NOTES

WHAT WE TALK ABOUT WHEN WE TALK ABOUT PERSONS:* THE LANGUAGE OF A LEGAL FICTION

The subject of this Note is the object of the law, and in particular the law's use of the term "person" to denote that object. John Chipman Gray observed that "[i]n books of Law, as in other books, and in common speech, 'person' is often used as meaning a human being, but the technical legal meaning of a 'person' is a subject of legal rights and duties."[1] Though a pithy definition of legal personality, it leaves much unsaid. Although Gray's comment raises the problem of law's object,[2] it assumes that this object may be readily identified. This ignores the antecedent problem of what — and who — is governed by the law. Gray's formulation further presupposes a sharp separation between the commonplace understanding of what it means to be a person — that all humans are persons and all persons are humans — and the legal metaphor "person," which may exclude some humans and include some nonhumans. This characterization, however, fails to attend to the relationship between these two meanings. Courts have not been able to distinguish cleanly between these two points of view, alternately treating the issue of personhood as a commonsense determination of what is human or as a formal legal fiction unrelated to biological conceptions of humanity. Furthermore, the expressive dynamic through which law communicates norms and values to society renders impossible a clear divide between the legal definition of "person" and the colloquial understanding of the term.[3] This Note considers the legal metaphor "person" from a transsubstantive point of view, focusing directly on the problems and meaning of legal personality.

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* This title was inspired by the title of a Raymond Carver short story, *What We Talk About When We Talk About Love*, reprinted in RAYMOND CARVER, WHERE I'M CALLING FROM: NEW AND SELECTED STORIES 128 (1988).

[1] JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray rev., 2d ed., The MacMillan Company 1931) (1909).

[2] Though Gray refers to persons as denoting "a subject of legal rights and duties," this Note will use the term "object" to refer to the things to which law applies.

[3] Some writers have attempted to address these problems but have generally done so in a highly specific manner, scrutinizing the legal category of "person" only to ask whether it does or should include a particular, borderline entity. *See, e.g.*, Steven Goldberg, *The Changing Face of Death: Computers, Consciousness, and Nancy Cruzan*, 43 STAN. L. REV. 659 (1996) (considering the legal personhood of individuals in permanently vegetative states); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231 (1992) (artificial intelligence); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425 (1992) (transgenic humanoid species).

While personhood may not be an inevitable means of identifying law's object,[4] it is unquestionably central to American legal culture. The law uses personhood as a primary means of specifying its object, and although no coherent body of doctrine or jurisprudential theory exists regarding this legal metaphor, a set of rhetorical practices has developed around it. Moreover, the issue of personhood is woven into some of the most essential sources of American law and lies at the center of some of our most wrenching historical and contemporary legal controversies. Through law's expressive function, this metaphor reflects and communicates who "counts" as a legal person and, to some extent, as a human being. Part I examines courts' approaches to the law of the person and then considers examples from three areas in which the American law of the person has developed — human nonpersons, nonhuman persons, and borderline cases — and then reflects on the character of the law of persons expressed in these areas. Part II considers the implications of the current state of the law of the person, noting the disaggregation of the American law of the person in light of law's expressive dimension and suggesting that American law's anxiety in this regard reflects a basic ambivalence about the social status of the object specified and about unitary definitions of personhood and humanity.

I. THE LAW OF PERSONS: THEORY AND PRACTICE

A. Defining the Law of Persons

The phrase "law of the person" can refer narrowly to the meaning of the legal metaphor "person," as courts have interpreted it when construing the common law or an ambiguous statute. For the most part, "person" refers to a living human being, but borderline cases that challenge courts to make statements about legal personhood arise often and create interpretive difficulties. More broadly, though, the law of the person raises the fundamental question of who counts for the purpose of law. Not all laws refer to their objects as persons, or even as human beings, but this does not mean the issue of personhood — or at least the issue of law's object, which personhood specifies — evaporates in the absence of this particular language. Even laws that do not explicitly refer to persons signal the issue by including or excluding

[4] The law could — and does — define its object otherwise, for example, by referring to "citizens" rather than "persons." *See, e.g.*, 28 U.S.C. § 1332(a) (1994) (limiting federal diversity jurisdiction to "citizens" and foreign states). Alternate specifications of law's object, however, may themselves depend on the definition of "person."

certain categories of individuals, either explicitly or through judicial interpretation.[5]

The question of legal personhood does present problems in most cases precisely because personhood is commonly equated with humanity. The Supreme Court relied on this biological conception of personhood in *Levy v. Louisiana*,[6] arguing that "illegitimate children are not 'nonpersons.' They are humans, live, and have their being."[7] Yet legal personhood is frequently extended to nonhumans, most conspicuously to corporations. The most difficult issues in the law of the person arise when considerable disagreement exists as to whether the entity in question can be regarded as human. The Supreme Court has famously spoken to this point, emphasizing in *Roe v. Wade*[8] that fetuses are not persons within the meaning of the Fourteenth Amendment's Due Process Clause.[9]

These doctrinal distinctions reflect the absence of a theoretically unified judicial approach to legal personality. Although the literature of legal theory abounds with attempts to make sense of what it means to be a person,[10] judicial opinions relating to legal personality have incorporated few, if any, of these ideas. Judges not only fail to invoke philosophical support for their ideas of personality, but also inconsistently apply jurisprudential theory in resolving problems of legal personhood, approaching it more as a legal conclusion than as an open question. The following three examples illustrate the theoretical unmooring and doctrinal disarray of the American law of persons.

B. The American Law of Persons

1. Human Nonpersons. — That slavery raises fundamental issues of legal personality is almost self-evident. If slaves are regarded as persons, how can one reconcile this fact with their treatment as a form of property? Judges tended to adopt robust visions of legal personality in the limited number of situations in which they wanted to treat slaves as legal persons, but readily retreated to a narrower, citizenship-oriented notion of legal personality when that characterization better suited their purposes.

Slaves' treatment under the criminal law provides an example of states' hewing closely to a robust understanding of slaves' personhood.

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[5] *See, e.g., infra* p. 1756.

[6] 391 U.S. 68 (1968).

[7] *Id.* at 70.

[8] 410 U.S. 113 (1973).

[9] *Id.* at 158, 162.

[10] *See generally, e.g.*, THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY (Michael Carrithers, Steven Collins & Steven Lukes eds., 1985) (discussing philosophical conceptions of the person).

For the most part, judges read laws proscribing the killing of persons to prohibit the killing of slaves.[11] In many of these cases, courts stressed slaves' essential humanity and — with a lack of irony that astonishes the modern sensibility — reflected on the necessity of so determining a slave's legal personality to maintain a civilized, decent society.[12] However, the ability of judges to inject their own views on the legal personhood of slaves declined throughout the nineteenth century, as emerging slave codes created a body of statutory rules that rendered common law adjudication less necessary.[13] These rules generally sidestepped the issue of legal personality by making it a felony to kill a slave, rather than by taking a position on whether slaves counted as persons for the purpose of the common law crime of murder.

The law also treated slaves as persons by holding them as publicly accountable for their crimes as nonslaves.[14] This broad characterization of slaves' legal personhood permitted an anomalous litigation tactic in which slaves argued that they were not legal "persons" and that they were therefore outside the ambit of the criminal law. In *United States v. Amy*,[15] for example, a young slave girl stood accused of stealing a letter from a post office in violation of a federal act that prescribed two years' imprisonment for "any person" who committed such an offense.[16] To Amy's argument that she was not a legal person because she was a slave, the prosecutor rejoined, "I cannot prove more plainly that the prisoner is a person, a natural person, at least, than to ask your honors to look at her. There she is."[17] Sitting as a circuit justice, Chief Justice Taney rejected Amy's reasoning and embraced the robust view of slave personhood, stating that he could conceive of "no

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[11] *E.g.*, State v. Coleman, 5 Port. 32, 39 (Ala. 1837); *cf.* State v. Jones, 1 Miss. (1 Walker) 83, 85 (1820) (holding that the common law crime of murder extended to killing slaves). *But see* Neal v. Farmer, 9 Ga. 555, 583 (1851) (holding that common law felony murder did not include killing slaves); *cf.* Mark Tushnet, *The American Law of Slavery, 1810–1860: A Study in the Persistence of Legal Autonomy*, 10 LAW & SOC'Y REV. 119, 120 (1975) (noting that after the passage of Mississippi's slave codes, the state supreme court held that common law conceptions of personhood did not include slaves).

[12] Whether these opinions actually did reflect such generous spirits on the part of their authors is questionable. *Cf.* ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 158–60 (1991) (questioning whether judges' opinions reflected community views or had any precedential weight). Here, though, the rhetorical value of the opinions' expression of slaves' legal personhood is the real issue, and that value is amply reflected in these documents. *See id.* at 129–31.

[13] The scattershot nature of the law of persons diminished during the final few decades of American slavery, as slave codes replaced common law as the primary source of law. *See* Tushnet, *supra* note 11, at 131–37 (1975).

[14] *See* 80 C.J.S. *Slaves* § 8(a) (1953).

[15] 24 F. Cas. 792 (C.C.D. Va. 1859) (No. 14,445).

[16] *Id.* at 809.

[17] *Id.* at 795.

reason why a slave, like any other person, should not be punished by the United States for offences against its laws."[18]

Judges sometimes adopted a narrow view of slave personhood, reading laws that protected "persons" as excluding slaves. For example, while most jurisdictions criminalized the killing of slaves, they held that the common law of assault and battery, which generally prohibited attacks on persons, did not apply to slaves. Judges particularly concluded as much in the context of owners' beating their slaves. Both Virginia[19] and North Carolina[20] courts held that owners who severely and unjustifiably beat their slaves could not be indicted under the common law. Similarly, the Tennessee Supreme Court determined that assaults against slaves by certain nonowners generally fell outside the ambit of the common law,[21] though the owners of the slaves could recover against the perpetrators of the assault for the resulting loss of property value.[22]

In the civil context, courts tended to adopt the narrow version of slave personhood, reading general grants to persons of civil, social, and political rights as excluding slaves.[23] Rather than stating that slaves were not legal persons for the purpose of a particular law, judges tended to make arguments based on the nature of slavery in ruling that slaves could not enjoy the general grants of rights and privileges that other humans enjoyed. As one South Carolina judge asserted of a slave, "'Every endeavor [. . .] to extend [to him] positive rights [. . .], is an attempt to reconcile inherent contradictions.' In the very nature of things, he is subject to despotism."[24]

The discord in the American law of the person in the context of slavery law operated at the theoretical level as well. When courts held that slaves were legal persons, they emphasized the obvious fact that slaves were human beings and relied on this fact to settle the issue. In

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[18] *Id.* at 810. Chief Justice Taney had, coincidentally, only months earlier penned an opinion repudiating the idea that slaves were citizens in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[19] Commonwealth v. Turner, 26 Va. (5 Rand.) 678, 680 (1827).

[20] State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829).

[21] *See* James v. Carper, 36 Tenn. (4 Sneed) 397, 402 (1857) (holding that nonowners who had hired the services of a slave possessed "the right to inflict reasonable corporal punishment on the slave").

[22] *Id.* at 404 (claiming, apparently without irony, that to deny an owner's action to recover damages for a third party's assault on a slave would "be justly esteemed a reproach to humanity in any condition of civil society above the level of barbarism").

[23] *See, e.g.*, Bryan v. Walton, 14 Ga. 185, 197–98 (1853) (limiting the property and testation rights of slaves); State v. Van Lear, 5 Md. 91, 95 (1853) (denying the ability of slaves to enter into valid contracts with their masters).

[24] *Ex parte* Boylston, 33 S.C.L. (1 Strob.) 41, 43 (1847) (quoting *Kinloch v. Harvey*, 16 S.C.L. (Harp.) 508, 514 (1824)) (alterations in original); *see also* 80 C.J.S. *Slaves* § 7(a) (1953) (using identical language and citing *Boylston*).

State v. Jones,[25] the Mississippi Supreme Court displayed, rhetorically at least, a great solicitude for slaves' humanity in its inclusion of slaves within the scope of persons protected by that state's murder laws, emphasizing that any other result would be "a reproach to the administration of justice."[26] And although the opinion in *United States v. Amy* did not celebrate the humanity of slaves as robustly, Chief Justice Taney readily accepted the prosecutor's argument that Amy's humanness provided ample proof of her legal personhood.[27]

In sharp contrast to this broad, biological understanding of personhood, some courts insisted that "person" was merely a legal metaphor unrelated to biological notions of humanity and held that slaves were not legal persons. The Kentucky Court of Appeals' general repudiation of the legal personality of slaves clearly reflects an understanding that there is a significant difference between humanness and legal personhood.[28] The South Carolina Supreme Court shared this approach to legal personality, analyzing the issue at a high level of abstraction and declining to regard slaves as persons because it represented an "inherent contradiction."[29] Other cases indicate an attempt to derive an understanding of slaves' status by analogizing to other areas of law; judges who wanted to embrace the narrow version of slaves' legal personhood compared their legal status to that of animals or categorized them as a type of chattel or as real estate.[30]

2. Nonhuman Persons. — That "[the] corporation is a person" remains one of the most enduring[31] and problematic[32] legal fictions. Whether this commonplace notion holds true, however, depends entirely on which aspect of doctrine one considers. In some cases, such as when a statute operationally defines the term "person" as including corporations, the legal personality of corporations is uncontroversial.[33] More complicated cases arise when legal texts fail to indicate whether the term "person" includes corporations. Courts tend to apply a highly variant set of rules, exemplified by the Supreme Court's jurisprudence regarding the inclusion of corporations among the "persons" eligible for constitutional protections.[34]

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[25] 1 Miss. (1 Walker) 83 (1820).

[26] *Id.* at 84–85.

[27] *See* United States v. Amy, 24 F. Cas. 792, 809–10 (C.C.D. Va. 1859) (No. 14,445).

[28] *See* Jarman v. Patterson, 23 Ky. (7 T.B. Mon.) 644, 645–46 (1828).

[29] Boylston, 33 S.C.L. at 43.

[30] *See* Tushnet, *supra* note 11, at 121–22.

[31] Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987).

[32] *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 650 (1990).

[33] *See, e.g.*, 28 U.S.C. § 1332(c)(1) (1994) (defining corporations as citizens for the purpose of federal diversity jurisdiction).

[34] *See infra* p. 1752 & n.49.

One area of relative stability in the Court's corporate personhood jurisprudence is its approach to property rights. Despite the summary nature of its original assertion in *Santa Clara County v. Southern Pacific Railroad*[35] that corporations counted as persons within the meaning of the Fourteenth Amendment,[36] the Court has largely followed this principle in subsequent cases.[37] Nevertheless, at the height of legal realism's sway, Justice Douglas, dissenting in *Wheeling Steel Corp. v. Glander*,[38] pointed out deep inconsistencies in the Court's complacent acceptance of corporate personhood. He first noted that the framers of the Fourteenth Amendment, who aimed to eliminate race discrimination, almost certainly did not intend to include corporations within the class protected under the Amendment.[39] Moreover, extending due process property rights to corporations by including them in the meaning of the Amendment's Due Process Clause threatened interpretive incoherence among its four other references to "persons" or "citizens."[40] Despite the analytical appeal of Douglas's assertion that "[i]t requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause,"[41] it has not garnered notable support.[42]

The Court's corporate personhood jurisprudence has been considerably more confused in the area of liberty rights. Nineteenth-century opinions generally rejected attempts to extend personhood to corporations in settings in which rights seemed to derive from interests that were exclusive to humans. In *Bank of the United States v. Deveaux*,[43] for example, while the Court ultimately invented a clever way for corporate litigants to plead as parties for federal diversity purposes, it ex-

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[35] 118 U.S. 394 (1886).

[36] Chief Justice Waite announced that the Court would not hear argument on the question. *Id.* at 396 ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of [the] opinion that it does.").

[37] For a list of cases in which the Court has explicitly stated the proposition that a corporation is a person for the purpose of the Fourteenth Amendment's protection of property rights, see Rivard, *supra* note 3, at 1452 n.103.

[38] 337 U.S. 563 (1949).

[39] *Id.* at 578 (Douglas, J., dissenting). A dissent by Justice Black in an earlier case presaged this argument. *See* Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85–90 (1938) (Black, J., dissenting).

[40] *Wheeling Steel Corp.*, 337 U.S. at 578–79. For example, "persons" in the first sentence could not possibly refer to corporations, because they are not "born or naturalized," *id.* at 578, and the Court had previously held that corporations were not "citizens" within the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, *id.* at 579 (citing *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907)).

[41] *Id.* at 579.

[42] Rivard, *supra* note 3, at 1453 & n.105.

[43] 9 U.S. (5 Cranch) 61 (1809).

plicitly rejected the idea that corporations were actually "citizens" within the meaning of the term as used in the Constitution.[44]

The twentieth century, however, has seen an increasing extension to corporations of Bill of Rights privileges — most, though not all, of which limit their protections to "persons" or "people."[45] In *Hale v. Henkel*,[46] the Court reached a peculiarly divided result in considering defenses raised by a corporation to a subpoena duces tecum. The Court found that corporations counted as persons for the purpose of the Fourth Amendment's protections against unreasonable searches[47] but held that corporations were not persons for the purpose of Fifth Amendment protections against self-incrimination.[48] Since then, however, the right against self-incrimination has been virtually the only part of the Bill of Rights that courts have not extended to corporations.[49]

Though the Court's corporate personhood doctrine has been described as "schizophrenic,"[50] the theoretical underpinnings of the doctrine are even more haphazard. American courts — particularly the United States Supreme Court — have employed various theories to conceptualize corporate personhood. In some cases, courts have emphasized the artificiality of corporations, holding that rights that inhere in humans as humans may not be extended to nonhuman entities; the assumption that legal personhood derives primarily from humanness has clearly animated this approach.[51] In one of its first pronouncements on corporate personhood, *Trustees of Dartmouth College v. Woodward*,[52] the Court limited the power of a corporation to the origi-

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[44] *Id.* at 86 ("That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States . . . .").

[45] *See, e.g.*, U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[46] 201 U.S. 43 (1906).

[47] *Id.* at 76.

[48] *See id.* at 75 (reasoning that "a corporation vested with special privileges and franchises, may [not categorically] refuse to show its hand when charged with an abuse of such privileges").

[49] For example, courts have deemed corporations "persons" for the purposes of the First Amendment's Free Speech Clause, First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978); the Fifth Amendment's Double Jeopardy Clause, *see* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977); and the Sixth Amendment's Jury Right Clause, Ross v. Bernhard, 396 U.S. 531, 532–33 (1970). For a comprehensive list of the corporation's "Bill of Rights," see Mayer, *supra* note 32, at 664–65.

[50] Mayer, *supra* note 32, at 621.

[51] This approach has been termed the "artificial entity" or "creature" theory, envisioning the corporation as a creation of the state, entitled to only those rights and privileges that the state chooses to extend and subject to the withdrawal of any of them if the state so chooses. *See, e.g.*, Schane, *supra* note 31, at 565–66; Rivard, *supra* note 3, at 1456–58.

[52] 17 U.S. (4 Wheat.) 518 (1819).

nal charter granted by the state: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."[53]

Members of the modern Court have employed this theory as well, most notably in *First National Bank v. Bellotti*,[54] in which both then-Justice Rehnquist and Justice White[55] dissented separately from the Court's holding that corporations enjoy First Amendment rights to political speech, arguing that because First Amendment rights extend only to persons as humans, it made no sense to extend them to artificial entities.[56]

Alternatively, courts have emphasized the human individuals that constitute the corporation, deploying the corporate personhood metaphor as a means of protecting those individuals' rights.[57] Early in its history, the U.S. Supreme Court employed this rationale in *Bank of the United States v. Deveaux*. Despite holding that corporations are not citizens within the meaning of the Constitution for the purpose of diversity jurisdiction in the federal courts, the Court allowed the individuals who constituted the corporation to bring suit on the corporation's behalf.[58]

A third approach conceives of the corporation as an autonomous entity, with an existence prior to — or at least separate from — its creation by the state or by the individuals that constitute it.[59] This theory provides the most robust version of corporate personhood, and courts invoke it when attempting to extend to corporations the full

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[53] *Id.* at 636.

[54] 435 U.S. 765 (1978).

[55] Justices Brennan and Marshall joined Justice White's dissent.

[56] *See First Nat'l Bank*, 435 U.S. at 826–27 (Rehnquist, J., dissenting) ("[A]ny particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation."); *id.* at 802–22 (White, J., dissenting).

[57] This approach is commonly called the "group" theory; it begins with the assumption that human beings are the original bearers of rights and concludes that a corporation is only entitled to legal personhood insofar as it protects the rights of the human persons that constitute the corporation. *See, e.g.*, Schane, *supra* note 31, at 566; Rivard, *supra* note 3, at 1458–59.

[58] Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 91–92 (1809); *see also id.* at 87 ("[A corporation] . . . cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character . . . and the individual against whom the suit may be instituted."). More recently, the Court employed this theory in *NAACP v. Button*, 371 U.S. 415 (1963), ruling that associations and corporations have standing to assert First Amendment rights, largely on the ground that the very act of congregating to form those organizations constituted a constitutionally protected act of political association by human persons. *Id.* at 431.

[59] This perspective has been termed the "natural entity" or "person" theory. *See, e.g.*, Schane, *supra* note 31, at 566–69; Rivard, *supra* note 3, at 1459–63.

panoply of legal rights. Though it requires a rather extreme anthropomorphization of corporations, this approach has found increasing favor with courts. For example, in *United States v. Martin Linen Supply Co.*,[60] the Supreme Court included corporations within the Fifth Amendment's protection against double jeopardy, arguing that such protection was necessary to protect corporations from such quintessentially human experiences as "embarrassment," "anxiety," and "insecurity."[61] Similarly, in extending Fourth Amendment protection from unreasonable searches to corporations in *Dow Chemical Co. v. United States*,[62] the Court seemed to presuppose a surprising degree of humanlike sentience when it claimed that corporations were entitled to a "reasonable . . . expectation of privacy" that "society is prepared to observe."[63]

As the cases discussed above illustrate, the various theories of the person that American courts can deploy permit virtually any result, from the sharply limited creature of the state in *Dartmouth College* to the worried, anxious, and peculiarly humanoid entity in *Martin Linen*. These different approaches have raised the question whether the Court's corporate personhood jurisprudence is purely result oriented.[64] At least, it does not seem a coincidence that as the increasingly complex modern corporation has become increasingly dependent on Bill of Rights protections and the American economy has become increasingly dependent on corporations, courts have adjusted definitions of personhood to accommodate the modern corporation's need for these protections.[65]

3. Borderline Humans. — The personhood status of the fetus raises particularly difficult questions, ones not present in cases involving the personhood of corporations or slaves. Whether legal persons or not, it was clear that slaves were human and it is clear that corporations are not, while debate continues to rage about when — if at all — a fetus becomes a human being.[66] The legal personhood of the fetus raises many problems; this section focuses only on legal approaches to

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[60] 430 U.S. 564 (1977).

[61] *Id.* at 569 (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957)).

[62] 476 U.S. 227 (1986).

[63] *Id.* at 236.

[64] *See* Rivard, *supra* note 3, at 1455 (arguing that because there is no "coherent legal theory for the entitlement of corporations to liberty rights[,] . . . the Supreme Court uses these theories to rationalize its purely result-oriented holdings").

[65] *See* Mayer, *supra* note 32, at 605–20. Mayer has argued that the personhood metaphor for corporations may have been apt for the smaller-scale nineteenth-century corporation but bears no meaningful relation to its transnational, monolithic, twentieth-century counterpart. *See id.* at 642–45.

[66] For a broad overview of the legal dimensions of this debate, see generally JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES (2000).

the question whether an attack on a pregnant woman that results in the death of her fetus constitutes murder.[67] This situation raises the issue of legal personhood in two ways: overtly, as when a court interprets a murder statute that includes the word "person," and covertly, as when legislatures criminalize attacks on fetuses in a way that places fetuses on the same level as born humans.

The legal status of the fetus with respect to personhood varies widely from state to state. Twenty-four states criminalize actions against the fetus in some manner; the rest do not.[68] Criminalization of feticide through interpretation of state murder statutes engages the issue of legal personhood most directly. In *Commonwealth v. Cass*,[69] the Massachusetts Supreme Judicial Court held that a fetus was a "person" within the meaning of the state vehicular homicide statute.[70] Emphasizing that statutory terms should be construed in light of their ordinary meaning, the court argued that "[a]n offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb."[71] The statute's ordinary meaning, and the failure of the legislature to provide any "hint of a contemplated distinction between pre-born and born human beings,"[72] effectively created a presumption that fetuses count as persons.[73]

Most states, however, address feticide through various forms of legislation. Some states include in their criminal codes sections that prescribe separate penalties for killing fetuses. The Minnesota legislature, in response to a state supreme court decision that held that fetuses are not "persons" within the meaning of that state's murder statute,[74] created a separate chapter of its criminal code entitled "Crimes Against Unborn Children."[75] This chapter established penalties for various types of violence against the fetus, including murder. Some states have taken a more straightforward approach by merely includ-

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67 Obviously, such an action would give rise to criminal penalties for the attack on the mother.

68 *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).

69 467 N.E.2d 1324 (Mass. 1984).

70 *Id.* at 1324–25.

71 *Id.* at 1325.

72 *Id.*

73 *Id.* at 1325–26. The court also relied on the "reasonable inference" that the legislature contemplated, in light of an earlier case, that the term "person" would be construed to include fetuses. *Id.* at 1326; *see also* State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (holding that fetuses count as persons for the purpose of the state's murder statute because "[i]t would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context").

74 State v. Soto, 378 N.W.2d 625, 630 (Minn. 1985).

75 MINN. STAT. § 609.266–.2691 (2000).

ing feticide as a form of murder.[76] Other states use a similar strategy but employ legal personhood as the means of criminalizing feticide. Utah law, for instance, stipulates that "[a] person commits criminal homicide if he . . . causes the death of another human being, including an unborn child."[77]

A final strategy — and one that prevails in several states that do not formally regard fetuses as persons for the purposes of their murder laws — is to penalize assaults against pregnant women that result in either miscarriage or injury to the fetus. In Delaware, for example, public outrage at a man who strangled his pregnant wife led to the swift passage of a law making it a felony to abuse or assault a pregnant woman.[78] In one sense, these statutes do not address the issue of personhood nearly as directly as does common law interpretation of the term "person" in murder laws, because they do not entail ongoing public considerations of and conclusions about legal personhood. However, these laws can still send a strong message about the personhood status of fetuses. Though Indiana[79] and California[80] extend to fetuses protection from assault while clearly differentiating homicide and feticide, the act of criminalizing feticide, regardless of the method, sends a message about the state's regard for fetal life and thereby implicitly grants fetuses limited personhood status.[81] And though states that focus on fetal assault from the perspective of protecting the pregnant woman deemphasize the issue of fetal personhood, they cannot avoid it altogether.[82]

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[76] Indiana, for example, separately lists as categories of murder "knowingly or intentionally kill[ing] another human being," IND. CODE § 35-42-1-1(1) (1998), and "knowingly or intentionally kill[ing] a fetus that has attained viability," *id.* § 35-42-1-1(4); *see also, e.g.*, MICH. COMP. LAWS § 750.322 (1979) (criminalizing the killing of an "unborn quick child").

[77] UTAH CODE ANN. § 76-5-201(1)(a) (1999). The statute further specifies that "[t]here shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion," *id.* at § 76-5-201(1)(b), presumably to avoid the obvious tension between its expression that a fetus is a human being and the U.S. Supreme Court's dictum to the contrary in *Roe v. Wade*, 410 U.S. 113, 158, 162 (1973).

[78] *See* DEL. CODE ANN. tit. 11, §§ 222(22), 605–606, 612(a)(9) (Supp. 1999); *see also Judge Sentences Waterman to Life in Prison for Killing Pregnant Wife*, ASSOCIATED PRESS, Dec. 3, 1999, Westlaw, ALLNEWSPLUS Database [hereinafter *Judge Sentences Waterman*] (describing public outrage over the murder).

[79] *Compare* IND. CODE § 35-42-1-1(1) (1998) (defining one category of murder as the knowing and intentional killing of a human being), *with id.* § 35-42-1-1(4) (defining another category of murder as the knowing and intentional killing of "a fetus that has attained viability").

[80] CAL. PENAL CODE § 187(a) (West 1999) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.").

[81] Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 95 (2000) ("By separating fetal killing from the crime against the pregnant woman, these states implicitly or explicitly accord the fetus at least limited personhood status.").

[82] Although some commentators have argued that such a strategy avoids the personhood morass entirely by declining to state a clear public position on fetal personhood, *see* Smith, *supra*

Alternatively, several jurisdictions still construe the term "person" within their murder laws to exclude fetuses. In some states, this interpretation is a result of clear statutory statement, as when the statute defines "person" as "a human being who has been born and was alive."[83] In the eight states that lack this particular definition of "person," courts have interpreted "person" as excluding fetuses, largely out of deference to the long-standing common law "born-alive" rule, whereby only humans that were born and alive could be considered persons for the purposes of murder statutes.[84] For example, in *State v. Beale*,[85] the North Carolina Supreme Court held that fetuses did not count as persons for the purpose of its homicide statute,[86] despite its earlier holding that fetuses counted as persons for the purpose of its wrongful death statute.[87] The court emphasized both the venerability of the born-alive rule, which it claimed prevailed in the "overwhelming majority" of jurisdictions,[88] and the lack of any affirmative indication from the legislature that it intended North Carolina's homicide statutes to extend to fetuses.[89]

Roe's famous dictum that fetuses are not constitutional persons[90] has done little to settle interpretive problems regarding personhood in the context of feticide law. Although the *Roe* dictum rendered fetuses nonpersons for constitutional purposes only, it represented a method of reasoning about fetal personhood that courts use to approach the issue. As this Note argues below, courts have not always applied this approach. Though courts consistently treat the issue of legal personality in feticide law as a matter of statutory or common law interpretation, just as the *Roe* Court approached the issue as one of constitutional interpretation, strikingly different theories of what personhood does or should mean have animated their interpretive efforts.

In some cases, courts have assumed that all fetuses are human. The Massachusetts Supreme Judicial Court adopted the strongest version of this approach in *Cass*, when it regarded the issue as resolved by

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note 68, at 1865–67, the statutes still communicate some message about public regard for the value of fetal life, Schroedel, Fiber & Snyder, *supra* note 81, at 95.

[83] *E.g.*, ALASKA STAT. § 11.41.140 (Michie 1998); HAW. REV. STAT. § 707-700 (1993); OR. REV. STAT. § 163.005(3) (1999).

[84] *E.g.*, State v. Courchesne, 757 A.2d 699, 703 (Conn. Super. Ct. 1999).

[85] 376 S.E.2d 1 (N.C. 1989).

[86] *Id.* at 4.

[87] DiDonato v. Wortman, 358 S.E.2d 489, 493 (N.C. 1987); *see also Beale*, 376 S.E.2d at 2 n.3 (acknowledging, but distinguishing, *DiDonato*).

[88] *Beale*, 376 S.E.2d at 3. By 2000, however, a minority of states retained the born-alive rule. *See* Smith, *supra* note 68, at 1848.

[89] *Beale*, 376 S.E.2d at 4. The court also noted that the state legislature had considered and rejected laws criminalizing feticide, *id.* at 4 n.4, and emphasized the strict construction due penal statutes, *id.* at 4.

[90] Roe v. Wade, 410 U.S. 113, 158, 162 (1973).

a simple syllogism: all human beings are legal persons; fetuses are human beings; therefore, fetuses are legal persons.[91] The obvious objection to this approach is that it presumes an easy answer to a hard question. Society has not reached a consensus on the issue of when — if at all — a fetus becomes human. This is a point the *Levy* Court left open in its biological definition of personhood, which did not require that humans be born to possess legal personality.[92]

Further, courts differ greatly in their insistence on whether the term "person," or at least the question whether fetuses count as persons for the purpose of statutory construction, has to be given a transsubstantive application. In *State v. Horne*,[93] the South Carolina Supreme Court found it intolerable that the legal personhood of fetuses would differ in the civil and criminal contexts.[94] Other jurisdictions, such as North Carolina in *Beale*, share no such insistence on a unitary notion of personhood.[95]

Though these different courts approach the determination of fetal personhood through statutory interpretation, their differing treatments of the issue of the transsubstantive consistency of legal personality suggest a deep theoretical divide. To courts that regard similar entities as persons in one area of law but not in another, "person" represents nothing more than a means of indicating a subject of rights and duties that may vary among bodies of law. A refusal to countenance different meanings of "person" among different areas of law, however, implies a rejection of — or at least discomfort with — this analysis. An insistence on consistency may indicate that a court regards the legislative statement of what counts as a "person" not merely as signifying the subject of rights and duties, but rather as expressing some notion of what it means to be a person in an a priori sense that should remain expressively stable.

These examples with respect to the legal status of slaves, corporations, and fetuses provide only an impressionistic sense of the fragmented body of personhood law. Yet each example provides a similar

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[91] *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) ("In keeping with approved usage, and giving terms their ordinary meaning, the word 'person' is synonymous with the term 'human being.'").

[92] Levy v. Louisiana, 391 U.S. 68, 70 (1968).

[93] 319 S.E.2d 703 (S.C. 1984).

[94] *Id.* at 704.

[95] *Compare* State v. Beale, 376 S.E.2d 1, 2 n.3 (N.C. 1989) (noting its holding in *DiDonato* that the word "person" in the state wrongful death statute should be interpreted to allow recovery for the death of a fetus), *with id.* at 4 (declining to read the state murder statute to extend criminal liability to the killing of a fetus). Arizona also maintains different interpretations of fetal personhood in the civil and criminal contexts. *Compare* Summerfield v. Superior Court, 698 P.2d 712, 724 (Ariz. 1985) (holding that fetuses are considered persons for the purpose of the state wrongful death statute), *with* Vo v. Superior Court, 836 P.2d 408, 415 (Ariz. Ct. App. 1992) (holding that fetuses are not considered persons for the purpose of the state murder statute).

impression. The question of personhood arises inevitably in statutes and common law alike, inviting — often requiring — interpretation. Such interpretation may take place explicitly, as when a court openly engages the meaning of the word "person," or implicitly, as when a court presumptively treats certain groups as outside the range of legal subjects affected by a given law. In either case, interpretations vary widely. Although it may be unsurprising that "person" means radically different things within different bodies of law, this reality reflects the fundamental disorganization that characterizes the doctrine of legal personhood.

The doctrinal discord in the law of the person results largely from the lack of a coherent theory of the person. One feature common to each of the current approaches is a disinclination on the part of courts to engage in theoretical inquiry into the nature of personhood as a basis for conclusions about legal personhood. The Supreme Court's theoretical stance in *Roe*, in which it preemptively disavowed any implication that its decision regarding a fetus's constitutional personhood reflected at all on the philosophical question of when life begins, epitomized this approach.[96] A similar disinclination is evident in each of the decisions discussed above, in which courts relied on assumptions about legal personhood but declined to include in their reasoning any reference to the considerable theoretical literature on this topic. The absence of any coherent theory raises an inference that courts' determinations of legal personality are strongly result driven, with judges selecting whatever theories of personhood suit the outcomes they desire.[97] As one commentator observed, "Personhood is . . . a conclusion, not a question."[98]

II. THE LAW OF PERSONS: IMPLICATIONS

A. The Expressive Dimension of Law

It is not a coincidence that personhood occupies a central place in debates over America's most divisive social issues.[99] The idea of per-

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[96] *See* Roe v. Wade, 410 U.S. 113, 159 (1973).

[97] *Cf.* Rivard, *supra* note 3, at 1465–66 ("Rather than developing a coherent theory of constitutional personhood, the Supreme Court has used only pragmatic concerns to derive a legal conclusion of constitutional personhood. . . . [T]his lack of theory plagues the law of personhood for both natural persons and corporations. . . . [T]he Supreme Court follows a result-oriented approach. . . . Such decisions appear to be made on a case-by-case basis, probably with an eye toward practical effects, without consideration for developing a coherent doctrine.").

[98] *Id.* at 1466.

[99] *See* Douglas O. Linder, *The Other Right-to-Life Debate: When Does Fourteenth Amendment "Life" End?*, 37 ARIZ. L. REV. 1183, 1183 n.1 (1995) ("Interestingly, the slavery, abortion, and end-of-life debates all relate to the meaning of constitutional personhood.").

sonhood is simply too rich for it to be manipulated without making, or at least intimating, some kind of statement about what it means to "count" for the purposes of law. This point becomes particularly relevant when one considers legal personhood in light of the expressive dimension of law. This approach attends to the social meaning of statements in statutes and judicial opinions, arguing that law does more than regulate behavior: it embodies and signals social values and aspirations.[100] Describing this function of law as "expressive," however, understates its importance. In addition to reflecting social ideals, law actually shapes behavior by creating social norms that people use to measure the morality and worth of their actions.[101] Eric Posner has argued that when law signals a certain set of values, it works two kinds of changes on the social structure.[102] The first is behavioral: by sending a signal about what behavior is unacceptable, law may cause people to engage in those actions less frequently. The second is hermeneutic: through this mechanism, law shapes and changes the beliefs people hold.[103]

The hermeneutic aspect of law's expressive function bears greater relevance to the law of persons. When the law manipulates status distinctions through the use of the metaphor "person," it necessarily expresses a conception of the relative worth of the objects included and excluded by the scope of that metaphor. These expressions then affect general understandings of personhood and regard for the objects of the law, as the law's values influence society's values.

B. The Expressive Dimension of Personhood

The social meaning and symbolism of law are deeply bound up with social understandings of status.[104] As one commentator has observed, "law often directly reflects social status or helps preserve status markers. Sometimes law helps constitute hierarchies of social status directly."[105] No less than other legal pronouncements, legal statements regarding personhood express normative assumptions about social

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[100] *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS 2–8 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026–29 (1996). On this point, compare ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991), which uses the example of ranchers in Shasta County, California, to illustrate the idea that operative norms may develop despite laws expressing contrary norms.

[101] Sunstein, *supra* note 100, at 2029–44. Of course, the success of the expressive function of law depends on a number of factors, most importantly the legitimacy of law itself. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352–61 (1997).

[102] *See* POSNER, *supra* note 100, at 33.

[103] *See id; cf.* Kahan, *supra* note 101, at 363–64 (making the same argument exclusively in the context of criminal law).

[104] *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2327 (1997).

[105] *Id.* at 2325; *see also id.* at 2325–26 (discussing slavery as an example).

status.[106] This notion, of course, contradicts Gray's assumption that the metaphor of legal personality exists independently of social understandings of personhood. This Part argues that this long-assumed distinction is untenable. The law of the person entails considerably more than a functional abstraction of a disembodied notion of legal capacity. When law uses the metaphor "person" to define its object, that metaphor acts as a vehicle for expressing beliefs and values about persons, both legal and natural. This phenomenon is evident when courts address or avoid the problem of legal personality in the contexts of slavery, feticide, and corporate law. And because legal personality becomes relevant most obviously in the context of America's most "exquisitely sensitive"[107] social issues, it often expresses a deep anxiety not just about what a person is, but about the basic contradiction inherent in creating and manipulating status distinctions in a highly individualist legal culture.

Though courts say little about legal personhood, what they do say on the subject reflects a basic ambivalence that goes considerably beyond the manipulation of a standard legal metaphor. The Mississippi Supreme Court, for example, extended legal personality to slaves for the purposes of common law murder prohibitions:

> In some respects, slaves may be considered as chattels, but in others, they are regarded as men. The law views them as capable of committing crimes. This can only be upon the principle, that they are men and rational beings. . . . In this state, the Legislature have considered slaves as reasonable and accountable beings and it would be a stigma upon the character of the state, and a reproach to the administration of justice, if the life of a slave could be taken with impunity, or if he could be murdered in cold blood, without subjecting the offender to the highest penalty known to the criminal jurisprudence of the country. Has the slave no rights, because he is deprived of his freedom? He is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law, but in vain shall we look for any law passed by the enlightened and philanthropic legislature of this state, giving even to the master, much less to a stranger, power over the life of a slave. Such a statute would be worthy the age of Draco or Caligula, and would be condemned by the unanimous voice of the people of this state, where, even cruelty to slaves, much less the taking away of life, meets with universal reprobation.[108]

Even courts that came to the opposite conclusion shared the *Jones* court's sentiment that the extension to slaves of legal personality directly implicated society's moral character. In concluding that slaves

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[106] *See* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1154, 1274–89 (1985) (arguing that all laws are based on presumptions of particular normative metaphors).

[107] Goldberg, *supra* note 3, at 659.

[108] State v. Jones, 1 Miss. (1 Walker) 83, 84–85 (Miss. 1820).

were not persons for the purposes of common law battery when assailed by their masters, Judge Ruffin of the North Carolina Supreme Court, in *State v. Mann*,[109] expressed deep moral ambivalence about the result: "I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so."[110] Had the *Mann* court not been conscious of the expressive impact of its decision, it would not have felt compelled to admonish the public to take away precisely the opposite moral message.

These approaches to legal personality reflect an assumption that the issue is closely tied to moral and ethical considerations, that what the law refers to as persons, and the act of the law's referring to entities as persons, shapes what society thinks of as human.[111] This linkage expresses one of the core contradictions at the root of American slavery: that obviously human entities were regarded by the law as less than human, or at least, as less than full legal persons.[112] Judicial rhetoric regarding slaves' legal personality, then, discloses anxiety about personhood itself, raising this category above the level of neutral abstraction to an expression of social mores.

In contrast to the open discussion of the relationship between persons and social norms in slavery cases, courts attempt to avoid the issue entirely in the context of feticide. Judges seem almost embarrassed that any pronouncement about the law of persons might have philosophical implications for the broader social meaning of personhood. In most cases, this attitude manifests itself in the absence of any reflection on the issue from a theoretical or interdisciplinary perspective, but sometimes courts make it explicit. The Arizona Court of Appeals made its reluctance to engage broader issues plain in *Vo v. Superior Court*:[113] "[W]e need to emphasize that this court is not embarking upon a resolution of the debate as to 'when life begins.' Rather our task is specifically to determine the legislative intent in defining first degree murder of a 'person.'"[114] Similarly, the Supreme Court pro-

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109 13 N.C. (2 Dev.) 263 (1829).

110 *Id.* at 266.

111 This argument could work in the opposite direction, as racist judges assumed that slaves' legally inferior status intrinsically resulted from their racial inferiority. *See* Bryan v. Walton, 14 Ga. 185, 198, 201 (1853).

112 Other cases express this ambivalence. *Compare, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426–27 (1856) (holding that slaves were not citizens for the purposes of federal law and the U.S. Constitution), *with, e.g.*, U.S. v. Amy, 24 F. Cas. 792, 809–11 (C.C.D. Va. 1859) (No. 14,445) (holding that slaves were persons for the purpose of a federal criminal law regarding mail tampering). For an interesting historical consideration of the incoherence of slaves' natural and legal personality, see *Amy*, 24 F. Cas. at 795–805.

113 836 P.2d 408 (Ariz. Ct. App. 1992).

114 *Id.* at 412.

nounced in *Roe v. Wade* that, despite that opinion's extensive discussion of the biological and historical arguments regarding when life begins:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[115]

One can see the same hesitation to acknowledge the expressive value of judicial holdings regarding fetal personhood in the Louisiana Supreme Court's decision in *Wartelle v. Women's & Children's Hospital*.[116] Though the Louisiana Civil Code rather clearly resolved the issue,[117] the court signaled its concern about the implications of its public statement limiting the rights available to a fetus:

> The Louisiana Civil Code's refusal to accord unconditional legal personality to a fetus before live birth constitutes no moral or philosophical judgment on the value of the fetus, nor any comment on its essential humanity. Rather, the classification of "person" is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties. "Person" is a term of art . . . .[118]

When courts insist that holdings on fetal personality have no extralegal implications, they appear to protest too much. If courts were truly confident that they could manipulate and interpret personhood simply as a legal fiction, no protestations to the contrary would be necessary.[119] Judges' reluctance to engage these issues itself suggests that denying or granting legal personality to fetuses sends a strong message about the state's valuation of fetal life, either by countenancing the visceral moral wrong of feticide[120] or by threatening the foundational assumptions of abortion rights.[121] The ambivalence and anxiety that courts experience in attempting to determine whether fetuses are legal

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115 Roe v. Wade, 410 U.S. 113, 159 (1973).

116 704 So. 2d 778 (La. 1997).

117 *See* LA. CIV. CODE ANN. art. 26 (West 2000) ("If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.").

118 *Wartelle*, 704 So. 2d at 780; *see also* Margaret A. Cassisa, Casenote, Wartelle v. Women's and Children's Hospital: *When Is a "Person" Not a Person? Solving the Riddle of the Stillborn's Survival Action*, 44 LOY. L. REV. 631, 638–41 (1998) (discussing in more detail the court's reasoning).

119 *Cf.* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (commenting on the ability of courts to manipulate the language of legal fictions).

120 *Cf.* Perry Mack Bentley, Comment, *Feticide: Murder in Kentucky?*, 71 KY. L.J. 933, 951 (1983) (urging that feticide be incorporated into Kentucky's murder statute).

121 *Cf.* Smith, *supra* note 68, at 1868–69 (discussing opposition to a proposed fetal homicide bill in Kansas because it defined fetuses as "persons" so broadly that it would effectively have classified abortion as first-degree murder).

persons reflect and express society's own strong feelings regarding this issue. In at least three states, for example, when courts defined fetuses out of murder statutes, the public reacted with outrage, and state legislatures passed responsive legislation within two months.[122] The legal personality of fetuses remains tied so deeply to the social debate over fetal humanity that courts cannot manipulate the legal category "person" without expressing certain values, whether they want to or not.[123]

The doctrine of corporate personhood provides another illustration of courts' ambivalence regarding the signals they send in defining legal personhood. Justice Douglas's dissent in *Wheeling Steel v. Glander* questioned whether an intent-based or even a purely textual reading of the Fourteenth Amendment could ever justify equating an artificial entity with a human.[124] Dissenting in *Connecticut General Life Insurance Co. v. Johnson*,[125] Justice Black expressed anxiety about corporate personhood that went far beyond skepticism of jurisprudential method. He observed that the conferral of constitutional personhood on nonhuman entities risked obscuring the constitutional personhood of the natural persons the Fourteenth Amendment was passed to protect:

> This Amendment sought to protect discrimination by the states against classes or races. . . . Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent. invoked it in protection of the negro race, and more than fifty per cent. asked that its benefits be extended to corporations.[126]

Justice Black's concern reflects an awareness not only that legal personhood relates to actual social status, but also that status may operate as a zero-sum game; grants of legal personality to corporations may cheapen the social meaning of humans' legal personality.[127]

Though there is no social consensus regarding the effects of increasingly monolithic business entities on American society, there appears to be no abatement to the expansion of freedoms granted corpo-

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[122] This happened in California, *see* Katharine B. Folger, Note, *When Does Life Begin . . . or End? The California Supreme Court Redefines Fetal Murder in* People v. Davis, 29 U.S.F. L. REV. 237, 243–45 (1994); Delaware, *see Judge Sentences Waterman*, *supra* note 78; and Minnesota, *see* Smith, *supra* note 68, at 1863–64.

[123] *See* Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 972 (1995) ("What is a person? When does life begin? These are the questions courts refuse to answer explicitly yet indirectly answer in nearly every opinion cited above."); Schroedel, Fiber & Snyder, *supra* note 81, at 95 (noting the impossibility of making feticide law without commenting on fundamental issues of personhood).

[124] *See* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 577–78 (1949) (Douglas, J., dissenting).

[125] 303 U.S. 77 (1938).

[126] *Id.* at 89–90 (Black, J., dissenting).

[127] *Cf.* Balkin, *supra* note 104, at 2328 (arguing that social status operates as a zero-sum game).

rate actors, a situation that has raised much concern. As one commentator noted, "it is certain that the conferral of corporate Bill of Rights protections, without any theory, has served an important legitimizing function. Extending these rights has legitimized corporations as constitutional actors and placed them on a level with humans in terms of Bill of Rights safeguards."[128] Calling corporations persons sends a message about the state's values: by implicitly extending human dignity to artificial business entities, the state cheapens the distinctiveness of legal personhood by overextending its application.[129] The law's ambivalence toward corporate personality — one best described as a surface appearance of doctrinal unity marked by a strong undercurrent of dissent — reflects concern about the propriety of elevating corporations to the status of persons, both because of reservations about business organizations themselves and because of concern about human uniqueness in an increasingly corporate world.

This anxiety occupies an even greater place in the academic literature. Though there are reasonable arguments that including corporations within the legal construction of personhood does not require much of a conceptual leap,[130] centuries of scholarly debate over this issue suggest otherwise.[131] Moreover, regardless of the metaphor's descriptive aptness, ascribing personhood to corporations may represent more than mere manipulation of legal categories. Judicial determinations of personhood not only reflect societal values, but also influence individuals' behavior. Public statements that corporations "are" persons — particularly from organs of government empowered with coercive authority, such as courts — represent an "illocutionary act,"

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128 Mayer, *supra* note 32, at 650–51.

129 Carl Mayer argues that granting rights to corporations detracts from natural persons' rights:

> Too frequently the extension of corporate constitutional rights is a zero-sum game that diminishes the rights and powers of real individuals. Fourth amendment rights applied to the corporation diminish the individual's rights to live in an unpolluted world or to enjoy privacy. The corporate exercise of first amendment rights frustrates the individual's right to participate equally in democratic elections, to pay reasonable utility rates, and to live in a toxin-free environment. Equality of constitutional rights plus an inequality of legislated and de facto powers leads inexorably to the supremacy of artificial over real persons.

Id. at 658.

130 *See, e.g.*, MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 43–44 (1986).

131 *See* Martin Wolff, *On the Nature of Legal Persons*, 54 L.Q. REV. 494, 498–99 (1938) (tracing the history of scholarly interest in the personhood of organizations to at least the High Middle Ages). Then-Justice Rehnquist expressed similar skepticism about this metaphor as recently as the 1980s. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) ("Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."); *id.* at 35 ("The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.").

whereby language does not merely describe a state of affairs, but helps bring that state of affairs into existence.[132]

C. *Personhood and the Problem of Status*

Legal personhood is more than a metaphor; it becomes, in many cases, law's repository for expressions of anxiety about powerfully divisive social issues. In the antebellum South, the rhetoric of personhood reflected the moral ambivalence of a society that called itself democratic while still owning slaves. In the context of feticide, the doctrinal confusion regarding legal personhood evidences the two-mindedness of a society that finds fetal murder abhorrent even as it desires to protect the autonomy of pregnant women. In debates about corporate personhood, lasting terminological anxiety expresses the tension between the desire to stimulate the economy by granting constitutional protections to corporations and the fear that unchecked corporate growth may have socially deleterious effects or that unchecked recognition of corporate personhood may cheapen our own.

Courts' treatment of legal personhood communicates anxiety not only about divisive social issues, but also about the operation of law itself. In highly individualistic modern American legal culture, status distinctions seem to be embarrassing remnants of an illiberal past. However, when courts and legislatures engage problems of legal personhood, they are necessarily interpreting and applying very fundamental notions of status. The law of the person, and especially courts' ambivalence about it, exposes the uncomfortable but inescapable place of status distinctions in even the most progressive legal systems.

The reluctance of American courts to manipulate status distinctions openly has deep roots. Sir Henry Maine famously articulated one strand of that reluctance when he formulated his foundational theory that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[133] Maine argued that ancient law regarded the basic unit of society as the collective, so much so that the individual was subsumed by a series of status distinctions, each of which was transmitted between generations.[134] The progression of legal culture realized a shift from status as the basis of rights to an individual capability to transmit property on a personal, contractual ba-

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[132] *See* Schane, *supra* note 31, at 577–78 ("In a like manner, the Supreme Court, in declaring that it deemed a corporation to be a citizen, by its use of this word, brought to fruition the new legal status so described."); *cf.* Mayer, *supra* note 32, at 650 ("Behind doctrines of commercial property and the free market of ideas is hidden the tacit acceptance of the corporation as a person, entitled to all the rights of real humans.").

[133] HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 165 (Univ. of Ariz. Press 1986) (1864).

[134] *See id.* at 121–23.

sis.[135] If regarding this development as entirely egalitarian may overstate the case, one may at least describe it as strongly individualistic — an evolutionary change that rejects status distinctions including, arguably, personhood as archaic.

The Fourteenth Amendment is a distinctively American manifestation of the great move from a more status-based to a more individual-focused legal system. The status distinctions on which slavery depended rendered hypocritical the egalitarian aspirations of the founding of the American republic. The Fourteenth Amendment repudiated these distinctions — at least distinctions made on the basis of race — in the apparent hope of creating a body of law in which personhood had a single, universal meaning.[136]

The major jurisprudential movements of the twentieth century also shed light on the law's reluctance to discuss personhood openly. The modernist/legal-realist approach (at least in its second, more skeptical strand)[137] denies the capacity of law to use language to embody an abstraction like "person" independently of social meaning and influence;[138] postmodern legal thought goes a step further, rejecting the possibility of ever overcoming the limitations of social context and language.[139] Both of these perspectives emphasize the centrality of individual experience, rather than connection with overarching institutions or beliefs, as a means to the good life.[140] Hence, the very project of the law, which depends on metaphors to make sense of its rules and to justify its use of force, is as unstable as it has ever been. It is not surprising, then, that in a legal culture characterized by such profound reluctance to recognize universal notions of the person, ascribing any transcendent meaning to personhood — such as a transsubstantive definition of legal personality — seems fraught with troubling normative implications.[141]

Courts' anxiety about manipulating legal personhood is a product of these trends. However much American legal consciousness may express an inclination to reject status distinctions, particularly in the case of legal personality, to have a law is to have an object on which that

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135 *See id.* at 248–52.

136 The Fourteenth Amendment clearly repudiates status distinctions among persons. *See* U.S. CONST. amend. XIV, § 1 ("All persons born in the United States . . . are citizens of the United States . . . . No State shall . . . deny to any person . . . the equal protection of the laws.").

137 *See* Peller, *supra* note 106, at 1222–26 (1985).

138 *Cf.* ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 5–15 (1984) (describing the modernist view of the strongly contextualized self).

139 *See* Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 676–77 (2000).

140 *See* UNGER, *supra* note 138, at 35–39. Note that these schools of thought differ importantly in their conceptions of the self; the postmoderns would express much more skepticism at the possibility of the self to overcome its own constructedness.

141 *See id.* at 48; *cf.* Feldman, *supra* note 139, at 675–76 (discussing modernist anxiety).

law acts. And in the case of American law, that object is more often than not a person. Hence, this very basic tension persists: law desires to repudiate transcendent notions of the object yet depends on such notions for its theoretical coherence.

III. CONCLUSION

The law of the person is fraught with deep ambiguity and significant tension, and the problem extends far beyond the standard interpretive difficulties attending the meaning of legal metaphors. The law's use of the fiction "person" to define its object inevitably evokes the anxiety that accompanies social definitions of personhood. This difficulty is exacerbated by the tension between our strongly individualist legal culture and the utter dependence of law on this metaphor. Moreover, social anxiety about personhood matters not only because it exposes ambivalence within the law, but also because the law, through its expressive dimension, signals norms and values that influence ideas and opinions about personhood.

This anxiety is likely to become more acute. Technological and economic progress promise to muddy further the waters of personhood, calling into question the once-stable notion of who counts as a living human. On one front, animal rights theorists[142] and activists[143] argue that the human/nonhuman distinction is founded on illegitimate notions of an absolute hierarchy of worth that places humans above other animals. On another, technology may soon enable the creation of entities that are neither clearly human nor nonhuman, such as transgenic animals,[144] or that closely replicate human consciousness, such as artificially intelligent beings.[145]

The grossly undertheorized character of this field suggests that the problem merits more attention. Such attention would not only aid in understanding the scope and meaning of the law's use of the fiction "person" to define its object, but — considering this metaphor's extralegal implications — would also help law contribute more fully to social dialogue about what it means to be human.

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142 *See* PETER SINGER, ANIMAL LIBERATION 1–23 (2d ed. 1990).

143 *See* Laura G. Kniaz, Comment, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 765–74 (1995) (tracing the growth of the animal rights movement).

144 Scientists very recently created the first transgenic primate, a monkey with one gene from a jellyfish. Sharon Begley, *Brave New Monkey*, NEWSWEEK, Jan. 22, 2001, at 50.

145 Solum, *supra* note 3, at 1256.