Revisiting legal personhood
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Abstract

As is well-known among jurists, the law has a special conception of personhood: corporations are persons, whereas slaves have traditionally been considered property rather than persons. This odd state of affairs has not garnered the interest of legal theorists for a while; the theory of legal personhood has been a relatively peripheral topic in jurisprudence for at least 50 years. However, many recent developments call for a theoretical investigation of this topic: animal rights activists have been demanding that some animals be recognized as legal persons in the US and in Germany and Switzerland, animals have been declared not to be “things”. On the other hand, developments in robotics have prompted questions as to whether driverless cars should be granted a limited legal personality, so that it itself would be responsible for such damages.

The paper argues that the traditional theories of legal personhood, which associate legal personhood with the holding of rights, are outdated and should be reassessed. This is because many modern theories of rights seem to come in conflict with our convictions regarding who or what is a legal person, and what X’s legal personality implies. For instance, the commencement of natural personhood is traditionally understood to take place at birth: foetuses are not natural persons but newborn children are. However, if we apply the so-called interest theory of rights, we’ll note that foetuses hold various rights, such as some rights against certain forms of abortion. The traditional theory of legal personality, according to which right-holding entails personality, should thus lead us to conclude that foetuses are already legal persons. This seems problematic to say the least. On the other hand, if we apply the will theory, which associates right-holding with the power to control others’ duties, then infants do not hold any rights at all. Again, the traditional theory of legal personality runs into problems.

This is why the paper proposes an alternative theory of legal personhood. Some of its main tenets include: (1) legal personality is not black-or-white but a matter of degree; some legal persons hold rights and others do not, (2) X’s legal personality involves primarily the endowment of X with incidents of legal personhood, much like ownership can be understood
as consisting of separate but interconnected incidents. The paper hopes to show as well that rather than being a “solved” theoretical issue, legal personhood is an undertheorized topic that should occupy theorists more in the future than is currently the case.

I. Introduction

The concept of legal personality is shared by all Western legal systems. In civil-law jurisdictions, such as Spain and Finland, legal persons are also called subjects of law/rights (sujeto de derecho; oikeussubjekti). Even though the concept is ubiquitous, the meaning of legal personhood has been a relatively peripheral topic in jurisprudence for a while, with the exception of corporate personhood. A judge or a scholar likely does not need a theory of legal personality to solve or comprehend easy cases, but the need for a theory may arise in hard cases. The only theoretical account available then is the legal-persons-as-right-holders view, according to which legal personhood involves either the holding of rights and bearing of duties or the “legal capacity” to hold rights and bear duties.¹ This definition of legal personality is not merely a textbook adage – even though any law student in the civil-law world likely comes across it, and many students of the common law as well – but is also endorsed and employed by jurists with a profound interest in questions relating to legal personhood. A number of such cases have become topical recently, from the legal personality of nonhuman animals to that of autonomous software agents. I argue in this paper that equating legal personhood with the holding of rights is not the best way to understand the concept but is rather quite confusing. I do not intend to provide a complete alternative theory; rather, I hope to persuade the reader that the legal-persons-as-right-holders view, paradigmatic as it is, can indeed be questioned.

Even though this paper is intended for a Spanish-Finnish audience, I will begin with a recent American example, which received a lot of publicity around the world. In December 2014, the New York State Supreme Court, Appellate Division, ruled in a case where the Nonhuman Rights Project, representing a chimpanzee called Tommy, called for the court to “enlarge the common-law definition of ‘person’ in order to afford legal rights to an animal”.² To be more precise, the appellants requested that Tommy be afforded the rights that pertain to the writ of habeas corpus (freedom from physical restraint). In its judgment, the court relied on the paradigmatic definition of legal personality that equates X’s legal personality with X’s holding of legal rights and/or duties:

¹ There are some other formulations of this view as well. I will return to them later in this dissertation.
Further, although the dispositive inquiry is whether chimpanzees are entitled to the right to be free from bodily restraint such that they may be deemed “persons” subject to the benefits of habeas corpus, legal personhood has consistently been defined in terms of both rights and duties.\(^3\) (emphasis in original)

To support this understanding of legal personality, the court cited *Black’s Law Dictionary*, according to which “[s]o far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties.” The court also mentioned John Chipman Gray’s similar assertion.\(^4\) As chimpanzees are currently not legal persons and as supposedly only persons can hold legal rights, chimpanzees do not hold legal rights. Recognising them as persons for the purposes of *habeas corpus* would thus entail endowing them with their first legal right. This premise structured much of the court’s argumentation. The court made reference to contract theories of rights, asserting that “the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government”.\(^5\) Animals could not, according to the court, fulfil any “social responsibilities” in exchange for rights, which is why it would have been “inappropriate to confer upon chimpanzees the legal rights – such as the fundamental right to personal freedom, protected by the writ of *habeas corpus* – that have been afforded to human beings”.\(^6\) This is why the court rejected the “rights paradigm” for animals, even though it hastened to add that animals are protected by various animal welfare statutes.

The chimpanzee Tommy was represented by the Nonhuman Rights Project. Steven Wise, the American lawyer and legal scholar who has founded the Project and written numerous articles on the topic of legal personhood, claims that legal personhood entails the “capacity to hold at least one legal right”.\(^7\) This “capacity” does not refer to one’s natural attributes. According to Wise, animals could very well be the holders of legal rights, but they cannot hold such rights as of now because they are legal things. The Nonhuman Rights Project aims to “demand that American state high courts declare that a nonhuman animal has the capacity to possess at least one legal right, to declare that she is a [...] legal person”.\(^8\) For anyone acquainted with contemporary analytic theories of rights, this seems an odd policy statement. How could one’s capacity to hold rights depend on whether one is declared a legal person?

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\(^3\) Id., at 6.
\(^5\) Id., at 4.
\(^6\) Id.
\(^8\) Ibid, at 5.
The question whether animals could hold legal rights got me originally interested in the topic of legal personality, as many of the chief assumptions of our paradigmatic understanding of legal personality seemed to be utterly at odds with the two most prominent theories of rights. Shortly put, according to the interest theory of rights, animals already hold legal rights regardless of whether they are defined as legal persons, because we have legal duties toward animals, such as the duty not to mistreat them. According to the will theory of rights, on the other hand, animals cannot hold rights regardless of whether they are declared legal persons – but neither can, for instance, small children, who are widely taken to be legal persons. I have since then come to understand that our paradigmatic conception of legal personality dates back centuries and is, I hope to show, in need of a reappraisal.

II. A very brief history of the right-holding person

I address the history of legal personality extensively in my dissertation, but I will provide a very brief summary here.

Roman scholar Gaius’s classification of law into the law of persons (personae), things (res) and actions (actiones) is usually mentioned as the first reference to the person-thing distinction.⁹ It is nevertheless not at all obvious that the Romans thought of the distinction in the abstract and systematic way that is familiar for many modern jurists – Roman law was in many ways casuistic, unsystematic and practically oriented. For instance, Gaius did not specify what it exactly implied for an entity to be a person or a thing.¹⁰ In addition, slaves were classified as persons – though unfree ones – but also as things and thus objects of ownership.¹¹ This pertains to the fact that Romans used the word persona in two different senses: the word had originally referred to the mask worn by actors in plays, which is why it could mean ‘status’ or attribute’, but it would later also start signifying ‘human individual’.¹² I will not delve into these matters here; how the Roman jurisconsults understood this distinction is not as important as how it has inspired the modern theory of legal personhood. Gaius’ trifurcation was adopted in Justinian’s Corpus Iuris Civilis, which would later be the document on which the reception of Roman law on the European continent would be based.¹³

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¹¹ Alan Watson, Roman Slave Law (The Johns Hopkins University Press 1988), at 46–47. Animals were only mentioned as things.
¹³ The trifurcation is mentioned in Institutes which is the third part of Corpus Iuris Civilis. See Peter Birks, Grant McLeod and Paul Krueger (eds), Justinian’s Institutes (Duckworth 1987).
It would seem that the French Renaissance humanist and law professor Hugues Doneau (1527–1591, also known as Hugo Donellus) took the first steps in developing a technical legal concept of personhood.

Doneau, a member of the Renaissance humanist movement, studied the Corpus critically, attempting to establish the systematic foundations of the law. He uses the word *persona* in a new, technical sense in his main work, *Commentarii in iure civili* ("Commentaries on the Civil Law"). *Persona* is now the point of departure of legal analysis, and any individual that has a positive status libertatis, civitatis and familiae is a *persona*. Doneau did not yet clearly distinguish between *homo* and *persona*, however. This was done by the German jurist Hermann Vultejus (1555–1634), according to whom *homo* refers to a human being, whereas *persona* is a "homo habens caput civile" – a human being with a civil standing. However, Vultejus seems to be the first to have defined these terms clearly, and the first to have claimed that slaves lacked legal personality – that they were not *personae*.

Later steps toward the development of a theory of legal personhood would be taken by Hugo Grotius, Samuel von Pufendorf, Gottfried Leibniz and Christian Wolff. I cannot address all these developments here. I will simply note that Continental legal scholarship was developing toward the idea of understanding law in terms of general principles and concepts, and *person* would serve as a central notion, for persons would now be defined as the “subjects” of rights and duties. Wolff, for instance, would distinguish *homo moralis* and *persona moralis*: the former is the subject of rights and duties, meaning a potential right-holder and duty-bearer, whereas the latter refers to a human being who actually holds specific rights and/or duties. Wolff’s influence could be felt in in the Prussian Civil Code of 1794 – the first of the so-called natural-law codes – according to which “A human being is referred to as a person insofar as he enjoys specific rights in the civil society”. Anton Thibaut, who was a natural lawyer but also a Roman scholar, would in 1803 propound an identical definition as that of Wolff’s. Thibaut is of particular interest because his scholarship would be valued very highly by John Austin, who would be instrumental in importing German jurisprudence

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15 Christian Hattenhauer, ‘Der Mensch als Solcher Rechtsfähiger” – Von der Person zur Rechtsperson’ in Eckart Klein and Christoph Menke (eds), *Der Mensch als Person und Rechtsperson* (Berliner Wissenschafts-Verlag 2011), at 44–46. ibid, at 51–52.

16 Der Mensch wird, in so fern er gewisse Rechte in der bürgerlichen Gesellschaft genießt, eine Person genannt. Allgemeines Landrecht für die Preußischen Staaten (01.06.1794), Part I, Chapter 1, Section 1. See also Ibid, at 52–56.

17 Anton Friedrich Justus Thibaut, *System des Pandektenrechts* (Mauke 1803), at 141.
to England. A very similar definition would later be adopted by the immensely influential German jurist Friedrich Carl von Savigny in his magnum opus *The System of Modern Roman Law*.\(^{19}\)

J.-R. Trahan names the views on legal personhood expressed by Savigny and other members of the German Historical School the *modern theory*.\(^{20}\) According to this theory, what persons – be they human beings or corporations – possess is legal capacity (*Rechtsfähigkeit*), the capacity hold rights and bear obligations. This is, however, not sufficient for entering into contracts and performing other legal transactions, which presupposes legal competence (*Handlungsfähigkeit*).\(^{21}\) One should note, however, that these definitions were usually offered in the context of private law. Savigny, for instance, excluded public law from his *System*. He also introduced the term *Rechtssubjekt* (subject of law/rights), which would later be adopted as a synonym of “legal person” by very many European languages – English being the noteworthy exception.

19th-century German legal scholarship was considered to be of very high quality, and legal scholars around the Western world set out to build similar systems as Savigny and other German scholars had done, founded on basic legal concepts.\(^{22}\) For instance, John Austin, who had lived in Bonn, Germany, and had become acquainted with continental legal scholarship, was persuaded by this systematic approach and used it in his lectures, which he started giving in 1832 at University College London.

It seems relatively clear that the genealogy of the paradigmatic understanding of legal personhood is in 18th- and 19th-century German scholarship. Modern theories of rights – the so-called will theory and interest theory – have also originated in this era. However, later authors have refined these theories; the contemporary theories of rights are very different from the ones formulated by Savigny and Rudolf Jhering, for instance.\(^{23}\) Theories of legal personhood, on the other hand, have not really changed much.


\[^{20}\] Trahan 10, at 14.


\[^{23}\] For the the rights theories of the 19th century, see NE Simmonds, ‘Rights at the Cutting Edge’ in Matthew H Kramer, NE Simmonds and Hillel Steiner (eds), *A Debate over Rights. Philosophical Enquiries* (Oxford University Press 1998).
III. Legal persons in contemporary Western jurisdictions

The best way to understand the person–thing distinction, or as I will call it, person–nonperson distinction, is to approach it as a conceptual scheme extant in Western legal systems. Eric Funkhouser styles conceptual schemes as “ways of thinking about things”.24 He writes:

> Every conceptual scheme [...] involves a classification into kinds. Examples are easy to come by. Biology classifies animals as mammals or reptiles, mathematics classifies numbers as prime or composite, and ethics classifies actions as duties or prohibitions. These classifications are then used to describe situations, make generalizations, advance laws and principles, and the like.25

The person–nonperson distinction is a conceptual scheme that can be employed to understand and categorise the norms of a Western legal system. Kaarlo Tuori maintains that the divide between persons and nonpersons is a part of the “deep structure of law” that is shared by all Western legal systems and that concepts like “legal subjectivity” – i.e. legal personality – and “subjective right” are basic legal categories which underpin “the conceptual space for modern law”.26 I agree with him that our paradigmatic notions of legal personality are deeply embedded in Western legal thought; the legal personality of animals (or, say, software agents) is not simply unacceptable but rather unthinkable for many jurists.

The conceptual scheme we are investigating divides the world into persons and nonpersons. Concepts have an extension and an intension. The former has to do with what entities in the world the concept corresponds to, and the latter tells us, roughly put, why they are covered by the concept. W.V.O. Quine used the examples of “cordate” (creature with a heart) and “renate” (creature with a liver) to illustrate this: both concepts have the same extension (because every creature that has a heart also has a liver) but different intensions.27 The paradigmatic theory of legal personality maintains that the intension of “legal person” is “someone or something that holds rights and/or duties”. However, if we apply the modern theories of rights to see who or what holds legal rights, we get an extension that does not correspond with whom or what we take to be legal persons.

Western jurisdictions share certain central tenets regarding the extension of “legal person” – i.e. regarding who or what is, or is not, a legal person. Firstly, every Western jurisdiction contains the distinction between

26 Kaarlo Tuori, Critical Legal Positivism (Ashgate 2002), at 186–188.
27 There may be some counterexamples, such as dead creatures whose livers have been removed, but I take the point to be clear.
natural persons and artificial persons. The former are human individuals, the latter corporations. The doctrine of who counts as a natural person is also relatively uniform across the Western world. In Western legal systems, the paradigmatic natural persons are

1. **Humanity**: Only human beings are natural persons. This is often not made explicit but is more of a silent assumption. The German Civil Code *Bürgerliches Gesetzbuch* is explicit about the humanity condition: “The legal personhood of a human being begins at the completion of birth” (emphasis added). A similar statement is made in the Austrian Civil Code: “Every human being has innate rights that are obvious to reason, and is therefore to be considered a person” (emphasis added).

2. **Having been born**: This condition dates back to Roman law. It is widely (though not uniformly and without exceptions) accepted in Western legal systems, in both common-law and civil-law jurisdictions, even if US states have increasingly departed from it. The condition is questioned especially when abortion is discussed. Stillborn children are usually excluded, whereas children born alive may occasionally benefit from the *nasciturus pro iam nato habetur quamdiu agitur de eius commodo* maxim – *nasciturus* for short – that is, ‘one who is about to be born is to be treated as if already born whenever that is to her or his advantage’. This rule presupposes, however, that the foetus is later born alive.

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30 *Jeder Mensch hat angeborene, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten*. Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*), § 16.
31 The condition is explicitly recognised in the German Civil Code, as was noted above, as well as in Part 1, Section 1 of the Italian Civil Code. In Spanish law, the neonate must live for at least 24 hours outside of the womb in order to be deemed a legal person. Teresa Rodríguez de las Heras Ballell, *Introduction to Spanish Private Law. Facing the Social and Economic Challenges* (Routledge-Cavendish 2010), at 34. Regarding French law, see for example Philippe Malaurie, *Cours de droit civil. Les personnes, les incapacités* (5th edn, Éditions Cujas 1999), at 27: “For natural persons, legal personality appears at birth [...] and disappears at death [...].” ([P]our les personnes physiques, la personnalité juridique apparaît avec la naissance [...] et disparait avec la mort [...].)
3. **Currently alive:** Dead people are not legal persons, even if their estates may very well be. However, it has been argued that dead people possess some limited rights. Dead people’s determinations may also continue to “exist” post mortem in the form of a last will. It should be noted that determining when a person is dead is not uncontroversial; the clinical criterion of brain-death is sometimes questioned.

4. **Sentience:** An entity that meets the three criteria above but that does not have a sentient mind at all, such as anencephalic infants who do not possess a brain cortex and therefore lack sentience are not paradigmatic legal persons. For instance, such infants have been deemed legal persons in the US, but this decision has been the subject of controversy, which implies that they are not easy cases.

If these criteria are met, one is a paradigmatic legal person. However, these criteria are only sufficient for what is in civil-law traditions denoted “legal capacity” (Rechtsfähigkeit, capacité de jouissance), which is most often defined as the capacity to hold rights and bear duties, or as the capacity to be a party of legal relations, as opposed to “legal competence” (Handlungsfähigkeit, capacité d’exercice), meaning the ability to enter binding contracts and so forth. “Legal capacity” is an ambiguous phrase in that it can also be used synonymously with “legal competence”; this usage is prevalent, for instance, among disability scholars.

Due to this ambiguity I call these two elements of legal personality passive and active legal personality.

The five criteria above are not sufficient for “legal competence” or active legal personality, which is generally contingent on one’s age and mental abilities. For active legal personality, Western legal systems typically require a sixth attribute:

5. **Sufficient rationality and age:** For active legal personality, one must be of a certain age and have mental abilities that roughly correspond to those of an adult human being of sound mind. If one lacks either attribute, one is under the power of a legal guardian and thus alieni iuris or – in the parlance of disability law – lacking legal capacity.

If one meets criteria 1-5, one is a passive natural person in contemporary Western legal systems; if one also

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35 See Berg, at 377–379. Jörg Neuner analyses anencephalic infants from the point of view of German law and concludes that they are “full legal persons” because the relevant organs – heart, lungs and brain – are still functioning. Jörg Neuner, ‘Zur Rechtsfähigkeit des Anencephalus’ (2013) 31 Medizinrecht 647, at 651.
38 This is somewhat inspired by Neil MacCormick’s terminology in MacCormick, at 77–99.
meets criterion 6, one is an active natural person as well.

There are also several points of consensus regarding what beings are not, or have not been, legal persons. Obviously, rocks and gusts of wind are not legal persons, but among the theoretically significant cases the most central one is likely slavery, which involved treating human beings as property rather than as legal persons (even though many scholars agree that slaves were legal persons insofar as they could be subjected to criminal punishments). It is likewise widely accepted that nonhuman animals are currently not legal persons, even if many authors claim that some animals should be accorded legal personhood.

The historical subjugated status of women in various Western jurisdictions has also been often analysed from the point of view of their lack of (full) legal personality. The most famous example is likely the common-law doctrine of coverture which meant that a married woman’s property was subsumed into that of her husband. Contemporarily, the Finnish and Swedish doctrines of guardianship (edusmiehyys in Finnish, målsmanskap in Swedish) allowed for women to retain their property but always required a male to represent them legally. In my terminology, Finnish and Swedish married women were thus passive but not active legal persons. Since the status of women has varied from jurisdiction to jurisdiction, I will not focus on them here.

So we have a number of extensional beliefs regarding who or what is or is not a legal person. If the legal-persons-as-right-holders view is correct, then the following should hold:

- adult human beings, infants and mentally disabled people hold rights and/or duties

39 Just a few of the scholars classifying slaves as legal nonpersons include Andrew Fede, People Without Rights: an Interpretation of the Fundamentals of the Law of Slavery in the U.S. South (Garland Publishing, Inc 1992); Hans Kelsen in various junctures such as Hans Kelsen, General Theory of Law and State (Transaction Publishers 2006), at 95; Steven M Wise, ‘The Legal Thinghood of Nonhuman Animals’ [1996] Boston College Environmental Affairs Law Review 471, at 1. The Scandinavian realist Karl Olivecrona takes himself to be reporting the received opinion when noting that slaves lack legal personality. Karl Olivecrona, Studier över begreppet juridisk person i romersk och modern rätt (Appelbergs 1928), at 38. Some historical views will be presented in chapter 2. See also for instance John W Cairns, ‘The Definition of Slavery in Eighteenth-Century Thinking’ in Jean Allain (ed), The Legal Understanding of Slavery: From the Historical to the Contemporary (Oxford University Press 2012).

40 In addition, some animals were prosecuted in criminal courts during the Middle Ages. See EP Evans, The Criminal Prosecution and Capital Punishment of Animals (The Lawbook Exchange, Ltd 2010) and Katie Sykes, ‘Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals’ (2011) 17 Animal Law 273.


- slaves held no rights
- animals and foetuses hold no rights (except foetuses hold so-called nasciturus rights, which become actual only if the foetus is later born alive)

However, if we follow the contemporary theories of what right-holding means, rights end up being ascribed to legal nonpersons or rights are denied to legal persons. Thus, the proposed intension (according to the legal-persons-as-right-holders view) does not match the widely-accepted extension of “legal person”.

IV. Assessing the paradigmatic theory

I should firstly note that I do not take the traditional theory of legal personality to be wrong. It is not wrong because it cannot be wrong. It makes, for instance, no predictive claims that could be empirically refuted. Even though some formulations of the legal-persons-as-right-holders view can be rejected on their own terms because of the non sequiturs that they contain, the theory at its barest is purely stipulative and definitional. The problem of the theory is rather that it cannot properly explain and structure the various ongoing debates that are, in some way or another, linked to the concept of legal personality. Such debates include those over the legal status of animals, foetuses and corporations. The mainstream theory of legal personality has implications that obscure the need for legal reasoning and normative argumentation; one such implication is that animals do not, or could not, currently hold legal rights because they are not legal persons.

We can now distinguish three conceptions of legal personhood. First, some authors define (legal) persons as the holders of rights and duties. I call this conception the legal-persons-as-right-holders position.43 Second, some jurists define legal personality as the legal capacity to bear rights and duties. As noted, Steven Wise claims that legal personhood is the “capacity to hold at least one legal right”.44 Such definitions are very popular among civil-law scholars, too.45 I denote this position the capacity-for-rights view.

A third definition, dating back to the German scholars, is that of explaining legal persons as the only possible parties of legal, or jural, relations.46 Savigny conceived of private law as relationships between persons; the second book of his System des heutigen Römischen rechts was even translated into English

43 I've omitted the “and-duty-bearers” part to improve readability.
44 Wise, ‘Legal Personhood and the Nonhuman Rights Project’ 8, at 1.
46 See von Savigny, System Des Heutigen Römischen Rechts 22, at §60. Some authors distinguish between legal and jural relations; I use the phrases interchangeably.
under the title *Jural Relations; or, the Roman Law of Persons as Subjects of Jural Relations.* This understanding of legal personality as the capacity to participate in legal relations is still invoked, though often with reference to the scheme of legal relations created by Wesley Newcomb Hohfeld. Wise, for instance, claims that legal things, such as animals, cannot participate in Hohfeldian legal relations. I call this the *capacity-for-legal-relations view.*

Due to constraints of space, I will focus on the first definition, i.e. the legal-persons-as-right-holders view, though I will say some words about the capacity-for-rights view as well.

*Legal personhood and right-holding*

As said, there are two main competing theories of rights: the interest theory and the will theory. I will focus here on formulations of these theories that are based on the Hohfeldian framework because of the analytic virtues of the Hohfeldian scheme and because many authors who write on issues of legal personality employ the framework. The most prominent Hohfeldian interest theory is that of Matthew Kramer; will theories have been developed and refined by HLA Hart, Nigel Simmonds and Hillel Steiner, among others. I will present an outline of both theories here, focusing on the features that are relevant to the discussion at hand.

According to Kramer’s interest theory, the holding of a right is (roughly) equivalent to being the beneficiary of a duty. Thus, A holds a right toward B if B has a duty toward A, and having a duty toward someone means that such a duty typically is in the interest of the entity in question. This is a relatively extensive conception of rights: it allows for children’s rights to, say, be nurtured. It also allows for many criminal-law rights which the will theory denies, such as the right not be murdered. In addition, it encompasses foetuses’ and animals’ rights. I will return to the scope of interest-theory rights below.

The will theories, on the other hand, assert that holding a right is not about being the beneficiary of a duty but having control over a duty. In will theories, a right-holder may always choose to demand or waive the

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49 Kramer’s interest theory was first articulated in Kramer, ‘Rights Without Trimmings’ 44, and subsequently refined in several articles, such as Kramer, ‘Getting Rights Right’ 24. For will theories, see HLA Hart, *Essays on Bentham. Jurisprudence and Political Theory* (Clarendon Press 1982), Hillel Steiner, *An Essay on Rights* (Blackwell 1994), and Simmonds 36.

50 To be more precise, rights are claims that are accompanied by sundry immunities. I will disregard this detail in the present discussion, as it does not affect my argument in any way.

51 Which entities can hold interest-theory rights is discussed more extensively in Kramer, ‘Getting Rights Right’ 49.
enforcement of a duty. Such control can only be wielded by people with sufficient mental faculties; this is why only adult human beings without serious mental deficiencies can hold rights according to the will theory.

I should note here that none of the modern analytic theories of rights assert that in order to be able to hold rights, one must first be “declared” to have the capacity to hold rights. Rather, one either is able to hold rights or one isn’t; this does not depend on the recognition of the legal system. Whether one actually holds rights depends, of course, on the legal norms of the jurisdiction. There is, however, a sense in which the capacity-for-rights view is appealing; being a legal person can enable one to hold so-called special rights. I will address this below.

So we have three conceptions of rights: the “anything-beneficial” conception which associates rights with all beneficial legal positions, the interest theory and the will theory. I will not endorse one of them as the correct conception here; I will rather use them all to test the legal-persons-as-right-holders position. What I will show is that when each conception is applied, there will either be legal nonpersons that have rights, or legal persons without rights. I will start with the interest theory.

Interest theory and the legal person

Rights, as defined in interest theories, can be attributed to entities that have interests and whose interests are furthered by duties. This leads us to ask what entities actually have interests, as the concept of interest is open to different kinds of interpretations. Suffice it to say here that Kramer takes sentient beings to be the primary group of interest-theory right-holders. This corresponds with, for instance, the seminal essay by Joel Feinberg on the rights of animals and unborn generations and, more generally, the mainstream of modern secular Western ethics, in which the sentience of a being is very often taken to be an important (though not perforce necessary or sufficient) condition for what may be termed – depending on the moral theory – as the possession of ultimate value, being a moral patient, figuring in the equal consideration of interests and so on. Sentience is thus also integral to an entity’s status as a potential holder of interest-theory rights, as it can be said that things matter only for sentient beings. On the other

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52 This is a crude simplification of Kramer’s interest theory, but it preserves the features of the theory that are relevant for the argument.
53 Kramer, ‘Getting Rights Right’ 49. Kramer has a more extensive conception of interests, as he thinks that interests can be ascribed to, for instance, blades of grass, but the normative protections of sentient beings are according to him the primary group of such protections that can be called rights.
55 I am not referring to any particular moral theory; I am merely claiming that sentience is typically taken to be an important criterion for an entity to be considered a moral patient, an end-in-itself and so on.
hand, moral agency or the capacity to claim one’s rights are not necessary attributes for being a holder of interest-theory rights.

Recent research indicates that certain nonhuman animals are conscious.\(^56\) Also human foetuses during the final trimester possess the capacity to be conscious, even though whether they actually experience anything is still unclear; preterm infants can, according to one publication, “reach a minimal level of consciousness”.\(^57\) Issues such as these are far from settled, but they provide sufficient reason for attributing the capacity to hold rights to foetuses at least in the late stages of development.\(^58\)

The interests of both foetuses and nonhuman animals are typically recognised to some extent in Western legal systems, as both are protected by law. The protection of foetuses takes place primarily through the regulation of abortions, especially in late stages of pregnancy, whereas animals are protected by animal welfare laws. According to the interest theory, therefore, both foetuses and animals already have legal rights. However, it is far from obvious that they are legal persons: animals are very widely understood to be legal nonpersons, and legal scholars and codes determine most often the beginning of a human being’s legal personality at birth.\(^59\) A similar point can be made with regard to American slaves. Slaves are widely classified as legal nonpersons, but they did in fact hold some rights. For instance, Section XXVIII of the South Carolina Slave Code of 1740 penalized the wilful killing of slaves:

And whereas cruelty is not only highly unbecoming of those who profess themselves Christians, but is odious in the eyes of all men who have any sense of virtue or humanity; therefore to restrain and prevent barbarity being exercised toward slaves, Be it enacted, That if any person or persons whosoever, shall willfully murder his own slave, or the slave of another person, every such person shall upon conviction thereof, forfeit and pay the sum of £700 current money [...].

So the slaves of South Carolina had the interest-theory right not to be killed wilfully.\(^60\) Does this right mean that the slaves were in fact persons in the eyes of the law? The right in question may be relevant when


\(^{58}\) It is important to note that the sheer fact that a foetus or an animal is sentient does not tell us what kind of legal protections these beings should be accorded. Even if a third-trimester foetus is sentient, there may still be moral justifications for the termination of pregnancy during this phase of gestation.


determining the slave’s legal personality, but taking this as a sufficient reason for the slave’s legal
personhood – as the legal-persons-as-right-holders view implies – seems simplistic. Does it not matter
that slaves were being bought and sold as property; that their own ownership rights were very limited; or
that they had no standing in courts, except when prosecuted for crimes? Determining an entity’s legal
personality is not always an either-or matter, but a more nuanced one, as the fact that slaves were persons
in the eyes of criminal law exemplifies.

So interest-theory rights cannot be used to justify the legal-persons-as-right-holders position. Animals and
foetuses have interest-theory rights – and thus anything-beneficial rights – but their legal treatment is
vastly different from that of infants. Similarly, claiming that slaves were legal persons just because of the
limited rights they held would be simplistic, as they lacked many of the entitlements that legal persons
typically hold.

Will theory and the legal person

Our treatment of the will theory can be relatively brief. As said, for the will theory, right-holding is equated
with control over duties. This is not just any control at all, but the kind of control that can only be exerted
by rational beings with mental faculties that correspond to those of adult human beings of sound mind.

Now, although an infant requires an adult human being of sound mind as their representative in order to
have their legal entitlements enforced and administered, this does not mean that infants are not legal
persons. I claim that legal personality involves both active and passive elements. The active elements
require the kind of mental capacities that adult human beings of sound mind have, whereas the passive
elements require mere sentience. Both are relevant, but legal personality cannot be explained by merely
making reference to the active elements. A theory of legal personality according to which only the holders
of will-theory rights are legal persons is unable to account for many important issues: for instance, it cannot
explain what the majority of legal scholars mean when they determine the beginning of legal personality at
the point of birth. Newborn children are treated legally in a different way than foetuses, but this difference
does not pertain to the holding of will-theory rights; infants do not control anyone’s legal duties any more
than foetuses do. Similarly, a theory that equates legal personality with the holding of will-theory rights has

61 Hans Kelsen claimed explicitly that the position of slavery means not holding rights or bearing any duties: “[T]hat a
slave is legally no person, or has no legal personality, means that there are no legal norms qualifying any behavior of
this individual as a duty or a right”. Kelsen, at 95.

62 Some adherents of the legal-persons-as-right-holders view recognise this; Richard Tur, for instance, notes that legal
personhood is “a matter of degree”. Richard Tur, ‘The “Person” in Law’ in Arthur Peacocke and Grant Gillett (eds),

63 Women have not been legal persons to a full extent at all times, either – for instance, in some jurisdictions, they
have lacked the competence to dispose of their property, and in others the legal capacity to own property altogether.
very little explanatory power with regard to the effects of the so-called foetal personhood amendments in some US states, which extend or would extend some aspects of legal personality to foetuses, as it is clear that these amendments do not generate any will-theory rights for the foetuses.

One must thus either conclude that the holding of will-theory rights is unnecessary for legal personality, or settle for a theory that is unable to explain many important issues pertaining to legal personality.

Duties and the legal person

Discussions of legal personhood revolve around the concept of right-holding, even though legal personality is typically defined as both right-holding and duty-bearing. Defining legal personality in this way has led legal scholars to make some very implausible claims about slavery. Hans Kelsen, for instance, claims the following: “That a slave is legally no person, or has no legal personality, means that there are no legal norms qualifying any behavior of this individual as a duty or a right.” At least as far as duties are concerned, the claim is simply false. The fact that slaveholding societies commonly held slaves legally responsible for their delicts is for slavery scholar Orlando Patterson reason enough to conclude that the “common definition of a slave as someone without legal personality” is a “fallacy that we can quickly dispose of.” He laments that “most students of slavery tend to be as knowledgeable about jurisprudence as they are ignorant of law”. But perhaps the problem lies within our definition of legal personality?

I have now addressed the question of whether legal personhood can be reduced to right-holding or duty-bearing, and found the answer to be negative. What I will do now is address very briefly whether legal personhood means the capacity to hold rights or to participate in legal relations.

Capacity to hold rights

As said, the capacity-for-rights conception does not really find support in the modern analytic theories of rights. One’s capacity to hold rights is not something that could be bestowed by the legislator or a judge. However, there is a limited sense in which the capacity-for-rights view is appealing. Private law involves, to a large extent, legal enforcement of what Hart calls special rights, which “arise out of special transactions between individuals or out of some special relationship in which they stand to each other” and where “the persons who have the right and those who have the corresponding obligation are limited to the parties to

64 An interesting exception in this regard is Arthur Machen, who claims that legal personhood is not about right-holding at all but only about duty-bearing. Arthur W Machen, ‘Corporate Personality’ (1911) 24 Harvard Law Review 253, at 263.
65 Kelsen, General Theory of Law and State, at 95.
66 The claim is also false with regard to rights, but not as glaringly false.
A large number of such relations are only recognised and enforced by legal systems if they arise between two legal persons. For instance, slaves could typically not enter into legally enforceable contracts, such as marriage. In this sense, the abolition of slavery involved granting the slaves the capacity to hold certain legally enforceable special rights. (They were, of course, granted other types of entitlements, too.)

The capacity-for-rights view can explain some private-law rights quite well. It seems that it was originally proposed in private-law context, as well. Savigny, who introduced the term Rechtsfähigkeit (legal capacity/capacity for rights) did indeed focus on private law in his System.

V. Alternative account

This essay has mostly consisted of highlighting the unsustainability of the paradigmatic theories of legal personhood. I will now offer a brief outline of what I consider to be the distinguishing features of legal persons.

The New York State Supreme Court, Appellate Division referred – perhaps inadvertently – to two different definitions of legal personality: in Black’s Law Dictionary, cited by the court, a legal person is defined both as “any being whom the law regards as capable of rights and duties”, and “[a]n entity […] that is recognized by law as having the rights and duties [of] a human being” (emphasis added). These definitions may seem very similar, but the latter is considerably closer to the truth: legal personality is not about having rights or duties in general, but rather about holding some or all of the specific types of legal entitlements and burdens that are held by some or all human beings in virtue of their status as legal persons. So, what are such entitlements and burdens? Consider the legal difference (in a typical Western jurisdiction68) between

1. newborn children and late-stage foetuses
2. newborn children and nonhuman animals
3. newborn children and adult human beings of sound mind

In cases (1) and (2), the relevant difference – which establishes the legal personality of newborn children – is that children hold many of the entitlements and burdens that are generally associated with legal persons:

67 Hart, ‘Are There Any Natural Rights?’. It may be that Hart precluded tort law from his conception of special rights, but I am here addressing also tort.

68 “Typical” in that the jurisdiction has, for instance, preserved the born-alive rule: only children that are born alive are legal persons.
- they may own property even if they cannot dispose of it independently;\textsuperscript{69} 
- their lives, liberty, and bodily integrity are protected, and in jurisdictions with a bill of rights, they are protected by those rights; 
- they have standing in courts and can thus be parties in lawsuits (though infants need, of course, someone else to represent them); 
- they are not susceptible to being owned;\textsuperscript{70} 
- they are protected by criminal law as potential victims (killing a newborn counts as a homicide, which is not the case with foetuses in most jurisdictions); and\textsuperscript{71} 
- they can undergo legal harms (torts) which may lead to restitution or compensation.\textsuperscript{72}

These are \textit{incidents of legal personality}. Neither nonhuman animals nor human foetuses hold such incidents to a high degree, though these two groups are mutually different in two aspects: nonhuman animals are property and thus susceptible to being owned, whereas human foetuses are not, and human foetuses benefit from the \textit{nasciturus} or born-alive rule, according to which one who is about to be born is to be treated as if already born whenever that is to his or her advantage, \textit{if} she or he is later born alive.

I call the incidents above \textit{passive incidents}, as they do not presuppose the kind of deliberative capacity, requisite for acting in the law, that adult human beings of sound mind have.\textsuperscript{73} This difference between newborn children and adult human beings of sound mind becomes relevant in case (3), as legal persons with high-level reasoning capabilities hold some additional, \textit{active incidents}:

- they can enter into contracts and perform other acts-in-the-law
- they are regulated by law and held responsible for their actions
- in democracies, they have political rights and powers, such as the right and power to vote

\textsuperscript{69} This depends somewhat on the jurisdiction, however. In certain common-law jurisdictions (such as England), children may only be the beneficiaries of trusts. Even in such jurisdictions where infants are allowed to own property, from a Hohfeldian point of view they only hold ownership-related claim-rights but not the ownership-related powers that require more advanced volitional capacity.
\textsuperscript{70} For example, Article 16-1 of the French Civil Code states explicitly that the human body, its elements and its products cannot be the objects of economic rights (\textit{droit patrimonial}). The question of whether human bodies can be property in the context of common-law jurisdictions is discussed extensively in Margaret Jane Davies and Ngaire Naffine, \textit{Are Persons Property?: Legal Debates About Property and Personality} (Ashgate 2001).
\textsuperscript{71} Even if in some jurisdictions the killing of one’s newborn may lead to a less harsh sentence than a typical homicide. For example, according to Finnish law, “[a] woman who in a state of exhaustion or distress caused by childbirth kills her baby shall be sentenced for infanticide” (Finnish criminal code, chapter 21, section 4).
\textsuperscript{72} See Stone 102, at 4: “in determining the granting of legal relief, the court must take \textit{injury to it} [to the right-holder] into account; and […] that relief must run to the \textit{benefit of it}.”
\textsuperscript{73} I am not the first to distinguish between active and passive elements of legal personhood. See for instance MacCormick 94, at 78.
Of these three incidents, slaves in the antebellum South held only the onerous one, that is, they were persons in the eyes of the criminal law. These active and passive incidents are what is distinctive about legal persons – not right-holding or duty-bearing in general, but the holding of specific types of legal entitlements and burdens. Legal personality according to the theory offered here is a cluster concept. There is thus no exact border between legal personality and nonpersonality. An entity may hold certain of the aforementioned incidents and not others. This is what court cases concerning personhood are often about: the *Tommy* case concerned the question of whether chimpanzees are legal persons for the purposes of *habeas corpus*, whereas a recent ruling in Oregon included “animals [...] in the class of ‘persons’ that officers may aid without a warrant”, thus improving the criminal-law protection of animals.74

We can thus distinguish legal personality with regard to a particular incident or a set of incidents from legal personality *tout court*, without qualifications. Slaves were clearly legal persons in the limited sense described above – what I call purely onerous legal personality – but were they legal persons *tout court*? Because of the cluster nature of legal personality *tout court*, there is no clear divide between legal persons and nonpersons, but the slaves were endowed with a very limited set of the incidents, which is why they were clearly not legal persons *tout court*.

VI. Conclusions and discussion

In this essay, I have challenged the paradigm conception of legal personality and sketched an alternative view. Legal nonpersons can hold rights, or – if one endorses the will theory – that legal persons do not necessarily hold any rights. Instead of the formalistic definitions recounted above, the sufficient condition for legal personality consists in being the holder of incidents of legal personality, such as fundamental rights, criminal law, legal standing, and so forth – even though there is no clear-cut threshold between persons and nonpersons.

The proposed account has many benefits. In everyday legal parlance the term “right” is often used indiscriminately to refer to both interest-theory and will-theory rights, so in this discourse there is no reason to abstain from talking of the legal rights of legal nonpersons. However, because animals are not legal persons and only legal persons can supposedly hold rights, many jurists (such as the judges of the New York court) are hesitant to call the animals’ legal protections rights. One thus sees dissimilarity where there

74 The Oregon Supreme Court has in fact recently delivered two interesting judgments in this regard. In *State v. Fessenden/Dicke* (355 Or 759 (2014)) the court affirmed a decision by a lower court, according to which “animals were included in the class of ‘persons’ that officers may aid without a warrant” (at 763). *State v. Nix* (355 Or 777 (2014)) concerned Oregon’s anti-merger statute, according to which a given type of conduct that violates only one statute constitutes as many crimes as there are victims. The court ruled that animals are such victims, which is why the defendant could be convicted of 20 counts of animal neglect rather than only one.
is uniformity because of the current paradigmatic theory. Secondly, the simplistic, binary nature of the current theory obfuscates the fact that an entity can simultaneously be a legal person for some purposes and a legal nonperson for others. It is obvious that slaves bore some criminal-law duties, but is this a reason enough for claiming that slaves were legal persons in general, without any qualifications? Relatedly, the positions I criticise often ignore dissimilarities between different areas of law: for instance, the capacity-for-rights view does have some application in the field of private law but it is unsuitable as a general theory of legal personality.

The New York State Appellate Court believed it was deciding whether to grant Tommy his first right. This premise was misguided, as Tommy was already protected by legal safeguards that, in the case of people, we call rights. Thus, the case was not about whether Tommy ought to be included in the “rights paradigm”, as animals already hold rights, but about whether a particular legal personhood-related institution ought to be extended to cover the chimpanzee. Though my proficiency in reading Spanish is limited, the Cámara Federal de Casación Penal in Argentina seemed to arrive at a much more reasonable conclusion in a habeas corpus case that was decided also in 2014. In a strikingly short verdict, the court simply noted that the orangutan Sandra already holds rights and should be deemed a non-human subject of rights (sujeto de derechos). Though I don’t think the court meant to distinguish “subject of rights” from “legal person”, this could be a useful distinction. We could thus say that animals are already the subjects of some rights but not legal persons.

Such disentangling of right-holding from legal personhood offers various benefits. It allows jurists to discuss animal rights without being uneasy about the topic: they need not worry that conceding the existence of animal rights would be extravagant because of its implying the legal personhood of animals. On the other hand, lawsuits concerning animal personhood do not need to focus excessively on the question of whether animals can, or ought to, hold rights at all, but rather on whether the animals in question ought to hold the particular legal entitlements that are being claimed for them. For it is of course the case that, though animals are not currently legal persons in Western jurisdictions, legal personality can be extended to them – there is no conceptual barrier that prevents the application of legal personality-related institutions, such as standing and habeas corpus, to nonhuman animals. However, only the passive elements, which infants also partake in, should apply. Animals should not for instance be criminally liable, as was the case in medieval animal trials, for animals do not possess the requisite deliberative capacities. The legal

75 “Que, a partir de una interpretación jurídica dinámica y no estática, menester es reconocerle al animal el carácter de sujeto de derechos, pues los sujetos no humanos (animales) son titulares de derechos, por lo que se impone su protección en el ámbito competencial correspondiente [...].” Cámara Federal de Casación Penal, 18 de Diciembre de 2014, Id SAJ: NV9953
arrangements to ensure the enforcement of the legal personhood-related entitlements that animals hold would be analogous to those that are applied in the case of infants: for instance, if animals were to own property, they would need guardians to dispose of it.

Finally

This short paper has probably not been enough to persuade the readers that my account of legal personality is the best one. But hopefully it has at least managed to show that there are alternative ways of understanding legal personality apart from the legal-persons-as-right-holders view. For us Continental jurists, the paradigmatic theory may seem almost tautological because of the connotations of oikeussubjekti or sujeto de derecho. But this does not have to mean that equating legal persons with the holders of rights would be the best way of understanding this conceptual scheme. Thus, rather than taking the legal-persons-as-right-holders dogma to be true by definition, the matter should be reopened for theoretical investigation in order to reach an account that can best explain the pressing issues of the 21st century.