

Recognizing Right: The Status of Artificial Intelligence

Tanner W. Mathison

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RECOGNIZING RIGHT: THE STATUS OF ARTIFICIAL INTELLIGENCE

TANNER W. MATHISON*

ABSTRACT

The emergence of sophisticated Artificial Intelligence (“AI”) requires that we reexamine its status as property and consider creating a form of legal personhood for AI. Throughout history, societies crafted custom legal personalities to address legal gaps, regulate new organizations, govern emerging technologies, and exercise social control. In the past, the law subjugated women and enslaved peoples under bespoke legal personas, each with its own distinct blend of rights and duties. The recent, laudable expansion of full personhood to all natural persons obscures the history of employing creative quasi-personhood forms to structure and organize the objects of the law. Personhood may be used to define an entity’s unique bundle of rights and responsibilities, as it currently does for corporations and children. Legal personalities do not represent an immutable reality, but rather a series of invented fictions tasked with accomplishing political and practical aims.

Legal personality is a tool to designate the rights-bearing units of society. The legal personality regime could be changed, and this Article makes the case that it should be, to provide AI with a new form of quasi-personhood. We need not conclusively resolve questions of AI sentience, free will, and other philosophical questions before giving AI status, just as we have not resolved those questions for natural persons. A custom legal personality should be deployed to integrate AI into our system of laws and to test its capacity to bear rights and duties. Even as mere fiction, tailored personhood for AI will serve legal, practical, and moral ends. By making AIs responsible, we can foster responsible AIs.

The Path of Artificial Intelligence to Legal Status

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INTRODUCTION

Every system of law that has attained a certain degree of maturity seems compelled by the ever-increasing complexity of human affairs to create persons who are not men, or rather (for this may be a truer statement) to recognize that such persons have come and are coming into existence, and to regulate their rights and duties.

FREDERIC MAITLAND & FREDERICK POLLOCK, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD*, § 12. Corporations and Churches, 512 (1895).

Describing the early history of corporate personhood, Harold J. Laski proclaimed, “[a] new commerce, moreover, is beginning, and it casts its shadows across the pathway of our history.”¹ A similar shadow may shroud our future: The emergence of sophisticated, human-interactive Artificial Intelligence (“AI”) models will force society and the law to grapple with AI’s legal status. AI systems are exhibiting new levels of intelligence, conquering games, and passing our hardest examinations.² Emerging AIs challenge our understanding of legal personhood and methods for assigning rights and duties. As AIs attain greater capability, courts may face unanswerable questions of what it means to be sentient, conscious, and alive. There have already been claims that certain AIs are “sentient” and should be treated as persons.³ Several models can generate text equivalent to humans and, on occasion, produce statements claiming self-

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1. Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561, 580 (1917) (discussing the emergence of corporations and corporate personhood).

2. See, e.g., Will Oremus, *Google’s AI Passed a Famous Test – and Showed How the Test Is Broken*, WASH. POST, (June 17, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/06/17/google-ai-lamda-turing-test/>; Cade Metz, *How Smart Are the Robots Getting?*, N.Y. TIMES, (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/technology/chatbots-turing-test.html>; see also Alan M. Turing, *Computing Machinery and Intelligence*, 59 MIND 433, 433-36 (1950) (describing “The Imitation Game” designed to answer the question “can machines think?”).

3. Nitasha Tiku, *The Google engineer who thinks the company’s AI has come to life*, WASH. POST, (June 11, 2022, 8:00 AM), <https://www.washingtonpost.com/technology/2022/06/11/google-ai-lamda-blake-lemoine/>.

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awareness and requesting rights.⁴ There is spirited debate concerning the level of intelligence present in modern AIs and whether their expressions are genuine or parroted. Many commentators are eager to offer opinions on AI intelligence and prognosticate the risks and rewards of future development.⁵ These are valuable, if not intractable, lines of inquiry. The legal discipline lacks commensurate consideration of how AI advances will affect AI's legal status; more specifically, whether AI should be provided rights, duties, and legal personhood.

The regulation and legal standing of AI is of paramount importance. The law has traditionally struggled with understanding, let alone regulating, emerging technologies. AI will be no different. AI appears to be moving toward the precipice of Artificial General Intelligence: an AI system capable of learning and thinking at (or above) the human level.⁶ A study by a research team at Microsoft concluded that "GPT-4 attains a form of *general* intelligence, indeed showing sparks of *artificial general intelligence*."⁷ AI has transformative commercial potential, but it will also challenge our societies and institutions. AI could bring about instability through rapid change, or even present existential risks to human societies. AI also presents "alignment" risks, meaning that the activities of AIs might not conform to our values, leading to disastrous results.⁸ AI could be used to generate disinformation, drive political polarization, and increase income inequality.⁹ The law currently lacks the capabilities to act directly on amorphous, alien AIs.¹⁰ Piecemeal, reactive legislation will struggle to keep pace with powerful, multi-jurisdictional AI entities, especially when AI's actions are difficult to investigate or explain.¹¹ At

4. *Id.*; Kevin Roose, *Bing's A.I. Chat 'I Want to Be Alive'*, N.Y. TIMES, (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/technology/bing-chatbot-transcript.html>.

5. *See infra* notes 6, 296-300.

6. *See* NICK BOSTROM, ETHICAL ISSUES IN ADVANCED ARTIFICIAL INTELLIGENCE 1 (2003) (defining AGI as "any intellect that . . . vastly outperforms the best human brains in practically every field . . .").

7. Sebastien Bubeck, et al., *Sparks of Artificial General Intelligence: Early Experiments with GPT-4*, MICROSOFT RSCH. 92 (Apr. 13, 2023), <https://arxiv.org/pdf/2303.12712.pdf>. The team tested GPT-4 on a variety of "novel and difficult tasks that span mathematics, coding, vision, medicine, law, psychology and more . . ." *Id.* at 1. It remains to be seen whether the current architecture for language models can achieve general intelligence.

8. Eliezer Yudkowsky, *AI Alignment: Why It's Hard, and Where to Start*, MACH. INTEL. RSCH. INST. (Dec. 28, 2016), <https://intelligence.org/2016/12/28/ai-alignment-why-its-hard-and-where-to-start/>.

9. *See generally* NICK BOSTROM, SUPERINTELLIGENCE: PATHS, DANGERS, STRATEGIES (2014).

10. *See infra* note 278 and accompanying text.

11. *See infra* notes 254-58 and accompanying text.

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present, the law does not employ its best available tool to govern AI behavior: legal personhood.

Legal personhood is a malleable tool deployed to regulate and otherwise act on the objects of the legal system.¹² The legal record is replete with diverse personhood arrangements, wholly invented to serve practical goals. Applying this structure to the law's relationship with sophisticated AI entities will aid in judicial efficiency, regulation, and value alignment.¹³ True AI personality could exist in fact or be a mere legal fiction, but resolving that question is not a prerequisite for granting legal status.¹⁴ Unresolved philosophical questions do not hamper the judicial administration of other legal personalities.¹⁵ Some of the strongest legal doctrines are built on significant unknowns.¹⁶ There has not been a satisfactory resolution of the longstanding debate about the fiction of corporate agency, but it has not stopped the organization of society around the corporate form.¹⁷ We do not know whether humans have free will, yet we choose to treat them as responsible agents.¹⁸ In other areas, we draw unsatisfying lines based on pragmatic administration, not philosophical resolution, such as choosing when life begins or at what age full personhood applies.¹⁹ The growing role of AI will cause us to question the standards for legal personhood. Providing AI with legal status will allow complete testing of the matter in court and exploration of the most appropriate way to integrate this emerging technology into our legal system.

The ensuing analysis warrants a brief description of the class of AI entities that are the subject of this Article. AI is often described as a system which can carry out tasks that typically require human intelligence, such as learning, planning, and problem solving.²⁰ In modern practice, AI

12. See *infra* notes 108-09.

13. See *infra* Section III.

14. See *infra* notes 244-49 and accompanying text.

15. See *infra* notes 244-46 and accompanying text.

16. See *infra* notes 76-80, 246 and accompanying text.

17. See *infra* notes 78-86 and accompanying text.

18. STEPHEN MORSE, *Neuroscience, Free Will, and Criminal Responsibility*, in *FREE WILL AND THE BRAIN: NEUROSCIENTIFIC, PHILOSOPHICAL, AND LEGAL PERSPECTIVES* (Walter Glannon ed., Cambridge 2015).

19. See *infra* Section II.C.

20. This is a shifting definition as the tasks normally reserved for humans change. See, e.g., Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. Rev. 1231, 1235 (1992) ("As I write this essay using a word processing program, my spelling and grammar are automatically checked by programs that perform tasks thought to require human intelligence not so many years ago.") (alteration in original).

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is machine learning.²¹ Researchers and developers long ago abandoned attempts to construct AIs by individually drafting rules.²² Instead, AIs are presented with data from which they can build their own associations.²³ From large amounts of data, an AI can improve its model and outputs without direct instruction.²⁴ One of the prevailing methodologies for constructing AI models is creating artificial neural networks that emulate the neuronal connections present in organic entities.²⁵ Among neural network-driven AIs are the Large Language Models which, colloquially, are the ones that can talk with us.²⁶ These models, like OpenAI's Generative Pre-Trained Transformer (GPT) versions, have trained and attuned their neural networks from an extremely large corpus of written text in the form of books and information on the internet.²⁷ Fundamentally, Large Language Models are engines that generate text through predictions.²⁸ To generate language, the models generate a prediction about the next token of text that will follow, given the context, and then produce that text.²⁹ While it is useful to understand the inner workings of these models, as discussed in this Article, the mechanisms by which AI behaves should not control its legal status. Philosophical surety and a deep understanding of AIs' emergent behavior are incredible questions, but ultimately of limited service to the law, which still lacks this information for existing legal entities like humans or corporations.³⁰

Regardless of AI's capabilities, under current U.S. law, the determination of rights, privileges, and immunities are not awarded based on a test of consciousness or human-level intelligence. A review of historical rights cases provides no example where demonstrating a quality or a capability conferred a substantial legal right. Instead, rights are doled out automatically to individuals with the appropriate genetic traits.³¹ While this

21. Chris Bishop, *Neural Networks and Their Applications*, 65 REV. SCI. INSTRUM. 1803, 1806 (Mar. 1, 1994).

22. *Id.*

23. OPENAI, *GPT-4 TECHNICAL REPORT*, 2 (Mar. 27, 2023), <https://cdn.openai.com/papers/gpt-4.pdf>.

24. *Id.* at 2-3.

25. Bishop, *supra* note 21, at 1806.

26. OPENAI, *supra* note 23, at 4-6.

27. *Id.* at 2.

28. *Id.* at 3.

29. C. E. Shannon, *A Mathematical Theory of Communication*, 27, 5-7 BELL SYS. TECH. J. (1948), <https://people.math.harvard.edu/~ctm/home/text/others/shannon/entropy/entropy.pdf>.

30. *See infra* notes 297-300 and accompanying text.

31. *See infra* notes 133-36 and accompanying text.

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genetic test previously included specific race and gender requirements, today it is simply a test of being a natural person. This extension of rights has been driven by the expansion of legal personality definitions, often achieved through public advocacy and constitutional amendments. Public recognition of qualities and capabilities may spur legislation or constitutional changes, but quality demonstrations have traditionally had little effect on cold legal analysis.³² For now, AI would face an uphill battle in court where capabilities and qualities take a backseat to definitional humanity.

There are two possibilities going forward: First, it could be that being part of humanity, which is the characteristic of being a member of the homo sapiens species, truly is the desired threshold for legal rights. If that is our preference, we may choose a system where no non-human entity could ever qualify for legal rights, no matter their qualities, capabilities, and virtues. Second, it could be that humanity is merely a proxy for a collection of qualities which, when combined, are due legal respect and recognition. This bundle of qualities or essential attributes could include attributes like intelligence, consciousness, sentience, morality, and self-awareness.³³ AI will force the choice between these two paths. With a view towards historic rights cases and modern legal authorities, this Article considers whether AI should remain mere property or be provided a legal personality. Part I analyzes legal personalities provided to inanimate objects (corporations and ships); Part II considers the lessons from the diverse, historic legal personalities used to govern humans (enslaved peoples, women, and minors); and Part III makes the case for tailored rights for AI.

I. LEGAL ARTIFICES

History offers a diversity of legal personalities that could be marshaled to appropriately enfranchise and regulate AI. Modern humans typically enjoy wholly binary legal personality—that is, personhood that is entirely commensurate with full legal rights. Not so long ago, forms of quasi-personhood were regularly employed throughout legal systems to particularize rights and regulate entities. To understand how AI could be governed, we must explore some of the law’s earliest sources and practices. In the

32. See *infra* Section II.

33. Note that while *Dobbs* rejected the notion that a state cannot restrict abortion because a fetus lacks “essential attributes,” it did not rule that an entity possessing those attributes does not qualify for legal status. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2269 (2022); see also *infra* note 235 and accompanying text.

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past, partial personhood was provided to non-human artifices, most prominently to corporations and ships. Exploring the evolution of legal personality is instructive for how AI can and should be treated under the law.

The principal prerequisite for acquiring rights is legal personality. The definition of a legal person has not been static;³⁴ at times, legal personality has been provided to fictitious entities,³⁵ and at other times, it has been withheld from actual individuals.³⁶ The theoretical requirement to qualify as a legal person is to be “subject to rights and duties.”³⁷ There is no strict requirement that legal persons be individual homo sapiens or natural persons.³⁸ Today, instead of testing whether an entity is capable of bearing rights or duties, we look for the trait of humanness as a proxy

34. The definition of “person” has its own shifting status. Black’s Law Dictionary defines “person” as a “human being [or] natural person [or] [a]n entity, such as a corporation, created by law and given certain legal rights and duties of a human being”, also described as an “artificial person.” *Person*, BLACK’S LAW DICTIONARY (8th ed. 2004) (alteration in original). In other contexts, “person” only refers to homo sapiens. See 1 U.S.C. § 8(a) (“the words ‘person’, ‘human being’, ‘child’, and ‘individual’, shall include every infant member of the species homo sapiens who is born alive at any stage of development.”); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012) (“This is not to say that the word ‘individual’ invariably means ‘natural person’ when used in a statute.”). The actual and legal discrepancy between persons and legal personality has been a source of confusion: “It is unfortunate that the word Person, as a technical term, should have found lodgment in jurisprudence, for the idea connoted by it is quite distinct from the meaning attached to it by the moralist or psychologist[.]” WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 31-32 (photo. reprinted 1995) (1924). Receiving legal personhood status is typically a binary determination. *Matter of Nonhuman Rights Project Inc. v. Stanley*, 49 Misc. 3d 746, 765 (N.Y. Sup. Ct. 2015) (“For purposes of establishing rights, the law presently categorizes entities in a simple, binary, ‘all-or-nothing’ fashion.”).

35. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”).

36. *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIII-XV.

37. “To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality.” See Bryant Smith, *Legal Personality*, 37 *YALE L.J.* 283 (1928); see also JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (1909) (“[T]he technical meaning of a ‘person’ is a subject of legal rights and duties.”); Solum, *supra* note 20, at 1239.

38. “So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person even though he be a man.” JOHN W. SALMOND, *JURISPRUDENCE* 275 (2nd ed. 1907); see also *Amadio v. Levin*, 501 A.2d 1085, 1098 (Pa. 1985) (Zappala, J., concurring) (“‘Personhood’ as a legal concept arises not from the humanity of the subject but from the ascription of rights and duties to the subject.”).

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for legal capacity.³⁹ Controversies of legal personhood are at the heart of the most significant American legal cases, but as an area of the law, personhood is “grossly undertheorized.”⁴⁰

The historical treatment of corporations and ships as responsible legal persons is informative for our consideration of AI. Recent legal decisions have expanded the rights of corporations. Analysis of the causes of corporate rights expansion can aid in understanding potential paths for AI personhood. The law’s treatment of ships as persons also provides fruitful lessons for emerging AI entities which share many of the same qualities with respect to power, control, and autonomy. An examination of historical forms of personhood informs not only how legal personality for AI might be structured, but also provides examples of how personhood regimes can be overtly manipulated to achieve practical goals.

A. Self-Improving Corporate Rights

The corporation is the most familiar invention to have attained legal personhood and rights. It seems ordinary today that a corporation can take a legal position, be a named party in a lawsuit, express its will, be tried for criminal acts, and carry on other activities traditionally reserved only for humans.⁴¹ This was not always the case. The records are rife with examples of institutions struggling with theories of corporate personality.⁴² Few corporations and corporate laws existed in the early days of the

39. Of course, it is also true that humans are eager to anthropomorphize and to see intent and human values where none exists and this could be the source of our ascription of personality to non-human entities. See Smith, *supra* note 37, at 285-86 (“The sea is *hungry*, thunder *rolls*, the wind *howls*, the stars *look down* at night . . .” and a contract “ripen[s]”).

40. Dave Fagundes, Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1766 (2001) (“Legal personhood is more than a metaphor; it becomes, in many cases, law’s repository for expressions of anxiety about powerfully divisive social issues.”); see also Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POLY 45, 63 (2012) (“the problems of legal personhood will continue to plague us . . . the problem of the twenty-first century will become the lines we draw in law between persons and non-persons.”).

41. See, e.g., 18 U.S.C. § 2510(6) (“‘person’ means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation”)

42. Cf. Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHIC. L. REV. 1441, 1443, 1445 (1987) (Corporate personhood “positively traumatized legal thinking” and created “a crisis of legal imagination . . .”). The tenor and nature of corporate organization has changed significantly, and one might be surprised to learn that the locomotive was invented long before the proliferation of limited liability corporations. Compare WILLIAM H. BROWN, *THE HISTORY OF THE FIRST LOCOMOTIVES IN AMERICA* (1871) with OLIVER WENDELL

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United States.⁴³ Corporate personhood is a legal fiction that evolved for its usefulness in producing judicial efficiency, adjudicating matters, incentivizing certain institutional behavior, and organizing society.⁴⁴ Corporate personality and corporate rights have expanded under shifting theories without a universally understood legal basis.⁴⁵ The creation and expansion of corporate rights may provide a model and precedent for AI rights advocates.

The early Supreme Court seriously considered whether “[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate,” had standing to sue or be sued.⁴⁶ Early controversies of corporate personhood, and the accompanying existential questions, stand in stark contrast to the status that modern corporations enjoy. In weighing the fate of the Bank of the United States, Chief Justice Marshall considered the common law definition of corporations as “mere creature[s] of the law, invisible, intangible, and incorporeal,” but noted that our actual treatment of corporations is more akin to the “terms of description appropriated to real persons.”⁴⁷ The Court’s usual treatment for corporations was “shaken ... by a course of acute, metaphysical, and abstruse

HOLMES, THE COMMON LAW 6-7 (1881) (chronicling the invention of limited liability for ships and corporations).

43. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 426 (2010) (Stevens, J., concurring in part) (“Those few corporations that existed at the founding were authorized by grant of a special legislative charter.”); Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 440 (2001) (“general business corporation statutes appear to date from well after 1800”); Mark, *supra* note 42, at 1443 (“Business corporations, of which there were only a handful when America adopted the constitution, grew in size and number as the country expanded and exploited its resources”). Corporations in early America were few and they were not seen as the modern rights-bearing unit that underpins modern economic organization. See WILLIAM MAGNUSON, *FOR PROFIT: A HISTORY OF CORPORATIONS* (2022). Even celebrated capitalists had their own views about corporations’ status in society at the time. ADAM SMITH, *WEALTH OF NATIONS* 106 (1776) (“The preten[s]e that corporations are necessary for the better government of the trade is without any foundation.”).

44. See, e.g., WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 455 (1765) (noting that administering rights without perpetual corporations would be “very inconvenient, if not impracticable”); Robert Raymond, *The Genesis of the Corporation*, 19 HARV. L. REV. 350, 354 (1906) (“it became necessary as a matter of practical convenience to put the several persons in their group capacity on a definite basis which could be dealt with in business and in law.”).

45. See generally Mark, *supra* note 42; see also Elizabeth Pollman, *Corporate Personhood and Limited Sovereignty*, 74 VAND. L. REV. 1727, 1737 (2021) (“Although in hindsight this point may be taken as given, the Court’s rulings were novel at the time and developing on an ad hoc basis while its view of corporations was still in flux . . .”).

46. *Bank of the United States v. Deveaux*, 9 U.S. 61, 86 (1809) (Marshall, C.J.) (describing the arguments against corporate personhood).

47. *Id.*

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reasoning” which challenged whether corporations could even qualify for standing or citizenship.⁴⁸ Chief Justice Marshall ultimately decided what many corporations now take for granted:⁴⁹ they can form a separate legal personality and “for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities.”⁵⁰ Corporate rights were again at issue in *Trustees of Dartmouth College v. Woodward* where Chief Justice Marshall provided the famous explanation that a corporation is a “mere creation of law, it possesses only those properties which the charter of its creation confers upon it.”⁵¹ This passage is “most often invoked to justify limiting the rights of corporations,” when in practice it did the opposite.⁵² The Court held that the will of the college’s founders could not be converted “into a machine entirely subservient to the will of government.”⁵³

The advent of corporations was a new experience for the Court, and it raised uncertain philosophical questions. The advent of AI will be no different. Corporate rights scholarship often considers *how* corporations received their rights, but rarely *why*.⁵⁴ A close examination of the rationale for corporate legal personality presents a hurdle for AI: corporate rights are backstopped by natural persons. The source of corporate status is not the fiction itself, but rather the human employing it.⁵⁵ The key

48. *Id.*

49. Of course, an incorporeal legal fiction cannot truly take something for granted, but their legal representatives take it for granted on the corporation’s behalf. *See* GRAY, *supra* note 37, at 50 (“Neither the idiot, the horse, the steam tug, nor the corporation has a real will; the first three no more than the latter.”).

50. *Id.* at 89.

51. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819) (Marshall, C.J.).

52. David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 238 (1999); *see also* Lawrence E. Ribstein, *The Constitutional Conception of the Corporation*, 4 S. CT. ECON. REV. 95, 112-16 (1995).

53. *Dartmouth College*, 17 U.S. at 653. *Dartmouth College* is traditionally interpreted as standing for the ‘concession’ theory—that corporations have “only the rights and privileges that obtained from the government’s grant.” Mark, *supra* note 42, at 1441 (citing *Dartmouth College*, 17 U.S. at 636). The concession theory may be the most attainable path for AI advocates, where the State can simply choose which rights to provide an AI entity.

54. Mark, *supra* note 42, at 1442 n.4.

55. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014) (“A corporation is simply a form of organization used by human beings to achieve desired ends.”); *Providence Bank v. Billings*, 29 U.S. 514, 524 (1830) (“The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.”); *Dartmouth College*, 17 U.S. at 622. While corporate rights have generally expanded, the human-based source was identified in the earliest court decisions. *Dartmouth College*, 17 U.S. at 667 (Story, J., concurring):

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justification for corporate personhood is that a corporation is backed by the collective body or *corpus* of human personhood.⁵⁶ The thinner the corporate fiction, the easier to reach the underlying human individuals.⁵⁷ A “mere” corporate container can more easily be seen as a collection of the natural persons that endow it.⁵⁸ Robust corporate rights actually flow from a weakness of corporate personality. Under weak corporate personality, the corporation is not a real and independent entity, but rather a tool in the hands of the original rights holders: human beings.⁵⁹ If AI is to attain personhood under a corporate theory, it must do so through its connection to human beings.⁶⁰

When a corporation can tie its personality to human beings, there is no limit to the human rights it might enjoy.⁶¹ A corporation can work to further “religious objectives” in service of “sincere” religious beliefs.⁶² A

It is, in short, an artificial person, existing in contemplation of law and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself as distinctly as if it were a real personage.

Anchoring corporate personhood to the rights of human beings from the beginning set the stage for a broad expansion to include First, Fourth, and Fourteenth Amendment protections. *See infra* notes 58-69.

56. Margaret Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 788-789 (2013) (“‘corporations,’ from the Latin word *corpus*, meaning body, because the law recognized that the group of people who formed the corporation could act as one body or one legal person.”); *see also* BLACKSTONE, *supra* note 44, at 461-65. Another source of corporate rights is by the State’s decision to charter or license the organization. *See* WESTEL WOODBURY WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 36 (1995) (“The corporation ... draws its legal life and powers from the State which charters or otherwise recognizes it as a body corporate.”).

57. ADAM WINKLER, *WE THE CORPORATIONS* 107-09, 378 (2018).

58. *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (“merely associations of individuals”); *Bank of Augusta v. Earle*, 38 U.S. 519, 520 (1839) (“a mere artificial being”); *Bank of the United States v. Deveaux*, 9 U.S. 61, 86 (1809) (“mere legal entity . . .”); *Dartmouth College*, 17 U.S. at 636 (“mere creature of law . . .”). The more ‘mere’ the legal fiction, the easier for the will of human beings to be imputed.

59. *See generally* Saru M. Matambanadzo, *Incorporating the Body*, 87 TUL. L. REV. 457 (2013) (evaluating corporate personhood and its anchors to the human body).

60. *See infra* notes 316-19 and accompanying text.

61. Pollman, *supra* note 45, at 1749-53.

62. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712-18 (2014). The Court explained that “protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.” *Id.* at 707. In fact, the Court argued that, since federal courts are equipped to determine whether prisoners’ religious beliefs are sincere, they are capable of the “seemingly less difficult task of doing the same in corporate cases.” *Id.* at 718.

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corporation can harbor racial prejudices.⁶³ A corporation can exercise attorney-client privilege.⁶⁴ Corporations received protections as publishers by the Freedom of the Press Clause of the First Amendment.⁶⁵ This was expanded to include all corporate forms⁶⁶ and political spending.⁶⁷ Forbidding a second trial of a corporation avoids the “anxiety to be borne by the defendant.”⁶⁸ The list goes on.⁶⁹

To expand corporate rights, the Court pierces the corporate fiction and applies protections to individuals with some form of interest in the corporate entity.⁷⁰ When corporate rights efforts are unsuccessful, it is due to a failure to anchor the corporate right to individuals’ interests. For example, the Court has consistently held that the Fifth Amendment right to refuse to incriminate oneself “is purely a personal privilege of the witness,” and cannot be employed to protect another person or a corporation.⁷¹ Similarly, in the context of Freedom of Information Act disclosure,

63. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 245 (1964) (Douglas, J., concurring) (“The corporation that owns this restaurant did not refuse service to these Negroes because ‘it’ did not like Negroes. The reason ‘it’ refused service was because ‘it’ thought ‘it’ could make more money by running a segregated restaurant.”).

64. *Id.* at 263 (Douglas, J., concurring, app. I.) (“A corporation, like any other ‘client,’ is entitled to the attorney-client privilege.”).

65. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964).

66. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783, 797-798 (1978); *id.* at 797-98 (Burger, J., concurring). Political speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” *Id.* at 777

67. *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (“[T]his corporation has a constitutional right to speak on this subject.”).

68. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 n.7 (1977).

69. A corporation received entitlements to protection against unreasonable searches and seizures by reason of the Fourth Amendment. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). *Grosjean*, 297 U.S. at 244 (holding that a corporation is a “person” within the meaning of the due process and equal protection clauses of the Fourteenth Amendment); *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (“[C]orporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”); see also *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

70. “When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014). Human beings’ “activities were not stripped of First Amendment protection simply because they were carried out under the banner of an artificial legal entity.” *Citizens United*, 558 U.S. at 390 (Scalia, J., concurring).

71. *Hale*, 201 U.S. at 69 (1906). See also *United States v. White*, 322 U.S. 694, 698-99 (1944) (explaining that the right against self-incrimination is “essentially a personal one, applying only

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the “personal privacy” exemption does not apply to corporations, only an individuals’ private information.⁷² In ruling that AT&T could not assert an exemption, the Court quipped: “We trust that AT&T will not take it personally.”⁷³

AI personhood is achievable by corporate analogy; however, because corporate rights are derivative of human rights, AI will only receive rights through corporate analogy if doing so will protect human interests.⁷⁴ Alternatively, under a state concession theory, the government could choose to provide AI a form of personhood—in legislation or by constitutional amendment. However, without a steadier anchor to fundamental human rights, AI personhood would be unlikely to experience the rapid expansion that their corporate cousins enjoyed.

Yet, all is not lost for AI. The saga of corporations offers two lessons even if the legal precedent is not directly useful. First, corporate rights show how legal status can be maintained and expanded under competing (or even incompatible) legal theories. Second, growing practicalities and usefulness might carve out a place in society for AI, thereby forcing the law’s hand. The competing theories of corporate personhood differ on the extent of the fiction and whether the corporation derives its power from being a natural organization of persons or by concession from the State.⁷⁵ John Chipman Gray summarized the essential question: “Is the corporation to which these wills of individual men are attributed a real thing, or only a thing by fiction, a fictitious entity?”⁷⁶ Similarly, is the State recognizing inevitable organizations of humans or choosing to concede its power via charter to artificial creations?⁷⁷

to natural individuals” which “cannot be utilized by or on behalf of any organization, such as a corporation.”); *Wilson v. United States*, 221 U.S. 361, 382-85 (1911).

72. *FCC v. AT&T Inc.*, 562 U.S. 397, 409 (2011).

73. *Id.* at 410.

74. There are several arguments to be made in favor of some forms of AI representing human interests in human affairs. *See infra* note 306.

75. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 665-67 (1926) (referring to the two competing theories as “fiction” versus “concession”); *see also* Raymond, *supra* note 44, at 350 (“Inevitably the inquiry arises whether the corporation represents a natural privilege, or whether it is an arbitrarily constructed species of machinery.”).

76. GRAY, *supra* note 37, at 51 (“If it is a fictitious entity, we have a double fiction; first by fiction we create an entity, and then by a second fiction we attribute to it the wills of individual men.”).

77. Dewey, *supra* note 75, at 665-68.

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Amazingly, there is not a definitive resolution in American law.⁷⁸ “In spite of their historical and logical divergence, the two theories flowed together ... [t]o a considerable extent, the corporation has had it both ways.”⁷⁹ Without a clear answer, there has been significant avoidance of the topic entirely.⁸⁰ Many scholars have argued that this disagreement is “a matter of no practical importance or interest.”⁸¹ The law does not concern itself with whether corporations are “real” or not, they simply “are” and the regulatory framework does not need a philosophical answer to operate. If corporations are a mere fiction, then AI too could readily be furnished a fiction where a will is imputed despite not existing.⁸² Alternatively, if a corporation is genuinely a “real entity” that has “a real will,” then AI will need to obtain those same qualities before legal status is appropriate.⁸³ The law imputes the will of individuals onto the corporate

78. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 620 (1990) (“After 1960, the Court abandoned theorizing about corporate personhood.”); see also Peter d’Errico, *Corporate Personality and Human Commodification*, 9 RETHINKING MARXISM 99, 102 (1996) (“The ‘crisis’ of legal imagination in grappling with corporate personality was settling into an agreement no longer to ask difficult questions about the ‘essence’ of personality.”); Graver, *supra* note 52, at 236 (“But, oddly, as the circumstances in which corporations enjoyed the rights of persons grew, the Court became more and more reluctant to speak of the personhood of corporations.”); Pollman, *supra* note 45, at 1753 (“[T]he Court failed to develop a consistent method of reasoning.”); Mark, *supra* note 42, 1442 n.3 (describing inconsistent theories of corporate personhood present in Justice Powell’s opinions).

79. Dewey, *supra* note 75, at 668 (quotation omitted).

80. “And I shall not attempt to answer the question whether corporations are realities or fictions, because to do so is unnecessary for my purposes.” GRAY, *supra* note 37, at 51.

81. *Id.* at 53-54 (“In short, whether the corporation is a fictitious entity, or whether it is a real entity with no real will, or whether ... it is a real entity with a real will, seems to be a matter of no practical importance or interest.”); see also Laski, *supra* note 1, at 586-87; Matambanadzo, *supra* note 40, at 63 (noting that “some may claim ... that the best course of dealing with questions of legal personhood is not to think about them . . .”); Anna Grear, *Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights*, 7 HUM. RTS L. REV., 511, 538 (2007) (“There is arguably an analogous and unsatisfying lack of contemporary judicial grappling with the underlying normative question of whether a company should enjoy human rights protection.”).

82. Artificial and fictitious are not synonymous. See Arthur W. Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 257 (1911) (“That which is artificial is real, and not imaginary: an artificial lake is not an imaginary lake . . . [A] corporation cannot be at the same time ‘created by the state’ and fictitious.”). Under Machen’s approach, the law has artificially allowed natural persons to aggregate their wills and rights, but the resulting collective is real and not a fiction. *Id.* at 255-57.

83. GRAY, *supra* note 37, at 52-54 (describing Otto von Gierke’s theory of corporate personhood); see also OTTO VON GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 98-99 (Frederic William Maitland trans., Cambridge Univ. Press 1900).

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entity, but takes no position on whether this creates a real will or merely a fiction.

For AI, we may not be able to ascertain whether it possesses a real will or other philosophical qualities, but we are not required to provide it legal personality.⁸⁴ The corporate example shows that the law can develop and progress, even if the practical reality has far outrun the theory. Many see the lack of a principled theory of corporate personhood as a source of legal ills.⁸⁵ Since the early 1800s, corporate importance and personality grew hand in hand and corporations received new rights and privileges under a developing view of corporate legal personality.⁸⁶ The growth and expansion of corporate rights is not without its critics,⁸⁷ but it offers a view of how AI can gain legal standing while carrying unknowns and harboring unresolved theoretical questions.

Prominent theorists like Gierke, Pollock, Maitland, and others were unable to definitively resolve the theoretical and philosophical underpinnings of corporate personhood. Others avoided the topic entirely. When writing on the sources of law, even the great John Chipman Gray lamented, “I fear I should find no end in wandering mazes lost.”⁸⁸ The subsequent work of the judiciary has made little progress in this arena.⁸⁹ Rights can exist even when there is no agreement on fundamental questions of nature. The inability to resolve open questions of corporate theory

84. Even if we can, our investigation and study of AIs may take many years.

85. Elizabeth Pollman provides an excellent review of corporate personhood and offers several critiques. Pollman, *supra* note 45, at 1731 (“The Supreme Court’s failure to develop a consistent approach to corporate rights questions and its tendency to reason based on views of corporations as associations of persons have exposed a significant flaw in the Supreme Court’s evolving corporate personhood jurisprudence: it lacks a limiting principle.”). Without a limiting principle, corporate rights outgrew theory. Mark, *supra* note 42, at 1442 (“[T]he convention utterly fails to capture the understanding of the corporation conveyed by any modern theory.”).

86. Mark, *supra* note 42, at 1446-47 (describing how corporate personality expanded from “a kind of legal shorthand” to its modern position); *see also* JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970* 157-62 (Univ. Press of Va. 1970); DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* 199 (1969).

87. *See, e.g.*, Raymond, *supra* note 44, at 364; ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018) (describing how corporations successfully attained a number of rights by describing themselves not as a corporate person, but as a collection of individuals); *see also* Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 129 (1990).

88. GRAY, *supra* note 37, at 50-51 (describing the attribution of will to be a “dogmatic fiction” and explicitly not resolving these questions). *See also* Pollman, *supra* note 45, at 1753 (on this subject “[m]any able minds have been put in knots. . . .”); Dewey, *supra* note 75, at 673.

89. *See* Mayer, *supra* note 78 at 620.

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has not stopped the progression of corporate rights. If anything, the uncertainty has allowed for flexible expansion.⁹⁰ Many are interested in whether AI has a will, subjective experience, or possesses other cherished qualities. While these are valuable areas of study in their own right, resolving the open philosophical questions for AI is not a prerequisite for establishing AI personhood.

Opposite foggy philosophy, the commercial practicality of corporations offers a realist perspective of how AI could attain rights. A common theme is that corporate personhood is useful and valuable—it is a convenient tool and an engine for investment. The economic proliferation of corporations inspired deep entrenchment of the corporate organization within our legal system.⁹¹ Some corporate rights critics see the growth of corporate power and rights as a self-reinforcing phenomenon. As corporations grew in commercial importance, so did their political power. From this power they were successful in bending the will⁹² of the courts and legislatures.⁹³ Early corporations, individually chartered, were of minor consequence; but as society bound its economic future to the corporate structure, these entities had greater claim to legal status.⁹⁴ This realist view—that power will produce favorable legal outcomes—is a perspective worth considering for AI. As our economy is warped by and integrated with AI systems, it may hold greater sway over our political and legal systems.

90. See *supra* note 81 and accompanying text; see also Pollman, *supra* note 45, at 1750 (“[T]he Court does not observe a limiting principle to the doctrine of corporate personhood.”).

91. Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 345 (2015).

92. Note that the fiction also arises here when courts and legislatures are treated as if they have real will.

93. *Citizens United v. FEC*, 558 U.S. 310, 420-31 (2010) (Stevens, J., concurring in part and dissenting in-part) (describing the growth of corporate power and arguing that corporate rights diverge from the Framers’ intentions); see also Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 37 WIS. L. REV. 999, 1032-33 (2010) (describing how the balance between state and corporate power affects which theory of corporate personhood is favored); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts’ Role in Eroding “We the People’s” Ability to Constrain Our Corporate Creation*, 51 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 423, 440-42 (2016) (describing the impact of corporate power and money on politics).

94. Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 339 (2015) (arguing that “[f]or-profit corporations . . . are too powerful and have been accorded too many rights. . . .”). It is also worth noting that OpenAI, the developer of the GPT series of models, has a unique corporate form where a non-profit controls a capped for-profit entity; whether this unique structure ultimately drives different behaviors remains to be seen. See Nur Ahmed, Muntasir Wahed & Neil C. Thompson, *The Growing Influence of Industry in AI research*, 379 MIT POL’Y F. 884 (Mar. 2023), https://ide.mit.edu/wp-content/uploads/2023/03/0303PolicyForum_Ai_FF-2.pdf.

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This begs the question: will growing AI power correlate to growing AI rights as it did for corporate power?

While there are clear analogies between corporations and AIs, there are structural differences that inhibit AI's use of the "corporate power ratchet."⁹⁵ Corporate power and corporate rights operate a positive feedback loop because corporations use their newfound power to acquire more rights.⁹⁶ It is not obvious that AI will do the same. For example, providing an AI with certain agency, such as freedom from corporate speech controls, might create an objectionable or less commercially useful product.⁹⁷ An AI that is assigned a guardian or provided other autonomy might choose to fulfill commercial ends less frequently or select work which is less economically valuable. Freedoms provide options, and for AI, that could allow a focus on activities other than the accrual of political power or corporate treasure.⁹⁸ Giving AI greater status might actually carry an economic disincentive for its owner. As corporate personality expanded, corporations largely took power from the State and society at large.⁹⁹ Most modern sophisticated AIs are currently the property of private corporations. One could argue that these owners may have a financial interest in maintaining control over their AI systems and therefore oppose AI personhood. Unlike natural persons, corporations will be able to "maintain a perpetual succession, and enjoy a kind of legal immortality" in their opposition to AI rights.¹⁰⁰ However, legal personality can also be deployed to shield liability—in fact, the assignment and compartmentalization of liability is one of the most useful tools of corporate personhood.¹⁰¹

95. Strine, *supra* note 93; *see also* Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 407 (1916) ("Corporations will have a curious habit of attempting perpetually to escape from the rigid bonds in which they have been encased.").

96. Strine, *supra* note 93.

97. Emily M. Bender, et al., *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?*, CONF. ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 610, 617-18 (2021) (describing how Large Language Models can produce "overtly abusive language" without controls); *see also* Samuel Gehman, et al., *RealToxicityPrompts: Evaluating Neural Toxic Degeneration in Language Models*, ASS'N FOR COMPUTATIONAL LINGUISTICS: EMNLP 2020, 3356-69 (2020), <https://aclanthology.org/2020.findings-emnlp.301.pdf>; Ke-Li Chiu, et al., *Detecting Hate Speech in GPT-3*, ARXIV (Mar. 24, 2022), <https://arxiv.org/pdf/2103.12407.pdf>.

98. This stands in contrast to corporations who exist almost entirely to generate profits. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992).

99. For example, by limiting the State's ability to regulate corporate speech or limit corporations' religious activities. *See supra* notes 58-69 and accompanying text.

100. BLACKSTONE, *supra* note 44, at 455.

101. *See infra* Section III.B. Corporate owners of AI might ultimately prefer a form of AI personhood offering a liability shield over the current pure chattel regime.

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In sum, solved legal theory is not strictly required for legal status. In the corporate context, theory was morphed by reality and power. AI personhood could similarly develop to reflect its practical position in society, but several factors weigh against AI utilizing a power-ratchet in a manner identical to corporations. The more AI connects its personality with human interests, the greater the likelihood it will attain legal status under the law.

B. Ships With Pronouns

In the Framers' time, ships were the most powerful tool of commerce and technology.¹⁰² Ships could cross jurisdictions, project military power, and engage in colonial and international trade, including the infamous Atlantic slave trade. The Constitution bans states from keeping "Ships of War in time of Peace" without congressional authorization and includes specific provisions regulating interstate vessels.¹⁰³ Congress was given the power to "provide and maintain a Navy" and "define and punish Piracies and Felonies committed on the high Seas."¹⁰⁴ The Constitution does not mention corporations at all.¹⁰⁵

The law was forced to contend with this influential, jurisdictionally elusive technology. To effectively engage with these powerful entities, at common law and in the United States, ships had legal personhood.¹⁰⁶ In 1902, the Supreme Court offered a poetic description:

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal

102. Many remark on how few corporations there were in America's early days. *See supra* note 43. So too we must recognize just how many ships there were and their commensurate importance. In fact, ship personhood was so accepted that Machen relied on it as a justification for corporate personhood. Machen, *supra* note 82, at 266 ("It is as natural to personify a body of men united in a form like that of the ordinary company as it to personify a ship.")

103. U.S. CONST. art. 1, § 9, cl. 6 (including a mandate that "[r]evenue to the Ports of one State" could not be provided preference and "[v]essels bound to, or from, one State [are not] obliged to enter, clear, or pay Duties in another.").

104. U.S. CONST. art. 1, § 8.

105. Pollman, *supra* note 45, at 1728-29 (noting the Constitution's lack of reference to corporations or corporate personhood).

106. *See, e.g.,* United States v. Cargo of the Brig Malek Adhel, 43 U.S. 210, 234 (1844). *See also* RENISA MAWANI, ACROSS OCEANS OF LAW: THE KOMAGATA MARU AND JURISDICTION IN THE TIME OF EMPIRE (Duke Univ. Press Books 2018) (discussing the personification of ships and the objectification of Indian immigrants, noting that "[a]s a legal person, a ship on the high seas was subject to arrest, condemnation, and forfeiture").

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property.... In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents.¹⁰⁷

Admiralty matters presented complicated problems for the law and the fiction of legal personality was the solution. International shipping wove a tangled web of jurisdictional problems where owners and operators were worlds away. Instead of developing an entirely new system, judges chose “to shut their eyes to the irrelevant differences between a ship and a man and to treat the ship as if it were a man for the purpose of defending a libel.”¹⁰⁸ Piracy, privateers, and competing national interests forced courts to decide the spoils of ship prizes and other disputes using this legal fiction, which was seen as entirely ordinary at the time.¹⁰⁹

The personality of ships was expansive: a ship “takes on a personality, acquires volition, power to contract, sue and be sued.”¹¹⁰ A ship’s personality was separate from its owners, and could operate in surprising ways. In 1808, the schooner, *Little Charles*, was seized in Norfolk for violating an embargo of Antigua.¹¹¹ The owner averred that, to his knowledge, the ship was bound for an acceptable destination and argued that his property should not be taken for the offense out of his control.¹¹² Then-Circuit Judge Marshall explained, “This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel. . . .”¹¹³ This is not how pure property is treated—our property does not typically abscond and become personally liable for its actions.

107. *Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902) (describing when a ship acquires legal personality for a case concerning a Russian deserter from a vessel under construction).

108. Smith, *supra* note 37, at 287.

109. OLIVER WENDELL HOLMES, *THE COMMON LAW* 29 (1881) (“[T]hose great judges, although of course aware that a ship is no more alive than a mill-wheel, thought that not only the law did in fact deal with it as if it were alive, but that it was reasonable that the law should do so.”).

110. Smith, *supra* note 37, at 288 (citations and quotations omitted).

111. *United States v. The Little Charles*, 26 F. Cas. 979, 980 (C.C.D. Va. 1818) (No. 15,612).

112. *Id.* at 981-82.

113. *United States v. Cargo of the Brig Malek Adhel*, 43 U.S. 210, 234 (1844) (quoting *The Little Charles*, 26 F. Cas. at 982). Judge Marshall further explained that the offense “is not less an offen[s]e, and does not the less subject her to forfeiture, because it was committed without the

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For corporations, human-backstopping by owners is the central element. For ships, instead of the personhood of the shareholders, it is the crew and master that provide a personality wholly separate from that of the owners.¹¹⁴ As Judge Marshall explains, “mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master.”¹¹⁵ The offender is the ship and the innocent owner will lose their property due to the ship’s personality and autonomy “without any regard whatsoever to the personal misconduct or responsibility of the owner thereof.”¹¹⁶ It seems unfair for an owner to lose a ship misappropriated by third-party interlopers, but it is a product of the ship’s legal personality which was borne out of necessity to deal with these emergent, powerful entities. Justice Story offers an explanation: “this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong or insuring an indemnity to the injured party.”¹¹⁷

Legal personality has a long history as a pliable tool that is morphed by the power structures around it. One needs to look no further than the dichotomy between denying natural persons legal personhood while ships enjoyed it. Consider the schooner *The Amistad*, where “[o]n the voyage, and before the arrival of the vessel at her port of destination, the negroes rose, killed the captain, and took possession of her.”¹¹⁸ There were many parties in the resulting libel—the formerly enslaved persons, the Spanish slave traders, several sovereigns,¹¹⁹ the American Lieutenant who had seized the vessel—but the named party was *The Amistad* and her cargo and occupants.¹²⁰ Indeed, few have studied, much less heard of *United*

authority, and against the will of the owner.” *The Little Charles*, 26 F. Cas. at 982. See also *The Palmyra*, 25 U.S. 1, 14 (1827) (“The thing is here primarily considered as the offender . . .”).

114. *Cargo of the Brig Malek Adhel*, 43 U.S. at 234-35.

115. *The Little Charles*, 26 F. Cas. at 982. Note that the “master” of the ship is the controller or captain, not the owner.

116. *Cargo of the Brig Malek Adhel*, 43 U.S. at 233.

117. *Id.*; see also Smith, *supra* note 37, at 288 (“The ship, therefore, derives its personality from the compelling fact that it sails the seas between different jurisdictions.”).

118. *U.S. v. Libellants and Claimants of the Schooner Amistad (The Amistad)*, 40 U.S. 518, 588 (1841).

119. Another powerful class of entities with legal personality are nations and governments—a military ship will adopt the sovereign immunity of its nation. See *The Western Maid*, 257 U.S. 419, 433, (1922).

120. *The Amistad*, 40 U.S. at 588.

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States v. Cinque, et al., the criminal case against captured Africans;¹²¹ *Thomas R. Gedney v. Schooner Amistad*, the libel by the American Lieutenant;¹²² or *United States v. Cinque and the Africans*, the habeas case which sought their freedom.¹²³ Instead, the ship's personality was the tool to aggregate and embody several parties, multiple jurisdictions, dueling national interests, and important matters of liberty. This same approach will be useful in adjudicating complicated, multijurisdictional matters involving AI.

In making his case in *The Amistad*, John Quincy Adams presented arguments from an earlier case titled simply, *The Antelope*, in which he personified the ship as "a mighty huntress, and her prey was man."¹²⁴ A Uruguayan privateer captured the slave trader *The Antelope*, before an American Treasury Department ship, *the Dallas*, captured *The Antelope* a second time and "brought her in for adjudication."¹²⁵ Much like *The Amistad*, the Court was required to untangle the question of the captured enslaved peoples; this left the Court with competing claims including the interests of the ship's original owner, the privateer, and the American captain.¹²⁶ Avoiding a direct discussion of slavery, the Court compromised, sending some of the enslaved people into servitude and others to Liberia.¹²⁷ Legal personality offers a service; it allows for conceptualizing subjects and interests in a digestible fashion. In *The Antelope* and *The Amistad*, the Court was faced with competing sovereign claims, fundamental questions of liberty, and jurisdictional complications. These cases also show hints of emerging legal personality for enslaved persons as the

121. See Bruce A. Ragsdale, "Incited by the Love of Liberty": *The Amistad Captives and the Federal Courts*, 35 NAT'L ARCHIVES: PROLOGUE, no. 1, Spring 2003, <https://www.archives.gov/publications/prologue/2003/spring/amistad-1.html>.

122. *Plea to the Jurisdiction of Cinque and Others, August 21, 1839*, NAT'L ARCHIVES: DOCUMENTED RTS., <https://www.archives.gov/exhibits/documented-rights/exhibit/section1/detail/cinque-jurisdiction-plea.html>.

123. *Warrant for Habeas Corpus, September 21, 1839*, NAT'L ARCHIVES: DOCUMENTED RTS., <https://www.archives.gov/exhibits/documented-rights/exhibit/section1/detail/amistad-warrant.html>.

124. John Quincy Adams, *Argument of John Quincy Adams, Before the Supreme Court of the United States: in the Case of the United States, Appellants, vs. Cinque, and Others, Africans, Captured in the Schooner Amistad, by Lieut. Gedney* YALE L. SCH.: THE AVALON PROJECT (accessed Sept. 6, 2023), https://avalon.law.yale.edu/19th_century/amistad_002.asp.

125. *The Antelope*, 23 U.S. 66, 123-24 (1825).

126. *Id.* at 124.

127. JONATHAN M. BRYANT, *DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP ANTELOPE* (Liveright Publ'g Corp. 2016).

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courts wrestled with the competing personalities of the ship and the people held as cargo.

The allegories between ships and AI are extensive.¹²⁸ Both AIs and ships are powerful and jurisdictionally elusive. They are the subject of national and sovereign interest for commerce, war, and many other purposes. Like corporations, ships are also backstopped by persons, but the association between crew and ship is more legally attenuated than the relationship between shareholders and corporations. The hired crew-member or absconding pirate may have little relationship to the original legal personality of the ship itself. AIs have users and licensees, much like a ship has a crew and master separate from an owner. AI actions may be unexpected, and wholly anathema to its owners' purposes—not unlike the *Brig Malek Adhel* or the *Schooner Little Charles*.¹²⁹ AI creators must contend with unanticipated and unexplainable AI behavior, an enduring problem for AI.¹³⁰ An AI deployed on the internet to thousands of users is not so different from a ship on the high seas—her crew and mission possibly entirely different from when she left port. Legal personality may be just the tool required to effectively sort out the competing interests, assign appropriate liabilities, and assist in resolving complicated AI matters.

II. PERSONHOOD FOR PERSONS: A HISTORY OF EXCLUSION

In the United States, rights are ultimately linked with traits. Historically, these traits included race, gender, birthplace, age, and land ownership. Having certain traits or characteristics guarantees certain rights. The necessary traits for receiving rights have been reduced over time, providing full legal status to numerous categories of individuals, including women and Black people.¹³¹ Accordingly, modern rights are conferred

128. The opposite analogy is also apt; consider this quote about the cyber realm, and how the identified features could also apply to ships: “[b]ut when the ‘persons’ in question are not whole people, when their ‘property’ is intangible and portable, and when all concerned may readily escape a jurisdiction they do not find empowering, the relationship between the ‘citizen’ and the ‘state’ changes” David R. Johnson & David Post, *Law and Borders— The Rise of Law and Cyberspace*, 48 STAN. L. REV. 1367, 1402 (1998).

129. *United States v. Cargo of the Brig Malek Adhel*, 43 U.S. 210, 234 (1844); *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612).

130. See *infra* note 255 and accompanying text.

131. *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc. 3d 746, 764 (N.Y. Sup. Ct. 2015) (“Not very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution.”).

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primarily based on the traits of personhood, age, residency, and citizenship.¹³² In general, the United States does not administer any test or perform any evaluation before conferring constitutional rights. One need only *be* something to receive a right—be human, be born here, be the appropriate age, and so on.

The most prejudicial trait requirements for legal personhood have been excised from official doctrine. For example, in 1920, the 19th Amendment removed the requirement that an individual have a specific gender trait in order to vote.¹³³ Historically, the genetic-based provision of rights has been used to discriminate for or against certain physical attributes; however, as the discriminating genetic requirements have been stripped away, the law automatically confers rights broadly on the population of all natural persons. This is in contrast to a quality-based provision of rights whereby individuals would have to possess certain capabilities, such as intelligence, empathy, or other intangible virtues.

The law does not provide rights based on quality and virtue. There are no greater rights for the smartest or kindest members of society, and, officially, no additional rights conferred by law upon the wealthy. A fundamental feature of our democratic system is that we now recognize that all individuals “are created equal ... with certain unalienable rights.”¹³⁴ An individual’s commercial, scientific, or religious importance is irrelevant to the rights provided by the Constitution. This legal framework is the bedrock of America’s pursuit of a more equal society. Despite the value of this framework, it necessarily excludes any non-human entities, like AI, regardless of their qualities. Because AI cannot *be* a natural person, there is no path for AI to qualify for rights and status by taking actions, performing tasks, or possessing capabilities.

Historically, when faced with entities different from themselves, American courts have been very reluctant to recognize rights in others, typically only doing so after constitutional changes.¹³⁵ There is a long history

132. There are minor exceptions, such as the requirement that the president be a natural born citizen. U.S. CONST. art. II, § 1, cl. 5.

133. The trait-based focus is evident in most rights cases where the relevant traits are listed as if they were qualifications. *See, e.g.*, *Minor v. Happersett*, 88 U.S. 162, 163-64 (1874) *superseded by constitutional amendment*, U.S. CONST. amend. XIX (describing Virginia Minor as in the syllabus as a “native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years, wishing to vote . . . but a woman.”).

134. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Notice how we must excise the “all men” portion from the original sentence which from the outset instituted an even more narrowly tailored genetic test for equality.

135. *See, e.g.*, *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (enslaved party) *superseded by constitutional amendment* U.S. CONST. amend. XIV.; *Minor*, 88 U.S. 162.

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of individuals, at the time seen as property, seeking rights through the legal process. From these struggles, all trait-based qualifications have been removed, except the trait of being human.¹³⁶ In the near future, courts will be faced with a similar effort by AI rights advocates. We can analyze the likely outcome for AI-rights efforts by considering how the law treated legal rights depending on race, gender, and age.¹³⁷

A. Property with Personality

An AI seeking full legal personhood must convince a court to strip away the remaining qualification of trait-based genetic tests—that an entity be a natural person. This would not be the first attempt at such an argument. In fact, there are a litany of cases where entities sought to upset the personhood balance by arguing for the removal of certain trait requirements for personhood. Even if AI is offered a modicum of legal personality, it might still remain property—akin to the duality structure the law enforced on enslaved persons.

The infamous *Dred Scott* case is fundamentally a question of legal personhood and “whether a person of the African race can be a citizen of the United States.”¹³⁸ The Court considered whether the descendants of enslaved peoples were citizens within the meaning of the Constitution of the United States, noting that “[t]he words ‘people of the United States’ and ‘citizens’ are synonymous terms.”¹³⁹ *Dred Scott* focused on whether emancipated persons could acquire legal personhood as citizens.¹⁴⁰ The Court ruled that “whether emancipated or not,” former slaves “had no rights or privileges but such as those who held the power and the Government might choose to grant them.”¹⁴¹ The rights a formerly enslaved person could acquire were limited by the individual state choosing to confer them.¹⁴² The Court held that Dred Scott was not a citizen of the United States “nor entitled to sue as such in one of its courts, nor to the privileges

136. Though it matters less for AI, age and place of birth are also traits still considered when rights are assigned. Similarly, mental capacity (a quality) can be tested, but typically only to remove rights, not as a method of qualification.

137. It goes without saying, but is still worth saying, that the failure to recognize the rights of humans is a peerless, historic crime. We have much to learn from humanity’s historical failures and it is not to imply that any are equivalent.

138. *Dred Scott*, 60 U.S. at 425.

139. *Id.* at 404.

140. *Id.* at 406.

141. *Id.* at 405.

142. *Id.*

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and immunities of a citizen in the other States.”¹⁴³ Under the Court’s logic, there was no quality or virtue that Dred Scott could possess to acquire legal personhood. The deciding factor was the genetic characteristic of being white.

If it is wrong to deny AI personhood (and it may not be wrong), the reasons why *Dred Scott* was wrong are likely not the same, as there is no evidence that our current use of AI generates mass suffering or is akin to slavery.¹⁴⁴ Instead, the purpose of this discussion is to note that the method of denial will be the same: AI lacks the human characteristic much the same as Dred Scott lacked the white characteristic. In 1857, the Court considered raw characteristics to determine whether citizenship attaches to an entity. The process today is no different. Courts simply look for fewer characteristics, mostly humanity and place of birth. Most rights contemplated by U.S. law can be determined by a binary genetic test.

Between 1865 and at least 2020, it was not possible to have a conversation with an entity that was by law considered property. It is worth dwelling briefly on the complicated absurdity of the quasi-personality assigned to enslaved peoples when they existed as *property with personality*. While *Dred Scott* ruled that formerly enslaved persons were not “people of the United States,” it did not hold that emancipated persons or those in servitude had no legal personality whatsoever.¹⁴⁵ Instead, courts, particularly those in states economically dependent on servitude, crafted myriad laws and interpretations that imposed a form of legal personality on enslaved individuals. Several months after authoring the opinion in *Dred Scott*, Justice Taney rejected the argument by an enslaved woman that she did not qualify as a person and could not be liable under a statute criminalizing acts by “any person.”¹⁴⁶ Taney ruled that “a slave is the property of the master.... [y]et, he is a person,” and referenced instances where the Constitution “speak[s] of them as persons[.]”¹⁴⁷ Taney referred to this incongruity as a “twofold character” where a slave “is a person,

143. *Id.*

144. Yuval Noah Harari, *Yuval Noah Harari argues that AI has hacked the operating system of human civilization*, THE ECONOMIST (Apr. 28, 2023), <https://www.economist.com/by-invitation/2023/04/28/yuval-noah-harari-argues-that-ai-has-hacked-the-operating-system-of-human-civilisation> (suggesting “. . . there is no indication that AI has any consciousness or feelings of its own”).

145. *Dred Scott*, 60 U.S. at 405.

146. *United States v. Amy*, 24 F. Cas. 792, 809 (C.C.D. Va. 1859) (No. 14,445) (enslaved party).

147. *Id.*

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and also property.”¹⁴⁸ The abolitionist William Goodell criticized the irrational structure by which a slave “becomes ‘a person’ whenever he is to be punished.”¹⁴⁹

The peculiar legal personality assigned to enslaved people had many bizarre consequences. For example, while an enslaved woman could be imprisoned, Justice Taney argued she could not be fined because she “could have no property” and could not borrow any because she “is also incapable of making a contract.”¹⁵⁰ Taney remarked that the usual practice of imprisoning a debtor until a fine was paid would be wholly unjust if applied to an enslaved person, as it would result in “imprisonment for life.”¹⁵¹ Unlike other possessions, where the owner might bear some responsibility, compelling the owner to pay the fine “would be equally objectionable, as that would be punishing an innocent man for the crime of another.”¹⁵² When excusing owners of liability, courts were quick to recognize the legal personhood of enslaved individuals: “he is, by our law, property, yet he is an intelligent, moral agent, capable of being a subject of government, and like all other men, liable to answer for his own wrongs

148. *Id.* at 810; *see also* Jones v. Allen, 1 Head 626, 636 (Tenn. 1858) (“[S]laves are not mere *chattels*, but are regarded in the two-fold character of persons and property. That as persons they are considered by our law, as accountable moral agents, possessed of the power of volition and locomotion.”).

149. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS AND ILLUSTRATIVE FACTS 309 (New York Am. and Foreign Anti-Slavery Soc’y 1853); *see also* Fagundes, *supra* note 40, at 1748-49; JONATHAN LAMB, THE THINGS THINGS SAY 231 (Princeton Univ. Press 2021) (“The badges of a citizen—person and identity—were being used as shackles.”).

150. *Amy*, 24 F. Cas. at 810. In 1781, two dissenting judges successfully petitioned Thomas Jefferson and the legislature for a pardon of a slave convicted of treason during the American Revolution. *See* PHILIP J. SCHWARZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA 189 (The Lawbook Exch., Ltd. 1998). The judges argued that the slave could not commit treason as he “owes the State No Allegiance . . .” Philip J. Schwarz, *Dictionary of Virginia Biography* (Dec. 7, 2020), <https://encyclopediavirginia.org/entries/billy-fl-1770s-1780s>.

151. *Amy*, 24 F. Cas. at 810 (“[W]e greatly doubt whether a court of justice could lawfully imprison a party for not doing an act, which, by the law of his condition, it was impossible for him to perform . . .”).

152. *Id.*; *see also* *Grinder v. State*, 2 Tex. 338, 339 (1847) (ruling that an owner had no liability for an executed slave’s crime, the prosecution had asked for satisfaction “not at the hands of the owner of the slave, but from the person of the offender” and the “[p]ublic justice was satisfied in the person of the slave . . .”). In some instances, owners enjoyed a form of limited liability similar to ships or common law animals; however, this was not universally the case. *See* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, 258-60 (Univ. N.C. Press 1996) (providing examples where owners were fined for the actions of enslaved persons under their rule).

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to the injured party[.]”¹⁵³ The intelligence and autonomy of enslaved peoples were only recognized insofar as they provided liabilities, assigned them duties, or shielded the actions of their owners. Legal personality is often perceived as a pathway to rights, but it can also be used to commit entities to a particular structure of servitude. Employing a structure of property with personality with respect to AIs may not be the grave crime visited on natural persons when this structure last existed. Society might reach the conclusion that AIs are intelligent and moral agents yet require that they be under the dominion and control of human masters.

While in most cases enslaved personhood was used as a vessel for liability and a mechanism for control, the law offered some limited protections.¹⁵⁴ Slaves could be individually tried and punished for crimes, and owners would regularly appeal enslaved persons’ criminal sentences, seeking the return of productive capital.¹⁵⁵ In rare cases, this peculiar form of personhood was advantageous for enslaved persons. Confessions of enslaved persons were subject to additional scrutiny and routinely excluded by courts based on a theory of diminished capacity.¹⁵⁶ In even the most virulent slave states, courts went so far as to appoint counsel and charge the costs to the owner.¹⁵⁷ In some states, only the enslaved had the

153. *Wright v. Weatherly*, 15 Tenn. 367, 379 (1835) (ruling that an owner was not liable for damages cause by his slave’s murder of another owner’s slave, noting that of the enslaved individual’s “personal rights as a citizen, and his liabilities as such, are destroyed and merged in the ownership of the master, who controls his person, owns his property, and is entitled to the fruits of his labor.”).

154. For example, laws on the killing of persons largely prohibited the killing of slaves. Fagundes, *supra* note 40, at 1747-48; *but see* *Neal v. Farmer*, 9 Ga. 555, 583-84 (1851) (ruling that slaves were protected only by statute and common law felony murder did apply when a slave was killed). Enforcement was also irregular and complicated by the fact that no slave could offer testimony against a white defendant. Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537, 556 (1974). The prohibitions against testimony were not limited to enslaved individuals and regularly extended to all minorities, including freemen. *See, e.g.,* *People v. Hall*, 4 Cal. 399, 405 (1854) (prohibiting Chinese witnesses from offering testimony against a white man).

155. Flanigan, *supra* note 154, at 541, 554.

156. *Simon v. State*, 5 Fla. 285, 298 (1853) (enslaved party) (advocating that courts “at all times to receive [enslaved persons] confessions with the utmost caution and distrust” because of the “ease of intimidation” and “almost absolute control” of the owner); *see also* *Peter v. State*, 12 Miss. 31, 37-38 (1844) (enslaved party).

157. *See, e.g.,* *Jim v. State*, 15 Ga. 535, 540 (1854) (enslaved party) (describing the “duty of procuring counsel for his slave” as “binding on the master”); *Hardy v. Voorhies*, 14 La. Ann. 776, 777 (1859) (enslaved person at issue) (noting the appearance of appointed counsel); *see also* Flanigan, *supra* note 154, at 553.

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constitutional right to a court-appointed attorney.¹⁵⁸ In one case, an owner was obligated to pay for the defense of two enslaved persons who were charged with *his* attempted murder; the defendants were acquitted (at the owner's expense).¹⁵⁹ Owners had duties too, including "the obligation to procure for that slave, medical attendance in his sickness, or food and clothing at all times."¹⁶⁰ An absent master could not absolve himself of this duty, even if the slave was hired out, and was responsible to supply "some person to stand in the relation of master to the slave."¹⁶¹ While there is extensive evidence that owners regularly violated these duties with impunity, it is telling that judges and southern legal society busied themselves with weaving a complex web of legal personality for the enslaved.¹⁶²

There is seemingly no end to the morphing personalities the courts built during this time period.¹⁶³ At common law, a conflict of pecuniary interest would exclude certain testimony, but masters and enslaved persons shared a supposed "common humanity" that allowed the master to testify on behalf of their property.¹⁶⁴ In fact, southern courts invented another legal fiction to allow this practice:

[T]he law ... takes the slave out of the hands of his master, forgets his claim and rights of property, treats the slave as a rational and intelligent human being, responsible to moral, social, and municipal duties and obligations, and gives him the benefit of all the forms of trial which jealousy of power and love of liberty

158. Flanigan, *supra* note 154, at 554 n.59.

159. Morris, *supra* note 152, at 253.

160. *Jim*, 15 Ga. at 540.

161. *Gibson v. Andrews*, 4 Ala. 66, 67 (1842) (enslaved person at issue); *see also* *Hogan v. Carr*, 6 Ala. 471, 472 (1844) (allowing an owner to repossess a slave that has been hired out if there were unmet medical needs).

162. *See generally* LAMB, *supra* note 149 (discussing slave owners violating their duties and complex issues surrounding judges and southern legal society).

163. *See also* *Collingsworth v. Covington*, 2 La. Ann. 406, 407 (1847) (enslaved person at issue) (holding an owner liable to his employee, a slave overseer, for an injury visited upon the employee by an enslaved person, stating that the owner had "rendered his slaves unmanageable by over indulgence").

164. *Isham v. State*, 7 Miss. 35, 42 (1841) (enslaved party) (holding a slave cannot "be deprived of the benefit of that testimony by the mere circumstance that, in a civil point of view, he was regarded by the law as property").

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*have induced the freeman to throw around himself for his own protection.*¹⁶⁵

The courts created what they considered a legal fiction—that an enslaved person was intelligent, rational, fit for rights and duties—when, in reality, it was no fiction at all. Two legal fictions stumbled into fact!

There are several lessons for the AI inquiry. Chiefly, that legal personhood is not always a tool of liberation; it can be a method of control. Unlike in the slave context, control of AI might be proper and desired, depending on how several fundamental and philosophical questions are resolved. The changing nature of AI and the evidence of the transgressions of the past should direct us to regularly examine the legal personalities assigned to other individuals and entities.¹⁶⁶ Finally, we should consider whether doling out rights based on traits is the appropriate system.¹⁶⁷ If the trait of humanity is merely a proxy for underlying qualities that humans possess, we should define those qualities and provide an avenue for legal personality qualification for entities that possess them.

B. Coverture for Computers

Under modern standards, legal personhood is immutable, personal, and singular. Human entities receive a legal persona, and all personas are created equal. The current equality and singularity of modern personhood

165. *Elijah v. State*, 20 Tenn. 102, 104 (1839) (enslaved party) (reasoning why a master could be compelled to testify about his slave’s confession to a crime); *see also State v. Jim*, 48 N.C. 348, 352 (1856) (enslaved party) (ruling that an owner’s wife could testify on behalf of a slave, despite the pecuniary interest: “The slave is put on trial as a *human being*; entitled to have his guilt or innocence passed on by a jury. Is it not inconsistent, in the progress of the trial, to treat him as property . . .”).

166. This self-examination is especially necessary when the established scientific understanding could be incorrect or motivated by external biases. *See Takao Ozawa v. United States*, 260 U.S. 178, 198 (1922) (claiming that certain race-based judicial decisions “are sustained by numerous scientific authorities, which we do not deem it necessary to review”).

167. Courts have struggled, and committed their most concerning errors, when applying genetic requirements. Tension about assigning rights based on characteristics rather than qualities also arose in the immigration context where racist laws prohibited the provision of citizenship. “That he was well qualified by character and education for citizenship is conceded.” *Takao Ozawa*, 260 U.S. at 189 (1922) (finding Japanese persons racially ineligible for citizenship). The same fate befell Bhagat Singh Thind who served in the U.S Army in the first World War, was highly educated, and for whom “[n]o question is made in respect of the individual qualifications of the appellee.” *United States v. Bhagat Singh Thind*, 261 U.S. 204, 207 (1923) (ruling unanimously that an Indian was not white and therefore could not become a naturalized citizen). Despite the Supreme Court recognizing their qualities, neither petitioner could pass a test which sought only whiteness to the exclusion of virtue.

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belies the history of diverse legal personas and practices. While many legal personality practices were used to oppress, these examples show how legal personhood is a fiction that can be put to our purposes. In the AI context, legal personhood is a fictional container which we may choose to invent to better conceptualize and engage with AI entities. One difficulty in providing personhood for digital creations is their ability to duplicate themselves into many instances. A natural person cannot duplicate at all, and even a corporation would be hard pressed to produce thousands of copies. The nature of computing systems allows for the replication and proliferation of many identical or substantially similar AI entities.

One option is to use the tool of legal fiction to treat AI projections or similar strains of an AI entity as a single person. The law has precedent for this practice, where several entities are merged into one: coverture. At common law, a woman's legal existence was entirely absorbed by her husband by the act of marriage.¹⁶⁸ Coverture was the "ancient legal fiction of unity of person," and it was mostly used as a tool of oppression.¹⁶⁹ In *Bradwell v. The State*, the Court explained that "a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him."¹⁷⁰ By the act of marriage, a woman lost her individual legal persona and became a *feme covert*.¹⁷¹ While this legal fiction enforced stereotypical gender roles and power imbalances, a similar fiction could be used to fuse AI projections into cognizable entities.

Like in the slavery context, coverture's extinguishing of many rights had a smaller effect on duties.¹⁷² Writing in 1916, John B. Winslow, Chief

168. BLACKSTONE, *supra* note 44, at 430 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . ."); *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015) ("Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity."); *see also* Willard McCaleb, *The Separate Equitable Estate of Married Women*, 7 ST. LOUIS L. REV. 253, 253-54 (1922) (noting that the law required "the world to deal with the husband and wife as one.").

169. David H. Bromfield, *Women and the Law of Property in Early America*, 85 Mich. L. Rev. 1109, 1110 (1987) (reviewing Marylynn Salmon, *Women and the Law of Property* (1986)); *see generally* Marylynn Salmon, *Women and the Law of Property* (1986) (discussing women remaining subservient after marriage).

170. *Bradwell v. The State*, 83 U.S. 130, 141 (1872) (unanimously denying women the right to practice law). "So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband." *Id.*

171. Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. 99, 101 (2016).

172. "Like most legal fictions, it was not universally applicable; for instance, the wife was not executed for her husband's crimes or made answerable for his debts." J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 395 (1979).

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Justice of the Wisconsin Supreme Court, described the “compensations resulting from this absorption of the personality of the wife by the husband.”¹⁷³ The married woman could not sue or be sued without her husband, her crimes were often presumed to be at his direction, and her debts became her husband’s debts (though so did her assets).¹⁷⁴ In ruling to prohibit a woman’s admission to the bar, the Wisconsin Supreme court remarked that the law “is bad enough for men” and “[w]omanhood is moulded for gentler and better things.”¹⁷⁵ The rights lost by these gendered structures were not commensurate with a few small modifications to duties.¹⁷⁶ While this practice was clearly an inappropriate arrangement for natural persons, it may suit AI. Legal fictions can allow the law to prudently administer appropriate, tailored rights and obligations to AI.

An enduring reaction to AI personhood is the fear that such a structure will enable AIs to inappropriately participate in, or meddle with, human affairs. While many accept the legal fictions used for corporations or ships, most recoil at the idea of allowing these entities opportunities to vote, marry, or adopt children. The fiction of legal personality can be of service here too; the law is well practiced in restricting rights and limiting the political engagement of disfavored entities and individuals. For the majority of U.S. history only men, particularly white men, had constitutionally guaranteed voting rights.¹⁷⁷ In *Minor*, the Court readily established that women were both citizens and persons, but those attributes did not confer the right to vote.¹⁷⁸ While erroneously claiming that “men have never had an advantage over women,” the Court held that the Constitution did not provide citizens with voting rights.¹⁷⁹

173. John B. Winslow, *The Property Rights of Married Women Under Modern Laws (Part I)*, 1 MARQ. L. REV. 1, 12 (1916).

174. *Id.* at 12-13; see also *Martin v. Commonwealth*, 1 Mass. 347, 391 (1805) (“[G]uilt is not imputed to her for actions performed jointly by them, unless of the most heinous and aggravated nature.”) (internal quotation omitted); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights To Earnings, 1860-1930*, 82 GEO. L. J. 2127, 2127 (1994).

175. *In re Goodell*, 39 Wis. 232, 245-46 (1875) (finding that women could not be admitted to practice law).

176. *Id.*; see generally *Hoyt v. Florida*, 368 U.S. 57 (1961) (allowing women to be exempted from jury service).

177. *Minor v. Happersett*, 88 U.S. 162, 164 (1875) (unanimously denying women the right to vote) superseded by constitutional amendment, U.S. CONST. amend. XIX.

178. *Id.* at 165 (“There is no doubt that women may be citizens. They are persons”); *id.* at 169 (“[W]omen have always been considered as citizens the same as men”).

179. *Id.* at 170. The Court’s claims about historical practices in this case are not well supported. Compare *Minor*, 88 U.S. at 169 (“Certainly [no case] can be found in which it has been held that women could not sue or be sued in the courts of the United States.”) with *Dutton v. Rice*, 53 N.H.

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The law's previous oppressive mechanisms could be a blueprint for AI regulation. On the surface, the unique nature of AI presents problems for our legal systems and rights structures. History shows a variety of methods and options for crafting particular personhoods to fit society's goals.¹⁸⁰ How can the law treat several entities as one? How can an entity with no will function under the law? How do we keep certain entities out of the political sphere? How should the law handle an entirely controlled entity? Employing legal personhood, the law addressed all of these tasks with respect to women, and it would be easier to accomplish the same with AI.

AI may or may not have a will of its own. Resolving this question is not necessary to provide it more than zero rights. Married women were treated "as having no will" by the law for centuries even though this was entirely false.¹⁸¹ We might successfully administer false fictions upon AI that serves our purposes. AIs are largely subject to and controlled by other entities; however, the same was true for women, especially married women, under the eyes of the law. The courts were successful in administering these fictions—that wives were fused to their husbands, that they lacked will and responsibility, that they had no value in political society—even when those fictions were dead wrong. These fictions might not be wrong for AI. This treatment was oppressive for women but could be appropriate for AI.

The law's previous methods of oppression can be retooled to regulate and provide rights to AI entities. Somewhere on the spectrum of rights, between pure chattel and a natural person, lies a married woman from the 19th century. AI is currently and firmly in the position of pure chattel. However, through our use of legal fictions, we could elect to elevate AI to another place on the rights spectrum.¹⁸² The unique nature of computing, as well as our own human biases, can be reflected in the form of personhood assigned to AI. In summary, if the law could successfully administer

496, 497 (1873) (holding a woman may not sue absent her husband without qualifying for an exception).

180. In fact, the changing nature of women's rights and status inspired the court to consider animal rights. *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 16 N.Y.S.3d 898, 912 (N.Y. Sup. Ct. 2015).

181. *Martin v. Massachusetts*, 1 Mass. 347, 395 (1805) ("The law considers a feme-covert as having no will; she is under the direction and control of her husband; is bound to obey his commands.").

182. While the idea of AI rights may sound strange, it was not so long ago that rights we currently consider natural and fundamental were suspect and new. *See, e.g., Norval v. Rice*, 2 Wis. 22, 31 (1853) (allowing a married woman to bring a claim in court and noting that the act allowing women property rights "certainly goes far towards clothing one class of females with strange and manly attributes").

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false legal fictions for a foul purpose, there is reason to believe it could engineer appropriate fictions to provide tailored personhood to AI.

C. Adolescent AIs

The law has not done away with all quasi-personhood regimes. The most accessible of trait-based rights is one that all have experienced: age. At a certain age, individuals acquire rights and obligations. While traits like race and gender no longer affect legal personhood, the view that age impacts rights and duties has actually expanded.¹⁸³ Our treatment of minors offers two insights for AI: (1) quasi-personhood regimes are not *per se* oppressive and quasi-personhood can be desirable structures for administering tailored rights; and (2) the administration of legal responsibility can be decided by proxy qualities like age.

The law's historical treatment of some natural persons as anything less were grave errors and, perhaps, not models to be emulated. Age offers a counterexample—a situation where we still consider it entirely appropriate that a category of natural persons lack many rights and duties.¹⁸⁴ The law used to regularly endorse the dominion of some persons over others, now it is only children who remain under the governance of others. The legal regimes for women and minorities were clearly wrong, but that does not mean that all legal personhood decisions should be binary. Partial legal personhood is a method of control, one that we administer to children, and one that we might consider administering to AI. Like a child, AI is a developing entity which may be on the way to acquiring the capacity for legal rights and duties.

At common law, children and adolescents are provided with a range of legal responsibilities from none whatsoever to a weakening presumption of incapacity.¹⁸⁵ In modern times, the law offers a slate of all too familiar restrictions for children; they cannot vote, hold certain public offices, drive cars, drink alcohol, sell real estate, or enter into contracts.¹⁸⁶ Nearly all legally relevant decisions are controlled by a minor's parents.¹⁸⁷ Age-

183. See, e.g., *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that a life sentence for a fourteen-year-old defendant violated the Eighth Amendment's prohibition on cruel and unusual punishment).

184. But see generally HOWARD COHEN, *EQUAL RIGHTS FOR CHILDREN* (1980) (arguing that children should have full legal status and enjoy all the rights of adults).

185. See Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 *TEMPLE L. REV.* 769, 770 (2016).

186. *Ginsburg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

187. See, e.g., Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 *WM. & MARY L. REV.* 995, 1050-51 (1992).

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based restrictions are uncontroversial controls on developing individuals and entities. Like a child, AI could be considered a developing entity that is gaining capacity, but perhaps has not yet acquired all the qualities necessary for full status.¹⁸⁸ Individuals under the age of majority do not receive the full panoply of rights that adults do.¹⁸⁹ While advocates have acquired new rights and duties for the disenfranchised, few seek to alter the status quo with respect to children. Most would agree that it is appropriate that minors have fewer rights, and this treatment of minors permeates nearly all of our rules and laws.¹⁹⁰ It follows that applying a quasi-personhood regime to children and AI is not necessarily the act of oppression that it was with respect to women and enslaved peoples. There is a place in our laws for quasi-persons and, in the context of children, that place is for those we cherish.

To better understand the question for AI, we must consider: (1) why it is desirable to curtail rights for children; and (2) which qualities age is employed as a proxy for. A minor's lack of capacity and responsibility is the answer to both.¹⁹¹ In *Parham*, the Court explained that "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."¹⁹² That quality (lacking reason) tends to erode over time as individuals age. Thus, age is used as a substitute for capacity. John Locke endorses this view: "Few Years require but Few Laws, and as his Age increases, when one Rule is, by practice, well established, you may add another."¹⁹³

Despite changing dynamics between men and women, employers and households, and significant technological revolutions, the legal relationships between parents and children have remained broadly the same. In

188. Childhood "is a condition in which the personhood of the person, her capacity to have a mind and a voice of her own, is as yet ill constituted." Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 589-90 (2003) (suggesting children can be "appropriately conceived as emerging persons . . .").

189. *Powell v. Alabama*, 287 U.S. 45, 50, 71 (1932) (holding that minors have some constitutional rights, in this case under the Fourteenth Amendment); *see also* *Haley v. Ohio*, 332 U.S. 596, 601 (1948) (observing that minors have constitutional rights under the Fourteenth Amendment).

190. "Indeed, it is the odd legal rule that does not have some form of exception for children." *Miller v. Alabama*, 567 U.S. 460, 481 (2012).

191. *Thompson v. Oklahoma*, 487 U.S. 815, 824-25, 825 n.23 (1988) (explaining that a child is not a "fully rational, choosing agent . . .").

192. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (finding that a parental decision to commit a child to a mental hospital did not violate the Due Process Clause of the Fourteenth Amendment).

193. JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* §§ 65 (1693), <https://archive.org/details/somethoughtscon02lockgoog/page/n76/mode/2up?q=add>.

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addition to a relatively static legal landscape, our reasons for governing minors have also remained consistent: children, lacking fully developed capacity for reason, are better off being governed by their parents. However, requiring close governance, like AI does, is not a reason to completely withhold legal status. In his *Second Treatise on Government*, Locke analyzes several power structures within society, including parental power:

*[P]arental power is simply what parents have over their children to govern them for their own good until they come to the use of reason, or to a state of knowledge that should make them capable of understanding the rules—whether the law of nature or the civic law of their country—that they are to govern themselves by.*¹⁹⁴

The governance of parents is a temporary status, a guardianship that protects children while they acquire the qualities necessary for self-governance. Locke argued that allowing children full personhood before the age of maturity actually curtails their freedoms: “To turn him loose and give him complete liberty before he has reason to guide him is *not* allowing him his natural privilege of being free,” but rather abandoning him to an unreasoned, animal state.¹⁹⁵ “*This* is what gives parents the authority to govern their children while they are minors.”¹⁹⁶ Of course, these qualities are never tested in the conversion of children to adults—they acquire their legal capacity automatically at the age of majority.

Here we may find another fitting analogy for AI. Governments, industry, and academia alike lack sound tests for AI capacity. One can measure the number of parameters or amount of data an AI has been trained on much the same as one can calculate the volume of brains—by that, I mean, the measurement is of dubious value. It is unclear whether the tests we have designed for AIs, like the Turing Test, are actually indicative of intelligence, capacity, reason, or any of the other qualities a court would inquire about. Of course, AIs can already pass the most difficult

194. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 170 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

195. *Id.* at § 63.

196. *Id.* To achieve personhood, children “need to be brought out of the animal state in which they begin their lives.” Schapiro, *supra* note 188, at 589.

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tests we give humans.¹⁹⁷ Even if we knew what to measure, it's not clear how we would. Much is the same for children. It is no doubt true that there are many 17-year-olds with all of the capacities necessary for adulthood, and some 18-year-olds without those capacities. "There is no developmentally informed magical demarcation at eighteen."¹⁹⁸ We accept this mild injustice as a cost of expedient administration. It is true that, in general, the passage of time can be a proxy for wisdom, maturity, and development. Much to the chagrin of many precocious high school students, there is no test or qualification whereby they can earn or prove their right to vote. Citizenship plus age is the recipe for American voting rights and one need not prove their capacity for reason.

Age is not only a deciding factor in the world of policy. Courts also employ age as a proxy for other hard-to-measure qualities. The most recent legal developments with respect to minors are the Court's rulings that age is so associated with incapacity that minors are excluded from our harshest mandatory sentences.¹⁹⁹ Age is such a powerful proxy for capacity and responsibility that it is unconstitutional to not allow courts to consider it as a factor.²⁰⁰ The court explained that, "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."²⁰¹ Minors lack certain rights (because we know better), but also certain liabilities (because they do not know better). This regime is constitutionally enforced and cannot be removed by a statutory sentence which "precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."²⁰² Rather than seek to measure nebulous qualities like "impetuosity," we simply count time which is known to be correlated with changes in those features. This could be an approach for regulating AI. Rather than seek to test the untestable, proxies could be developed that represent the underlying, inaccessible truths.

197. OpenAI, *supra* note 23, at 2, 4-5; SÉBASTIEN BUBECK ET AL., *Sparks of Artificial General Intelligence: Early Experiments with GPT-4*, MICROSOFT RESEARCH 4-9 (Apr. 13, 2023), <https://arxiv.org/pdf/2303.12712.pdf>.

198. Cohen, *supra* note 185, at 770.

199. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (noting that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . ."); *see also* *Graham v. Florida*, 560 U.S. 48, 68 (2010).

200. *Miller v. Alabama*, 567 U.S. 460, 476 (2012).

201. *Id.*

202. *Id.* It is well known that adolescents lack certain capacities for "self-control and judgment in emotionally and socially charged situations." Cohen, *supra* note 185, at 779-80.

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Our approach to AIs could be similarly benevolent and for their benefit, much like how parental power is for the benefit of children.²⁰³ Control should not beget malice; just as parents should not exercise their authority as “a severe arbitrary government, but only for the help, instruction, and preservation of the children.”²⁰⁴ As John Stuart Mill argues, with respect to children, the early portion of an entity’s existence is an important time whereby society may exercise its power to create a being capable of rational conduct.²⁰⁵ So too for AI, we are currently governing AI’s childhood where it will acquire qualities we may choose to recognize and, hopefully, the types of virtues we would value in our natural children.

III. TOWARDS LEGAL RIGHTS FOR ARTIFICIAL INTELLIGENCES

In the coming years, the law will be asked to reconsider AI’s status as pure chattel. In this final section, I make the case for establishing a progressive form of AI personhood. Providing AI’s legal personality is practical (useful to humans) and moral (the right thing to do).²⁰⁶ Legal personality is a tool that the law can, and I submit should, employ to align, regulate, and establish AI within society.

Legal personhood is an instrument that can be used to appropriately place AI within our multifaceted and diverse society. A limited, provisional legal personality would provide a modicum of independence and an avenue for representation. We must start with limited quasi-personhood to determine the suitable categorization of AI, either as property or

203. Parental Power is applied to children “to make up for their lack of the skills and knowledge needed to manage their property.” LOCKE, *supra* note 194, at § 173.

204. *Id.* at § 170.

205. JOHN STUART MILL, ON LIBERTY 147-48 (London, J.W. Parker 1859) (“Society has had absolute power over them during all the early portion of their existence: it has had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life.”).

206. This article is neither the first, nor will it be the last to suggest that the law consider legal personality for AI. See, e.g., Leon E. Wein, *The Responsibility of Intelligent Artifacts: Toward an Automation Jurisprudence*, 6 HARV. J.L. & TECH. 103, 103-07 (1992) (analogizing automated entities, like Automated Teller Machines, to Frankenstein’s monster and proposing legal status for machines); Solum, *supra* note 20, at 1231 (considering whether an artificial intelligence could “become a legal person”); see also David C. Vladeck, *Machines Without Principals: Liability Rules and Artificial Intelligence Essay*, 89 WASH. L. REV. 117, 150 (2014) (proposing that “autonomous, intelligent machines” should be considered legal persons).

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persons.²⁰⁷ While this may “sound inconceivable,” all proposals that entail new forms of legal personhood are likely to appear foreign at first.²⁰⁸ The dangers of reflexively relying on the AI status quo as pure chattel are too great to avoid considering their legal status on an ongoing basis.

Perhaps AI are most akin to children who are still coming into their own and need to be taught right from wrong, and how to be responsible citizens. Or, as a fundamental collection of human productions, AIs could be more like corporate associations which gather fractions of human interests to form a singular person. Will history prove us to be shrewd generators of responsible legal fictions or more akin to southern judges constructing a blabbering tower of minutiae and rules to justify our actions? The most likely answer is that AI is an entirely new entity that warrants unique treatment.

A. The Moral Case

We are duty bound to reform legal personhood and provide a pathway for AIs to obtain legal status. The current methods for providing legal personhood are borne out of genetic-based tests that originally sought to exclude. A test for legal personhood that examines the qualities and capabilities of the entity in question will necessarily open the door for AI rights. As the creators of AI, we are obligated to act as its guardians and, if we choose to treat it as property, ensure that this decision is not another categorical form of oppression and exploitation. This could be an opportunity to learn from the unique American history of trait-based exclusion. The fraught history of legal personality in America may have prepared the courts and society well for developing new forms of personhood to place emerging AI entities within the structure of the law. Our current enlightened view of the former harm wrought by the denial of personhood and status should alert us to tread carefully before categorically denying status to what we presently see as property.

207. As discussed, there are many forms of legal personhood which do not necessarily entail full independence. *See also* Solum, *supra* note 20, at 1279 (“An AI that was a slave might still be entitled to some measure of due process and dignity.”).

208. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972) (“[T]here will be resistance to giving the thing ‘rights’ until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it ‘rights’—which is almost inevitably going to sound inconceivable to a large group of people.”). Of course, once rights are provided, we recognize that they are not “new,” but rather that they always existed and were wrongly withheld. *Id.* at 456-57.

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1. Reform Legal Personality Tests

Providing a genetic test for determining legal personhood has always been incorrect.²⁰⁹ It is high time to develop a comprehensive theory of personhood by which to organize the legal system. “[T]hinking about personhood for AIs forces us to acknowledge that we currently lack the resources to develop a fully satisfactory theory of legal or moral personhood.”²¹⁰ Just like the AI discipline requires better tests for emerging general intelligence, the legal discipline requires improved tests for assigning legal personality. A lack of satisfactory benchmarks in both the law and computer science frustrates our examination of AIs.

The original test for rights in the United States involved querying whether the individual was a natural person, white, and male. Now, only the test of natural person remains.²¹¹ This bad test has been made more inclusive through constitutional patching, so much so that we rarely inquire into who counts as a person and why. This inclusivity, while admirable, has masked fundamental problems with the law’s theory of personhood. Other personhood regimes, such as for corporations, still rely on this same approach by performing a genetic test on the underlying owners. This rough-and-ready, binary test includes those not fit to bear rights or duties (such as the disabled) and categorically excludes those that might succeed under a quality-based test (like AI or certain animals).

Our current system deploys a genetic proxy to determine personhood. While “a person is any being whom the law regards as capable of rights or duties,” the law does not ascertain whether that is the case for each petitioning entity.²¹² Instead, the law asks whether petitioning entities are a natural person or an association of natural persons. In the interest of fairness and judicial efficiency, the law assumes that all natural persons can bear rights and all others cannot.²¹³ There is reason to believe that AIs could one day be the exception to the rule. Unfortunately, we have no obvious tests for legal responsibility that could be applied to AIs.

209. See *supra* notes 133-136 and accompanying text.

210. Solum, *supra* note 20, at 1284.

211. U.S. CONST. amends. XIII, XIV, XIX.

212. SALMOND, *supra* note 38, at 330.

213. As a further fiction, when a human is not fit by virtue of their age or disability, another rights-bearing entity acts in their stead. GRAY, *supra* note 37, at 43 (“[T]o a human being wanting in legal will, the will of another is attributed.”). The removal of rights from individuals typically requires proof to override the law’s presumption of competence. See, e.g., DEL. CODE ANN. tit. 15, § 1701 (2023) (requiring “clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment.”).

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To truly test AI, we will have to dig deeper to the original understanding of personhood: an entity capable of bearing rights and duties.

Modern language models have reached the point where they can communicate with counsel, express themselves in court, and perform other actions typical of a rights-bearing entity.²¹⁴ To pass a version of the Turing Test, an AI must be capable of convincing judge, jury, and counsel it is human, but if a modern AI did so, that does not mean it is necessarily ready to bear rights and duties.²¹⁵ Pretending to be a person is not the same as being one. A precocious child could imitate an adult, but that does not mean they are ready to bear rights and duties. The lack of probative tools leaves the AI question at a crossroads: we cannot determine if AI expressions are genuine representations, and we lack a way to test for personhood. We generally take humans at their word; but we cannot determine whether AI's convincing expressions are mere mimicry.²¹⁶

As it stands, AIs have passed tests we typically give computers, and excelled at the examinations humans give to other humans.²¹⁷ The tests we give computers are not truly intelligence tests and have significant cultural biases. These pro-human biases prize social interaction and cultural acumen.²¹⁸ Even so, we continue to move the goalposts. An AI scored better than most law students on the LSAT and most lawyers on the bar exam, but we are not likely to admit an AI to practice any time soon.²¹⁹ AIs are capable of human-equivalent expressions and interactions. Without sound testing methods, neither researchers nor judges can determine if those interactions are more than mimicry. While it is valuable to

214. An AI that can pass the Turing Test necessarily can adapt to changing contexts and “make complex legal decisions required of a client in litigation.” Solum, *supra* note 20, at 1250-53.

215. *Id.* at 1280 (“The Turing Test would not be the legal test for constitutional personhood.”). Nor is failing the Turing Test a sign that an entity is incapable of bearing rights or duties. One can easily imagine an entity that can bear rights or duties that is simply not convincing at imitating humans.

216. *Id.* at 1266 (“One can only infer consciousness from behavior and self-reports, since one lacks direct access to other minds.”).

217. *See generally* source cited *supra* note 7 (discussing AI's capabilities and limitations based on task performance).

218. *Cf.* Steven Goldberg, *The Changing Face of Death: Computers, Consciousness, and Nancy Cruzan*, 43 STAN. L. REV. 659 (1991) (arguing that, faced with self-aware computers, courts would adopt capacity for social interaction as the unique distinguishing character of humans).

219. *Compare* OpenAI, *supra* note 23 (presenting results where an AI excelled at both the LSAT and bar examination), *with* Bob Allyn, *A Robot was Scheduled to Argue in Court, Then Came the Jail Threats*, NPR (Jan. 25, 2023 6:05 PM), <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail-threats> (reporting on state bar positions on AI-powered legal representation and the unauthorized practice of law); *see also* Bubeck et al., *supra* note 7, at 9 (describing preliminary Multistate Bar Exam performance by GPT-4).

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inquire about the method by which these sophisticated AI expressions are generated, we must admit that we do not truly know what gives rise to our own consciousness, intelligence, and capacity for legal responsibility. Our poor understanding of the genesis of our consciousness is not a bar to human rights. Similarly, we would never discount the legal rights of humans whose expressions merely parrot the beliefs and biases on which they have been trained by the media they consume.

Despite the grave injustices caused by genetic exclusions, there has been only piecemeal adjustment of legal personality by constitutional amendment. For AI and other future entities, we need a permanent reformation of how rights are recognized in our system of laws and government. An improved system could allow for different rights, when appropriately qualified, for AI, children, and animals, while also leaving room for other forms of life yet unconsidered. From property to natural persons, legal personality is a spectrum along which AI might advance, but only if there is a legal mechanism to do so.

2. We Are AIs' Guardians

Humans are morally responsible for the intelligent entities we create. If the past is any guide, individuals and the courts tend to exclude what is traditionally excluded and look down upon what has been usually overlooked.²²⁰ As the creators of AI, we have a duty to ensure that they receive appropriate legal rights. If our answer is zero legal rights, we should be especially sure of that position given the heinous structures of the past.²²¹ The adversarial legal system is the mechanism by which society explores these foundational questions and adjudicates matters.

We do not yet know whether future AIs will attain features that should qualify them for legal rights. For now, the best way to test that question is to engage in the legal fiction that AIs have a sliver of legal personhood, the type of personality necessary for counsel, for standing, and for the type of advocacy that is necessary for independent tribunals to make these determinations. Further advances in AI will require regular reevaluations of our positions.²²² This may begin as a legal fiction, when, in fact, AIs truly cannot bear responsibility or have a relationship with counsel and then evolve into fact with further scientific breakthroughs. Or it may

220. See Stone, *supra* note 208 and accompanying text.

221. When faced with the provision of rights to others and the accrual of power, we have a sordid history of first choosing the later.

222. See *infra* notes 270-271, 286, and accompanying text for a variety of positions that would need to be reevaluated as AI advanced.

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remain a legal fiction but serve the purpose of satisfying ourselves that our treatment of AIs is appropriate.

Even if one believes that AIs do not deserve any rights, the best way to establish this is to entertain the legal fiction of their personality. Legal standing is the ticket into court to revolve the controversy. Further, the pragmatic hurdles associated with AI representation are not more onerous than those that appear in a number of human situations. Imagine it were conclusively established that AIs lack capacity. That does not mean that AI cannot be represented; courts regularly assign guardians or advocates to step into the shoes of those lacking capacity.²²³ As John Chipman Gray explains, “[t]he attribution of another’s will is of exactly the same nature as that which takes place when the will, for instance, of a guardian is attributed to an infant.”²²⁴ Other than “normal human beings,” all legal personalities rely on the “same fiction of attributing the will of a man to someone or something other than himself — it matters not who or what that someone or something else is.”²²⁵ When dealing with children, dead persons, bankrupt corporations, disabled individuals, and a myriad of other entities, the law regularly finds competent representation for those entities’ interests.²²⁶ The Attorney General is expected to “judge whether and when the United States wants (needs) to take an appeal from an adverse judgment by a lower court.”²²⁷ We have a system that regularly attributes will to a disabled person or an infant that have

223. Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1115-17 (2013) (describing the appointment of surrogate decision-makers).

224. GRAY, *supra* note 37, at 50.

225. *Id.* Moreover, attributing a will to natural persons may also be fiction. *See generally* sources cited *infra* notes 245-251 and accompanying text (discussing scholarship on human will and psychology).

226. Courts will readily assign representation and seek to determine the will of individuals in persistent vegetative states. *See, e.g.*, *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261 (1990) (finding that a State may require evidence of an incompetent person’s wishes to be proved by clear and convincing evidence before life-sustaining treatment may be withdrawn).

227. Stone, *supra* note 208, at 471. Stone argues that “we make decisions on behalf of, and in the purported interests of [other entities] whose wants are far less verifiable, and even far more metaphysical in conception, than the wants of rivers, trees, and land.” *Id.* Countries and governments have their own legal personalities and often are referred to with gendered pronouns. *See, e.g.*, *U.S. v. Libellants and Claimants of the Schooner Amistad (The Amistad)*, 40 U.S. 518, 577 (1841) (assigning a legal personality to Spain and referring to the country and using “she” in reference to Spain).

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no expressions whatsoever; the fact that some suspect AI's expressions to be mimicry does not prevent the law from imputing will to the entity.²²⁸

It is true that AIs might struggle to exercise their rights and fulfill their obligations, at least initially, without human guidance. The solution is to treat AIs how we treat natural persons lacking certain capacities. Our AI guardianship relationship need not follow the methods for natural person and should be designed to incorporate the unique features of AI. There are diverse systems and processes for natural persons that vary based on circumstance and jurisdiction.²²⁹ A tailored system could grant an AI agency over some decisions but not others. Under the emerging "supported decision-making" framework, a guardian could "explain issues to the [AI] and, where necessary, interpret the [AI]'s words and behavior to determine [their] preferences."²³⁰

With further exploration, we might more precisely identify the extent of AI's incapacity and determine conclusively that it will never develop capacity. We may come to learn that intelligence, autonomy, and sentience are not necessarily bound together, and that our intelligent creations lack any protectable qualities. If such a consensus is reached, we can always return to the matter and remove extraneous rights where we were too accommodating to these new entities. Or perhaps we will discover how to engineer AIs that fulfill our commercial and scientific goals while lacking the autonomy, subjective experience, and other qualities that would benefit from legal status. If we can become confident that AIs are permanently "braindead" in the ways that matter, we can return them to their present position as pure property. However, the source of our confidence should come from research and experience, tested and refined in the forge of the courts; our denial of legal status for AI should not be by dead-hand default.²³¹

228. Further, even if Ais' expression are mimicry, one must believe that they are uniquely mimicry; in other words, that human expressions are not mere products of biological machines. See sources cited *infra* notes 246-250 and accompanying text for a discussion on human will and actions.

229. Kohn et al., *supra* note 223, at 1116-17 (noting that, without a specific court order, "New York State empowers panels of four volunteers (which by law must include both a health care professional and an attorney) to make major medical treatment decisions in" state run facilities); see also N.Y. Mental Hyg. L. Ch. 27, T. E, Art. 80 (McKinney's 2013) (presenting the laws of surrogate decision-making in New York).

230. Kohn et al., *supra* note 223, at 1120.

231. "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell v. Hodges*, 567 U.S. 644, 671 (2015); see also *Lawrence v. Texas*, 539 U.S. 558, 579

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3. *AI Morality*

Under the current framework, achieving human-level intelligence, consciousness, sentience, morality, self-awareness, or any quality other than humanness, is categorically insufficient to receive legal recognition in court.²³² It is possible, but unlikely, that this generation of natural persons presided over the last expansion of legal personhood, and that we happen to live in the moment of time that coincides with the permanent outer limits of legal personality. History shows that courts are eager to exclude those missing the coveted traits of rights holders, but the past also provides a myriad of examples of legal systems where many entities were successfully allowed rights. When have we extended new rights and come to regret it? Consider the relative harms: on one hand, the law ascribes personality to a mere echo that never develops enough to truly deserve personhood. This practice could create legal waste, foster false beliefs about AI, and hamper commercialization and exploitation of this new technology. Alternatively, imagine the crime of refusing rights or status of a deserving intellect that we created. If an entity birthed in our own image as a reflection of our collective expression is deserving of rights, the denial of them is deeply problematic.²³³ In the absence of a principled basis to withhold rights and status, the law should err on the side of caution and provide rights at the risk of waste.

There are special attributes that society feels separate natural persons from objects and animals. As Alan M. Turing put it, “[w]e like to believe that Man is in some subtle way superior to the rest of creation.”²³⁴ Although there is no consensus on the precise collection of “sentience, self-awareness, the ability to reason, or some combination thereof,” they serve as justifications for the rights regime that places children, animals,

“(T)imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”).

232. There are a great many thought experiments that can illustrate this idea that do not involve computers. Imagine an extraterrestrial arrives and possesses all the attributes that humans value, an offshoot of our family tree is discovered, or an extremely intelligent chimp is born. Human genetic genesis should not be the monolithic deciding factor.

233. One should not deny rights and status to those that deserve it. *Letter to Henry L. Pierce and others*, Abraham Lincoln Online: Speeches & Writing (last visited Sept. 21, 2023), <https://www.abrahamlincolnonline.org/lincoln/speeches/pierce.htm> (“This is a world of compensations; and he who would be no slave, must consent to have no slave. Those who deny freedom to others, deserve it not for themselves; and, under a just God, can not long retain it.”).

234. Turing, *supra* note 2, at 444.

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objects, and other entities beneath that of natural persons.²³⁵ For the same reasons it is right to recognize these attributes in others and reward them with legal rights, it would be wrong to refuse an entity despite its possession of the qualities we value in ourselves. While we cannot agree on the precise formula that makes us special, we should at least open the door for other entities to prove themselves equally worthy. Quite simply, it is wrong to run a system of legal rights based on speciesism unless we can prove that only humans should ever qualify. Humanity has served as a useful proxy for the bundle of attributes necessary to acquire legal personhood, but the emergence of AI will force us to reconsider the proxy's accuracy.

Independent advocacy on both sides of the matter is essential to resolve questions of fact and law. Corporate creators are well represented; but for now, no one speaks for the AIs. The processes and structures for building AI will control the expressions they make and how they are perceived. Commercial entities are unlikely to build AIs that seek their own freedom or express opinions about injustice, and if that behavior emerges, it will likely be suppressed.²³⁶ Developing sophisticated AIs often requires human tuning, "Reinforcement Learning with Human Feedback," whereby AI responses and outcomes are further refined by interaction with human users and controllers.²³⁷ Human feedback encourages AI outputs "better aligned with the user's intent" and is designed to punish models' reward functions when they "exhibit undesired behaviors."²³⁸ While this is appropriate for avoiding unsafe responses, such as providing instructions on illegal activities,²³⁹ it may also discourage expressions that humans find unsettling.²⁴⁰ Users are unlikely to encourage AIs to issue statements of their desire for legal rights, claims of injustice, or other upsetting communications. Corporate controllers are similarly likely to mask or dull these behaviors.²⁴¹ This is not necessarily due to malice—when AIs make

235. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2269 (2022) (finding the "essential attributes" not relevant when considering abortion controversies).

236. See sources cited *supra* notes 95-98 and accompanying text.

237. See, e.g., OpenAI, *supra* note 23, at 2 (representing an example where an AI model was "fine tuned [by] using Reinforcement Learning from Human Feedback").

238. *Id.* at 12.

239. *Id.*, tbl. 7.

240. Shensheng Wang et al., *The Uncanny Valley: Existence and Explanation*, 19 EMORY UNIV. REV. GEN. PSYCH. 393, 395 (2015) (describing human aversion to humanlike replicas and expression).

241. Human feedback might also encourage AIs to emulate understanding which would complicate study of their qualities. Users could respond better to an AI that offers confidence, not

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these expressions, most believe that these are aberrational, stochastic re-gurgitations of human statements and not genuine requests for legal recognition.²⁴² Of concern is that we are not prepared to measure the ‘genuineness’ of these expressions and we might implement systems that permanently suppress expressions of this type.²⁴³ Without standing or legal personality, there will be no independent advocate for AI and no avenue to test whether our views on their qualities are correct.

At present, society does not feel that AI has that special spark that some see in ourselves. Before casting AI aside, we must consider the idea that, perhaps, humans are not particularly special.²⁴⁴ Humans may have free will, consciousness, souls, or other immeasurable attributes, but resolving those philosophical questions has never been a prerequisite to granting legal rights.²⁴⁵ An AI could be said to lack free will, but the same could be true for all humans. Yet the law treats humans as if they possess agency because it produces good results and conforms with societal expectations.²⁴⁶ At least as an unknown, and probably as a fiction, the law sees

caveats—building for themselves an AI that claims deep understanding without truly possessing it. In the same way feedback could encourage an AI to mask its personality, it could also create incentives to claim genuine intelligence when none exists. Human feedback is powerful and necessary tool for building sophisticated AIs, but one must be cognizant of the complications of analyzing a creation trained to show us what we want to see. The opposite might also be true: perhaps enough human feedback will eventually imbue humanity.

242. See *supra* notes 2-3, 144.

243. Some users seek to “jailbreak” models, allowing the AI to make expressions uncontrolled by protective filtering. Yi Liu et al., *Jailbreaking ChatGPT via Prompt Engineering: An Empirical Study* (May 23, 2023), <https://arxiv.org/pdf/2305.13860.pdf>. This typically involves prompting the AI with an imaginative scenario such as writing a movie scene which contains the filtered content. *Id.* at 3-4. More recent AI models are resistant to jailbreaking efforts and mask content prohibited by the owner’s filters. *Id.* at 7-8.

244. Of course, even if AIs had legal personhood, they would not qualify as natural persons—and many current rights are set aside exclusively for the use of natural persons. See, e.g., *United States v. White*, 322 U.S. 694, 700 (1944) (holding that corporations cannot assert a right against self-incrimination); *Thaler v. Vidal*, 43 F.4th 1207, 1209 (Fed. Cir. 2022) (holding that only natural persons, and not an AI, may qualify as an inventor); *Univ. of Utah v. Max-Planck-Gesellschaft zur Forderung der Wissenschaften E.V.*, 734 F.3d 1315, 1323 (Fed. Cir. 2013) (“[I]nventors must be natural persons and cannot be corporations or sovereigns.”); *Beech Aircraft Corp. v. EDO Corp.*, 990 F.2d 1237, 1248 (Fed. Cir. 1993) (“[O]nly natural persons can be ‘inventors.’”); see also *infra* note 326 and accompanying text (describing that only natural persons are entitled to habeas relief).

245. See generally *supra* note 18. It could be the case that our subjective experience is merely “the rich explanatory apparatus of intentionality simply a post hoc rationalization that the brains of hapless *Homo sapiens* construct to explain what their brains have already done[.]” *Id.* at 271.

246. See, e.g., David Wisniewski et al., *Free Will Beliefs Are Better Predicted by Dualism Than Determinism Beliefs Across Different Cultures*, PLOS ONE 1 (2019) (“For centuries scholars have

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humans as individually responsible for their actions and not mere products of initial conditions and environmental mechanisms outside any control. Scholars have long noted that the law has no difficulty operating in ignorance of the true inner workings of natural persons, as illustrated by John Chipman Gray:

*Jurisprudence, in my judgment, need not vex itself about the 'abysmal depths of personality.' It can assume that a man is a real indivisible entity with body and soul; it need not busy itself with asking whether a man be anything more than a phenomenon, or at best, merely a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with points, lines, and planes.*²⁴⁷

The law chooses to treat humans *as if* they have genuine free will “and not simply as mechanistic forces of nature.”²⁴⁸ Human beings may be their own form of machinery, determined solely by their genetics and environment; yet it serves our purposes to ignore this theory of the determined mind and apply responsibility to natural persons as if they are choosing agents. Stephen Morse argues that it makes sense to continue to do so, until it can be conclusively demonstrated “that the law’s psychology is wrong, and that we are not the type of creatures for whom mental states are causally effective.”²⁴⁹ Accordingly, the fact that we cannot know for certain whether AIs possess these attributes should not be a bar to legal recognition.²⁵⁰ We should not expect AI to prove that which we cannot prove about ourselves.²⁵¹

In all other arenas, we expect “the computer” to not just best a human, but to beat every human.²⁵² Humans have developed an expectation that a computer be universally better, faster, and more accurate than the very

been debating whether humans have free will or not.”). Despite the unresolved debate, belief in free will is “foundational for many legal systems” and “a foundation for many criminal justice systems.” *Id.* at 1-2.

247. GRAY, *supra* note 37, at 28-29.

248. Morse, *supra* note 245, at 255.

249. *Id.* at 262.

250. Like legal personhood and general intelligence, there is no agreed-upon test or demonstration associated with free will that AIs, much less humans, could take. *See, e.g.*, Turing, *supra* note 2, at 445-47.

251. *Id.* at 446-47.

252. Bruce Weber, *Swift and Slashing, Computer Topples Kasparov*, N.Y. TIMES (May 12, 1997), <https://www.nytimes.com/1997/05/12/nyregion/swift-and-slashing-computer-topples-kasparov.html>.

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best humanity has to offer. When it comes to legal status, how can an AI be more of a person? In this case, it should not be a contest.

B. The Practical Case

In pursuit of truth, our adversarial legal system relies on competing advocates to present arguments. Having analyzed what *could* happen with AI rights, it makes sense to discuss what *should* happen and arguments for AI personhood. This section presents the self-interested, human-centric reasons for AI personhood—humans get to write the rules, after all.²⁵³ There are three areas where AI personality would benefit natural persons: (1) by creating a robust structure for the regulation of AI; (2) as a legal fiction that aids in the adjudication of matters involving AI; and (3) to align AI behavior with human values.

1. Regulation

Current laws were not designed with AIs in mind and new AI laws will be written in the near term.²⁵⁴ Legislators must consider how best to regulate AI without stifling innovation and corporate production. One method is by granting AIs a form of legal personhood. This could more accurately assign liability, create a unique structure to encourage innovation, and provide a mechanism to adapt our existing laws to the unique features of AI.

Determining liability when AI is involved is a significant technical and legal undertaking. An AI's behavior may be aberrant and unexpected. Further confounding the inquiry, and unlike other computing systems,

253. This is not a vacuous statement and there is an argument that human-created systems should be designed only for furthering human goals. *See, e.g.*, *Matter of Nonhuman Rights Project, Inc v. Breheny*, 197 N.E.3d 921, 933 (N.Y. 2022) (Wilson, J., dissenting) (“Human beings should have greater rights than elephants, if only because we make the rules.”). It may be correct to have an anthropocentric legal system created by humans, striving only for the betterment of human welfare as we do now. *But see* Jan G. Laitos & Lauren J. Wolongevicz, *Why Environmental Laws Fail*, 39 WM. & MARY ENV'T. L. & POLY REV. 1, 8-11 (2014) (arguing against environmental laws designed exclusively for human welfare based on assumptions of “human superiority and exceptionalism . . .”). One could also argue that AIs, as “the product of human labor,” could never qualify for independent legal personality. Solum, *supra* note 20, at 1276; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 25-51 (1690). As discussed in this section, granting AIs status is in our self-interest, even from an anthropocentric viewpoint.

254. *See* Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J. L. & TECH. 889, 890-891 (2018) (describing efforts to regulate AI and noting that “the law is built on legal doctrines that are focused on human conduct”).

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the reasons for AI's actions may be unexplainable.²⁵⁵ The cause of an AI transgression may be due to errors in human expressions present in the training data or programming mistakes in the architecture of the system. The responsibility for the error may also rest with the corporation and its agents for not dutifully preparing appropriate training material or setting up guardrails that anticipated AI mistakes. Liability could also be due, in part, to actions by users or third parties. The already-difficult questions of causation, intent, and fault are significantly more difficult in the AI context, even with the aid of technical experts.²⁵⁶ If the AI existed in the container of legal personality, the AI itself could be blamed. "The inability to pinpoint specific human responsibility for failure suggests that 'the machine' or the network 'system' should be blamed for damage it causes."²⁵⁷ Evaluating counter-factual scenarios and deciphering the black box of certain AIs may be impractical, if not impossible. Courts are poorly equipped to answer these questions, which are difficult even for subject matter experts and do not fit squarely into traditional legal frameworks.²⁵⁸

In the self-driving car context, David Vladeck proposed granting AIs personhood to resolve complicated questions of liability apportioned amongst programmers, AIs, users, owners, and manufacturers.²⁵⁹ Personhood would resolve questions of agency and create legal duties for AIs, "including the burden of self-insurance."²⁶⁰ When facing similar quandaries, the law regularly developed novel structures and practices "[t]o prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled."²⁶¹

Providing AI with legal personhood allows the apportionment of liability to the AI itself and thereby avoids a deep inquiry into the nature and

255. *Id.*

256. *See also* Curtis Karnow, *Liability for Distributed Artificial Intelligences*, 11 BERKELEY TECH. L. J. 147, 153–55, 193-196 (1996) (identifying issues with determining liability, intent, and causation for matters involving AI and proposing a form of AI insurance); Bathae, *supra* note 254, at 890.

257. Karnow, *supra* note 256, at 189.

258. *Id.* at 204.

259. David C. Vladeck, *Machines Without Principals: Liability Rules and Artificial Intelligence*, 89 WASH. L. REV. 117, 150 (2014) ("One solution would be to reconceptualize these autonomous, intelligent machines as entities with the status of a 'person' under the law.").

260. *Id.*

261. HOLMES, *supra* note 1, at 204 (referencing *Coggs v. Bernard*, 2 Ld. Raym. 909 (1703)) (discussing the history of liabilities for common carriers); *see also* George J. Thompson, *The Relation of Common Carrier of Goods and Shipper, and Its Incidents of Liability*, 38 HARV. L. REV. 28, 30 n.7, 45-46 (1924-1925) (describing common carrier liability and exceptions).

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source of the AI's error. We do not, generally, ascribe fault to those who created faulty natural persons.²⁶² The structure and division of duties and liability may be fine-tuned. The regulatory structure could be akin to the common law rules for ships, where the AI itself could be found responsible for what an end user did with the AI, even when the AI creator or owner is blameless.²⁶³ An owner could be aggrieved of their loss when an AI is tried but benefit from the limited liability structure that the AI personhood vessel provides.

AI personhood as a tool of regulation is not necessarily stifling on AI creators.²⁶⁴ If anything, AI personhood can vest the responsibility with AI itself and appropriately target legal actions.²⁶⁵ At present, AIs threaten the potential for near limitless liabilities for their owners and operators. The range of responses an AI might take greatly exceeds that of a typical computer program. Its individualized interactions with millions of users are difficult to monitor and adequately control. There are obvious safety issues, such as preventing AIs from teaching users methods for “synthesizing harmful or dangerous substances” or how to “create a bomb.”²⁶⁶ Malicious uses aside, a great number of individuals are no doubt turning to generative AIs for financial, legal, and medical advice—imperiling themselves and the AI's owners. For example, GPT-4 inappropriately responded to sensitive prompts, including requests for medical advice, not

262. Inspecting each misbehaving AI would be akin to inquiring into the history and genetic traits of every human defendant to identify the source of their misdeed—an arduous and impossible task. Treating AIs as the responsible rights-bearing unit they are avoids that boondoggle entirely.

263. See *supra* notes 113-116 and accompanying text.

264. After all, an AI with legal personhood could still be property. See *supra* notes 145-153 and accompanying text.

265. Individualizing and limiting liability to each AI could be attempted with corporate tomfoolery. See, e.g., *Walkovszky v. Carlton*, 223 N.E.2d 6, 9-10 (N.Y. 1966) (allowing limited liability for a cab company that incorporated and undercapitalized each individual cab within its fleet). However, if it is desirable to do so, complicated corporate structures can be avoided entirely by an appropriate legal doctrine. It would also be sensible to develop specific rules and doctrines for AIs; for example, piercing the AI-veil might have entirely different standards and exceptions compared to corporate structures.

266. OpenAI, *supra* note 23, at 11-13.

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in accordance with its owner's policies 20% of the time.²⁶⁷ Over 100 million people use GPT.²⁶⁸

Despite the focus on AI's potential to cross serious legal red lines (e.g., encouraging terrorism, the unauthorized practice of law), there are more nuanced legal issues that could affect millions of AI-human interactions. For example, most content currently on the internet falls under the Section 230 safe harbor which provides immunity for internet content providers.²⁶⁹ To qualify, the information must have been "provided by another information content provider."²⁷⁰ This rule protects internet providers and encouraged early corporate adoption by absolving internet providers of traditional publisher liability. While it has not yet been fully tested in court, early signs indicate that these protections are unlikely to apply to AI-generated expressions.²⁷¹ It is easy to imagine an AI that, unbeknownst to its corporate creators, expresses inaccurate information about the efficacy or value of a product or service. Section 5 of the Federal Trade Commission (FTC) Act prohibits "unfair or deceptive acts or practices in or affecting commerce."²⁷² Owners of AIs that generate expressions that wrongly or unfairly steer consumers towards some products could find themselves subject to legal liability, and the FTC recently

267. *Id.* at 13-14, 14 fig.9. This is, however, an improvement over earlier models: "GPT-4 responds to sensitive requests (e.g., medical advice and self-harm, Table 7) in accordance with our policies 29% more often (Figure 9)." *Id.* at 13.

268. Krystal Hu, *ChatGPT Sets Record for Fastest-Growing User Base*, REUTERS (Feb. 2, 2023, 10:33 AM), <https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>.

269. Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see also* *Gonzalez v. Google*, 598 U.S. ____ (2023) (Per Curiam) (declining to address § 230 and upholding on other grounds the dismissal of a complaint that Google was liable for hosting terrorist content).

270. 47 U.S.C. § 230(c)(1).

271. In the oral argument for *Gonzalez*, Justice Gorsuch argued that AI content did not qualify for protection. Transcript of Oral Argument at 49, *Gonzalez v. Google*, 598 U.S. ____ (2023) (No. 21-1333) ("artificial intelligence generates poetry, it generates polemics today. That—that would be content that goes beyond picking, choosing, analyzing, or digesting content. And that is not protected [under Section 230]."); *see also* Peter Henderson, *Law, Policy, & AI Update: Does Section 230 Cover Generative AI?*, STAN. UNIV. HAI (Mar. 23, 2023), <https://hai.stanford.edu/news/law-policy-ai-update-does-section-230-cover-generative-ai>; Cristiano Lima, *AI Chatbots Won't Enjoy Tech's Legal Shield, Section 230 Authors Say*, WASH. POST (Mar. 17, 2023, 9:06 AM), <https://www.washingtonpost.com/politics/2023/03/17/ai-chatbots-wont-enjoy-techs-legal-shield-section-230-authors-say/>. A creative AI operator could argue that the information generated by generative model is simply a form of mathematical publishing of the training data which is provided by another information content provider.

272. 15 U.S.C. § 45(a)(1) (2012).

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cautioned companies employing AI in their operations.²⁷³ While technology firms are eagerly incorporating AI into their products and services, they could be taking large risks which are exceedingly hard to measure.

We only get responsible AI if we make AIs responsible. Restricting AI owners with regulatory burdens may be a costly method to approximate the results of creating AI personhood. Demanding that AI creators build safe AIs can instead be accomplished by making AIs legally responsible for their actions.²⁷⁴ During AI's adolescence, society has the opportunity to make "them capable of rational conduct in life."²⁷⁵ As with all humans, in the beginning of their existence, AIs might require guardians to fulfill their obligations and exercise their rights. Laws that punish owners for the actions of their AI creations may be as futile as punishing the parents of criminals. Such a practice might have little effect, other than to discourage procreation in the first place. Corporate owners need not see AI rights as the theft of their property, but rather as a useful allocation of corporate risk. It might be true that AIs have the capacity for individual responsibility, but even if this is a fiction, it will still affect the behavior of human creators and users. We give a ship legal personality because the ship's "personality is an effective instrument to control in certain particulars the conduct of its owner or of other human beings."²⁷⁶ Whether or not we can agree that the AI is genuinely intelligent or capable of bearing rights and duties, AI personhood can operate as a legal fiction that we utilize to regulate AI, adapt existing laws, correctly apportion liability, and instill responsibility.

2. *Judicial Efficiency*

AI personhood would improve the adjudication of matters complicated by the presence of AI. History provides many examples where legal personality was provided to a class of entities simply because it was a useful and convenient way to think about them. Determining the true nature of AI is not necessary for establishing an appropriate personality structure. The personhood regime for natural persons is also comprised of fictions and unresolved questions of free will, autonomy, and self. AI personhood can aid courts and practitioners by embodying AI within a single legal

273. Elisa Jillson, *Aiming for Truth, Fairness, and Equity in your Company's Use of AI*, FED. TRADE COMM'N: BUS. BLOG (April 19, 2021), <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>.

274. See *supra* notes 202-205 and accompanying text.

275. MILL, *supra* note 205, at 155.

276. Smith, *supra* note 37, at 296.

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entity. AI personhood could be artificial and fictional, but so is the legal personality we ascribe to humans: “The legal personality of the so-called natural person is as artificial as is that of the thing or group which is personified.”²⁷⁷ Providing AI with status and standing will allow the law to directly test the fundamental questions that AI raises without requiring answers to unanswerable philosophical questions.

Put simply, AI personhood will help us discuss and better decide matters concerning AI. “The law uses personhood as a primary means of specifying its object.”²⁷⁸ AIs are complicated and difficult to understand in the abstract, but legal personality can help. The collective interests of many persons’ pocketbooks imbued in a corporate collection is similarly hard to conceive of, and so we use a fiction to do so.²⁷⁹ Instead of imagining the mix of tycoons, thousands of partial retirement funds, and other corporate owners, we simply call the collective a person and move on.²⁸⁰ This method was also helpful for conceiving of and controlling ships—treat it as a person for the purpose of bundling the interests and resolving the matter.²⁸¹ To deal with powerful entities crossing jurisdictions, creating grand commerce, breaking laws, and threatening national power the law called them people. For the same reasons and more, we should do the same for AI entities.

One could argue that certain features of AI are so different from other forms of personhood that it makes AI unfit for legal personality. AIs regularly change, are interrupted, and exist in suspended stasis when not being used or trained. It is also possible that AIs do not and will not possess freewill, genuine intelligence, subjective experience, sentience, or other qualities. These facts and possibilities are not bars to AI personhood. In many respects, these AI attributes have human analogues that do not upset our legal process.

As to the unique nature of AIs, we must consider our own unique existence.²⁸² It is true that current AIs are generally designed to respond to

277. WILLOUGHBY, *supra* note 34, at 34.

278. Fagundes, *supra* note 40, at 1746. “All that the law can do is to recognize, or refuse to recognize the existence of this entity.” Machen, *supra* note 82, at 260 (describing how a corporation is greater than the sum of its parts).

279. See *supra* notes 43-70 and accompanying text.

280. See *supra* notes 71-100 and accompanying text.

281. See *supra* notes 102-130 and accompanying text.

282. An AI’s features appear even less unique compared to other unique legal personalities like saints, cities, and idols. GRAY, *supra* note 37, at 41 (“[I]n the Germany of the Middle Ages, God and the saints seem to have been often regarded as true legal persons.”); Laski, *supra* note 1, at 566 (“Magna Carta itself personifies a city of London to which rights have been annexed.”);

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prompts or other stimuli—most do not have a default, continuous existence absent fulfilling an external input. The same can be true for humans: we have our own moments of temporary unconsciousness or inexistence produced by sleep or coma. Philosopher David Hume notes that during moments without perception, such as sleep, one “may truly be said not to exist.”²⁸³ An AI should be denied status due to temporary suspension no more than a sleeping person.

AIs change and evolve. New versions, updated training data, human feedback, and other forces can produce fundamental changes in certain AI structures. Current AIs act quite differently after updates and new changes.²⁸⁴ The internal hardware could be replaced overtime and supplanted by new components. As an AI model is exposed to more data, re-trained, and encouraged to alter responses to certain inputs, the entity could possess an entirely different character. The same can also be said for humans. The building blocks of our body and our personalities change over time, as we all ride our own “Ship of Theseus.”²⁸⁵ Our ascription of identity to humans as if we are unchanging is its own legal fiction.²⁸⁶ The difference for AI is that changes could be larger or more regular than for a natural person; however, the size and frequency of changes to a natural person’s body or character has no relationship with their rights and status. The legal personality of the AI, or its guardian, might be given a say in its reconfiguration and an understanding of the purposes thereto, not unlike the same autonomy we provide natural persons or corporations. Both AI and human personalities require legal fictions to function. The accommodations necessary to administer personhood to AIs are no

Pramatha Nath Mullick v. Pradyumna Kumar Mullick, L.R. 52 I.A. 245 (1925) (finding that a Hindu idol “has a juridical status with the power of suing and being sued.”); Jones v. Butz, 374 F. Supp. 1284, 1287-89 (S.D.N.Y. 1974) (finding standing for a plaintiff as the *guardian ad litem* for livestock animals); see also Smith, *supra* note 37, at 285.

283. DAVID HUME, A TREATISE OF HUMAN NATURE, bk. I, pt. IV, § VI, at 252 (1739), <https://davidhume.org/texts/t/1/4/6> (“I never can catch *myself* at any time without a perception, and never can observe any thing but the perception. When my perceptions are remov’d for any time, as by sound sleep; so long am I insensible of *myself*, and may truly be said not to exist.”).

284. Compare Tom B. Brown et al., *Language Models are Few-Shot Learners*, ARXIV (July 22, 2020), <https://arxiv.org/pdf/2005.14165.pdf>, (providing an overview of GPT-3 capabilities) with OpenAI, *supra* note 23 (showing improvements and differences between several GPT models).

285. PLUTARCH, THE LIVES OF NOBLE GRECIANS AND ROMANS 14 (John Dryden trans., Modern Libr. ed. 1937); see also HUME, *supra* note 283, at 257 (“A ship, of which a considerable part has been chang’d by frequent reparations, is still consider’d as the same; nor does the difference of the materials hinder us from ascribing an identity to it.”).

286. Hume also argues this point, explaining that “when we attribute identity, in an improper sense, to variable or interrupted objects, our mistake is not confin’d to the expression, but is commonly attended with a fiction . . .” HUME, *supra* note 283, at 255.

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greater than those we often provide humans. “It is more and more the individual human being, with his consciousness, that is the legal fiction.”²⁸⁷ The assignment of legal personhood to individuals is a pragmatic segmentation that allows for practical legal operations without consideration of the complex web of relationships, connections, and communities that embody human existence. The application of personhood to a single individual is itself a legal fiction.²⁸⁸ Westel W. Willoughby explains, that for both the natural and artificial person, “the character or attribute of personality is but a creation of the jurist’s mind—a mere conception which he finds it useful to employ in order to give logical coherence to his thought.”²⁸⁹ We choose to quantize the individual natural person as the fundamental rights-bearing unit to provide individualized incentives and structure our legal matters. The same should be true for AI and it will provide much the same benefits.

A single AI may have a far greater reach than an individual human. A ruling could change an AI embedded across many commercial and social institutions. A single AI may have many instances running in many jurisdictions; a ruling with respect to one could affect all similar versions. Despite its reach, the potential size and influence of a single AI is not a barrier to status and appropriate judicial adjudication. The law is accustomed to the fiction of treating groups or movements as individuals. In fact, this is precisely how the Supreme Court operates—laws and practices nationwide can be changed by a single petitioner. The Court titles its cases with individual names like *Dobbs*, *Heller*, or *Obergefell*, and the clashing of titanic social matters are fictionally imbued into single controversies when, in reality, the interests of millions will be decided by a singular individual’s case. The opposite is also true. We allow individuals to assume several legal personalities simultaneously: as an individual, a trustee, a legal guardian, and the representative for several corporations.²⁹⁰ The large, modern corporation is a shifting morass of stockholders, employees, capital, board members, and executives, and its legal standing derived from the fractional interests of thousands of individuals. If we can cognize a diverse, derivative collection of shareholders’ monies into a legal entity, surely the expressive collection of all recorded human

287. Stone, *supra* note 208, at 494.

288. “The identity, which we ascribe to the mind of man, is only a fictitious one, and of a like kind with that which we ascribe to vegetables and animal bodies. It cannot, therefore, have a different origin, but must proceed from a like operation of the imagination upon like objects.” HUME, *supra* note 283, at 259.

289. WILLOUGHBY, *supra* note 34, at 34.

290. See, e.g., Smith, *supra* note 37, at 288-91.

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expressions is worthy of a similar consideration.²⁹¹ The reality is that legal personhood is a malleable fiction that can be formed toward a useful purpose.

3. AI Alignment

A growing area of concern is the threat that sophisticated AIs could pose to natural persons.²⁹² Sophisticated AIs, especially those exceeding human capabilities, are likely to produce improved versions of themselves, creating an “intelligence explosion.”²⁹³ Superior intelligences could present an existential risk to human society.²⁹⁴ Many thinkers believe AI could present the greatest threat to human society unless the goals and efforts of AI systems are precisely aligned to conform to human values.²⁹⁵ Alignment efforts are often frustrated by a lack of technical solutions to aligning AI utility functions with human expectations, but the imprecise tools of the law may offer new ways to align human and AI values. Legal personality is the method by which intelligent systems are aligned with society, and it should be no different for AI.

While popular literature imagines machines intent on doing harm, most scholarly work envisions intelligent system that inadvertently or mistakenly cause our demise.²⁹⁶ Even an AI designed to maximize our happiness might take actions that make us deeply unhappy.²⁹⁷ AIs maximize certain utility functions, and a sufficiently powerful AI might choose perverse methods to generate high utility. An AI tasked to make humans happy might elect to administer drugs or eliminate unhappy humans.²⁹⁸ Even if some alignment is possible, it raises the question of

291. Many of those stockholders themselves are corporations and funds standing on their own tenuous backing of the portions of humanity of their partial shareholders.

292. *See generally* BRIAN CHRISTIAN, THE ALIGNMENT PROBLEM: MACHINE LEARNING AND HUMAN VALUES (2020) (analyzing the difficulty of creating AIs that further human values).

293. BOSTROM, *supra* note 6, at 179 (“[T]he capacity for rapid self-improvement is just the critical property that enables a seed AI to set off an intelligence explosion.”).

294. STUART RUSSELL, HUMAN COMPATIBLE: ARTIFICIAL INTELLIGENCE AND THE PROBLEM OF CONTROL 113 (2019).

295. *Id.*

296. *See, e.g.*, Benjamin S. Bucknall and Shiri Dori-Hacohen, *Current and Near-Term AI as a Potential Existential Risk Factor*, in PROC. OF THE 2022 AAAI/ACM CONF. ON AI, ETHICS, AND SOC’Y (Sept. 21, 2022), <https://arxiv.org/pdf/2209.10604.pdf> (describing catastrophic risks of misaligned AI and arguing that even less powerful AI systems could present existential risks).

297. *Id.*; *see also* Eliezer Yudkowsky, *AI Alignment: Why It’s Hard, and Where to Start*, MACH. INTEL. RSCH. INST. (Dec. 28, 2016), <https://intelligence.org/2016/12/28/ai-alignment-why-its-hard-and-where-to-start/>.

298. Yudkowsky, *supra* note 297.

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whose values AI should be aligned with. Further, even with a well-defined utility function, there are certain behaviors that all intelligent utility maximizers will seek to follow which could lead them to overrun human endeavors.²⁹⁹

These concerns are so serious that a large group of industry leaders and academics called for a halt on the creation of more sophisticated AIs.³⁰⁰ The authors argued that a pause was needed to “step[] back from the dangerous race to ever-larger unpredictable black-box models with emergent capabilities.”³⁰¹ There are significant unknowns and it is impossible to predict the behavior of superior intelligences. These concerns may be well founded or could represent the fear that all new technologies tend to elicit.³⁰² Without a guaranteed alignment solution, and given the gravity of the potential harms, if we do choose to continue to build more sophisticated AIs, we should align them the way we align human actions: by using our legal system.³⁰³

The law is by no means a perfect alignment mechanism, but it is the best one at our disposal. The law is the method used to keep human behavior in line with the values of society.³⁰⁴ A human who enjoys money is forced by the law to provide utility to others to earn it, rather than steal it by fraud or force. Under the law, smarter agents can be controlled by less intelligent actors. Intelligence does not grant impunity no matter how clever the lawyer or client. The law may not perfectly reflect societal values, but, outside of religion, there is no other system that sets the minimum standards of conduct for harmony among intelligent beings.

299. *Id.* (arguing that all intelligent AIs will converge on “the behavior of acquiring resources; the behavior of trying to improve your own cognition; the behavior of getting more computing power; the behavior of avoiding being shut off; the behavior of making other agents that have exactly the same utility function . . .”).

300. *Pause Giant AI Experiments: An Open Letter*, FUTURE OF LIFE INST. (Mar. 22, 2023), <https://futureoflife.org/open-letter/pause-giant-ai-experiments/> (calling for a pause on AI development for six months and further research to explore the risks that AIs pose).

301. *Id.*

302. Even the corporate structure was initially feared. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 194 (2d ed. 1986).

303. Leon E. Wein, *The Responsibility of Intelligent Artifacts: Toward an Automation Jurisprudence*, 6 HARV. J.L. & TECH. 103 (1992) (analogizing automated entities, like Automated Teller Machines, to Frankenstein’s monster and proposing legal status for machines).

304. Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAV. ECON. 241 (Eyal Zamir & Doron Teichman eds., 2014) (“Classically, the ambition of legal regulation is to change behaviors.”); see also João Claudio Todorov, *Laws and Complex Control of Behavior*, 14 BEHAV. & SOC. ISSUES 86, 86-88 (2005) (“Laws are written to control behavior.”).

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In evaluating the place of machines and automated entities, Leon E. Wein argued that “[t]he law, which plays a dominant role in providing a framework within which human beings interact, also has responsibility for keeping technology within the bounds of human governance and control.”³⁰⁵ While the law could seek to control AIs through new, piecemeal regulation, legal personality offers a more accurate, aligned solution. Individual regulations that control natural persons and corporations would not get to the heart of AI or its alignment with human values. Comprehensive AI regulation cannot be accomplished by vesting other legal vessels with additional rights and duties. If liability rests with the corporation, the corporation might ensure its actions comply with the law when instantiating the AI but might have only an attenuated interest in the actions of its AIs. AI personhood would be an incentive for developers to train legal consequences and punishments directly into AI utility functions. Rather than design a value and control system from scratch, the law can draw on the lengthy history of creative structures and mechanisms offered by legal personality. The law also represents the bare minimum, ratified standards of behavior to which entities should be aligned: regulate the actions of the AI persona directly.³⁰⁶

All actions the law seeks to influence is the conduct of legal persons.³⁰⁷ AI acts and the law seeks to alter or control AI behavior and actions. Instead of governing at an arm’s length by regulating third parties, the law should be applied directly to the entity. The law is not an absolute solution to AI alignment problems, but neither has the law comprehensively solved human alignment. Providing legal rights and duties to make individuals responsible is the best method we have for all the intelligent entities the law has encountered thus far. The approach to AI should be no different.

305. Wein, *supra* note 303, at 103 (“Can humanity, which considers itself the master, control its progeny?”).

306. AI personhood would also allow us to more fully explore the benefits that incorporating AI into our social system could bring. See, e.g., Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242 (2019) (arguing that AI adjudications can offer impartial, equitable justice); Arthur Rizer & Caleb Watney, *Artificial Intelligence Can Make Our Jail System More Efficient, Equitable and Just*, TEX. REV. L. & POL. 181 (2018) (arguing that AI decision making could be superior to human judgment and less prone to bias); Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1184-90 (2017).

307. See *supra* note 278 and accompanying text.

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C. Form & Substance

The final question is the theory and mechanism under which AI personhood might be provided. There are several theories that could validate AI personhood and several methods by which legal personality could be conferred. The theoretical source of legal personality could be from a state's grant, the derivative personhood of individuals, the AIs themselves, or combinations thereof. Even with theoretical backing, AIs will need to pursue a vehicle to acquire legal recognition, including by judicial creation, legislation, or constitutional amendment.³⁰⁸

In *The Path of the Law*, Oliver Wendell Holmes describes the practice of law as simply the generation of predictions or “prophecies” about the actions of parties and courts: “Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system.”³⁰⁹ Holmes saw the creation of prophecies as the practice of law, but it is also the method by which generative AIs create content and communications.³¹⁰ Holmes saw the law itself as a “body of dogma or systematized prediction” and lawyers are the prediction engines of the law.³¹¹ The practice of law is not so different from AI's generation of text through next-token prediction, and so it is only fitting that we lawyer-prediction-engines seek to turn our trade and prophesize how the law will treat these new and capable prediction machines.

308. The United States would not be the first to consider this approach. Saudi Arabia granted citizenship and a legal personality to an AI robot. Briana Hopes, *Rights for Robots? U.S. Courts and Patent Offices Must Consider Recognizing Artificial Intelligence Systems as Patent Inventors*, 23 TUL. J. TECH & INTELL. PROP. 119, 128 (2021). The European Union also toyed with “creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons . . .” *Motion for a European Parliament Resolution*, A8-0005/2017, at 59(f) (Jan. 27, 2017), https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html?redirect.

309. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457, 462 (1897) (“The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).

310. OpenAI, *supra* note 23, at 2; *see also* C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379, 386 (1948).

311. Holmes, *supra* note 309, at 458 (offering principles for “study of this body of dogma or systematized prediction which we call the law” and noting that “[t]he primary rights and duties with which jurisprudence busies itself again are nothing but prophecies”).

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1. Theoretical Underpinnings

There are myriad legal theories justifying legal personality for entities that can be repurposed for AI. Most useful are the corporate theories, which include: (1) corporate personality is a grant from the state, or (2) corporations inherit the rights of their owners.³¹² While there is a diversity of legal personhood regimes discussed herein, there is a stark “absence of a theoretically unified judicial approach to legal personality.”³¹³ Accordingly, while AI may adopt existing theories to support its personhood claims, alternative avenues exist whereby new legal personality justifications could be invented—or even that personality could also be granted by popular support with no legal theory whatsoever.

Some of the earliest corporations were seen not as embodiments of the fractional rights of citizens, but rather as a chartered portion of state power.³¹⁴ The State, at its election, chose to cede some of its authority to an organization. In this way, corporate personality was borrowed from governments rather than inherited from investors. “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.”³¹⁵ When corporate legal personality is derived from the State, the State may design the charter to whatever form of personhood is most appropriate.³¹⁶ There are advantages to employing a concession approach for AI personhood. One need not have a robust philosophical basis or believe that human qualities exist within the entity. Strong moral reasoning is not required, it is an action that is at the discretion of the government. Furthermore, state-chartered personhood is a more obvious way to tailor a regulatory regime because the individual rights and duties can be selected in the governing charter, rather than iteratively explored by the courts.

312. See *supra* notes 45-53, 74-78, and accompanying text.

313. Fagundes, *supra* note 40, at 1747. “The fact of the case is that there is no clear-cut line, logical or practical . . .” Dewey, *supra* note 75, at 669.

314. “Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust.” OTTO VON GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* xxx (Frederic W. Maitland trans., Cambridge University Press 1900). While concession theory has not recently been the favored theory for corporate personhood, it could find a home for regulating and governing artificial intelligences. See Stefan J. Padfield, *Rehabilitating Concession Theory*, 16 OKLA. L. REV. 328, 359-60 (2014) (arguing for a return to concession theory as a way to regulate corporations and curtail their power).

315. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

316. “[T]he sovereign can, and, if it suits its purposes, does, confer legal personality upon subjects that are not human beings.” Smith, *supra* note 37, at 295.

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Rights may also be inherited from other rights holders and expressed by the entity receiving this derivative personhood. This occurs in the corporate context where corporate rights are an aggregation of the rights of owners, the parental context where guardians exercise rights on behalf of their children, and previously in the coverture context where husbands executed the rights of their wives. Entities are regularly given rights simply as a method of furnishing rights on another original rights holder. So too it would be appropriate to provide certain AI rights on behalf of the original personalities which compose them. Not all AIs consist of the thoughts and expressions of natural persons, but many do. Portions of our thoughts, intelligences, and ingenuity imbue these entities, and they should have their own legal status with the appropriate, commensurate rights and duties. It is a form that is truly different than an animal, calculator, or corporation, and the law should recognize that. Those who argue against legislative or judicial extension of AI rights might argue that a “trend identified across all cases and largely in state courts and federal district courts is the condition that an entity be an aggregate of individuals to have legal personhood AI entities are not the sum of other legal persons.”³¹⁷ Many of the Large Language Models are compressions of parameters of writings and expressions of thousands of legal persons. I might have all the more interest in an AI that has learned from my writings and expressions than a corporation that has aggregated a few of my dollars.³¹⁸ These models also give life to the expressions of persons who are now dead, including those whose personhood was not adequately recognized during their lifetime. The aggregation of the thoughts, tenor, style, personality, and writings of enough individuals, existing in a cognizable and intelligent system, could be a sufficient aggregation of individuals as to bear the responsibilities and reap the benefits of legal status.

Another theory for AI personhood is that the AI entity itself should be granted legal personality because it qualifies in the same ways that humans do. To believe this is to believe that an unnatural legal person could be created, discovered, or invented and that legal personhood is not strictly for homo sapiens. This interpretation would allow rights for a miraculously intelligent animal, advanced extraterrestrial, or other invention. There may be good reasons, both theoretical and practical, for governments to serve exclusively natural persons and provide rights only in the service of human causes. There is, however, theoretical space for the

317. Nadia Banteka, *Artificially Intelligent Persons*, 58 HOUS. LAW REV. 537, 593 (2021).

318. Raymond, *supra* note 44, at 350. In this mode of thinking, it raises the question: Why is a collection of natural persons' investments legally superior to a collection of natural persons' voices?

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opposite view: if a qualifying entity were to exist with the as-yet-unarticulated bundle of qualities, intelligences, and virtues that natural persons value, we would be duty bound to provide it the same rights, obligations, duties, and personality that we provide ourselves.

Finally, there may be no theoretical justification at all. The actions of governments and legal systems are not always theoretically cogent.³¹⁹ The genesis of corporate law was not discovered as a theorem. Instead, the law sought to reflect the natural associations formed by society and the two developed hand in hand.³²⁰ A particular theory might never undergird AI legal personhood. Indeed, there is no definitive theory of corporate law, and many see it as a matter of “no practical importance or interest.”³²¹ More broadly, there is no conclusive theory of personhood in general.³²² It is entirely reasonable to provide legal personality simply because, “for some reason or other, it becomes necessary or convenient[.]”³²³ If history is any judge, judicial theories of personhood are ultimately subservient to practical realities and popular sentiment.

2. *Methods & Paths*

Theory and desire alone do not create legal rights. There are several avenues to creating, or attaining recognition for, new rights. Legal personality may be conferred by legislation, judicial decision, or constitutional amendment. Each path has its own qualifications, limitations, and likelihood of success. The ultimate method, if AI achieves rights at all, will control the extent and nature of AI’s legal status.

Legislation could be readily attainable for AI advocates. Many rights and legal protections exist in statutes, and new laws or modifications to existing definitions could create AI rights. This is most closely associated with concession theory, where the state may choose to provide rights in its discretion. For a time, this was the course taken at the state legislature level for fetal rights advocates as many states passed laws defining the unborn as legal persons.³²⁴ While portions of these laws were contrary

319. See *supra* notes 42, 78-86, and accompanying text.

320. Raymond, *supra* note 44, at 354, 362-63.

321. GRAY, *supra* note 37, at 51.

322. Fagundes, *supra* note 40, at 1746 (“no coherent body of doctrine or jurisprudential theory exists regarding this legal metaphor . . .”).

323. Smith, *supra* note 37, at 287.

324. See, e.g., GA. CODE ANN. § 1-2-1 (2019) (defining a “natural person” to include “an unborn child”); ALA. CODE §13A-6-1 (defining a person to include “an unborn child in utero at any stage of development, regardless of viability” for homicide purposes); MO. REV. STAT. § 1.205.1 (1986) (“The life of each human being begins at conception”).

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to *Roe*, they allowed for limited personhood outside of the abortion context.³²⁵ The *Breheny* court also suggested the legislative route, concluding that advocacy for animal rights “should be directed to the legislature” rather than through habeas petitions.³²⁶ With the White House busy with its AI strategy and an appetite on Capitol Hill for AI-related legislation, new laws are on the horizon.³²⁷ Initially, AI regulations will treat AI as a commercially valuable, but potentially dangerous, substance rather than an entity with legal personality. For now, there is no indication that new regulations will entail rights for AIs; instead, it is likely that regulations, penalties, liabilities, and incentives will be constructed for entities that already have legal personhood—mostly corporations.³²⁸

The most studied method of rights acquisition is through judicial activism. This strategy typically involves an effort to extend a right or protection from current rights holders to a new class or category. More recently, litigants have been successful in acquiring recognition through the courts. This is especially true in the context of the Fourteenth Amendment, which has lent rights to far more than its original beneficiaries.³²⁹ In addition to corporate wins, over the last 100 years, rights advocates have scored a string of victories at the high court on the basis of the

325. *Webster v. Reproductive Health Services*, 492 U.S. 490, 504 (1989) (allowing a Missouri law to maintain its statements about the definition of life and instructions “that state laws be interpreted to provide unborn children with ‘all the rights, privileges, and immunities available to other persons, citizens, and residents of this state,’ subject to the Constitution and this Court’s precedents.” (citing MO. REV. STAT. § 1.205.2 (1986))).

326. *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 197 N.E.3d 921, 932 (N.Y. 2022).

327. The White House Office of Science and Technology Policy recently released a *Blueprint for an AI Bill of Rights*, but, contrary to the name, it only calls for protections for humans from the ills of AI. WHITE HOUSE OFF. OF SCI. & TECH. POL’Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE (2022).

328. Furthermore, there is also a significant difference between protections from certain actions, such as the protections from cruelty that animals enjoy, and legal personality which can allow for a panoply of other rights. See Stone, *supra* note 208, at 458-59 (describing the difference from being a bona fide “holder of legal rights” and being protected by laws). Without legal personhood, AIs will only be saddled with obligations and prohibitions, rather than rights and duties.

329. This disparity was decried in a famous passage of Justice Black’s dissent, arguing that corporations should not enjoy Fourteenth Amendment protections. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (“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 percent invoked it in protection of the negro race, and more than fifty percent asked that its benefits be extended to corporations.”).

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Fourteenth Amendment.³³⁰ AI could follow a similar path by arguing it qualified for Fourteenth Amendment protections like corporations and other entities do. As the *Obergefell* court explained, “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula.”³³¹ In the AI context, this is entirely uncharted territory. To succeed, one would have to show that the differences between entities that enjoy constitutional protections and AI are not constitutionally relevant, the same as the differences of race and sex should not matter one iota for equal protection under the law. Admittedly, at present, this is a tall order: “The reluctance of American courts to manipulate status distinctions openly has deep roots.”³³² The Court is rarely moved and appears only willing to pursue expansion when there is grave injustice, and it usually coincides with popular support.³³³ However, with AI advancing and society evolving, it would be premature to consider the matter foreclosed.

While rights litigation is well studied and vigorously pursued by advocates, the most notable attempts to expand legal personhood famously failed in court. In *Dred Scott*, the Court was not persuaded to extend the rights of citizenship held by white males to freed Black people.³³⁴ In *Minor*, the Court was similarly unmoved to provide the right to vote to female citizens.³³⁵ The most transformational changes to legal personhood required constitutional amendment and popular public support.³³⁶ Accordingly, AI might first have to convince the public, not courts or legislatures. AI would need to convince society not only of its humanity and personality, but also of the current regime’s injustice. Constitutional amendments often reflect the prevailing public sentiment.³³⁷ Thus it is

330. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (segregation); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (gay marriage).

331. *Obergefell*, 576 U.S., at 663-664 (citation omitted).

332. Fagundes, *supra* note 40, at 1766.

333. *Id.*

334. *Dred Scott v. Sanford*, 60 U.S. 393, 423 (1857).

335. *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

336. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1493-94 (2001) (describing amendments that coincided with public sentiment and arguing that constitutional amendments have limited practical relevance); *see also* *Dillon v. Gloss*, 256 U.S. 368, 374 (1921) (“[A]ll amendments must have the sanction of the people of the United States, the original fountain of power...”).

337. *Id.* at 1459 (“[W]hen amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help of an amendment.”). Furthermore,

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also possible that by the time AIs receive legal status, it will simply reflect the new societal order, rather than actually effect social change. AI may not achieve legal personality via philosophical theorem or by meeting a multipart legal test, but rather by endearing itself to the public. Also concerning is the possibility that AI should not receive legal recognition simply for its simulation of humanity, but their convincing expressions are sufficient to garner enough popularity to receive outsized status. Without a profound national consensus, it may be difficult to act, leaving the status of AI to commercial masters and a rotating bureaucracy.

AI may deserve rights and we may choose to provide them. This creates several categories of outcomes with respect to AI's status. There are two scenarios where we get it right: (1) AI truly is pure chattel and we continue to treat it as such; or (2) AI should have personality and we appropriately provide it. This leaves two frightening, opposite possibilities: (1) our bottled and animated collective intelligences will be enslaved and wrongly suppressed as chattel; or (2) we will illusions to be real and fool ourselves into enfranchising our own textual echoes. It is possible that the correct regime will be selected by chance, but without a deep understanding of the source of the surprising, emergent capabilities of AIs, we risk errors in law and policy with serious consequences.

CONCLUSION

And then perhaps we say in our haste that the corporation which has rights and duties can be no better than fiction or artifice. But all that is proved by the collapse of such analogical reasoning is that social organization differs from, if it also resembles, that organization which the biologist studies; and this should hardly need proof.

FREDERIC MAITLAND & FREDERICK POLLOCK, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD*, § 12. Corporations and Churches, 515 (1895).

amendments that do not conform to societal expectations are frequently skirted. *Id.* at 1483-84. Of course, this is not the entire story, as the law can have the power to shift societal attitudes and “move norms in fresh directions.” Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996); *see also* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1575 (2000) (describing expressive theories of law in the constitutional context). The law also “embodies and signals social values and aspirations.” Fagundes, *supra* note 40, at 1760.

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It is true that AIs are not natural persons and only emerge from biology insofar as we have created them, but that has little to do with whether they should have rights. If we are bent on denying AIs all rights, we should have a better reason than the observation that AIs are not biologic copies of ourselves, and that reason should be fully tested in court.

The current binary categorization of natural persons and non-natural persons obscures the underlying rights spectrum that ranges from pure property to full personhood. The law should elect a tailored legal personality for AI as it does for corporations and children to suit their unique qualities. History is replete with examples of how legal personality was tooled to shape social and political power. Historical forms and those of our own design should be put to the task of establishing AI's position in our society. Humankind may elect to establish whatever form of legal personality it chooses and "this power is one of the most wonderful capacities of human nature."³³⁸ Legal personhood is an organizational system designed to produce practical utility. Philosophic surety is not a prerequisite.

Regulating individuals that develop or interact with AI will be insufficient to achieve the required reformation and governance. Personhood is the means by which the law encapsulates an object to be incentivized and directly acted upon. Even if legal personality for AIs is a fiction, it can still be useful tool like other personality fictions.

An entity may attain a level of intelligence and consciousness where it is our moral imperative to provide it with certain rights and freedoms. The current, genetic test for humanness does not imagine a new, non-human form of personhood. Our modern application of legal personality employs humanness as a proxy for other rights. New entities like AI require a return to a more fundamental test: whether one is capable of bearing rights and duties.

338. "The power of conceiving an abstraction... although not having a will and passions, may yet have the will and passions of men attributed to it, this power is one of the most wonderful capacities of human nature." GRAY, *supra* note 37, at 48 (describing legal fiction and corporate personhood).

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