

Of Elephants and Embryos: A Proposed Framework for Legal Personhood

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It is not true . . . that the legal order necessarily corresponds to the natural order . . . ; it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence.¹

INTRODUCTION

What is a person? What responsibilities or obligations do we have to entities that we recognize as persons under the law? These are not simply theoretical questions. Louisiana recently became the first state to statutorily designate *ex utero* embryos as “juridical persons,” with rights to sue and liability to being sued.² The battle over stem cell³ legislation is at base a battle over whether the embryos destroyed to harvest cells should be considered persons.⁴ The international “Great Ape Project” seeks to imbue non-human primates with attributes of legal personhood—specifically “protections of the right to life, the freedom from arbitrary deprivation of liberty, and protection from torture.”⁵ The Defense Advanced Research Projects Agency (DARPA) is pushing the limits of human-machine interfaces in an attempt to create better

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1. *Byrn v. N.Y. City Health & Hosp. Corp.*, 286 N.E.2d 887, 889 (N.Y. 1972).

2. LA. REV. STAT. §§ 9:121, 123 (1999).

3. See, e.g., Evan Y. Snyder & Jeanne F. Loring, *Beyond Fraud—Stem-Cell Research Continues*, 354 NEW ENG. J. MED. 321, 321–24 (2006) (describing the generation of stem cells after somatic-cell nuclear transfer and the discovery that a prominent stem cell scientist had fabricated much of his research in this area).

4. President Bush seems to have taken the stance that embryos are moral persons, and thus entitled to legal protections. See Dana Bash & Deirdre Walsh, *Bush Vetoes Embryonic Stem-Cell Bill*, CNN.com, Sept. 25, 2006, <http://www.cnn.com/2006/POLITICS/07/19/stemcells.veto/index.html>.

5. See GAP: Great Ape Project, *The Great Ape Project: An Idea, A Book, An Organization*, <http://www.greatapeproject.org> (last visited Nov. 22, 2007).

persons, or even replacement “persons” that can perform jobs in lieu of human beings.⁶ One might easily imagine the creation or discovery, in the near future, of an entity that is of equal moral status with human beings, but not genetically human.⁷ Far from being mere science fiction, questions of legal personhood have already faced courts and legislatures and are likely to become more relevant as technology advances.

Although many philosophers have struggled with the concept of moral personhood, legal personhood has largely been ignored outside of the corporate context. Yet as the issues raised above indicate, there is a pressing need to answer the question of what constitutes a person. While this Article deals indirectly with questions about moral status, its focus is on legal status and the ways in which the law should recognize rights and interests of certain entities.⁸ In Part I of this Article, I argue that two bases for according legal personhood status (either natural or juridical) exist, and that distinct rights and protections flow from each status. The first basis rests on the interests of the entity in question. The second basis rests on the interests of currently recognized human persons. In both cases, the rights and protections that follow from legal personhood status should be limited by the justification for granting the status in the first place. In Part II, I apply and consider the implications of the proposed framework to various entities including embryos and fetuses, non-human animals, and machines with artificial intelligence. Part III offers a brief conclusion. The result of the analysis provided should be three-fold: a richer understanding of legal personhood as currently applied (e.g., to human beings and to corporations), the development of a framework for evaluating the personhood status of novel or not currently recognized entities, and a better theoretical reconciliation of some apparently inconsistent laws regarding persons.⁹

I. THE LAW OF PERSONS

Before discussing categories of legal personhood, it is worth considering whether there is such a thing as “personhood” law in the first

6. See generally DARPA Office Programs, http://www.darpa.mil/body/off_programs.html (last visited Nov. 22, 2007) (listing DARPA projects).

7. Consider machines with artificial intelligence or extraterrestrials (E.T.): should E.T. or artificially created persons be considered legal persons? See generally Robert A. Freitas, Jr., *The Legal Rights of Extraterrestrials*, 97 ANALOG SCIENCE FICTION/SCIENCE FACT 54, 67 (1977) (noting that an extraterrestrial would not have the status of personhood and would have no legal rights but that Congress could decide to create a new legal classification—the “pseudo-person”—which grants the E.T. a measure of rights and responsibilities).

8. I will adopt an interest theory of rights in this Article, rather than competing “choice” or “will” theories. See generally THEORIES OF RIGHTS 9 (Jeremy Waldron ed., 1984).

9. See generally William E. Buelow, Comment, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMP. L. REV. 963 (1998); Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933 (1995).

place.¹⁰ It could be that there are simply a number of different areas of law that define persons in different ways depending on the purpose of the law, but no cohesive “law of persons.” The argument for this view may be similar to ones that have taken issue with new categorizations of specialty areas of law, such as Internet law. These arguments maintain that the issues arising out of technological developments break down into basic legal areas such as contract, tort, or criminal law, and there is no unifying theme that justifies a special label.¹¹ It is certainly true that there is no express definition of “person” in the Constitution, nor has the Supreme Court proffered one.¹² Moreover, different state and federal statutes define “person” differently, depending on their goal.¹³ Focusing

10. See, e.g., Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001) (stating that “although no coherent body of doctrine or jurisprudential theory exists regarding [the legal metaphor “person”], a set of rhetorical practices has developed around it”). But see Jane English, *Abortion and the Concept of a Person*, 5 CAN. J. PHIL. 233, 233 (1975) (pointing out that there is no clear agreement regarding the concept of “person”).

11. See, e.g., Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (arguing that there may be no specialized law of the Internet, there is something to be learned by examining the legal regulation of cyberspace).

12. See, e.g., Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 199 (1996) (arguing that although “the notion of a ‘constitutional person’ is uncertain,” that “[a]ll persons certainly have . . . a minimum bundle of constitutional rights, which can never be suppressed without challenging the person’s very dignity and existence,” and that “no U.S. case law exists on the equivalent of the hard nucleus” but claiming “it would include the right to due process, the right to own property, the right to bodily integrity, the right to live, and the right not to be owned”); Kathleen Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193 (1997). Although there may well be a core of rights of persons, I will not analyze whether Ducor’s list is correct. Furthermore, Ducor takes the position that “everything short of a person will be considered an object”—a framework I clearly reject because I argue that embryos can be considered both subjects and objects of rights. Ducor, *supra*, at 200. However, since Ducor makes clear he is coming from a continental/civil law perspective it is possible that our disagreements stem from our familiarity with, and embedding in, different legal systems. Moreover, he explicitly “categorizes the embryo or fetus in the womb with other body parts before their separation from the person.” *Id.* at 206. He rejects the notion of giving embryos outside the womb interim status and holds they are objects. *Id.* at 211. Living fetuses are to be considered subjects while they survive outside the womb (as are viable fetuses after delivery—e.g., babies). *Id.* at 212.

13. See generally Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357 (1986) (discussing history of treatment of fetus and embryos as persons or property under various areas of law). For example, the Bankruptcy Act includes individuals, partnerships, and corporations, but not governmental units, as persons. See 11 U.S.C. § 101(30) (2000). Under Ohio’s corporate laws, which are typical, “person” is defined to include, “without limitation, a natural person, a corporation, whether nonprofit or for profit, a partnership, a limited liability company, an unincorporated society or association, and two or more persons having a joint or common interest.” OHIO REV. CODE ANN. § 1701.01(G) (West 1994). Foreign governments are “persons” with the right to sue for treble damages under § 4 of the Clayton Act. See *Pfizer, Inc. v. Gov’t of India*, 550 F.2d 396, 399 (8th Cir. 1976), *aff’d* 434 U.S. 308, 320 (1978). Municipalities and other governmental units are “persons” under 42 U.S.C. § 1983. *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 122 (2003); *Monell v. Dep’t of Social Services*, 436 U.S. 658, 690 (1978). An unborn child is a “person” for purposes of tort (wrongful death) and criminal law (feticide/Crimes Against Unborn Children Acts) in many states. See Michael Holzapfel, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL’Y 431 (2002) (summary of state law). Eighteen states follow a “born alive”

our attention on a personhood law as a whole, however, is a useful endeavor. It is likely to lead to greater clarity in a variety of areas of law (e.g., corporate law, animal law), as well as provide a framework under which we can consider the application of current laws to new developments, such as artificial intelligence.¹⁴ As a result, conducting an in-depth evaluation of legal personhood is both necessary and useful.

Even if there is a coherent law of personhood, why focus on that as opposed to merely evaluating the issue in terms of legal rights, without the “personhood” label, or with a new “pseudo-person” label?¹⁵ First, our current system of laws is set up to focus exclusively on the rights of persons and not of other entities.¹⁶ Persons have rights, duties, and obligations; things do not.¹⁷ Although there have been challenges to this binary framework,¹⁸ thus far the United States legal system has maintained the distinction. As a result, creating new legal categories to address the rights of entities along a moral continuum would entail great educational and other costs.¹⁹ Second, as will be made clear by the arguments below, currently existing personhood categorizations are flexible enough to accommodate a variety of different levels of rights, and thus there is little need to create a new category of rights holders.

A. LEGAL CATEGORIES

There are two legal categories of persons: natural and juridical.

rule of recovery for prenatal injuries. *Id.* at 451. Other states apply a viability standard at the time of injury. See Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1851 (2000); see also *Miller v. Kirk*, 905 P.2d 194, 196 (N.M. 1995) (analyzing state wrongful death cases). In the context of employment law, employers covered by civil rights law include any “natural” or “juridical” persons employing persons in return for any kind of compensation, for profit or nonprofit purposes, as well as their agents and supervisors. See 42 U.S.C. § 1983 (2000). Local governments, municipal corporations, and school boards are “persons” subject to liability under 42 U.S.C. § 1983, which imposes civil liability on any person who deprives another of his federally protected rights. See *Monell*, 436 U.S. at 683.

14. See, e.g., Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135 (2004).

15. See, e.g., Cass Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1336 (2000) (suggesting that animals have rights, regardless of whether they have standing, and also that they should be given standing, even though they are not persons).

16. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 75–76 (Walter Wheeler Cook ed., 1923) (stating that all rights of persons are against other persons, and that there is no such thing as a right against a thing).

17. *Id.*

18. See Sunstein, *supra* note 15, at 1336.

19. See, e.g., David Schmahmann & Lori Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 760 (1995) (pointing out that animal rights “must mean reposing in the government a wholly new and undefined set of powers, presumably to be exercised on behalf of an entirely new and vague constituency” and further questioning “[w]hat sort of fearsome bureaucracy would purport to institutionalize, standardize, and write regulations pertaining to animals’ rights and interests implicated by all legislation”).

“Natural person” is the term used to refer to human beings’ legal status. Certain legal rights adhere automatically upon birth, and the designation of “natural person” may be taken as shorthand for identifying entities that are entitled to the maximum protection under the law. Nonetheless, not all natural persons have the same legal rights—children, for example, are afforded fewer legal rights than adults. Additionally, the wording of the Constitution suggests that the Framers were careful in their choice of terms and recognized different rights of different types of natural persons. Thus Section 1 of the Fourteenth Amendment of the U.S. Constitution distinguishes between the rights of “persons” and the rights of “citizens.”²⁰ Likewise, the Supreme Court’s determination in *Roe v. Wade* that fetuses are not persons under the Fourteenth Amendment²¹ did not answer the question of whether or not they should be considered persons with respect to other areas of law. Thus states have sometimes considered fetuses persons under tort or criminal statutes.²² In fact, should the Court overturn *Roe*, it is not likely to decide that fetuses are persons under the Fourteenth Amendment, but rather will leave the issue up to the states.²³ So the law already appears to recognize different types of persons.

In contrast to “natural person,” the designation “juridical person”²⁴ is used to refer to an entity that is not a human being, but for which society chooses to afford some of the same legal protections and rights as accorded natural persons. Corporations are the best example of this category, but juridical persons may also include other entities.²⁵

20. U.S. CONST., amend. XIV, § 1 (“All *persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.”) (emphasis added). Thus, there appear to be certain fundamental rights of all persons, although citizens may have additional protections compared to non-citizens (as do residents versus non-residents of a particular state).

21. 410 U.S. 113, 158 (1973).

22. See, e.g., Holzapfel, *supra* note 13.

23. The Court is understandably wary of recognizing new constitutional rights. Thus, for example, in the recent physician-assisted suicide cases the Court found that there was no federal constitutional right at stake, and thus states would have to decide whether or not to create a state constitutional or statutory right. See *Vacco v. Quill*, 521 U.S. 793, 797 (1997); see also *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997).

24. Juridical persons are also referred to as “artificial,” “juristic,” and “fictitious/fictional” persons. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 636 (1819) (“corporation is an artificial being”); Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563–65 (1987) (referring to corporations as fictional persons).

25. See, e.g., 1 U.S.C. § 1 (2000) (stating that the word “person” in any Act of Congress includes, unless the context indicates otherwise, “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”); see also N.C. G.S. § 12-3(6) (1986) (defining “person” to include political bodies and corporations).

Both designations, “natural” and “juridical,” signify legal personhood as opposed to moral personhood. But the terms also signal two important distinctions. The first is that an entity labeled a natural person is genetically human. The differentiation between genetically human persons and other persons may become more important as additional entities lay claim to the latter categorization. Juridical persons may be genetically human, but there are no non-human natural persons. Second, natural persons are entitled to priority over juridical persons in a hierarchy of rights. This is not to say that juridical persons might not be granted equal rights with natural persons, but that such allocation of rights would have to be justified by the interests involved. In other words, natural persons function as the baseline against which other rights allocations are judged. Our society was developed by and for natural persons, and thus legal rights focus on this group.²⁶

B. NATURAL PERSONS

Currently the legal category of natural persons is limited to human beings once they are born.²⁷ Because rights entail corresponding obligations on the part of other rights-holders to respect those rights, recognizing another entity as a natural person would necessarily limit the rights of currently recognized natural persons.²⁸ In some cases the rights at issue may even be diminished if additional entities share the rights. Voting is one example. If more entities are given the right to vote, the value of any previously recognized person's right to vote is weakened, from a quantitative perspective.²⁹ Because of this effect, there must be some basis for according legal personhood status to new entities that justifies the potential diminution of rights for current status holders. Such limitation could be justified either by the interests of the entity itself, or by the interests of currently recognized natural persons in protecting their rights. That is to say, it could be that in order to protect the rights of currently recognized persons, the new entity must also be afforded the same rights as persons. To continue with the voting example from above, the extension of the right to vote to entities that *should* have a voice in an election may be necessary to achieve a legitimate outcome, and thus

26. I do not intend to take issue with this assertion, although one could certainly argue that the preference for natural persons is an artifact of their power at the time we initially created legal protection (had there been non-human persons in power at that time, those other entities may well have had priority in a rights hierarchy). This is an argument for another piece, and thus I start my evaluation of legal personhood from the initial premise that natural persons are entitled to priority.

27. See *Roe v. Wade*, 410 U.S. 113, 158 (1972).

28. Ronald Green, *Toward a Full Theory of Moral Status*, AM. J. BIOETHICS, Nov.–Dec. 2005, at 44–45 (2005) (noting that “[b]estowals of status reflect what moral agents allow each other to do with the entities in question, or what is the same thing, what limitations agents are willing to impose with respect to such entities on each other's liberty of action”).

29. RONALD DWORKIN, *LIFE'S DOMINION* 113–14 (1993).

function to protect the rights of currently recognized voters. Another way to put this is to say that even though the addition of new voters diminishes the value of any one person's vote quantitatively, it increases its value qualitatively, by strengthening the validity of the entire process. So the shorthand "interests of currently recognized persons" includes both the interests of currently recognized persons individually, and aggregate (and broader) "societal interests," such as according rights fairly. I will develop this idea in later sections examining the interests of others. The following two subsections focus on exploring the two bases in the context of natural personhood

I. Interests of the Entity in Question

A full analysis of the philosophical debate regarding moral status or moral personhood is beyond the scope of this Article.³⁰ For our purposes, it is important only to recognize that there are a number of different factors that have been proposed as a basis for according moral status.³¹ Characteristics that have been used, either singly or in combination, include: biological life, genetic humanness, brain development, ability to feel pain, consciousness/sentience, ability to communicate, ability to form relationships, higher reasoning ability, and rationality.³² Bonnie Steinbock and Mary Anne Warren both provide excellent reviews of the different proposals, each pointing out the limitations of the varying approaches for determining either moral status, or moral personhood.³³

30. Some authors talk about moral status and some talk specifically about (moral) personhood. The term "person" when used in a moral context is not necessarily coterminous with "human being." See, e.g., H. TRISTRAM ENGELHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* 104 (1986) ("Persons, not humans, are special."). Engelhardt goes on to argue that persons have higher moral standing than other living creatures, including human embryos and fetuses. *Id.* at 110. His test for personhood revolves around membership in a moral community and specifically "capacity to be self-conscious, rational, and concerned with worthiness and blame and praise." *Id.* at 107. He also notes that non-humans can be persons, such as extraterrestrials. *Id.* Other commentators have argued that certain higher reasoning animals should be considered moral persons. Whether these entities are entitled to legal status is an issue I will touch on below. See discussion *infra* Part II.B.

31. See English, *supra* note 10, at 234–35 (noting that no single criterion can capture the concept of a person but that a "person" is a cluster of features, of which rationality, having a self-concept and being conceived of humans are only part"). Interestingly, English goes on to point out that "a fetus lies in the penumbra region where our concept of a person is not so simple. For this reason I think a conclusive answer to the question of whether a fetus is a person is unattainable." *Id.* See generally EMBRYO EXPERIMENTATION: ETHICAL, LEGAL AND SOCIAL ISSUES (Peter Singer et al. eds., 1990). For a bibliography of different moral personhood arguments see James Park, Personhood Bibliography, <http://www.tc.umn.edu/~parkx032/B-PERSON.html> (last visited Nov. 4, 2007).

32. See, e.g., Park, *supra* note 31. Whether or not one can determine moral status solely on evaluation of characteristics is beyond the scope of this Article. See generally George Khushf, *Owning up to Our Agendas: On the Role and Limits of Science in Debates About Embryos and Brain Death*, 34 J.L. MED. & ETHICS 58, 59 (2006) (arguing that science will not answer the questions about the moral status of embryos).

33. See generally BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* (1992) (listing and analyzing the different arguments); MARY ANNE WARREN, *MORAL STATUS: OBLIGATIONS TO PERSONS AND OTHER LIVING THINGS* (1997).

Their work will not be repeated here.

According to the prominent legal philosopher Joel Feinberg, an entity must have interests to have moral status.³⁴ Steinbock adds that “interests” is a term of art which refers to the capacity of an entity to have a stake in things, and this capacity is contingent on the entity being sentient, or consciously aware.³⁵ “Interests” in this sense refers to an entity having “a sake or welfare *of its own*” and “the expression . . . is intended to emphasize the stake that conscious, sentient beings have in their own well-being.”³⁶ One need not agree with Feinberg or Steinbock about whether “interests” are necessary for moral status to acknowledge the role they play in legal personhood designations.³⁷ If an entity does not have interests in the sense identified above, then legal personhood cannot be based on the protection of those interests. In other words, we cannot claim that an entity without interests has a claim to legal personhood for its own sake, or because it has interests that must be protected.³⁸ Instead, a determination of legal personhood must be based on the protection of the interests of others.³⁹ Legal personhood based on the interests of others may be more limited than legal personhood based on the interests of the entity itself. I will return to this point in more detail in subsections below.

Interests likely develop over a continuum, as the entity develops, rather than appear as a single-point-in-time event.⁴⁰ How legal personhood should track this development is a different question. One might designate a single point in time for granting legal personhood protections, even though the entity has not fully developed all the characteristics in question.⁴¹ This is essentially what the Supreme Court did in *Roe* when it stated that the constitutional protections of the

34. JOEL FEINBERG, HARM TO OTHERS 34 (1984).

35. STEINBOCK, *supra* note 33, at 40–41. Identifying the exact point at which moral personhood applies to a developing human may be important, but is not necessary for the arguments made in this Article. An entity may or may not meet the criteria for moral personhood, but that does not answer the question of whether legal personhood rights should be recognized.

36. *Id.* at 18, 20.

37. Steinbock spends quite a bit of time in her book discussing the implications of the “interests” approach as well as different uses of the word “interests.” *Id.* at 14–41. I will not repeat those arguments here, but will accept the use of the term as defined by her.

38. I am considering whether to apply legal personhood status in the first place, not how to evaluate whether that status has been lost or how it should be handled for individuals who were previously identified as natural persons but have currently lost the ability to form interests.

39. The interests of others can include an interest related to an entity without interests. That is to say, I might have an interest in something happening to my car (which itself does not have interests). Likewise, assuming without argument that plants do not have interests, I might have an interest in preventing the death of my plants.

40. This is consistent with the Supreme Court’s recognition that state interests in protecting potential human life become stronger as a pregnancy progresses. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

41. STEINBOCK, *supra* note 33, at 85.

Fourteenth Amendment apply at birth.⁴² But the lack of constitutional protections prior to that point does not determine whether other legal protections apply. For example, using birth as the single-point-in-time event for granting human beings any legal rights may create problems because it fails to recognize the significant personhood interests of late-term fetuses. The approach of jurisdictions that allow tort and criminal prosecutions for injury to *in utero* fetuses indicates that birth is not always the line at which any and all legal rights start.⁴³ I will return to this issue later in Part II.A. For now, it is sufficient to reiterate that legal personhood based on an entity's interests is not possible until the entity has actually developed interests. Prior to that development, legal personhood must be based on concerns about protecting the interests of others.

2. *Interests of Others*

Natural personhood status need not depend solely on the interests of the entity in question. We consider all human beings, once born, to be natural persons, regardless of whether they actually have interests. Anencephalic infants, for example, are born without a brain cortex and thus completely without any cognitive ability;⁴⁴ they cannot, by Feinberg's definition, have interests.⁴⁵ Nonetheless we still treat them as natural persons.⁴⁶ The American Medical Association's (AMA) opinion in 1994 that, while still living, these infants be considered appropriate organ donors was met with considerable resistance—prompting the AMA to reverse its recommendation and issue an opinion reverting to its 1992 standard, which asserted that anencephalic infants be treated as

42. *Roe v. Wade*, 410 U.S. 113, 162 (1972).

43. See, e.g., Note, *supra* note 10, at 1763–64 (describing the conflict between different notions of personhood inherent in abortion and feticide laws). It may be that the application of tort and criminal law to actions involving fetuses are based on concerns about other's rights and are not tied to whether the fetus is a person under the law. Lawrence C. Becker, *Human Being: The Boundaries of the Concept*, 4 PHIL. & PUB. AFF. 334, 348–50 (1975) (noting that “[a] duty not to kill . . . may be justified by reference to the consequence for the agent or society” rather than “reference to the victim's ability and title to lay claim to the duty”). It is also possible that the jurisdictions that have such apparently conflicting statutes are in error and one or the other approaches should be reconsidered.

44. Taber's medical dictionary defines “anencephalus” as a “[c]ongenital absence of brain and cranial vault, with the cerebral hemispheres completely missing or reduced to small masses.” TABER'S CYCLOPEDIA MEDICAL DICTIONARY 100 (17th ed. 1993). Interestingly it goes on to state that the condition “is incompatible with life.” *Id.* In fact, anencephalic infants may survive for some short period after birth, if the brain stem is present and with a variety of technological interventions. Cognition, however, remains impossible. Nor do such infants feel pain. See *infra* note 103 and accompanying text.

45. STEINBOCK, *supra* note 33, at 30–36.

46. See, e.g., Lawrence J. Nelson & Michael J. Meyer, *Confronting Deep Moral Disagreement: The President's Council on Bioethics, Moral Status, and Human Embryos*, AM. J. BIOETHICS, NOV.–DEC. 2005, at 33, 35 (2005) (providing a general theory of moral status that gives born human beings the same moral status as moral agents, even if they lack moral agency).

other natural persons are for purposes of transplantation.⁴⁷ Since anencephalic infants lack interests under the model suggested above, the basis for the natural personhood status would have to be the protection of the interests of other currently recognized persons. The interests here are broader than simply the interests of the anencephalic infant's parents, although their interests play a role. There is general societal value in granting full legal personhood protections to all human beings at least at birth, regardless of the interests of the entity in question.⁴⁸ While some infants may have failed to develop any relevant characteristics because of impaired growth, making distinctions between neonates⁴⁹ is extremely difficult. Perhaps the complete absence of any cognitive ability, such as is the case with anencephalic infants, can function as a bright line; but almost any other attempt at distinguishing based on cognition will be impossible given the limited capacity of all newborns.⁵⁰ As discussed above, society has thus far been unwilling to deny even anencephalic infants the protections of personhood. Perhaps because all human babies share the same external form and because there is a societal interest in encouraging specific caring behaviors towards all infants (and discouraging other behaviors such as infanticide), we include even anencephalic infants in the category of natural persons.⁵¹

47. See Faith Lagay, *Considering Organ Donation by Anencephalic Neonates*, VIRTUAL MENTOR, Aug. 2004, <http://virtualmentor.ama-assn.org/2004/08/code1-0408.html#10>; see also AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, *Opinion 2.162, Anencephalic Infants as Organ Donors*, in CEJA ANNOTATED OPINIONS 16 (1992); AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, *Opinion 2.162, Anencephalic Infants as Organ Donors*, in CEJA CURRENT OPINIONS WITH ANNOTATIONS 30 (1994); AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, *Opinion 2.162, Anencephalic Infants as Organ Donors*, in CEJA CURRENT OPINIONS WITH ANNOTATIONS 33 (1996); see also AMA Council on Ethical and Judicial Affairs, *The Use of Anencephalic Neonates as Organ Donors*, 273 J. AM. MED. ASS'N 1614 (1995).

48. Yet even as our legal system accepts that at birth humans are entitled to full legal protection, it does not truly afford babies and even children equal status with competent adult human beings. Part of the difficulty is certainly the need to have someone else articulate and promote the rights of children since they are unable to do so for themselves. But another part of the lack of equal status is the continued recognition of parent's property interests. Property interests attach at the initial developmental stages of the embryo. They do not extinguish, but rather are progressively limited by the development of personhood interests as the entity matures. For an interesting discussion of parental rights relating to children (although not termed as property rights) see Harry Brighouse and Adam Swift, *Parents' Rights and the Value of the Family*, 117 ETHICS 80 (2006).

49. Human infants are commonly referred to as neonates during the first six weeks of life after birth.

50. Or, to put it another way, we have limited capacity to test newborns for cognitive ability.

51. Jane English concludes that some of the restrictions on late-term abortions or infanticide can be justified not because the entity in question is a person, but because "[o]ur psychological constitution makes it the case that for our ethical theory to work, it must prohibit certain treatment of non-persons which are significantly person-like . . . [lest we] undermine the system of sympathies and attitudes that make the ethical system work." English, *supra* note 10, at 241; see also PETER CARRUTHERS, *THE ANIMALS ISSUE: MORAL THEORY IN PRACTICE* 115-16 (1992); CARSON STRONG, *ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE: A NEW FRAMEWORK* 57-58 (1997) (discussing the external form and similarity arguments); A.V. Townsent, *Radical Vegetarians*, 57 AUSTRALIAN J. PHIL. 85, 93

This “form” argument is not simply about external appearances, however. A doll that looks extremely lifelike would not be entitled to personhood protections. The basis of the argument is the effect of the designation (or lack thereof) on the rights of currently recognized persons. The more similar an entity is to other entities that are designated legal persons, the more likely we are to treat them the same. Anencephalic infants are too much like other newborn babies to treat as if they were not full legal persons. Likewise, while we may stop treatment when someone is declared brain dead,⁵² we do not bury her while still warm and breathing. A warm body is too much like a living person.⁵³

Apart from anencephalic infants, who share all characteristics with other newborns except presence of the brain cortex, and previously recognized persons who are temporarily or permanently unable to form interests (e.g., unconscious or incompetent individuals),⁵⁴ there appear to be no other situations where natural personhood rights are granted to an entity that does not itself have interests. This is an important point. Granting natural personhood status provides the entity in question the highest level of rights and protections, and thus limits the rights of other natural persons (since their rights are limited by the rights of the newly recognized natural persons). Justifying such limitation on the *protection* of the rights of existing persons seems counter-intuitive. Protection here does not necessarily mean protection of any one individual’s rights, but protection of the concepts underlying the rights—that which makes the right meaningful. In fact, it may be that the inclusion of anencephalic infants in the category of natural persons using this reasoning is mistaken. I will return again to this point in Part II.C.2, but full exploration of this particular debate is beyond the scope of this Article. Nonetheless, the analysis provided here may afford insight into a variety of other contexts in which the rights and protections of legal personhood are a matter of controversy. For our purposes, the crucial point is that under the current legal framework, natural personhood status is only appropriate where the entity in question is genetically human *and* either the entity has interests of its own that justify the designation or, in rare situations, protection of the interests of other natural persons justifies the designation.

(1979).

52. Legal death, or brain death, is determined by the absence of brain function even though artificial means may be in use to maintain heartbeat and respiration (traditionally death was determined by the absence of heartbeat and breathing).

53. Interestingly, although newborn gorillas are also reminiscent of newborn humans we do not afford them legal personhood protections. Perhaps their form is not close enough, or perhaps it is a mistake not to afford them protections. I will talk about non-human animals in more detail in Part III.

54. It is beyond the scope of this Article to evaluate how personhood status should be handled for entities that have lost the ability to form interests. My focus here is on the initial assignment of personhood status.

C. JURIDICAL PERSONS

Unlike the designation of natural person, there appear to be few, if any, legally established limitations either on what kind of entity can be labeled a “juridical person,” or what rights follow. An initial review of the jurisprudence suggests that states have broad authority to designate juridical persons⁵⁵ and to define the extent of their powers under the law.⁵⁶ Despite the lack of legal limitations, I suggest that the rights accorded a particular juridical person should follow from the reason for the designation, although in many of the legal cases there is little or no discussion of this point. As a result, not all juridical persons will necessarily have the same legal rights. The rationale for restricting juridical persons’ rights based on the justification for granting them arises from the impact on existing persons’ rights. As stated above, the inclusion of any additional entities in the category of legal persons may limit the rights of previously recognized persons: first because they now have to respect the rights of the newly recognized persons, and second because in some contexts the value of a pre-existing right may be diminished.⁵⁷ If juridical personhood is necessary to protect the interests

55. It may not be true that a state could designate *any* entity a juridical person. Even if it could, using the juridical person label for an entity without any justificatory basis as defined here, and thus creating an entity with a label but no real rights, may undermine the use of the term in other contexts. In other words, if a state can simply decide to call anything a “person,” even something with no rights at all, the label “person” carries less weight.

56. Many of the constitutional guarantees in the Bill of Rights have been held to apply to juridical persons (usually corporations), including the Fourteenth Amendment Equal Protection and Due Process Clauses with respect to property interests and First Amendment freedom of speech protections. See *First Nat’l. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Corporations can have privacy interests that protect them from unreasonable searches under the Fourth Amendment. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986). Corporations are also afforded double jeopardy protection, but not self-incrimination, under the Fifth Amendment. At least since 1886 in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886), the Supreme Court has consistently held that the Fourteenth Amendment assures corporations equal protection of the laws, and that it entitles them to due process of law, at least since 1889 in *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 28 (1889). Justice Douglas, dissenting in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 577–78 (1949), argued that the Equal Protection Clause, intended to remedy “gross injustice and hardship” against the “newly emancipated negroes,” applied only to human beings. It was never intended to protect corporations “from oppression by the legislature.” *Id.* at 578. On the other hand, the Privileges and Immunities Clause is not applicable to juridical persons, as are some other “personal” rights. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936); see also *United States v. White*, 322 U.S. 694, 698 (1944) (holding that neither the Fourth or Fifth Amendments apply to juridical persons). But see *Cook County, Ill. v. United States ex rel Chandler*, 538 U.S. 119, 125 (2003) (holding that the False Claims Act applies to corporations because they are equally capable of defrauding or exploiting the exercise of federal spending power). The state’s powers to grant or withhold rights to a juridical person, however, are not unlimited. See, e.g., *R.R. Co. v. Harris*, 79 U.S. 65, 81 (1870) (noting that a corporation is limited by the terms of its charter). And states are not free to enact laws that would arbitrarily favor individuals over corporations. See *Bellotti*, 435 U.S. at 777 (1978); see also *Frost v. Corp. Comm’n*, 278 U.S. 515, 522 (1929).

57. Using the example from above, if a state gives corporations the right to vote in elections, it would dilute the votes of natural persons. See DWORKIN, *supra* note 29.

of the entity, the rights that follow should be those that actually protect the interests at stake. Likewise, if juridical personhood is necessary to protect the interests of others, the rights that follow should be those that actually protect *those* interests, so as not to risk infringing on other rights. Similarly, even the rights of natural persons are understandably limited by the rights of other natural persons; the rights and interests of others must be factored in. The sections below consider how the interests of the entity and the interests of others function in the context of juridical personhood.

I. Interests of the Entity

Unlike the debate about natural personhood, historically discussions of juridical personhood rarely involved a discussion of the moral status of the entity in question. Nonetheless, some commentators studying corporate personality theory⁵⁸ have suggested that it would make more sense to base juridical personhood on the interests of the entity in question, thereby mirroring the debates about natural persons above.⁵⁹ One author states that personhood is appropriate when the entity in question “behave[s] in those ways that, by and large, are explainable by appeal to a coherent set of true empirical generalizations.”⁶⁰ He goes on to assert that the generalizations cluster around the primary state of intentionality, which is ascribed based on “observed outward manifestations or behavioral evidence.”⁶¹ On this basis he claims that corporations are moral persons.⁶² An expert in business ethics, Thomas Donaldson, takes the argument a step further and states that if corporations are moral persons, then they also should have the rights that natural persons have.⁶³ He then considers and rejects the notion that

58. In drawing from the literature on corporate personality theory I do not mean to imply that embryos are like corporations, but merely that it is useful to examine previously developed legal theory regarding juridical persons.

59. For example, Alexander Nekam states that any entity, real or imagined, can be recognized under law as a subject of rights, regardless of its characteristics, so long as it is “looked upon by the community as a unit having interests which need and deserve social protection.” ALEXANDER NEKAM, *THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY* 26 (1938). Nekam distinguishes between administrators and subjects of rights. He notes that “[w]hile every right needs an administrator and such administrator can only be a human being not deprived of his will, the subject of the right, the beneficiary [sic] of legally protected interest, can be, on the contrary, anything which the community regards as a unit having socially important interests needing and deserving juridic protection.” *Id.* at 33; *see also* PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 34 (1984) (noting that some commentators argue that “juridical person” is simply a label applied to all entities that are the subject of rights).

60. FRENCH, *supra* note 59, at 88.

61. *Id.*

62. *Id.* at 93. French does not want to distinguish moral persons as a subset of persons. Rather he thinks that intentional agency is sufficient to be considered a person and thus a moral person. *Id.* He would likely take issue with my distinctions between natural persons and juridical persons.

63. THOMAS DONALDSON, *CORPORATIONS AND MORALITY* 18 (1982).

corporations are moral persons.⁶⁴ Instead he argues that corporations are sometimes moral agents.⁶⁵ Still others find it problematic that we would ever use the terminology of persons in the context of an entity that is not a moral actor.⁶⁶

Although moral corporate personality theory provides a natural starting place for discussions of juridical personhood, there are two problems with drawing directly from this literature to develop a broader theory of legal personhood. The first is that most commentators focus exclusively on corporate entities, leaving little room for a broader theory of juridical persons that might be applied to non-associative entities. The second is that the interests deemed important by the commentators for moral agency and thus juridical personhood may not be found even in entities we comfortably include in the category of natural persons (e.g., very young children or developmentally disabled adults). In fact, we have little in the corporate personality literature that helps identify when it is appropriate to use juridical personhood as a basis to protect the entity in question. As a result, such analysis will have to be fleshed out in the context of each specific entity under consideration, and more insight may be gained in drawing from general moral philosophy, then specifically from moral corporate theory. I suggest some initial steps in Part II.

2. *Interests of Others*

In contrast to the corporate personality theories discussed above, most discussions about corporate personality develop the concept of juridical personhood using the interests of already recognized natural persons. There are two related arguments for according juridical personhood based on the interests of others. First, categorization as a juridical person may be necessary for practical reasons, since the law requires an object upon which to act. In other words, currently recognized natural persons may have an interest in identifying entities as legal actors who can have rights or obligations, who can sue or be sued. Alternatively, one might recognize entities as juridical persons (and give them some of the same rights as natural persons) because the failure to do so would undermine the rights of currently recognized natural persons.

64. *Id.* at 23.

65. *Id.* at 30 (noting that “embody[ing] a process of moral decision-making” requires “(1) The capacity to use moral reasons in decision-making [and] (2) The capacity of the decision-making process to control not only overt corporate acts, but also the structure of policies and rules”). Corporations that fail to meet these requirements should not be considered to be moral agents and also “fail to qualify as a holder of rights or responsibilities.” *Id.* at 32.

66. *See, e.g.*, ELIZABETH WOLGAST, *ETHICS OF AN ARTIFICIAL PERSON* 88–95 (1992) (summarizing debates about corporate personality and arguing that it is morally hazardous to separate moral accountability from personhood designations and concluding that corporations should not be treated as persons).

The notion of practical necessity is drawn from early articulations of corporate personality theory—fictional entity theory and real entity theory—that were based not on suppositions about the moral character of corporations, but on the need to create an entity to which the law could apply. Fictional entity theory states that corporations are completely creatures of law.⁶⁷ Real entity theory, by contrast, acknowledges that there is an actual entity, which is termed the “corporation.”⁶⁸ Both the fictional entity theory and the real entity theory are compatible with broad discretion on the part of states in determining what rights to accord. But although the theories function descriptively, they provide no basis for understanding whether and when a particular entity should be considered a juridical person.⁶⁹ Moreover, instead of articulating a basis,⁷⁰ the judicial cases using the theories rely on circular analysis, asserting that corporations have a particular legal right *because* they are juridical persons.⁷¹ Explaining this lack of normative reasoning, John Dewey asserted that the term “person” in law might merely be “a synonym for a right-and-duty-bearing unit.”⁷² The

67. See *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of N.Y.*, 170 N.E. 479, 482 (N.Y. 1930) (noting that the concession theory states that corporate personality is “invariably the gift and creature of the state” and holding the law determines when the life (legal personality) of an artificial person has been terminated, conditioned by the juristic quality of the cause for termination); see also *McCabe v. Ill. Cent. R. Co.*, 13 F. 827, 830 (N.D. Iowa 1882) (holding a corporation is a citizen only in the state of its creation because it cannot exist away from the law which created it); *City of Baton Rouge v. Bernard*, 840 So. 2d 4, 7 (La. Ct. App. 2003).

68. This theory is based upon the idea that “even in the absence of a charter or other token of the will of government there are groups so natural and so spontaneous as to evoke legal recognition of a corporate existence.” *Petrogradsky*, 170 N.E. at 482. The legal recognition or lack of recognition of the corporation does not extinguish its existence.

69. See Morton Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985) (pointing out that these theories functioned to set guidelines as corporate doctrine developed, and arguing that they were both affected by social developments and, in turn, themselves shaped historical development); see also David Millon, *Frontiers of Legal Thought I: Theories of the Corporation*, 1990 DUKE L. J. 201, 204, 241–51 (discussing Horwitz’s arguments).

70. See, e.g., Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 620–51 (1990) (discussing the application of the Bill of Rights to corporations and arguing that the Court has put forth no coherent theory to justify its decisions).

71. See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (suggesting that these questions of law regarding rights of corporations would be better decided based on either empirical evidence or ethical argument, rather than recourse to circular arguments of legal terminology).

72. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926). Although it is true that to the extent we live in a society governed by law there may be no practical distinction between those entities recognized as legal persons because they are natural persons or those that are artificial persons—both are “legal” persons. But there may be fundamental differences between the rights of entities that can claim moral status and the rights of entities that cannot, regardless of official legal status. Moreover, while Dewey’s point about historical artifacts of corporate personality theory obfuscating debates about the law applied to associations is important, the current question of whether legal personhood should be recognized for entities which meet none of the characteristics of corporations and only one (genetics) with natural persons, should lead us to reexamine the idea that the state can determine the whole of what it means to be a person under the

law must have an object upon which to act and that object must be a "person."⁷³ Thus, Dewey argued, the development of the term "corporate personality" and the accompanying theories are a historical anomaly.⁷⁴ Dewey may be correct in his analysis of the historical development of corporate personality theory; I will take no stand on this debate. But unlike corporations, the categories of embryos, fetuses, non-human animals, and machines with artificial intelligence are clearly not "fictional" entities. The potential application of juridical personhood to these entities makes it necessary to reconsider the possibility of a normative justification for juridical personhood based on social interests.⁷⁵ On the other hand, these new entities may not be actors functioning in the legal or social marketplace, so there may be less basis for categorizing them as juridical persons on this rationale alone.

An alternative possibility likewise draws on the interests of natural persons, but not in terms of practical needs of the legal system. Steinbock argues that the symbolic value of potential persons, while less important than the moral value of actual persons, functions as a basis to afford some protections to embryos and fetuses.⁷⁶ The term "symbolic value" refers to the consideration of the interests of currently recognized persons. However, there are many things that we might recognize as having symbolic value, but to which we would not think to grant juridical personhood. The American flag is one example. Moreover, the concept of symbolic value is itself limited, since not only would it be inappropriate to designate some things with symbolic value "juridical persons," but some currently recognized juridical persons—corporations—do not necessarily have symbolic value. So although the notion of symbolic value is theoretically appealing, it is of limited use. This is not to imply that embryos lack symbolic value, but the concept of symbolism cannot (alone) form the basis for a framework of personhood

law.

73. *Id.* Hohfeld's system applied only to persons. See HOHFELD, *supra* note 16, at 74–75.

74. See Dewey, *supra* note 72, at 658 (discussing F.W. Maitland, *The Corporation Sole*, 16 L.Q. REV. 335 (1900)). As a result, Dewey concludes that discussions of personhood should be divorced from theoretical conceptions of natural or artificial personality. *Id.* at 669. Thus he would prefer not to use the term "person" to characterize the debate. *Id.* at 662. I think, however, that given the common use of the term in our language it serves as a good proxy for the underlying issues and brings with it an already developed legal framework.

75. Frederick Hallis, writing from an English law perspective, points out that a legal theory of corporate personality should take into account the real nature of the entities that will be considered juridical persons, as well as pragmatic concerns about how the law will function. See FREDERICK HALLIS, *CORPORATE PERSONALITY* xxxvii (1930). Hallis argues that there are three elements required to be a juridical person: (1) "It must be an organized collectivity capable of acting as a whole in furtherance of an interest which the law will protect"; (2) "it must have a directing idea, a definite aim" that "controls its internal and external activities"; and (3) it must have "a social value by virtue of pursuing an interest worthy of legal protection." *Id.* at 241–42.

76. STEINBOCK, *supra* note 33, at 196–97.

status and rights.

Rather than concentrate on the symbolism of a particular entity, I would argue that one should consider broadly the effect on natural persons of granting rights of juridical personhood. Recognition of rights of juridical persons ultimately may benefit or harm the rights of natural persons.⁷⁷ This is an empirical question and should be evaluated in a particular context. Thus granting free speech rights to a particular corporation may help or harm the rights of natural persons.⁷⁸ But making inquiries in each case may be too costly or time consuming. Instead of adopting such an act-utilitarian approach,⁷⁹ one might prefer a rule-utilitarian approach that asks generally whether granting a particular right to a juridical person benefits or harms the rights of natural persons.⁸⁰ Again, as with all utilitarian inquiries, this is an empirical issue, and gathering data, particularly generalizable data, may be difficult. Corporations are already observable in the marketplace, but we have no means of gathering empirical information on the effect of granting or withholding certain rights from embryos or fetuses or non-human

77. For example, the nexus of contracts theory justifies corporate personhood, and the resulting rights that adhere, based on the freedom of contract rights of the natural persons who make up the corporation. Thus the theory functions as a limit on state interference with corporations due to the limits the state generally has in interfering with the freedom of natural persons to contract. In order to enter into such a contract, a group of people "must organize, assume a name and choose from their number trustees" to become an artificial person "with the general rights and powers, and subject to the obligations and duties of a natural person, having power to exist, notwithstanding there be a complete change in its membership." *Miller v. Milligan*, 1881 Ohio Misc. LEXIS 12, at *8 (Ohio Common Pleas). *But see* William W. Bratton, *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 409-10 (1989) (arguing that the nexus of contracts concept is not entirely accurate and suggesting a replacement model); David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 239-40 (1999) (arguing that the nexus of contracts theory "stretches unduly the notion of contracts" and "fails to account for the ways corporations act in the world").

78. Graver notes that the courts have not been willing to examine the specific motivations of corporations in the same way they've been reluctant to examine the motivations of natural persons exercising constitutional rights. Graver, *supra* note 77, at 247. However, he argues that the situations are different and we should "draw sharp distinctions among fictional bodies of various types of organizations and accord each type of body constitutional rights based on the benefits or harms such rights for such bodies will bestow on humans." *Id.*

79. Rule-utilitarianism seeks to effectuate rules that will generally result in the greatest good (e.g., a rule that physicians should keep patient confidences). Act-utilitarianism, on the other hand, focuses on individual acts and in each case evaluates what action will lead to the greatest good (which may or may not result in the physician maintaining confidentiality). *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 343-45 (5th ed. 2001). Richard Lippke provides an example of this approach when he develops his theory of business ethics (and thus identifies the limits that society should place on corporate actions) based on the extent to which things advance or restrict individual autonomy. *See generally* RICHARD LIPPKE, *RADICAL BUSINESS ETHICS* (1995).

80. *See, e.g.*, Tara Radin, *700 Families to Feed: The Challenge of Corporate Citizenship*, 36 VAND. J. TRANSNAT'L L. 619, 653 (2003) (suggesting that the courts chose not to extend constitutional protections against double jeopardy and self-incrimination to corporations because the result would have been unjust).

animals.

In the absence of data, one might compare the characteristics of the entity in question to natural persons and infer whether excluding a particular protection would necessarily affect the rights of natural persons, based on similarities between the entity and natural persons. This is not a question about whether the Framers envisioned the entity in question as a “person,” but whether the concept of “person” would or should encompass the entity given our current understanding of the term.⁸¹ To the extent that an entity matches the relevant characteristics of entities which have all the characteristics of persons—e.g., adult competent human beings—that entity should be afforded personhood protections because to do otherwise would both be inconsistent and would undermine the rights sought to be upheld. Slavery is a good example. Even though the Framers did not envision slaves with constitutional rights (in fact many of the Framers themselves owned slaves), the entities they did envision as protected shared all relevant characteristics with slaves except skin color. The exclusion based on such a nominal characteristic undermined the strong protections for which the Constitution stands. In contrast to slaves,⁸² corporations are not human beings and their exclusion from certain constitutional protections may not undermine the precepts upon which the Constitution is based, although this may have to be evaluated for each right in question.⁸³

D. SUMMARY

In sum, determinations of both natural and juridical personhood rest on the evaluation of two issues: (1) interests of the entity, and (2) interests of others. Concerns about protection of the interests of others further breaks down into two issues. First, currently recognized natural persons may have an interest in identifying entities as legal actors who can have rights or obligations. The basis for this rationale is practical need, and it is not sufficient for according natural personhood. Since the goal is to protect the interests of currently recognized persons, the mere need to recognize a legal actor is not enough to limit the rights of other natural persons by including additional entities in the categorization.

81. This point is often confused. See, e.g., Mayer, *supra* note 70, at 657 (“A theory of original intent provides no basis for extending rights to corporations because these entities are never mentioned in the Constitution.”). Mayer conflates original intent with textualism. Compare *id.*, with David Graver, *supra* note 77, at 243–44 (advocating a constitutional theory of personhood which he calls “embodied consciousness” focusing on the Framers’ intent, and highlighting “three elements: interiority, exteriority, and autonomy”).

82. The rights of slaves, of course, are linked to their own moral status as well as the implications for other persons, whereas the rights of corporations are linked only to the interests of persons with moral status.

83. For a list of constitutional rights that have been applied to corporations see Radin, *supra* note 80, at 652.

Second, one might recognize entities as legal persons because the failure to do so would undermine the rights of currently recognized natural persons. This rationale is strong enough to provide a basis for either natural or juridical personhood. However, if the personhood designation is necessary to protect a particular right of previously recognized natural persons, then the rights of the newly recognized juridical person should be limited to those actually necessary to protect the threatened right, and should not infringe upon other rights to the extent possible.

Determining whether natural or juridical personhood is appropriate based on concerns about undermining the rights of currently recognized persons will not be simple.⁸⁴ One needs to evaluate whether the entity in question is sufficiently similar to currently recognized natural persons. The earlier discussion of anencephalic infants provides one of the few examples where the entity is almost identical to currently recognized natural persons (e.g., normal infants who have interests and thus a claim to natural personhood protections), but is granted the natural personhood designation due not to its own interests, but based upon concern about protecting the interests of others. As noted previously, to argue that the interests of other natural persons cannot be sufficiently protected except by recognizing the new entity as a natural person itself cannot avoid a limitation of the rights of the currently recognized natural persons, because now these newly recognized natural persons will have equal rights. Rarely should this be the case, and anencephalic infants may be the only example.⁸⁵ In most other situations, recognition of lesser legal status (e.g., juridical personhood) and fewer legal rights will suffice. The following section considers the implications of this personhood framework.

II. APPLICATION OF THE FRAMEWORK

I turn now to the application of the above analysis to two general “categories” of entities that have raised personhood questions: genetically human entities before birth and non-human entities such as animals or machines with artificial intelligence. The following subsections address the questions of legal personhood status for each entity in turn, primarily developing the concepts with respect to

84. See Mark Sagoff, *Extracorporeal Embryos and Three Conceptions of the Human*, AM. J. BIOETHICS, NOV.–DEC. 2005, at 52, 54 (2005) (stating that, with respect to extracorporeal embryos, “[t]o determine . . . moral status . . . society cannot consult biological landmarks but must debate what is ethically permissible and culturally appropriate in view of the practical consequences and expressive properties of our decisions” and that “[f]rom a Kantian perspective we may help secure our own humanity by treating embryos with great respect”).

85. And perhaps this is a reason to think that the legal treatment of anencephalic infants is incorrect and they should not be regarded as natural persons. Evaluation of this claim is beyond the scope of this Article.

embryos⁸⁶ and fetuses, but also including some initial thoughts about the implications for non-human entities.

A. GENETICALLY HUMAN ENTITIES PRIOR TO BIRTH: EMBRYOS AND FETUSES

The logical place to begin is with the question of whether embryos are natural persons. If the answer is yes, it follows that all later developed stages (e.g., fetus) would also be natural persons. If the answer is no, then we must determine whether embryos/fetuses should be designated juridical persons, and at what stage of development the entity in question should be considered to be a "natural person," and thus entitled to the full panoply of legal rights.

Currently, natural personhood designations are limited to human beings after birth.⁸⁷ So the question for embryos is really a question of whether that designation (and all the rights that accompany it) should apply at some earlier stage of development prior to birth. If the answer to that is no, then we might consider whether the embryo should be given rights as juridical persons, and at what stage of development these rights should apply. Both inquiries begin with evaluation of the interests of the entities in question, and then move to evaluation of the interests of others in providing protections.

86. A handful of commentators have struggled to define the legal status of embryos. See, e.g., Andrews, *supra* note 13, at 357–58; Ducor, *supra* note 12, at 203–06; see Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703 (1999); see John Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990).

87. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (holding that the state's interest in protecting the fetus becomes compelling at viability). There have been a few recent cases challenging the status of embryos or fetuses as persons under different areas of law. Although most of these address the actions of pregnant women, a few do not. For example, in one case a judge dismissed a suit filed against a stem cell research lab which tried to claim embryos were persons. See *California Judge Dismisses Lawsuit Against CIRM*, BNA MED. RES. LAW & POL'Y REPORTER, Nov. 16, 2005, at 22. In another case a judge rejected a claim that a pregnant woman and her fetus constitute two persons for purposes of driving in an HOV lane. See *NPR: Judge: Fetus Doesn't Count in HOV Lane* (NPR radio broadcast Jan. 12, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5151368>. There are also some IVF cases that claim embryos are persons, although these claims have generally been rejected. See, e.g., *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1259 (Ariz. Ct. App. 2005) (holding that three day old pre-embryos are not persons under wrongful death statute).

I. Embryos⁸⁸

Unlike later developed fetuses or even some non-human animals, embryos exhibit none of the relevant criteria for having interests⁸⁹ such as a brain or neural system (embryos are a mass of largely undifferentiated cells), sentience, consciousness, pain and pleasure perception, capacity to relate to others, or ability to communicate. However, embryos are genetically human and do have the potential to develop these various capacities.⁹⁰ As one author puts it, embryos are not yet human beings, but are “human becomings.”⁹¹ Is genetic humanness and potentiality sufficient for according embryos the rights and privileges of either natural or juridical personhood? The biggest problem with using genetic humanness and potentiality as a standard is its broad implications.⁹² The advent of cloning technology means that any cell in the human body that contains a full complement of DNA has the potential to develop into an entity with interests, and eventually a person. These clones would

88. Although the term “embryo” is the most commonly used label, the appropriate scientific term for the fertilized egg at the earliest stage of development is “blastocyst.” A blastocyst is a multi-celled organism (a group of cells around a fluid filled cavity) that forms four days after fertilization. Fertilization is the event that begins with the sperm entering the egg and concludes when the genetic material is combined to form the zygote (e.g., the single-celled organism immediately after the egg and sperm have joined). All so-called “frozen embryos” are in fact frozen blastocysts. The cells of a blastocyst are undifferentiated; they are able to form into any of the cells in the body, and each one of the cells can be separated from the unit and divide to form another blastocyst. This process, called “twinning,” would result in two (or more) genetically identical individuals. “Embryo” is the term given to the entity at approximately two weeks after fertilization, which coincides with the formation of the primitive streak (the structure which will eventually develop into the neural system). Occasionally the term “pre-embryo” is used to refer to the developing entity during the two-week stage prior to the formation of the primitive streak. Despite the scientific definitions, the common usage of the term embryo has been extended to cover the many frozen blastocysts currently in storage, as well as those at almost all stages of development following fertilization. For simplicity, this Article refers to all of the entities in question prior to the fetal stage as embryos. A “fetus” is the label given to the entity from eight weeks after fertilization until birth, at which point it is referred to as an “infant,” “baby,” or “neonate.” I do not believe that the use of the terms (or of proposed different terms) necessarily alters the debate. Certainly there are misleading terms, e.g., “developing baby,” which imply that the entity in question is closer in attributes to a child than to original gametes (i.e., sperm and egg). But it does not appear to make much of a difference in people’s analysis whether the entity is called a blastocyst, a pre-embryo, or an embryo.

89. See, e.g., Bonnie Steinbock, *The Morality of Killing Human Embryos*, 34 J.L. MED. & ETHICS 26, 26–34 (2006) (describing why embryos do not have interests and the implications for moral status).

90. Extracorporeal embryos may be significantly different from *in utero* embryos in their potential since, as the science currently stands, they will not fully develop unless implanted. See STEINBOCK, *supra* note 33, at 200.

91. Becker, *supra* note 43, at 337 (“Human fetal development is a process analogous to metamorphosis and just as it makes good sense to speak of butterfly eggs, larvae, and pupae as distinct from the butterflies they become (to say that they are *not* butterflies) so too it makes sense to say that human eggs, embryos, and fetuses are distinct from the humans they become—that they are not human *beings*, only human *becomings*.”).

92. STEINBOCK, *supra* note 33, at 59–68, 199–200 (describing the logical problems with arguments that the potential to become an entity with moral status is sufficient to grant current moral status); see also Robertson, *supra* note 86, at 442.

arguably be legal and moral persons in their own right. If potential to become a full moral person is the basis for legal personhood, then every human skin cell, for example, would have a claim for personhood status.⁹³ Potentiality is thus far too broad a basis for according personhood. Even the more specific characterization of “potential to develop into a unique individual” would not be a useful standard. Cloned individuals would be unique individuals, because of differences in environmental factors.⁹⁴ Genetically identical twins are considered unique individuals, despite their shared genetic code. Moreover, embryos are not necessarily genetically unique since twinning is still possible. Therefore, potentiality alone should not be the basis for according legal status.⁹⁵

Since embryos themselves do not have interests and the potential to develop those interests is not sufficient, the only basis for legal personhood would be the interests of other currently recognized persons. Perhaps embryos should be designated as juridical persons because of the need to identify a legal actor? It is difficult to understand why this would be the case. Embryos have no interests (as defined by Feinberg and Steinbock)⁹⁶ of their own that need protecting and there is no evidence that the interests of other persons suffer if embryos are not recognized as persons. To the contrary, recognition of embryos as persons may limit, and thus undermine, the rights of currently recognized persons.

Moreover, evaluation of whether embryos are the type of entity that should be covered by legal personhood protections leads to the same conclusion. Embryos share one characteristic with natural persons—they are genetically human, and clearly the U.S. Constitution is designed to deal with human entities. Nonetheless, despite the fact that embryos have the potential to share all characteristics with adult competent

93. Insoo Hyun and Kyu Won Jung distinguish between biological and circumstantial potential. See Insoo Hyun & Kyu Won Jung, *Human Research Cloning, Embryos, and Embryo-Like Artifacts*, 36 HASTINGS CENTER REPORT 5, 34 (2006). The first is “potentiality in the biological, quasi-Aristotelian sense of an entity’s gradually actualizing its preexisting potential.” *Id.* at 39. Circumstantial potential, by contrast, depends on circumstance and choice. Hyun gives the example of a medical student’s potential to become a physician. *Id.* Extracorporeal embryos may have biological potential (not all of them may be viable), but not necessarily circumstantial potential since they may never be implanted. *Id.*

94. Despite popular belief, clones would be unique individuals. Environment plays a significant role in development of identity. Thus, at most one could assure that the clone would be genetically identical, as are identical twins, but s/he would not be the same person. Even more complicating, some cells taken from an adult will have mutated, so each of those cells would in fact be unique, again creating a too inclusive standard for personhood.

95. See also David DeGrazia, *Moral Status, Human Identity, and Early Embryos: A Critique of the President’s Approach*, 34 J.L. MED. & ETHICS 49, 53 (2006) (arguing that embryos are “precursor” organisms, not potential humans).

96. See *supra* notes 33–36 and accompanying text.

human beings,⁹⁷ they remain easily distinguishable from the entities that are covered. Their exclusion from the protections normally afforded to “persons” would not do damage to the concept itself by creating arbitrary distinctions because embryos are vastly different from other protected persons both in terms of capacity and form. Embryos share no characteristics with infants, children, or adult competent human beings except genetics. The characteristic of shared genetics, however, is not sufficient by itself, since the resulting grouping would be both too broad (it would include every human cell) and too narrow (it would exclude a number of creatures who have significant interests, such as non-human animals). Nor do embryos share any characteristics except genetics with any other entities which are considered persons. Moreover, we exclude a variety of entities that share genetic characteristics with currently recognized natural persons from legal personhood protections. For example, cells and tissues from the human body are not considered persons, despite their genetic make-up. And sentient non-human animals that share over 98% of their genetic code with humans are not considered persons.⁹⁸ In fact, granting embryos legal rights may do damage to the underlying precepts by limiting the rights of those who more clearly fit the framework.

In sum, there are neither interests of embryos, nor interests of currently recognized persons, that would justify granting legal personhood protections to embryos. Debates about embryo disposition should thus be primarily addressed through the application of property theory, as I have discussed elsewhere.⁹⁹ Embryos should not be afforded

97. In this respect embryos are unlike corporations or other entities that have fixed characteristics.

98. John Nobel Wilford, *Almost Human and Sometimes Smarter*, N.Y. TIMES, Apr. 17, 2007, at F1 (“[J]ust a 1.23 percent difference in their genes separates Homo sapiens from chimpanzees . . .”).

99. See Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 162 (2005). My argument starts from the novel position that recognizing property interests in an entity does not preclude their recognition as persons. Thus, something might have legal personhood status and also be subject to property interests of other persons. At least one author has suggested that corporations are also both “persons” and “things.” See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 585 (1999). I argue that property rights are the appropriate basis for legal analysis of embryo disposition, asserting that property theory provides a conceptually better fit than the competing procreative liberty framework. See Berg, *supra*, at 163. Not only is the property framework conceptually accurate, it is normatively compelling; application of utilitarian, labor, and personality theories of property leads to the conclusion that individuals (specifically progenitors) can have property interests in embryos, fetuses, and even children. *Id.* Finally, property law provides both a descriptively accurate explanation of courts’ decisions in embryo cases and also allows judges to draw on an existing framework of law to resolve disputes. *Id.* These arguments are developed and explored in my previous article. *Id.* For the current Article, the important point is that individuals have property interests in their offspring that must be considered in evaluating legal rights, and these property interests do not disappear upon the development of the entity’s personhood interests. *Id.*

rights, the exercise of which would infringe on the rights of currently recognized natural persons. Thus while a state may choose to designate an embryo as a juridical person for certain, very limited, purposes, there is no compelling legal rationale for doing so, and thus no rights that must follow. Despite states' theoretical ability to do so, thus far only Louisiana has chosen to designate embryos "juridical persons."¹⁰⁰ Furthermore, there may be significant limitations to what rights can be granted an embryo, as recognition of embryo rights will necessarily infringe upon the rights of natural persons. In some situations the infringement may be unconstitutional. As the embryo develops, however, it will develop interests, and those may form the basis for juridical or (eventually) natural personhood status.

2. *Fetuses*

The Supreme Court in *Roe v. Wade* held that a fetus is not a "person" under the Fourteenth Amendment of the U.S. Constitution.¹⁰¹ The resulting furor over the case, and subsequent three decades of jurisprudence, plunged this country into a battle for which the lines seem to be clearly and irrevocably drawn. At the base of these debates is the question of fetal personhood. Contrary to popular belief, the Supreme Court's pronouncement in *Roe* did not forestall all state determinations of legal personhood.¹⁰² Moreover, even if *Roe* is overturned, as some believe to be possible given changes in the composition of the Supreme Court, there will still be significant questions left unresolved about the legal status of fetuses and embryos. In other words, not only is the legal status of embryos and fetuses an open question under the current law of *Roe v. Wade*, but it will remain an open question even if the case is overruled. At the very least, if *Roe* is overruled, the Court is highly likely to allow the states to determine for themselves whether to accord fetuses legal status, rather than decide legal status itself as a matter of federal constitutional law.

If embryos should not be considered either natural or juridical persons, while infants once born are natural persons, there are two remaining issues for fetuses. The first question is at what point should the fetus be considered a natural person—should the relevant legal line remain at birth or be earlier? The second question is whether prior to the recognition of natural personhood, the fetus should be designated a juridical person with some, but not all, of the rights of natural persons. The previous section explored the limits of potentiality arguments, and

100. For a description of Louisiana law and the development of the statute, see Jeanne Louise Carriere, *From Status to Person In Book 1, Title 1 of the Civil Code*, 73 TUL. L. REV. 1263, 1263–86 (1999). Other states, however, have attempted to define when life begins for purposes of feticide or child abuse statutes. See, e.g., WIS. STAT. ANN. §§ 48.01(1)(bg)(2), 48.02(1)(a) (1998).

101. *Roe v. Wade*, 410 U.S. 113, 158 (1972).

102. See, e.g., Robert Destro, *Is Roe v. Wade Obsolete?*, 24 HUM. L. REV. 55, 61 (1998).

they will not be repeated here. To the extent that the argument for recognizing legal personhood for fetuses rests on their potential to develop interests or to become a natural person at some future time, it fails for the reasons stated above.

Since the focus of this paper is on legal, not moral status, the evaluation of fetal interests is constrained. Legal and moral evaluations are intertwined, but not necessarily equivalent. As stated previously, moral status, or the lack of it, does not determine legal personhood status. An entity may lack moral status, but still be considered a legal person. Conversely, an entity may have moral status but not be considered a legal person. In such a case, the lack of legal recognition would not negate the entity's moral status, and the absence of legal obligations would not imply the absence of moral obligations.

The concern is not with determining at what point the fetus develops any interests, but at what point those interests should form the basis of legal personhood. This is a question of line drawing—legal personhood must come into play at some point in time even though fetal interests likely develop along a continuum. The law is a rather blunt instrument. Although there may be a way to achieve a somewhat nuanced legal approach by recognizing juridical personhood at an early stage of fetal development, and subsequently natural personhood at a later stage, both designations still must be based on fairly easily identifiable standards—in other words, we must still draw lines. The final determination of whether and how to draw distinctions between different developmental levels of human beings may depend on practical needs in identifying clear legal lines. If this is the case, then the lack of legal personhood recognition will not negate the moral claims of the entity in question. The entity may still have certain moral rights, and others will have moral obligations to respect those rights.

There are a number of possible biological events that can be used to determine legal status, each having significance in different ways. I will not go through all the potential biological landmarks in the subsections that follow. Rather, this section considers the legal significance of, and interplay between, three important factors in fetal development: sentience (consciousness), birth, and physical development. I choose not to focus on viability since it is a changing line (as technology improves, viability will push back towards conception), as well as an incredibly imprecise standard—does the standard mean viable for a minute, an hour, a day, a week, a month, or longer?

a. Sentience

Prior to the development of sentience, which occurs in the latter part of the second trimester, the fetus does not have interests of its own and thus does not have the requisite basis for natural personhood. Sentience,

or conscious awareness, is necessary to feel—for example, fetuses cannot perceive pain prior to sentience (and thus have no interest in avoiding pain).¹⁰³ Sentience cannot occur until the neural system is sufficiently developed to allow for brain functioning and consciousness, at around twenty-two to twenty-four weeks.¹⁰⁴ While this currently provides a rough match with the present standards for viability, unlike viability the timeline will not change as medical technology advances. Eventually artificial womb technology may suffice to keep the *ex utero* fetus alive from the embryonic stage, and allow development to continue. But prior to sentience the fetus will not have interests, regardless of its location in or outside the body. This is not to say that artificial womb technology should not be used prior to sentience, but merely that its use cannot be based on regard for the fetus's own interests, but must refer to the interests of others.

I have pointed out previously that natural personhood is rarely, if ever, granted merely on the basis of the interests of others. It is hard to understand how the interests of currently recognized people would suffer if we do not include non-sentient fetuses on an equal legal footing. Fetuses are not currently recognized as natural persons, and there is little or no evidence that the legal rights and interests of currently recognized persons have suffered. An argument to recognize fetuses as natural persons should bear the burden of showing that the interests of others are harmed, or else it must rest on the interests of the fetus itself. As noted above, prior to sentience fetuses lack interests of their own, under the Feinberg/Steinbock approach, thus juridical personhood prior to sentience would be inappropriate. Arguably, the Supreme Court jurisprudence recognizing increasing state interests after viability (which maps roughly onto sentience) is compatible with the notion that prior to sentience the interests at stake (those of others, not the fetus) are too weak to provide significant legal protections for the fetus itself. Others are certainly free to reject the Feinberg/Steinbock concept of interests, and attempt to develop a different theory of interests that would apply to fetuses. My point is that if fetuses are to be considered natural persons because of their interests, an argument must be made that they have interests, using a coherent understanding of the term that can be applied across different entities. If fetuses are to be considered natural persons because of the interests of others, there must be some argument about how the interests of others are harmed by the exclusion of fetuses in the category of natural persons. All of this is not to say that fetuses are not

103. Pain perception may occur even later than the onset of sentience. See, e.g., Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. A.M.A. 947, 952 (2005) (concluding that given the timeline for neural development, it is extremely unlikely that a fetus perceives pain before twenty-seven to thirty weeks gestation).

104. STEINBOCK, *supra* note 33, at 84–85.

entitled to legal protection, or that juridical personhood is not a possibility, merely that natural personhood prior to sentience is not warranted.

But what happens after sentience? At this point fetuses have claims based on their own interests. What would be the effect of granting natural personhood status to fetuses when they reach the point of sentience? Significantly greater restrictions on abortion would result as states would have an obligation to protect fetuses, just as they now do to protect already-born children. Moreover, designating fetuses as natural persons prior to birth would limit the rights of other currently recognized natural persons—particularly pregnant women whose decisions during pregnancy might be constrained in the same way that parents' decisions are constrained by the interests of their already born children. Fetal interests at the point of sentience are not strong enough to justify these limitations. Arguably newborn interests at the point of birth are not sufficient either. Rather, the natural person designation at birth is based on protection of the interests of others. However, during the prenatal period, the interests of others are not strong enough to justify granting fetuses full natural personhood status or protections while still *in utero* based solely on sentience—other factors must also be present. Those who disagree with this position should have the burden of showing that limiting the rights of others (by designating fetuses as natural persons) would be necessary in order to fully protect the rights of currently recognized people.

Would it be appropriate to consider a sentient *in utero* fetus a juridical person with certain legal protections prior to birth? The answer here is likely yes. It would be a matter of state choice (as are other juridical personhood designations). Those states that choose to afford sentient fetuses juridical personhood status would need to align the rights given to the interests at stake. The fact that sentience is not possible prior to twenty-two and twenty-four weeks gestation does not mean that the fetus has fully developed cognition and perception. At this point, for example, the fetus may not be able to feel pain, and thus has no interest in avoiding pain.¹⁰⁵ If this is so, a state should not be able to require fetal anesthetic use during all abortions at twenty-two weeks based on sentience.¹⁰⁶ Legislation providing specific protections prior to birth, but

105. See Lee, *supra* note 103, at 952. A few letters written in response to the article questioned the twenty-seven-week cut-off point, but even these individuals did not question the lack of pain perception before sometime late in the second trimester. See Laura Myers et al., Bobbi Lyman, Brian Sites, Letters to the Editor, 295 J. A.M.A. 159, 159–60 (2006).

106. Perhaps there are other interests that might justify such a requirement, although it is a more difficult argument to make. For example, requiring that women be informed after twenty-two weeks, that abortions may cause fetal pain may be based on the state's interests in preserving fetal life (assuming that some women will choose not to undergo the procedure if told the misleading

after sentience, is an area which states might explore in more detail.

b. Cognitive and Physical Development

The closer to birth, the greater the interests of the fetus, and the greater the interests of others in providing the same kinds of protections as are granted to currently recognized persons such as children. If we give newborn infants legal protections based on these interests, why not fully developed fetuses? It is hard to understand why an entity at this stage should not be considered as having equal legal status as an entity outside the womb. But one problem with a “development” standard is that it does not take into account fetuses that have problems in development. As a result, we might set the standard based on gestational age, rather than “full development.”

At the end of the eighth month of pregnancy (thirty-two weeks), in most cases, all of the fetus’s internal and external organ structures have substantially developed.¹⁰⁷ Natural personhood and thus constitutional protections could apply at this late stage of development. The result would change in the analysis of both abortions and forced caesarian-sections after this time point—the rights of the pregnant woman would be balanced against the rights of a “fetal natural person.” I will discuss this in more detail in the following section. While it may be tempting to change the timeline for according natural personhood, there are reasons to be wary. First, fetal age determinations can be inexact.¹⁰⁸ Second, even in the absence of natural personhood protections prior to birth, the fetus is entitled to significant moral status—status which may be recognized under a juridical personhood framework. Pregnancy terminations at this point are highly restricted; except in cases of severe fetal abnormality, they are almost always undertaken with the goal of achieving a live birth (e.g., ending the pregnancy, but not the life of the fetus). In cases of severe fetal abnormality, the issues raised are similar to those raised by neonatal euthanasia.¹⁰⁹ The only difference is the added complication of the pregnant woman’s right of bodily integrity, which plays a significant role in the analysis and does not change if the fetus is considered a natural person. As a result, it may not be necessary to consider the fetus a natural person prior to birth to achieve fetal protections, and may significantly complicate the situation to do so.

information).

107. Additionally, at this point infant mortality rates decrease as compared to preterm births before thirty-two weeks. See Michael Kramer et al., *The Contribution of Mild and Moderate Preterm Birth to Infant Mortality*, 284 J. A.M.A. 843, 844 (2000).

108. See Michael S. Kramer et al., *The Validity of Gestational Age Estimation by Menstrual Dating in Term, Preterm, and Postterm Gestations*, 260 J. A.M.A. 3306, 3307 (1988).

109. This is not to say that the neonatal euthanasia is simple, but that the situations should be considered comparable. See Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 175–76 (1988) (discussing neonatal euthanasia).

Juridical personhood based on developmental or gestational age may be appropriate. This is already done implicitly by states which accord fetuses limited rights prior to birth by recognizing a variety of causes of action for harm done to fetuses at different stages of development. Alternatively, gestational age might serve as a bright line cut-off for sentience. Thus a state might explicitly grant juridical personhood protections at twenty-two weeks gestation, on the assumption that for a normally developing fetus that point marks the earliest time at which sentience is possible. For fetuses which are not experiencing normal development, the presumption of personhood could be rebutted—much as is done currently in determining viability or lack thereof.

c. Birth

There are practical reasons for choosing birth as the latest point at which personhood protections adhere, and thus at which the label “natural person” must be applied. Likewise, a fetus born prematurely, but after sentience, should also be considered a natural person and treated as a full-term newborn would be treated under the law. Except in the absence of brain material or brain activity, it is practically impossible to determine sentience using current medical technology, and treatment decisions for premature neonates are based on rough approximations of development, rather than evaluations of sentience. But what about a fetus “born”¹¹⁰ clearly prior to sentience,¹¹¹ as might be the case if artificial womb technology advances?¹¹²

The answer depends on whether there are interests of others in according legal personhood protections, as is the case with anencephalic infants.¹¹³ Unlike anencephalic infants, however, these entities may not

110. In fact, it may become possible to fertilize and develop a fetus completely outside the womb. See generally ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION (Scott Gelfand & John R. Shook eds., 2006) (discussing ectogenesis).

111. There are also fetuses born prior to viability, which live for a brief period of time. In one case the court determined that the lack of viability meant the fetuses could not be considered “persons” under the Ohio wrongful death statute. See *Griffiths v. The Rose Ctr.*, No. 2005CA00256, 2006 Ohio App. LEXIS 1474, at *10 (Ohio Ct. App. Mar. 29, 2006).

112. Also of interest would be cases of fetal surgery where the fetus is either partially or fully removed from the womb temporarily or the uterus is removed from the woman temporarily. See generally Maggie Jones, *A Miracle, and Yet*, N.Y. TIMES MAGAZINE, July 15, 2001, at 40–43.

113. Becker identifies the eighth month of development as the time of “metamorphosis.” Becker, *supra* note 43, at 345. He goes so far as to suggest that a fetus born before metamorphosis is complete, such as an extremely premature infant, should be regarded as the birth of a human becoming. *Id.* at 345–48. But cf. *Nealis v. Baird*, 996 P.2d 438, 454 (Okla. 1999) (conceding that there may be a distinction between biological existence and personhood, but rejecting the idea that the distinction extends beyond live birth). There are also issues of when to withdraw legal status protections from a human being that no longer meets the moral status requirements. See Douglas O. Linder, *The Other Right-to-Life Debate: When Does Fourteenth Amendment “Life” End?*, 37 ARIZ. L. REV. 1183, 1188 (1995) (“When history and constitutional text yield ambiguities rather than answers, constitutional interpretation should be guided by the moral and economic consequences that might follow from

share any form with later developed humans. Would an eight-week old fetus be considered a legal person if in an artificial womb? The interests of others do not seem strong enough to accord natural personhood protections in this case. But this may be a situation in which juridical personhood protections are appropriate. A living but pre-sentient fetus outside the mother's body (in an artificial womb) creates an unusual situation. *In utero* fetuses have the ancillary protections of their mother's legal personhood. But *ex utero* fetuses would not have these protections. While parental property interests would function and may provide a basis for decision making and control (as they do in the *ex utero* embryo context),¹¹⁴ we may well need the additional identification of the developing *ex utero* fetus as a separate legal actor. As artificial womb technology advances, this question should receive more thought and analysis.

d. Summary: Juridical to Natural Persons

Thus far I have argued that sentience is crucial for the development of fetal interests, and birth and external form each play a role in considering the interests of others. The same constraints that limit the scope of juridical personhood rights for embryos function in the pre-consciousness context for fetuses. Granting juridical personhood status to fetuses prior to sentience may undermine the rights of currently recognized persons—for example pregnant women's rights to make a variety of decisions in the first trimester would be limited. Even apart from abortion decisions, if we grant fetuses such status, women may have constraints placed upon their decisions to engage in risky activities, or to partake of legal substances that are harmful to the fetus. In order to justify this, proponents would need to show that the legal recognition was necessary in order to safeguard rights of currently recognized natural persons, and that the result would be a greater protection of the rights of natural persons overall. This is an extremely difficult argument to make, and may fail in many situations. Arguments that the lack of legal recognition of fetal rights prior to sentience harms the rights of people generally, ignores the harm to the rights of people resulting from the recognition itself. Thus prior to sentience the fetus should be considered neither a natural, nor a juridical person. There may be restrictions on what can be done with fetuses born extremely early, either because of an interrupted pregnancy, or because they were never implanted after *in vitro* fertilization, but these limitations are not based on the personhood status of the fetus. The interests of others can function to limit many actions, without resulting in personhood status for the entity in question. Consider, for example, legal restrictions related to actions involving

equally plausible alternative meanings.”).

¹¹⁴. See Berg, *supra* note 99, at 214.

endangered species.¹¹⁵ We may not be allowed to destroy the habitat of a particular type of frog, regardless of whether that frog can make any claim to personhood. The protections are based on the interests of others in maintaining the diversity of species on this planet, not necessarily on the interests of the species itself. Likewise, there may be a variety of restrictions on what can be done to a pre-sentient fetus based on the interests of currently recognized persons.

Birth, after sentience, is sufficient for natural personhood status—not because the interests of the fetus are any greater with the birth, but because the interests of others in affording full natural personhood protections are strong enough to grant natural personhood. This is true regardless of the physical development of the child. Birth without sentience due to developmental problems, but at the point of significantly complete physical development, also provides a basis for natural personhood, again based on the interests of others. Substantially full physical development (eighth month of pregnancy or later) combined with sentience may be sufficient to accord the fetus the protections of natural persons, but careful consideration should be given to the practical effect of such designation.

In the period of time between sentience and natural personhood, there may be reasons to provide fetuses the status and protections of juridical persons. Sentience does not mean that the fetus attains equal status with adult competent human beings,¹¹⁶ merely that the fetus has characteristics that can form the basis for personhood protections based on its own (rather than other's) interests. Moreover, as the fetus develops closer to a newborn infant, both its interests and the interests of others that form the basis for juridical personhood protections may increase.¹¹⁷ The following section discusses some initial implications of this proposed framework.

e. Implications

My goal here is not to provide a full analysis, nor even a complete summary of the relevant issues, but rather to begin to refocus, in light of my proposed framework, the debate in some of the most highly contentious areas of law such as abortion and medical interventions on behalf of a fetus. Paradoxically, perhaps, the framework I suggest should

115. See Sunstein, *supra* note 15, at 1339–40. Sunstein, however, would argue in favor of legal standing for animals. *Id.* at 1336.

116. STEINBOCK, *supra* note 33, at 24 (“[The interest view] . . . does not locate beings on a scale of moral importance. In particular, it is silent as to whether all beings who have moral status have it equally. Perhaps such features as species membership, rationality, and potentiality are relevant to moral status, providing principled reasons for counting the interests of some beings more heavily than others.”).

117. See STRONG, *supra* note 51, at 41–62 (suggesting that moral status increases along with fetal development).

not result in drastic changes in current laws. This is one of the strengths of the proposal, as it should not result in great legal upheaval. The most significant change should be in how the cases are analyzed, and the basis for evaluating future cases that do not fit well under the current model (such as fetuses in artificial womb environments). The shift in focus should clarify the issues that need further evaluation, and move us away from the simplistic, and misguided, assertion that *Roe's* determination about whether the fetus is a person under the Fourteenth Amendment is the only relevant question.

To begin, I want to make two, interrelated, points. The first is that fetuses are considered persons already under the laws of many states.¹¹⁸ The second is that this recognition should be explicit and fetuses should be labeled juridical persons for purposes of the application of these rights. The status designation serves a number of purposes. It emphasizes that the rights in question are rights of persons, but those of a juridical person, not a natural person. To some extent this clarifies the apparent inconsistency between laws allowing abortions, for example, and laws allowing tort suits for pre-birth injuries. It is not that fetuses are considered persons for some laws and not for others, but that they are considered juridical persons with specific, but not complete, rights. Finally, explicit recognition allows states to identify specifically the rights in question that go with the status, rather than simply assert that the fetus is a "person" (without limitation) for some purposes and not a person for others. This should result both in more detailed policy discussions about allowing fetuses certain "personhood" rights, understanding that the recognition of the rights limits the rights of existing natural persons, and also more attention paid to *why* we grant certain juridical personhood rights to various entities, and whether those should be limited or even extended. As a result, we may choose to provide personhood protections for sentient fetuses without granting them the same rights as fully recognized natural persons. Juridical personhood is not a unitary concept; there are different kinds of juridical persons and different rights which may adhere. To the extent that states have discretion in determining which entities will be considered juridical persons, they may make different choices about the types of rights which they grant sentient fetuses. This has already proved to be the case, as demonstrated by the vast array of prenatal laws currently in place.

There is little in the above analysis that should change abortion laws which apply prior to twenty-two to twenty-four weeks, that is, prior to the development of sentience, other than to reinforce that the restrictions before this time period cannot be based on fetal interests.¹¹⁹ The above

118. See, e.g., sources cited *supra* note 100.

119. Most of the statutory restrictions are based on state interests in potential fetal life, not directly

framework may, however, have some implications both for evaluations of abortion restrictions post-viability and for prenatal and medical care decisions made by a pregnant woman towards the very end of the pregnancy. The current “undue burden” test articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹²⁰ and reaffirmed by *Stenberg v. Carhart*¹²¹ is based on balancing the interests of the woman making the abortion decision against the interests of the state. Certainly this balance would still be a factor even if the fetus is granted additional legal rights. That is, the state would still have interests which may need to be balanced against the individual’s interests.

Designating fetuses as legal persons, however, would create a situation in which the fetus’s interests would have to be taken into account on their own (not simply indirectly as is now done through the state’s interests in protecting potential life). Thus the analysis would look more like the analysis that takes place in the context of parental decisions regarding minor’s medical care—specifically, refusal of life-sustaining medical treatment. Others have pointed out that the language of “rights” is less helpful in the parental decision-making context, since “parental rights” do not rest on any clear constitutional basis.¹²² In contrast, the abortion situation does involve constitutional rights of bodily integrity.¹²³ Weighing the rights of one natural person against another natural person is difficult. To the extent a fetus is considered a natural person, the abortion debate will have to consider how to weigh the woman’s right of bodily integrity against the fetal right to life. Although a complete analysis is beyond the scope of this Article, we can draw some initial conclusions. Since there are no laws requiring parents to sacrifice their lives for their children, it would be hard to imagine that we would accept a legal requirement to do so in the context of pregnancy. Thus between the woman’s right to life and the fetus’s right to life, the woman’s legal rights should be given preference. Harder, of course, is the balance between the woman’s right to health, and the fetus’s right to health or even life. The varying opinions either allowing or disallowing forced c-sections for almost full-term pregnancies is evidence of the difficulty courts have weighing these issues.¹²⁴ The framework I have suggested here should encourage a shift in thinking about these issues to focus on the parallel between this situation and

on fetal interests. The two may be the same or may entail a slightly different focus. Analysis of this issue is beyond the scope of this Article.

120. 505 U.S. 833, 874–79 (1992).

121. 530 U.S. 914, 938–46 (2000).

122. Schneider, *supra* note 109, at 157–161.

123. Of course the question will be how extensive that right is and what it entails.

124. See, e.g., Veronica E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1192–96 (1987).

others that involve direct conflicts between the health/life of one person and the health/life of another. Moreover, it should lead to greater evaluation of the concept and extent of so-termed “bodily integrity” rights.¹²⁵

My proposal should have three significant advantages over the current mode of analysis. First, it will allow states to “experiment” in finding the best system of recognizing and balancing legal rights in cases involving embryos and fetuses. Since legal personhood should no longer be viewed as a closed question, states should be free to consider how best to accord juridical personhood status. Second, it should allow us to find better and conceptually more appealing answers to new debates in reproductive law. This will be extremely important as reproductive technology advances and the legal cases continue to move away from the traditional abortion context. Finally, it may achieve a compromise position in an area that has thus far been marked by heated and divisive commentaries.

B. NON-HUMAN ANIMALS AND ARTIFICIAL INTELLIGENCE

Although I have focused primarily on embryos and fetuses thus far, the framework suggested here may be applicable to other entities. The idea that we might exclude from legal status an entity that meets all the attribute requirements for equal moral status with currently recognized persons, but that is not genetically human, raises the question of why genetic humanness matters.¹²⁶ It seems inconsistent to argue for the extension of legal protection to a non-sentient multi-celled human organism in the beginning stages of development (i.e., an embryo) and withhold such protections from fully developed sentient, and perhaps even rational, non-human animals.¹²⁷ If genetics is the sole basis for legal personhood, there must be some explanation as to why this characteristic is so important.¹²⁸ Thus far no one has provided a satisfactory argument

125. Given the post-viability time period, abortions would not be permissible in most states except to save the mother's life/health, or, in a few states, because of severe fetal abnormalities. The former case involves a balancing of mother's interests against fetal interests. The latter case may rest on a determination that the fetus in question does not have interests or has lesser interests because of the abnormalities. This determination may be more controversial since it rests on the assumption that we can evaluate sentience/interests based on disability. I have suggested that this is extremely difficult in most cases but perhaps not impossible. See Schneider, *supra* note 109, at 170 (discussing the conservative dislike of attempts to distinguish between people based on worth).

126. See generally PAOLA CAVALIERI, *THE ANIMAL QUESTION: WHY NONHUMAN ANIMALS DESERVE HUMAN RIGHTS* 3–12 (Catherine Woollard trans., 2001); ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) [hereinafter ANIMAL RIGHTS].

127. Bernard Rollin takes this a step further and points out that if the potential to become rational is sufficient reason to grant non-rational humans moral status, animals should also be afforded moral status because they have the potential to *evolve* into rational beings. See BERNARD ROLLIN, *ANIMAL RIGHTS AND HUMAN MORALITY* 33–34, 50 (rev. ed. 1992).

128. See L.W. SUMNER, *ABORTION AND MORAL THEORY* 32–33 (1981) (discussing moral personhood

in this respect.¹²⁹

Apart from concerns about consistency and fairness, withholding legal personhood protections from an entity that clearly meets all criteria for moral personhood is not *a priori* improper, as long as the interests of the entity in question are respected. The danger, of course, is that society has tried in the past to limit the legal rights of entities that clearly met all requirements for moral personhood—e.g., women and slaves—and the results were highly problematic, not only because violations of moral rights occurred, but because the exclusion of such entities from the system of legal protection *per se* undermined moral rights. In other words, at some point the moral and legal rights may be so intertwined that it is impossible to respect moral rights without also granting legal rights. But the situations of women and slaves may be unique in that they are groups that are both human *and* meet the moral requirements for personhood (e.g., they shared all characteristics/capacities with other fully recognized legal persons, except sex or skin color).¹³⁰ By contrast, restrictions on the legal status of entities that fail one or the other attributes (e.g., non-human animals) may not prevent recognition of their moral rights.¹³¹

Part of the difficulty in accepting legal status based on moral claims of non-human entities may stem from a mistaken insistence on “all-or-nothing” designations. Categorically determining what entities *lack* any moral status, such as a rock, is fairly simple. But most claims of moral status map along a continuum. Using such an approach, many animals would be granted moral status based on interests, but their placement on the moral hierarchy may be lower than that of human persons.¹³² Legal

and stating that a criterion of personhood “must have some plausible connection with the possession of certain moral rights” and “[t]here must, therefore, be some reason for thinking that it is in virtue of an entity’s possessing just *these* properties that it has such rights, that *these* properties mark the crucial watershed between entities with these rights and entities without them”).

129. For example, it is common knowledge that humans and chimpanzees share over 98% of their genetic code. *See, e.g.,* Wilford, *supra* note 98. It is unlikely that the 2% genetic difference is a sufficient basis for according legal personhood, without some consideration of other factors.

130. Of course this was part of what was at issue at the times when women and black people were excluded from legal protections. Both were thought to be intellectually inferior to white men, and lacking the criteria necessary to be considered of equal moral status to white men. Black people were also sometimes referred to as “sub-human,” a label which presumably was designed to imply that black people were not even human and thus had even less claim to legal status.

131. Some advocates for animal rights accept the analogy with women and slaves and argue that the denial of rights to “nonhumans endowed with intentionality . . . does not simply deprive the victims of the objects of their rights, but is a direct attack on those very rights themselves.” CAVALIERI, *supra* note 126, at 142–43. Others reject the analogy. *See, e.g.,* Richard Epstein, *Animals as Objects, or Subjects, of Rights*, in ANIMAL RIGHTS, *supra* note 126, at 143, 151. It will be interesting to consider the future legal status of chimeras (animal-human) mixes, particularly those that are sentient. *See, e.g.,* Jamie Shreeve, *The Other Stem-Cell Debate*, N.Y. TIMES MAGAZINE, Apr. 10, 2005, at 42–47.

132. *See* Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 54 (2002) (noting that some historical views generally hold

status might follow this hierarchy. For example, some authors assert that great apes and dolphins should be considered legal persons based on their mental and emotional similarities to human beings.¹³³ Perhaps we should develop a system of lesser legal status for non-human animals.¹³⁴ The fact that the law as it is currently written does not include non-human animals does not mean that it could not be altered to recognize the rights of entities with varying moral status.¹³⁵ Rather than do so by creating new categories, I argue that is what could be done with the concept of “juridical personhood.”

There are good reasons to consider whether sentient animals should be given juridical personhood protections. These may not be equivalent for all sentient creatures, but, as with developing human fetuses, may vary depending on the interests at stake.¹³⁶ Thus far no state has chosen to provide any legal rights directly to animals; animal welfare laws protect the interests of natural persons in preventing harm to animals. This, like fetal juridical personhood, is an area ripe for state

that animals are part of the “Great Chain of Being” with humans at the top of the moral chain and “progressively lower rungs” are inhabited by “rational beings, sentient beings,” and “creatures who are barely alive” (quoting GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 112 (2000))). Even strong advocates of animal rights, such as Peter Singer, accept that persons (which he defines as “sentient beings that are self-aware and capable of reason”) are more valuable than non-persons. See WARREN, *supra* note 33, at 69 (discussing Singer). Likewise, our society is built on the notion that laws focus on the highest actors in the moral hierarchy, human persons, rather than non-persons, regardless of whether the non-persons have a morally valuable life and interests such as avoiding pain.

133. See Gary L. Francione, *Personhood, Property and Legal Competence*, in THE GREAT APE PROJECT 248, 248–57 (Paola Cavalieri & Peter Singer eds., 1993); Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1, 1–68 (2000); MARY MIDGLEY, *Is a Dolphin a Person?*, in UTOPIAS, DOLPHINS AND COMPUTERS: PROBLEMS OF PHILOSOPHICAL PLUMBING 107, 107–17 (1996).

134. Many animal rights advocates would accept such a system. For example, in their brief in favor of granting personhood rights to great apes Lee Hall and Anthony Jon Waters note that their premise is based on the fact that there are only two categories—person or property. Hall & Waters, *supra* note 133, at 2. Presumably they would be open to categorization of the great apes in a third category if one were available. See, e.g., *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997) (stating that pets occupy “a special place somewhere inbetween a person and a piece of property” (quoting *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (1979))); see also David Favre, *A New Property Status for Animals*, in ANIMAL RIGHTS, *supra* note 126, at 234, 234–50 (describing a system of equitable self-ownership for animals).

135. See, e.g., Linda MacDonald Glenn, *Biotechnology at the Margins of Personhood: An Evolving Legal Paradigm*, 13 J. EVOLUTION & TECH. (2003), <http://www.jetpress.org/volume13/glenn.html>. (discussing genetic engineering, transgenics and newly- or to-be-created life forms; attempting to define each “new” or “altered” entity as a person, from historical, moral, societal, philosophical, theological, and legal perspectives; and concluding by arguing that all life forms, including pre-embryos, should be treated as persons or property, depending upon where they fall on a continuum of property to persons and accorded rights commensurate with the degree of “personhood” each entity possesses).

136. Consider, for example, whether elephants should have legal protections to avoid psychological trauma. See Charles Siebert, *An Elephant Crackup?*, N.Y. TIMES MAGAZINE, Oct. 8, 2006, at 42–48, 64, 71–73 (describing the possibility of post-traumatic stress disorder in elephants).

experimentation. If animals are to be considered legal persons with specific rights based on their own interests, the protections should reflect and be commensurate with those interests.

It is less appropriate to grant legal status to non-human animals based on concerns about the effect on other persons of withholding such legal status. There is little evidence, for example, that failing to recognize animals as juridical persons, or failing to give them particular rights, harms the exercise of those rights for human persons. The closest argument to this, sometimes used to justify animal welfare laws, is that cruelty to animals is linked (or may lead to) cruelty to humans. Even if this is true, this may not justify granting juridical personhood to animals, but merely laws designed to prevent cruelty to animals. In such a case, the lack of legal recognition would not negate the entity's moral status, and the absence of legal obligations would not imply the absence of moral obligations.¹³⁷ Thus we may have a moral obligation not to be cruel to animals, whether or not we have a law against such cruelty.

Additionally, should scientists succeed in creating sentient machines,¹³⁸ our society will have to consider whether those machines may also lay claim to legal personhood protections.¹³⁹ Here, both justifications for juridical personhood function—some machines may have interests sufficient for legal status, others may be so human-like in form that excluding them from personhood status will harm the interests of current humans. Like the Replicants in Philip K. Dick's novel-turned-movie, *Blade Runner*,¹⁴⁰ the creation of such entities will challenge our conventional notions of what it means to be a person, and our recognition of what legal rights should follow. Perhaps the creation of such entities will force greater attention to the question of legal personhood status, since the discussion in the context of embryos and

137. Moral obligations may not preclude killing of the entity in question. See, e.g., Ronald Green, *supra* note 28, at 44 (suggesting that "one can use an entity (embryo; animal) in research, and even kill it when necessary, without necessarily failing to respect the moral claims that the entity has on us").

138. See generally John Markoff, *Brainy Robots Start Stepping into Daily Life*, N.Y. TIMES, July 18, 2006, at A1.

139. See Linda MacDonald Glenn, *A Legal Perspective on Humanity, Personhood, and Species Boundaries*, 3 AM. J. BIOETHICS 27, 27–28 (2003) (considering human-nonhuman chimeras); Richard Lucas, *Why Bother? Ethical Computers—That's Why!*, in ACM INTERNATIONAL CONFERENCE PROCEEDING SERIES, VOL. 7: SELECTED PAPERS FROM THE 2ND AUSTRALIAN INSTITUTE CONFERENCE ON COMPUTER ETHICS 33–38 (John Weckert ed., 2000) (arguing that computers, and other artificial intelligence, may be held to moral standards as persons because they possess the following characteristics: reason, the capacity for choice, self-awareness, nurturance, co-operation, respect for all life-forms, and moral reciprocity and that "Computer-ethics" must contain, at least, computer (not human) versions of anonymity, duty, equality, intentionality, judgment, and responsibility); Michael D. Rivard, *Toward A General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1428–1510 (1992) (considering transgenics).

140. See *BLADE RUNNER* (Blade Runner Partnership 1982).

fetuses is marred by the strong feelings underlying the protracted abortion debate.

CONCLUSION

This Article explores and develops a model for according legal personhood, arguing that natural personhood designations are extremely limited and that juridical personhood designations should be explored in greater detail. The work here is by no means complete. The implications are not fully developed—rather I stress how this new framework might function to shift the focus of debate.

The purpose of the work done here is to stress that “legal personhood” is a rich and complex area of law. In the reproductive area, arguments framed in terms of “pro-life” and “pro-choice” have thus far been unsuccessful in moving dialogue forward. Likewise, simplistic assertions of embryo, fetal, or non-human animal personhood, without considering the justifications for such designations, also fail to provide sufficient resolutions. Creative solutions are necessary. The analysis of legal personhood proposed in this Article is an attempt to provide one such solution. Its success will be measured, in part, by the debate it engenders.