally, it provides key findings and possible methods of expanding the bestowal of personhood to other entities.

In order to explicate the important findings in this study, I begin with a review of the three hypotheses that were established in the first chapter. The first hypothesis concerns how the development of a core theory of personhood would illuminate the understanding of personhood for each of the four entities. This chapter analyzes how well the respective jurisprudence reflects the core theory and how well the core theory explains the law's bestowal of personhood. The second hypothesis states that personhood can be conceptualized in terms of the dichotomies between person and property, as well as person and human being. How these dichotomies were applied is compared and contrasted. Finally, the third hypothesis posits that the law pertaining to personhood for each of the entities should be consistent. This claim is tested to see if it is indeed true and if a more robust concept of personhood can be established. This comprehensive review and analysis reveals a number of findings concerning moral and legal personhood. The analysis questions whether the law should be more consistent or even more expansive in its bestowal of personhood. These lessons learned can be used to help determine the status of future entities who will come before the courts in the pursuit of personhood.

Analysis of the First Hypothesis – The Core Theory

My first hypothesis is that a core body of political theory concerning personhood, rooted in the liberal tradition as established by John Locke and Immanuel Kant, influences the law. Each of the previous chapters concludes with an analysis of whether this hypothesis is supported in respect to each entity. I will now analyze this hypothesis to see how the relationships differ in each area. Because I grounded the core theory primarily in the works of Locke and Kant, it makes sense to begin with a comparison of

the Lockean and Kantian views of personhood. This Lockean and Kantian foundation is not concrete however, because although the Lockean and Kantian conceptions of personhood are consistent for several of the entities, there are variations in the theories as well that can lead to different outcomes depending upon the interpretation taken. Likewise, scholars who study and expand upon Locke and Kant provide their variations of the core theory, and some scholars take these theories in new directions which lead to vastly different conclusions about personhood. A review of the principles of this core theory in respect to each of these entities illustrates that there are many variations which can lead to very different arguments in respect to personhood. This review sets the stage for a comparison of how the law reflects the concepts presented in the core theory.

Both Locke and Kant wrote against slavery with Locke arguing that slavery was contrary to human nature, and Kant arguing that it violates the maxims of a just and moral society in which one person cannot be used as an end for another person's purposes. According to Kant, persons are beings whose interests cannot be sacrificed for someone else's ends and are distinguished from property which is simply a tool. As rational agents, Kant believed in a person's autonomy, and he therefore concluded that slavery violates the autonomy of a person. According to Kant, slavery, which subjects one person to the domination of another, violates the maxim that a person or rational agent cannot be used as an end.

Locke also writes against slavery and considers a person to be an autonomous agent, which suggests that he would be opposed to the American slave trade. However, Locke's biography reveals otherwise – he wrote colonial documents that condoned slavery and was an investor in a slave trading company. Although Locke does not

explicitly say that slaves are not persons, his actions within the slave industry demonstrate that he was not completely opposed to slavery. It is implied that he did not think that slaves were persons on a par with white, male persons. Therefore, Locke's conception of slavery is contradictory to his own actions. So too, the Founding Fathers, who were familiar with Locke's writing, were conflicted in their conceptions of liberty and freedom. While many Founding Fathers protested against the tyranny of England's rule and complained that they were "enslaved," they tolerated or turned a blind eye to the real enslavement that was occurring in America.

Many early American leaders conveyed their inner turmoil over slavery but ultimately, these officials condoned denying personhood to African slaves. For example, James Madison faced an inner conflict concerning a slave's status as both property and person. Madison treated his slaves benevolently as appropriate to their status as human beings. However, he did not waver from his views that slaves were legal property and that masters needed to be compensated for any loss of property through manumission. James Madison, writing as Publius in the Federalist Papers, wrote, "The Federal Constitution ... decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live."[590] On the other hand, fellow Founding Father Thomas Jefferson did not seem to be bothered as much about this dual identity. Jefferson firmly categorized slaves as property and did not acknowledge their personhood status.

Pseudo-scientific anthropology demonstrating the Africans were not rational agents provided another justification for denying personhood to African slaves. The core

[590] "Publius" [James Madison], Federalist No. 54.

theory in respect to slaves is therefore mixed with arguments both for and against granting personhood to slaves. The law of slavery echoed the views of Locke and the Founding Fathers while virtually ignoring the liberal positions of Kant who argued that rational agents are persons and, as such, cannot be treated as property. Many judicial opinions in slave cases bemoan the fact that slavery violates liberal principles but hold fast to the concept that a slave is not a person. An example of this is seen in Judge Ruffin's opinion in *State v. Mann* 13 N.C. 263 (1829). Ruffin wrote that the slave was "doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits" (13 N.C. 263, 266). This statement echoes the liberal arguments against slavery in that it objects to the domination of a human being by another person. Ultimately Ruffin accepted slavery because he found that the property status of the slave overrules personhood. The core theory stemming from Kant and abolitionist writers that condemns slavery is generally ignored, while the core theory stemming from Locke and the Founding Fathers that allows slavery despite the principles of freedom and equality is upheld.

Locke and Kant were primarily interested in the personhood of rational individuals and therefore did not heavily discuss the possibility that a collective, such as a corporation, could be a person. Inferring from their writings, we can reach some tentative conclusions about corporate personality. Locke speaks of the social contract, and in some ways, a social contract is similar to a corporation in that it is a covenant agreed upon by the individual members. But it is the individual members forming the contract who are the persons, while the corporation is the outcome. In Locke's view, a corporation would not likely qualify as a person. A modern scholar, Loren Lomasky,

who builds his theory of personhood on Locke's understanding of rational agency, argues that a person is a project pursuer who has the rational capacity to identify various courses of action, has the autonomy to make such a decision, and then is responsible for his actions. Lomasky concludes that a corporation is not a person.

Like Locke, Kant did not speak directly to the personhood of the group or the corporation, but he did argue that that the whole cannot be greater than the sum of its parts. Therefore, Kant would likely assess the personhood of the individuals who comprise the corporation, but would not consider the personhood of the corporation itself. Further, in order to qualify as a person with moral agency in Kant's ethics, an entity must have a rational nature and consciousness to determine its own ends. A corporation has ethical policies to guide behavior but it is not clear that a corporation itself can have desires or moral principles apart from the motives and goals of its constitutive members. The other argument against corporate personality that stems from Kantian ethics follows from Kant's argument concerning means versus ends. The corporation can be considered a means to achieve human ends such as wealth, scientific progress, status, and other goals. The corporation, which is a type of property to be used at the will of human persons, cannot be considered a person in and of itself because it is simply a tool or a means for achieving progress.

A few modern scholars have criticized the Kantian argument that a corporation does not qualify as a moral agent in its own right. Ethicist Peter French argues that corporations have an internal decision-making structure that produces corporate outcomes that are not dependent upon one manager or group of managers. Through this process, which French contends is not reducible to one human actor within the

corporation, the corporation demonstrates a form of rationality and intentionality that is similar to that of an individual human person. Thus, French argues that a corporation can be considered a rational agent and a person.[591]

A strict reading of Locke and Kant leads to the conclusion that a corporation cannot be a person because a) the individuals within the corporation are the rational agents rather than the corporation itself, and b) a corporation is a means to an end and is therefore property not a person. Personhood is reserved for individual rational agents. Despite the consistency in the Lockean and Kantian view that corporations are not rational agents, some modern scholars such as French have pointed out that corporations do have some capacities of moral and rational agents and should be considered as such. Although the corporate person is a collective rather than an individual rational agent, it is still understood that qualities such as negligence, deception, or even good will can be ascribed to a collective. A corporation can speak through its spokesperson. Corporations can be considered guilty of a crime and can own property in their own right. Therefore, although Locke and Kant would have most likely concluded that a corporation is not a person, based on rational agency there are grounds to consider the corporation as a person. The cases I analyzed involved rational agency, and although the law decided that corporations are persons, the works of Locke and Kant did influence the debate.

Lockean and Kantian theories of rational agency are also relevant to the debate over fetal personhood. Locke considers the human body to be a person's private property, but rather than argue that a person can treat this property in any way one

[591] Peter French. Inference Gaps in Moral Assessment: Capitalism, Corporations, and Individuals. International Social Science Journal (2005); Peter French, "The Corporation as a Moral Person," *American Philosophical Quarterly*, Vol. 16, No. 3 (Jul., 1979).

desires, he argues that a person must protect the health of one's body. In the 1600s, it is likely that Locke would have considered the fetus as part of a woman's body before quickening as taught by Thomas Aquinas. If the fetus is a part of the woman's bodily property, then it seems that a woman would have the right to decide whether to keep or terminate a fetus as part of her right to a healthy body. On the other hand, as part of his argument that a person must protect his or her health, Locke argues that one cannot harm oneself. If the fetus is part of the self, then a woman is bound to protect that part of herself as well. Another indication that Locke may have believed that a fetus was worthy of protection comes from his writing on education in which he argues that children have moral value and parents are obligated to care for their children. As a scholar of Aquinas, Locke likely would have argued that a fetus beyond quickening had moral value and should be protected. Overall, it is difficult to determine exactly what protections Locke would have granted to a fetus at any particular stage of development.

Kant is more forthright in his opinions on the fetus arguing directly that children, from the time of procreation, are persons with an innate right to the care of their parents.[592] Even though the fetus is not yet a rational being, Kant makes an exception to this requirement for personhood in the case of the fetus and children. His stance on fetal personhood also makes an exception for his theories that a person cannot be used as a means to an end. If a woman can be forced to undergo a pregnancy, then it can be argued that a woman is forced into being a means or fetal container for the end of procreation. Kant seems to allow this subjugation of women in order to preserve a fetus, which he considers to be of moral value.

[592] Immanuel Kant, The Metaphysics of Morals, Translated by Mary J. Gregor, [Cambridge University Press, 1996, originally published in 1785]: (6:280-281).

Despite Kant's explicit statements that a fetus should be considered a person and Locke's inferred argument that he would grant some type of fetal protection, some of the most cogent arguments against fetal person stem from the Lockean and Kantian arguments that a person must be a rational agent. A fetus does not qualify as such. This study has relied extensively on Daniel Dennett's understanding of personhood as a rational agent who is self conscious, can evaluate his or her actions, take actions to reach goals, and can communicate to other persons through language. Under these criteria, both a fetus and a young child do not qualify for personhood. Most children begin to acquire language skills and act with a limited amount of autonomy only after their first birthday. Therefore most humans do not qualify for personhood until well into their first or second year of life.

Philosopher Michael Tooley takes rational capabilities at face value and concludes that fetuses and newborns under three months old are not persons, and infanticide of these humans is not morally wrong.[593] Using this logic, infanticide of children up to age two might be acceptable as well since young children are not fully rational agents. Tooley's view is extreme, and most scholars are willing to grant some consideration to potential persons. Legal scholar Ronald Dworkin considers the ability to experience physical pain an important criterion. Because a fetus is likely to experience pain at twenty-six weeks, he considers abortion before that point to be morally acceptable.[594] However, the ability to experience pain is just one of many important milestones in the development of a fetus and an infant that begins at conception, goes

[593] Michael Tooley, *Abortion and Infanticide,* [Oxford: Clarendon Press, 1983]: 407-411.

[594] Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, [New York, NY: First Vintage Books Edition, 1994].

thru birth, and reaches until an age when a child has some rational autonomy. Although many volumes have been written about the cognitive ability of fetuses and infants and the relationship to personhood, the fact remains that modern scholars have not agreed upon a defining moment when a potential person can be considered a full moral and legal person.

Rational agency is a hallmark of personhood for both Locke and Kant. By this standard, a fetus would not qualify for personhood. However, Kant makes an exception to this rule and states that all humans, from procreation, are persons. Locke's admonishments that a person cannot cause harm to his or her own body combined with his works concerning education lead to the conclusion that Locke would likely provide some protection to a fetus and possibly a limited personhood. Modern theorists who endorse the rationality standard have challenged the exception made for a fetus arguing that a fetus and even a young child do not qualify for personhood. Therefore the arguments concerning fetal personhood are mixed with Kant arguing for personhood, Locke not providing a definitive answer, and some modern scholars arguing that the fetus is not a person. The law has struggled with the question of fetal personhood for the last decades and has considered the rationality criteria set forth by Locke and Kant. In *Roe v. Wade*, the Supreme Court decided that a fetus was not a rational agent and denied Kant's exception granting personhood to the fetus. As the law of abortion has developed, the Supreme Court has followed modern theorists in considering cognitive criteria as crucial but choosing the earlier milestone of viability as the compelling point at which a fetus can be considered a potential person.

The case for considering some animals such as great apes as persons does not have a strong foundation in the core theory. Most of the early scholarship I reviewed does not consider an animal to be more than simple property. This notion has its foundation in both Greek and biblical philosophy. Aristotle wrote that animals had sensitive souls but not rational souls and therefore animals were the property of humans.[595] Similarly, Roman law classified animals as things based on the inability to reason or exercise autonomy.[596] The Bible teaches that humans have dominion over animals and lists many examples of animals being used for food, clothing, and sacrifice.[597] Locke and Kant followed this paradigm of treating animals as property and not contemplating that some animals may have a claim to moral or legal personhood.

Based on his biblical understanding of human domination of animals, Locke wrote that humans could use "inferior ranks of creatures" as property, and animals did not have rights that humans needed to observe.[598] Kant too used Genesis to argue that humans alone are rational and self-aware and therefore it is justified that animals be used as ends to fulfill human needs. Kant warns that cruelty to animals is wrong because cruelty destroys the moral disposition of humans. However, Kant does not consider the pain and suffering that cruelty inflicts upon the animals themselves. Both Locke and Kant are concerned with moral status of humans and do not consider that animals could by anything more than objects. Utilitarian philosopher Jeremy Bentham challenged the

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[595] Aristotle, "A Treatise on Government," Book 1, Chapter VIII, paragraph 1256 b.

[596] Jordan Curnutt, *Animals and the Law: A Sourcebook,* [ABC-CLIO, Inc., Santa Barbara, California, 2001]: 433.

[597] Genesis 1:26-28.

[598] John Locke, *The Second Treatise of Civil Government*, Peter Laslett, editor, [Cambridge University Press, 1988 edition, originally published 1764]: Chapter 2, Section 6.

notion that animals have no moral status by arguing that the ability to feel pain merits some type of moral worth. Bentham argued that humans had an obligation to animals themselves to refrain from causing them undue suffering. However, Bentham did not challenge the fact that animals were property.

Although both Locke and Kant are quite clear in describing animals as property with no moral value, modern scholars advocating increased recognition of animals have reinterpreted some of their theories to argue for animal rights and personhood. Tom Regan, who is a noted philosopher of animal rights theory, argues that just as Kant recognized that all humans have value, animals too should have intrinsic value because animals have lives that are meaningful. Regan argues that animals are sentient, have memory, have a sense of their own future, and they initiate actions in pursuit of their welfare and goals. Because of these capacities, Regan argues that animals should have moral worth and should not be considered property.

Both Locke and Kant classify animals as simply property based on the fact that animals are not rational agents. The capacities of great apes were not well known during their time, but it is unlikely that Locke and Kant would have been swayed to consider personhood for any type of animal. Modern studies have shown that certain animals such as gorillas, chimpanzees, and bonobos have significant cognitive capacities that might qualify for personhood. Thus far, however, the law has not truly considered personhood for animals beyond human beings.

This analysis of the core theory involving four diverse entities is complex in the amount of material that is analyzed and the range of arguments presented. For each of the four entities, there is core theory that can be interpreted in several ways. To recap, in

respect to slavery, Kant argues vociferously against a denial of personhood, but the analysis stemming from Locke and the many of the Founding Fathers is indecisive as they championed freedom but were involved in the slave economy. Locke and Kant would likely agree that a corporation is not a rational agent itself and therefore not a person. However, modern scholars have demonstrated that corporations do have intentional decision making systems, a corporate voice, and are culpable for their crimes. Even though these modern theories came after the time when most of the corporate personality cases were decided, the concept that a corporation was more than the sum of its parts was understood by lawmakers in the 1800s.

Locke argues that a person cannot cause harm to herself and that parents must provide proper care to their progeny. The conclusion can be reached that Locke would have granted the fetus some type of protection as a person. At the same time, Locke's arguments that a person is a thinking, intelligent being preclude personhood for the fetus. Kant argues that a person is a rational agent but he makes an exception to this rule for the fetus who he states is a person despite a lack of rational capacity. He also argues that a person cannot be used as a means to an end but makes an exception to this rule because he allows pregnant women to be used as a fetal container to produce a child. Modern scholars, using Locke as a basis, have argued that a fetus is not a person because it is not a rational agent. Other modern scholars employing Kant have argued that limiting a woman's right to choose an abortion limits her autonomy as a person. In respect to animals, Locke and Kant agreed that animals were not rational agents and therefore should not qualify as anything more than property. Some modern deontologists disagree,

arguing that as sentient creatures with fairly high cognitive abilities, some animals should be allowed a type of personhood.

As can be seen, within the core theory, arguments can be found supporting personhood for each of the entities, as well as arguments against personhood. Therefore, when analyzing how well the law reflected the core theory, it is possible to find pieces of the core theory within most legal interpretations of personhood. In respect to slavery, the law reflected the core theory as provided by Locke and allowed the denial of personhood in order to uphold the economic system of slavery. In corporate law, the courts considered that a person is a rational agent as described by Locke and Kant, and have decided that a corporation qualifies as a rational agent in a collective form. The Supreme Court, after taking into consideration rational agency and a woman's autonomy as a person, decided that a fetus is not a person because it is not a rational agent but is a potential person once the fetus reaches viability. Further, a woman cannot be used as a means to end for birthing children because this violates *her* personhood. In respect to animals, the law has mirrored Locke and Kant in concluding that animals do not qualify as persons.

My hypothesis that there is a core body of political theory concerning personhood that influences the law has proven to be basically correct. Although the law has not followed the prescriptions of Locke and Kant to the letter, their theories have been useful in conceptualizing personhood. Even though Locke and Kant are not often quoted by the Supreme Court, the spirit of their arguments is felt in many decisions. At the same time, it is difficult to prove a strong causal relationship between the core theory and the law because the philosophy of personhood is vast and various scholars working within the

liberal paradigm have reached different conclusions concerning personhood. As the summary of the core theory demonstrates, many conclusions about personhood can be reached using the core theory.

It is little wonder then, that the law's conclusions on personhood are also varied. The law's conclusions on personhood are diverse just as the concepts within the core theory are diverse. There are some general consistencies between the core theory and the law, but that is not an especially noteworthy finding. The fact that the core theory is taken into consideration by justices and judges is too vague to be a truly significant finding. Therefore, this analysis needs to dig deeper into the core theory to some of the fundamental ways a person is conceived in order to discover whether and to what extent the law follows the patterns presented in the core theory. This is the purpose of my second hypothesis.

Analysis of the Second Hypothesis – The Dichotomies of Personhood

While the core theory on its own does not clarify the issue as much as I hoped, my second hypothesis is that the core body of political theory conceptualizes "person" by distinguishing "person" from "human being" and "property." This is a more specific expectation because it adds definition to the nebulous concept of person. By conceptualizing a person as an either or category – either a person or property; either a person or human being – the core theory provides a more concrete definition of personhood that can be applied to each of the four entities. Accordingly, I expected that a review of judicial opinions concerning the slave, corporation, fetus, and animals will also reveal the tendency to define "person" in opposition to both human being and property.

Much of the core theory defines a person as a rational and autonomous agent as opposed to a human being, which in this type of comparison is considered a lesser entity without rational capacity. The other way of defining a person is to demonstrate that a person is an entity that cannot be considered an object, a means to an end – in other words a person cannot be property. As I conducted my analysis, I discovered that there was a third important way of defining a person. Personhood is a socially bestowed status and a person is an entity that is either rejected by other persons or is accepted into the community of persons. By focusing the core theory on these three conceptualizations of personhood, a clearer understanding of personhood can be gleaned and applied to the law.

The first dichotomy that is manifest in the personhood discussion for each chapter is that of person versus human being. Recall Locke's conceptualization of a person as a mental being who possesses self awareness, acts with volition, and has a memory of past actions. Locke defines a person as a "thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness which is inseparable from thinking and, as it seems to me, essential to it: it being impossible for anyone to perceive without perceiving that he does perceive."[599] For Locke, a person is an elevated status from that of a human being. A human being is one who genetically qualifies as homo sapiens and has the human body but does not necessarily have the cognitive abilities that Locke describes. Only rational agents can hold the status of person.

[599] John Locke, *An Essay Concerning Human Understanding*, Peter Laslett, editor, [Penguin Publishing, London, 1997 edition, originally published 1690]: BK II, CH XXVII.

This study also employed the work of Daniel Dennett concerning the philosophy of the mind which confirms Locke's characterization of the rational person. Dennett's six conditions of personhood, based on the mental capacities, are frequently cited as criteria for personhood. His conditions include 1) persons are rational beings, 2) they are conscious, 3) they are considered persons by others, 4) they can reciprocate, 5) they have the capacity for verbal communication, and 6) they are self-consciousness or self-aware. These criteria have been important in assessing each entity's capabilities as a rational agent.

Taken together, a rational being is conscious of his or her decisions, can evaluate his or her decisions, and then choose an action that best accords with one's goals. Self-awareness and self-evaluation allow one to be responsible for one's actions and culpable for violations of ethical codes. This brings a moral component to personhood. Locke argues that only those who remember their actions can justly be held accountable. Kant writes that a moral agent must be able to make rational decisions based upon the categorical imperative and this capacity is what sets persons apart from all other humans and other creatures. An important aspect in assessing the rational capacity of each entity is determining whether the entity can be held culpable for its actions.

If it can be demonstrated that an entity is not a rational agent, then the case for personhood is much harder to prove. The attributes of each of the four entities in this study have been carefully analyzed to discover whether it qualifies as a rational agent and therefore a person. Examining the dichotomy between person and human being for each entity reveals that the law has used rational ability as a criterion for determining the personhood of some entities, but has ignored this factor for other entities. Therefore, the

law has both consistencies and inconsistencies in bestowing personhood based on rational criteria.

The definition of a person as a rational agent was devastating for the institution of slavery because it led to the obvious conclusion that slaves, as rational beings, must be accorded personhood and therefore should not be enslaved. In order to counter the argument that slaves as rational beings should be valued as persons, some early American "scientists" such as anthropologist George Morton tested theories to prove that Africans were inferior intellectual beings who did not qualify as persons based on rational ability. Some proponents of slavery, desperate to defend the institution of slavery against rational agency arguments, used this pseudo-scientific evidence to demonstrate that African slaves did not meet the cognitive criteria of persons.[600] Ultimately, these studies were shown to be false but they are evidence of the lengths advocates of slavery would take in order to demonstrate that a slave should not qualify as a person.

Some court cases acknowledged the rational capacity of slaves, but rather than interpreting rational ability as a criterion of personhood, judges reasoned that qualities such as intelligence simply added to the monetary value of a slave – an intelligent slave had a higher property value to the master. For the most part, the law tended to ignore the fact that slaves were rational agents and withheld personhood in order to maintain the slave system. The mind and volition of the slave were disregarded and the preferences and decisions of the master were the only components of rational agency taken into consideration by the law. Only in criminal matters was a slave deemed competent to

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[600] Charles A. Lofgren, (1987) *The Plessy Case: A Legal-Historical Interpretation*, [Oxford University Press, 1987]: 99; Samuel Cartwright, "Natural History of the Prognathous Species of Mankind," New York Day-Book, November 10 1857*;* reprinted in E.N. Elliott*, Cotton is King, and Pro-Slavery Arguments,* [Augusta: Pritchard, Abbot & Loomis, 1860]: 707.

think about his actions and act according to his will. Thus, the slave could have a guilty mind and therefore could be held culpable for his actions just as any other rational person.

Overall, the courts tended to disregard the fact that slaves were rational agents, and by Lockean standards, should be accorded personhood. Therefore, the law of slavery did not follow the standard that rational agents were an elevated status above human being that were deserving of personhood. This dichotomy was not a compelling factor in determining the personhood of the slave.

In contrast, the criterion of rational agency was a significant factor when adjudicating whether a corporation should be bestowed the status of person. Locke's and Kant's discussion concerns the rational agency of an individual. In the application of this dichotomy to the corporation, the analysis changes because the critical question is whether a collective is eligible for personhood through cognitive criteria just an individual human being. The question is not whether the individuals who comprise the corporation have rationality and volition but whether the corporation itself has a collective rational mind and a collective will that could qualify the corporation for personhood.

As Chapter Three explained, it is common to hear statements such as British Petroleum Corporation was negligent in its drilling practices in the Gulf Coast or that British Petroleum deceived the public in its cleanup efforts. But what do such statements really mean? When a statement says that British Petroleum was negligent, who exactly is at fault? British Petroleum has tens of thousands of employees ranging from the company's CEO to the laborers who worked in the Gulf region. Perhaps it was the

CEO's decision to employ faulty drilling practices or perhaps the fault lies with a series of middle-managers who modified practices to save money. Perhaps some fault lies with the well workers who may have witnessed problems but failed to report them. Or, maybe the fault lies with one of the sub-contracted corporations that provided equipment or did safety testing for British Petroleum. Most likely, the blame lies with a whole host of people who were involved in some small way and whose collective actions led to the spill. It is difficult to determine which individuals within the corporation are really to blame.

The same problems arise when saying British Petroleum deceived the public. To be devious requires a rational mind that can choose among alternative courses of action and deliberately choose to act in a certain way. Does British Petroleum have this type of rational mind? These questions are not easily answered. The actions taken by a corporation are more than the sum of its parts and it does seem that in many instances, such as the British Petroleum oil spill, the corporation itself has rights and duties as an agent. Through a decision-making process involving numerous actors, none of which can be isolated, the corporation itself comes to make decisions. Furthermore, through official spokespeople, the corporation can speak. Corporate speech is not the opinion of the laborers, management, stockholders, or any other individual within the corporation; the corporate view is the view of the collective as obtained through corporate policies and decision making processes. The corporation has many of the qualities of Locke and Kant's rational agent. This is essentially the argument made by Peter French that was mentioned in the previous section.

Yet, to personify a corporation seems to be stretching the limits of personhood by attributing a status to a collective that should only belong to an individual rational agent. The individuals behind the corporate veil are really the rational agents who make decisions and can act with deceit or malice. Is the corporation as a person simply a metaphor to facilitate the fact that a corporation bears resemblance to the rational individual within the law? Or, can the collective corporation itself deceive the public, act immorally, and have a guilty mind? These are the questions with which the justices wrestled as they tried to decide if a corporation could be considered a person in the sense of having a rational mind.

The difference between a corporation as a person and an individual, rational agent as a person arose in *Bank of the United States v. Deveaux* 9 U.S. 61 (1809) when the Supreme Court argued, "a corporation aggregate is an artificial, invisible body, existing only in contemplation of law. It has no analogy to a natural person. It has no organ but its seal. It cannot sue, or be sued, for a personal injury. It cannot be outlawed. It never dies. …" (9 U.S. 61, 86). The Court was comparing the corporation to a human individual and found that the corporation does not qualify because it does not have a human body, it cannot receive personal injury, and is not mortal. Thus, in this early case, the Supreme Court found that the corporation was not a person in the same way that a human being can qualify for personhood.

In his opinion for *Rundle v. Delaware Raritan Canal Co.* 5 U.S. 80 (1852), Justice Daniel argues that if a corporation is to be considered a citizen or a person, then the corporation must be able to take part in all political functions of a person such as serving as a U.S. President. Daniel's point is that only rational and autonomous

individual humans have rights and duties within the political system as persons. Justice Black echoes this argument in his dissenting opinion for *Connecticut General Life Insurance Company v. Johnson* 303 U.S. 77 (1938) in which he argues that persons under the Fourteenth Amendment are counted for representation and can hold political office or serve in the military. Black argues that a corporation does not fit this description of a person and therefore does not qualify for personhood. Black concludes that only the individual human being that has autonomy and rationality can qualify as a person. In a modern opinion, Justice Rehnquist neatly sums up the arguments against corporate personhood based upon the rational mind. In *Pacific Gas & Electric v. Public Utilities Commission*, Rehnquist writes, "Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality" (475 U.S. 1, 34).

This brief review of some of the cases analyzed in Chapter Three demonstrates that there is a line of judicial reasoning concluding that a collective such as a corporation is not a rational agent and therefore should not be bestowed personhood. On the other hand, there are Supreme Court opinions that argue just the opposite: that a corporation does not need to have a rational mind in order to gain personhood or that a corporation does in fact have a mind and moral agency. In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* 43 U.S. 497 (1844), the attorney for the railroad argued that corporations "stand in this respect precisely in the same category with minors, lunatics and idiots" (43 U.S. 491, 522), meaning that just as minors and lunatics do not possess a rational mind and yet are considered persons, so too should a corporation be granted

personhood even though it is not clear that a corporation has a rational mind. Some Court opinions considered the possibility that a corporation has a form of rational mind and volition. In his tirade against corporations, Justice Campbell characterizes corporations as having a "display a love of power, a preference for corporate interests to moral or political principles or public duties, and an antagonism to individual freedom, which have marked them as objects of jealousy in every epoch of their history" *Dodge v. Woolsey* (59 U.S. 331, 376, 1855). Campbell is attributing moral capacities to a corporation that are only possible with a rational mind, autonomy and volition. This line of reasoning refutes the previous arguments that a corporation cannot qualify as a rational agent.

The capacities for moral agency and volition take center stage when a corporation is accused of a crime. In order to be found guilty, an entity must have motive and malicious intent which requires a rational mind with which to plot and weigh options. In the slave cases, the courts found that a slave did have a rational mind when it came to violations of the law. Similarly, the courts have found that a corporation does have the capacity to commit crimes and have assigned motive and blame to many corporations in decisions where corporations have been found guilty of a crime. As Justice Day ruled in *New York Central R.R. v. United States* 212 U.S. 481 (1909), a corporation, just an individual moral agent has the capacity for intention and moral action, and to give corporations immunity from punishment would take away the means of controlling corporate behavior.

The *Santa Clara* opinion, which granted corporate personhood, did not delve into the criteria needed for personhood. Subsequent cases building on the corporation's

bestowal of personhood have assumed that as a person, a corporation should have rights and protections that are generally thought to apply only to individual agents such as protection from search and seizure, the right to remain silent, and free speech. This is an expansive interpretation of corporate personhood because it argues that a corporate person has autonomy, privacy, and a right to be heard even though the corporation does not have a corporal body to search or a mouth with which to speak. In a recent corporate free speech case, Justice Kennedy writes "Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials" (*Citizens United v. Federal Election Commission,* 130 S.Ct. 876, 91). Kennedy is essentially saying that a corporation has the ability for rational thoughts and the volition to use that rational ability through speech designed to influence other persons.

The dichotomy between person and human being plays a central role in determining the personhood for corporations. The analysis demonstrates the many debates that occurred and continue to take place regarding whether a collective entity can qualify as a person under the same criteria as an individual human being who has rational capacity and volition. Some Supreme Court Justices have presented solid arguments disputing the fact that a corporation can be a rational agent worthy of personhood. However, there are also many arguments by Justices demonstrating that a corporation can demonstrate preferences, speak, and have a guilty mind just as an individual rational agent. Ultimately, the Supreme Court decided that a corporation does have rational

agency and followed the standard that an entity with a rational mind should be accorded personhood.

As with corporations, the distinction between a person as a rational agent and a human being is important in determining the status of the fetus. The fetus is biologically a human being but lacks many of the criteria defined by the core theory as necessary for personhood such as rationality, autonomy, language, or culpability. Infants and young children also do not possess these capabilities. Likewise, Alzheimer's patients and the comatose are human beings, but do not possess these criteria for personhood. The law grants personhood to infants, young children, Alzheimer's patients, and the comatose even though they do not qualify for personhood based on rational capacity. However, the law does not grant the fetus personhood but instead declares that the fetus is a potential person who will develop the necessary criteria of personhood with time.

As the judicial system struggled to sort out the many complicated moral and legal issues involved in the debate over fetal personhood, it relied upon the dichotomy between human being and person to decide if and when a fetus could qualify as a person whose life and liberty was protected by the state. Justices had to decide if a fetus, who is biologically a homo sapiens and a human being, could qualify as person; and if so, what criteria were necessary for a fetus to be granted personhood. Cases concerning the fetus quite often recount the biological progression a fetus goes through as the brain develops and organs grow culminating in viability and then birth. The core theory however does not heavily rely on overall biological development but instead focuses on cognitive development. Several of the Supreme Court opinions addressing abortion mirror the core theory and examine the development of the fetus to see if there is a compelling point at

which the fetus gains cognitive capabilities such as sentience, ability to interact with surroundings, and capacity to think in a rational manner. However, the Court takes into consideration other milestones beyond cognitive capabilities as well. For instance, in the *Roe v. Wade* 410 U.S. 113 (1973) decision written by Justice Blackmun, viability, or the point at which the fetus can survive outside the womb, was the significant milestone.

In a later dissent for *Webster v. Reproductive Health Services* 492 U.S. 490 (1989) Blackmun argued, "[T]here is obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth" (492 U.S. 490, 569). He goes on to argue that a newly fertilized egg does not experience physical pain or mental anguish because these capacities do not yet exist. He concludes that a fetus without the ability to suffer does not have a valid interest in continuing life whereas the state does have an interest in protecting a more developed fetus with the ability to experience physical and mental pain. Although the ability to feel pain is not one of the conditions of a rational person as described by Locke or Dennett, sentience is an early capacity of the developing brain. Blackmun chose an earlier milestone than rationality, but still relied upon a mental capacity for his bestowal of personhood.

In a concurring opinion for *Thornburgh, Governor of Pennsylvania v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), Justice Stevens argues that the state's interest in protecting an embryo and fetus increases as "organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day" (476 U.S. 747, 778). Stevens's milestones are based on the mental capacities of consciousness and the ability to reciprocate. However, not all justices

agreed with the determination of Justice Blackmun and Stevens that the qualifying criteria for personhood should be based on cognitive capacities. In his dissent in *Thornburgh,* Chief Justice Burger provides a biological argument that a fetus is a homo sapiens throughout its development just like a child or adult human being and that alone is enough to warrant state protection. Burger does not take a further step and argue that all homo sapiens are persons.

Despite the large body of literature considering the rational criteria for personhood, in several opinions, Supreme Court relied on sentience as a critical milestone which is an earlier cognitive milestone than rationality. It seems that the Court was conceding that cognitive ability had something to do with personhood but was not willing to draw the line at the late milestone of rationality which is not achieved until sometime after birth. And even the milestone of sentience is not set in stone. Viability, the milestone set in *Roe* and still commonly considered as compelling, depends upon both physical and mental development.

Overall, the Court has carefully considered the dichotomy between person and human being, and has based some of its important reasoning on the cognitive capabilities set forth in the core theory. Ultimately, the Supreme Court decided that a fetus did not have the necessary capacities for personhood and has not overruled this precedent. However, cases concerning the personhood of the fetus continue to face the Court as issues such as abortion, fetal injury, and emerging issues in embryology are adjudicated. Just as fetal personhood remains a salient issue among theorists who continue to debate when a fetus has interests as a person and not just as a human, the Court continues to adjudicate this sensitive matter.

The dichotomy between person and human being does not truly arise in the cases concerning animals because animals are not human beings. Instead, animal rights scholars have tried to prove that some animals have cognitive capacities that rival human beings and therefore should be treated as if they were human beings and persons. Great apes, the nearest biological relative of humans, have demonstrated the ability to think rationally, communicate in sign language, and according to some researchers, are self-aware. Many animal rights activists argue that based on these abilities, great apes are moral creatures just as human persons. At the very least, they argue that these animals should be given the same legal protections as young children and mentally disabled adults who do not have full rational capacities.

Despite the remarkable abilities of some great apes, researchers have not conclusively proven that great apes have second order volitions or the capacity to evaluate actions, rank desires, and then act based upon this evaluation. This is a significant stumbling block because this is the necessary capacity to make moral decisions as a rational agent. A human person can evaluate his desire to eat meat based upon various concerns such as the pleasure gained from consuming meat versus the harm that will come to the animal he chooses to eat. He can then choose to refrain from eating meat. A lion does not stop to evaluate the ethics of eating a deer. Scientists working with great apes are still trying to prove whether any great apes have the ability for such ethical considerations. There is no evidence that a great ape can engage in rational thought at this level. Thus, a great ape cannot be culpable for its actions in the same way that a human person is accountable for his actions because the great ape cannot ethically

evaluate its choices. Without this capacity, it is very difficult to award full legal or moral personhood to great apes.

Scholars have debated the significance of a great ape's rational capacity to a great extent. However, the law has not issued a verdict on this issue primarily because the law simply has not contemplated the fact that animals such as great apes should qualify as persons based on their capacities. An animal does not have standing to bring suit which precludes most cases that concern personhood from even reaching the court system. Because animals do not have the capacity to bring suit with a guardian, animal rights advocates have not had a large opportunity to present evidence of an animal's cognitive capacity in a court of law. Within the law, an animal has no rights as a person based on any type of rational or cognitive capacity.

The cases concerning animals are few in number and generally focus on the standing of an individual human being rather than broach the topic of personhood for certain animals. The similarities in the arguments for personhood based on rational ability between great apes and fetuses are therefore not well discussed in the law. There are no references to the cognitive abilities of fetuses in any of the cases concerning animals. In fact, there are very few cross-comparisons in the animal rights literature except by scholars considered particularly bold such as Singer and Wise. Although such comparisons might illuminate the discussion of personhood, pointing out the similarities is almost taboo. Comparing the animal rights movement to movements seeking increased rights for humans is often considered as reducing these humans to the level of animals. Advocates for fetuses avoid any insinuation that a fetus could be compared to the family

pet even though such comparisons might illuminate the fact that the lives of many animals are protected while the life of a fetus remains unprotected.

In comparing the dichotomy between person and human being across all four entities, a couple findings come to light. First, the capacity to morally evaluate one's actions and to be culpable for wrongdoings is an important criterion for personhood for all four entities. Legal scholar Arthur Machen argues that the essence of legal personality lies with legal duties and the ability to exercise a will, obey commands, and experience punishment.[601] This conception of legal personality excludes infants and the mentally disabled who he argues are persons in form only. This exclusion would include the fetus and animals that are not capable of performing legal duties. Fetuses, which do not have the capacity to commit offenses or engage in moral actions within the womb, are not counted as moral or legal persons. Animals too are not able to ethically evaluate options and choose to act in a moral manner. Machen reasons that the exclusion of slaves in Southern law was only in respect to rights; with respect to duties and punishment, the slave was a person. Therefore, the only consideration for personhood that the law granted to slaves was in culpability for their crimes. One of the reasons corporations were granted personhood was because the courts realized that corporations, just like individuals, had to be accountable and punished for offenses against the law.

The second finding is that the amount of emphasis the court places on rational capacity varies by entity. Despite pseudo scientific studies claiming otherwise, it was well understood by lawmakers that slaves had the cognitive capacities to qualify as rational agents. The law however, chose to overlook this significant fact. The courts do

[601] Arthur Machen Jr., *Corporate Personality*, Harvard Law Review, XXIV, no. 4, (1911): 264.

not spend a considerable amount of time dwelling on the argument that rational capacity leads to personhood because this would undermine the institution of slavery. By giving very little emphasis to rational agency, the court was able to brush aside this argument for the personhood for slaves. Rational capacity has not been a pressing issue for animal personhood either. The law has given very little import to research demonstrating some great apes have advanced mental abilities. The courts have not allowed animals to be represented by a guardian *ad litem* who could present this evidence. There is some flexibility in deciding who or what is considered in court. If the mental capacities of some animals were a compelling issue for the Supreme Court or a lower court, there are ways for admitting this evidence. The fact that the court has not considered the rational capacity of great apes speaks to the insignificance of the issue to the law.

In contrast, the courts have spent a considerable amount of time poring over the rational abilities of corporations and the fetus. Many of the cases concerning corporate personhood considered whether a corporation as a collective could qualify as a person in the same way an individual qualifies. The Supreme Court decided that a corporation is a person and has continued to build upon this personhood by granting free speech protections to the corporation, which is a protection generally thought to apply to rational, communicative agents. Although a fetus is not a rational agent, the Supreme Court has spent a significant amount of time analyzing the mental and cognitive capacities of a fetus. Ultimately, the Court cited this as evidence in deciding that a fetus is not a person until birth. The Court also took into consideration both mental and physical capacities when deciding that viability and sentience are critical milestones in determining when a fetus can qualify as a potential person.

The dichotomy between person and human being has been considered in the law pertaining to each of the entities, but has not been consistent in holding rational agency has a hallmark of personhood. Similarly, the analysis of the dichotomy between person and property reveals that this dichotomy is utilized in analyzing the legal definition of personhood but is not absolute.

Person or Property

The second method that is employed in both the core theory and judicial opinions to clarify the meaning of person is to describe a person in contraposition to property. The concept that a person cannot be property has its origins in Kant's writing. According to Kant, what is a person cannot be property by definition. Kant writes, "A person cannot be the property and so cannot be a thing which can be owned for it is impossible to be a person and a thing, the proprietor and the property."[602] This is a useful definition because if scholars determine that an entity is property, such as an animal, then by definition the animal cannot also qualify as a person. This is the crux of Kant's argument condemning slavery. Persons, as Kantian ends in themselves, cannot be owned by another person. Each of the entities in this study is involved in a dual person/property status that the law must sort out when bestowing personhood.

Both Kant and Locke argue that a rational agent is a person. Therefore, according to Kant's theories, a rational agent cannot be property. The last section covered the pseudo-scientific studies that were conducted to prove that the slave was not a rational agent. Of course, most lawmakers and Southern slave owners knew that their slaves were cognitive, rational beings. Therefore, the law needed to determine how the slave could

[602] Immanuel Kant, *Lectures on Ethics,* Translated by Louis Infield, [Harper and Row, 1965]: 165.

be both property and person at the same time. Most judges and justices followed the example of the Founding Fathers and Locke who simply denied personhood to the slave in order to classify slaves a property to be used by white owners.

Antebellum writer and judge George Stroud explained how the law classified a slave writing, "The cardinal principle of slavery – that the slave is not to be ranked among *sentient beings,* but among *things,* as an article of property, a chattel personal – obtains as undoubted law, in all these [slave-holding] States."[603] This was the reality of the southern institution of slavery in which slaves were considered the chattel property of their owners. The slave was a tool to be used at the discretion of the owner to fulfill the owner's financial goals. The personhood of the slave was denied or ignored in order to maintain the property status of the slave. Several antebellum cases illustrate this fact.

In the case *Allen v. Freeland* 24 Va. 170 (1825), Judge Brook argued that although slaves are rational beings they are classified as property. He wrote, "Slaves are not only property, but they are rational beings, and entitled to the humanity of the Court, when it can be exercised without invading the right of property..." (24 Va. 170, 178). Brooks stresses the primacy of the property status over any concerns of humanity. Similarly, on the North Carolina Supreme Court, Judge Nash described the status of the slave as, "He is, in contemplation of law, not a person for that purpose. He has no legal capacity to make a contract. He has no legal mind. He is the property of his master" (*Batten v. Faulk*, 49 N.C. 233, 2331856). In the Supreme Court decision *Dred Scott v. Sanford* 60 U.S. 393 (1856), Justice Taney's opinion resolved the conflict between a slave's status as both person and property by ruling that the property claim outweighed

[603] Emphasis his. George Stroud, *Sketch of the Laws Relating to Slavery in the Several States of the United States of America,* [Henry Longstreth Publisher, Philadelphia, 1856]: 35.

any claim to personhood. In most of the cases analyzed in this study, the courts consistently denied personhood to slaves and allowed slave property to be taxed, sold, traded, and abused just like any sentient property such as horses. Many of the opinions refer to laws pertaining to livestock rather than reflecting a slave's human nature.

On the whole, the dichotomy between person and property was very influential in determining the legal status of the slave but instead of following the standard of Kant, the law confirmed the slave as property. Many decisions provided elaborate justifications as to why a slave should be considered property rather than a person. The law primarily concluded that the slave was not a person in order to confirm the slave as property. There are some cases which acknowledge that a slave is a person, but in these instances, the law ignores the fact that an entity cannot be both person and property, and instead allows both statuses with the property status prevailing.

Just as the slave was a human being that was the legal property of another person and straddled the divide between person and property, so too the corporation is considered both person and property. As a person, the corporation is the subject of property rights as the corporation owns assets. As property, the corporation is the object of property rights as investors own the corporation. Therefore, the corporation violates the Kantian rule that a person cannot be property. Kant would likely see a corporation as a means to an end and therefore simply property with no claim to personhood. The Supreme Court ruled differently and decided that the corporation is a person. However, the cases I analyzed did not evaluate whether the corporation could hold this dual status. Whereas in the slave cases the division between property and person is considered at

length, with corporations, the Court seems to have accepted that a corporation is both person and property with no argument.

The dichotomy between person and property is an important part of the debate concerning the status of the fetus. As a part of a woman's body, there is a sense in which the woman owns her fetus just as she has a type of ownership in herself. Therefore, there is a sense in which the fetus can be considered the property of the mother carrying it. The fetus is also a human being with the potential to develop into an autonomous and rational person in the course of normal growth. The fetus has the dual status of both property and person/potential person. The idea that a woman owns her fetus is fraught with potential moral concern because it echoes some of the discussions involved in slavery where one person could own another. The parallels with slavery are a primary concern for justices who have been careful to avoid defining fetal personhood in terms of property rights. Although much of the core theory concerning the dichotomy between person and property is quite applicable to the fetus, the law has studiously avoided using the language of property in decisions concerning abortion or fetal welfare. The potential negative backlash of a justice's decision echoing the decisions of slavery is a quagmire that most justices seek to avoid.

The distinction between person and property arose early in judicial history as the courts had to decide if a fetus was a person or simply the property of the woman carrying the fetus. The issue first arose in cases where an infant was injured in utero. In *Dietrich v. Inhabitants of Northampton* 138 Mass. 14 (1884), Judge Holmes ruled that a fetus was part of the mother and an injury to the fetus was simply an injury to the mother's body. Holms did not use the word "property" to describe the fetus, but he speaks of "trespass"

against a woman‘s body and implies that the fetus is part of the body that is in a sense owned by the woman. This precedent stood for many years until *Bonbrest et al. v. Kotz et al.* 65 F. Supp. 138 (1946) overruled this decision. In Bonbrest, the federal district court ruled that a fetus is not part of the mother. Again, Judge McGuire did not speak of the fetus as property or the woman's body as property. However, he did speak of the sacrosanct right of an individual to possess and enjoy his life, limbs, and body (65 F. Supp. 138, 8). Judge McGuire found that a viable person was such an individual with a right to possess his body, and thus McGuire found that the fetus was a person who could recover from injuries sustained *in utero*.

The person versus property distinction is also relevant in the abortion cases because if the woman owns her body, and a fetus is part of her body, then she may do what she wishes with respect to the fetus. This was the argument addressed in the only opinion I analyzed that directly confronted the issue of whether a fetus is property. *Byrn v. New York City Health & Hospitals Corp.* 31 N.Y.2d 194; 286 N.E.2d 887 (1972) set the stage for the Supreme Court cases on abortion that began with *Roe v. Wade*. In his dissent, Judge Burke spoke to the property issue. He argues that even if a woman's body is her private property to use as she wishes, the fetus within her body is not part of that property and thus she may not destroy the fetus (31 N.Y.2d 194, 212). *Roe v. Wade* and the subsequent Supreme Court opinions concerning abortion do not directly say that if the fetus is not granted personhood then the fetus can be classified as property. Rather, the Court avoids the sensitive issue. Although the Supreme Court avoids the issue, many of the *amicus curiae* briefs issued in the abortion cases use the analogy to slavery to argue that a fetus cannot be considered property and thus must be a person.

The person versus property dichotomy is central for other issues beyond abortion such as the disputes that arise in battles over frozen embryos that are produced during the in vitro fertilization (IVF) process. In the seminal case involving frozen embryos, the Supreme Court of Tennessee ruled that an embryo was not a person and yet was not property either. In *Davis v. Davis,* 842 S.W.2d 588 (1992), Judge Daughtrey found that although an embryo was not a person, it was bodily tissue of special moral worth and neither party in the case had a property right to the tissue. Subsequent cases relied on this precedent and the provisions of cryopreservation contracts to determine the disposition of embryos when a conflict between a couple arises. Recent cases including *Roman v. Roman* (193 SW3d 40, 50 Tex App, 2006) and *Dahl v. Angle* (222 Or App 572, 2009) determined that an embryo does have a property value that is subject to contractual rights. However, the issues surrounding IVF technology are fairly new and the status of frozen embryos has not been systematically adjudicated by the courts. Beyond these two recent cases, the property status of fetal tissue has not been thoroughly discussed in terms of custody or ownership. The property aspects of a fetus or embryo are bound to arise with increasing frequency as IVF becomes more widespread and more disputes arise over frozen embryos.

Although not explicitly discussed, the dichotomy between person and property lies beneath much of the legal debate concerning the status of the fetus. Judges are loath to equate a human fetus with property because such a comparison would certainly cause a public backlash. But the dichotomy is present as the fetus is considered to be part of the mother's body and subject to the mother's decisions as an autonomous agent. The Supreme Court has not gone so far as to classify the fetus as property, but the argument

that a fetus could be property will continue to come before the law as cases concerning frozen embryos are adjudicated.

The dichotomy between person and property is the essence of argument that animals are property and not persons. Following the paradigm established in Greek, Roman, and biblical culture, and continued by scholars such as Locke and Kant, the animal remains chattel property in both common understanding and the law. The animal is a Kantian means to an end and can be used as food, clothing, or experimentation for human benefit. Animal anticruelty laws such as the Animal Welfare Act (AWA) designed to benefit animals as sentient beings establish limited obligations owed directly to animals to avoid unnecessary animal suffering. However, the AWA does not challenge the property status of animals and does not consider that animals could be legal persons in any sense. The idea that animals are simply property is entrenched in the law. In his dissent in *Sierra Club v. Morton* 405 U.S. 727 (1972), Justice Douglas suggests that natural entities such as trees and parks should be considered juridical persons who suffer direct harm. Douglas argued that natural beings could be represented by a guardian *ad litem* and could be considered artificial persons just like corporations. This is the only Supreme Court opinion that suggests that a natural object, which would arguably encompass animals in the wild, should have a claim to personhood. Although animal rights activists applauded this dissent, Douglas's opinion did not influence future cases.

In the case *State of Hawaii v. Kenneth LeVasseur.* 1 Haw. App. 19, (1980), LeVasseur released dolphins into the wild claiming that he committed the theft in order to avoid a greater harm to "another" which in this case was a dolphin. The Hawaiian court

disagreed and ruled that "another" only included human persons and LeVasseur's choice-of-evils defense failed because he was not protecting a human person. In *Hawaiian Crow ('Alala) v. Lujan* 906 F. Supp. 549 (D. Hawaii, 1991), the judge ruled that the 'Alala bird could not serve as a plaintiff claiming injury under the Endangered Species Act (ESA) because the ESA authorized enforcement by any person and specified that a person meant an individual, corporation, or other private entity. An animal did not qualify. Finally in *Citizens to End Animal Suffering & Exploitation v. New England Aquarium* 836 F. Supp. 45 (1993), Judge Wolff followed this precedent stating that animals could not bring suit under the Marine Mammal Protection Act. Another case with an animal as plaintiff has not yet been attempted.

Even if scholars could successfully argue that some animals should have moral rights that ought to be respected, granting animals legal rights is a step further. Documents such as the Constitution and the Bill of Rights give no indication that animals could be anything more than property. The law has held steadfast to the concept that animals are property rather than persons and as such animals can be used to fulfill human needs. The fact that the dichotomy between person and property could be crossed by some intelligent animals has not been seriously contemplated in the law.

Animal rights advocate Marjorie Spiegel wrote a book comparing slavery abuses to animal abuses. Spiegel titled her book "The Dreaded Comparison: Human and Animal Slavery" to illustrate how controversial such a comparison is.[604] The reason such a comparison is controversial is that the wounds inflicted by antebellum America which included slaves with chattel animals are still too fresh and any comparison between the

[604] Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery,* Mirror Books I.D.E.A., (1997).

personhood of the two entities is often met with outrage. It is considered derogatory to equate the moral, rational person of the African slave to a brutish, unintelligent animal. It is true that the two entities are vastly different. Animals are generally considered lesser beings because they lack the capacity to act rationally, morally, and pursue their life goals. A comparison between slaves and animals does not imply that slaves were lesser beings not worthy of personhood. A comparison simply points out that the designation of property for slaves and animals are noteworthy for academic exploration. In 2005, PETA created a campaign called "Are Animals the New Slaves?" which juxtaposed pictures of animals alongside pictures of enslaved Africans. The campaign created anger among civil rights activists. John White, an NAACP spokesman stated, "They're comparing chickens to black people?" Mark Potok, director of the Intelligence Project with the Southern Poverty Law Center stated, "Black people in America have had quite enough of being compared to animals without PETA joining in."[605] PETA campaigns such as this which are designed for shock value detract from serious academic discussions over the division between property and person because they create fear among legal scholars that drawing such parallels might be seen as equating African Americans with animals. It is not likely that the law will consider the parallels in the property status of animals with any other human entity.

An exception to the restriction on comparing animals to other entities is made with respect to corporations. Corporations are property but have managed to straddle the person/property divide. Perhaps because corporations are not human, the comparison is not so offensive. The similarity between personhood for animals and corporations is that

[605] "PETA Evaluates Charges of Racism," *CBS News,* February 11, 2009, available from http://www.cbsnews.com/stories/2005/08/13/national/main777016.shtml, accessed July 11, 2011.

the personhood for both entities could be based upon a legal fiction. Although corporations are collectives of humans, they are not human themselves. Therefore, their personhood is often considered a fiction and is granted in order to ease business and legal transactions for groups of persons. It is possible to grant animals a similar limited legal personhood to allow animals to serve as plaintiffs with a human guardian. This would ease the problems of standing animals face and could arguably simply be interpreted as a device to facilitate legal transactions. This was suggested by Justice Douglas in the *Sierra* case. Despite the options of allowing guardians or granting personhood through fictions, the law has not widely considered this possibility.

In comparing the dichotomy between person and property across all four entities, a couple of conclusions arise. The first is that in the past, the law has allowed some violations on the seemingly strict divide between person and property. Corporations violate the division, but the Supreme Court did not consider this violation to be important when granting personhood. Modern cases concerning corporate personhood have not resurrected the issue, so in the case of corporations, the law has accepted that an entity can be both person and property. The law also violated the dichotomy in upholding slavery. This violation produced public outcry at the time when the cases confirming the slave's property status were decided, and in historical analysis, this violation continues to haunt legal history. Entire volumes have been written analyzing court decisions to allow a slave to be both person and property.

This leads to the second finding which is that the violation of the divide between person and property that was allowed in the slave cases continues to influence judicial decision making concerning other entities. The reluctance of justices to delve into

property issues in the fetal cases proves how wary modern lawmakers are to rehash the dichotomy between person and property in modern cases. Animal rights activists sometimes claim parallels between slavery and abuse of animals but are careful to not raise public ire with their comparisons. The abuses of human dignity and personhood that were allowed by the law with slavery prevent serious academic comparison among the personhood of slaves and other entities.

Membership in the Community of Persons

As I was researching my hypothesis that the core theory and the cases would reflect the dichotomies between person and property and between person and human being, I discovered that there was a third dichotomy. This dichotomy involves being socially accepted into the community of persons and is an either or classification – either an entity is accepted into the community or an entity is not accepted. This classification draws from Daniel Dennett's third condition of personhood which states "Whether something counts as a person depends in some way on an attitude taken toward it, a stance adopted with respect to it."[606] The criterion of social acceptance is present in all four entities in this study.

The chapter on slavery concludes with an analysis of whether slaves and African Americans were truly included in the phrase "We the People." While it was difficult to prove that slaves were not worthy of personhood based on cognitive criteria, white Americans were very effective in denying personhood to slaves based on inclusion within the community. To many white leaders in colonial and antebellum America, blacks, as

[606] Daniel Dennett "Conditions of Personhood," in *The Identities of Persons,* Amelie Oksenberg Rorty, Editor [University of California Press, 1976]: 177.

well as Native Indians, the Chinese, and member of other non-Anglo races, were a separate and degraded caste of persons who were not included within the "We the People" for whom the country was founded.

Orlando Patterson, who has extensively studied slavery, calls this phenomenon social alienation and finds that it exists in almost all slave-holding societies. By alienating the slave from his homeland, his parents, and his children, he is deprived of any social relationships that bind him to society. The slave is denied a position within the social order and is an excluded being or a non-person.[607] By denying the slave a place within the social community, the master is able to objectify the slave and treat him as property rather than a person.

In early American society, differences in race were used to demonstrate that blacks differed significantly from whites and should not be included within the community. The law reinforced this concept by accepting this exclusion as fact. Historian Paul Finkelman explains, "If blacks could be perceived as inferior, basically uneducable and inherently venal, it might be intellectually less self-condemnatory to relegate them because of their 'lower status' to a subordinate role – either for their own good or as one judge had the audacity to express it, for the good of the total society, whites and blacks alike."[608]

One of the most notorious examples of denying the slave's position in the social community is found in Justice Taney's *Dred Scott v. Sanford* opinion 60 U.S. 393 (1856). Taney argues that when the Declaration of Independence and the Constitution were written, slaves and freed blacks were "considered a subordinate and inferior class of

[607] Orlando Patterson, *Slavery and Social Death,* [Cambridge, MA: Harvard University Press, 1985].

[608] Paul Finkelman, *Slavery and Law* [Lanham, MD: Madison House Publishers, 1997]: 10.

beings" and were purposefully excluded from the community of persons served by these foundational documents (60 U.S. 393, 404-405). Because slaves were not considered part of the community of fellow persons, Taney argued that he could legitimately deny freedom to the slave Dred Scott and could solidify the precedent that slaves were simply property and not persons. The "We the People" of the United States did not includes slaves and even after slavery was abolished, did not fully include African Americans which is a struggle that continues to the present day. Social inclusion was a significant obstacle in recognizing the personhood of the slave.

The social recognition criterion also plays a role in the personhood of the corporation. In its *Santa Clara County v. Southern Pacific R.R.* 118 U.S. 394 (1886) opinion, the Supreme Court states, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." The Court does not elaborate on this point and seems to assume that corporate personhood is a concept of general consensus. At the time of this decision, big businesses such as railroads were strongly arguing for corporate personhood. Perhaps the voices calling for corporate personhood were strong enough to create the impression that corporate personhood was a generally accepted idea. The Court might also have valued the opinions of those arguing for corporate personhood and reasoned that if these authorities accepted corporations as persons, then the Supreme Court should honor the status.

Since the 1886 decision, the Supreme Court has not rescinded this status which also lends itself to the argument that corporations are now established persons. Pundits

remain who protest corporate personhood on websites and articles, but the majority of the legal community has accepted the status or is apathetic to the issue. The lack of large-scale public protest over the issue has led to corporations slipping into the realm of personhood with general social acceptance. Social and political recognition has played a significant role in allowing corporations to retain their status after the 1886 decision.

Dennett's criterion of social recognition has played a significant role in conceptualizing personhood for the fetus. Just as slaves were not considered part of the community of persons, the fetus too is generally not considered to be part of the social community. Hidden from view and unable to interact with its surroundings, the fetus remains isolated from the world until birth. In thought experiments conducted by metaethicist Roger Wertheimer, subjects are asked to imagine that a woman's womb was transparent and the woman was wearing mid-drift bearing clothing so that the womb was visible to the public. He asked his subjects to also imagine that they could remove the fetus, cuddle it, and then return it to the womb. He found that subjects who imagined the public exposure of the fetus were more likely to consider the fetus to be part of the community.[609] Some medical experts who specialize in obstetrics and prenatal care and work with fetuses on a daily basis see the fetus as a patient and part of their community.[610]

Technology such as advanced ultrasounds have allowed a woman to view the fetus at all stages of a pregnancy which can strengthen the bonds between the woman and fetus and thus further the social recognition of the fetus as a person. Ultimately, it is the

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[609] Roger Wertheimer, "Understanding the Abortion Argument" *Philosophy and Public Affairs* 1 no. 1 (1971): 91-93.

[610] A.W. Liley, "The Foetus as a Personality," *Australian and New Zealand Journal of Psychiatry* 6 (1972): 99.

woman who decides if the fetus is socially accepted. A woman who greets a wanted pregnancy with happiness and goes through with her pregnancy until birth has accepted her fetus as an entity with moral worth. This explains why society feels outrage and seeks punishment when third-party violence causes a woman to miscarry a fetus that has been welcomed into the community. A woman who does not desire a pregnancy does not welcome her fetus and rejects it through abortion. A woman who does not desire her pregnancy has not accepted her fetus into the community of persons and therefore, society does not have protective measures for the unwanted fetus.

A dilemma associated with the criterion of social acceptance is that the mother is the sole moral arbitrator able to decide if the fetus is accepted or rejected into the social community. Should the mother, even though it is her body in which the fetus resides, have exclusive determination in this important matter? The *Roe v. Wade* decision confirms that until the point of viability, the woman is the sole arbitrator. In the case of slavery, the master class had complete control over the slave and with respect to the fetus, the mother has complete discretion. This is not to equate pregnant women with slave owners but only to say that there are parallels between the discretion both sets of people had in determining who is or is not part of the social community of persons. Nor does it mean that a slave has the same moral status as a fetus. If the fetus is not considered to qualify as a legal and moral person based on a host of criteria, then there may be valid reasons for not accepting a fetus into the social community of persons while the slave was wrongly denied acceptance. At the same, the analysis provided in this thesis demonstrates that there are myriad factors that are important in considering who belongs

to the moral, social, and political community and there could be negative consequences when excluding an entity that may have moral weight.

Finally, social acceptance is a significant factor preventing animals from gaining any type of recognition by human persons. Most human persons simply do not consider even sophisticated animals like great apes to be anything like a person. Just as persons know what they are not: they are not slaves, they are not fetuses, and they certainly know that they are not animals. The human/animal divide is arguably the greatest barrier among the four types of entities being compared. Slaves and fetuses at least qualify as humans. Human persons have a very difficult time considering the status of an entity that is outside the realm of humanity. While big businesses were successful in convincing the courts and the general public that corporations should be accepted as persons, animal rights advocates who call for animal personhood do not have the political or economic power to successfully persuade society to include animals as persons.

Overall, social acceptance is demonstrated to be a powerful criterion for personhood. Either an entity is in or it is out. Slaves were out; animals are out; corporations are in; and the fetus is out but there is a fierce public debate over this exclusion. It may seem surprising that corporations, which are a unique form of person due to their collective nature and their differences from the rational agent that usually occupy personhood studies, are the entity that is given the greatest recognition as persons. Perhaps that is a large part of the reason why – corporations are not as morally contentious as the other categories and their acceptance has slipped by without much protest by the rest of the members in the community of persons.

My second hypothesis, which is that the core theory and the law would conceptualize personhood in terms of the person/human dichotomy and the person/property dichotomy, is proven to be correct. I also discovered a third influential dichotomy which characterizes a person as an entity that is either accepted or rejected by the social community of persons. These three dichotomies explain much of the basis for whether an entity is considered a person. With this foundation, I can then focus my analysis on the ways in which the law has been consistent in applying these dichotomies. For instance, I examined whether the emphasis placed on each of the three dichotomies varied among the four entities in this study. I also conducted a rigorous text analysis to determine important terms employed in the court documents for each of the entities to detect similarities. Finally, I searched for cross-references among the four entities to see where and how the courts have applied personhood doctrine developed for one entity to other entities involved in the personhood debate.

Consistencies and Inconsistencies among the Four Entities

My third hypothesis held that there should be consistencies in how justices adjudicate personhood for slaves, corporations, fetuses, and great apes. The preceding analysis of the dichotomies of personhood demonstrated that how the law interpreted these dichotomies varied among the four entities leading to both consistencies as well as some inconsistencies in the law's interpretation of personhood. This section will evaluate this third hypothesis to further determine where the consistencies in interpreting personhood lie and where the law has been inconsistent.

Comparing how the dichotomies were employed for each of the four entities results in one of the inconsistencies in the law's construction of personhood. The law did

not prioritize one dichotomy over the others when interpreting personhood. Instead, the law elevates the person/property dichotomy for some entities and the person/human dichotomy for others.

In the slave cases, the convention that developed was for justices to consider the humanity of the slave but ultimately deny these human qualities and rule that the slave was property rather than a person. In respect to corporations, the law accepted that corporations were property and did not debate the point to a great extent. Instead, the courts focused on whether a collective could qualify as a person in the same way a rational individual could qualify. The courts ruled affirmatively and granted corporate personhood. In the fetal cases, the law examines both the distinction between person and property and the distinction between person and human being, but the emphasis is on ensuring that the fetus has capacities such as sentience and viability. The priority is with the dichotomy between person and human being. The discussion of dichotomies is limited in the animal cases but the law is steadfast in defining the entity as property. For the corporate, and fetal cases dichotomy between person and human being was paramount and the priority was placed on ensuring that the entity had cognitive or rational capacities. In the slave and animal cases, the emphasis was on the dichotomy between person and property as the law defended its classification of these entities as property. Across all four categories, the priority is inconsistent. The law has not set one dichotomy as paramount over the other but instead has emphasized the dichotomy that the justices feel is the best suited to the entity at hand.

Insert Table A About Here

	Slave	**Corporation**	**Fetus**	**Animal**
Humanity	Considered	Considered the	Carefully	Did not consider

	humanity and acknowledged rationality, but was not determining factor	rationality and humanity of a collective	considered humanity and rationality	humanity or rationality
Property	Upheld status as property	Acknowledged property status but was not determining factor	Avoided debate concerning property status	Upheld status as property
Priority of Dichotomy	Person/Property	Person /Human	Person/Human	Person/Property
Bestowal of Personhood	Denied	Granted	Denied	Denied

In both the corporation cases and fetal cases the Court relied upon rational agency as a determining factor. The corporation, as a collective of rational individuals, was allowed to qualify as a collective person based on the capacities of its components. Because the fetus is not a rational agent, personhood was denied. There seems to be some consistency here because the Court has relied upon rational agency for both entities. The inconsistency is that slaves too were rational agents and they were denied personhood in order to preserve the economic institution of slavery. Therefore, the finding is that rational agency is an important consideration when it suits the goals of a politically powerful segment of society.

An interesting analogy can be drawn between the claim of personhood for animals and that of mentally disabled humans. Like animals, many mentally disabled humans have some cognitive abilities but do not fully qualify for personhood as rational agents. Some theorists accordingly deny these mentally disabled humans from the classification of person. Other theorists, however, claim that the fact that the disabled are humans gives them an automatic grant of personhood. This also seems to be the consensus of the

general public who favor treating the mentally disabled with a certain amount of respect due to persons. The mentally disabled also have a strong claim to certain rights and protections based on sentience. Humans do not like to see fellow humans suffer from physical and psychological abuse and therefore grant increased protections to their own kind. Moral philosopher Carl Cohen argues that comparing animals to mentally disabled children misses the point completely. He says that rights are not doled out to humans based on their cognitive capabilities – there is no screening test. Rather, rights are given to humans simply because they are human. Rights are in the realm of humans who are moral agents and thus are persons. Animals simply do not belong in this realm.[611]

It seems to be true that mentally disabled humans are granted personhood simply based on their humanity and acceptance into the social community of persons. However, this study reveals that personhood based simply on humanity is an exception rather than the rule. The Supreme Court decided that while a fetus was a human being, it did not qualify as a person. This parallels the slave cases in which the Supreme Court confirmed that a human being does not automatically qualify as person. Corporations and other entities such as ships are granted personhood even though they are not human. Therefore, a finding of this study is that humanity is not a guarantee of personhood although the fact that an entity is human is a factor in favor of an entity seeking personhood and non-humanity is a factor against personhood. Arguably the greatest obstacle to personhood for any animal is the fact that animals are not human.

The dichotomy between person and property was paramount for both slaves and animals. The debate over the property versus person status for slaves was fierce and

[611] Carl Cohen and Tom Regan, *The Animal Rights Debate*, [Rowman & Littlefield Publishers, Inc. New York, 2001]: 38.

ultimately violent in antebellum America. However, within the law, judges and justices were fairly consistent that slaves were property rather than persons. The law has declared that animals are property and held steadfast to this categorization. The classification of both of these entities as property has had some strikingly similar results. As property, slaves could be bought, sold, and even abused at the whim of their owners.[612] Similarly, animals can be bought and sold by their owners. There are some animal protection laws in place to prevent abuse of animals, but animal rights activists argue that these are not enough. This is not to argue that African slaves are in any way similar to animals but only to argue that a classification as property led to similar abuses. Whether one believes that these abuses are of the same scale depends upon the moral value you place on each entity. The vast majority of the human population places human beings of all races on a higher moral plane than any animal and therefore the abuse of the human slave is a much greater moral tragedy than the abuse of an animal. However, there is a small group of people who truly believe that all living, sentient creatures are equal in the need to lead lives free of pain. To this group of people, the abuse of an animal is on a moral level as the abuse of a human. Some animal rights activists contend that as long as animals are considered legal property, animals will be abused just as slaves were wrongfully abused.[613]

The dichotomy that is consistent across all four entities is social acceptance in the community of persons versus social rejection. Slaves were not considered part of "We

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[612] For a thorough analysis of this argument, please see Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery,* Mirror Books I.D.E.A., (1997).

[613] For a thorough analysis of this argument, please see Peter Singer, *Animal Liberation*, [HarperCollins, New York, 2002] and Steven Wise, *Drawing the Line*, [Perseus Publishing, Cambridge, MA, 2002], Steven Wise, *Rattling the Cage,* [Perseus Publishing, Cambridge, MA, 2001].

the People" and therefore were not included in the community of persons. (Although freedmen were granted personhood, while slavery was Constitutional slaves were never granted personhood.) Similarly, a fetus is not yet an active part of the community of persons and therefore is excluded by those who do not feel that the fetus is an accepted person. The divide between animals and humans is arguably the greatest of all as most human persons do not perceive animals as similar beings. The corporation is the only entity that has been accepted into the community of persons and this is despite a modicum of protest that corporations should not be considered persons. It seems the arguments of the politically powerful business community in favor of corporate personhood combined with public apathy have convinced the law that corporations are acceptable persons.

Text Analysis of Documents

One of the methods I used to identify consistencies and inconsistencies in the concept of personhood is an automated text analysis of the cases to determine if there are cross references among the four entities within the court opinions – i.e. did the fetus cases ever mention any of the slave or corporation cases and so on. I also analyzed the key terms such as "person," "property," and "human" to see if these terms occurred repeatedly in all four categories of cases in order to verify my analysis of key concepts of personhood. Automated text analysis allows an unbiased review of the terms that reoccur among the various cases in order to examine the frequency with which justices and judges employ certain terms within the court documents. Text analysis has been

successfully employed by scholars to identify key concepts within a series of documents that otherwise might not be recognized.[614]

The automated text analysis does not reveal the context of the terms and therefore the text analysis must be accompanied by a more careful examination of how the terms are employed to ensure that the meaning of the word is consistent among all the cases. Therefore, when examining key terms such as "property" or "human," care must be taken to ensure that these terms were used in the appropriate context of personhood. After identifying the key terms, I reviewed each instance where the term appeared to verify that the word was being used in the relevant context.

The text analysis of the court documents for my cases helped me pinpoint where the courts have perceived overlapping concepts of personhood. Through word frequency testing, I was able to calculate which terms arose repeatedly in my data set of cases. My first test was for the word "person." "Person" appeared in 80.7% of all my opinions and court documents and the percent of documents including "person" was over 70% in each of the categories. Variations of the word "person" also appeared in many of the documents. The analysis of the word "persons" revealed that 65% of cases contained the term while 65.7% contained the word "people." Overall, the high frequency of "person," "persons," and "people" confirms that this concept was important in these cases. This is not unexpected however, because I purposefully selected cases that concerned the

[614] For examples of successful automated text analysis, please see Jonathan B. Slapin and Sven-Oliver Proksch. "A Scaling Model for Estimating Time-Series Party Positions from Texts." *American Journal of Political Science*, Vol. 52, No. 3 (Jul., 2008): 705-722; Kenneth Benoit, Michael Laver and Slava Mikhaylov, "Treating Words as Data with Error: Uncertainty in Text Statements of Policy Positions," *American Journal of Political Science,* Vol. 53, No. 2 (Apr., 2009): 495-513; Michael Laver, Kenneth Benoit, and John Garry; "Extracting Policy Positions from Political Texts Using Words as Data," *The American Political Science Review,* Vol. 97, No. 2 (May, 2003): 311-331.

meaning of personhood. This result confirms that I chose cases that revolved around the meaning of "person." (See Appendix A for a full frequency table.)

On the other hand, "personhood" appeared in only 13.6% of my cases. However, "personhood" is not a common word in the English vernacular, so it is not surprising that this variation of the word "person" does not appear as frequently. With one exception, "personhood" appears only in the fetal cases. By the time the fetal cases reached the courts, "personhood" was becoming a common legal and judicial term whereas in the slave and most of the corporation cases, "personhood" was not yet a readily used word. The slave and corporation cases are more likely to employ the word "person" or "personality." The one corporate case in which "personhood" appears is a recent case from 2010. In the animal cases, the issue of personhood is not generally discussed, and therefore it is not surprising that "personhood" does appear, although I did expect at least a couple references. The fact that "personhood" does not appear in the animal cases attests to the fact that the concept of personhood is not generally considered applicable to animals.

Within the fetal cases, when "personhood" is used, the Justices are specifically referring to the concept of personhood and what is included within the concept under the law. For instance, in *Roe v. Wade,* Justice Blackmun mentions "personhood" saying that if the "personhood [of a fetus] is established, the appellant's case, of course, collapses for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment (410 U.S. 113, 157). "Personhood" is a word of importance in the fetal cases.

My next test was for "human" and this search revealed that 62.5% of the documents contained the word, but the frequency by category varied immensely.[615] Within the corporation cases, human was only mentioned in 32% of the documents revealing that the law involving corporate personhood did not heavily depend upon whether the corporation was a human being. Although my study of the person versus human dichotomy demonstrated that this dichotomy was important in formulating the personhood of the corporation, the law's formulation did not revolve around humanity but instead involved whether a collective could act as an individual human. For example, in *First National Bank of Boston v. Bellotti*, Justice Powell argued that speech was an indispensible part of a democracy "and this is no less true because the speech comes from a corporation rather than an individual" (435 U.S. 765, 777). On the other hand, in *Bellis v. The United States,* Justice John Marshall argued that the Constitutional protection against self disclosure applied only to individual persons rather than corporations (417 U.S. 85, 91). In both these instances, "individual" was an important term used to distinguish the concept of a human person from a collective person. Accordingly, "individual" was a central term in the corporations cases appearing in 77.3% of the documents.

"Human" was not an important term in the animal cases appearing in any 40.4% of the animal documents which is expected since animals are not human and therefore the law would not spend a great deal of time analyzing how humanity applies to an animal. In actuality, the frequency is less than 40.4% because many times when "human" is used it is referring to the human guardians of an animal rather than the animal itself. There are some comparisons between the qualities of an animal and a human in the law such as

[615] "Humans" appeared in 8.7% of cases while "humanity" appeared in 10.8% of cases.

Judge Friedman's comparison of the love and affection a dog is able to provide in *Corso v. Crawford Dog and Cat Hosp., Inc.* (415 N.Y.S.2d 182; 1979). However, such comparisons between the qualities of an animal and a human are not frequent in the cases I studied. Other instances of "human" occur when justices specify animals as "non-human" beings. For example, in *Citizens to End Animal Suffering & Exploitation v. New England Aquarium* 836 F. Supp. 45 (1993), Judge Wolf defines entities who are able to be parties in a lawsuit by specifically excluding "non-human entities or forms of life" (836 F. Supp. 45, 12). In this opinion, Wolf used "human" to specifically exclude animals from the realm of legal consideration.

"Human" appeared in only 47.9% of slave documents which is surprising since slavery involves the moral controversy of enslaving a human being. However, true to my previous findings, the law did not center on the humanity of the slave but instead concentrated on the slave's property status. The absence of the word "human" could be deliberate in that the judges and justices did not want to draw attention to the humanity of the slave. The other explanation is that the law simply did not fully discuss the humanity of the slave because judges and justices did not find it relevant to their decisions.

Finally, "human" was used in 81.3% of the fetus cases. The high frequency with which "human" appears in the fetus documents signals that the human versus person dichotomy was the critical issue when deciphering the status of the fetus. This high percentage is again expected because the crux of the abortion cases is whether a fetus, as a human being, can be aborted or must be respected as a person. "Life" is also a commonly used term appearing in 95.1% of fetal documents which reveals the deliberations of the courts as they tried to decide if a fetus was a human life or a life that

deserved protection. Appendix A provides a table delineating the frequencies for each of these variables.

"Property" appears in 53.8% of the documents I analyzed and is most frequently found in the slave and corporations cases. "Property" appears in 79.2% of the slave cases which is expected since the law was adamant in confirming the slave's status as property. The higher frequency of the word "property" as compared to "human" within the slave cases strengthens my finding that the person/property dichotomy was more important in these cases as compared to the person/human dichotomy. "Property" is also prevalent in the corporation cases appearing in 78.1% of documents. Although I did not conclude that the person/property dichotomy was dominant in the corporation cases, many of these cases concern business transactions which include property concerns. A closer analysis of the context for "property" within the corporation cases reveals that the term generally refers to the property owned by the corporations or other parties and with little exception does not refer to the corporation's status as property. The high percentage of corporation documents that contain the word "property" does not refute my finding that the person/property dichotomy was not central to the law's bestowal of corporation personhood.

"Property" is mentioned in 43.1% of fetal documents, and this low percentage is expected given the hesitancy in the law to talk about the fetus as property. Examining each of the times "property" is used in the fetal cases reveals that when property is mentioned it is usually in the context of the property rights of the unborn. Rarely is the fetus referred to as property which confirms my finding that the law is extremely hesitant to declare that the fetus is a type of property. Finally, in the animal cases, "property"

only comes up in 40.4% of the documents. This is a surprising finding since the law has been unwavering in declaring the animal to be property. However, almost all the times that "property" is used in the animal cases it is in reference to the animal's status as property. For example, *Petco v. Schuster,* Judge Pemberton wrote, "[The law] classifies dogs as personal property for damage purposes, not as persons, extensions of their owners, or any other legal entity whose loss would ordinarily give rise to personal injury damages" (114 S.W. 3d 554, 12). However, after acknowledging that dogs are property, Pemberton goes on to analyze the nature of this property to see the dog's owner could recover personal damages stemming from the death of this animal/property. An examination of the context of the term "property" in the animal cases reveals that even though "property" does not occur as many times as I'd expect, when it does appear, it is in the context of declaring the animal to be property.

The text analysis of key words reveals that certain terms relating to personhood including "person," "property," and "human" are commonly used in the opinions pertaining to all four entities. It seems as if the courts were using the same language and concepts to determine the personhood of these entities even though the entities are diverse in scope. The text analysis supports the conclusion that by analyzing personhood in an inclusive manner across many types of entities, a more comprehensive understanding of personhood can be gleaned. It seems logical to employ the understanding of personhood gained from the slave and corporation cases to more modern cases pertaining to fetuses and animals. With this in mind, my next step was to conduct a text analysis of the cases to pinpoint cross-references where the court

documents for one entity refer to another of the entities I analyzed in order to create a comprehensive understanding of personhood.

I searched every case for cross-references to cases in the other categories. I presumed that some of the later cases concerning personhood would reference previous cases concerning other entities where personhood was a primary issue. Despite my finding that key concepts are used in the documents for all four entities, I found very little overlap in the court opinions, concurrences, and dissents among the four clusters of cases. It seems that the court opinions for each entity are mutually exclusive. In other words, in the fetal cases, there were very few references to the personhood decisions made in the corporation or slave cases and in the corporation cases there were very few direct references to the slave cases. This was surprising given the overlap in the key concepts. Either the courts did not recognize or did not want to call attention to the coinciding themes among the entities. While court opinions did not contain numerous cross-references among the entities, there was significant cross-referencing in the *amicus curiae* briefs in the fetal cases. Because the *amicus curiae* briefs provide the most data, my analysis begins with the cross references in the *amicus curiae* briefs.

Many of the *amicus curiae* briefs for the abortion cases discuss the parallels between the property classification for both slaves and fetuses. *Dred Scott* is the case most often cited by the fetal *amicus curiae.* For example, in an *amicus curiae* brief from attorney Ronald W. Meyer for *Gonzales v. Carhart*, 550 U.S. 124, (2007), Meyer cites the *Dred Scott* decision that a slave was property and writes, "There is no more basis to hold that a Negro is not a person under the Constitution as there is to hold that an unborn

child is not a person under the Constitution."[616] Similarly, another *amicus curiae* brief for *Gonzales v Carhart* filed on behalf of the Legal Defense for Unborn Children argues that *Dred Scott* wrongly denied personhood to Blacks which violated a universal guarantee of life to all persons which includes fetuses.[617] Arguments such as those proposed in the amicus curiae for *Gonzales v. Carhart* have been used by *amicus curiae* briefs in virtually every important abortion case following *Roe v. Wade*.[618]

Some critics of the Court's denial of personhood for the fetus have criticized the Court for granting personhood to the non-human corporation while denying personhood to the fetus. An *amicus curiae* brief for *Gonzales v. Carhart* from the Right to Life Advocates calls this "invidious discrimination."[619] An *amicus curiae* brief from Right to Life Advocates for *Webster* calls the Court's willingness to grant personhood to an artificial entity but not a human "a crazy-quilt interpretation of the word person."[620] Another *amicus curiae* brief filed for *Webster* by the Knights of Columbus criticizes the *Roe* decision as Orwellian saying, "something can be a person without being human, and

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[616] *Amicus Curiae* Brief of Ronald W. Meyer in *Gonzales v. Carhart*, 550 U.S. 124, p. 7.

[617] *Amicus Curiae* Brief of the Legal Defense of Unborn Children in *Gonzales v. Carhart*, 550 U.S. 124, footnote 5.

[618] For more examples of *amicus curiae* briefs that reference the denial of personhood in slavery cases, see *Amicus Curiae* Brief of Dr. Eugene Diamond and Americans United for Life, Inc, in *Planned Parenthood v. Danforth*, 428 U.S. 52; *Amicus Curiae* Brief of Legal Defense of Unborn Children in *Stenberg v. Carhart*, 530 U.S. 914; *Amicus Curiae* Brief of The American Center For Law & Justice And The Thomas More Center For Law & Justice in *Stenberg v. Carhart*, 530 U.S. 914; *Amicus Curiae* Brief of Texas Black Americans for Life and L.E.A.R.N. in *Stenberg v. Carhart*, 530 U.S. 914; *Amicus Curiae* Brief of Legal Defense of Unborn Children in *Thornburgh, Governor of Pennsylvania v. American College of Obstetricians and Gynecologists*, 476 U.S. 747; *Amicus Curiae* Brief of Birthright in *Webster v. Reproductive Health Services*, 492 U.S. 490; *Amicus Curiae* Brief of Holy Orthodox Church in *Webster v. Reproductive Health Services*, 492 U.S. 490; *Amicus Curiae* Brief of Free Speech Advocates in *Webster v. Reproductive Health Services*, 492 U.S. 490.

[619] *Amicus Curiae* Brief of Right to Life Advocates, in *Gonzales v. Carhart*, 550 U.S. 124, p. 23.

[620] *Amicus Curiae* Brief of Right to Life Advocates, in *Webster v. Reproductive Health Services*, 492 U.S. 490, p. 21.

can be human without being a person. If the word 'person' can be extended to embrace a corporation, it surely must include living human beings, like the unborn, whom it meets along the way."[621] These are just a few examples of *amicus curiae* briefs that express dismay that corporations qualify for personhood but the fetus does not.[622]

The *amicus curiae* briefs in the fetal cases argue the point that a fetus, as a human being, should be considered a person. These briefs reference the slave cases to point out the injustices of denying personhood to this set of persons, and they reference the corporation cases to point out the injustices of granting personhood to this set of non-persons. The petitioners in *amicus curiae* briefs are advocating for the Supreme Court to amend the legal definition of personhood to include all human beings regardless of cognitive ability or level of development. Despite the urgings of these petitioners, the Supreme Court has not created a universal definition of personhood based on humanity.

While there are many *amicus curiae* briefs in the fetal cases that cross-reference the slave and corporation cases, my text analysis revealed only three instances of cross-referencing in court opinions. Since the slave cases were decided first, I did not expect to find significant references to other types of cases because these cases were decided at a later date. I also did not expect to find many instances of cross-referencing in the animal cases simply because there are so few animal cases that speak to the issue of personhood. However, I did expect to find significant reference to the slave cases in the corporation

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[621] *Amicus Curiae* Brief of Knight of Columbus, in *Webster v. Reproductive Health Services*, 492 U.S. 490, p. 12, quoting East and Valentine, "Reconciling Santa Clara and Roe v. Wade: A Route to Supreme Court Recognition of Unborn Children as Constitutional Persons" in *Abortion and the Constitution,* Horan, Grant, and Cunningham eds. (Georgetown University Press, 1987);

[622] *Amicus Curiae* Brief of United States Catholic Conference in *Colautti v. Franklin*, 439 U.S. 379, p. 8; *Amicus Curiae* Brief of Birthright Inc., in *Webster v. Reproductive Health Services*, 492 U.S. 490, p. 11; *Amicus Curiae* Brief of the Knights of Columbus, in *Stenberg V. Carhart*, 530 U.S. 914, p. 16; *Amicus Curiae* Brief of United States Catholic Conference, in *Planned Parenthood v. Danforth*, 428 U.S. 52, p. 15.

cases as well as significant mention of slave and corporation cases in the fetal cases. Surprisingly, my analysis revealed only one reference to the issues of personhood in slave cases among the corporation cases and two cross-references among the fetal cases.

Although the corporation cases concerning personhood occurred during the approximate time frame that the personhood of slaves and freed Blacks was being decided, there is very little overlap between the two sets of cases. The only corporation case in my data set that mentions slavery is a dissent for *Connecticut General Life Insurance Company v. Johnson* 303 U.S. 77 (1938), in which Justice Black argues that the purpose of the Fourteenth Amendment was to grant rights to newly freed slaves and it was not meant to apply to corporations. Justice Black was reflecting on the similarities between the two types of cases, but coming some 100 years after the abolition of slavery, his dissent did not have an influence on slave cases adjudicating personhood. Given the parallels in the property and personhood arguments that apply to both slaves and corporations, I would expect that there would be more than just this one cross-reference among the two types of cases. Perhaps the justices adjudicating the two entities did not recognize the similarities. The debate concerning personhood for slaves primarily concerned confirming the slave's property status where as the debate over corporations concerned the corporation's status as a rational agent. The debates were centered in two different dichotomies and therefore the debate did not overlap to a great extent.

There is only case in my data set that explicitly applies the lessons of personhood gleaned in the slave cases to the fetus. In *Byrn v. New York City Health & Hospitals Corp.* 31 N.Y.2d 194; 286 N.E.2d 887 (1972), Judge Breitel observed that not all human beings qualify as persons as he cites the example of slaves. He uses this observation to

rule that just because the fetus is human does not guarantee personhood. Judge Breitel's opinion is a very appropriate use of past personhood doctrine to contemporary issues, and exactly the type of overlap I expected to find. However, *Byrn* is the only case I analyzed where the personhood doctrine is developed through an inclusive study of entities vying for personhood. Justice Scalia's dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) references *Dred Scott* as a poorly decided Supreme Court decision, but he does not delve into the personhood issues that exist in both the slave and fetal cases.

The fact that there is very little cross-referencing among the various types of personhood cases is a significant finding. As this study has demonstrated, there are several important concepts that apply to all four entities and these concepts could be used to form a more coherent definition of legal personhood. The question then is why do judges and Justices refrain from employing the concepts of personhood from early slave and corporations cases to the later fetus and animal cases? A possible answer is that the Supreme Court simply has not recognized the similarities among the cases. While it may seem unusual to compare a fetus to an animal or a slave, this answer is not satisfactory because many theoretical studies make these comparisons and *amicus curiae* briefs also discuss the overlapping concepts of personhood. There must be another explanation.

Another possible explanation is that Justices purposefully avoid comparisons among the entities. Adjudicating personhood is a highly political issue and one with which the courts do not want to become embroiled. This explanation has some validity because, as has been demonstrated, comparison among the entities is controversial in several ways. Demonstrating the parallels between personhood for slaves and for fetuses

evokes the passion that still exists from the past mistake of slavery. The idea that a human fetus could be considered property is a risky proposition because commodification of a human being is reminiscent of slavery. Further, comparing an animal to a human fetus or a human slave also evokes passion among those who disagree with any type of comparison between humans and what are considered lower animals. Perhaps Justices purposefully avoid bringing up the past atrocities of slavery or comparisons of human persons with animals. By avoiding the issue, the courts maintain their distance and leave this highly political and sensitive issue to the other branches of government to arbitrate.

The other possible explanation is that the Supreme Court does not think that comparisons among the entities are relevant. The entities are very diverse and perhaps the Court does not feel that the personhood of the slave applies to corporations, fetuses, or animals. Rather than build a comprehensive understanding of legal personhood, the Court feels that is it better to define personhood in isolation with each entity so that the understanding of personhood is tailored to that particular entity. This seems plausible with the slave and corporation cases. Slavery involved human rights, racial discrimination, and other deeply divisive social issues. Corporate personhood was a more mundane legal designation to facilitate business transactions. It is likely that the Court did not see the two issues as similar. This explanation is also plausible given the disputes over the abortion issue. Many pro-life groups are pressing for a firm definition of personhood that includes the fetus. In several states, advocates are pushing for personhood amendments that define person from the moment of conception.[623] By defining personhood for each entity in isolation, the Supreme Court has better control

[623] Personhood amendments are active in the states of Georgia, Colorado, Mississippi, Nevada, Maryland, North Dakota, Montana, South Carolina, Alabama, and Michigan, while every other state has petitions circulating to develop a personhood amendment.

over the meaning of personhood as it applies to relevant social issues. A broad definition that encompasses many entities could limit the Court's abilities to sanction or prohibit social policies involving any type of personhood issue.

Although there are a couple of plausible explanations for the lack of cross referencing among personhood cases, I was not able to confirm any one explanation. Unfortunately, there is very little scholarship concerning the Supreme Court's definition of personhood as it applies to numerous issues. Most of the legal personhood scholarship applies to one entity and while other entities might be mentioned, the scholarship does not provide a comprehensive analysis of Supreme Court opinions. Further, I was not able to find any discussion of personhood in memoirs or interviews with past or current Justices. I am left to conclude that the Court's unwillingness to apply personhood doctrine across a spectrum of entities stems from either a hesitancy to become embroiled in highly political issues, a reluctance to resurrect controversial issues, or a determination that personhood should not be decided in a broad manner. Either way, the fact that the Supreme Court has not cross-referenced the various cases is a significant discovery. It seems as though the courts have not completely embraced the idea that certain concepts of personhood are universal among various entities and using common themes, the law can develop a more systematic concept of personhood. Instead, the courts have largely decided the personhood of the three entities in isolation of each other.

The analysis of my third hypothesis, which held that there should be consistencies among the personhood cases for slaves, corporations, fetuses, and great apes proved to be partially correct. The text analysis revealed key terms that were consistently employed in the court documents for all four entities. Another important consistency was that the

three dichotomies I identified were influential in the case law across all the entities. However, the analysis also revealed some notable inconsistencies. The emphasis placed on the dichotomies varied by type of entity. Although I expected numerous cross references among the decisions for each entity, I only discovered three. The law has not developed a comprehensive legal definition of personhood that has been applied to a number of entities and can be applied to future entities for personhood.

This study provided an in-depth look at the political theory of personhood in conjunction with court decisions dealing with issues of personhood. Through this comprehensive exploration of the issue, several findings concerning how the law conceptualizes personhood have come to light. The analysis proved my thesis which was that integrating a comprehensive study of the core political theory concerning personhood that informs judicial decision making as well as an in-depth look at many of the court decisions dealing with issues of personhood will yield a more meaningful understanding of personhood. A review of the significant findings in this study reveals the evidence supporting this thesis.

Summary of Findings

Of the four entities in this study, the courts have only bestowed personhood on the corporation. Ultimately, America's lawmakers realized their mistake in denying personhood to slaves; slavery was abolished; and personhood was granted to freedmen. However, slaves were never considered to be persons. Fetuses and animals remain outside the scope of personhood although the status of these two entities is the subject of much current discussion. The fact that three out of the four entities in this study have not been granted personhood indicates that personhood is not a status automatically given but

is a status that is granted by the law to certain entities that the courts deem worthy. This thesis studied four diverse candidates for personhood in order to determine what factors the law uses in this calculation of worthiness. By comparing these four entities to a core theory of moral and legal personhood and also comparing the four entities to each other, this study sought a more comprehensive understanding of personhood.

A significant finding of this study is that the courts do not often reference the personhood doctrine formulated for one entity to other entities vying for personhood. Except for the *amicus curiae* briefs, there are very few cross-references to the other entities. The four entities in this study were adjudicated in isolation from one another and the courts have avoided creating a comprehensive definition of personhood that could be used as a concrete standard for deciding if an entity qualifies or is rejected as a person. Instead, the courts have retained a large measure of flexibility to decide personhood on a case-by-case basis. Although the law did not design a concrete definition of person, many of the concepts used in adjudicating personhood are the same across each entity. These concepts are found in the core theory as articulated in this study.

The core theory of personhood revolves around the concepts of rational ability, property status, and inclusion in the community of persons. This core theory influences the law, but at the same time is so expansive in its considerations of personhood that many definitions of a person can be accommodated within the theory. Within this core theory, there are various criteria of personhood that stem from the dichotomies of person/human, person/property, and inclusion within the community of persons. This structure gives some coherence to the understanding of personhood because the courts have by and large used these dichotomies to formulate grants of personhood. However,

this analysis revealed that the criteria used to acknowledge one entity as a person may not be the same as the criteria used in arbitrating the status of another entity. Further, the dichotomies of personhood may be applied with varying emphasis depending upon the entity under consideration. Therefore, while there is a general framework for considering legal personhood, there is not a concrete definition that is applied to all entities vying for the status.

A large component of this study was to first present a core theory of personhood which outlined various criteria that scholars found necessary for personhood and then to compare how the courts have used those criteria when determining personhood. I found that although the courts consider these criteria, they do not always follow these criteria to the letter. Judges and justices allow themselves a great deal of flexibility when using the standards stemming from the person/human dichotomy and the person/property dichotomy.

Much of the moral theory of personhood relies on the rationalist ideal of a person as an autonomous, thinking agent. While this paradigm has been important in influencing the courts, the criterion of rational capacity has not been definitive. Rational capacity was an important factor in determining the personhood of corporations and fetuses and promises to be critical determinant if animals ever have their day in court. On the other hand, rational capacity was not a strong determining factor for the slave cases as the law largely ignored the slave's intelligence in order to deny personhood. This is also true for the mentally disabled who the law still considers to be persons even though they lack full rational capacity. Legal scholar Ngaire Naffine reasons that although jurists frequently expound the importance of autonomy and rational capacity,

the law is not consistent in demanding that all persons exhibit a rational will. She argues that the law is versatile in its conceptions of legal personality and uses this flexibility to both deny and grant personhood to entities that are not included as rational agents.[624] In employing this flexibility, the law has demonstrated that although rational capacity is an important consideration when considering personhood, it is not absolute. Therefore, rational capacity is not a concrete standard for the bestowal of personhood.

The courts have also been flexible when distinguishing between person and property. Naffine argues that there is a moral freight in the both the concepts of person and property, and that entities that are considered to be less than a person can be stripped of moral status and considered property.[625] This assessment certainly seems to be true for slaves and animals which were both considered to be less than persons and therefore relegated to the status of property. However, the courts made an exception for the corporation which was granted personhood even though it is a form of property. The same can be said of ships which are often considered as legal persons. Therefore, the perception that property and person are mutually exclusive has been influential in judicial decision-making but again has not been a concrete standard for the bestowal of personhood.

The one criterion that was consistent across all four entities was that of social acceptability. Whether society considers an entity to be "one of us" or part of "We the People" seems to carry significant weight in influencing the law to bestow personhood.

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[624] Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person,* [Hart Publishing, Portland, Oregon, 2009]: 117.

[625] Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person,* [Hart Publishing, Portland, Oregon, 2009]: 181.

Slaves were not part of accepted political society and therefore were excluded. So too, animals are too different from human persons to be considered. The final verdict concerning the fetus is still pending because the debate over abortion and fetal personhood is still embroiled in a fierce public debate. For now, the fetus is not included but advocates are arguing vociferously to change this status. Corporations, with the backing of big business, have been accepted into the community of legal persons but the growing public outcry on Wall Street from grassroots organizations may eventually be strong enough to challenge this status.

Another significant finding is that humanity is not a prerequisite for personhood. Slaves and fetuses are human, but the law rejected these entities as persons. Corporations have qualified as persons, but they are not human, although they are composed of humans. This indicates that animals, even though they are not human, have a chance at gaining some type of personhood-related recognition. The law's rejection of humanity as a *sine qua non* of personhood is somewhat controversial among some theorists such as legal and moral philosopher Martha Nussbaum who argues that the capacity for moral judgment and reason makes humans morally "special." She contends that animals can never be included with humans in this realm of morally "special" entities.[626] Naffine argues that there is something to be said for considering humans as a special class because if the law completely loses the sense of humans as a valuable type of being, society might lose its moral concern over what can be ethically done to a person.[627] By

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[626] Martha Nussbaum, "Animal Rights: the Need for a Theoretical Basis," Harvard Law Review, vol. 114 (2001) 1511.

[627] Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person,* [Hart Publishing, Portland, Oregon, 2009]: 179.

retaining a foundational concept of the person as a moral as well as legal being, the law can use the moral language of human dignity when discussing the rights and protections of a person. If humans are not an elevated moral class, then society might lose its prohibitions on causing suffering to fellow humans.

Although humanity is not a determining factor for the law's bestowal of personhood, there is something about human suffering that gives pause when considering who is in or out of the community of persons. What makes Americans cringe when considering our history of slavery is the amount of human suffering slavery caused. Opinion polls consistently find that a majority of Americans are against late-term abortion and cite the potential that the fetus will experience pain during the procedure as part of the explanation for this opinion.[628] Sentience is also a consideration for non-humans. What makes most people cringe when an animal is beaten is not the abuse of property but the suffering the animal experiences. Many advocates for slaves, fetuses, and animals see a bestowal of personhood as a legal protection from physical suffering and therefore argue vociferously for personhood. In reality, greater protections from suffering would often satisfy these advocates.

Similarly, many advocates for personhood for the fetus and animals use legal personhood as a vehicle to ensure greater protections for the lives of these entities. It is commonly understood that life has value. For many opponents of abortion, this is the crux of their argument – the fetus has a moral value and should not be destroyed. A grant of personhood would protect the life of the fetus and therefore is an expedient way to

[628] Gallup Poll, "Americans Agree with Banning Late-Term Abortion," 2003, available from http://www.gallup.com/poll/9658/americans-agree-banning-partialbirth-abortion.aspx, accessed 30 June 2011.

prevent abortion. However, many opponents of abortion would be satisfied if the abortion were outlawed to protect human life even if personhood was not granted to the fetus. Similarly, many animal advocates would be appeased with greater protections for the lives of animals even if the animal was not given consideration as a person. This is especially true for endangered species whose lives are based upon their rarity. Most people would agree with legal scholar Ronald Dworkin who argues that just as a priceless work of art should not be destroyed whimsically, neither should a fetus or an endangered animal be destroyed with caprice.[629]

If preventing suffering and preserving the sanctity of life is a positive outcome, perhaps the law should be more liberal in bestowing personhood in order to protect more entities from harm. Before agreeing with this statement it is important to determine the full implications of a moral liberal grant of personhood.

A More Liberal Grant of Personhood

The abolition of slavery and granting of personhood to the freed slaves was a victory for American rights and freedoms. The transformation of slaves as property to freedmen as persons laid the foundation for much of America's human rights. Modern capitalism has been greatly enabled by the personification of the corporation as the bestowal of personhood simplified contracts and facilitated business transactions. Other expansions of personhood include the recognition of women as persons, which doubled the population of Americans participating in the political community and the recognition of other groups including Native Americans, Chinese immigrants, and other racial and ethnic groups whose personhood was often denied. These expansions are viewed as

[629] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, [New York, NY: First Vintage Books Edition, 1994].

salutary developments in the entities included under personhood. Can it then be inferred that greater expansions to include entities such as animals and fetuses would be worthwhile?

Many animal rights activists answer "yes" and encourage the law and society to accept intelligent animals as persons. Stephen Wise argues that as the law has steadily expanded its circle of persons, it is now time to include great apes and possibly other non-human animals.[630] Wise's argument has gained traction with many animal advocates, but it is necessary to consider the effects of including animals as persons. Allowing great apes to be persons would affect whether humans could imprison primates in zoos and could also affect the duties that are owed to these animals. If a primate was consumed as food or imprisoned as a family pet, that animal, as a person, could have recourse to the law and fellow persons may have an obligation to protect these animals. Altering the status of animals would have many affects that could cause alarm among human persons.

As Chapter Five pointed out, many of the discoveries in health and medicine are attributable to experiments done on animals and particularly primates. If these animals were elevated to the status of person, then it would be difficult to justify why one person's life could be sacrificed to benefit another. Forcing a chimpanzee to undergo medical experimentation would be on the same moral level as forcing a human to undergo experimentation. The most vulnerable humans would likely be young children or mentally impaired adults who cannot be considered rational agents. Because these humans lack the rational capacities of personhood, they could be considered inferior to

[630] Steven Wise, *Drawing the Line*, [Perseus Publishing, Cambridge, MA, 2002], Steven Wise, *Rattling the Cage,* [Perseus Publishing, Cambridge, MA, 2001].

some great apes. They might then be used aggressively has human research subjects or sources of organs.

Most of society is not willing to go this far in granting an equal personhood among intelligent animals and non-rational humans. Most human persons have an understanding that there is something sacred about humanity that separates the most intelligent animal from the least intelligent human. Margaret Somerville, a professor of law, medicine, and ethics, voices a concern that an extension of personhood to animals could confuse the idea that humans are persons because they deserve special respect above and beyond other animals.[631] This echoes Nussbaum's argument that humans are "special." Both of these scholars argue that an extension of personhood to animals would result in putting both sets of interests on the same level and could undo the achievements of the human rights movement which has used the distinction between humans and animals as the basis of their message of human rights. Nussbaum contends that preserving the uniqueness of the human person is essential in maintaining human rights protections. She argues that humans and animals cannot be equated "lest we lose our moral footing utterly."[632]

It is unlikely that the law will acquiesce to granting personhood to any non-human animals in the near future, and therefore animal rights activists are left to argue that animals at least deserve increased protections against harm as sentient beings. Another possible avenue for an expansion of personhood is for the fetus but this too would have

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[631] Margaret Somerville, "Is the best way to prevent animal cruelty to bestow "personhood" on animals?" The Mark Blog, January 25, 2010, available from http://www.themarknews.com/articles/868-are-animals-people, accessed July 8, 2011.

[632] Martha Nussbaum, "Animal Rights: the Need for a Theoretical Basis," Harvard Law Review, vol. 114 (2001) 1511.

effects on society. Personhood for the fetus would effectively outlaw abortion because abortion would end the life of a person. Banning abortion would have great consequence for women as persons. As Chapter Four demonstrated, an essential part of a woman's personhood is her ability to make and carry out decisions concerning her body. A ban on abortion would limit this personhood and therefore limit her autonomy. Therefore, the expansion of personhood to the fetus would in effect contract the personhood of women.

On the other hand, there is an argument to be made that humans have an elevated status that merits protection from harm, and as humans, the fetus is entitled to this protection. At the least, it can be argued that a fetus with the capacity to feel pain should have the same protections as an animal. Within the window of six to twenty-six weeks, most physicians agree that the fetus can feel pain.[633] Therefore it seems equitable that there would be some type of protection, similar to endangered species law, which would protect a sentient fetus. A grant of personhood need not accompany greater protections for the life and well-being of a fetus. Just as many animal rights activists press for personhood for great apes in order to protect the lives and well-being of these animals, many advocates for the fetus also request personhood for the protections personhood confers. Greater protections for the fetus could be accomplished without a corresponding expansion of personhood.

The study of slave law revealed that many judges viewed slavery as regrettable but nevertheless an accepted pillar of the social order. These judges voiced their personal objections to slavery as immoral but continued to condone the institution as part of the law. A comparison can be made with abortion. Many Americans claim that they do not

[633] Jacqui Wise, "Fetuses Cannot Feel Pain Before Twenty-six Weeks," *British Journal of Medicine*, 315, (November 1997): 1111-1116.

personally approve of abortion and an abortion would be morally wrong for them, yet they support permissive abortion laws claiming that they cannot limit the abortion rights of others.[634] Slavery was eventually found to be an extreme violation of human rights and an offense against personhood. Recent surveys have found that the American public is less supportive of abortion than it used to be.[635] Perhaps at a future date, the tide will turn against abortion and Americans will decide that abortion is a violation of personhood just as slavery once was.

Expansions of personhood are quite controversial due to the implications for the current holders of personhood, and the courts, being cognizant of these controversies is reticent to abruptly alter the existing boundaries of personhood. This study has demonstrated that the courts are not consistent in applying standards of personhood across a number of entities. Perhaps rather than requesting that the courts should expand personhood, the more suitable demand might be that the courts are at least more consistent in their bestowals of personhood. In order to evaluate the soundness of such a request, it is necessary to understand some of the possible ramifications of a standard application of personhood.

In his dissent in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949), Justice Douglas argues that the meaning of "person" in the Constitution should be interpreted consistently. He states, "it requires distortion to read 'person' as meaning one thing then another within the same clause and from clause to clause" (337 U.S. 562, 579). Despite Douglas's appeal for consistency, the Supreme Court and lower courts have not

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[634] Pew Research Center, "Support for Abortion Slips," 2009, available from http://pewforum.org/uploadedfiles/Topics/Issues/Abortion/abortion09.pdf, accessed June 2, 2011.

[635] Research Center, "Support for Abortion Slips," 2009, available from http://pewforum.org/uploadedfiles/Topics/Issues/Abortion/abortion09.pdf, accessed June 2, 2011.

been completely consistent in their standards for personhood. If the courts were constant in upholding the criteria of rationality and autonomy, slaves would have been declared persons rather than property. The corporation as property and a collective would most likely have been declined personhood. The fetus, which does not qualify as a rational agent, would likely remain a non-person or a potential person. Finally, great apes, which have some capacities as rational agents would be at least considered as persons.

Rather than applying a strict conception of personhood to entities to determine which entities qualify and which entities do not qualify as persons, the courts have taken a more flexible approach in deciding the fate of each entity separately in the context of that entity's particular circumstances. Judges evaluate each entity's suitability as a person based on a number of considerations stemming from science, religion, and history. Justices seek answers from the classic works of Locke and Kant for guidance. They also look to the dominant culture, and the understanding of what it means to be a person that they hold in their own personal worldview. The views of the dominant political elites are taken into account. Rationality, property status, and acceptability into the community of persons are all considerations. The law absorbs and reflects each of these considerations in its judgments concerning personhood and does not necessarily strive to be consistent in its ruling across a number of issues. This dynamic process allows the law to respond to the particularities of the unique entities vying for personhood rather than trying to refer back to a fixed idea of what it means to be a proper person.

At the same time, the flexible approach the courts have taken in respect to personhood results in a very nebulous understanding of both legal and moral personhood. The meaning assigned by the law to personhood seems to drift from one entity to another

and important concepts are applied differently. Justices and judges sometimes appear to adjudicate disputes of personhood without a firm understanding of the core theories that could provide guidance. These justices are wading in a sea of controversy because questions concerning an entity's status as a person are part of the basic nature of the law. The diverse meanings of "person" as assigned to various entities lead to an unstable understanding of the term. The vagueness and inherently contestable nature of personhood leads to an insecure conception of one of the most important concepts in political society.

An understanding of personhood is the heart of what it means to comprehend one's own worth, rights, and duties within a community. Through its power to define legal persons within the moral and political community, the law determines who matters. If an entity is a person, it counts in its own right. If an entity is not a person, its legal protections are dramatically diminished. Life and death issues are at stake because entities who are considered persons have much greater protections for life and wellbeing. Providing some structure to the concept of personhood provides guidelines to those who wonder if an entity is part of the community of persons. With such an important concept, it is necessary to have some structured guidelines for adjudicating the issue. If not, atrocities such as the genocides may be more likely to occur. Native American scholar Ward Churchill argues that the United States experienced the genocide of many Native American tribes which were brutally decimated as Europeans conquered American soil. Churchill attributes this genocide to the belief held by the Europeans that the Native Americans were less than persons who lacked moral value worthy of respect.[636] Without

[636] Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present,* [City Light Books, San Francisco, 1997].

an understanding of personhood, such atrocities are more likely to occur because there are no standards for declaring that these individuals are autonomous, rational agents in the moral community of persons and therefore cannot be killed.

This study has shown that although the law maintains its flexibility in adjudicating personhood, some standards do exist. A person can be considered a rational, autonomous agent; a person is distinct from property; and a person is a member of the community of persons. In defining legal personhood, the courts have the ability to pay close attention to these standards while still maintaining some flexibility to respond to the particularities of a certain case. This method would likely produce a basic conception of legal personhood but maintain the dynamism needed in the law. By looking to the core theory established in this study and the dominant concepts this analysis revealed, judges could formulate a more consistent understanding of personhood to be applied as new entities enter the legal arena vying for personhood.

The issue of personhood involves the law's deepest assumptions about the nature of moral existence. It questions for whom the law is created as well as the basic priorities and functions of the law. It involves hierarchies of beings imposed by the law and who gets to decide who is included within the community of persons and who is excluded. It considers who or what can be treated as a means to an end. It questions why psychological or biological criteria matter for a person. It concerns who or what matters and why.

Through the concept of a person, the law develops the order of beings in the moral, social, and legal world. This study has demonstrated that this world is complex and involves diverse entities with an important element in common – the quest for

personhood. The fact that the law and the greater political society still turns to the concept of personhood to serve as an arbiter of justice reveals the importance of this concept in juridical, moral, and social realms, and also reveals that the concept is less definitive than we may believe. The construction of legal personhood continues, but this study reveals that there are certain concepts that solidify the meaning of personhood and can provide guidance for adjudicators as they face new entities seeking personhood. Through this study and future analysis on this subject, the concept of legal personhood will continue to develop.

Appendix A

Key word statistics are given for the total documents and then broken out by each type of case.

FREQUENCY	NB CASES	% CASES	TF • IDF*	
PERSON	**3904**	**456**	**80.7%**	**363.4**
Slave Cases	360	36	75.0%	45.0
Corporation Cases	565	90	70.3%	86.4
Fetus Cases	2706	279	85.3%	186.6
Animal Cases	258	49	86.0%	16.9
PERSONS	**2550**	**367**	**65.0%**	**477.8**
Slave Cases	551	32	66.7%	97.0
Corporation Cases	617	92	71.9%	88.5
Fetus Cases	1098	202	61.8%	229.7
Animal Cases	260	38	66.7%	45.8
PEOPLE	**2261**	**371**	**65.7%**	**413.0**
Slave Cases	340	30	62.5%	69.4
Corporation Cases	418	77	60.2%	92.3
Fetus Cases	1401	230	70.3%	214.1
Animal Cases	99	33	57.9%	23.5
PERSONHOOD	**455**	**77**	**13.6%**	**393.8**
Slave Cases	0	0	0.0%	0
Corporation Cases	1	1	0.8%	2.1
Fetus Cases	454	76	23.2%	287.7
Animal Cases	0	0	0.0%	0
HUMAN	**3898**	**353**	**62.5%**	**796.3**
Slave Cases	61	23	47.9%	19.5
Corporation Cases	102	41	32.0%	50.4
Fetus Cases	3669	266	81.3%	329.0
Animal Cases	66	23	40.4%	26.0
HUMANS	**99**	**49**	**8.7%**	**105.1**
Slave Cases	0	23	0.0%	0
Corporation Cases	3	2	1.6%	5.4
Fetus Cases	86	41	12.5%	77.6
Animal Cases	9	5	8.8%	9.5

HUMANITY	**131**	**61**	**10.8%**	**126.6**
Slave Cases	33	13	27.1%	18.7
Corporation Cases	2	2	1.6%	3.6
Fetus Cases	95	45	13.8%	81.8
Animal Cases	1	1	1.8%	1.8
PROPERTY	**2859**	**304**	**53.8%**	**769.6**
Slave Cases	911	38	79.2%	92.4
Corporation Cases	1207	100	78.1%	129.4
Fetus Cases	603	141	43.1%	220.3
Animal Cases	120	023	40.4%	47.3
INDIVIDUAL	**2728**	**404**	**71.5%**	**397.4**
Slave Cases	94	20	41.7%	35.7
Corporation Cases	870	99	77.3%	97.1
Fetus Cases	1633	244	74.6%	207.6
Animal Cases	129	40	70.2%	19.8
LIFE	**9791**	**425**	**75.2%**	**1210.8**
Slave Cases	159	29	60.4%	34.8
Corporation Cases	295	62	48.4%	92.9
Fetus Cases	9283	311	95.1%	202.3
Animal Cases	603	141	43.1%	220.3
LANGUAGE	**1400**	**320**	**56.6%**	**345.7**
Slave Cases	149	22	45.8%	50.5
Corporation Cases	147	64	50.0%	44.3
Fetus Cases	860	197	60.2%	189.3
Animal Cases	48	22	38.6%	19.8
CITIZENS	**2575**	**313**	**55.4%**	**660.5**
Slave Cases	757	27	56.3%	189.2
Corporation Cases	816	75	58.6%	189.4
Fetus Cases	563	174	53.2%	154.3
Animal Cases	419	34	59.6%	94.0

* TF • IDF stands for term frequency–inverse document frequency and is a composite weight for each term in a document. It is statistical measure of how important a word is to a document or a collection of documents by calculating the proportionality of the number of times a word is in a document multiplied by the inverse frequency of the word in the overall collection.

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