

# Embodying Vulnerability: A Feminist Theory of the Person

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## INTRODUCTION

Law is the social, economic, political and personal struggle that determines who counts as a member of the community. This struggle also determines how we should take account of the diverse interests of members of the community. Which entities, individuals or collectives do we consider members of the legal community? Of those entities, individuals and collectives, which rights, duties, privileges and protections should they enjoy? Legal rules create the contours of recognition for various entities, individuals and collectives. They define who counts and how we take account of them.

Legal disputes in a variety of areas can be understood as determinations about who counts and how we should take account of them. In family law, for example, custody disputes often concern determinations about which individuals are entitled to visitation or custody and which individuals are under an obligation to provide financial support. Legal rules, like the best interests of the child standard,<sup>1</sup> guide these determinations and shape adjudication.

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1. The "best interests of the child" standard guides determinations by courts as to whom custody and visitation should be awarded and what type of custody or visitation should be awarded. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 338, 357-60 (2008) (noting that an 1815 Pennsylvania case appeared to be "the first use of the best interests of the child as a legal standard"). Although the standard varies by state, it involves an assessment of factors such as the emotional ties to the parent, ties to the community, capacity of the parent to provide for the child's physical and emotional needs, and the mental and physical health and fitness of the parent. *See generally Determining the Best Interests of the Child: Summary of State Laws*, CHILD WELFARE INFORMATION GATEWAY, [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm) (last visited Oct. 30, 2012); UNHCR GUIDELINES TO DETERMINING THE BEST INTERESTS OF THE CHILD (2008), available at <http://www.unhcr.org/4566b16b2.pdf>. While the best interests of the child standard may take account of third party interests in some circumstances, there is a "presumption that parental decisions generally serve the best interests of their children . . . and clearly in the normal case the parent's interest is paramount." *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (finding the right of the

Immigration law bases the right to remain within a specific geographic nation state on who counts – i.e. which individuals are citizens<sup>2</sup> and permanent residents,<sup>3</sup> and which undocumented individuals may be deported.<sup>4</sup> The law also determines how we regard various diverse classes of foreign nationals to make determinations about which rights and considerations these individuals should enjoy. For example, certain immigrants may be granted a permanent visa while others are not.<sup>5</sup> In terms of federal tax law, the regulations governing joint or individual filing statuses determine which collective groups are recognized as a unit for the purpose of filing a federal tax return.<sup>6</sup> One man and one woman joined in a state sanctioned marriage can file jointly under federal law, accessing particular tax incentives, while two men, two women or one man, and four women may not.<sup>7</sup> Similarly, even though some families of two or more persons are prohibited from filing their taxes together, for the purposes of business ventures, groups of individual human beings shielded by the corporate form may file taxes together as a single unit.<sup>8</sup>

There are numerous ways to name the process of determining who counts

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parent to control and care for her daughters primary to the right of the grandparents). This presumption ensures protection for the interests of parents in caring for their children. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

2. U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401 (2006). *See generally* *Citizenship*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=a2ec6811264a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=a2ec6811264a3210VgnVCM100000b92ca60aRCRD> (last visited Oct. 30, 2012); BLACK’S LAW DICTIONARY 278 (9th ed. 2009) (defining a citizen as “[a] person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges”).

3. In the United States, an “alien” has been defined as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2006).

4. There are many classes of deportation, or removal. *See* 8 U.S.C. § 1227 (2006) (citing specific deportable statuses and criminal offenses, including improper entry by aliens).

5. Under 8 U.S.C. § 1153 (2006), visas are allocated by order of preference, including: specific members of citizens’ families, § 1153(a), employment-based visas, particularly for aliens with “extraordinary ability,” § 1153(b)(1)(A)), and limitations according to geographical regions, § 1153(c)), among others. Implicit in § 1153 is that immigrants that would otherwise qualify for visas but who do not fall into the preferred categories may not be issued a visa. For example § 1153(b)(3)(B) states the following ‘limitation on workers’: “Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for [unskilled workers].”

6. *See* I.R.C. § 1 (a)–(d) (2006) (outlining tax tables for married filing jointly, head of household, unmarried, and married filing separately returns); Treas. Reg. 1.4–3 (2012) (determining tax liability for a husband and wife filing separate returns).

7. I.R.C. § 7703 (2006) (explaining that in order to qualify for the joint filing status, an individual must be determined as married for the sake of the statute). *But see* Tax Information for Same-Sex Married Couples, STATE OF CAL. FRANCHISE TAX BD., FTB PUB. 776, TAX INFORMATION FOR SAME-SEX MARRIED COUPLES (2011), available at [https://www.ftb.ca.gov/forms/2011/11\\_776.pdf](https://www.ftb.ca.gov/forms/2011/11_776.pdf) (“For California tax purposes, the same long-standing rules applicable to opposite-sex married individuals (relating to filing status, community property income, etc.) now apply to SSMCs [same-sex married couples]. However, because the federal government does not recognize SSMCs as married individuals for federal tax purposes, [same-sex married couples] will continue to file as unmarried individuals on their federal tax returns.”).

8. I.R.C. § 11 (2006).

and how we take account of them in law. Citizenship,<sup>9</sup> legal rights<sup>10</sup> and legal subjectivity<sup>11</sup> are various ways to speak about who counts in law and how we take account of them. Another way in which legal scholars talk about the issue of recognition for the purposes of structuring the legal community is accomplished through the concept of legal personhood. At the dawn of the twenty-first century, legal personhood has become a political battleground for activists and legislators. While some work to expand the community of legal persons to include unborn human beings like fetuses and zygotes,<sup>12</sup> others focus their efforts on pushing the boundaries of legal personhood beyond human beings to include great apes or whales and orcas.<sup>13</sup> And finally, some activists are concerned with limiting the community of legal persons to exclude collective legal entities like corporations, limited liability companies and unions.<sup>14</sup>

Recent activism concerning the status of persons and non-persons reveals how the legal boundaries of personhood have served as the background for

9. For example, women's rights advocates use the frame of citizenship only insofar as the idea relates to equality (i.e. second-class citizenship). See Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 587 (2010) (stating that women's rights advocates have "long pitched their arguments in citizenship terms," including the fight for women's suffrage). Since the Naturalization Act of 1790, U.S. immigration law has also enacted various reforms in order to designate citizenship status in terms of gender, race or ethnic identity, often depending on the particular political climate. See The Naturalization Act of 1790, 1 Stat. 103 (1790) (initially limiting citizenship to white men and operating to exclude racial minorities and women); see also The Act of July 14, 1870, 16 Stat. 254 (1870) (amending the Naturalization Act to include African Americans but to exclude non-white immigrants after the Civil War through the Act of July 14, 1870); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13 (1998) (stating that the Chinese Exclusion Act of 1882 was "the first express racial restriction").

10. Legal scholarship on the question of rights often invokes Wesley Newcomb Hohfield's taxonomy of legal rights. See Wesley Newcomb Hohfield, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 30 (1913). Legal rights, however, have a long intellectual history that can be placed in conversation with other philosophical perspectives. See, e.g., Joseph William Singer, *Legal Rights Debate in Analytic Jurisprudence from Bentham to Hohfield*, 1982 WIS. L. REV., 975, 986–1011 (1982). Rights have been used in feminist discourse to articulate claims to legal recognition and equality. See generally, Adelaide H. Villmoare, *Women, Differences, and Rights as Practices: An Interpretive Essay and a Proposal*, 25 LAW & SOC'Y REV. 385 (1991); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

11. Legal subjectivity is often used in scholarship in diverse and ambiguous ways. E.g., Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453 (2006) (defining legal subjectivity as the capacity to respect the rule of law); but see Jeanne Lorraine Schroeder, *Juno Moneto: On the Erotics of the Marketplace*, 54 WASH. & LEE L. REV. 995 (1997) (defining legal subjectivity in relation to personhood and as legal rights and privileges). In some circumstances, legal subjectivity is used in conjunction with the concept of legal personhood. See, e.g., Teemu Ruskola, *Raping like a State*, 57 UCLA L. REV. 1477, 1489 (2010) ("[T]he individual person has become the privileged paradigm of political and legal subjectivity: All rights and duties must be held by a 'person.' It is this juridico-political axiom that generates law's fictional persons today."); Sueann Caulfield, *The Right to a Father's Name: A Historical Perspective on State Efforts to Combat the Stigma of Illegitimate Birth in Brazil*, 30 L. & HIST. REV. 1 (2012) (discussing legitimacy as a foundation for legal subjectivity). Other scholars have connected legal subjectivity to citizenship. See, e.g., Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion*, 8 THEORETICAL INQUIRIES L. 527 (2007) (connecting citizenship to legal subjectivity).

12. See discussion *infra* pp. 57–61.

13. See discussion *infra* pp. 61–65.

14. See discussion *infra* pp. 53–57.

debates in law and politics. In light of the recent legal and political activity concerning the boundaries of personhood, this article argues that feminist legal theory should engage with the question of legal personhood. To this end, it articulates one possible framework for a feminist legal theory of the person. Drawing on the work of scholars in vulnerability studies and embodiment theory, this article imagines and proposes an analytic framework to aid those who make and interpret the law when faced with the twenty-first century challenges of legal personhood.

Part I of this article examines the political battles around legal personhood in historical and contemporary contexts. It focuses on the diverse controversies concerning legal personhood for corporations and other associations, fetuses and embryos and non-human animals. In Part II, it examines the concept of legal personhood from a theoretical perspective. It simultaneously highlights the indeterminacy of legal personhood as a definitive concept and the normative force entailed by legal personhood in clarifying the distribution of rights, privileges and entitlements. Part III begins to sketch one possible articulation of a feminist legal theory of the person from a perspective grounded in vulnerability studies and embodiment theory. It provides one possible framework for addressing the twenty-first century challenges of legal personhood from a feminist perspective, arguing for an analytic framework that takes the body and embodied vulnerability as central and essential aspects of legal personhood.

#### I. THE CHALLENGE OF LEGAL PERSONHOOD: HISTORICAL CONTEXT AND CONTEMPORARY CONTROVERSIES

In both historical and contemporary contexts, battles concerning legal personhood structure the legal, social and political realities of the United States. Historically, debates about legal personhood have had high stakes, concealing political contests regarding the distribution of legal privileges, political rights and social entitlements to groups and individuals. Legal personhood animated many political challenges in the United States from its founding forward. In the twenty-first century, legal personhood continues to create challenges to jurisprudence in the United States. Particularly in terms of battles concerning corporations, fetuses and embryos and non-human animals, controversies concerning legal personhood shaped political, social and legal activism. And today, the battles concerning legal personhood mark the boundary lines of the legal community and highlight places of complexity and contradiction in the status quo.

From the founding of the United States to the so-called "First Wave" suffragette struggles of the late nineteenth and early twentieth century, controversies concerning legal personhood shaped political, social and legal activism.<sup>15</sup> Historically, in the United States, the rights of personhood were

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15. Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 722 n.23 (2011) (examining legal personhood in a post-*Citizens United* context from a perspective informed by critical legal studies, feminist legal theory and critical race theory).

granted to white male property owning citizens.<sup>16</sup> During the nineteenth century, suffragettes demanded an expansion of personhood to include married and unmarried women living in the shadow of coverture. Coverture, according to feminist thinkers like Elizabeth Cady Stanton and Lucretia Mott, made women less than full persons under law, rendering them, “in the eye of the law, civilly dead.”<sup>17</sup> In the United States, for example, while women were considered legal persons,<sup>18</sup> they were accorded neither the rights and privileges nor the duties and obligations of full legal personhood.<sup>19</sup> Women, like African Americans and others, were excluded from the full privileges and benefits of legal personhood.<sup>20</sup> While women were considered citizens of the United States, they were often excluded from the statutory interpretation of persons eligible for certain rights and privileges under law.<sup>21</sup> And once married, women were limited in their ability to exercise many basic capacities and rights of legal personhood at common law, such as making contracts and owning property.<sup>22</sup> Women could lose their nationality as American citizens and the rights of American citizenship by marrying a foreigner.<sup>23</sup> They could be explicitly excluded from juries by state

16. See generally Anna Grear, *Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights*, 7 HUM. RTS. L. REV. 511, 528 (2007) (noting that natural rights were granted to the quasi-disembodied male citizen).

17. Seneca Falls Declaration of Sentiments and Resolutions (1848) in FEMINISM THE ESSENTIAL HISTORICAL WRITINGS, 76, 79 (Miriam Schneir ed., 1972).

18. See *Minor v. Happersett*, 88 U.S. 162, 165–66 (1874) (“There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment ‘all persons born or naturalized in the United States and subject to the jurisdiction thereof’ are expressly declared to be ‘citizens of the United States and of the State wherein they reside.’”); cf. *Edwards v. Att’y Gen. of Canada* [1930] A.C. 124 (The Persons Case) (declaring women persons under the law of Canada despite arguments that they were not persons based on the fact that they were not able to exercise rights administered to the state).

19. See *In re Lockwood*, 154 U.S. 116, 117–18 (1894) (holding that the Virginia Supreme Court’s interpretation of the word “persons” as not including women was valid in the statute regarding admittance to the state bar); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*433, \*442 (noting that a woman’s legal existence was “suspended” during marriage and incorporated into her husband’s); cf. *Muller v. Oregon*, 208 U.S. 412, 418 (1908) (“It is the law of Oregon that women, whether married or single, have, equal contractual and personal rights with men.”); *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding rule prohibiting women from being admitted to the bar); see also *id.* at 141 (Bradley, J., concurring) (“It certainly cannot be affirmed, as an historical fact, that [the opportunity to engage in any and every profession, occupation, or employment in civil life] has ever been established as one of the fundamental privileges and immunities of the sex.”).

20. See Ellis, *supra* note 15, at 724–36; see generally Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Race and Sex Equality*, 84 N.Y.U. L. REV. 1464 (2009) (explaining that white male decision-makers validated the limitation of rights and legal privileges to women and blacks on the basis of mutual benefits – that women and blacks were incapable, and thus better off, under the oversight and protection of others making decisions and exercising rights on their behalf).

21. See *supra* note 20.

22. Blackstone, *supra* note 19, at \*442–45; MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 14–57 (G. Edward White ed., 1986); but see Karen Pearlston, *Married Women Bankrupts in the Age of Coverture*, 34 LAW & SOC. INQUIRY 265, 266 (2009) (arguing that coverture was maintained and enabled by a system of exemptions and rationalizations that allowed women to play some role in economic life).

23. See *Mackenzie v. Hare*, 239 U.S. 299, 307 (1915) (holding that Congress could validly enact a statute under which an American woman loses her citizenship when she marries a foreigner).

law,<sup>24</sup> and states were under no obligation to make laws that qualified women for jury service.<sup>25</sup> Even where a state permitted women to be jurors, they were not compelled to serve and could be exempted from mandatory jury service by statute.<sup>26</sup> While the Nineteenth Amendment<sup>27</sup> has often been thought of as granting women the right to vote, this amendment's prohibition against discrimination because of sex was not always adopted in practice. Despite the hard work of suffragists and the hopes that the possibility of the franchise engendered, this amendment was not initially applied in a way that radically altered the position of women in the United States. On the contrary, it was interpreted in a way that did not universally guarantee women the right to vote. Courts instead interpreted this amendment narrowly, claiming that it simply meant that while states could not pass legislation explicitly prohibiting women from voting, they could systematically apply requirements for the franchise that would severely curtail the right to vote for most women.<sup>28</sup> The accordance of a positive right to vote was left to the states to confer upon women. Thus many women gained the *de jure* right to vote while *de facto* exclusion from the franchise was still permissible.<sup>29</sup>

Struggles to expand the boundaries of legal personhood have long been part of the feminist legal project, not only in terms of protecting and expanding the legal personhood of women. In the nineteenth century, many feminists in the United States were part of the abolitionist movement which sought to expand the scope of legal personhood to include African Americans as free individuals.<sup>30</sup> Many feminist abolitionists like Elizabeth Cady Stanton regarded the conditions of marriage and the status of coverture<sup>31</sup> to be akin to slavery.<sup>32</sup> In the nineteenth

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24. *State v. Mittle*, 113 S.E. 335, 336–38 (S.C. 1922).

25. *See Ballard v. United States*, 329 U.S. 187, 191–92 (1946).

26. *See Hoyt v. Taylor*, 368 U.S. 57, 58–65 (1961).

27. U.S. CONST. amend. XIX. (“The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”).

28. *Mittle*, 113 S.E. at 337.

29. *See Minor v. Happersett*, 88 U.S. 162, 170 (1874) (noting that the Fourteenth Amendment did not confer the right to vote upon women); *see also Lesser v. Garnett*, 258 U.S. 130, 137 (1922) (upholding the validity of the Nineteenth Amendment against continuing opposition to expanding the right to vote to women). It was not until 1964 that *Minor* was effectively if “silently” overturned in *Reynolds v. Sims*, 337 U.S. 533, 612–13 (1964) (holding that the Constitution protects the right of all qualified citizens to vote) (Harlan, J., dissenting).

30. Feminist abolitionists, who had diverse perspectives as to the substance and meaning of emancipation for free and enslaved women, were crucial voices in the abolitionist movement. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 29–35 (1998) (outlining divergent perspectives on whether enslaved black women would be freed by the protections of marriage and coverture).

31. *Id.*

32. The loss of “self-ownership,” which included the ability to contract and the right to refuse sexual relations with one’s husband, was regarded as especially pernicious. *Id.* at 176–77. This comparison between slavery and coverture did not only emerge from the feminist movement. The link between slavery and coverture has often been made in a comparative fashion because women and African Americans were both denied full access to legal personhood. *E.g.*, *Gentry v. McMinnis*, 33 Ky. (3 Dana) 382, 384 (1835) (“Actual slavery is a disability even greater than that of infancy or coverture, and is surely entitled to, at least as much indulgence and protection. A person held and

century, feminists in the U.S. actively participated in the abolitionist movement, seeking increased recognition of the legal personhood of African Americans and women in terms of political and social equality.<sup>33</sup> From late nineteenth century activists fighting for suffrage and full citizenship rights for all persons, both male and female,<sup>34</sup> to mid-twentieth century legal battles attempting to cast off the disabilities of coverture,<sup>35</sup> women in the United States have fought not only for legal personhood but also for the citizenship rights essential to realize the fullest form of legal personhood possible. In a global context, in spite of efforts in international law to ensure full equality for women,<sup>36</sup> discriminatory laws

governed as a slave, is not either physically or intellectually a free agent.”).

33. Before emancipation, enslaved individuals occupied a liminal legal status where they were simultaneously recognized as persons and property. *See, e.g.,* *Sneed v. Ewing and Wife*, 28 Ky. 460 (5 J.J. Marsh 1831) (recognizing slaves were persons and had personal attachments but were also property that could be moved and sold at any time); *see also* COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* 140 (2011) (arguing law did not erase personhood for slaves but “disfigured” it). Enslaved persons were effectively people without rights who could not contract, access the courts, own property, control the sale of their labor or retain their bodily integrity. *See* ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE SOUTH* 201 (1992). Even black individuals who acted free, seeming to hold title to property and their persons were still considered slaves. *See* *Burke v. Negro Joe*, 6 G. & J. 136 (Md. 1834) (finding a deed of manumission could not be presumed unless actions inconsistent with slavery were known to the putative owner even though the enslaved individuals owned property, contracted debts and rented farm within three miles of putative owner’s home). Even in cases where African Americans were not slaves, they were not granted full access to legal personhood. *E.g.,* *Bryan v. Walton*, 14 Ga. 185, 198 (1853) (“Whereas, we maintain, that the *status* of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed on him by Statute; that he can neither contract, nor be contracted with; that the free negro can act only by and through his guardian; that he is in a state of perpetual pupilage or wardship; and that this condition he can never change by his own volition.”). In fact, many cases made no distinction between free and enslaved black persons. *E.g.,* *State v. Baynard*, 1 Del. Cas. 662, (Del. 1794) (noting that because of servile status “it would be both illegal and impolitic” to admit the testimony of black persons).

34. *E.g.,* Seneca Falls Declaration of Sentiments and Resolutions, *supra* note 17. *See also* Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (using a synthetic interpretation of the constitution to examine the history of the women’s suffrage movement and to link the Fourteenth Amendment with the Nineteenth Amendment).

35. *See* *Orr v. Orr*, 440 U.S. 268, 280–81 (1979) (finding that gender was not an “accurate proxy” for financial need, overturning a statute that required husbands to pay alimony but did not similarly require wives to pay alimony); *Reed v. Reed*, 404 U.S. 71, 74 (1971) (finding that an arbitrary preference established in favor of males cannot stand in the face of the Fourteenth Amendment’s commitment that no state deny the equal protection of the laws to any person); *see also* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (examining the history of contemporary laws providing reduced criminal penalties for rapes committed by husbands against their wives). Women and men are still treated differently under United States law in many circumstances. *E.g.,* *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (differentiating between women and men who have illegitimate children on foreign soil); *see also* *Michael M. v. Superior Court*, 450 U.S. 464, 472–73 (1981) (upholding the constitutionality of a statutory rape statute that distinguished between underage girls and underage boys).

36. *See, e.g.,* Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/RES34/180 (Dec. 18, 1979), [hereinafter CEDAW] (defining “discrimination against women and set[ting] up an agenda for national action to end such discrimination”); *see also* Goal 3: *Promote Gender Equality and Empower Women*, THE UNITED NATIONS MILLENNIUM DEVELOPMENT GOALS, <http://www.un.org/millenniumgoals/gender.shtml> (last visited Oct. 21.

denying women full access to legal personhood continue to impact women's lives.<sup>37</sup> And while gender is not the only limitation to membership in the legal community of persons,<sup>38</sup> one's status as a woman or a man has historically shaped the way in which legal persons are recognized and legal personhood is realized.

In the twenty-first century, legal personhood has emerged as a contested issue of which feminist theory should take account. Currently, human beings that have been born are considered persons for the purposes of law, even if they are not treated equally in terms of status.<sup>39</sup> From the halls of the legislature, to

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2012) (stating as Goal 3: "to promote gender equality and to empower women" through "[e]liminat[ing] gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015"). According to the Global Justice Centre, there are also numerous international nonprofit organizations working for both material gender equality and legally recognized gender equality. See *Women's Rights*, GLOBAL JUSTICE CENTER, <http://www.globaljusticecenter.net/research-links/womens-rights.html> (last visited Oct. 21, 2012).

37. For example, Afghanistan ratified CEDAW in 2003. See CEDAW, *supra* note 36. But in 2009, President Hamid Karzai signed a family law that "negates the need for sexual consent between married couples, tacitly approves child marriage and restricts a woman's right to leave the home." Jerome Starkey, *Afghan Leader Accused of Bid to 'Legalise Rape'*, THE INDEPENDENT, March 31, 2009, available at <http://www.independent.co.uk/news/world/asia/afghan-leader-accused-of-bid-to-legalise-rape-1658049.html>. Also, while the U.S. is a signatory to CEDAW, it has not ratified it into law. See CEDAW, *supra* note 36. Current U.S. immigration law still distinguishes citizenship requirements based on gender outside the marriage construct. See 8 U.S.C. § 1422 (2006) ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex, or because such person is married."). Yet the Supreme Court of the United States has validated laws that treat U.S. citizen mothers and fathers differently in terms of the requirements that must be met in order to pass on citizenship to a child born outside of marriage. See *Nguyen*, 533 U.S. at 62.

38. The legal personhood of women and the citizenship rights arising in part from legal personhood has also been influenced by other aspects of identity. Structural impediments arising from discrimination due to undocumented citizenship status, race, sexual orientation, disability and class also play an important role in shaping the contours of legal personhood for individuals on the ground.

39. Not all human beings are equally treated to all of the rights of personhood. Children are persons whose status as a minor insulates them from some liabilities and duties and denies them access to particular rights and privileges. In both historical and contemporary contexts children have been treated as if they were property. See Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 261 (1995) (noting that before the nineteenth century children were regarded as chattel); Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 252 (1999) (arguing custody decisions often reflect interests of parents and treat children like chattel). Undocumented persons, who lack the robust protections of citizenship, have also been excluded from the community of persons in terms of basic legal rights and privileges. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1782 (2010) (examining how immigrants "obliquely or indirectly" assert rights under law); Fran Ansley, *Constructing Citizenship Without a Licence: The Struggle of Undocumented Immigrants in the USA for Livelihoods and Recognition*, 4 STUD. SOC. JUST. 165, 165-66 (2010) (detailing a successful campaign for undocumented immigrants to receive state issued licenses in Tennessee). Additionally, undocumented persons have been excluded for constitutional purposes as well. See generally M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557 (2008) (examining the use of "citizen" as synonymous with "person" in Fourth Amendment cases); L. Darnell Weeden, *Standing and Speaking Constitutional Truth to Local Power Regarding Undocumented Immigrant Residents Dwelling with We the People of the United States*, 34 S. ILL. U. L.J. 55 (2009) (arguing that undocumented immigrants are persons for the purposes of the Due Process Clause of the Fourteenth Amendment).

the chambers of the courtroom, issues concerning the threshold of legal personhood have re-emerged for a diverse array of persons and non-persons. Legal personhood for corporations and other juridical persons, human embryos and fetuses, animals and human/animal hybrids and others has become the subject of controversy, activism and political action. The following sections highlight the problem of personhood by examining law reform efforts from various parties, including local grass roots activists and high-profile national figures. It examines the problem of personhood with a focus on controversies concerning corporations, fetuses and embryos and non-human animals.

#### A. The Controversy of Corporate Personhood

Corporate personhood has become a controversial proposition in the wake of the Supreme Court's 2010 decision, *Citizens United v. Federal Election Commission*.<sup>40</sup> This decision expanded political speech rights for corporations, noting that corporations and other associations should not be treated differently under the First Amendment simply because they are not individuals.<sup>41</sup> After all, "[t]he First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."<sup>42</sup> Drawing on these principles, one could surmise that the First Amendment protects the speech of corporations in part because of the individuals collectively associating behind the corporate form.<sup>43</sup> While some have hailed the decision as a positive expansion of political speech for associations<sup>44</sup> and a logical extension of the Supreme Court's jurisprudence in First Amendment law,<sup>45</sup> others have argued it is a problematic expansion of political rights for corporations and corporate personhood.<sup>46</sup> One of the most

40. 130 S. Ct. 876, 886 (2010) (holding that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether").

41. See *id.* at 898–900.

42. *Id.* at 917 (Roberts, J., concurring).

43. Justice Scalia's spirited concurrence, in particular, highlights the role of individuals in corporations and associations. See *id.* at 929 (Scalia, J., concurring). According to Justice Scalia, "[t]he [First] Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion." By highlighting the role of the individual in a collective association, this reading of *Citizens United* reveals a continued deference to a theoretical "take" on these matters that mirrors the nineteenth century "organicism view" of the corporation, regarding corporations as collectives that have life separate from the individuals that form them. Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1469–70 (1987). However, it is important to note that corporations, like other legally recognized collective associations, can be created by single individuals or groups of individuals. Instead of being essentially collective, one commentator even characterized it as "essentially a collection of capital." Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 650 (1989).

44. See Bradley Smith, *Corporations Are People, Too*, NPR (Sept. 10, 2009), <http://www.npr.org/templates/story/story.php?storyId=112711410>.

45. See Adam Liptak, *A Drop in the Bucket*, COLUM. L. SCH. MAG. (Fall 2010), available at <http://www.law.columbia.edu/magazine/54665/a-drop-in-the-bucket>.

46. Activist groups created websites against corporate personhood, arguing for a constitutional amendment repealing corporate personhood. See, e.g., Ralph Nader, *Corporate Personhood Should Be*

interesting side effects of this debate has been the impact it has had on the popular imagination, as activists and commentators perpetuate the perception that corporate personhood provides a foundation for ensuring legal recognition and special constitutional protections for corporate collective entities.<sup>47</sup> Although *Citizens United* was not explicitly decided in reference to corporate personhood, some activists<sup>48</sup> claim that the root of the problem with the decision lies with the underlying conceptual assumption that “corporations are persons.”<sup>49</sup> Even though the *Citizens United* decision concerned free speech, it has made corporate personhood controversial in the United States.<sup>50</sup> Activists have tried to engage the popular political imagination with the problem of corporate personhood.<sup>51</sup> While some have been absurdist<sup>52</sup> and some have been

*Banned Once and For All, Outrageous SCOTUS Decision Should Reignite Most Necessary of Debates*, COMMON DREAMS (Jan. 21, 2010), <http://www.commondreams.org/view/2010/01/21-10>; Robert Koehler, *Corporate Personhood*, HUFFINGTON POST, (Jan. 22, 2010, 5:15 PM), [http://www.huffingtonpost.com/robert-koehler/corporate-personhood\\_b\\_433615.html](http://www.huffingtonpost.com/robert-koehler/corporate-personhood_b_433615.html); *Corporations v. Democracy*, WOMEN’S INT’L LEAGUE FOR PEACE & FREEDOM, <http://www.wilpf.org/cvd> (last visited Oct. 21, 2012); Mike Ferner, *This Isn’t About Peace. It’s About Democracy*, PROGRAM ON CORP., L. & DEMOCRACY (Mar. 14, 2011), [http://www.poclaid.org/BWA/2011/BWA\\_2011\\_MAR](http://www.poclaid.org/BWA/2011/BWA_2011_MAR).

47. See generally Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood* in *Citizens United*, 61 CASE W. RES. L. REV. 497 (2010) (exploring how corporate law informs the analysis of corporate speech in a post-*Citizens United* context).

48. Outrage over corporate personhood was a reoccurring theme of the Occupy Wall Street Protests in 2011. According to NPR’s Melissa Block, “[a]mong the demands of Occupy Wall Street protestors is this, an end to corporate personhood. That demand has been spelled out on protestors signs, like one that reads: I’ll believe corporations are people when Texas executes one.” *What is the Basis for Corporate Personhood?*, NPR All Things Considered (October 24, 2011), available at <http://www.npr.org/2011/10/24/141663195/what-is-the-basis-for-corporate-personhood>. Similarly, Susanna Kim Ripkin notes, drawing on photographic essays concerning Occupy Wall Street, that protestors carried signs reading, “End Corporate Personhood” and “Corporations are not People.” Susanna Kim Ripkin, *Citizens United, Corporate Personhood and Corporate Power: The Tension between Constitutional Law and Corporate Law* (Chapman. Univ. Law Research Paper No. 12-10, Aug. 22, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2134465&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134465&download=yes) (arguing that the strategy of eliminating corporate personhood is wrong-headed in part because the concept of personhood is indeterminate).

49. In discussing the post-*Citizens United* status quo, former Secretary of Labor Robert Reich notes, “[f]ive members of the Supreme Court think corporations are people. Mitt Romney agrees. And now the minority leader of the Senate – the highest-ranking Republican official in America – takes this logic to its absurd conclusion: If corporations are people, they must be capable of feeling harassed and intimidated if their shareholders or consumers don’t approve of their political expenditures . . . Hell, they might even throw a tantrum. Or cry.” Robert Reich, *Robert Reich: Corporate Feelings*, MARKET PLAYGROUND (June 18, 2012), <http://marketplayground.com/2012/06/18/robert-reich-corporate-feelings>; see also, *More Occupy Wall Street Posters*, LAYMAN’S LAYOUT (Dec. 7, 2012), <http://laymanslayout.wordpress.com/2011/12/07/layout-more-occupy-wall-street-posters>.

50. One poll reported that eighty percent of people surveyed disagreed with *Citizens United*. *Washington Post-ABC News Poll*, Question 35, WASH. POST, [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_021010.html?sid=ST2010021702073](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html?sid=ST2010021702073) (last visited Oct. 21, 2012).

51. Some activists were arguing against corporate personhood long before the *Citizens United* decision. E.g., Ralph Nader & Carl J. Meyer, Op-Ed., *Corporations Are Not Persons*, N.Y. TIMES, April 9, 1988, available at <http://www.nytimes.com/1988/04/09/opinion/corporations-are-not-persons.html>.

52. To date, two women have made attempts to marry corporations in order to generate conversation. Seattle resident Angela Vogel managed to wed a corporation after persuading a King County clerk to issue a marriage license. *Seattle Woman Weds Corporation*, RT.COM (July 19, 2012), <http://rt.com/usa/news/corporation-corporate-reifman-person-594>. Although the license was

outrageous,<sup>53</sup> many other engagements with corporate personhood have attempted to prompt serious law reform.<sup>54</sup>

Various political interest groups have taken on the cause of repealing constitutional corporate personhood, and state and local governments have enacted legislation to address the problems raised thereby. Legislation designed to dismantle corporate personhood has been introduced in Montana,<sup>55</sup> Vermont<sup>56</sup> and Washington.<sup>57</sup> On March 8, 2011 in Minnesota, a state constitutional amendment for the 2012 general election was introduced that would limit the definition of person to natural persons, excluding corporations from constitutional personhood.<sup>58</sup> Similar amendments and initiatives have been adopted by other local governments,<sup>59</sup> and proposed by political parties<sup>60</sup> and

ultimately revoked, Vogel did manage to marry her putative spouse Corporate Person in a ceremony. Jake Ellison, Evan Hoover & Mallory Kaniss, *Why King County Nixed Woman's Marriage to a Corporation in Seattle*, KPLU.ORG (July 18, 2012), <http://www.kplu.org/post/why-king-county-nixed-woman-s-marriage-corporation-seattle>. Sarah "Echo" Steiner has been seeking a nice corporation to marry. Keith Goetzman, *Woman Wants to Marry a Corporation*, PALM BEACH POST NEWS (January 18, 2011), <http://www.palmbeachpost.com/news/cerabino-shes-ready-to-marry-and-means-business-1194103.html>. She has been seeking a "well-endowed" entity for an open marriage because she is, after all, "not enough to satisfy one corporation [and] they will be screwing other people." *Thom Hartman Show*, BIG PICTURE (Jan. 21, 2011), <http://www.thomhartmann.com/bigpicture/attractive-woman-seeks-well-endowed-corporation-marriage>.

53. Murray Hill Inc. has taken steps to run for Congress in Maryland's Eighth Congressional District. Catherine Rampell, *Corporation Says It Will Run for Congress*, N.Y. TIMES ECONOMIX (February 2, 2010, 12:14 PM), <http://economix.blogs.nytimes.com/2010/02/02/corporation-says-it-will-run-for-congress>.

54. Susan Kim Ripkin, *Corporate First Amendment Rights after Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations* (Chapman Univ. Law Research Paper No. 10-37, Nov. 3, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1702520](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1702520).

55. Marnee Banks, *Initiative 166 Qualifies for Montana Ballot*, KRTV.COM (July 12, 2012), <http://www.krtv.com/news/initiative-166-qualifies-for-Montana-ballot/>.

56. On January 21, 2011, a group of Vermont state senators, headed by Virginia Lyons, introduced a Joint Senate Resolution to urge the United States Congress to propose an amendment providing that corporations are not legal persons. The proposal declares that corporations are not human beings and they have been created to be subservient to human beings and the government. According to the legislators sponsoring the bill, it is the "only way to reverse this intolerable societal reality" J.R. S. 11 (Vt. 2011), available at <http://www.leg.state.vt.us/docs/2012/journal/SJ110121.pdf#page=1>. Some sources in the Senate claim the bill has a "good chance of passing." Christopher Ketchum, *Resolution Calling to Amend the Constitution Banning Corporate Personhood Introduced in Vermont*, ALTERNET (January 22, 2011), <http://www.alternet.org/story/149620/>.

57. In Washington state, bills were introduced in the state house, H.J. Mem'l 4005, 62nd Leg., 2011 Reg. Sess. (Wash. 2011) and the senate, S.J. Mem'l 8007, 62nd Leg., 2011 Reg. Sess. (Wash. 2011). Like the Vermont bill, it urges the federal government to adopt a constitutional amendment that rescinds corporate personhood.

58. S.F. 683, 87th Leg. (Minn. 2011) (proposing to amend Minnesota Constitution article CIII, adding a section defining the term "person").

59. Monroe, Maine eliminated corporate personhood in June of 2010. TOWN OF MONROE LOCAL SELF-GOVERNMENT ORDINANCE (2010), <http://celdf.org/downloads/ME%20-%20Monroe%20Corporate%20Personhood%20Ordinance.pdf>; see Ethan Andrews, *Monroe rejects corporate personhood*, REPUBLICAN J. (June 16, 2010), <http://www.celdf.org/monroe-rejects-corporate-personhood>. Madison, WI voted by eighty-four percent that "only human beings, and not corporations, are entitled to constitutional rights." *Madison and Dane County WI Voters Support*

public interests groups.<sup>61</sup> These proposals either limit free speech rights for corporations<sup>62</sup> or actively deny corporations personhood.<sup>63</sup> At the federal level, Congressman Ted Deutch of Florida and Senator Bernie Sanders of Vermont introduced a constitutional amendment limiting constitutional rights to “natural persons” and eliminating constitutional rights for “for-profit corporations, limited liability companies, or other private entities established for business purposes.”<sup>64</sup>

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*Constitutional Amendment, MOVE TO AMEND* (April 6, 2011), <http://movetoamend.org/madison-and-dane-county-wi-voters-support-constitutional-amendment>. Seventy-eight percent of voters in Dane County, WI endorsed eliminating federal recognition for corporate personhood by changing the U.S. Constitution to explicitly state that only human beings and not corporations are entitled to constitutional rights. *Id.* Similar resolutions have been proposed in other local communities. *E.g., Ordinance to Deny Corporate Personhood: Lane County Oregon*, DEMOCRACYEUGENE (2011), <http://democracyeugene.pbworks.com/f/ordinance+to+Deny+Corporate+Personhood+Oregon.pdf>. The recent events were preceded by other local attempts to eliminate corporate personhood. For example, in 2000, Point Arena, CA passed a resolution rejecting corporate personhood and stating that corporations are not persons for the purposes of the Fourteenth Amendment. *Northern California City Challenges Corporate Personhood*, BIG MED., (June 2000), <http://www.nancho.net/corporation/cparena.html>. In Pennsylvania, Licking township has passed similar ordinances against corporate personhood. *First Local Government in the United States Refuses to Recognize Corporate Claims to Civil Rights: Bans Corporate Involvement in Governing*, DEMOCRACY UNITED, <http://www.ratical.org/corporations/abolishcph.html> (last visited Oct. 23, 2012).

60. Brian Gunn, *Democrats Pass Resolution Opposing “Money as Speech” and Corporate Personhood*, WASH. LIBERALS (May 2, 2011, 10:57 PM), <http://waliberals.org/democrats-pass-resolution-opposing-%E2%80%9Cmoney-as-speech%E2%80%9D-and-corporate-personhood/2011/05/02>. A resolution against corporate personhood was also drafted for membership review and discussion. *Proposed Resolution 1 - Abolish Corporate Personhood*, UNION COUNTY DEMOCRATS, (March 3, 2011, 1:55 PM), [http://union.oregondemocrats.org/Abolish\\_Corporate\\_Personhood](http://union.oregondemocrats.org/Abolish_Corporate_Personhood) (“A Resolution by the Democratic Party of Union County Oregon to Legalize Democracy and Abolish Corporate Personhood.”).

61. *E.g., An Amendment to Preclude Corporations from Claiming Bill of Rights Protections*, RECLAIM DEMOCRACY, [http://reclaimdemocracy.org/political\\_reform/proposed\\_constitutional\\_amendments.html](http://reclaimdemocracy.org/political_reform/proposed_constitutional_amendments.html) (last visited Nov. 8, 2012).

62. The Massachusetts state Democratic Party passed a resolution “to deny corporations the free speech rights of ordinary persons under the First Amendment.” David Swanson, *Massachusetts Democratic Party Passes Resolution to Protect Free Speech Rights for People*, ABOLISH CORP. PERSONHOOD NOW (June 8, 2010), <http://acpn.citizenact.org/2010/06/massachusetts-democratic-party-passes-resolution-to-protect-free-speech-rights-for-people/>.

63. The Nevada County California Democratic Party adopted a broad resolution to eliminate corporate personhood in February of 2011. *Resolutions*, NEVADA COUNTY DEMOCRATIC CENTRAL COMMITTEE, <http://www.nevadacountydemocrats.com/page.php?21> (“Move to Amend call to Action: California Democrats will pass a Resolution to Legalize Democracy and Abolish Corporate Personhood.”). In Washington State, the Democratic Central Committee passed a resolution “Amending the U.S. Constitution to Reserve Constitutional Rights for People, Not Corporations.” Brian Gunn, *Democrats Pass Resolution Opposing “Money as Speech” and Corporate Personhood*, WASH. LIBERALS (May 2, 2011), <http://waliberals.org/democrats-pass-resolution-opposing-%E2%80%9Cmoney-as-speech%E2%80%9D-and-corporate-personhood/2011/05/02/>. In Union County Oregon, the Democratic Party presented a resolution to abolish corporate personhood for a vote on March 3, 2011. *Proposed Resolution I - Abolish Corporate Personhood*, UNION COUNTY DEMOCRATS (Mar. 3, 2011), [http://union.oregondemocrats.org/Abolish\\_Corporate\\_Personhood](http://union.oregondemocrats.org/Abolish_Corporate_Personhood).

64. H.R.J. Res. 90, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hjres90ih/pdf/BILLS-112hjres90ih.pdf>; S.J. Res. 33, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/query/z?c112:S.J.RES.33>: (prohibiting private for-profit entities from making campaign contributions). Note that non-profit entities, charitable entities and unions are not

## B. Fetuses and Embryos: The “Pro-Life” Personhood Movement

Corporations are not the only legal subjects that may present significant challenges to the current conception of legal personhood in the United States. While some have attempted to roll back the expansion of legal recognition for corporate persons, others have made attempts to expand the community of legal persons in the United States by seeking recognition for fetuses and embryos. While the U.S. Constitution does not define the concept of a person explicitly, according to the Supreme Court, “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>65</sup> Some states, however, have made efforts to expand constitutional protections for fetuses and embryos. The state of Georgia has been on the cutting edge of these legal efforts. In 2009, the Option of Adoption Act was passed, which changed the definition of “child” to include a human embryo.<sup>66</sup> That same year, S.R. 328 was passed. This bill acknowledged “the right to life is paramount and the need for protection of the lives of the innocent at every stage.”<sup>67</sup> Georgia legislators have introduced a significant amount of legislation proposing expanded personhood protections for fetuses and embryos. For example, in 2007, the Georgia state house proposed HR 536, the “Paramount Right to Life” amendment. This amendment would extend constitutional protection to unborn children “from the moment of fertilization without regard to age, race, sex, health, function, or condition of dependency.”<sup>68</sup> In 2009, a proposed amendment to the Georgia Constitution stated that the “right to life is vested in each human being from the moment of fertilization.”<sup>69</sup> In 2011, this amendment was reintroduced as H.R. 1072.<sup>70</sup>

Georgia is not alone. Over two thirds of the states have passed legislation providing some legal recognition of fetuses for the purposes of homicide,<sup>71</sup> or for

included in these limitations on constitutional legal personhood.

65. *Roe v. Wade*, 410 U.S. 113, 157–58 (1973). In 2010, select counties of Georgia voters decidedly supported an amendment to the Georgia Constitution that “the right to life is vested in each human being from their earliest biological beginning until natural death.” *Georgia Voters Say ‘Yes’ to Personhood Amendment*, CHRISTIAN NEWS WIRE (July 22, 2010), <http://www.christiannewswire.com/news/391914486.html>. The poll, however, did not have a binding legal effect. Instead, the polling is an indicator of public sentiment and the Georgia legislature must take action to pass the amendment. *Id.*

66. GA. CODE ANN. § 19-8-40 (2009), available at <http://www.legis.ga.gov/Legislation/20092010/96494.pdf>. In the act, “embryo” is defined as “an individual fertilized ovum of the human species from the single-cell stage to eight-week development.” *Id.*

67. S.R. 328, 150th Gen. Assemb., 1st Sess. (Ga. 2009).

68. H.R. 536, 149th Gen. Assemb., 1st Sess. (Ga. 2007).

69. H.R. 5, 150th Gen. Assemb., 1st Sess. (Ga. 2009).

70. H.R. 1072, 151st Gen. Assemb., 1st Sess. (Ga. 2011). A similar resolution, S.R. 153, was proposed by the Senate. See S.R. 153, 151st Gen. Assemb., 1st Sess. (Ga. 2011).

71. Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL’Y \_\_\_ (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2121574](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2121574); see e.g., ALA. CODE § 13A-6-1(a)(3) (2006) (defining a person for the purposes of homicide as all human beings including unborn children in utero); ALASKA STAT. ANN. § 11.41.150 (West 2011) (defining the murder of an unborn child); TENN. CODE ANN. 39-13-214 (2011) (including viable fetuses in the definition of persons for the purposes of homicide). Some states have recognized this liability

other purposes.<sup>72</sup> Other states have made laws that, while stopping short of recognizing fetal personhood, limit abortion on the basis of fetal pain.<sup>73</sup> Legislative efforts have even been proposed to expand the community of persons to include fetuses and embryos from the time of conception.<sup>74</sup> In other states,

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in case law as well. In Wyoming, criminal liability can arise from the crime committed against the mother and the death of the unborn fetus. *E.g.*, *Goodman v. State*, 601 P.2d 178, 185 (Wyo. 1979) (holding that an individual can be prosecuted for the crime of assault and battery on a mother and the death of the fetus incident to the criminal act). Wyoming has also recently considered legislation that would make killing a fetus homicide under law. *See* H.B. 132, 60th Leg., Budget Sess. (Wyo. 2010) (stating that it is a crime to kill a woman if one knew she was pregnant). Similar legislation has been proposed in various states. *See generally*, H.B. 30, 50th Leg., Reg. Sess. (N.M. 2011) (proposing legislation in New Mexico entitled *The Unborn Victims of Violence Act*); H.B. A01673, 2011 Leg., 234th Sess. (N.Y. 2011) (proposing legislation in New York); S.B. 04347 2011 Leg., 234th Sess. (N.Y. 2011). In 2010, Vermont State Senator Victor Illuzi introduced a fetal homicide bill, which failed. S. 175, 2010 Leg., Reg. Sess. (Vt. 2010). In 2010, the Vermont legislature did not consider a Fetal Homicide Bill. *Vermont Senate: Fetal Homicide Bills Won't Be Heard*, COVENANT NEWS (Feb. 10, 2010), <http://www.covenantnews.com/abortion/archives/066098.html>.

72. *See e.g.*, ALASKA STAT. ANN. § 11.41.160 (West 2006) (defining the manslaughter of an unborn child); N.C. GEN. STAT. ANN. §§ 14-23.1—23.8 (West 2011); W. VA. CODE § 61-2-30(c) (2011) (recognizing a fetus or embryo as a separate victim distinct from its mother in a crime of violence against the person); TENN. CODE ANN. 39-13-107 (2011) (including viable fetuses in the definition of persons for the purposes of assault); S.D. CODIFIED LAWS § 21-5-1 (2004) (defining fetuses as persons for the purposes of wrongful death statutes). Many states are considering “heartbeat” bills that would expand fetal personhood and limit abortions. For example, the Ohio Heartbeat Bill would outlaw abortion after a heartbeat can be detected, which is generally between six and seven weeks. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Oh. 2011). *See also* H.B. 3043, 80th Leg., Reg. Sess. (WV 2011) (entitled *The Grieving Parents Act*, amending W. VA. CODE § 16-5-21 and providing for reporting the death of a fetus through miscarriage, death and terminations and offering a birth certificate for grieving parents); Douglas E. Rushton, *The Tortious Loss of a Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice*, 61 S.C. L. REV. 915 (2010) (discussing prenatal injury).

73. Nebraska was the first state to pass the Pain-Capable Unborn Child Protection Act in 2010. Dan Harris, *Nebraska Passes Controversial Abortion Ban*, ABC NEWS (Apr. 13, 2010), [http://abcnews.go.com/WN/Supreme\\_Court/nebraska-passes-controversial-abortion-ban/story?id=10361705](http://abcnews.go.com/WN/Supreme_Court/nebraska-passes-controversial-abortion-ban/story?id=10361705). The law makes it a felony to perform an abortion after twenty or more weeks unless the mother’s life is in danger, requires physicians performing abortions to report the procedure within thirty days to be compiled in an annual report and provides a right of action for women who have had abortions in violation of the law against the physician performing the abortion, NEB. REV. STAT. ANN. § 28-3,102 (LexisNexis 1995), L.B. 1103, 102nd Leg., Reg. Sess., (Neb. 2011). Oklahoma has also passed a similar act, the Pain Capable Unborn Child Protection Act. OKLA. STAT. ANN. tit. 63, § 1-745.1 (West 2011), H.B. 1888, 50th Leg., 2011 1st Reg. Sess. (Okla. 2011). And in Utah, the legislature has passed a law requiring fetuses that are about to be aborted to be given some sort of pain medication. *See* UTAH CODE ANN. § 76-7-305 (West 2011). Activists in many other states have tried to expand the legal recognition of fetuses. For example, Alabama enacted the Pain-Capable Unborn Child Protection Act. ALA. CODE § 26-23B (2011). The Pain-Capable Unborn Child Protection Act was introduced to the Arkansas House, but the bill died in the House Committee, H.B. 1887, 88th Gen. Assemb., Reg. Sess. (Ark. 2011). The Act would have banned abortions after twenty weeks unless they are performed to save a mother’s life and requires doctors to report abortions performed to the Arkansas Department of Health. *Id.* The bill mirrored a law passed by Nebraska in 2010 which was the first of its kind in the United States. Robert Dean, *Controversial Abortion Restriction Law Introduced in Arkansas Legislature*, EXAMINER (Mar. 4, 2011), <http://www.examiner.com/government-in-little-rock/controversial-abortion-restriction-law-introduced-arkansas-legislature>.

74. *See e.g.*, H.B. 409, 2011 Leg., Reg. Sess. (Ala. 2011) (recognizing fetuses as persons by amending the state constitution); H.B. 405, 2011 Leg., Reg. Sess. (Ala. 2011) (amending “persons” for the purposes of the Ala. Code of 1975); S.B. 301, 2011 Leg., Reg. Sess. (Ala. 2011) (expanding “persons” to include all human beings from the moment of conception, subsequently voted down). In

2009, initiative 09LPHB, An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children, was proposed. It would recognize the legal personhood of fetuses. Initiative 09LPHB, *An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children*, STATE OF ALASKA DIVISION OF ELECTIONS (2010), [http://www.elections.alaska.gov/pbi\\_ini\\_status\\_list.php#09LPHB](http://www.elections.alaska.gov/pbi_ini_status_list.php#09LPHB). The Natural Right to Life Amendment was rejected by the Alaska Attorney General's Office as unconstitutional. Roger Maynard, *Natural Right to Life Initiative Fails AG Scrutiny*, HAINES ALASKA NEWS AND COMMENT (January 10, 2011), <http://hainesnews.net/2011/01/10/natural-right-to-life-initiative-fails-ag-scrutiny-alaska-attorney-general-recommends-non-certification-on-constitutional-grounds> (affirming the natural right to life and body of the unborn child supersedes the rights of the mother). In 2010, the Sanctity of Life in Alaska Bill was also declared unconstitutional. *Review of 10TSLA Initiative Application*, ALASKA ATT'Y GEN. OFFICE, JU2010-201-751 (Oct. 4, 2010), [http://www.elections.alaska.gov/petitions/10TSLA/Attorney\\_General's\\_Opinion.pdf](http://www.elections.alaska.gov/petitions/10TSLA/Attorney_General's_Opinion.pdf). Although the measure received enough signatures to be placed on the ballot, it missed its one year filing deadline. *Id.* In 2009, Florida petitioners collected signatures to amend the Florida Constitution so "person" and "natural person" would apply "from the beginning of biological development." Patrick B. Craine, *Florida Pro-Life Group Announces Personhood Amendment Campaign*, LIFE SITE NEWS (September 11, 2009, 11:15 AM), <http://www.lifesitenews.com/news/archive/ldn/2009/sep/09091107>. Petitioners need 676,811 signatures to make the ballot. Virginia Chamlee, *Progress Florida Questions Scott's Stance on Proposed 'Personhood' Amendment*, FLA. INDEPENDENT (Nov. 18, 2010, 12:12 PM), <http://floridaindependent.com/15240/progress-florida-questions-scotts-stance-on-proposed-personhood-amendment>. The 2010 Hawaii Senate passed S.C.R. 161, requesting the legislature to define personhood and protect the status and legal rights of a natural person. S.C.R. 161, 25th Leg., Reg. Sess. (Haw. 2010). *See also* S.R. 71, 25th Leg., Reg. Sess. (Haw. 2010). Iowa H.F. 153 proscribed that life begins at conception, "and each life, from that moment, is accorded the same rights and protections guaranteed to all persons by the Constitution." H.F. 153, 84th Gen. Assemb., Reg. Sess. (Iowa 2011). H.J.R. 3 proposed an amendment to the Iowa Constitution that would specify that "'person' applies to all human beings. . . from the beginning of their biological development, including the single-cell human embryo." H.J.R. 3, 84th Gen. Assemb., Reg. Sess., (Iowa 2011). However, the bill did not make it out of subcommittee. Similarly, S.J.R. 2 did not make it out of subcommittee. S.J.R. 2, 84th Gen. Assemb., Reg. Sess. (Iowa 2011). H.J.R. 3 was identical to H.J.R. 2003, which failed in 2010. H.J.R. 3, 83th Gen. Assemb., Reg. Sess. (Iowa 2010). An amendment to the Kansas Constitution recognizing personhood from the biological beginning of human development did not pass the two-thirds majority required by both houses to place the measure on the ballot. *Personhood Kansas Launches Campaign to Amend Constitution*, LIFE SITE NEWS (Jan. 26, 2010, 12:15 PM), <http://www.lifesitenews.com/news/archive/ldn/2010/jan/10012602>. Recent advocates collected over 4,000 signatures. Fred Mann, *Kansas groups push stricter abortion limits*, THE WICHITA EAGLE (July 17, 2011), available at <http://www.kansas.com/2011/07/17/1936557/groups-push-stricter-abortion.html#storylink=misearch>. A 2009 Montana measure defining persons as human beings "at all stages of human development" died in standing committee. S.B. 406, 2009 Leg., Reg. Sess. (Mont. 2009). Similarly, H.B. 490, which passed the Montana House in March 2011, also died in the Senate. H.B. 490, 2011 Leg., Reg. Sess. (Mont. 2011) Nevada activists proposed to amend the state constitution to define person to include every human being possessing the human genome in 2009. STATE OF NEVADA INITIATIVE PETITION 1250 (2009), available at <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1250>. The Nevada Supreme Court rejected the ballot proposal. Steven Ertelt, *Nevada Personhood Amendment Loses Case at Supreme Court*, LIFE SITE NEWS (Dec. 21, 2010), <http://www.lifenews.com/2010/12/31/nevada-personhood-amendment-loses-case-at-supreme-court>. Virginia H.B. 112, which deemed human beings persons for constitutional purposes and provided that fetuses have protected interests, was unsuccessfully proposed in the state House in 2010. H.B. 112, 2010 Leg., Reg. Sess. (Va. 2010). In 2011, House and Senate bills were introduced to provide legal personhood to fetuses. *See* H.B. 1440, 2011 Leg., Reg. Sess. (Va. 2011); S.B. 1378, 2011 Leg., Reg. Sess. (Va. 2011). In South Dakota, similar bills were proposed in the House and Senate in 2009. *See* H.R. 881, 111th Cong., 1st Sess. (S.D. 2009); S. 346, 111th Cong., 1st Sess., (S.D. 2009). South Dakota defines a fetus as a human being. "'Human being,' an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." S. D. CODIFIED LAWS § 34-23A-1(4) (2011) (upheld in *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008)). Other states have proposed similar

activists have attempted to expand fetal personhood through ballots initiatives and referendum.<sup>75</sup> And, while such campaigns have not always been successful,<sup>76</sup> activists committed to expanding legal personhood to include fetuses have been persistent in their efforts to make change in what they characterize as a crucial contemporary civil rights struggle.<sup>77</sup>

Embryos and other pre-birth human tissue also present a challenge to the contours of legal personhood. Reproductive technology has facilitated the possibility of separate existence for human tissue, creating indeterminacy in law for a variety of individuals, entities and collectives. For example, questions about what happens to unimplanted embryos may arise for potential parents and for the facilities housing these unused embryos. While some of these issues may be resolved through contracts between potential parents and the facilities in question, or between the potential parents themselves, the legal status of embryos does not lend certainty to these scenarios. In the United States, embryos currently occupy a place of liminal legal recognition, receiving different levels of protection and recognition in different jurisdictions. In some jurisdictions they are juridical persons,<sup>78</sup> while in others they are property subject to contract law<sup>79</sup> or occupy an intermediate space between persons and property.<sup>80</sup>

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legislation. See S.B. 616, 2011 Leg., Reg. Sess. (S.C. 2011); H.B. 1571, 2011 Leg., Reg. Sess. (Okla. 2011) (defining “person” as a “human being at all stages of human development of life, including the state of fertilization or conception, regardless of age, health, level of functioning, or condition of dependency”).

75. For example, activists in Oregon proposed to amend the state constitution with the Oregon Personhood Amendment for the ballot through initiative 30. NEWS RELEASE, OFF. OF SEC. OF STATE (Oct. 14, 2008), <http://www.sos.state.or.us/elections/irr/2010/030text.pdf>. The proposed amendment affirmed a right to life for all human beings and defined persons as all human beings at every stage in biological development including fertilization. Ultimately, the amendment never made it to the ballot and was not certified. OR. SEC. OF STATE, ELECTIONS DIVISION, [http://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20100030..LSCYY](http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20100030..LSCYY).

76. *NH House Rejects Fetus as Person Bill*, MS. MAG. (Feb. 10, 2010), <http://www.msmagazine.com/news/uswirestory.asp?ID=12227> (detailing voter rejection of bill defining fetuses as persons for the purposes of first and second degree murder, manslaughter and negligent homicide). Colorado voters have twice rejected a statewide ballot initiative recognizing fetuses as persons. In 2008, the amendment was defeated, with seventy-three percent voting against the measure. Leslie Jorgensen, *Personhood Amendment Revised and Revived*, COLO. STATESMAN (July 3, 2009), <http://www.coloradostatesman.com/content/991130-personhood-amendment-revised-and-revived>. In 2010, voters rejected the amendment, by 70.5 percent, COLO. CUMULATIVE REP., available at <http://www.sos.state.co.us/pubs/electionresults2010/general/ColoradoReport.html>.

77. *What is Personhood?*, PERSONHOOD USA, <http://www.personhoodusa.com/what-is-personhood>.

78. LA. REV. STAT. ANN. § 9-123 (2011) (“An *in vitro* fertilized ovum exists as a juridical person until such a time as the *in vitro* fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.”); *but see in re Marriage of Witten*, 672 N.W.2d 768, 774–76 (Iowa 2003) (holding that the “best interest of the child” standard does not apply to an embryo); *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1259 (Ariz. Ct. App. 2005) (holding that Arizona law will not sustain a wrongful death action for the loss of embryos).

79. *York v. Jones*, 717 F. Supp. 421, 424–27 (E.D. Va. 1989) (holding that when embryos were deposited in a fertility clinic’s freezer, a bailment was created); *Kass v. Kass*, 696 N.E.2d 174, 180–82 (N.Y. 1998) (enforcing a prior contractual agreement between intended parents providing for a donation).

80. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (holding fetuses occupy an interim category

### C. Animal Activism and the Possibilities of Personhood

The legal status of animals has also become an area of scholarly and political dispute.<sup>81</sup> The exclusion of non-human animals from the legal status of personhood has theoretical roots that can be traced to the teleological worldview of ancient Greek and Roman philosophers,<sup>82</sup> and to metaphysical religious traditions of “Western” thought.<sup>83</sup> In the United States, as in many other English-speaking countries, non-human animals are not persons but “things.”<sup>84</sup> As things, animals are considered property and not generally eligible for the full scope of legal protections, rights and privileges enjoyed by human beings or other persons like corporations.<sup>85</sup> A recent case, brought by activists from the People for the Ethical Treatment of Animals (PETA) on behalf of killer whales owned by Sea World, held that non-human animals were not part of the community of persons recognized by the Thirteenth Amendment.<sup>86</sup>

The status of animals as property, however, does not mean that they have been completely excluded from the community of persons. Animals occupy the legal status of quasi-persons, being recognized as holding some rights and protections but not others. Although animals generally lack standing to sue on their own behalf, in some limited circumstances, non-human animals have been accorded standing to sue through a *guardian ad litem*.<sup>87</sup> Currently, one state, one

between persons and property because they have the potential for human life). This interim category approach has been used in various contexts. See generally *In re Marriage of Witten*, 672 N.W.2d 768 (embryos); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (2000) (embryos); *Janicki v. Hospital of St. Raphael*, 744 A.2d 963 (Conn. Super. Ct. 1999) (fetuses); *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. App. 2d Dist. 1993) (making a similar determination for vials of sperm).

81. Joseph Vining, *Beyond Genetics and Environment: Recognition in Animal Law of the Third Factor*, STATE B. MICH. ANIMAL L. SEC. NEWSL., 2009, at 13–14, available at <http://ssrn.com/abstract=1588979> (noting that treatment of animals has become one of the most important issues of the twenty-first century).

82. Steven M. Wise, *Legal Rights for Non-Human Animals: The Case of Chimpanzees and Bonobos*, 2 ANIMAL L. 179, 180–82 (1996) (providing a historical examination of the philosophical justification for the exclusion of animals from legal personhood).

83. See Taimie Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Personhood Primacy of Humans*, 39 RUTGERS L.J. 247, 268 (2008).

84. Steven M. Wise, *Animal Thing to Animal Person – Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61, 62 (1999) (providing seven strategies for attorney’s seeking to expand legal recognition for animals).

85. *Id.*

86. *Tilikum v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d. 1259, 1264 (S.D. Cal. 2012) (finding no case or controversy because the Thirteenth Amendment of the U.S. Constitution applies only to “humans, and not orcas”).

87. *Jones v. Butz*, 374 F. Supp. 1284, 1287–89 (S.D.N.Y. 1974) (granting standing to a plaintiff suing as the *guardian ad litem* for all livestock animals now and hereafter awaiting slaughter in the U.S.). In Rhode Island, guardian and owner means effectively the same thing. R.I. GEN. LAWS § 4-1-1(4) (2010) (“‘Guardian’ shall mean a person(s) having the same rights and responsibilities of an owner, and both terms shall be used interchangeably. A guardian shall also mean a person who possesses, has title to or an interest in, harbors or has control, custody or possession of an animal and who is responsible for an animal’s safety and well-being.”). It is unclear whether this should or will have additional legal consequences in the long term. Susan J. Hankin, *Making Decisions about Our*

Canadian city and 17 U.S. cities reference pet owners as “guardians.”<sup>88</sup> Animals have also received protection in the context of anti-cruelty and animal welfare laws,<sup>89</sup> and their owners may seek some legal protections for them in terms of tort law and the law of trusts and estates.<sup>90</sup> Animal activists have tried to increase legal recognition for great apes and other non-human hominids.<sup>91</sup> There is even some evidence that many countries are moving toward increased legal recognition for animals and their well-being.<sup>92</sup> Some argue that there has been a serious divergence in law between the U.S. and the E.U. concerning agriculture and animal welfare law.<sup>93</sup> Nevertheless, even the most well intentioned legal change does not have a substantial impact on the lives of many animals.<sup>94</sup> Although there are many who have challenged the division between persons and animals, and have argued that animals should be accorded more protections and rights,<sup>95</sup> legal definitions of personhood render animals different from, and less than, human beings in most cases.<sup>96</sup> The issue of legal personhood for animals will become even more complicated as the possibility of human-animal hybrids emerges,<sup>97</sup> artificial intelligence becomes more sophisticated,<sup>98</sup> and as things

*Animals' Healthcare: Does It Matter Whether We Are Owners or Guardians?* 2 STAN. J. ANIMAL L. & POL'Y 1, 2 (2009) (discussing alternative foundations for guiding animal health care decisions).

88. *Id.*

89. Luis E. Chiesa, *Why is it a Crime to Stomp on a Goldfish? – Harm, Victimhood Structure of Anti-Cruelty Offenses* 78 MISS. L.J. 1, 4 (2008) (noting that animal cruelty is a crime in all fifty states).

90. See David S. Favre, *Judicial Recognition of the Welfare of Animals – A New Tort*, 2005 MICH. ST. L. REV. 333, 345–352 (2005).

91. Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 164–67, 178–82 (2001) (discussing the Great Ape Project).

92. Pamela A. Vesilind, *Continental Drift: Agricultural Trade and the Widening Gap Between European Union and United States Animal Welfare Laws*, 12 VT. J. ENVTL. L. 223, 223–34 (2011).

93. *Id.*

94. Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. ANIMAL L. & ETHICS 175 (2006) (arguing that animal cruelty statutes are ineffective because they fail to address underlying aspects of exploitation); Peter Sankoff, *Five Years of the “New” Animal Welfare Regime: Lessons Learned from New Zealand’s Decision to Modernize its Animal Welfare Legislation*, 11 ANIMAL L. 7, 9, 13–33 (2005) (arguing that New Zealand’s 1999 reforms for hominids and great apes have only limited impact).

95. See generally PETER SINGER, *ANIMAL LIBERATION* (1975); Wendy A. Adams, *Human Subjects and Animal Objects: Animals as “Other” in Law*, 3 J. ANIMAL L. & ETHICS 29 (2009) (arguing for inclusion of animals in a human-centric legal system on their own terms); Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J. L. & PUB. POL'Y 314 (2007) (arguing for the adoption of a status for companion animals that lies between persons and property); Ani B. Satz, *Animals as Vulnerable Subjects: Beyond the Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65 (2009) (arguing that the legal treatment of animals should be guided by an Equal Protection for Animals framework that starts from the capacity for suffering); *but see* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009) (claiming that assigning rights to animals would be dramatic and harmful); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000) (arguing for a private right of action for persons to sue those who violate animal welfare protections).

96. *E.g.*, Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 503 (2004) (comparing the legal status of animals to that of cars).

97. The potential existence of human-animal hybrids, a trope invoking the mythical Minotaur and the Island of Dr. Moreau, blur boundaries and force a reconsideration of strict boundaries between human and animal in law. See D. Scott Bennett, *Chimera and the Continuum of Humanity: Erasing the Line of Constitutional Personhood*, 55 EMORY L.J. 347 (2006); Michael D. Rivard, Comment,

previously conceptualized as property come to be recognized as worthy of legal consideration.<sup>99</sup>

If current campaigns to expand or limit personhood in law are any measure, the problems of legal personhood will continue to plague us. Although some may claim that the questions of legal personhood have been settled,<sup>100</sup> or that the best course of dealing with questions of legal personhood is not to think about them,<sup>101</sup> the recent political action around fetal and corporate personhood—and the future challenges emerging from individuals and entities formerly conceptualized as things—shows us that the legal contours of personhood are open to new interpretations and possibilities. If, as W.E.B. Dubois noted, the problem of the twentieth century was the color line,<sup>102</sup> one could argue that the problem of the twenty-first century will become the lines we draw in law between persons and non-persons. In the wake of populist responses to the Supreme Court's expansion of political speech rights for collectives and associations shrouded in juridical personhood, the re-emerging debate around the legal status of embryos and fetal personhood and the arising issues regarding the potential recognition of animals as legal persons, it is time for legal scholarship—particularly in feminist theory—to re-engage with the question of legal personhood and its meaning.

The continuing challenges of personhood should matter to feminist legal theorists for several reasons. First, constructing the contours and limits of the community of persons has consistently been part of the feminist legal project. From the early efforts of suffragettes<sup>103</sup> to contemporary feminist efforts to examine intersectionality,<sup>104</sup> equality,<sup>105</sup> motherhood,<sup>106</sup> family,<sup>107</sup> sexuality<sup>108</sup> and

*Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425 (1992) (arguing that that the borders of constitutional personhood should be more permeable); see also Joseph Vining, *Human Identity: The Question Presented by Human-Animal Hybridization*, 1 STAN. J. ANIMAL L. & POL'Y. 50 (2008) (placing the question of human/animal hybrids in conversation with larger ethical questions).

98. See generally Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1232 (1992). Like artificial intelligence and robots, some other non-natural entities or things might push the boundaries of personhood. For example, Oliver Wendell Holmes has noted that “[a] ship is the most living of inanimate things. Servants sometimes say ‘she’ of a clock, but every one gives a gender to vessels.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 26 (1909).

99. E.g., Christopher Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (arguing that we “unlock” rights by granting them to slaves, trees, cows, history, rivers, rocks and all of society’s “untouchables”).

100. See Charles I. Lugosi, *If I Were a Corporation, I’d Be a Constitutional Person, Too*, 10 TEX. REV. L. & POL. 427, 439–40, 445–47 (2006) (arguing expectations of corporate personhood are too entrenched to revise).

101. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655 (1926); Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561 (1917).

102. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 24 (1994).

103. Seneca Falls Convention Declaration of Sentiments, *supra* note 17, at 79.

104. E.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

105. E.g., Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

106. E.g., Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000); Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992); MARTHA ALBERTSON FINEMAN, *THE NEUTERED*

subjectivity,<sup>109</sup> feminist legal theorists have challenged the legal and political status quo in an effort to secure increased recognition for women as persons.<sup>110</sup> Second, determinations about legal personhood have serious costs and benefits for women. An expansion of political speech for associations may flood a democratic conversation where women's voices are already marginalized. It may also enable powerful associations to deploy their economic privilege to blunt crucial substantive procedural rules designed to protect women, including protections from discrimination, family and medical leave, and worker protections. Moreover, efforts to expand legal recognition for fetuses and embryos – and the rights arising from it – may narrow the rights and reproductive choices of women. For these reasons, feminist legal theory should engage with the challenges of legal personhood.

## II. THE MEANING OF PERSONHOOD IN LAW: THE INDETERMINACY OF A LEGAL FICTION

The current controversies concerning legal personhood and the political efforts to limit or expand the community of persons reveal how the meaning of legal personhood is plagued by uncertainty and indeterminacy. In law, "person" is often used in a confusing fashion.<sup>111</sup> The boundaries of legal personhood may seem, at best, inconsistent and, at worst, arbitrary. Jurisdiction to jurisdiction, it is often unclear who counts as a person in law and why. Different jurisdictions have created different thresholds for personhood and different distributions of rights, privileges, protections and entitlements, such that the same individual or entity might be recognized as a person in one place and property in another.<sup>112</sup> And even within jurisdictions, the same entity might be treated as a member of the legal community of persons for one purpose, but not another.<sup>113</sup> This creates a legal regime in which different entities, individuals and collectives are treated differently, and in which similar entities, individuals or collectives are subject to different legal requirements and different degrees of recognition, even when they are similarly situated.

In the United States' common law tradition there is no discrete body of law

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MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) [hereinafter SEXUAL FAMILY].

107. E.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

108. E.g., Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267 (2008).

109. E.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000).

110. See discussion, *supra* pp. 48–52.

111. See Stephen C. Hicks, *On the Citizen and the Legal Person: Toward the Common Ground of Jurisprudence, Social Theory, and Comparative Law as the Premise of a Future Community, and the Role of the Self Therein*, 59 U. CIN. L. REV. 789, 866 (1991) (noting that person can be used to indicate the "individual, self, subject and citizen").

112. See *supra* pp. 57–61 (discussing embryos).

113. See *supra* pp. 61–65 (discussing animals).

containing all of the applicable provisions of legal personhood.<sup>114</sup> Legal persons constitute a diverse community that includes various individuals, entities and collectives in different ways for different jurisdictions.<sup>115</sup> To add to this diversity, the common law of legal personhood is disparate and diffuse, found in cases, statutes and treatises. In contrast, persons and the rights and liabilities arising from legal personality play a crucial role in the civil law tradition. In civil law jurisdictions, the law of persons is laid out in a codified set of principles and in private law. For example, the Louisiana Civil Code contains an entire section concerning the contours of legal personhood and its application in law.<sup>116</sup> Legal personhood is considered the “benchmark” for the distribution of rights and entitlements in civil law.<sup>117</sup> The law of persons has legal and ethical force and, in some cases, even makes distinctions between physical and moral persons.<sup>118</sup>

Many legal scholars reduce the Latin meaning of person, *Persōna*, to the mask worn by players in dramatic performances.<sup>119</sup> Max Radin noted that “there can be no doubt that ‘person’ is the Latin *persona*, the Greek *prosopon*, and that originally these words meant a ‘theatrical mask,’ familiar to us as one of the devices of the Greek and Roman theatre.”<sup>120</sup> The origins and meanings of *Persōna*, however, are more complex. Some who specialize in etymology claim that the word *Persōna* comes from an Etruscan word that is derived from the Greek word *prosopon*, meaning face.<sup>121</sup>

Tracing the origin of the person to the face and not to a theatrical mask provides insight into the concept of the person that is useful for understanding its contemporary and historical operation in law. Barbara Johnson’s critical

114. See Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745 (2001) (arguing that the disaggregation of the law of persons reflects anxiety legal personhood).

115. For example, Delaware, the leading jurisdiction for creating juridical persons for business purposes, defines a person broadly to include a variety of juridical persons in its definition. In Delaware, “person” means a natural person, partnership (whether general or limited), limited liability company, common law trust, business trust, statutory trust, voting trust or any other form of trust, estate, association (including any group, organization, co-tenancy, plan, board, council or committee), corporation, government (including a country, state, county or any other governmental subdivision, agency or instrumentality), custodian, nominee or any other individual or entity (or series thereof) in its own or any representative capacity, in each case, whether domestic or foreign. DEL. CODE ANN. tit. 6, § 18-101 (West 2010); DEL. CODE ANN. tit. 6, § 15-101 (West 2010); DEL. CODE ANN. tit. 6, § 17-101 (West 2010). And in its Uniform Unincorporated Nonprofit Association Act, Delaware also includes joint ventures, in addition to many of the other entities listed in the code among the community of persons. DEL. CODE ANN. tit. 6, §§ 1901–1916 (West 2011); see also Clean Water Act § 502(5), 33 U.S.C. § 1362(5) (2006) (“The term ‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”).

116. LA CIV. CODE ANN. arts. 24–31 (1993); see also Jeanne Louise Carriere, *From Status to Person in Book I, Title I of the Civil Code*, 73 TUL. L. REV. 1263, 1266 (1999).

117. Carriere, *supra* note 116, at 1266.

118. Angela Fernandez, *Albert Mayrand’s Private Law Library: An Investigation of the Person, the Law of Persons, and ‘Legal Personality’ in a Collection of Law Books*, 53 U. TORONTO L.J. 37, 46 (2003).

119. E.g., LON FULLER, *LEGAL FICTIONS* (1967) (arguing personhood was originally metaphorical because it meant “mask”).

120. Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643, 645 (1932).

121. See J.D. Sadler, *Popular Etymology*, 66 CLASSICAL J. 236, 239 (1971).

discussion of the relationship between persons and things focuses on the cultural and social meaning of the face.<sup>122</sup> The mask, for Johnson, is designed to be seen and recognized as acceptable to others. And in spite of its relational purpose, the mask is incompatible with life and is inanimate.<sup>123</sup> For Johnson, a mask is “[s]omething inanimate always approximat[ing] an ideal . . . [but] [a]n ideal is not an individual.”<sup>124</sup> The face, in contrast, is living and is often considered to be a unique representation of an individual’s soul or innermost essence.<sup>125</sup> The face also entails an ethical relational imperative. Drawing on Emmanuel Levinas’ claim that the living face represents the ethical claims of the human Other, Johnson notes that the face is open and public and that it entails knowledge of the Other and thus, ethical responsibility.<sup>126</sup> Associating the face with the person entails acknowledging the importance of an animate existence in our legal interactions, one where moral and relational ethos must be acknowledged. It is also, for human beings and other mammals, a communicative organ that is thought of as the external representation of some internal identity or essence that is often conceptualized as authentic. It is taken to manifest our emotional and intellectual life in the social spaces where we interact. But the face is not a perfect proxy for truth as an authentic representation of the individual. Because the face is also capable of deceit and technological perfection, it is capable of manipulating others who observe it.

As the face is the representation of the individual in social interactions, the person is the representation of the individual in legal interactions. Scholars have described the person in law as the “subject of legal rights and duties.”<sup>127</sup> For this reason, the act of recognizing an individual, entity or collective as a person determines a variety of potential legal capacities, including who can act in law (legal persons) and who cannot act in law (non-persons). It also determines which sorts of beings can claim the protection of the law through political, social and legal rights and entitlements, and which sorts of beings have moral responsibilities, obligations and duties that the law will enforce.<sup>128</sup> Conferring legal rights and duties, for this reason, confers legal personality on persons.<sup>129</sup> Bryant Smith went further in his analysis, defining legal personality as the capacity for legal relations.<sup>130</sup> Capacity is a concept that entails not only current abilities but also possible unrealized potential that is yet to come.<sup>131</sup> For this reason, legal personality is often conceptualized as relational capacity and

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122. BARBARA JOHNSON, PERSONS AND THINGS 182–83 (2008).

123. *Id.*

124. *Id.* at 183.

125. *See id.* at 181.

126. *See id.* at 186–87.

127. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray ed., 2d ed. 1921).

128. Ngairé Naffine, *Who are Law’s Persons? From Cheshire Cats to Responsible Subjects*, 66 MOD. L. REV. 346, 347 (2003).

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

130. *Id.*

131. As an example, Smith discusses the fact that minors lack the capacity to marry when they are underage and obtain the capacity when they reach the age of majority. *Id.* at 283–84.

persons are those legally recognized individuals or entities that “are brought, by the operation of acts and events, into relation with things and with one another: that is to say, relations capable of begetting duties, rights and claims.”<sup>132</sup> This status renders legal persons both entitled to rights and bound by the rights of others, entitled to have obligations to them met and bound to meet the obligations they have to others.<sup>133</sup> Some scholars have highlighted the important conceptual relationship in law between personhood access to specific rights or privileges. For example, Margaret Radin has argued that property plays a crucial role in defining persons.<sup>134</sup>

Beyond the common law and in a more contemporary context, other scholars have argued that personhood in law is a “placeholder for deeper concepts that ground our moral intuitions about human rights.”<sup>135</sup> For example, Jens Ohlin argues that the word “person” does not stand for a single legally applicable concept but a cluster of ideas.<sup>136</sup> The first cluster of ideas centers on a naturalistic concept of the person in law embodied by the human being. The second cluster of ideas focuses on the rational agency of entities or individuals, and takes account of psychological or cognitive aspects of persons and of the capacity of persons to be culpable for moral choices. The third piece of the cluster of legal personhood describes what Ohlin calls the normative concept of legal personhood. The normative concept of legal personhood recognizes that persons are the objects, entities or individuals that are morally and legally recognized as holders of rights and subjects with their own interests. This conception of the person is premised on the idea that “[w]e do not ascribe human rights because an entity is a person – it is a person because we ascribe human rights to it.”<sup>137</sup> For this reason, the concept of the person, which is used for many purposes, often clouds the already murky water of legal issues; “[r]ather than illuminating human rights claims, the concept of the person often obscures them.”<sup>138</sup> While this does not mean the concept of a person in law is empty, many scholars maintain it is not necessary for human rights and it should not be the “central battleground” for discussions of human rights.<sup>139</sup> Pragmatist John

132. FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW* 105 (1896).

133. *Id.* at 107.

134. MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993). For Radin, control and ownership of property constitutes an important aspect of personhood. The relationship between personhood and property, which she calls the personal-continuity thesis, is necessary for the realization of human freedom and for intelligibility as a person. *Id.* at 197. According to Radin, “property is necessary to give people ‘roots,’ stable surroundings, a context of control over environment . . . .” *Id.* at 44–45. At the margins of legal personhood, particularly in the historical context, the right to own property was not a necessary aspect of legal recognition for persons. *See supra* pp. 49–50 and accompanying text. *See also* MARGARET DAVIES & NGAIRE NAFFINE, *ARE PERSONS PROPERTY? LEGAL DEBATES ABOUT PROPERTY AND PERSONALITY* (2001).

135. *E.g.*, Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 *COLUM. L. REV.* 209, 248–49 (2005).

136. *Id.* at 230–238.

137. *Id.* at 237.

138. *Id.* at 211–12.

139. *Id.* at 238.

Dewey has similarly argued that the category of “person” in law is an empty category. For Dewey, “‘person’ signifies what law makes it signify.”<sup>140</sup> But even such an approach to personhood requires conceptual frameworks and analytic foundations as a starting point for making its determinations.

Even with such extensive scholarly endeavors, the legal meaning of personhood is still uncertain and indeterminate. Pragmatic attempts to endow entities, individuals and collectives with rights, entitlements and privileges, or to impose duties and obligations on them, have led to a fragmented jurisprudence of legal personhood. Because the community of legal persons is diverse, the challenges of legal personhood have been met by a variety of pragmatic solutions that have left it indeterminate in its theoretical foundations and piecemeal in its approach to new challenges. The meaning of legal personhood shifts depending on what sort of persons one is talking about and what the dominant legal framework of analysis in question is.<sup>141</sup>

In spite of this theoretical indeterminacy, legal personhood – for all the aspects of its meaning that entail transcendental nonsense – is more than a legal fiction. It is important to remember that while the *category* of person is a legal fiction, the *concept* still carries normative, ethical and political force.<sup>142</sup> The stakes of legal personhood are high and entail meaningful determinations about how we impose obligations and duties, and which individuals, entities, and associations have access to rights, privileges and entitlements. Legal personhood plays an important role in cultivating the community of those individuals, collectives and entities whose rights, privileges and entitlements are worthy of recognition in law. Legal personhood, however, is not merely an individual concept. Collective entities have the capacity to form a variety of associations that receive the protections of separate legal personhood apart from the human beings and juridical persons that comprise them. Legal personhood also pushes the boundaries of individuality in so far as it is a tool to facilitate interactions between various legally recognized persons. It mediates those relationships, determining which particular individuals, entities and collectives hold intelligible claims that can be addressed through law.<sup>143</sup>

Legal personhood, for this reason, is more than just a placeholder for rights, entitlements, privileges and obligations.<sup>144</sup> The naming of an entity, individual or collective as a person has moral force in so far as it turns something, which is defined by its lack of access to rights, privileges and entitlements, into someone. The process of making some individuals persons also renders them subject to obligations and duties, making them accountable to the community and

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140. Dewey, *supra* note 101, at 655.

141. *See generally supra* note 114.

142. *See* DAVIES & NAFFINE, *supra* note 134, at 51–52 (arguing legal personhood determines who is granted the capacity to be seen and heard by the law).

143. According to Gear, the corporation’s status as a legal person, for example, “function[s]. . . to mediate the interests and desire of natural humans” through the creation of an artificial juridical entity that lies apart from the natural persons behind it. Gear, *supra* note 16, at 524.

144. *See* NAFFINE, *supra* note 128; *but see* David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STANFORD AGORA 1 (2001) (arguing that the various characterizations of corporate personhood can support multiple competing normative conclusions).

endowing them with rights and privileges.<sup>145</sup> Most importantly, persons can act in ways that lead to the expansion and addition of the legal benefits of personhood by seeking more rights, privileges and entitlements.

In spite of its importance, the legal recognition of a person is never completely realized by any individual legal person or group of legal persons. Most individuals do not possess the abilities to exercise all the rights of personhood at once even if the law has deemed them capable of acting. There is not one legal treatment of persons because there is no singular definition of persons – there are diffuse standards to meet the needs of diverse classes of persons. In this way, personhood is a bundle of rights, entitlements, privileges, obligations and duties that are distributed to different types of legal persons in different ways. Furthermore, personification does not necessarily entail the same collection of rights, privileges and entitlements, or the same sort of capacities for each person recognized.<sup>146</sup> Personhood can be disaggregated. However, declaring an individual or entity a “someone” for the purposes of one particular entitlement or privilege means that “someone” has access not only to that one slice of recognition initially endowed to it but also is able to expand this recognition.<sup>147</sup>

The legal meaning of personhood is uncertain, in part, because the community of legal persons contains a diverse array of individuals and collectives that are categorized in a variety of ways related to legal recognition.<sup>148</sup> The community of persons and non-persons is so diverse that many groups of persons, like human beings, may have more in common with non-persons, like animals, than they do with other legally recognized persons, like corporations. For this reason, the community of persons is an analytic unity that contains multitudes. However, the diversity and multiplicity contained in the community of legal persons recognized by the state can be analytically contained and clarified by examining the status of those legal entities, individuals and collectives that are located at the margins of legal personhood. The substance of legal personhood is constituted, in part, by determining who is not a person or who does not have access to the fullest realization of rights, privileges, and entitlements in law. This process of “othering” those entities, individuals and collectives as *less than* full persons or *not* persons plays a crucial role in determining not only where the borders of personhood lie but also which entities, individuals and collectives lie within them.

The issues surrounding legal personhood concern not only the question of who counts as a full member of the legal community but also how we take

145. This process of holding individuals and entities accountable has been complicated, as the community of those subject to duties and obligations and holding rights, privileges and entitlements has changed. See generally Walter Hyde Woodburn, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696 (1915) (noting buildings, animals and statues were accorded rights and entitlements and had duties and obligations); Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994) (arguing efforts to hold inanimate objects liable reflect important community values).

146. See *supra* note 33 and accompanying text (discussing slavery and coverture).

147. *Id.*

148. DAVIES & NAFFINE, *supra* note 134, at 52–57.

account of them. This question entails determining which entities, collectives and individuals are considered legal persons and which rights, privileges, entitlements, duties and obligations these persons have access to. Furthermore, in some cases, the current contests of legal personhood involve expanding legal personhood for some while placing limits on the rights and privileges of others. The legal recognition of persons can have legal and moral consequences for existing members of the community of persons. If the legal recognition of personhood for some animals is expanded, for example, the property rights of those individuals and corporate entities who sell animals as commodities may be restricted. In addition, recognizing certain domestic animals as members of the legal community may entail legal penalties for those who eat animals or enhanced criminal liabilities for those who abuse animals. And because the concept of legal personhood has an ethical force, requiring us to reconsider who and what we regard as worthy of respect and consideration by law, an expansion of legal personhood for animals would have moral consequences beyond the realm of law.<sup>149</sup> The current efforts to expand the legal personhood of fetuses, embryos and zygotes may similarly entail limitations on the rights and privileges of other persons, particularly women. Women in the United States who currently enjoy limited constitutional protections for reproductive freedom<sup>150</sup> may be unable to realize these reproductive freedoms if the legal rights, privileges, protections and entitlements of fetuses, embryos and zygotes are expanded.<sup>151</sup>

In the next section, I draw on scholarship in vulnerability studies to present one possible picture of what a theory of legal personhood would look like if it relied upon the body and human embodiment as its foundation. The vulnerabilities of embodied human beings and the capabilities of the body could be used to provide a conceptual foundation for legal recognition and the distribution of rights, privileges and entitlements to a variety of non-persons, such as animals,<sup>152</sup> and persons without rights, such as undocumented persons. Drawing on the insights of vulnerability studies, I construct a conceptual experiment in articulating a tentative framework for a feminist theory of the person.

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149. Potentially, the legal expansion of personhood for animals might entail some reconceptualization of religious dogma, including an expansion of which types of sentient beings we must take account of in our spiritual journey.

150. See generally, *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a woman's right to an abortion as included in the fundamental right to privacy, but emphasizing that it is not an absolute right that must be conditioned against the state's interests in the mother's health and the potential life); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (establishing the undue burden standard, such that a regulation is unconstitutional if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (upholding the Constitutional protection of the woman's right to choose whether to have an abortion, finding that the criminalization of "partial birth abortion" unduly burdened the woman's ability to choose); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (finding Congress's ban on partial-birth abortion was not unconstitutionally vague and did not impose an undue burden on the right to an abortion).

151. Timothy Stoltzfus Jost, *Rights of Embryo and Foetus in Private Law*, 50 AM. J. COMP. L. 633, 634 (2002) (articulating the rights of the fetus and the mother as "rights in conflict").

152. See *supra* pp. 61–65 (discussing animals).

## III. TOWARD AN EMBODIED LEGAL PERSONHOOD

*When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.*<sup>153</sup>

If our current conceptions of legal personhood have led to court challenges, political dissent and legislative action – as the current controversies around animals, corporations and fetuses might imply – perhaps scholars and judges should reconsider how the boundaries of the community of persons should be determined. It is time for a change regarding who counts and how we take account of them. This section sketches one possibility for change. In a framework that starts from the body and embodiment, human beings, defined in part by the limitations of the body and their embodied vulnerability, serve as the paradigmatic class of persons for the purpose of determining legal personhood. As a starting point, a feminist theory of the person should ground its insights in theoretical paradigms that emphasize the shared vulnerability of human bodies and precarious possibilities embedded in embodiment. This section will use the insights of vulnerability studies and its perspective on the body and embodiment to provide the foundation for a re-conceptualization of legal personhood that takes the vulnerability of bodies and vulnerable embodiment as a starting place for thinking about what and who is entitled to legal recognition as a person. This framework seeks to answer the question: What would legal personhood look like if the body and embodiment were its foundation?

The body, and the vulnerability of embodied individuals, plays an important role in this section's effort to reconstruct legal personhood. Relying in large part on the insights of the feminist theory of the body,<sup>154</sup> legal scholars have argued for increased recognition of the importance of bodies and embodiment by the meaning of legal personhood. In the late 1990's the body enjoyed particular theoretical attention in legal scholarship.<sup>155</sup> Since these earlier articulations, the body and embodiment have provided a critical lens for scholars to think about legal problems.<sup>156</sup> These scholars have shown, however, that

153. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), reprinted in 110 HARV. L. REV. 991, 1001 (1997).

154. Feminist theory of the body, also called embodiment theory, focuses on questions of the construction of the self and various aspects of modernity in order to expose dualist anti-somatic perspectives and to denaturalize cohesive conceptions of a natural "pre-cultural" body. See Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213, 232–237 (2005).

155. Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267–80 (1992) (arguing the Supreme Court employs a perspective of physiological naturalism in its jurisprudence related to reproduction); Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1334–35 (1996) (arguing that the body is produced in line with a liberal theory); ALAN HYDE, *BODIES OF LAW* (1997) (arguing there are multiple conceptions of the body in law); David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 243–45 (1999) (arguing persons should be recognized as embodied consciousness).

156. See Gear, *supra* note 16, at 539 (arguing the vulnerable human body should be the

employing the body and embodiment as a starting point for legal personhood might entail its own theoretical complications. The body is not an objective pre-cultural representation of the “natural.”<sup>157</sup> Instead, it is, like the concept of the person itself, culturally constructed and historically contextual.<sup>158</sup> Our understanding of what the body is and how it interacts with the world emerges in part from the cultural conceptions that shape our perception of the world.<sup>159</sup> The body has been constructed by culture in relation to such diverse fields as science,<sup>160</sup> medicine,<sup>161</sup> law<sup>162</sup> and the nation state.<sup>163</sup> In spite of these limitations, an effort to start from the body and re-conceptualize personhood around embodied vulnerabilities and capacities as the foundation for legal personhood provides a decidedly different take on the question of how we define and conceptualize who counts and how we should take account of them. The purpose of this discussion of the body and embodiment is not meant to endorse a universal essentialist conception of the body in an ahistorical fashion. For this reason, the analytic framework described in this section should be understood as an experiment with one conception of the body and embodiment that may provide a productive way of structuring legal personhood. There could be competing conceptions that create different outcomes.

In the legal imagination, the body and embodiment serve an important explanatory role. Law is often described as a body<sup>164</sup> or as a *Corpus Juris*.<sup>165</sup> This use of the body as a metaphor, however, is not merely a poetic tactic. Instead, it serves to explain and organize various doctrines, rules, standards, cases and statutes into a unit.<sup>166</sup> This metaphorical description of the law as a single body

foundation for human rights).

157. See generally DONNA J. HARAWAY, *SIMIAN, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* (1991) (examining how nature and science are constructed through cultural norms and expectations).

158. See generally ELIZABETH GROSZ, *VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM* (1994) (examining how bodies and embodiment are constructed through cultural paradigms); see also SUSAN BORDO, *UNBEARABLE WEIGHT, FEMINISM, WESTERN CULTURE AND THE BODY* (1993).

159. See generally JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* (1993) (arguing that cultural conceptions of gender inform the construction and understanding of biological sex).

160. See ANNE FAUSTO STERLING, *SEXING THE BODY: GENDER, POLITICS AND THE CONSTRUCTION OF SEXUALITY* 20–25 (2000) (arguing that scientific conceptions of binary biological sex are influenced by cultural conceptions of gender).

161. See THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 4–11 (1992) (arguing that the scientific model of biological sex shifted from a conception of one sex with similar variation to two “opposite” different sexes).

162. See generally HYDE, *supra* note 155.

163. See generally MOIRA GATENS, *IMAGINARY BODIES ETHICS, POWER AND CORPOREALITY* (1996).

164. See, e.g., WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 8 (1941) (defining torts as “a body of law” designed to compensate individuals for losses); Holmes, *supra* note 153, at 469.

165. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 479 (1933).

166. Many scholars explained the unity of law through the metaphor of the body and embodiment. Pound, for example, described law through the metaphors of the body. *Id.* at 476 (defining law as “the body of authoritative materials”). Pound even explained that “[i]f the rules are the bone and sinew of the legal order, the technique is its life blood and the ideals are its brains.” *Id.* at 486.

preserves the intellectual, moral, social and philosophical cohesiveness of law, rendering sometimes contradictory applications and articulations into conceptual completeness. Legal professionals are taught from their earliest days to think of the philosophical jurisprudential concerns of constitutional law as part of the same cohesive unit as criminal law, tax law, bankruptcy law, corporate law, real estate law, tort law, property law, contract law, administrative law and various other discrete areas. This metaphor of the body forges a picture of a collective entity (a collection of disparate rules, cases, treatises, codes, customs and statutes in various jurisdictions), which functions (or dysfunctions) in concert as a unity (“the law”). The notion that the law is a body places legal rules in a mythical category, invoking the natural and political bodies of the sovereign king, the body politic and even the mystical body of Christ.<sup>167</sup> The metaphor of the body also serves a practical purpose. The body is accessible. Individual human beings have intimate experiential knowledge of their own bodies. This experiential knowledge of one’s own body provides some semblance of a foundation for understanding the ways in which law works. One might believe, “If law is like a body, then perhaps it is like my body. Perhaps I can understand it – or at least learn to live within it and use it for my ends.”

The body is also an essential descriptive aspect of legal personhood.<sup>168</sup> It provides a critical foundation from which to think about the problem of legal personhood. Although it may not “explain or justify” legal decisions,<sup>169</sup> it serves an important expressive purpose, describing implicit attributes of legal persons and indicating what sorts of creatures law makers feel a legal person should be. Non-human entities, individuals or collectives that do not possess a recognizable physical body must be rendered conceptually corporeal and embodied through the use of the body as a metaphor in order to be recognized as persons.<sup>170</sup> Naming an individual, collective or entity as a body links it to personhood in a way that makes it easier to recognize as a member of the legal community. The body and embodiment, in this way, is a foundation for humanizing the inhuman

167. See generally ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES* (1997) (examining the embodied dualism of the king as human being and the king as a representative of his office). Law has often been idealized as a sort of secular religion, enabling citizens to discern a sense of justice and right even in the shadow of competing conceptions of the good. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971). It even has its own robes and initiations into legal mysteries related to thinking like a lawyer. Bradley C. Bobertz, *Legitimizing Pollution Through Pollution Control Laws: Reflections on Scapegoating Theory*, 73 TEX. L. REV. 711, 747 (1995) (noting that law is a priesthood).

168. Saru Matambanadzo, *The Body, Incorporated* 87 TUL. L. REV. \_\_\_\_ (forthcoming Feb. 2013) (manuscript at 26–51) (arguing that the body has been a key metaphor in organizing corporate personhood); but see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (claiming that such metaphorical concepts are part of the “language of transcendental nonsense” which is “entirely useless when we come to study, describe, predict, and criticize legal phenomenon”). Formal aspects of law require substantive values, norms and frameworks in order to ensure their functioning and to endow them with meaning. Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1456 (2006). As such, the divide between theoretical paradigms that analyze the form and those that examine substance is a false binary. *Id.* (highlighting the work of feminists in unpacking the divide between form and substance).

169. Cohen, *supra* note 168, at 812.

170. Matambanadzo, *supra* note 168.

and creating community. The body is not a “mere” metaphor but plays an important role in defining not only the field of law, but as we will see, the substance of legal personhood.<sup>171</sup> In this way, the body consistently serves as an important reference point in law for understanding the boundaries of the community of persons.

Scholars working in vulnerability studies, informed by feminist legal theory, human rights discourses, political theory and embodiment theory, have made the claim that vulnerability is a universal constant for human beings.<sup>172</sup> Grounding their insights in the notion of the vulnerable embodied human being, they have argued for a legal regime that places embodied vulnerability at the center of legal subjectivity and takes account of the realities of dependency that arise from embodied vulnerability.<sup>173</sup> Taking on the underlying assumptions of the equality norms in legal theory, vulnerability studies pursues its scholarly interventions by starting from the recognition that human beings are inherently characterized by a universal and constant vulnerability that arises from human bodies and embodied pain, pleasure and need.<sup>174</sup> Vulnerability studies scholars strive to reorganize the relationship between individuals and the state by anchoring access to legal, economic and social entitlements, rights and privileges to the human condition of embodied vulnerability.<sup>175</sup>

Vulnerability, according to many, is a condition which emerges in part from embodied human needs and in part from the destabilizing forces of globalization, forces that upend traditional support systems and coping mechanisms.<sup>176</sup> The origin of vulnerability studies has been intertwined with international human rights laws and analyses of the economic and social impact of globalization.<sup>177</sup> Peadar Kirby has argued that globalization has led to increases in vulnerability and violence that have fundamentally altered the well-being of individuals and society as a whole.<sup>178</sup> Vulnerability, according to Kirby, adequately describes “the impact of globalization on our personal and social lives,”<sup>179</sup> because it highlights the ways in which social and economic risks, challenges and changes have become complex and multifaceted in their causes, interactions and effects.<sup>180</sup> The United Nations Department of Economic and

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171. *Id.*

172. Fineman, *supra* note 109.

173. *Id.* at 8–14.

174. *Id.*

175. *Id.* at 19–22.

176. See PEADAR KIRBY, VULNERABILITY AND VIOLENCE THE IMPACT OF GLOBALISATION 54–73 (2006).

177. BRYAN S. TURNER, VULNERABILITY AND HUMAN RIGHTS 27–28 (2006).

178. KIRBY, *supra* note 176.

179. *Id.* at 3.

180. KIRBY, *supra* note 176. It is important to note that for Kirby the concept of vulnerability also entails an engagement with coping mechanisms and with violence – violence that arises from coping with vulnerabilities and violence that causes vulnerabilities. This relationship between violence and vulnerability highlights the fact that traditional coping mechanisms like social support networks, seemingly stable climate and weather patterns, and state social welfare systems which enhanced peoples’ abilities to cope and survive have been upended by the changes of globalization. *Id.* at 32. His effort to embrace competing concepts (vulnerability and capacity to cope) and to regard coping

Social Affairs has defined vulnerability as “a state of high exposure to risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with the negative consequences.”<sup>181</sup> This vulnerability, according to the UN definition, is an “integral part of the human condition” that influences the lives of individuals and the organization of society.<sup>182</sup>

Prolific philosopher Judith Butler has highlighted the ways in which human beings are defined in part by embodied vulnerabilities. For Butler, human beings are constituted as political subjects in part by the social vulnerability of the body. Starting from the vulnerability of the body acknowledges that we are corporeal creatures who are subject not only to dangers from our environment but also to sickness, illness and accidents.<sup>183</sup> But the loss and grief arising from death, illness and the vulnerability of the body does not rest on a framework of isolated individualism. Instead a perspective that starts from vulnerability recognizes the interconnected, reciprocal nature of human existence and the constant potential for dependency during the human life cycle.<sup>184</sup>

Vulnerability studies—through its use of embodiment and the body as a starting point for political structures, ethical obligations and legal rules—contains some particular intuitions that may be helpful in thinking about the pending personhood battles in the United States. The following intuitions underlying vulnerability studies may be helpful:

Persons are characterized both as individuals and by their connection to others.

Persons possess a human body. They are characterized by embodiment, have been born and have been gestated in the body of another member of their species. Persons are potentially mothers and always the children of mothers.

Persons are sentient creatures that spend some time in their lives with self-awareness.

Persons possess present potential for individual existence and present potential for collective associations.

Persons’ bodies are characterized not only by needs and appetites, but also by the limits of sickness, illness and death.

Persons are demonstrably capable of pain and suffering and also

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capacities ambivalently (through his discussion of violence) avoids some aspects of essentializing that trap the legal deployment of the vulnerable subject.

181. *Id.* at 4–5 (quoting United Nations *Report on the World Social Situation: Social Vulnerability: Sources and Challenges* (New York: United Nations Department of Economic and Social Affairs (2003))).

182. *Id.*

183. TURNER, *supra* note 177, at 28–29.

184. Turner, like others, points out that dependency is a crucial stage in the human life cycle and that all human beings start their lives from a place of being dependent. *Id.* at 25. Martha Fineman has argued for increased recognition of dependency in the realm of the political. SEXUAL FAMILY, *supra* note 106. For Fineman, vulnerability is individually universal whereas dependency is episodic. Fineman, *supra* note 109, at 10 n.25.

pleasure and happiness.

These general principles help to develop a presumption of personhood for vulnerable embodied individuals and a set of nine responsive non-hierarchical factors to be used in determinations about legal personhood. Adopting a presumption of personhood is one possible way to begin addressing the challenges of legal personhood in a way that consciously embraces the body and embodiment as its foundation. This presumption of personhood would be granted to embodied individuals, entities or collectives as recognition that their bodies, and the vulnerabilities and capabilities of their bodies, render them part of the same community as human beings. A presumption of personhood could be accorded to all those entities, individuals or collectives whose existence mirrors *prima facie* that of a human being in terms of body and embodiment. In threshold disputes concerning the recognition of novel classes of legal persons or the expansion of legal rights, privileges and entitlements for currently recognized persons, those individuals and entities whose existence mirrors that of an embodied human being should be treated to a presumption of legal recognition for the rights, privileges, entitlements, obligations and duties of personhood that accords them *at least* the status of quasi-personhood. Those entities, individuals and collectives that are not similar to human beings in terms of embodied capacities and vulnerabilities should have the burden of proving that they resemble bodies and are similarly situated to embodied human beings.<sup>185</sup>

A presumption of personhood could be augmented by a nine-factor analytic framework, gleaned from the intuitive potentials, vulnerabilities and capabilities of the human body that would serve to take account of the body and embodiment. This framework has the potential to create a more substantive framework for dealing with the diversity of legal individuals, entities and collective, and balancing their various and conflicting interests in law. While these factors may be articulated in diverse ways, one possible articulation is as follows:

Embodied

“Natural” in so far as it is born of another member of its species

Vulnerable to death, illness, injury and need arising from embodiment

Capable of pain and suffering

Capable of pleasure and joy

Capable of volition

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185. Many scholars may find the human-centered nature of this framework problematic for the ways in which it naturalizes the privileges of personhood for human beings while potentially marginalizing non-human animals currently not included in the community of persons. There are ways to alleviate this challenge. *E.g.*, Bryant, *supra* note 83, at 329–30 (arguing that advocacy employing arguments for direct standing for animals may be useful for decentering human beings). This central presumption, however, is designed in part to de-center human beings by placing them in relation to other individuals and entities. By placing non-human animals with human beings in a constellation of individuals and entities worthy of legal rights and recognition as persons, it is my intention to recognize and expand the community of legal subjects to include animals.

Possessing the potential for individual and collective existence

Possessing the potential for relational capacity under law (willingly enter into contractual relationships and mutual obligations) and potential to understand the ramifications of such relations

Possessing self-awareness<sup>186</sup>

If a dispute concerning personhood came before a court, the interests of the putative persons could be adjudicated using a presumption of personhood, analyzing this presumption using the above nine-factor test. These factors could be deployed in a subjective and responsive way that allows for interpretation, or in a more objective and rigid way that creates clear standards for determinations of legal personhood. For example, those individuals, entities and collectives lacking two or fewer factors of embodied human existence would be accorded quasi-personhood status, guaranteeing most of the rights, privileges and entitlements of personhood. Those individuals, collectives or entities lacking between three and five of the factors could be accorded the status of quasi-personhood with some rights, privileges and entitlements of personhood but not all. And finally, those individuals, entities and collectives whose existence strays far from that of embodied human beings and does not display the sorts of vulnerability and the types of potential that arise from the body, will be non-persons. They could be granted capacities, protections and entitlements as a matter of privilege and not as a matter of right. And if they seek capacities, protections and entitlements as a matter of right, these disputes would be adjudicated without the presumption of personhood. This analytic framework restructures our legal conception of personhood in a way that centers on human embodiment and the body consciously and could be used to structure a legal personhood that recognizes the relationship between and among persons and non-persons.<sup>187</sup> According to scholars like Tom Regan, the relationship between embodiment and legal status may yield a productive expansion of animal rights if one adopts a non-anthropomorphic perspective.<sup>188</sup> If the body matters and “if it turns out that what is done to the bodies of (at least) some nonhuman animals matters morally, then it may be that these animals . . . should have legal rights to the integrity and protection of their bodies.”<sup>189</sup> A conception of legal personhood that privileges embodiment and vulnerability, for this reason, may provide a foundational justification for some non-human animals to claim space and gain recognition as legal persons.

A presumption of personhood accorded only to embodied individuals and entities whose existence mirrors that of an embodied human being might create uncertainties about the legal status of embodied non-persons and disembodied juridical persons. These uncertainties are not inevitable or destabilizing. States and legislatures may choose to distribute some recognition to legal entities and

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186. See *infra* Figure 1.

187. See *infra* Figure 2.

188. Tom Regan, *The Day May Come: Legal Rights for Animals*, 10 ANIMAL L. 11, 12–13 (2004).

189. *Id.* at 12.

individuals without according them the full status of legal personhood with all of the privileges and moral force it entails. Personhood is not a totalizing all or nothing status. Individuals and entities need not be recognized as persons in order to possess legal rights and privileges.<sup>190</sup> And individuals recognized as persons have not always been accorded all of the legal recognition, rights and privileges typically associated with personhood.<sup>191</sup> For example, the current capacities of corporations to own property, make contracts and act under law could be guaranteed by the state charters that sanction their creation and the state laws that create them without recognizing these entities as legal persons. These rights may be accorded to collectives serving legitimate ends without according these collectives unequivocal recognition as legal persons. Strengthening personhood from a foundation that builds upon embodied vulnerability and the human body also might limit the expansion of special privileges for corporations in the constitutional context, sending an important normative message about which entities and individuals are part of the community of democratic participants, and which are created and designed as a means to serve the ends of individuals in that community. For this reason, these uncertainties could have some positive consequences. Juridical entities might participate in the democratic process more cautiously and less ruthlessly if their speech rights were deemed a matter of privilege and not a right, subject to the democratic impulses of human beings. Those who own and operate juridical entities like corporations and limited liability companies might take greater care in training and monitoring employees if their privacy interests and search and seizure protections were not constitutionally guaranteed.

While such a scheme would be radically different in some respects, it would retain many aspects of the status quo. For example, in dealing with the challenges arising from those who advocate for legal personhood for embryos and fetuses, legal frameworks could retain existing privacy protections while leaving the door open for potential expansions of personhood that might be necessary in light of technological advances that would facilitate sustained life and birth outside of an individual woman's womb. All individual human beings that have been born would still universally enjoy access to legal personhood. However, human tissue, without further technological advances, including fetuses and embryos, would remain outside of the community of quasi-legal persons because they have not been born and lack the present potential for individual existence and collective association. Fetuses and embryos, through argument and proof, may still be accorded the status of quasi-persons in some limited contexts, but they would not enjoy a presumption of personhood which would serve as the foundation for their membership in the legal community.<sup>192</sup>

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190. See *supra* pp. 48–52 (discussing how rights, privileges and immunities were differentially afforded to women, despite the recognition that they were persons).

191. *Id.*

192. The potential for full human life that embryos and fetuses possess does not necessarily mean they are similarly situated to born human beings in terms of embodiment. *But see* Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 127 (2006/2007). This potential does not occur apart and separately from the body of the mother in an imagined "state of nature." Women's experiences with sexuality, reproduction and care do not mirror those of the ideal liberal individual

While such a regime of body and embodiment centered personhood might create uncertainties, this instability might be productive and creative instead of destructive and destabilizing, particularly for the legal persons that benefit from it. Adopting a presumption of personhood for embodied individuals would disrupt the status quo in some positive ways. A presumption of personhood for embodied entities grounded in the human body and a flexible nine-factor framework would shift the current conceptualization of personhood in ways that center on the body and embodiment to provide some additional recognition for animals. Furthermore, the presumption of quasi-personhood for individual embodied and disembodied entities may accord animals more legal recognition under law, perhaps even rendering the enforcement of laws related to animal welfare more enforceable.<sup>193</sup>

Because access to legal personhood is often regarded as a pre-requisite for legal rights and capacities, including the right to sue and be sued, some scholars regard personhood as a foundational necessity for any meaningful shift in the legal status of animals.<sup>194</sup> It would also have the potential to justify the complex ways in which human tissue and unborn human beings are treated under law.<sup>195</sup> Furthermore, a presumption of personhood for embodied individuals that starts from the human body and embodiment also has the potential to push the current legal status quo, which privileges corporate persons,<sup>196</sup> in order to better meet human need.<sup>197</sup> Finally, a presumption of personhood for embodied individuals

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presumed by law and philosophy. See, e.g., Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 151 (2000) (arguing how the biological nature of reproduction, child rearing and sexuality for women undermines the myth of the impermeable liberal individual). The privileging of the individual as an ideal self in law also fails to account for the important role that collectives play in society and in law. See Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1217–18 (1994) (arguing that methodological paradigms that privilege individualism or collectivism are reductive in nature). Fetuses and embryos do not constitute a separate individual being apart from the women who carry them and are completely dependent upon their carriers for support and care. See generally Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971) (comparing the moral dilemma arising from an unintended and unwanted pregnancy to a scenario where an individual is hooked up to a terminally ill violinist without her consent).

193. Some authors have argued that personhood is not necessary to enhance the legal protections of animals. Taimie Bryant, for example, argues that advocacy for animals may employ a strategy that attempts to establish duties toward animals and leaves the question of personhood for animals out of the equation. Taimie Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHI. LEGAL F. 137, 153–55 (2006).

194. Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 2–5 (2010) (declaring the goal of the Nonhuman Rights Project to be a declaration by a United States state court that animals are legal persons); *but see* Bryant, *supra* note 83, at 252–53 (arguing that pursuing personhood is not fruitful because no theory of legal personhood provides a guaranteed roadmap to alter the status quo of animal cruelty and human inflicted injury).

195. See *supra* pp. 57–61 (discussing the complexities of legal recognition for fetuses and embryos).

196. See Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 BUFF. L. REV. 1369, 1369–87 (2006) (noting that corporations “occupy” a significant deal of legal space and consume a large share of legal resources including attorneys and judicial resources).

197. While human need is not the first priority of law, some default legal rules can be altered or disregarded in order to meet human need. See Laura S. Underkuffler, *The Politics of Property and Need*,

and entities—and not for others—taps into important shared intuitions about community and justice, and about who counts and how we should take account of them.

Admittedly at the core of this reliance on the body and embodiment for entities lies a normative judgment that human beings are the reference point for legal personhood. Although this is a subjective value judgment,<sup>198</sup> it is one subjective value judgment among many. In the current state of legal personhood in most U.S. based jurisdictions, law makers and judges employ individual implicit or unspoken value judgments, many of them quite subjective, about the value of life and the community of persons all the time. This presumption of personhood with its analytic framework for embodiment presents the possibility of one subjective paradigm for personhood grounded by embodied vulnerability and the vulnerability of the body, and guided by intuitions about what it means to be a person. A subjective normative perspective that embraces the body and embodiment in a clear and explicit way acknowledges the stakes and the foundations for legal personhood, and takes account of the human being as paradigmatic person in a way that matters and has real consequences.

While there might be administrative costs that arise from adopting a presumption of personhood for embodied individuals, such a presumption has the potential to foster a legal framework that is more capable of dealing with the technological and social diversity of human, animal and juridical subjects that might challenge the limits of personhood. The challenges arising from the vested interests of property and capital and their accompanying uncertainties are not necessarily grounds for ignoring the positive possibilities presented by an embodied conception of the person. Similar arguments about vested interests, uncertainty and instability were made about the costs of admitting women and African Americans to the community of full legal persons. And previously, rights for African Americans as full legal persons and citizens were unthinkable in law.<sup>199</sup> What was unthinkable before, however, now seems inevitable and

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20 CORNELL J.L. & PUB. POL'Y 363, 368–72 (2010) (examining how the need to sustain life is sometimes recognized as a justification for altering the default rules protecting private property).

198. This analytic framework is not the only paradigm designed to take human beings as the reference point for legal community. The concept of human dignity that lies at the center of human rights law also starts from a human centered perspective. Like the concept of human dignity, which has the potential to place important limits on who counts and how they count in law, a concept of personhood that centers human beings through the paradigm of the body and embodiment might be useful for addressing the complications of expanding and contracting legal personhood. Like the concept of human dignity, however, an analytic framework that starts with the human body could be problematic because it perpetuates a perspective on personhood that is speciesist in nature. See SINGER, *supra* note 95, at 7 (defining speciesism as “a prejudice or attitude of bias toward the interests of members of one’s own species and against those of members of another species”). The assumption of the primacy of human beings as legal and ethical subjects privileges particular human centered intuitions, arising from western metaphysical religious dogmas that may undermine the values that an expansion of legal personhood strives to make. See Bryant, *supra* note 83, at 268.

199. The “unthinkable” nature of legal rights for excluded groups often seems unthinkable. See Stone, *supra* note 99, at 453 (discussing how rights for African Americans were previously unthinkable under the status quo). According to Christopher Stone, shifts in the status quo concerning the community of rights holders seem unnatural and intractable. Stone notes, “[t]hroughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless ‘things’ to be a

morally righteous. In the end, justice and equity trumped the uncertainties arising from the elimination of coverture, slavery and segregation. Justice and equity should prevail here, ensuring that legal persons are only accorded the fullest array of legal benefits if they are similarly situated in terms of embodiment and their bodies to human beings.

#### IV. CONCLUSION

The law, along with other institutional structures, creates a *nomos*, or a socially constructed normative universe.<sup>200</sup> The *nomos* of law influences behavior by simultaneously enacting social controls and spaces of resistance through discourse and mythology.<sup>201</sup> The *nomos* of law can have far reaching influence – structuring the contours of our social, cultural and political institutions. For this reason, this article ends where it started: with the notion that law is a site of political, economic, social and personal struggle where varied interests play out in competition for a legal ruling that vindicates their claims. Much of this struggle occurs in the realm of theoretical normative conceptions where articulations are given effect through legal endorsement. The recognition of one individual as a person renders the individual in question a member of the legal community. Law, like other powerful cultural institutions, has the power not only to regulate culture but to limit possibilities by imposing a narrow understanding of the intelligibility of persons, i.e. who counts and how we take account of them. It also has persuasive powers to generate new spaces for resistance and recognition for persons that have been previously ignored.

This article has provided one attempt to deal with the complexities of the personhood struggle in law. It provides one possibility for re-imagining legal personhood from a perspective that takes account of the body and embodiment. It is not meant to provide a totalizing theory but to begin a conversation that starts with the vulnerabilities of the body as an alternative foundation for thinking about how the rights, privileges and entitlements of legal personhood should be expanded for some and perhaps limited for others.

The borders of legal personhood continually emerge and re-emerge in response to advances in technology, science and industry. Because the meaning of legal personhood can change and shift across time and in response to circumstances, legal personhood is empty of meaning and can be filled with content in response to the needs of those individuals, entities and collectives that seek it. Legal personhood, however, is also full of potential and promise, harnessing the moral force that comes with the recognition of law. This is the paradox of meaning that legal personhood entails. The meaning of legal personhood can be empty of content, capable of being construed in multiple ways, and yet it can be full of moral force, providing a platform for accessing rights, privileges and entitlements and creating the foundation for arising obligations and duties.

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decree of Nature, not a legal convention acting in support of some status quo." *Id.*

200. Robert M. Cover, *Foreword: Nomos and Narrative, The Supreme Court 1982 Term*, 97 HARV. L. REV. 4, 17–21 (1983).

201. *Id.*

Appendix - Figure 1

Nine Factor Framework		
Representation	Sample Discussion	Sample outcome
	<p><b>Full persons under law -</b></p> <ol style="list-style-type: none"> <li>1. Embodied</li> <li>2. "Natural" in so far as it is born of another member of its species</li> <li>3. Vulnerable to death, illness, injury and need arising from embodiment</li> <li>4. Capable of pain and suffering</li> <li>5. Capable of pleasure and joy</li> <li>6. Capable of volition</li> <li>7. Possesses potential for individual and collective existence</li> <li>8. Possesses potential for relational capacity under law (willingly enter into contractual relationships and mutual obligations) and potential to understand the ramifications of such relations</li> <li>9. Self-awareness</li> </ol> <ul style="list-style-type: none"> <li>• <b>Entitled to all potential rights, privileges, and protections</b></li> <li>• <b>Subject to all obligations and duties that persons are subject to</b></li> <li>• <i>Cannot be made property</i></li> </ul>	Human beings
	<p><b>Quasi-persons -</b></p> <ul style="list-style-type: none"> <li>• Lacks one or two of the factors</li> <li>• <b>Entitled to most rights, privileges and protections related to its potential, its vulnerability and its capacities</b></li> <li>• <b>Subject to some obligations and duties</b></li> <li>• <i>Cannot be considered property</i></li> </ul>	Non-human mammals (8) Chimeras (2, 8) Sentient pain capable robots (2, 3)
	<p><b>Non-persons with some guaranteed legal entitlements</b></p> <ul style="list-style-type: none"> <li>• Lacks more than three and less than five of the factors</li> <li>• <b>Entitled to limited rights privileges and protections</b></li> <li>• <b>Subject to some obligations and duties</b></li> <li>• <i>Can be considered property</i></li> </ul>	Non-pecuniary associations (1, 2, 3, 7) Other animals (2, 6, 8, 9) Fetuses (2, 6, 7, 8, 9) Artificial Intelligence (1, 2, 3, 4, 6) Sentient robots (2, 3, 4)
	<p><b>Non-persons without guaranteed legal entitlements</b></p> <ul style="list-style-type: none"> <li>• Lacks more than five crucial elements</li> <li>• <b>May be granted limited rights, privileges and protection but lacks a robust legal entitlement to them</b></li> <li>• <b>Subject to obligations and duties arising from any right, privilege or protection granted to it, and obligations and duties imposed upon it, by the community of persons</b></li> <li>• <i>Designated as property</i></li> </ul>	Pecuniary Associations (1, 2, 3, 4, 5, 9)

Figure 2

