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IS THE CONCEPT OF THE PERSON NECESSARY FOR HUMAN RIGHTS?

*Jens David Ohlin**

The concept of the person is widely assumed to be indispensable for making a rights claim. But a survey of the concept's appearance in legal discourse reveals that the concept is stretched to the breaking point. Personhood stands at the center of debates as diverse as the legal status of embryos and animals to the rights and responsibilities of corporations and nations. This Note analyzes the evidence and argues that personhood is a cluster concept with distinct components: the biological concept of the human being, the notion of a rational agent, and unity of consciousness. This suggests that it is the component concepts—not personhood itself—that are indispensable for grounding our moral and legal intuitions about rights. The component concepts also promote greater systematicity and coherence in legal reasoning. The Note concludes by suggesting some implications of this view for applied legal reasoning.

INTRODUCTION

In one of the first court cases testing the legal status of frozen embryos, a Tennessee court was asked to decide the fate of a couple's frozen embryos following an unsuccessful attempt at in vitro fertilization.[1] The husband had filed for divorce and the proceedings required a resolution to the thorny question of the status of their frozen embryos. Were the embryos mere *property* to be divided up through the same judicial process as the family house and bank accounts? Or were the embryos *persons*, whose future should be decided within the same legal framework as the custody of children? This was the one sticking point in the divorce that required litigation.[2] The dispute was animated by the couple's incompatible wishes: Mary Sue Davis wanted to use the embryos for implantation or, if that proved impossible, to donate them to another couple; her husband, Junior Lewis Davis, wanted the embryos to remain frozen until he and his wife could agree about their use, and he preferred destroying the embryos to donating them to another couple.[3] A midlevel appellate court held that life begins at conception and granted *custody* of the embryos to the wife.[4]

The Tennessee Court of Appeals was perturbed by this result, noting on appeal that Junior Lewis Davis would be forced to have a child and might suffer "the psychological, if not the legal, consequences of pater-

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1. Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641 (Sept. 21, 1989).
2. Id. at *1.
3. Id. at *58–*60, *74–*75.
4. Id. at *2.

nity against his will."[5] So the court reversed and ruled for the father, holding that both parents had an equal and undivided interest in the embryos, suggesting, though never explicitly saying, that the embryos could be treated like property.[6] Mary Sue Davis subsequently appealed the case to the Tennessee Supreme Court, which reasoned that the interests of the parent not seeking procreation were paramount and the embryos would have to be destroyed in accordance with the husband's wishes.[7]

The outcome of the case was widely reported in the scholarly literature.[8] But more than the outcome, the *reasoning* of the case is striking. The Tennessee Supreme Court's decision relied heavily on a report from The American Fertility Society which surveyed the three major positions on the ethical status of embryos. The first position views the embryo "as a human subject after fertilization, which requires that it be accorded the rights of a person."[9] The second view holds that "the preembryo has a status no different from any other human tissue"[10]—in other words, mere property. The third view walks a fine line between these extremes by denying embryos "the respect accorded to actual persons" while nonetheless finding that the preembryo "deserves respect greater than that accorded to human tissue" because of "its potential to become a person" and "its symbolic meaning for many people."[11]

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5. Davis v. Davis, No. 180, 1990 Tenn. App. LEXIS 642, at *9 (Sept. 13, 1990).

6. Id.

7. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

8. See, e.g., Timothy Stoltzfus Jost, Rights of Embryo and Foetus in Private Law, 50 Am. J. Comp. L. 633, 637 (2002) (noting *Davis* court's particular concern with constitutional right against unwanted parenthood); Christina L. Misner, What if Mary Sue Wanted an Abortion Instead? The Effect of *Davis v. Davis* on Abortion Rights, 3 Am. U. J. Gender Soc. Pol'y & L. 265, 267 (1995) (exploring discrepancy between the law's quick recognition of man's right not to procreate and the law's reluctance, historically, to grant the same right to women); John A. Robertson, Precommitment Strategies for Disposition of Frozen Embryos, 50 Emory L.J. 989, 993 (2001) (discussing *Davis* and ultimately arguing that refusal to enforce a contract for disposition of frozen embryos is unfair to those who relied on contract); Ellen A. Waldman, Disputing over Embryos: Of Contracts and Consents, 32 Ariz. St. L.J. 897, 908–09, 937–391 (2000) (suggesting procedural reform for dispositional contracts for contested embryos); Jennifer Marigliano Dehmel, Note, To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?, 27 Conn. L. Rev. 1377, 1402 (1995) (agreeing with the *Davis* analysis that priority should be given to the party wishing to avoid procreation); Daniel I. Steinberg, Note, Divergent Conceptions: Procreational Rights and Disputes over the Fate of Frozen Embryos, 7 B.U. Pub. Int. L.J. 315, 319–21 (1998) (analyzing the *Davis* decisions in terms of the "right to life" approach, the "pure property" approach, and the "special status" approach); Joshua S. Vinciguerra, Comment, Showing "Special Respect"—Permitting the Gestation of Abandoned Preembryos, 9 Alb. L.J. Sci. & Tech. 399, 406–11, 419–21 (1999) (suggesting that states adopt specific legislation to deal with abandoned preembyros).

9. *Davis*, 842 S.W.2d at 596 (quoting report from the American Fertility Society).

10. Id.

11. Id.

In all three positions, the concept of the person looms large: In the first, the embryo's status as a person makes it a legitimate subject of moral concern; in the second, the embryo's lack of personhood justifies the withholding of rights; and in the third, the embryo's status as a *potential* person supports the intermediate conclusion. In *Davis*, the court was hamstrung because the person-property dichotomy was inadequate to the task.[12] Indeed, the court explicitly endorsed the third view.[13] But in spite of these shortcomings, the concept of the person retained its central place in the debate.

The quandary encountered by the court in *Davis* represents a general problem within legal reasoning. *Davis* is just one example where the concept of the person is asked to do more than simply replicate the biological concept of the human being. Personhood is a talisman that confers status, respect, and moral worth, and for this reason the concept is deeply ingrained in legal discourse in general and in human rights in particular.[14] Rights are usually ascribed to *human beings* or *persons* because these categories are valid bearers of moral interests; indeed, this pattern of reasoning is frequently invoked in domestic case law, the scholarly literature on rights,[15] and international instruments such as the Universal Declaration of Human Rights.[16] But these sources frequently offer conflicting guidance on the exact content of the concept of the person or its relationship to the idea of human beings. (Is *person* a broader category than *human being* or merely a synonym?) Indeed, this very content is at issue in these debates, which might suggest that finding the true definition of personhood is the key to a coherent theory of human rights. But as the following analysis shows, the centrality of the concept of the person in legal reasoning betrays its true argumentative role: Rather than illuminating human rights claims, the concept of the person often obscures

12. The court's first priority was to decide whether or not an embryo was a person under Tennessee law, presumably because such a determination would have some significance. Id. at 594. Note that the dichotomy between persons and property is an ancient distinction going back at least to Roman law, where the early classical legal theorist Gaius divided up everything under the law into three categories: persons, things, and actions. See G. Inst. 1.8 (Edward Poste trans., photo. reprint 1925) (4th ed. 1904).

13. 842 S.W.2d at 597.

14. The term "human rights" is used broadly in this Note, encompassing not only international abuses such as torture, but domestic questions of constitutional rights as well. There are two reasons for this wide interpretation. First, the scholarly literature in human rights is increasingly making linkages between international standards and domestic cases, so the term now has a broader application. Second, the concept of the person looms large in the rights discourse of both the U.S. Constitution and international instruments such as the Universal Declaration of Human Rights, so a comprehensive analysis of personhood requires consideration of both legal arenas.

15. See, e.g., John Finnis, Natural Law and Natural Rights 221–22 (1980) (discussing a person's entitlement to equal concern and respect); Louis Henkin, The Age of Rights 6–8 (1990) (discussing political and moral foundations for human rights).

16. Universal Declaration of Human Rights, U.N. GAOR, 2d Special Sess., Supp. No. 2, pmbl., at 72, U.N. Doc. A/810 (1948) (referring in preamble to "dignity and worth of the human person").

them. This suggests that, despite appearances, the concept of the person is unnecessary for human rights.

In Part I, this Note surveys the diverse areas of jurisprudence where personhood takes center stage, noting that the concept plays a key role even when its exact content is unclear. Part II explains this seemingly contradictory evidence by suggesting that personhood is a cluster concept, an umbrella that shelters diverse and conflicting intuitions. Part III distills the evidence from the previous two Parts and presents three ways that personhood is typically used in human rights discourse, arguing that each is ultimately unhelpful for pursuing these claims. By exploring these three categories of arguments, it becomes clear that the concept of the person cannot be the foundation for a human rights claim. Finally, Part IV offers an alternative analysis that identifies the real—but limited—contribution offered by the concept.[17]

I. THE CENTRALITY OF PERSONHOOD IN HUMAN RIGHTS

In order to understand the centrality of personhood in contemporary rights claims, it is crucial to determine the function played by the concept—i.e., how it moves the argument forward. The scholarly literature that discusses the content of this concept—what it means to be a person and how this differs from being a human being, if it does—has offered varied accounts, although most scholars assume that, whatever it means, personhood is indispensable for making a human rights claim.[18] To take just the most obvious examples, the U.S. Constitution ascribes Fourteenth Amendment rights to *persons*,[19] the Universal Declaration of Human Rights makes reference to *human beings*,[20] and the International

17. It is not within the scope of this Note to offer a complete theory of human rights, nor is it feasible to catalog which rights should be included under this banner—a massive task well beyond the purview of this analysis. Nor will this Note identify which entities are the proper recipients of human rights. Furthermore, it also is impractical to offer a comprehensive and metaphysical account of personhood. Rather, the aim of this Note is quite modest in scope: to analyze the *role* played by the concept of the person in these legal arguments, how the concept functions, and to what degree the concept is essential to these arguments.

18. See, e.g., James J. McCartney, Embryonic Stem Cell Research and Respect for Human Life: Philosophical and Legal Reflections, 65 Alb. L. Rev. 597, 603 (2002) (noting many different and conflicting notions in legal literature as to what constitutes "personhood," and attributing lack of consensus to our "age that eschews meta-physics and asserts that much of our understanding of reality is invented, created, or is the product of interpretation"); Margaret Jane Radin, Reflections on Objectification, 65 S. Cal. L. Rev. 341, 346 (1991) (arguing that the conception of the person is problematized "[w]hen attributes that are (or were) intrinsically part of the person come to be detached and thought of as objects of exchange" and certain characteristics of persons become marks of "lesser" personhood).

19. U.S. Const. amend. XIV, § 1.

20. Universal Declaration of Human Rights, supra note 16, art. 1, at 72 ("All human heings are horn free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.").

Covenant on Civil and Political Rights makes reference to both[21] without indicating whether each term encapsulates distinct or overlapping groups. But a more detailed analysis is in order. This Part surveys some of the most contentious areas of human rights discourse to determine how the notion of the person is deployed. In each area, the concept of the person stands at the center of the legal controversy. These include cases of partial persons (children), potential persons (fetuses and embryos), past persons (brain-dead patients), almost persons (animals), irrational persons (patients with multiple personality disorder), and group persons (corporations and nation-states). While the first few cases deal with biological questions and their legal implications, the last few trace how the concept of the person can be uncoupled from its biological origins.

It is important to survey these areas of the law because the term "person" has varied meanings. Even within philosophy, personhood does not have a settled meaning but is the site of intense metaphysical disagreement. For example, Descartes famously conceived of persons as the union of body and soul, and fundamentally, the union of two *kinds* of substance: *res extensa* and *res cogitans*.[22] This union distinguished persons from mere animals (machines lacking souls) and from the divine (*res cogitans* completely untethered from physical bodies). Locke too thought of a person as a "thinking intelligent being,"[23] and that the essential characteristic of the person was consciousness, so much so that transferring a consciousness to another human body would result in the continuation of personal identity in another body.[24] This meant that being a particular *person* was something quite different from being a particular *human animal*. But the Lockean view has been widely rejected by a more recent

21. Compare International Covenant on Civil and Political Rights, Dec. 19, 1966, pmbl., S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) ("[T]he ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."), with id., pt. 3, art. 10, no. 1, S. Exec. Doc. E, 95-2, at 26, 999 U.N.T.S. at 176 ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").

22. René Descartes, Discourse on Method and Meditations 105–07 (F.E. Sutcliffe ed., Penguin Books 1968) (1641) (distinguishing between being a thinking thing and having corporeal extension).

23. John Locke, An Essay Concerning Human Understanding 335 (P.H. Nidditch ed., Oxford Univ. Press 1975) (1690) (concluding also that a person "has reason and reflection, and can consider it self as it self, the same thinking thing in different times and places").

24. Id. at 340 (arguing that if the consciousness of a prince were transferred into the body of a cobbler, the resulting combination would be the prince). Indeed, Locke also argued that consciousness and memory were the keys to legal responsibility and divine punishment would be handed down on that basis: "But in the great Day, wherein the Secrets of all Hearts shall be laid open, it may be reasonable to think, no one shall be made to answer for what he knows nothing of; but shall receive his Doom, his Conscience accusing or excusing him." Id. at 344.

school of thought advocating a view of personhood as a natural-kind term.[25] Under this view, persons are simply biological organisms of sufficient complexity that we can attribute psychological as well as physical characteristics to them.[26] Philosophers advocating a neo-Lockean position have vigorously challenged this viewpoint by conducting a series of deeply controversial thought experiments meant to elicit Lockean intuitions.[27] But the term "person" is so contested that it is not even clear that the word is being used in the same way by each theorist.

For that reason this Note conducts an independent inquiry into the term. Locke provides a starting point in his suggestion that "person" is a forensic term, "appropriating Actions and their Merit; and so belongs only to intelligent Agents capable of a Law . . . ."[28] The meaning of the term is so difficult to nail down because it straddles not only metaphysics, biology, and religion, but also value theory, such as moral philosophy and the law. Given that at least part of the function of the term is to attribute *legal* predicates such as rights and responsibilities, we might analyze specific instances of this discourse in order to understand the concept's role in legal reasoning. That is the methodology of Part I.

A. *Children*

Take, for example, a situation where the agency of persons is in doubt. The uncertain legal status of children, particularly young infants, stems from a dilemma about classification.[29] Their status as biological human beings suggests that they are legitimate bearers of human rights,[30]

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25. See, e.g., P.F. Strawson, Individuals: An Essay in Descriptive Metaphysics 104 (1959) ("[T]he concept of a person is to be understood as the concept of a type of entity such that *both* predicates ascribing states of consciousness *and* predicates ascribing corporeal characteristics . . . are equally applicable to an individual entity of that type."); David Wiggins, Sameness and Substance Renewed 225–26 (2001) (arguing that identity of persons coincides with identity of human beings).

26. See Strawson, supra note 25, at 101–03 (arguing that states of consciousness can only be ascribed to an entity if they are ascribed to the same entity as corporeal predicates). According to Strawson, the only concept that fills this role is the concept of a person. Id.

27. See, e.g., Derek Parfit, Reasons and Persons 199–209 (1984) [hereinafter Parfit, Reasons] (discussing hypothetical example of teletransportation); Sydney Shoemaker, Persons and their Pasts, *in* Identity, Cause, and Mind 19, 19–22 (2003) (arguing for Lockean conception of persons based on memory).

28. Locke, supra note 23, at 346.

29. See, e.g., In re Gault, 387 U.S. 1, 13–14 (1967) (holding that children in delinquency proceedings deserve due process protections afforded by the Constitution to persons). As several commentators have noted, the Supreme Court paved the way for this decision in Brown v. Board of Education, 347 U.S. 483 (1954), with its willingness to apply the Fourteenth Amendment to schoolchildren. See, e.g., Janet L. Dolgin, The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship, 61 Alb. L. Rev. 345, 366 (1997) (describing *Brown* and *Gault* as birth of children's rights movement).

30. See H. Tristram Engelhardt, Jr., The Beginnings of Personhood: Philosophical Considerations, Perkins J., Fall 1973, at 20 (analyzing rights of children in terms of degree of personhood achieved); Tamar Schapiro, Childhood and Personhood, 45 Ariz. L. Rev.

but their agency is not fully formed, suggesting that they should be denied absolute freedom of choice.[31] This produces an uneasy tension. When formulated in legal terms, the question becomes whether children are persons under the law.

But to what degree is the concept of the person the appropriate conceptual framework within which to decide the human rights of children? In this situation, two elements of our notion of the person stand in tension: biological human beings and rational agency. While infants are undeniably biological human beings, infants have yet to fully actualize either their moral or rational agency. (Indeed, if an infant is a newborn or is mentally disabled, he or she may display less cognitive sophistication than some fully matured animals.[32]) Usually these elements coincide in a fully formed human being who displays rational agency and deserves full legal rights; this is the typical case and it is uncontroversial. But for newborns, the components diverge in subtle but significant ways.

One might respond by noting that the concept of the person can vary by degrees. In that sense, a child could be *less of a person* than an adult—but a person nonetheless—in the same way that one object might be taller than another. While true, it is doubtful that this resolves the tension between the biological elements and the rational agency of the young child—especially when we probe our intuitions about the source of the varying degrees of personhood that we find in children. What varies by degree is the rational agency of the child. Depending on his or her age, a child may not yet have fully developed the hallmarks of rational agency such as means-end reasoning, accepting the logical consequences of beliefs and desires, and the transitive ordering of preferences. Such capacities develop with time and it is these deeper properties, and their fluctuations, that are the source of our intuition that children are persons to some lesser degree than adults.

B. *Embryos and Fetuses*

Consider the concept of the person in another area of human rights: embryos and fetuses.[33] It is striking that personhood still frames the de-

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575, 585–91 (2003) (justifying paternalism on basis of emerging personhood of children as moral agents who are not yet fully the authors of their own actions).

31. See Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 82–83 (1994) (noting that children are denigrated by the law because their diminished reasoning capacity prevents them from being recognized as full persons under the law).

32. See Peter Singer, Animal Liberation: A New Ethics for Our Treatment of Animals 18 (2d ed. 1990).

33. Although the Supreme Court held in Roe v. Wade, 410 U.S. 113 (1973), that the U.S. Constitution does not grant any independent protection to fetuses and embryos, id. at 156–57 (noting that references to "person" or "persons" throughout U.S. Constitution only apply postnatally), this is not to say that a state could not enact legislation to grant protections, subject to constitutional limitations designed to protect the liberty of other interested parties (such as pregnant women). For example, some state courts have

bate over their legal and moral status, even when the concept is poorly equipped to handle such questions.[34] A debate over the use of embryos in stem cell research has raged in both the medical and legal literature, arguing the ethical question of whether embryos have interests which might bar their use in this research.[35] Much of this argumentation is person-centric.[36] When the debate moves beyond the concept of the person, it does so because the concept has little to offer and breaks down at the margins.[37] And it breaks down at the margins for the very reason that embryos are potential biological human beings who have not yet developed rational agency or a cognitive structure capable of supporting psy-

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extended wrongful death actions for the unlawful killing of fetuses, and some states have explicitly amended wrongful death statutes to require this reading. See, e.g., Mich. Comp. Laws Ann. § 600.2922a (West Supp. 2004) ("A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus."). For a general discussion of this problem, see Dena M. Marks, Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question, 37 Akron L. Rev. 41 (2004).

34. For a probing analysis of in vitro embryos and the concept of the person, see Kathleen V. Wilkes, Real People: Personal Identity Without Thought Experiments 69–72 (1988) (arguing that implanted embryos "require[ ] the full application of the stance that we take to persons, ascribing to it interests as demanding as those of any fully-fledged persons" but that an embryo not in a position to develop has no sucb claims on us).

35. See, e.g., Ronald M. Green, The Human Embryo Research Debates 133–63 (2001) (exploring recent developments in stem cell debate); Kayhan Parsi, Metapborical Imagination: The Moral and Legal Status of Fetuses and Embryos, 2 DePaul J. Health Care L. 703, 704 (1999) ("Moral and legal status often encompasses issues of personhood, interests, and suffering. Is the fetus a person? Is the embryo a piece of property? Does a fetus have interests?").

36. See, e.g., Kass v. Kass, 1995 WL 110368, at *2 (N.Y. Sup. Ct. Jan. 18, 1995) (unpublished decision) (placing concept of the embryo somewhere between categories of persons and property in concluding that their potential for human life entitles them to some minimal rights), rev'd on other grounds, 663 N.Y.S.2d 581 (App. Div. 1997); Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992) (noting that the three major ethical positions over legal status of embryos assign or deny rights on basis of a continuum with full personhood at one end and mere human tissue at the other). The concept of the person still frames the debate in *Kass*—the implicit assumption of the trial court seems to be that full human rigbts go with personhood and that entities in between persons and property should be afforded some—though not all—human rights. *Kass*, 1995 WL 110368, at *2 (stating that "[t]he fact that zygotes are not persons from a legal standpoint does not establish they are property within the ordinary sense of that term," noting that "they represent the ultimate in nascency and potentiality," and calling any equation between them and "wasbing machines and jewelry for purposes of a marital distribution . . . absurd").

37. See Karen Lebacqz, On the Elusive Nature of Respect, *in* The Human Embryonic Stem Cell Debate 149, 160 (Suzanne Holland et al. eds., 2001) (concluding that an embryo should be respected as an entity with value even if it falls short of full personhood, although maintaining that embryonic research is consistent with this respect); John A. Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. Cal. L. Rev. 942, 971–76 (1986) (arguing that preimplantation embryos should not be afforded same rigbts as full biological persons, but may deserve greater respect than mere human tissue because of our respect for human life).

chological properties. Once again, there is a tension between competing interpretations of personhood.

A similar phenomenon exists in the abortion debate. Arguing whether a fetus is a person puts pressure on the legal concept. *Roe v. Wade* framed the issue in terms of whether a fetus was a *person* under the U.S. Constitution,[38] although the Court declined to pass judgment on the metaphysical status of the fetus.[39] However, fetuses are frequently referred to as "persons" for purposes of wrongful death in tort law.[40] The need to hang onto the concept of the person can be so strong that the jurisprudence does so even on pain of contradiction.[41]

The person-centric nature of the abortion debate can be explained, in part, by the language of personhood in the Fourteenth Amendment, which establishes the legal concepts required for anyone making an equal protection claim.[42] In other words, the nature of constitutional interpretation requires that litigants frame their arguments to fit the language of a constitutional provision, even when that language is unsuitable. But there are two points to be made here. First, it is striking that the concept of the person looms large in ethical debates about the status of the fetus

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38. See Ronald Dworkin, Life's Dominion 109–10 (Vintage Books 1994) [hereinafter Dworkin, Life's Dominion]. Dworkin notes that the status of a fetus as a person cannot be a matter for the states to decide because that would beg the question against recognizing constitutional protection for fetuses under the Fourteenth Amendment. Because the Fourteenth Amendment demands equal treatment for persons in all fifty states, the matter could only be left to states if it were decided, from the beginning, that fetuses were not persons for federal constitutional law. Id.

39. Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins.").

40. See, e.g., Marks, supra note 33, at 53–70 (surveying states that consider fetuses persons for purposes of wrongful death statutes); Brenda Daugherty Snow, Note, Torts—Wrongful Death: A Viable Fetus is Not a "Person" Under the Arkansas Wrongful Death Statute, 19 U. Ark. Little Rock L.J. 307, 308 (1997). However, when the House of Representatives attempted to make violence against a fetus a separate crime from violence against the mother, they did so with the language of "human being" and by including the fetus within the category of *Homo sapiens*. See Unborn Victims of Violence Act of 2001, H.R. 503, 107th Cong. § 2 (2001); see also Tara Kole & Laura Kadetsky, Recent Developments, The Unborn Victims of Violence Act, 39 Harv. J. on Legis. 215, 215 (2002) (discussing Act in comparison to *Roe*'s assessment of fetal life). For a discussion of these issues as they were treated before *Roe*, see Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 358–59 (1971) (tracing historical evolution of wrongful death actions for fetuses and stillborn infants and their status as "persons" in tort law).

41. See Jost, supra note 8, at 633 (noting that "states tend not to deal with the question of personhood or legal capacity of the unborn comprehensively, but rather address the issue on a case by case and issue by issue basis").

42. See Dworkin, Life's Dominion, supra note 38, at 22–23 ("The question is therefore inescapable whether a fetus is a person for the purposes of that clause—whether a fetus is a *constitutional* person."); Ruth Colker, The Section Five Quagmire, 47 UCLA L. Rev. 653, 674 (2000) (tracing legal implications of decision by the framers of the Fourteenth Amendment to apply the Equal Protection Clause to the category of all persons).

and the embryo, even when issues of constitutional interpretation are largely absent.[43] This suggests that the centrality of the concept of the person in these debates is not wholly attributable to the constitutional language. Second, the fact that the Constitution requires litigants to invoke the language of personhood suggests that the term is not meant to *begin* an argument, but rather to signal the *conclusion* of the argument. In other words, personhood would not, by itself, constitute a *reason* for granting rights. The term "person" might be applied not as a justification for the ascription of rights but rather to signal that we have, for other reasons, granted rights to the fetus and wish to signal this fact through conferral of personhood.[44] But if the concept of the person is deployed as a mere placeholder for a conclusion, it cannot simultaneously serve as a *reason* for granting rights, on pain of circularity.

C. *Brain-Dead Patients*

This brief survey demonstrates the centrality of the concept of the person to human rights discourse but suggests that the various elements associated with personhood do not necessarily cling together. Indeed, the most contentious cases in law and morality are precisely those where interpretations conflict. Consider the once-thorny issue of organ donation.[45] In order for organs to be viable for transplantation, they must be harvested while the patient's heart and lungs continue to function and provide oxygen to the body. However, organ donation of critical organs is only ethically permissible if the patient is already dead.[46] We ask ourselves: Is this patient still a *person*?[47] The answer, of course, depends on the essential elements of personhood. If the essential element of personhood is cognition, then the patient is dead, and no rights are violated. If the essential element is biological functioning,[48] such as a beating heart, then the patient is arguably not dead, and organ harvesting might violate his rights.

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43. See supra notes 30–31 and accompanying text.

44. See infra Part III.C.

45. See Robert M. Veatch, Transplantation Ethics 43–47 (2000) (discussing role of brain death in transplant ethics); Brian Kibble-Smith, Note and Comment, Can Good Medicine Be Bad Law?, 61 Chi.-Kent L. Rev. 151, 164 (1985) (arguing that adoption of brain-death standard will increase conflict in the law rather than reduce it).

46. See Ronald Munson, Raising the Dead: Organ Transplants, Ethics, and Society 185 (2002) (discussing the "Dead-Donor Rule").

47. See David Lamb, Death, Brain Death and Ethics 83–94 (1985) (discussing concept of the person in relation to brain death); Erik S. Jaffe, Note, "She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses, 90 Colum. L. Rev. 528, 553–54 (1990) ("When a person has irreversible termination of brain function, that person is legally dead—the 'person' no longer exists. The law thus views the primary defining characteristic of a person as the capacity (or at least the possibility, however remote) for mentation.").

48. Jaffe, supra note 47, at 554 n.125 (pointing out that some consider "capacity to maintain integrated biological functioning" the appropriate standard for personhood).

The medical community ultimately solved this philosophical conundrum by inventing brain death, a neuro-state typically measured by a neurologist administering, among other things, an apnea test.[49] Brain death resolves the paradox that arises when a patient is dead even though her body continues to function biologically.[50] This theoretical rubric has been codified in state law[51] and state courts have also adopted the definition.[52] This solved the ethical quandary faced by the medical community: Doctors would only harvest organs from patients who were biologically alive but who were no longer persons under the law because they were brain dead.[53]

The brain-death category prompts uneasiness for the very reason that it brings two interpretations of what it means to be a person directly into conflict. A biological animal continues to function (at some minimal level), but there is no evidence of higher cognitive functioning, no evidence of consciousness, and no evidence of rational agency at all.[54] If we insist on analyzing the question as one of personhood, an answer is not forthcoming.[55] But theorists tenaciously seek an answer because they as-

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49. The apnea test determines whether the brain can identify an absence of oxygen in the blood and send a signal to the lungs to breathe. See Fred Plum, Clinical Standards and Technological Confirmatory Tests in Diagnosing Brain Death, *in* The Definition of Death 34, 41 (Stuart J. Youngner et al. eds., 1999) ("[T]he apneic test represents the ultimate physiological-clinical test to diagnose brain death.").

50. See Munson, supra note 46, at 85–86.

51. These states include Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Montana, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See In re Haymer, 450 N.E.2d 940, 943 n.2–4 (Ill. App. Ct. 1983).

52. For example, the New York State Court of Appeals has sanctioned the "brain death" theory in rejecting appeals by convicted murderers who argued that their victims were legally killed by doctors harvesting organs for transplant. New York v. Eulo, 472 N.E.2d 286, 290, 295 (N.Y. 1984). In rejecting the defendants' claims, the Court expressed the issue in terms of personhood, noting that in "the immediate context, pertinent here, determination of a person's 'death' is relevant because our Penal Law defines homicide in terms of 'conduct which causes the *death* of a person.'" Id. at 349.

53. The acceptance of the solution by medical practitioners was not completely mirrored by the scholarly literature in law and ethics, where it is still debated. See, e.g., Munson, supra note 46, at 180–82 (noting that the brain-death definition is "fraught with problems"); David Randolph Smith, Legal Recognition of Neocortical Death, 71 Cornell L. Rev. 850, 860 (1986) ("Biological existence following neocortical death raises several problems for law and medicine."); Josef Seifert, Is "Brain Death" Actually Death?, *in* Working Group on the Determination of Brain Death and Its Relationship to Human Death 95, 139 (R.J. White et al. eds., 1992) (rejecting the medical definition of brain death on religious, theological, and philosophical grounds); cf. Alexander Morgan Capron, The Bifurcated Legal Standard for Determining Death: Does it Work?, *in* The Definition of Death, supra note 49, at 117, 129–30 (arguing that legal definition of death has problems but has produced a workable consensus).

54. See Veatch, supra note 45, at 208–09 (noting that doctors and nurses may find organ procurement from a still-warm body "deeply troubl[ing]").

55. See, e.g., Margaret Lock, Twice Dead: Organ Transplants and the Reinvention of Death 235 (2002) (asking what happens "[w]hen [b]odies [o]utlive [p]ersons"). Lock

sume the answer will be legally and morally relevant for determining the rights of those involved.[56] In fact, we consider it the central job of the law to resolve such questions because the stakes are so high.[57]

D. *Animals as Nonhuman Persons*

As a next example, consider the role played by the concept of the person in the animal rights movement. The status of animals—particularly sophisticated primates—remains deeply controversial in law and philosophy,[58] although their cause has not yet been adopted under the banner of human rights in American law schools. However, the relevant aspect for the present argument is not the acceptance or denial of the animal rights worldview, but the concepts marshaled during these debates. Several theorists have suggested that some animals meet most criteria for personhood and are therefore deserving of basic human rights.[59] As with embryos, part of the problem stems from the law's reliance on the mutually exclusive concepts of persons and property—neither of which are entirely satisfactory for dealing with animals.[60]

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notes that "[t]he physical demise of individuals and their social death do not always coincide closely. Although social and personal death and their memorialization usually take place after physical death, under certain circumstances the situation is reversed." Id. at 119.

56. See Veatch, supra note 45, at 45 (noting that all definitions of death attempt to "determine that which is so significant to a human being that its loss constitutes the change in the moral and legal status of the individual").

57. For a discussion of the human rights implications of informed consent abuses across the world, especially in developing countries, see generally Troy R. Jensen, Comment, Organ Procurement: Various Legal Systems and Their Effectiveness, 22 Hous. J. Int'l L. 555 (2000).

58. For a general discussion of developments in the animal rights movement, see The Animal Ethics Reader 1–10 (Susan J. Armstrong & Richard G. Botzler eds., 2003). The current debate over animal rights was sparked by the publication of philosopher Peter Singer's *Animal Liberation* in 1975. See generally Singer, supra note 32, at viii–x.

59. See, e.g., David DeGrazia, Great Apes, Dolphins, and the Concept of Personhood, 35 S. J. Phil. 301, 302 (1997) (identifying traits of dolphins and great apes that "might lead one . . . to ask wbether such animals are persons"); Robert W. Mitchell, Humans, Nonhumans and Personhood, *in* The Great Ape Project 237, 237–45 (Paola Cavalieri & Peter Singer eds., 1994) (arguing that primates meet most, but not all, criteria for personhood established by philosopher Daniel Dennett).

60. See, e.g., Michael P.T. Leahy, Against Liberation: Putting Animals in Perspective 23–26 (rev. 1994) (analyzing use of the concept of the person in animal rights argnments); Steven J. Bartlett, Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks, 8 Animal L. 143, 147 (2002) (noting that courts rarely consider animals "ends in themselves" and instead attempt to locate their value somewhere between personhood and mere property); David Favre, Equitable Self-Ownership for Animals, 50 Duke L.J. 473, 502 (2000) ("Animals are not humans and are not inanimate objects. Presently, the law has only two clearly separated categories: property or juristic persons."); Alan White, Why Animals Cannot Have Rights, *in* Animal Rights and Human Obligations 119, 120–21 (Tom Regan & Peter Singer eds., 2d ed. 1989) (arguing that only persons can have rights because "only a person can be the subject of such predications"). But see Gary L. Francione, Rain Without Thunder: The Ideology of the Animal Rights Movement 32–34 (1996) (noting some animal advocates have backed away from "all or nothing"

Although much of the animal rights literature is utilitarian in nature,[61] some of the arguments are framed within social contract theory, suggesting that certain animals have the cognitive sophistication to be considered auxiliary members of the social contract and therefore deserve Kantian respect.[62] These arguments suggest that the legal concept of the person is not only a central concept for human rights discourse, but is also an avenue for conceptual *expansion* of human rights.[63] One could expand the concept of the person to include animals that are not even biological human beings, either because they display some minimal rational agency or some of the psychological properties of human beings.[64] In this case, again, the various elements of the concept of the person stand in pronounced tension. While advocates for animal rights argue that animals exhibit some of the rational and psychological attributes of personhood, they readily admit that they seek expansion for *nonhuman beings*, i.e., for members of the animal kingdom who fall outside of the biologically defined group of *Homo sapiens*. Again, the important

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approach on animal rights in favor of arguing for animal *welfare*, regardless of theoretical foundation for that treatment); Tom Regan, The Case for Animal Rights 152–54 (1983) (putting animals into the category of moral *patients*, i.e., beings who are not sophisticated enough for moral agency but may nonetheless have moral interests); Singer, supra note 32, at 9–17 (urging ethical treatment of animals because of their capacity to feel pain but refraining from using concept of the person).

61. See, e.g., Tom Regan, Animal Rights, Human Wrongs 63–66 (2003) [hereinafter Regan, Human Wrongs] (discussing utilitarian justifications for animal rights); Singer, supra note 32, at 7 (appealing to Jeremy Bentham and utilitarian tradition generally).

62. See Paola Cavalieri, The Animal Question: Why Nonhuman Animals Deserve Human Rights 94 (Catherine Wollard trans., Oxford Univ. Press 2001) (1999) (discussing animal rights theories in terms of Kantian intrinsic value); Immanuel Kant, Grounding for the Metaphysics of Morals 36–37 (James W. Ellington trans., Hackett 3d ed. 1993) (1785) [hereinafter Kant, Grounding] (positing rational nature as the foundation for the categorical imperative); Mark Rowlands, Animal Rights: A Philosophical Defence 120–58 (1998) (using Rawls's social contract framework to argue for animal rights). However, Kant himself did not analyze the rights of animals in terms of their participation in the social contract. Rather, Kant suggested that we should refrain from animal cruelty because it is a prelude to engaging in cruelty towards fellow human beings. Consequently, our duty to animals stems from our indirect duty to *mankind*. See Immanuel Kant, Duties Towards Animals and Spirits, *in* Lectures on Ethics 239, 239–41 (Louis Infield trans., The Century Co. 1930) (1924). For a Kantian argument for animal rights that does not make reference to persons, see Regan, Human Wrongs, supra note 61, at 96 (concluding that all human beings and all animal beings "possess inherent value" and deserve "equal treatment" because both are "subjects-of-a-life").

63. See Cavalieri, supra note 62, at 122 ("[T]he rhetorical usage of 'person,' far from being useful only when it comes to strengthening the paradigm, turns out to be particularly valuable in just those cases in which moral reform is at stake."); cf. Steve F. Sapontzis, Aping Persons—Pro and Con, *in* The Great Ape Project, supra note 59, at 269, 270–72 (arguing that using personhood as basis for animal rights promotes species bias).

64. See Anthony D'Amato & Sudhir K. Chopra, Whales: Their Emerging Right to Life, 85 Am. J. Int'l L. 21, 27 (1991) (arguing that "whales and some other sentient mammals are entitled to human rights or at least to . . . the most fundamental entitlements that we regard as part of the humanitarian tradition").

point is not so much the validity of the arguments presented but the use of the concept of the person while making them.

Often these arguments for animal rights proceed by way of analogy.[65] First, biological human beings are entitled to rights. Second, animals share many of the characteristics of human beings, at least to some lesser degree. Therefore, animals are entitled to at least some of the same rights as human beings. Obviously, this argument only works if the shared characteristics are relevant to the ascription of rights—otherwise the analogy loses its force.[66] Personhood is often deployed in this context to *signal* the use of this argument by analogy.[67] Extending the concept of the person to animals therefore merely indicates that they share relevant characteristics with human beings and deserve rights on that basis.[68] This is not necessarily the correct analysis for all arguments in the animal rights debate. Indeed, it may be the case that personhood signals this kind of argument by analogy in some cases but not others. In any case, to the extent that it does, it indicates that these arguments must make reference to the relevant characteristics below the surface and that the concept of the person *signals* the analogy but does not lend direct force to it.

E. *Patients with Multiple Personality Disorder*

Consider next the difficult issue of criminal responsibility for patients with multiple personality disorder (also known as MPD).[69] While this diagnosis remains controversial in both the medical and legal literature,[70] the concept of the person provides the conceptual framework for

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65. See, e.g., Richard A. Posner, Animal Rights: Legal, Philosophical, and Pragmatic Perspectives, *in* Animal Rights: Current Debates and New Directions 51, 66 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) [hereinafter Animal Rights: Current Debates] ("What is needed to persuade people to alter their treatment of animals . . . is to learn to feel animals' pains as our pains and to learn that (if it is a fact, which I do not know) we can alleviate those pains without substantially reducing our standard of living . . . .").

66. Id.

67. See, e.g., Gary L. Francione, Animals—Property or Persons?, *in* Animal Rights: Current Debates, supra note 65, at 108, 131 (arguing that animals are moral persons, a designation that simply means "that the being has morally significant interests, that the principle of equal consideration applies to that being, that the being is not a thing").

68. Id.

69. The condition is also referred to as dissociative identity disorder (DID). For a medical analysis of MPD and DID, see Frank W. Putnam, Diagnosis and Treatment of Multiple Personality Disorder 6–23 (1989) (discussing diagnostic criteria for MPD from the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-III*)).

70. See, e.g., Elyn R. Saks & Stephen H. Behnke, Jekyll on Trial: Multiple Personality Disorder and Criminal Law 106 (1997) (arguing that patients with MPD should not be held responsible for their crimes because, inter alia, punishment would harm innocent alter personalities who are persons in their own right or blameless centers of consciousness); Harold Merskey, The Manufacture of Personalities: The Production of Multiple Personality Disorder, *in* Dissociative Identity Disorder: Theoretical and Treatment Controversies 3, 28–29 (Lewis M. Cohen et al. eds., 1995) [hereinafter Dissociative Identity Disorder] (arguing that MPD patients often have real problems

the debate.[71] In order to determine when and how patients with MPD should be held criminally responsible for their actions, much of the debate hinges on whether each "personality" identified by a psychologist should be considered a distinct legal person.[72] This is another clear case where two interpretations of the concept of the person stand in some tension. Patients with multiple personalities have one biological body but exhibit extreme disunity in their lives. They often contradict themselves, change their minds on important matters, and experience stark episodes of forgetfulness and amnesia.[73] Some therapists make sense of this behavior by attributing these inconsistent actions to different psychological personalities.[74] Indeed, the patient may facilitate this process by naming the personalities and presenting himself to the world in the guise of one or more of them.[75] In some cases, the personalities interact with each other through the use of diaries and other communication methods. Therapists treating these patients are faced with two ways of looking at

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stemming from child abuse and other trauma and MPD diagnosis is unhelpful for resolving these obstacles); August Piper, Jr., A Skeptical Look at Multiple Personality Disorder, *in* Dissociative Identity Disorder, supra, at 135, 135–45 (argning that diagnostic criteria for MPD are imprecise and overinclusive). But see Phil Mollon, Multiple Selves, Multiple Voices: Working with Trauma, Violation and Dissociation 122–23 (1996) (arguing that MPD patients are "pretending" in some sense, although denying that this impeaches the disorder and instead defining MPD as a "pathology of pretence").

71. The issue is discussed in Wilkes, supra note 34, at 109–31 (arguing that cases of MPD represent "the fracturing of the concept of a person").

72. See, e.g., Elyn R. Saks, Multiple Personality Disorder and Criminal Responsibility, 10 S. Cal. Interdisc. L.J. 185, 189–90 (2001) (using rubric of personhood and personal identity to analyze legal responsibility of patients with multiple personalities); Walter Sinnott-Armstrong & Stephen Behnke, Criminal Law and Multiple Personality Disorder: The Vexing Problems of Personhood and Responsibility, 10 S. Cal. Interdisc. L.J. 277, 277 (2001) (discussing legal implications of conferring personhood on alter personalities in patients with multiple personality disorder).

73. See, e.g., Eugene L. Bliss, Multiple Personality, Allied Disorders, and Hypnosis 121 (1986) (noting that multiple personalities often assume distinct name, identity, and behavior that cannot be explained away by therapist influence).

74. Part of the therapist's goal is to treat the patient as charitably as possible, in the sense of trying to find a rational explanation for his or her actions. See Carol Rovane, The Bounds of Agency 201–02 (1998) (suggesting that therapists may need to forgo the assumption that they are speaking with a single person in order to make rational sense of patients' behavior). The need to find the greatest degree of rationality in an interlocutor is not limited to the therapeutic context and is, of course, a generalized situation in behavior interpretation. See Donald Davidson, Inquiries into Truth and Interpretation 27 (2001) (explaining principle of charity in linguistic interpretation); Simon Evnine, Donald Davidson 102–03 (1991) (noting that charity principle requires a listener to make assumptions about a speaker's beliefs); Willard Van Orman Quine, Word and Object 59 (1960) (discussing charity principle and suggesting the maxim that "assertions startlingly false on the face of them are likely to turn on hidden differences of language," rather than an interlocutor's irrationality).

75. See, e.g., Doris Bryant & Judy Kessler, Beyond Integration: One Multiple's Journey 23–24 (1996) (describing development of patient's alternate personality during her high school years); Putnam, supra note 69, at 84 (noting that patients frequently use the first person plural to describe their behavior).

the situation. First, they can see the patient as one agent, with one mind, who is experiencing pronounced episodes of irrationality and psychological discontinuity. Or, they can see multiple agents within their patient, each of whom exhibits a distinct rational point of view on the world and who acts accordingly.[76] In many cases, this might also lead the therapist to conclude that the patient no longer displays a single unity of consciousness but rather multiple centers of consciousness.

These disruptions are most compelling when the personalities pursue incompatible projects—especially if one is criminal.[77] In such cases an academic question of psychology becomes an acute problem for the law.[78] This radical disjuncture in behavior might be evidence that each personality constitutes an individual rational agent, and in turn, a person in his own right.[79] This would have consequences both for legal rights and responsibility.[80] One can justify this ascription by noting that an individual personality goes to great lengths to form coherent and consistent rational explanations, but does not feel compelled to offer explanations

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76. See Rovane, supra note 74, at 201–02 (noting the unified rational point of view of an alter personality); R.D. Hinshelwood, The Di-vidual Person: On Identity and Identifications, *in* Attachment, Trauma and Multiplicity 211, 223–24 (Valerie Sinason ed., 2002) (noting that persons are "influenced in 'who they think they are' and in what they think their identity is, by external pressures, but also by pressures within themselves").

77. See Saks & Behnke, supra note 70, at 108 (providing example of Marie Moore, whose alleged alter, Billy Joel, held a group of children hostage); State v. Moore, 113 N.J. 239, 310 (1988) (reversing Moore's conviction and death sentence because trial court erred in not instructing jury on diminished capacity); see also United States v. Denny-Shaffer, 2 F.3d 999, 1021–22 (10th Cir. 1993) (overturning conviction and trial court's refusal to allow insanity defense stemming from defendant's diagnosis of MPD).

78. See, e.g., *Denny-Shaffer*, 2 F.3d at 1014 (holding that there was "substantial evidence" that defendant's host personality was unaware of criminal conduct of her alter personality and was consequently unable to appreciate wrongfulness of conduct).

79. See Stephen E. Braude, First Person Plural: Multiple Personality and the Philosophy of Mind 206–10 (1995) (arguing that, in many respects, multiple personalities are persons and even those who deny their personhood frequently treat them as individual persons); Rovane, supra note 74, at 169–79 (arguing that multiple personalities should qualify as persons). However, Rovane does not take a stand on the complicated clinical issue of whether MPD is a valid psychological diagnosis; she simply argues that if multiple personalities exist, then they are persons in their own right. Id. at 170. Nor does the analysis presented in this Note require acceptance of the diagnosis. See infra note 86 and accompanying text.

80. See Saks & Behnke, supra note 70, at 119 (setting explicit standards for legal nonresponsibility in MPD cases). But see Kirkland v. State, 304 S.E.2d 561, 564 (Ga. Ct. App. 1983) (accepting *Ohio v. Grimsley* proposition that an MPD patient is a single person and concluding that "the law adjudges criminal liability of the person according to the person's state of mind at the time of the act; we will not begin to parcel criminal accountability out among the various inhabitants of the mind"); Ohio v. Grimsley, 444 N.E.2d 1071, 1075–76 (Ohio App. 1982) (concluding that defendant raising a multiple personality disorder defense was "one person"). The Tenth Circuit in *Denny-Shaffer* rejected the reasoning of these state court decisions and argued that the control executed by the dominant personality at the time of the crime was crucial for determining legal responsibility. *Denny-Shaffer*, 2 F.3d at 1018. Other courts have found insufficient evidence to resolve the controversy. See, e.g., State v. Wheaton, 850 P.2d 507, 514 (Wash. 1993).

consistent with those of the other personalities.[81] While this is a strong and controversial conclusion,[82] it is further evidence that our different interpretations of personhood can stand in radical tension. While rational agents usually come one to a body, this need not always be the case, as these rare psychological case studies indicate.[83] These cases place extreme pressure on our notion of the person as a biological human being with a unified rational point of view.[84]

Of course, some might object that these cases are the product of overeager therapists, susceptible patients, and criminal defendants looking for legal excuses to avoid prosecution. Indeed, many psychiatrists and critics have discredited the diagnosis and its theoretical underpinnings.[85] Fortunately, we need not address the controversy here, as nothing in the current analysis requires an acceptance of the legitimacy of MPD as a diagnosis.[86] Even if no verifiable case of the disorder could be found, the conceptual point would remain: Faced with these circumstances, the concept of the person is invoked on both sides of the debate—among those who would ascribe personhood to multiple personalities and among those who would deny it—even though this novel situation makes it difficult to extend the concept successfully. When dealing with MPD, the biological concept of the human being conflicts with our notion of rational agency, producing tension *within* the concept of the person.

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81. Rovane defends this standard and notes that the personalities in patients with MPD demonstrate "distinct rational points of view." Rovane, supra note 74, at 169; see also Braude, supra note 79, at 200 (describing personhood as "the set of psychological and behavioral attributes in virtue of which we are able to adopt certain attitudes toward the individual, interact with bim as a more or less autonomous agent, and form a distinct relationship with him").

82. Several theorists have parsed the issue differently. See, e.g., D.H.M. Brooks, Tbe Unity of the Mind 142 (1994) (arguing that split personalities are self-reflexive consciousnesses within a *single* mind); Owen Flanagan, Self Expressions: Mind, Morals, and the Meaning of Life 66–67 (1996) (arguing that patients with MPD exhibit multiple *narrators* who bave fractured tbe individual's narrative structure); cf. Ian Hacking, Rewriting the Soul: Multiple Personality and the Sciences of Memory 221–23 (1995) (arguing that MPD "does not furnish any evidence for any substantive philosophical thesis about mind (or self, etc.)").

83. See generally Bryant & Kessler, supra note 75, at 4–6 (discussing Judy's story of dissociation and creation of multiple personalities).

84. See Rovane, supra note 74, at 170.

85. See generally Joan Acocella, Creating Hysteria: Women and Multiple Personality Disorder (1999) (offering broad critique of MPD and therapists who championed it). Acocella argues that patients told fanciful stories because they were, among other things, taking higb doses of medications and undergoing hypnosis. Id. at 12–13; see also Merskey, supra note 70, at 6 (discussing skepticism stemming from growing number of MPD cases reported); Colin A. Ross, The Validity and Reliability of Dissociative Identity Disorder, *in* Dissociative Identity Disorder, supra note 70, at 65, 81 (arguing that the question can only be settled by designing an empirical study, as opposed to relying on case studies).

86. Indeed, the diagnosis has been discredited by, inter alia, therapeutic reliance on hypnosis, recovered memory, and stories of satanic ritual abuse, all of wbich have attracted *serious* criticism from the profession at large. See Acocella, supra note 85, at 39.

F. *Corporations as Group Persons*

While patients with MPD may include multiple rational agents within a single human body, the opposite is also possible: Several biological human beings might join together to form a single rational agent—a corporation with legal status.[87] There is wide disagreement in the literature about the scope of rights for corporations under domestic and international law.[88] However, the disagreements take place against a common background provided by the concept of the person.[89] Furthermore, legal theorists have provided a rigorous defense of the possibility that corporations are persons.[90] Foreign legal systems grant corporations the basic right to property and in doing so attribute legal personality to corporations.[91] U.S. law grants corporations many more rights, including legal personality for purposes of tax law[92] and a right to be free from unreasonable search and seizure,[93] but denies other rights, such as the right

87. For an excellent analysis of group agents and their properties using the language of rational choice theory, see generally Philip Pettit, Collective Persons and Powers, 8 Legal Theory 443 (2002). Pettit notes that collective persons display a unique rational decisionmaking structure which can only be explained by analyzing them as a group entity, rather than an aggregate of individual decisionmakers. This is the so-called "discursive dilemma." Id. at 446–47, 451–55.

88. Compare S. Ry. Co. v. Greene, 216 U.S. 400, 412 (1910) ("That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion."), and Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) (holding that corporations are persons for purposes of the Fourteenth Amendment), with Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) ("Extension of the individual freedom of conscience decisions to business corporations strains the rationale . . . beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality.").

89. See, e.g., Gregory A. Mark, Comment, The Personification of the Business Corporation in American Law, 54 U. Chi. L. Rev. 1441, 1443 (1987) (tracing history of the idea of the corporation as a legal person).

90. See, e.g., Peter A. French, Collective and Corporate Responsibility 35 (1984); Roger Scruton, Corporate Persons, 63 Aristotlean Soc'y 239, 245–49 (Supp. 1989). But see Sanford A. Schane, The Corporation Is a Person: The Language of a Legal Fiction, 61 Tul. L. Rev. 563, 563 (1987) ("The edification of the corporation to the status of person is one of the most enduring institutions of the law and one of the most widely accepted legal fictions.").

91. The European Convention gives property rights both to *natural persons* and *legal persons* in an attempt to explicitly confer some human rights to corporate entities. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Mar. 20, 1952, art. 1, 213 U.N.T.S. 262, 262 (entered into force May 18, 1954); see also Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (analyzing corporations as legal persons in contrast to natural persons and recognizing their right to hold property).

92. See Linda Sugin, Theories of the Corporation and the Tax Treatment of Corporate Philanthropy, 41 N.Y.L. Sch. L. Rev. 835, 842 (1997) (noting that "the tax law's wholesale adoption of the corporate person fiction is well illustrated by the current rate schedule applicable to corporations").

93. Hale v. Henkel, 201 U.S. 43, 76 (1906) (holding that corporation does not have to produce books or papers if request constitutes unreasonable search and seizure).

against self-incrimination.[94] These rights have spurred a corresponding movement to subject corporations to the same criminal liability as regular citizens. This liability includes responsibility under international human rights agreements[95] and even U.S. domestic penal law.[96] Again, the key point here is not the specific legal rights or responsibilities attributed to corporations. Rather, the proposition is two-fold: First, arguments attributing these rights and responsibilities make frequent reference to corporations as legal persons. Second, such arguments are paradigmatic examples of two elements standing in tension: the idea of the person as a single biological human being and the idea of a person as a single rational agent. In the case of corporations, multiple biological human beings combine to form a single rational agent for purposes of the law. The result is an internal tension in our understanding of what it means to be a person.

What this case study makes clear is that the concept of the person is not wholly restricted to scenarios where the person has some kind of intrinsic worth—where, as it were, the intrinsic moral worth of the person can be asserted. In these scenarios the concept is atomic and directly grounds a moral intuition about moral worth. But corporate rights are precisely the opposite: Corporations themselves have no intrinsic worth. Rather, their worth is extrinsic and stems from the benefits flowing to the natural individuals involved: the shareholders, the consumers, the employees, etc. To put the point more directly, the death of a corporation is cause for concern only for its *effects* on individuals, including unemployment, the loss of investment savings, or the termination of valuable products and services. By contrast, the death of an individual may be cause for concern regardless of its consequences, because the life of a human being has an intrinsic moral worth. While personhood's appearance in the latter case may give the false impression that the concept is intimately tied to moral worth, the term's use in the former case indicates something altogether different.

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94. See Scott A. Trainor, Note, A Comparative Analysis of a Corporation's Right Against Self-Incrimination, 18 Fordham Int'l L.J. 2139, 2168 (1995) (noting that in the United States, "a corporation has no right against self-incrimination").

95. See, e.g., Stephen G. Wood & Brett G. Scharffs, Applicability of Human Rights Standards to Private Corporations: An American Perspective, 50 Am. J. Comp. L. 531, 540–47 (Supp. 2002) (surveying different theories of corporate personhood and applying human rights standards to them on that basis).

96. See, e.g., United States v. Paccione, 949 F.2d 1183, 1200 (2d Cir. 1991) (holding that corporation can be held criminally liable for acts of supervisors who intentionally disregarded the law). For a good discussion of the development of corporate criminal liability, see Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?, 47 Rutgers L. Rev. 605, 607 (1995) (noting that corporations are generally held criminally liable when their employees act wrongly during the scope of their employment).

G. *States as Group Persons*

A similar move is made in international law where states are treated as legal persons for purposes of international relations.[97] Indeed, the notion of the state as a legal person goes back to the very genesis of the nation-state as an actor within an international legal order.[98] Furthermore, not only are states granted legal personhood, their personhood is frequently invoked as the very reason they should be afforded rights in the international system.[99] These rights include negotiating treaties, freedom from territorial aggression, and self-defense. Indeed, most rights in international law are attributed to nations, and under at least one jurisprudential theory, nations are considered to be the *only* legitimate bearers of rights under international law.[100] Also, legal theorists have gone to some length to demonstrate how states act as unified rational agents within the international system.[101] A nation's status as a rational actor on the international stage is one possible reason for considering it a rational agent—and consequently, a legal person. This yields a similar result as

97. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 (referring to state as a "person of international law"; declaring that "the federal state shall constitute a sole person in the eyes of international law"; and arguing that juridical equality of states does not "depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a *person* under international law" (emphasis added)).

98. Emmerich de Vattel, The Law of Nations § 12, at 3 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson 1853) (1758) ("The law of nations is the law of sovereigns; free and independent states are moral persons . . . ."); see also Immanuel Kant, The Metaphysics of Morals 114 (Mary Gregor ed., Cambridge Univ. Press 1996) (1797) (referring to the state "as a moral person . . . living in relation to another state in the condition of natural freedom").

99. See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 124, U.N. Doc. A/8082 (1970) (proclaiming that states are juridically equal and have the duty to respect the *personality* of other states); Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 2418, 119 U.N.T.S. 3, 54 (declaring that equality of states and their subsequent rights depend "not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a *person* under international law" (emphasis added)). The charter also declares that recognition of one state by another means accepting the personality of the new state. See id. art. 10, 2 U.S.T. at 2419.

100. Recognizing the personality of nonstate actors is a new and vanguard position in international law. See, e.g., Martin A. Ölz, Non-Governmental Organizations in Regional Human Rights Systems, 28 Colum. Hum. Rts. L. Rev. 307, 321–22 (1997) (arguing in favor of extending legal personality to nonstate actors); Peter J. Spiro, Accounting for NGOs, 3 Chi. J. Int'l L. 161, 167 (2002) (discussing implications of extending legal personality to nonstate actors).

101. See, e.g., Charles R. Beitz, Political Theory and International Relations 53 (1979) (noting that it is helpful to view states as rational actors to understand their behavior, though not necessarily helpful for *prescribing* their conduct); cf. John Rawls, The Law of Peoples 32–33 (1999) (founding theory of international relations on a second original position composed of rational agents, behind a veil of ignorance, who represent liberal societies).

that of the corporation: a group of biological human beings brought together to form one rational agent. Once again, the conceptual machinery provided by the concept of the person is at the center of a debate about legal rights and—just as before—the diverse elements of the concept stand in some tension with each other. The notion of the person as a biological human being sharply diverges from the notion of the person as a rational agent.

As with multiple personality disorder, one could simply deny the empirical reality (that nation-states exhibit a coherent rational point of view in the same way as corporations) and consequently argue that nation-states *should not* be considered legal persons. Again, this would be an empirical claim and would not change the fact that international law, whether justified in doing so or not, recognizes nation-states as legal persons. Also, one could claim again that the term personhood is being used as a placeholder to signal the *conclusion* of an argument about collective rights, or that it is being used to signal an argument by analogy. But even if these objections are accepted, this would simply be further evidence that personhood does not directly ground a rights claim. Attributions of personhood are not doing the logical work of moving the argument forward. The concept of the person cannot be an essential battleground for rights.

II. The Concept of the Person as a Cluster Concept

Part I pulled together diverse examples of legal arguments that place the concept of the person at their center. While it may seem difficult to draw together these diverse phenomena into a coherent framework, they are united by one factor—their use of the concept of the person. By harnessing examples from legal controversies in the human rights field, Part I revealed deep strains on the concept. While personhood may be an elastic notion, suitable for use in diverse arenas, the evidence in Part I indicates that it is not nimble enough to ground arguments about the human rights of embryos, fetuses, and children, while simultaneously grounding arguments about animals, corporations, and nation-states. The concept's coherency begins to break down when placed under such extraordinary pressure.

The task of Part II is to develop a conceptual matrix to explain these conflicts. This Part suggests that the concept of the person is a cluster concept, an umbrella term that clusters together diverse and sometimes contradictory notions.[102] Objections to this view are presented and dis-

102. The idea of a cluster concept is well traveled within legal theory and philosophy. Indeed, it is quite fashionable to argue that a proper analysis of a concept can only proceed if it is recognized as a cluster concept. But this theoretical move has only occasionally been made with the concept of the person. See, e.g., Amélie Oksenberg Rorty, A Literary Postscript: Characters, Persons, Selves, Individuals, *in* The Identities of Persons 301, 302 (1976) (noting that "person" is used to "designate the entire class of expressions that refer to the entities we have invented ourselves to be"). However, Rorty

missed. The result is a dual understanding: The concept of the person is often central to legal debates about human rights, but its use betrays a deep tension in its components.

A. *The Internal Tension Within the Concept of the Person*

The concept of the person works well in ordinary discourse when we want to refer to individuals who are, incontrovertibly, persons. This is also true when typical persons appear before the legal system and their status is not questioned. However, the cases outlined in Part 1 are exceptions and reside at the margins of law and morality. This is important to remember because it explains why the term "person" has survived for so long. The philosopher W.V. Quine once noted that words have only as much precision as our current needs have required and it is foolish to search for greater precision where none exists.[103] Any attempt to find this precision is bound to dissolve into *legislation*—i.e., a decision.[104] If the concept of the person had broken down in *all* legal cases it would have been revised, altered, or eliminated. It was not, which suggests that in many situations the legal term is adequate.

But the fact that the concept breaks down in contentious cases is important. The law functions not only to resolve typical cases but also to extend existing concepts and categories to new facts. So, putting pressure on the concept in cases of legal dispute exposes the deep tensions within it. This Note suggests the following explanation for the source of the conflict: The term "person" does not stand for a single concept but rather for a *cluster* of ideas. In our daily lives, when we have no difficulty picking out persons from nonpersons, the individual components of the cluster are consistent with each other, i.e., there is no conflict between them. But the legal controversies discussed in Part 1 demonstrate that the law is rife with cases where the components of the cluster pull in opposite directions.

What does it mean to say that our concept of the person is a cluster concept? It is to say that the term is useful shorthand for a collection of more precise—but somewhat theoretical—concepts. Our use of this cluster concept has paved over our conflicting intuitions about its source, its use, and its application. This phenomenon obscures deep disagreements

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does not explicitly use the term "cluster concept," and does not identify the same subconcepts that are highlighted in this Note. Id.; see also Jens David Ohlin, Personal Identity Without Persons 37–45 (2002) (unpublished Ph.D. dissertation, Columbia University) (on file with the Columbia University Library) (arguing that personhood is a cluster concept and drawing on Rorty's discussion of the historical changes in the concept).

103. See Willard Van Orman Quine, Book Review, 69 J. Phil. 488, 490 (1972) (reviewing Identity and Individuation (Milton K. Munitz ed., 1971)) [hereinafter Quine, Book Review] (arguing that "[t]o seek what is 'logically required' for sameness of person under *unprecedented* circumstances is to suggest that words have some logical force beyond what our past needs have invested them with" (emphasis added)).

104. Id.

about what it means to be a person—disagreements which emerge in human rights discourse. To say that personhood is a cluster concept means that the umbrella concept works just fine *sometimes*, but that use of the components instead of the umbrella term would promote clearer analysis of the legal issues involved.

Although we use the word "person" to pick out these components, *which* components we are picking out depends on the situation. Sometimes we use the word to talk about rational agents, sometimes to emphasize continuity of consciousness, and sometimes to highlight biological human beings. Most often, though, we use the word to reference two or more of these discrete concepts. For our daily needs, then, the word does remarkably well. It identifies a cluster of concepts that in quotidian discourse we have little need to distinguish. We talk about persons when we want to identify "people" in the vulgar sense of the expression. It does not matter if we are specifically thinking about bodies, minds, or agents, because people are all of these things. But when put under extreme pressure by a contentious legal situation, the concept becomes problematic for the simple reason that it does not stand for just *one* concept, but for a *cluster* of concepts that are often linked by contingent fact.[105]

B. *An Objection: Are the Lower-Level Components Any Better?*

A possible objection presents itself at this juncture. This Note has thus far argued that the concept of the person is a cluster concept and that legal controversies about rights erupt when the components conflict with each other. But are the component concepts any better for purposes of legal dispute resolution? There certainly are conflicts about what it means to be a biological human being, to exhibit continuity of consciousness, or to be a rational agent. To continue an example from Part I, there are deep disagreements about the status of the fetus independent of any issues of personhood. Is the fetus a separate biological entity from its mother, or do they constitute a single biological animal?[106] Or consider again the case of corporations. An entire field of inquiry is

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105. The idea of a cluster concept has some affinity with Wittgenstein's characterization of the concept of a game: It has blurry edges and can be identified only by "family resemblance." In other words, the concept is gathered around a group of similar exemplars, without necessarily having exact or specific criteria for which ones should be included under the concept. See Ludwig Wittgenstein, Philosophical Investigations §§ 67–71 (G.E.M. Anscombe trans., Prentice Hall 3d ed. 1958) (1953).

106. Indeed, these issues were very much part of the discussion initiated by the *Roe* decision. See, e.g., Ilana Hurwitz, Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood, 33 Conn. L. Rev. 127, 157 n.163 (2000) (noting that some commentators consider the fetus to be part of the mother's body); Radhika Rao, Property, Privacy, and the Human Body, 80 B.U. L. Rev. 359, 363 (2000) ("The law of the body is currently in a state of confusion and chaos.").

devoted to analyzing conflicts about the nature and behavior of rational agents.[107] There is hardly unanimity in either case.

The analysis presented here does *not* suggest that the individual component concepts are free from vagueness, imprecision, or outright incoherence. There are indeed preexisting conceptual problems within the components, problems which are under investigation by legal theory and the philosophy of biology, mind, and action respectively. But in pushing the analysis one level down we can excise one source of the conflict—the conflict *between* the components. While the component concepts might suffer from their own problems (local inconsistencies, vagueness, etc.), they are nonetheless *discrete* concepts. And discrete concepts, though by no means free of problems, are free from the kind of conflict that can plague a cluster concept.

Consider our intuitions about what it means to be a biological animal. The issue seems rife with vagueness. When a body has an arm replaced it is clearly still the same body. And if all limbs are replaced it is probably still the same body, though the question may be more contentious.[108] What if almost all of its body is replaced? At some point, we are likely to think that we are no longer dealing with the same body.[109] We have intuitions about the extremes, but in the middle case we have difficulty answering the question. The difficulty is not with our linguistic competence with the concept; rather the concept fails to fit these marginal cases. In essence, it is not that we do not know how to use the word in the middle cases—the problem is with the vagueness of the concept itself. In these middle cases the question might be *empty*.[110]

So it is clear that the component concepts are not perfect. But this is not evidence that personhood is not a cluster concept. It is not necessary that the components be free from vagueness or any other local inconsistency to accept the suggestion that the concept of the person is a cluster concept. The only requirement is that in recoguizing personhood as a cluster concept we diaguose the tension between the components. The recognition that personhood is a cluster concept did not *create* the vagueness within the component concepts. The vagueness was already there implicitly; now we just see it explicitly. So recognizing that personhood is a cluster concept improves the situation by making clear how the concept actually functions in difficult legal cases.

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107. For a pathbreaking discussion of the implications of decision theory, see generally Issac Levi, Hard Choices: Decision Making Under Unresolved Conflict (1986).

108. Parfit addresses this issue in a thought experiment called The Physical Spectrum, where scientists create a physical replica of a body with new matter by replacing one at a time an original particle with a replicated particle. Parfit asks at which point in the process a new body comes into existence, ultimately concluding that it may be indeterminate at what point a physical body ceases to be the same physical body. See Parfit, Reasons, supra note 27, at 234–43.

109. Id. at 235.

110. In fact, Parfit notes that "[w]e could not *discover* what the critical percentage is, by carrying out some of the cases in this imagined spectrum." Id.

Having explained the evidence in Part I by reconceiving personhood as a cluster concept, this Note now turns to a more generalized, theoretical explanation of how the concept of the person is used in these debates. Therefore, Part III diagnoses the argumentative role played by the concept and suggests that, although central, personhood is ill equipped to perform the task we have delegated to it. The analysis is accomplished by dividing up the arguments into three conceptual categories—each of which represents a different use of the concept. Part IV then explores in what circumstances, if any, it is appropriate to retain personhood for legal reasoning.

III. Three Uses of the Concept of the Person and Their Emptiness

We now move from identifying examples of personhood in human rights debates to considering the argumentative role played by the concept. At first glance it would appear that the concept of the person is central and indispensable for making the human rights claims surveyed in Part I. But the argument in this Part challenges this assumption. While the concept is indeed central to human rights discourse, this Note argues that it obscures the very issues it should address. This Note identifies three basic classes of human rights arguments and show how, in all three, the concept of the person carries little of the argumentative load. The first kind of argument interprets personhood as synonymous with biological human beings—this will be referred to as a *naturalistic* argument. The second argument uses person in a *non-naturalistic* sense because it goes above and beyond the biological concept. The third argument uses personhood to signal the conclusion of an argument—this is a *normative* use. Although these three arguments do not necessarily exhaust all possible uses for the concept, they do nonetheless occupy the vast majority of human rights claims about persons. It is therefore conceptually significant that personhood fails to perform strong argumentative work in these three classes. Part IV of this Note then endorses a new analysis and suggests changes to human rights theory.

A. *The Naturalistic Conception of the Person as a Biological Human Being*

When we look at how the concept of the person was used in the human rights arguments from Part I, there are three different ways to interpret its role. The first is the *naturalistic*[111] conception of the person

111. The label "naturalistic" is meant to invoke the philosophical doctrine of naturalism, or the idea that everything real belongs to the world of nature. A naturalist tends to prefer scientific categories, since natural science is the preferred method for investigating the natural world. A committed naturalist would therefore interpret "person" as synonymous with human beings, since biology's investigation of the natural world deserves a privileged epistemic status. See, e.g., Willard Van Orman Quine, Pursuit of Truth 19 (rev. ed. 1992) (arguing that "our information about the world comes only through impacts on our sensory receptors").

as a biological human being.[112] It grounds a human rights claim by asserting that the capacities of the biological human being are morally and legally significant and entail certain rights. The structure of the argument is: (a) x is a person; (b) persons have certain characteristics; (c) these characteristics are morally and legally significant; therefore (d) person x is entitled to these rights. And what it means to be a person is cashed out as roughly synonymous with a biological human being.

There are two reasons why the structure of this argument is problematic. First, the real conceptual work is not being done by personhood at all—the lower-level notion of the biological human being is carrying the argumentative load. Since biological human beings have characteristics that are morally and legally significant, biological human beings deserve human rights. The biological concept is grounding the claim—not the concept of the person—so it is the lower-level facts that are significant for human rights. This does not by itself suggest that the naturalistic conception of persons is wrong. What it does suggest, though, is that *if* this analysis of personhood is correct, then the concept is less important for human rights than one might have thought. What really matters for purposes of settling a human rights claim is the biological concept of the human being.

Second, interpreting the concept of the person as essentially biological leaves out too many instances where we may want to ascribe rights, for example, to organizations,[113] corporations,[114] or nation-states.[115] We would then be obliged to offer a completely independent basis for granting rights to those entities. One might respond that we *should* ascribe rights to these other entities on a different basis. In other words, corporations might have rights regardless of their status as persons.[116] While this is certainly a plausible avenue, it suggests, once again, that the concept of the person adds little to the concept of the human being, i.e., *the biological concept is doing all of the work here.* It also produces the uncomfortable situation of arguing whether someone is a person in order to deter-

112. Several philosophers have argued forcefully that the concept of the person should be organized exclusively around the biological concept of the human being or that personal identity should be analyzed exclusively in terms of bodily identity. See Erik T. Olson, The Human Animal: Personal Identity Without Psychology 4 (1997); Wiggins, supra note 25, at 225–26; Bernard Williams, Are Persons Bodies?, *in* Problems of the Self 64, 70 (1973) [hereinafter Williams, Bodies]; Bernard Williams, Bodily Continuity and Personal Identity, *in* Problems of the Self, supra, at 19, 19; Judith Jarvis Thomson, People and Their Bodies, *in* Reading Parfit 202, 202–05 (Jonathan Dancy ed., 1997); Judith Jarvis Thomson, Ruminations on an Account of Personal Identity, *in* On Being and Saying 215, 233–38 (Judith Jarvis Thomson ed., 1987).

113. See supra note 100.

114. See supra notes 87–90 and accompanying text.

115. See supra notes 97–99 and accompanying text.

116. One might, for example, grant legal rights to corporations on a purely utilitarian theory.

mine if he or she gets human rights.[117] This is precisely the kind of reasoning that seems backward because it is the underlying facts that are morally important for human rights, not the upper-level fact of personhood.

This Note's argument does not require adopting the position that the biological concept of the human being is the ultimate ground of personhood. Rather, the argument is simply that *if* personhood is ultimately reducible to a biological notion, *then* two consequences follow. First, personhood cannot be used, as it is now, in scenarios that exceed the biological paradigm, e.g., corporations, nation-states, and even multiple personalities. Second, if personhood is defined in purely biological terms, personhood cannot play a greater logical role than the underlying biological concept. This would not be a radical conclusion—it would simply clarify that personhood does not *directly* ground a rights based argument.

B. *A Non-Naturalistic Conception of Persons*

The second way to interpret the concept of the person in a human rights argument is non-naturalistically. "Non-naturalistic" means that the concept is broader and more expansive than the biological notion of the human being, and indeed, not organized around biology at all. To understand the concept of the person in this way, it must be organized around the principle of rational agency,[118] psychology, or cognitive properties, suggesting that personhood is linked to the properties of rational agency rather than the properties of a single biological human body. This is an expansive reading of the concept of the person.[119]

The benefit of this view is its power to ascribe rights to group agents such as corporations and nation-states. The expansive reading allows greater flexibility in attributing human rights because the concept of the person is not limited to biological human beings. Rational agents that do not correspond one-to-one with biological human beings are entitled to rights, which accords with common sense intuitions about the rights of

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117. See Quine, Book Review, supra note 103, at 490. The problem is that such so-called "investigations" inevitably become an exercise in *legislation*. In other words, at a certain point, trying to find out whether someone meets the metaphysical criteria for personhood might just degenerate into an ethical *decision* as to who should be *considered* a person. Cf. Ronald Dworkin, Law's Empire 42 (1986) (distinguishing cases of genuine legal debate and cases of arbitrary linedrawing).

118. The agency criterion is also advocated by Korsgaard. See Christine M. Korsgaard, Personal Identity and the Unity of Agency: A Kantian Response to Parfit, 18 Phil. & Pub. Aff. 101, 109–15 (1989). Korsgaard emphasizes that rational agents are committed to life plans that require rational unity over time, although she does not explicitly endorse the possibility that corporations and other group entities could meet her Kantian standard.

119. This view is echoed in Rovane, supra note 74, at 71–72. By arguing for the view that persons are agents (and who are capable of engaging in agency-regarding relations), Rovane recognizes the possibility that one biological human being may contain more than one rational agent, or conversely, that one rational agent may contain more than one human being (as is the case with a corporation). Id. at 137–42.

group agents (such as corporations).[120] But the non-naturalistic conception has a downside because it violates common sense in one important regard: We generally assume that the concept of the person has something to do with biological human beings and entirely untying the two concepts strains credulity.[121]

In any case, when the non-naturalistic conception of the person is deployed in a human rights argument, once again a lower-level concept is doing the real argumentative work—in this case, the concept of rational agency. If a human rights argument relies on such a theory, it seems clear that the moral urgency comes not from the concept of the person but from the lower-level implications of what it means to be an agent.[122] Rational agency is morally relevant because it entails certain claims about the human rights necessary to exercise that agency.[123] There is nothing that the concept of the person adds to the concept of the rational agent. Once again, the concept of the person proves dispensable.

One might object that the above analysis misses an entirely different—yet compelling—non-naturalistic view of the person: the idea of a biological human being animated by a *soul*. While this is a minority view in the philosophical literature,[124] and legal analysis rarely makes much use of it, the view remains a powerful account for a sizeable percentage of the population with a religious outlook.[125] Undoubtedly this view is non-

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120. This also accords with their rational deliberative structure. See Pettit, supra note 87, at 448.

121. The literature on personal identity includes several examples where intuition supports the theory that the concept of the person must have something to do with our bodies. See, e.g., Williams, Bodies, supra note 112, at 70 (suggesting position that persons "form a class of material bodies"). But see Rovane, supra note 74, at 40–45 (arguing that scholarly literature as a whole demonstrates that our intuitions about these thought experiments are inherently conflicted).

122. For example, Alan Gewirth's derivation of rights appeals exclusively to the properties of persons having to do with rational and moral agency. Alan Gewirth, Reason and Morality 48–50 (1978).

123. Arguably, the inherent rights found by both Kant and Rawls stem from a person's capacity to engage in rational or moral agency. For Kant, an agent's capacity to reason in accordance with the categorical imperative marks him or her with dignity in the Kingdom of Ends; individuals who participate in universal human legislation are afforded this protection. See Kant, Grounding, supra note 62, at 39–40. For Rawls, a rational agent's position as a bargainer in the social contract yields a social order that respects his or her rights; creatures without the rational sophistication to bargain at the social contract table are not parties to the contract and are not, properly speaking, appropriate subjects for moral rights. See John Rawls, A Theory of Justice 123 (rev. ed. 1999) (discussing assumption that "persons in the original position are rational"); see also Gewirth, supra note 122, at 63 (arguing that rational agents *must* be committed to the view that they have a right to the means necessary to achieve their ultimate goals).

124. Cf. Richard Swinburne, Personal Identity: The Dualist Theory, *in* Personal Identity 1, 27 (Sidney Shoemaker & Richard Swinburne eds., 1984) (arguing that persons are composed of material and immaterial substance).

125. See, e.g., Roe v. Wade, 410 U.S. 113, 133 (1973) (noting that English common law dealt with abortion by permitting it up to the point when the fetus became a person by being infused with a soul).

naturalistic, because it views the person as more than mere biology, but rather a biological component animated by divine substance.[126] Indeed, many religious individuals might negotiate the difficult moral terrain of the scenarios in Part I by asking whether the entity in question still has a soul. There is much that could be said at this point about the validity of these religious views. However, the argument presented here does not require a deeper consideration of them. Consider, for the sake of argument, that the religious view of persons is correct. If persons are biological bodies with animated souls, this suggests that the moral worth of the person would be a function of their soul—the divine substance within. Regardless of the truth of this claim, it suggests yet again that personhood cannot be the absolute foundation. The soul is the real engine of this argument.

C. *Personhood as a Purely Normative Concept*

There is, of course, a third alternative: The concept of the person is a completely normative determination, so when we ascribe the predicate of legal personhood we do *nothing more* than recognize an entity as a valid object of legal concern. This third alternative suggests that we have completely misunderstood how the concept works in a human rights argument. We do not determine that an entity is a person first and then chart the moral and legal consequences of that ascription later. Rather, the ascription of personhood is nothing but our declaration that an entity is a valid object of our moral concern. In other words, personhood is a moral and legal concept *all the way down* (as opposed to a metaphysical concept with legal consequences). We do not ascribe human rights because an entity is a person—it is a person because we ascribe human rights to it. We have it all backwards.

For example, human rights theorists sometimes draw a distinction between natural and legal persons.[127] This is common when discussing the legal rights of corporations and other group entities.[128] Also, some human rights instruments make explicit reference to legal persons when attributing rights to corporations or labor unions.[129] This is a perfect example of legal personhood as a purely normative concept. Since the corporation is a valid subject of human rights—e.g., it deserves the right

126. Descartes, supra note 22, at 126–29 (concluding that God is the ultimate cause of the human mind).

127. The distinction goes back at least as far as Hobbes, if not farther. See Thomas Hobbes, Leviathan 88 (Richard E. Flathman & David Johnston eds., Norton 1997) (1651) (noting distinction between natural and "Artificiall [sic]" or "Feigned" persons).

128. See, e.g., French, supra note 90, at 33 (discussing legal personhood of corporations separately from "moral and metaphysical matters"); Scruton, supra note 90, at 259 (discussing law's conferral of legal personality to a corporation "so as to conduct its affairs as an independent legal entity"); supra Part I.G (discussing states as group persons).

129. See, e.g., Protocol of Buenos Aires, Feb. 27, 1967, art. 43, 21 U.S.T. 607, 669–70, 6 I.L.M. 310, 320–21, amending the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48 (referring to the "juridical personality" of unions).

to property—then corporations deserve to be called persons. The designation has no additional meaning.

There is nothing wrong with this alternative analysis, although it demonstrates—once again—that the concept of the person is grounding little of the argument. If all that being a person means is that one can be a valid subject of human rights, then one cannot turn around and *justify* that ascription by appealing to an entity's personhood (on pain of vicious circularity). The concept of the person is just a placeholder for moral or legal concern. But if that is the case, it cannot simultaneously serve as a *reason* for moral concern. The reasons must be *external* to the concept of the person. The reason-giving force in the argument is being supplied by the *underlying reasons* for ascribing personhood in the first place. So under this third alternative, the concept of the person still plays little role in moving the argument forward.

D. *A Common Diagnosis*

We then arrive at a common diagnosis for why the concept of the person is dispensable in all three possibilities: It is the underlying facts of personhood—not personhood itself—that are morally and legally important for human rights. This does not mean that personhood is empty or should be eliminated from the lexicon of human rights dialogue, only that the concept is shouldering little of the argumentative weight. But it is important not to exaggerate this claim. To say that a concept is *entirely empty* is a much stronger claim than the one made here. The concept of the person—or at least the different versions examined here—has some conceptual content. But the analysis does suggest that personhood should not be the central battleground for human rights discourse. These claims deserve further explanation.

1. *The Argument from Below.* — Derek Parfit has defended a version of this argument called the Argument from Below.[130] Although he used the Argument from Below to slightly different effect, the underlying rationale is the same. Parfit has argued that "whenever there are facts at different levels, it is always the lowest-level facts which matter."[131] There are several examples with which to explain the Argument from Below, taken from many subject areas other than the concept of the person. Being married consists in certain lower-level facts: living together under one roof in a committed romantic or sexual relationship, the intention to raise a family together, the pooling of financial resources, or some combi-

130. Derek Parfit, The Unimportance of Identity, *in* Identity 13, 32–33 (Henry Harris ed., 1995) [hereinafter Parfit, Unimportance]. For a discussion of Parfit's Argument from Below and objections to it, see Ohlin, supra note 102, at 65–76 (arguing that the Argument from Below applies to personhood, although doing so for purpose of resolving dispute in analytic philosophy about personal identity).

131. Parfit, Unimportance, supra note 130, at 32–33.

nation of the above.[132] When considering such things as spousal rights (such as inheritance[133] or medical insurance for dependents[134]), many would argue that the lower-level facts matter most. In other words, marriage consists solely of certain lower-level facts (like living together in a committed romantic relationship), and those who fulfill these facts should receive these rights even in the absence of a marriage certificate. When states recognize common law marriages in the absence of a marriage ceremony, they are invoking reasoning similar to the Argument from Below.[135] The assumption behind common law marriages is that the lower-level facts are important and the higher-level fact of getting married is significant only insofar as it usually consists in these lower-level facts.[136]

The concept of the person may be similar. Just as being married simply consists in certain other facts, so too being a person just consists in certain other facts. In the former case these other facts are that two people live together in a particular domestic arrangement. In the latter case, these other facts are about biological human beings, rational agents, and psychology. In both cases, it is surely the lower-level facts that are legally siguificant for human rights. Just as it would be perilous to ignore those lower-level facts in the absence of a marriage certificate (as one might be tempted to do if one looked solely at the higher-level fact), so too would it be perilous to think that being a person has an intrinsic importance

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132. See, e.g., Carolyn J. Frantz & Hanoch Dagan, Properties of Marriage, 104 Colum. L. Rev. 75, 81 (2004) (defending ideal of marriage as an "egalitarian liberal community").

133. See, e.g., Kris Bulcroft & Phyllis Johnson, A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics, 2 J.L. & Fam. Stud. 1, 25 (2000) (noting that evolving definition of "family" is challenging standard rules for succession).

134. See, e.g., Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164, 1194 (1992) (describing how employee benefits such as health insurance "are a driving force for domestic partnership recognition"); Lindsay Brooke King, Note, Enforcing Conventional Morality Through Taxation?: Determining the Excludability of Employer-Provided Domestic Partner Health Benefits Under Sections 105(b) and 106 of the Internal Revenue Code, 53 Wash. & Lee L. Rev. 301 (1996) (exploring how definition of "dependent" impacts health benefits for domestic partners).

135. For an analysis of the general rationale for recognizing common law marriages, see John B. Crawley, Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine, 29 Cumb. L. Rev. 399, 402–04 (1999) (tracing development of common law marriage doctrine).

136. A similar argument is often used to justify same-sex marriages. For an overview of recent developments in this area, see generally David L. Chambers, What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447 (1996) (advocating extension of existing marital law and concomitant regnlatory regime to same-sex partnerships); Developments in the Law II—Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe, 116 Harv. L. Rev. 2004 (2003) (surveying international trends in recognition of gay marriage, hypothesizing that recognition of same-sex marriage rights will differ in the United States, and argning for extension of equal protection doctrine in this field).

over and above the facts that constitute it (such as being a biological human being or a rational agent). Since it is the lower-level facts that are important, the concept of the person itself cannot be necessary for human rights.

2. *The Argument from Above.* — The Argument from Below is not without its critics. For example, the philosopher Mark Johnston has argued that the Argument from Below leaves Parfit vulnerable to a charge of nihilism.[137] Johnston's objection uses an example from metaphysics. Say, for example, that a scientific view of the world is correct and everything that exists is created from physical particles; this doctrine is called physicalism. If physicalism is true, then every fact about the world just consists of facts about physical particles. But here is where the difficulty arises, according to Johnston. Individual physical particles are rather insignificant in themselves; they are significant only insofar as they constitute the larger objects of our social existence. According to the doctrine of physicalism, however, everything is reducible to physical particles, so nothing matters at all. That is why, according to Johnston, Parfit's argument runs the risk of degenerating into nihilism.[138]

The objection demands a response.[139] Parfit makes a distinction between reductionism about what exists and reductionism about facts.[140] Reductionism about what exists is an ontological theory, which is to say that it is a point about the ultimate furniture of the universe.[141] This kind of reductionism argues that some upper-level entities do not *exist* at all—the only things that truly exist are the lower-level entities that compose them. Contrast this with reductionism about facts, which means that some facts can be (and perhaps ought to be) reduced to other facts.[142] So reductionism about what exists is ontological, while reductionism about facts is conceptual. Parfit's point is that the former does not entail the latter; while physicalism dictates that everything is composed of particles, it might not be the case that all *facts* can be reduced to facts about particles.[143] For example, one could coherently claim that while corporations are just composed of individual human beings, it is not the case that all facts about corporations can be reduced to facts about individual human beings.[144] Reductionism about what exists differs from reductionism about facts and so, even if physicalism is correct, reductionism does

137. See Mark Johnston, Human Concerns Without Superlative Selves, *in* Reading Parfit, supra note 112, at 149, 168.

138. Id. at 168–69.

139. One response to the objection is to deny pbysicalism outright. But it is unclear to what degree Johnston's argument depends on the truth of physicalism.

140. See Parfit, Unimportance, supra note 130, at 32–33.

141. Id.

142. Id.

143. See id. at 33.

144. See Pettit, supra note 87, at 457–58 (arguing that it is sometimes "reasonable, even compulsory, to think of the integrated collectivity as an intentional subject").

not entail the view that nothing matters. This rehabilitates the Argument from Below in the face of Johnston's objection.

3. *The Argument from Below Applied to Persons.* — The Argument from Below certainly does not apply universally, regardless of the subject matter or the kinds of facts at issue. For example, facts about corporations need not always be reduced to facts about their members. It would be wrong to suggest that *whenever* there are facts at different levels, the upper-level facts must be disregarded in favor of the lower-level facts. But one can respond to this objection by noting, along with Parfit, that merely *conceptual* facts cannot be intrinsically important. "What matters is reality, not how it is described," he writes.[145] For conceptual facts, what matters are the lower-level facts that constitute them. And merely conceptual facts cannot, by themselves, carry moral or legal significance.[146] Personhood is just such a conceptual fact because what it means to be a person can be reduced to facts about biological human beings, rational agents, and psychology. Personhood has no objective content above and beyond these facts.

A Parfitian Argument from Below for persons would run like this:[147] Being a person just consists in x (where x is being a human being and a rational agent with unity of consciousness). Since being a person just consists in x, then being a person is a mere conceptual fact. Consequently, being a person cannot be *intrinsically* important. Its importance is derived purely from the importance of x. This Argument from Below could be challenged with a Johnstonian Argument from Above. While we argue that being a person is important only because it consists in x, a Johnstonian might argue that x only matters because it constitutes being a person.

Consider the brain-death scenario from *People v. Eulo*.[148] A woman is shot in the head and critically injured.[149] She is rushed to the hospital, but there is little the doctors can do.[150] The damage to her brain leaves her brain dead, though the rest of her bodily functions continue, albeit with medical assistance.[151] An EEG detects no brain activity.[152] But the victim continues to breathe, her heart continues to pump, and her blood continues to circulate.[153] She cannot exercise rational agency, nor does she exhibit any psychological continuity with her previous experiences.

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145. See Parfit, Unimportance, supra note 130, at 33.

146. Id.

147. Parfit does not make this argument. This is a reconstruction of what a Parfitian would say if they believed that being a person was a mere conceptual fact.

148. 472 N.E.2d 286 (N.Y. 1984); see supra Part I.C.

149. *Eulo*, 472 N.E.2d at 289.

150. Id.

151. Id.

152. Id.

153. Id.

However, her status as a biological animal is unchanged.[154] Is she dead? Is she still the same person?

On the view being explored, being a person is a mere conceptual fact because it consists solely in lower-level facts, such as those described in *Eulo*. Answering the metaphysical questions (e.g., is she a person?) will not help us decide if the victim is a valid subject of human rights, since we already have the information we need. And it is these facts that are important, not whether the term "person" applies. What matters is reality and not how we describe it. The Argument from Below, therefore, clearly supports this analysis of personhood.

In contentious cases we often ask ourselves if the victim is a person and we take these discussions to be about something more than just the proper use of a linguistic term. We think of these questions as crucial and worthy of civic debate.[155] And they are—but only because such questions are shorthand for asking if the object in question is an appropriate object of moral concern. Having antecedently *assumed* that it is persons that are the appropriate objects of moral concern, we frame our dialogue in the language of personhood as a way of deciding how we should treat someone. If we conclude that someone deserves moral treatment, we call her a person. If we do not, then we choose an alternate concept. This is an example of the purely normative use of the concept described in Part III.C.

But no *intrinsic* importance derives from our use of this label. What is important is reality, not how we describe it. The different answers (i.e., yes, this is a person, or no, this is not) are not different ways the world might be. The difference is merely conceptual. And because the difference is conceptual, the Argument from Below applies and the importance flows upward. Personhood is important only because it constitutes being a biological human being, with continuity of consciousness, and rational agency. But the essential importance derives from these lower-level facts.[156] If we know these lower-level facts, we know everything that

154. Indeed, if the patient was not still a living biological organism, doctors would not have been able to harvest his organs. Id.

155. See, for example, the case of Terri Schiavo, a Florida patient in a persistent vegetative state. Her husband wanted the hospital to withhold nutrition and won the right to do so in court, but the Florida legislature passed a law authorizing the Governor to issue a one-time executive order for her continued treatment. 2003 Fla. Laws ch. 418 (Oct. 21, 2003), available at http://election.dos.state.fl.us/laws/03laws/ch_2003-418.pdf (on file with the *Columbia Law Review*); Fla. Exec. Order No. 03-201 (Oct. 21, 2003), available at http://sun6.dms.state.fl.us/eog_new/eog/orders/2003/october/eo2003-201-10-22-03.html (on file with the *Columbia Law Review*); see also In re Guardianship of Schiavo, 851 So. 2d 182 (Fla. Dist. Ct. App. 2003). The Florida Supreme Court subsequently struck down the law, holding that it violated the separation of powers doctrine under the state constitution. Bush v. Schiavo, No. SC04-925, 2004 Fla. LEXIS 1539, at *3 (Sept. 23, 2004).

156. *Which* lower-level facts constitute personhood is a deeply controversial question. There might be several competing theories of personhood. But this is a logically separate question. The point here is that personhood is extraneous. What matters are the lower-level facts—whatever they are. See supra Part III.A–C.

matters for legal theory. Given this, the concept of the person cannot be truly necessary for human rights. It is the lower-level facts of personhood that are truly necessary.

As stated before, the Argument from Below can be countered with the Argument from Above. For example, one might claim that it is the *official* act of getting married that lends significance to the lower-level facts of living together in a committed, romantic relationship. The official act is important because it codifies the relationship publicly and the lower-level facts of marriage derive their importance from above. Also, one might argue that the lower facts of being a human being or a rational agent are only important because they constitute being a person. But this seems less plausible in both examples.[157] When pressed for answers about the reasons for this importance, we eventually make reference to the lower-level facts.

Of course, the Argument from Above and the Argument from Below are not the only possible ways to parse the issue. A third interpretation is offered in Part IV that finds a middle ground. This interpretation is developed by advancing Professor Felix Cohen's well-known critique of "metaphysical" concepts in legal reasoning[158]—as well as Professor Jeremy Waldron's response to it[159]—and then applying the resulting lessons to our current analysis of personhood.

IV. The Explanatory Circle of the Concept of the Person

This Part points toward a solution by considering Professor Felix Cohen's famous criticism of metaphysical legal concepts[160] and applying it to the concept of the person. It then harnesses Professor Jeremy Waldron's response to Cohen that legal concepts must be viewed holistically; Waldron suggests that Cohen's so-called "metaphysical concepts" often play a key role in charting the logical consequences of our legal views and rooting out inconsistencies within them.[161] While Waldron's response is endorsed, an application of his standard to the concept of the person suggests that the lower-level components achieve greater systematicity than the upper-level concept. Finally, the analysis turns to the practical

157. This does not necessarily imply that we should do away with the concept of the person and banish it from our pantheon of legal concepts. One might argue that since the importance flows from the lower-level facts, eliminating the higher-level term is required. But this is a stronger claim and it would require much stronger evidence. There might be many reasons why a concept is useful, independent of the considerations discussed here. For example, a concept might have rhetorical force in political contexts. The analysis presented in this Note demonstrates simply that the concept of the person is performing little of the argumentative work. For a fuller examination of this issue, see infra Part IV.C.

158. See generally Felix S. Cohen, Transcendental Nonsense and the Functionalist Approach, 35 Colum. L. Rev. 809 (1935).

159. See generally Jeremy Waldron, "Transcendental Nonsense" and System in the Law, 100 Colum. L. Rev. 16 (2000).

160. Cohen, supra note 158, at 823.

161. Waldron, supra note 159, at 22.

consequences for human rights discourse. Since some of the most contentious arguments about human rights deal with cases where one or more of these components are absent, legal arguments about human rights should avoid taking a definition of personhood as a starting point.[162]

A. *Cohen's "Transcendental Nonsense"*

Cohen's famous rejection of theoretical legal terminology provides the perfect framework for judging the concept of the person and its deficiencies, as identified in the previous two Parts of this Note.[163] Indeed, Cohen even used corporate personhood as an example of the "supernatural" ideas that plagued jurisprudence.[164] These concepts were "infecting" legal theory because they could not be defined through experience.[165] Cohen argued that these metaphysical concepts distract judges from seeing that their decisions are based on social policy, economics, and other extralegal considerations. More significantly, though, the metaphysical concepts hold the promise of what is inevitably an elusive possibility: furnishing a useful explanation for judicial decisions.[166]

As argued in this Note, the concept of the person is an excellent candidate for inclusion in Cohen's "special branch of the science of transcendental nonsense"[167] for the same reason announced by Cohen: The metaphysical concept, despite appearances, furnishes no reasons for adopting the conclusion of the argument.[168] In other words, it does little of the argumentative work. To illustrate, Cohen parodies metaphysical concepts by invoking Molière: Opium makes you sleepy because it has a *dormitive* principle.[169] This is absurd, of course, because it is precisely the dormitive principle that we seek to explain. Inspired by Cohen, much of the same objection could be deployed against the concept of the person: It cannot serve as the foundation for human rights because it is *personhood* itself that requires explanation. We seek a deeper understanding of what it means to be a person and we cannot simply appeal to the principle of personhood as a satisfactory response.

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162. Others have reached similar conclusions. See Tom L. Beauchamp, The Failures of Theories of Personhood, 9 Kennedy Inst. Ethics J. 309, 319 (1999) (reaching similar conclusions but from different analysis than one presented here).

163. Cohen, supra note 158, at 823.

164. Id. at 813.

165. Id. at 823.

166. Id. at 842.

167. Id. at 821.

168. Id. at 847 (noting that Cohen's functional approach cleanses legal rules of metaphysics and "permits ethics to come out of hiding").

169. Id. at 820.

B. *Waldron's Explanatory Circle*

Cohen's analysis is subject to rebuttal—and it is important to understand the strength of the rebuttal to properly diagnose our problems with the concept of the person. In a powerful response to Cohen's framework, Waldron notes that the problem with the "metaphysical" concepts disparaged by Cohen is not their circularity—the problem is that the explanation runs *in a very tight circle.*[170] Given that we can only understand legal concepts holistically, the issue of circularity per se is a canard. It is the *diameter* of the explanatory circle that distinguishes the benignly circular from the viciously circular, according to Waldron.[171] The diameter of the explanatory circle in modern physics is extremely large, while the "dormitive principle" of Molière's opium belongs to a circle that is so absurdly tight that it furnishes no explanation at all.[172]

1. *Waldron's Holism Applied to Persons.* — While Waldron presents his argument as a general rebuttal to Cohen's critique, one can see how it applies to the concept of the person. Employing the Waldron rebuttal, one might say that the concept of the person enforces systematicity in legal reasoning, forcing us to recognize that a shift in one area of our jurisprudence—say, declaring a corporation a person for purposes of property rights—might have logical consequences for other areas of our jurisprudence that are conceptually linked—say, making corporations criminally or civilly responsible for their actions.[173] The concept raises a red flag, as it were, to alert us to possible areas of inconsistency or contradiction.[174] It might be wrong to grant one right to an entity by deeming it a person while at the same time denying its personhood in other areas of the law, on pain of contradiction or hypocrisy.[175] The systematicity imposed by the concept of the person prevents us from making these purely local transformations to our jurisprudence at the expense of overall coherence.

2. *The Lower-Level Concepts Achieve the Greatest Systematicity.* — The analysis presented in this Note departs in a siguificant fashion from Waldron's general position. Whenever a series of concepts appears in an explanatory circle, one has to make a decision about *which* concepts belong in the circle. Only the right concepts will yield a circle wide enough to produce real explanatory results. If a concept is too unwieldy it might

170. Waldron, supra note 159, at 50–51.

171. Id. at 21.

172. A dictionary is another classic example of an explanatory system that is not viciously circular. Each word in the dictionary is defined relative to other words in the dictionary, creating a system of meaning that can only be understood holistically. But the dictionary's circularity is not vicious because the circle is large enough to yield real explanations as to the meaning of words.

173. French, supra note 90, at 173–86.

174. Waldron, supra note 159, at 23.

175. Rovane makes a similar point when she concludes that persons "stand in a certain distinctively interpersonal ethical relation to one another—one that they cannot escape except through hypocritical prejudice." Rovane, supra note 74, at 73.

achieve systematicity at the expense of giving precise answers. On the other hand, achieving coherence in a conceptual system will only be possible if one chooses the concepts wisely.[176] Any decision about concept choice must weigh these two factors.

While the Waldron standard is correct, the evidence from Part 1 indicates that the concept of the person does not meet his standard. The concept falls victim to serious problems: It demands a synthesis of diverse legal issues that should not be synthesized together. This results in an imprecise concept that is too close for comfort to Molière's dormitive principle. A single umbrella houses such diverse ideas as biological human beings, rational agency, and a psychological point of view on the world. And these subconcepts do not necessarily converge. In fact, as the examples provided in Part 1 make clear, human rights discourse becomes most contentious in cases where the components diverge.

Still, systematic connections can and should be made among the components of the concept of the person.[177] The biological concept of the human being has obvious consequences for rational agency and the biological nature of human beings may determine, in part, their psychological point of view on the world.[178] But these concepts are not necessarily related in a single concept that has unified consequences across the jurisprudential spectrum. Indeed, the survey of the field presented in Part 1 of this Note suggests otherwise. Personhood is just as likely to spread conceptual mischief across the legal spectrum as it is to provide illuminating conceptual linkages. This should be no surprise. How can the legal dilemmas over embryos, corporations, and patients with multiple personalities all be solved with the same concept?

Dealing directly with the lower-level components will yield concrete advantages for legal reasoning. First, it will become clear that there could be more than one source for human rights; not all rights must flow from the same conceptual spring.[179] For example, biological human beings and rational agents might have different rights. Individual human beings and corporations need not be treated the same. Second, lawyers charged

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176. For example, in the philosophy of science there are well-debated criteria for which concepts should be used in scientific theories. See Ernest Nagel, The Structure of Science 148 (1979) (discussing role of theoretical terms and concepts in experimental science). There ought to be equally rigorous criteria when determining which concepts we admit into our *legal* theory.

177. This point concedes some of the ground to Wiggins and other naturalists who believe that the concept of the person must be organized around the biological notion and that the components necessarily coincide. See Wiggins, supra note 25, at 194. However, recognizing that there are systematic connections does not require going the full route and enshrining an *essential* connection under the rubric of personhood. See supra notes 111–112 and accompanying text.

178. See generally Olson, supra note 112.

179. See Loren E. Lomasky, Persons, Rights, and the Moral Community 39–40 (1987) (arguing that rights should be granted to beings who pursue rational projects *and* beings who stand in a social relation to project pursuers). Lomasky calls this kind of moral theory "multivalent." Id.

with drafting human rights instruments must carefully decide which concepts they select to ground each right asserted in the document. In general, a concept should wear its theoretical significance on its sleeve. When it comes time to *apply* the concept in legal arguments, the concept should be transparent enough to reveal how it moves the argument forward. Spurious arguments thrive in the absence of transparency.

C. *Final Objections*

There are two final objections to the position outlined in this Note—one theoretical and the other practical. The first argues that conceptual difficulties at the margins of a legal concept are no reason to revise or eliminate it, especially if the concept does well in the majority of cases. The second objection argues that elimination of the concept will deprive human rights activism of its profound rhetorical force.

1. *The Quarantine Objection.* — According to the first objection, the concept of the person performs remarkably well in almost every situation. When walking down a street, the language of personhood is completely adequate for picking out, and interacting with, the average passerby. There are no problems in ninety-nine percent of the cases because all of the components—rational agency, biological human beings, and unity of consciousness—almost always coincide. The cases cited in Part I are truly marginal.[180] Consequently, the concept's failure at the margins is no reason to abandon, revise, or eliminate it from legal reasoning. Personhood's breakdown in difficult cases can be quarantined from the majority of successful cases, and only *local* modifications to the concept are justified in those rare cases.

But this objection falsely assumes that the above analysis requires removing the concept of the person from legal reasoning. One might have thought that our previous analysis of personhood as a cluster concept *required* its elimination from human rights discourse. While cluster concepts are often ripe for elimination, their status as cluster concepts alone does not *demand* such unequivocal action. It is tempting to conclude that the structure of all cluster concepts is such that the higher-level concept is not "real" and that the relative precision of the lower-level concepts gives them a better claim for inclusion in our ontology. But this is a false assumption. Use of the terms "higher" and "lower" should not be read to mean that the "lower" concepts are somehow—by definition—more fundamental, more real, or ontologically prior. The relationship between the higher and lower concepts in the cluster is more subtle. Personhood brings together a cluster of related ideas that reside in close proximity in legal reasoning. In many cases it might be wise to pursue legal reasoning without the language of personhood and with the deeper components instead. But the decision ought to be based on conceptual utility—i.e.,

180. See supra Part I.A–G.

which concepts are nimble enough to facilitate systematicity in legal thinking.

Nor does personhood's status as a cluster concept mean that our use of the word in legal reasoning is nonsensical. Sometimes theorists label an idea a "cluster concept" when they want to accuse it of outright incoherence. This leads to the semantic conclusion that uttering the phrase "person" is literally meaningless because its sense cannot be ascertained. This is a strong claim in the philosophy of language that, if borne out, usually necessitates revision or elimination of the concept. But this Note does not advance that claim. Instead, this Note has suggested that personhood brings together a diverse group of subordinate concepts that coincide in daily life but diverge in controversial legal cases. As a consequence, it cannot serve as the *foundation* for a human rights claim. But the word is not meaningless.

2. *The Rhetorical Force of Personhood.* — The concept of the person has another advantage for legal reasoning that cautions against abandoning it too quickly. Groups demanding human rights have not only used the concept of the person to achieve remarkable change, they may consider the concept essential to that rhetoric. Arguably, depriving buman rights activists of the rhetorical force of the concept will hamper their ability to argue for progressive political reform. Simply put, the concept of the person retains a certain intuitive force not captured by other concepts at our disposal. So even if our use of the concept lacks logical clarity, it makes up for it with rhetorical appeal.

However, nothing in this argument requires that we *eliminate* personhood and describe legal reality in strictly nonperson terms. In fact, human rights activists can still make their claims on behalf of *persons*. This Note simply suggests that theorists should be more aware of the real motivating force behind their arguments, so that they offer real reasons for their legal conclusions, as opposed to resorting to question-begging terminology. Furthermore, we can revise our legal reasoning in a way that does not impact the human rights theorist. It makes little sense to develop a full-blown account of personhood first and then track its implications for human rights. Theorists can look to the lower-level facts and debate their legal relevance directly. However, once they complete this legal reasoning, nothing suggests that activists cannot press their claims in the political arena armed with the rhetorical force of the concept of the person.

CONCLUSION

This Note argues that the concept of the person, while seemingly at the center of human rights discourse, performs little of the heavy theoretical work. In addition to cataloguing the wide range of arguments that appeal to personhood, this Note analyzes the performance of the concept in specific human rights arguments. The analysis yields the following insight: Personhood is a placeholder for deeper concepts that ground our

moral intuitions about human rights. Consequently, human rights arguments are obscured by their reliance on the concept of the person.

But we need not completely banish the concept from legal reasoning. Rather, this Note seeks to replace one set of questions about persons and personhood (and their implications for human rights) with a new set of questions about biological human beings, consciousness, and rational agency. Although the vocabulary of personhood is deeply entrenched in legal reasoning, this Note demonstrates that applied legal reasoning must be more sensitive to its reliance on the *deeper elements* of personhood. Understanding the role played by the deeper components—and consequently embracing the new questions—will increase the conceptual clarity of human rights discourse.