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## Digital Personhood, Time, Religion

### The Right to Be Forgotten and the Legal Implications of the Soul/Body Debate

#### Abstract

This paper addresses questions of legal personhood that have been coming to the fore in European courts in recent years through what has been termed the “Right to Be Forgotten.” These cases center around conflicts between the permanence of online information and the desire of users to instead make their own determinations about what personal information is accessible to others and when. I will argue that while Courts have sought to find a balance between public rights to information and individual rights to privacy, they have failed to address the core social exigencies that lie beneath these conflicts. Furthermore, the Courts’ decisions currently put the onus of determining what is permitted to be de-referenced (and when, and how) on search engines, which would seem to be an odd arbiter of personhood. While court cases consider the rights of “data subjects,” people are busy re-inventing what it means to be a person today, both during and after biological life spans. Indeed, the issues at the heart of the concept of personhood are connected to fundamental human rights and so should be analyzed in these terms. Underestimating or overlooking these concerns of human agency will make it impossible to find legitimate solutions to conflicts of personhood that will only increase as technology develops. To that end, I will argue that religious traditions can offer precious contributions to our cognitive understandings of the possibilities for people and their development. Ancient ideas such as “dispositions for the soul” show how there has long been demand and legal support for the desire to influence our post-humous being. Similarly, online posthumous services continue to grow, while leading scientific research supports conceptions of cognitive processing that extends beyond the confines of the body. It is to these kinds of ideas and models that we should turn if we are to find meaningful ways to support people as they “make” their lives: online, offline and everywhere in between and beyond.

**Keywords:** Law, Personhood, Religion, Avatars, Cyborgs, Right to be Forgotten, Embodiment Theory, Dispositions for the Soul.

#### 1. Introduction

Questions of personhood, legal and beyond, have occupied philosophers, theologians, and jurists alike for centuries. Is the person in the body? In the mind? In their union? In the soul? In a series of bodies (reincarnation)? In the products or property or labor of the person? At the moment, and regardless of the view sustained, there does appear to be some consensus in theory and/or in practice that the person is more than what is contained by the body. Though this is an ancient idea, our modern technologically driven societies underscore the point in new ways. From online avatars to the digital micro-tracking and storage of our interactions with technology (heartbeats, itinerary, online shopping clicks, e-book clicks, etc.), the digital immortality of our images, voices, words and more, are bringing a variety of aspects of our “person” to the forefront. While the material physicality of the

person has in many situations been excluded from legal definitions of personhood, technological developments continue to push law to make new determinations about how people interact with and control their disseminated digital selves.

Among these challenges is the so-called “Right to Be Forgotten,” also variously addressed as the Right to Oblivion, or even The Right to Be Remembered. A person claiming this right seeks to determine their personhood autonomously, such that as events occur, their online traces can be edited or deleted to avoid stigmatization for past actions and prevent them from being trapped within past ‘selves.’ In this essay I will argue that past, present, and future selves, including those that persist after death, are part of one continuum that is personhood. Further, this unsettling of the category is necessary to making human agency and fluidity (including between the material body and the person) a more central consideration when shaping law. At the heart of the Right to Be Forgotten controversies are unexamined questions of personhood that should not be ignored. If we turn a blind eye to the complex ways in which personhood is actually forged, and leave decision making to corporate technology interests (e.g., Google), we risk engendering deeply incongruous solutions that can overwhelm the possibilities of individual agency.

I would also like to argue that an examination of the questions of personhood can benefit from a consideration of the religious dimension of legal experience, for at least two reasons. The first is that the major religions have from their beginnings offered profoundly relational understandings of the human individual which connect it both to divine entities and to fellow humans, defining what the human person is in complex ways. The concept of *persona ficta* as well as the openness to metonymical and metaphoric understandings of human body/mind/spirit offer analogies that are germane to modern concerns of personhood. Second, today’s digital projection of legal personhood is inescapably informed by antecedent theological distinctions which were, in a sense, lost in the rubble left behind by historical secularizations. Regaining awareness of these cultural/historical connections can help unmask the conceptual patterns underlying current notions of legal personhood and its original teleological axes.

In addition to the cultural-historical-religious lens, a phenomenological/cognitive perspective can positively contribute to an analysis of online personhood issues. Since at least the mid-twentieth century, an entire heterogeneous field of scholarship has emerged that puts into question the Cartesian mind-body divide and offers new interpretations of distributed personhood and its meanings and possibilities. There are undoubtedly continuities among both the religiously rooted and neuroscience derived interpretations of personhood. These perspectives considered in tandem may contain the potential to reconnect the “self” to the “citizen” inside new conceptions of personhood that include life online and life after bodily death. Armed with this new consciousness, we can better assess the margin of these notions’ adaptability for addressing the contemporary challenges presented by the ‘virtual dimension’ of human experience.

## 2. The “Right to Be Forgotten” Cases

In 2014, the Court of Justice of the European Union (CJEU) made an important decision regarding who is responsible for the outdated personal information appearing online. In *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos*, the court held that Internet search engine operators are

responsible for the processing of personal information they carry out which appears on web pages published by third parties. The particular case regarded property auction notices for the recovery of social security debts that were still available on a newspaper's site 16 years after the fact. These notices reflected a delinquency on the part of the debtor that was no longer an accurate reflection of his financial status and which he wished expunged from the online record. The CJEU ruled that while the newspaper had a right to maintain the data as a matter of historical fact, Google must prevent the page from coming up in its search results. The decision was based on the protections offered by Articles 7 (Respect for Private and Family Life) and 8 (Protection of Personal Data) of the European Charter of Fundamental Rights.

The decision of the Court, at least in its English translation, is laborious. Three of the four points of the judgment are dedicated to interpreting certain articles of Directive 95/45/EC which define what the free movement of data is, what processing of personal data is and who can be said to do it (search engines), and what it means to oblige a search engine to remove information from a list of results. Only at the fourth point is the plaintiff mentioned (as "the data subject"), and here we learn that this subject may request the removal of his information without proving that the information requested for delisting/de-referencing causes prejudice, and that this right (protected by Articles 7 and 8) overrides both the economic interests of the search engine as well as the public's interest in the information. There is an exception, of course. The data subject's fundamental rights could potentially be interfered with if the general public were to have a "preponderant interest" in access to information on the subject "on account of its inclusion in the list of results." This interest could be sparked by particular (unspecified) reasons, "such as the role played by the data subject in public life." It can be put in simpler terms: if you are famous/interesting to the public in some way and therefore links to your information are compelling to said public, you might lose your rights to control your information. Earlier in the document, the judgment also emphasizes that the concern is over information that is "inadequate, irrelevant or no longer relevant." In keeping with the conception of the person at issue as a "data subject," the ruling addresses data understood as *facts*, steering clear of the murky waters of defamation, reputation, psychological damage and other such vagaries. In short, the CJEU ruled that a person can require that search engines put up a curtain in front of her outdated/inaccurate information as long as this information is not overly desirable to the public.

In this case, there is no question of any extended online presence or personhood. There are only outdated financial facts. Though the Right to Be Forgotten is strongly associated with concerns about social stigmatization resulting from the unwanted spread of personal information, the Court's use of the term "data subject" emphasizes an almost non-human characterization of the person, whose information is accessible (or not) according to the public's potentially preponderant interests. This positioning of subjects and values operates in the international case law as a sort of opening gambit. The terms are these: the person is a data subject. The public (as defined in the case by the Court) decides how compelled it is or isn't to override the subject's interests, and the service agent, aka, search engine, subsequently has a restricted requirement to remove links to outdated information.

One year later in 2015, *CNIL v. Google* asked the CJEU to rule on territoriality with regard to online personal data. If search engines are required to remove outdated personal information, must they do so globally? Or can they continue to de-reference European subjects' information only within

European domain names, e.g., Google.fr? The court ruled in favor of territorial specificity, but the ruling nevertheless left the door open to the legality of a global enforcement, under the right circumstances.<sup>1</sup> In the final text of the judgment, the presence of the person whose information is at issue again recedes behind the search engine's newly clarified obligation to, "effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request." The effect is to move further still from the concerns of online personhood, since the object of protection is now "links" accessed through European search engines. The responsibility is placed squarely on the shoulders of search engines: "...it is for the search engine operator to take, if necessary, sufficiently effective measures to ensure the effective protection of the data subject's fundamental rights."<sup>2</sup>

The third and most recent international case regarding the Right to Be Forgotten, *M.L. and W.W. v. Germany*, was decided in 2018 by the European Court of Human Rights (ECtHR). The plaintiffs, two German half-brothers, were convicted in May 1993 for having murdered a popular German actor. Both plaintiffs were sentenced to life imprisonment but were subsequently released on probation 14 years later in 2007 and 2008 respectively. At the time of their release, they sought legal remedies seeking anonymization in their media coverage (specifically a radio web site as well as weekly magazine and a newspaper)<sup>3</sup>. The brothers were 54 and 53 years of age at the time they were released and were presumably attempting to begin their lives anew after more than a decade in prison. Their request was not so much to be forgotten as to be disassociated from their past. Both the initial court case and the appeal were decided in their favor, with judges determining that the plaintiffs' interest in no longer being confronted with their past actions many years after their conviction prevailed over the public interest in access to that information. The radio station, however, appealed once more and the Federal Court ruled in its favor. The judgment was made on the grounds that the station's right to freedom of expression in serving the public's desire for information was the more important concern. In 2010 the case reached the ECtHR with the plaintiffs arguing that their right to private life had been infringed. Eight years later, the ECtHR's decision confirmed the German Federal Court's ruling, denying the plaintiffs' request for anonymization.

In contrast with the previous two cases analyzed, in the ECtHR judgment the subjects of the case are not referred to as "data subjects" but rather "applicants" as is the norm for the Court and the case is very much involved with the specific behavior of the plaintiffs before, during, and after the many court proceedings. In fact, one of the key points supporting the judgment was that after exhaustive attempts to re-open the criminal proceedings against them, in 2004 the plaintiffs delivered documents to the media and asked for their assistance, inviting journalists to keep the public informed. The Court felt that since the plaintiffs had previously asked for media coverage, "less

<sup>1</sup> See para 72 of the judgment available at

<http://curia.europa.eu/juris/document/document.jsf?docid=218105&doclang=EN>

and here for a succinct recap: <https://europeanlawblog.eu/2019/10/29/google-v-cnll-case-c-507-17-the-territorial-scope-of-the-right-to-be-forgotten-under-eu-law/>

<sup>2</sup> Para. 70 of the judgment.

<sup>3</sup> The English language press mainly focused on the brothers' 2010 lawsuit against the American online encyclopedia Wikipedia who agreed to remove the their names from the German-language portal, but not from the English language portal.

weight was to be attached to their interest in no longer being confronted with their convictions through the medium of archived material on the internet.” Also in contrast to the prior cases, search engines are secondary to the substance of the case since, per the Court, they merely amplified the distribution of information published by the media whose freedom of expression is central. Finally, in this third case the public is no longer a theoretical possible interest, but rather sits at the heart of the decision insofar as it is the public interest that is cited as the primary motivator for the entire decision. According to the ECtHR, the German Federal Court, “emphasised that the public had an interest in being informed about a topical event, and also in being able to conduct research into past events,” and also reiterated that “one of the media’s tasks was to participate in creating democratic opinion, by making available to the public old news items that were preserved in their archives.”<sup>4</sup>

So it is that with this case we come to the end of a kind of trajectory: the plaintiffs interests in controlling their online visibility are assessed within a social context rather than buried under legal technical language; search engines are no longer the protagonists; the public interest interpreted and held up by the Court comes first. I would like to highlight how this ruling (and the two previous ones) all sidestep the issue of the relationship between a person’s online presence/digital data and the embodied earth-bound person. Freedom of the press and freedom of the public to information are all called upon, but the ideas that undergird rights such as the Protection of Personal Data and the Right to Privacy have to do with the development of the person, with having the social space and capacity to live in the manner one chooses, and these are not present in the judgments. While there is an increasing scope of interests assessed over the course of the cases, the sociological core inside the concept of a “right to be forgotten” remains largely ignored. Forgetting, furthermore, is perhaps a misnomer. With the Right to be Forgotten, the person seeks to determine the development of their life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past. The plaintiffs in all of the cases were driven to seek protection because they felt that the version of them being presented and distributed online was not compatible with who they were and the lives they wished to lead at present. This is especially evident in the last case. There was little likelihood that the crimes of the plaintiffs would be forgotten any time soon. But after having served their sentences and emerged from prison at the ages of 53 and 54, the men could potentially have commenced new lives. Eleven years later when the courts issued the final judgment against them, this potential would seem to have been diminished if not extinguished, particularly if measured against the lifespan of the online information about the plaintiffs, which will likely long outlive them.

The most obvious difference between this case and the others is the severity of the crime from which the plaintiffs wish to be distanced. There is an unmistakable indignation in the English-language press coverage of the various lawsuits which uniformly refers to them as “murderers” or “killers.” The sentiment is clearly that the plaintiffs are morally reprehensible people who are adding insult to injury by seeking to impose censorship and edit history.<sup>5</sup> The Court, for its part, does not

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<sup>4</sup> *M.L. and W.W. v. Germany* available at [https://hudoc.echr.coe.int/eng/#{%22itemid%22:\[%22003-6128897-7918743%22\]}](https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22003-6128897-7918743%22]})

<sup>5</sup> <https://www.nytimes.com/2009/11/13/us/13wiki.html>

<https://www.wired.com/2009/11/wikipedia-murder/>

<https://www.theguardian.com/technology/2009/nov/13/wikipedia-sued-privacy-claim>

comment on the morality of the plaintiffs, but does cite journalistic freedom. Indeed, in the judgment the media is tasked with “creating democratic opinion,” which could be interpreted in various ways but surely has something to do with influencing how the public feels about the plaintiffs. The court also cites the importance of maintaining the accessibility of news reports acknowledged to be lawful.<sup>6</sup> This supports an argument frequently made against Right to be Forgotten claims that we cannot compromise the “integrity of history.”<sup>7</sup> But what about the integrity of the person? One may fully agree that people convicted of murder should not have the right to anonymize their online presence. But to make such a claim in the absence of any identification of what an online presence is and does, and how it relates to other aspects of people’s lives would seem to be at least an equally important kind of suppression. The wrong kind of anonymization, if you will. If there were greater shared moral concern over financial debts and their importance to the record of history, would the plaintiff in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos* have lost the case?

Furthermore, as the law stands, Google and other search engines have total control over which requests for delisting they honor and which they do not. Why should Google determine how a person’s online presence is shaped? They do so now at least in part because the legal cases on the Right to be Forgotten stand aligned behind a notion that the person and his data are two separate entities. Rulings are made about “the data.” And yet the line here created is artificial and has always been so, even before the exponential growth in personal technology. I will address the historical dimension of this line further ahead, but I would first like to turn to what constitutes a person’s “online presence” today.

### 3. Have People Become Avatars?

The technology desk editor at the BBC recently wrote a profile about Amazon’s role as a data collection mammoth entitled, “Why Amazon Knows So Much About You.”<sup>8</sup> The article explored Amazon’s virtual assistant Alexa and its accessory Echo (the smart speaker system), Ring (the Amazon owned home security system that captures video of every person coming to your door), as well as the detailed results of the writer’s “data subject access request” which revealed the astounding amount of information Amazon has about the writer. This includes: the music played at home (every single instance, time-stamped, by every family member), the oral requests for such music (including recorded audio of the family’s voices), the individual taps on every e-book (including time of day for each tap), each click made while researching and concluding every purchase at Amazon (which, for the writer totaled 2,670 product searches carried out within the store since 2017) and the corresponding analysis listing all products viewed, which device was used to do the research (including data “hinting” at the user’s location), and more. Amazon’s clickstream data allows it to see “which sites users come from, how they travel through its pages and where they go to next.” Importantly, Amazon’s view of user data is from on-high, meaning they can compare each user’s preferences to

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<sup>6</sup> A somewhat paradoxical detail is that the anonymity the plaintiffs sought is fully supported in the Court documents themselves, since this is standard practice in legal documentation.

<sup>7</sup> <https://www.eff.org/deeplinks/2009/11/murderer-wikipedia-shhh>

<sup>8</sup> <https://www.bbc.co.uk/news/extra/CLQYZENMBI/amazon-data>



millions of others, allowing them to seek patterns, make predictions, and perhaps even learn what users care about emotionally through, for example, voice data analysis. Somewhere in California in a conference room a group of executives are listening to the recorded voices of their customers in their homes, looking at graphic depictions of their “click paths,” analyzing charts that summarize every single product they have looked at, in what order and for how long. They can see video of who visits their users’ homes (home security camera footage) and listen to their users’ children asking Alexa to play a song over and over and over again. They know what customers read, what household products they use (and in what exact quantities for users of the “Amazon Dash” ordering service), and in another new project, every item bought at the new cashier-less convenience/food stores. Future projects include healthcare services, prescription medicine delivery, and continued expansion into voice control for “smart homes” (heating, lighting, security, etc.). Amazon is currently exploring at least two paths that directly involve human bodies: speech-emotion detection and health insurance. Their home robots may soon take body temperatures, assess symptoms, recommend non-prescription medication, and then purchase and deliver it to customers’ homes.

Amazon is of course not the only corporation in the spotlight for its access to and tracking of people’s actions. Both Google and Apple have come under scrutiny for the data they collect regarding people’s locations and movements. There are those who laud them for their technologies’ role in, for example, tracking down criminals, as well as those who lament the Orwellian access they have to the micro-movements of millions, if not billions, of people. Technological devices increasingly track not only our steps but our heartbeats. They respond to our faces, our fingerprints. Regardless of one’s position on consumer convenience, capitalism, surveillance, Big Data, or any of the myriad issues that arise, one thing is certain: there is a web consisting of “microfacts” about each person’s behavior that is coalescing in data. For millions of people, some aspect of our “selves” exists online and can be viewed, heard, and assessed by external agents, and this circumstance is replicating exponentially.

The above descriptions, furthermore, include only data culled from without. There is of course an overlapping world of online “data” that is willingly shared, every minute, by people with millions of other people. To wit: one quarter of the world is on both YouTube and Facebook. Facebook owns Instagram which has 800 million monthly active users, while Twitter has 330 million. These platforms feature photos and videos of every imaginable moment in people’s lives, a constant stream of self-reported ideas, opinions, emotions, desires, predictions, and so on. Both consciously and not, we are creating complex digital avatars of our ‘selves’ every day.

In recognition of the growing phenomenon of our “avatarization,” online services are cropping up to address needs that may be independent of the chronology of life of our physical body. Email can be programmed for future send dates, expiration dates can be put on our personal online content so that our photos vanish, for example, at the moment of our choosing, and expiration dates can also be added to web pages so that after a certain date they are no longer indexed by search engines. In certain circumstances, we can even transfer some part of our digital presence to another person and have them carry it out after we have passed. This means that people can program their spoken or written words and images to be shared in the future and they can also determine when their past expressions will disappear. What was once, perhaps, a letter written to our children to be delivered after our passing can now be a robust set of multimedia communications with a timed schedule that could continue indefinitely after our bodily death. Services aside, the fluidity between our digital selves and our “fleshly” selves has been visible for at least the last three decades. High quality video

recordings and the ability to digitally manipulate them can extend people's living presence and even mesh it with that of others:

Most famously, in 1991 [Natalie] Cole and her producer David Foster originated the 'virtual duet' practice, now commonplace in the music industry, when they 'resurrected' her late father to create a new version of his signature song 'Unforgettable' featuring them both. 'Nothing had been attempted like that,' she said. 'To lift Dad's voice, literally, off of that track and put it on a brand new one, and then line it up, match it up, get the phrasing right. I remember listening - everyone listening at the end, and we were just enthralled. It was really wonderful.'<sup>9</sup>

It might seem at first glance that the above examples of our scattered digital selves are merely fragments, not truly constitutive of the human person. After all, it is Nat King Cole's performance that is being used in the new formulation, his voice and image, yes, but not his "self." So too with email, web pages, clicks or heartbeats, or even paths traversed and tracked via satellite. Though a recent study has found that online encounters have displaced friends as the main way heterosexual couples in the United States meet,<sup>10</sup> at some point these relationships become "real," bodily, present in the physical world. So, can it really be said that humans are avatars? The term avatar is most often used today with reference to its secondary meaning, an icon representing a person in a video game. But its older, original meaning includes, "an incarnation, embodiment or manifestation of a person or idea." The question to consider then is: what is the difference between a *manifestation* of a person and *the person*? Is there a difference? Where? When? Rather than continue to interrogate the digital, it may be useful at this point to examine the physical. If the traditional idea of the person is not an avatar but rather a bodily entity, is this entity integral? Does it "contain" all aspects of personhood?

#### 4. The Body as Person and Life on the Internet

The idea that the person is contained in the body is both ancient and so culturally diffuse that in the West, at least, it seems like simple logic. The integration of the body and the person is such a given, that the word 'body' scarcely appears in international human rights documents. If humans are "born free," have the right to "security of person," have the right of movement, of property ownership, work, etc.,<sup>11</sup> these would seem to depend on a body that is exclusive, unique, and integral to the person. Nevertheless, even the briefest of inquiries into the state of biotechnology today reveals a dramatic dispersal of the human body. From organ transplants to sperm and egg donations to "rented wombs," never has there been more exchange of human biological components, an exchange with lasting societal effects. Family members can request sperm extraction from deceased male relatives for use in embryo creation, frozen embryos can be implanted years after the original donation was made, and genetic manipulation advances allow for multiple-party embryo creation. As a result, human

<sup>9</sup> <https://www.independent.co.uk/news/obituaries/natalie-cole-singer-who-performed-the-first-virtual-duets-with-her-late-father-nat-king-cole-a6794906.html>

<sup>10</sup> <https://www.pnas.org/content/116/36/17753.short?rss=1>

<sup>11</sup> Universal Declaration of Human Rights, full text available at: <https://www.un.org/en/universal-declaration-human-rights/>



generational spans are now expandable, and human genetic restraints “correctable.” Even setting reproduction aside, modern medicine depends on blood and organ donation to save lives, and a human body can donate as many as eight different organs.<sup>12</sup> Corneal transplants, skin grafts, bone marrow transplants and other tissue transplants are performed worldwide such that millions of people are literally composed of parts of other people. Among the fastest growing areas of development in this vein is the study of microbiology and the millions of bodily human bacteria that can now be exterminated, cultivated and transplanted to eliminate human deficiencies and disorders. Also to be considered is the enhancement of human performance through technical devices: artificial hearts, limbs, eyes and more, increasingly connected to the nervous system and even the cerebral cortex, not to mention chemical and hormonal treatments. If we regard technological assistance as anything external to the body that enables or assists its functioning (eyeglasses, hearing aids, speech devices, orthopedic devices, wheelchairs, etc.), the majority of humans are functionally incomplete and require technological tools to achieve a capacitated integrity. Both internally and externally, our physical bodies today are perhaps more dispersed than not.

Is this state of affairs relevant to an understanding of the person? A negative response to this query, of course, finds its strongest ally in Cartesian thinking, which received a cultural power boost from the modern development of ever-more intelligent computing machines. As computer technology became more widespread, people responded almost as if they had been waiting for this perfect metaphor: the human brain is a computer which holds human intelligence and is independent from the rest of the body. If we follow the Cartesian proposition that our being consists of our *cogito* (intelligence), then it is only logical that organ and other bodily transplants and external assistants have nothing to do with the person. I offer this observation somewhat superficially because it is typically ingested and then reproduced superficially, in the manner of the transmission of many cultural concepts. There is, however, an entire body of scholarship beginning in the mid-twentieth century that argues forcefully against this position and in favor of embodied cognition, or the impossibility of separating mental constructs (concepts, categories) and the performance of cognitive tasks (reasoning, judgment) from bodily aspects (perceptual and motor systems). Within Philosophy this is the domain of the phenomenologists. Within Cognitive Science it is the domain of linguistics scholars as well as neuroscientists. Later branches include enactivism and extended mind theory which argue that cognitive processing is not limited to the brain or the body but rather extends out into the surrounding environment/world.<sup>13</sup> These views presume that experiential consciousness is always relational.

Addressing these scholarly approaches adequately is impossible within the confines of this essay, but it should at the very least be noted that even from a scholarly scientific point of view, there

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<sup>12</sup> The heart, two lungs, the liver, the pancreas, two kidneys and the intestines. The World Health Organization estimates that over 100,000 whole organ transplants are performed every year, while the US governments puts the number of tissue transplants in the US alone at more than a million. Global statistics are available at <https://www.who.int/transplantation/gkt/statistics/en/>, while American statistics can be found at: <https://www.organdonor.gov/statistics-stories/statistics.html>

<sup>13</sup> Among the most recent work from an enactivist point of view see, Di Paolo, De Jaegher, and Cuffari (2018). See, moreover, Di Paolo (2020), for an excellent and detailed analysis of the relationship between enactivism and a renewed conceptualization of ‘person.’

is a great deal of contemporary debate about the role of the body in understanding the person.<sup>14</sup> The further research progresses, the more evidence emerges that body, mind and environment are in constant communication, and more importantly, are irrevocably co-constitutive. The more we investigate, the harder it is to detach one from another. Or rather, the more we see detachments, the more we see connections.

In support of this directionally disembodied conceptualizing of personhood, there is an entire new range of online practices of “avatarization” that puts into stark relief the ways in which people fail to remain fixed inside definitions of material-body-as-person: life after death online, or, “posthumous social personhood.”<sup>15</sup> Though many of the current technologies are immature, services available towards the goal of continuing to “live” online after bodily death include: continued interaction with deceased persons through a living human surrogate, autonomous and semi-autonomous software enabling the deceased to continue to use social media (to post, ‘tweet,’<sup>16</sup> etc.), and most comprehensively, the operation of algorithmic presence services (e.g., Eterni.me) that use artificial intelligence to create a digital form of the deceased. This last service states that nearly 50,000 people have already signed on, answering positively to their query, “What if you could live on forever as a digital avatar?”<sup>17</sup> The premise here is of course that just outlined above: if personhood is relational, then it follows that people can and do seek symbolic immortality in various ways.<sup>18</sup> At least one technology consultant, Adam Ostrow, argues that the fusion of this desire and the exponential growth of digital capacities will combine to make this immortality a real possibility. He stated in 2011 that computers would soon be able to:

...[u]nderstand human language and process vast amounts of data [...] It’s going to become possible to analyse an entire life’s worth of content – the tweets, the photos, the videos, the blog posts that we are producing in such massive numbers. And I think as that happens it’s going to become possible for our

<sup>14</sup> Yet another debate with its own extensive bibliography is that of the categorical definition of the posthuman. At the least, two major categories emerge: cyborg and upload. The cyborg model imagines a future in which the posthuman is characterized by enhancements to current day versions of humanity which are, however, more advanced by means of technological additions and transformations. In some iterations, the cyborg is envisioned as providing the opportunity for an ontological kinship between the human and the nonhuman, as in Donna Haraway’s landmark essay, “A Cyborg Manifesto,” Haraway (1985). The upload model, instead, conceives of a disembodied, autonomous being, sometimes associated with the transhumanism movement, and sometimes connected instead to a “human-plus” model that bears more similarity to some cyborg conceptions. The field is highly interdisciplinary and quite muddy at the moment resulting in a view of the posthuman that is open-ended, with multiple and even mutually-excluding definitions, as Christian theologian Thweatt-Bates rightly points out: Thweatt-Bates (2013).

<sup>15</sup> For an excellent concise summary of these practices and their philosophical and social implications, see Meese et al, (2015).

<sup>16</sup> One such service features a rather alarming tag line: “When your heart stops beating, you’ll keep tweeting,” *Ibid*, at 412.

<sup>17</sup> In May, 2020, Netflix released a new science fiction television series called “Upload,” set in 2033 and featuring a marketplace of digital “heavens” to which people can ‘upload’ their consciousness after bodily death. Life in these digital heavens is experienced by people who are now called avatars, and whose connection to the ‘real’ world is managed by companies staffed with customer service reps called ‘angels.’ The first season of the show is largely focused on a romance between an avatar and his ‘angel.’ The show efficiently captures several of the current fantasies regarding the future: eternal life, a consciousness that exists exclusively in our brains, and the idea that technology can easily replace all necessary bodily aspects, making physical connection between the dead and the living possible.

<sup>18</sup> *Supra* at Note 15, 410.

digital personas to continue to interact in the real world long after we're gone thanks to the vastness of the amount of content we're creating and to technology's ability to make sense of it all.<sup>19</sup>

This is perhaps the most extreme current iteration of attempts to expand online personhood beyond the life of the body. There are others, including of course the inescapable participation of online giant Facebook, where online memorial pages for deceased members have been published since 2009, entrusted to users' chosen "legacy contact." It has been estimated that more than 8,000 Facebook users die every day, and not all of them have memorial pages. In most cases, the profile pages live on; you might have to scroll down to see the eventual obituary post.<sup>20</sup> The kind of flatness that often distinguishes digital content thus contributes to a blurring of the lines between pre- and post-mortem content, an occurrence that has been criticized by some. In one reported case, a husband who kept his deceased wife's page alive as part of fundraising efforts to fight cancer faced men making passes at his wife, unaware of her passing.<sup>21</sup> In another case, a young man was enthusiastically memorialized on Facebook when he was allegedly disconnected from life support technology after falling into a coma. Though the family posted that he was in fact still on life support, this message was buried in the flurry of condolences from his friends. It was a shock to many when he spontaneously emerged from coma and his "resurrection" was announced.<sup>22</sup>

In these cases, it is a basic lack of awareness of a person's passing that causes distress. There is still another way, however, in which the blurring of personhood can cause stress. Many technologically based expressions of personhood are affected by the quality of a creepy uncertainty regarding the perceptible distinction between the dead and the living. This has been referred to as the 'uncanny valley,' a term coined in 1970 by a Japanese robot scientist who observed that there is an inverse relationship between the resemblance of robots to humans and human comfort levels with those robots; in short, if they are too real, they become creepy.<sup>23</sup> Humans both strain to exceed their organic constraints and also recognize the primacy of these very constraints.

Another source of discomfort has emerged in the transferal of historic physical memorial sites to online versions. The famed American Vietnam Veteran Memorial wall underwent a kind of two-step process towards the mobility of its materiality. In 1996, an exhibit entitled, "The Wall That Heals" featured a ¾ scale memorial wall that travelled around the US and was ultimately displayed in close to 600 communities. Two years later, the Virtual Wall was created, an online memorial that features an interactive digital wall of individual soldier profiles. As one writer points out, this is a significant change in both the structure but more importantly the experience of the memorial:

<sup>19</sup> Cited in *Ibid*, 414.

<sup>20</sup> <https://www.bbc.com/future/article/20160313-the-unstoppable-rise-of-the-facebook-dead>

<sup>21</sup> Meese (2015), at 413.

<sup>22</sup> Reported on the radio program, *This American Life* episode 646, "The Secret of My Death." Transcript available here: <https://www.thisamericanlife.org/646/transcript>

<sup>23</sup> Basset (2018). In 2013, a popular English science fiction television series, *Black Mirror*, explored the post-mortem android concept in an episode entitled, "Be Right Back." A woman who loses her young husband in a car crash has an android made of him whose similarity is so convincing that it ends up horrifying her. She takes the android to a cliff and orders it to jump to its death. The android begs for its life. In the final scenes, we learn that the android has been spared. It is kept in a closet turned off, and brought out only on weekends, mainly for the young daughter to interact with it. The mother remains uneasy. The question raised is one that will surely be confronted sooner or later: can human facsimiles replace humans? If not, why not?

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This is not to imply that the experience of mediated information is no less or more meaningful or powerful for those for whom the memorial is meaningful in the first place, but rather that the shift in visual terms afforded by the particularity of the internet has replaced the imaginative space of physically sited reticence with the immersive, saturating experience of massive amounts of information.<sup>24</sup>

In summary, there is a kind of chaos of unprecedented online practices regarding personhood that is apt to get still more chaotic particularly in its posthumous iterations. Though the dead have been communicating with the living for quite some time through wills, letters, videos and more left behind,<sup>25</sup> online technologies and environments move these acts to another level. The inescapable truth that emerges is that humans are actively engaging with digital sites of expression in massive numbers and there is a demand for this interaction to continue posthumously. We do not appear to be prepared with any sort of ethical or legal framework to address these changes which are speedy and relentless. While internet services race ahead offering the possibility to send email, video, tweets postmortem, and to create avatars whose AI has received copious written, oral and visual input, terabytes of data, the law refers to living people as “data subjects.” The Right to Be Forgotten cases, specifically, present a “data subject” with rights to be distinguished from a “convicted criminal,” both of whom are separate from a “public with a right to information.” And yet these limited and limiting formulations raise important questions about who receives the right to determine the shape of her own subjectivity and how, and for how long. The other side of the coin, conspicuously absent, is the right to be remembered.<sup>26</sup> These cases do not remotely address this question, since they do not present any notion of personhood that can be defined and defended as such. Nevertheless, there is a mountain of jurisprudence (and another philosophizing about it) which address the issue of personhood directly. A brief foray in this direction is inevitable.

## 5. Law and Personhood: From the Ancient World to AI

In even greater proportion than the literature on embodiment, the works dedicated to personhood and the law are seemingly without end. An adequate summary is impossible within the space confines of a single essay, and yet some references must be considered if we are to better understand the cogs and wheels turning within the Right to Be Forgotten cases. At first glance, it might even appear to be quite simple to consider law’s vision of personhood, for it has long been comfortable with a disassociated vision of body and person. It is Roman law, after all, that made space for slaves whose bodies were undeniable, but who as legal subjects were not considered to be persons. Common law allowed that women and children were not legal persons, while corporations, instead, were. All of this occurred long before today’s technological advances raised the question of online personhood. No less than the philosopher John Dewey boldly declared in 1926 that “for the purposes of law the

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<sup>24</sup> Grider (2007).

<sup>25</sup> Meese et al. (2015), 418.

<sup>26</sup> These issues of course exist not only for the personal but also for the societal, as those who research the duty of memory, for example after acts of genocide or war. For a contemporary legal reflection on these issues, see Della Morte (2014).

conception of 'person' is a legal conception; put roughly, 'person' signifies what law makes it signify." This was an opening taunt, of sorts, as it introduces his renowned essay on the historic background of corporate legal personality<sup>27</sup> in which he shows how a comparison of corporate legal person and individual legal person demonstrates the law's need to rely on fields outside of the law to justify the (changing) categorizations. While there is overlap between the two, there are clear differences as well.

Dewey also shows how each claim made for a particular definition or use of legal personhood comes from, "positions and claims of some party to a struggle."<sup>28</sup> In a democracy the law is a tool, a means, to achieve particular ends. All of its categories (personhood, but also property, truth, punishment and so on) are artificial. They are created in order to support people's attempts to make and manage their lives. Even in the driest of the cases assessed in this essay, the Court recognizes that the subject has a right to determine what data about himself is no longer relevant. This is an—albeit modest—concession to the notion that legal subjects have the right to make changes in their ways of presenting themselves, and thus living in society. Indeed, law is full of provisions aimed at allowing people to shape and mold their personhood. Birth names can be legally changed; citizenships obtained or renounced; gender can be changed, parentage can be assumed or dissolved; legal marriage typically produces a long series of effects on property ownership, the destination of our income, and inheritance. All of these provisions are based upon a view of the *natural person*. With "natural person," we once again we bump up against a term that has a vast sea of scholarship behind it. What is important to the scope of this essay, however, are the teleological positions the concept encompasses and engenders.

The natural person is nothing other than a bundling together of a group of cultural agreements and assumptions that constitute (for law) a "right-and-duty-bearing-unit."<sup>29</sup> Another way of saying this is that there is a category, called natural person, to which certain features are attributed. Some features are inside the category, such as historically founded ideas about both body and mind, and other features are outside the category. As many scholars have pointed out, what is considered to be a natural rights-holding and duty-bearing human mind-body bundle has fluctuated over time (not slaves but yes corporations, as mentioned above). Controversies have abounded regarding the personhood of people with severe mental disabilities or severe physical disabilities or limitations, raising question such as: are people who are lacking any perceptible brain activity still people?<sup>30</sup> What about people whose bodies are entirely immobile but who can convey their still-active mental activity using a

<sup>27</sup> Dewey (1926).

<sup>28</sup> *Ibid*, 665.

<sup>29</sup> Dewey (1926), citing Maitland at 656. A similar observation is made in the Italian legal experience by Falzea as paraphrased by De Luca, "It is clear then that subjectivity is not a natural quality, i.e. identified in *rerum natura*, but - like all legal values - is the result of a normative qualification: this explains how it could be a quality attributed not only to man." Translation mine. Original text: "È chiaro fin d'ora che la soggettività non è una qualità naturale, individuata cioè in *rerum natura*, ma - come tutti I valori giuridici—è il risultato di una qualificazione normative: si spiega così se essa può essere una qualità che viene attribuita non soltanto all'uomo." De Luca (1984) at 21, Note 4. See also, Falzea (1939), well known for his work on the axiological significance of values within the Italian legal experience, and of course Barcellona, particularly his work on the autonomy of the legal subject, Barcellona, 1984.

<sup>30</sup> Legal scholar Sheryl Hamilton begins her analysis on legal personhood with the American case of Terry Schiavo, a woman who suffered a cardiac arrest at the age of 26 resulting in loss of oxygen to the brain and pervasive brain damage. She was subsequently kept alive through life-support technology for 15 years, during which numerous legal battles were fought to determine her fate, Hamilton (2009).

communicative system of alphabetically-mapped eyelash movements? The reason people in a (so-called) vegetative state provoke conflicts is because they reveal the assumption that in order to be a person, that person must be capable of thought, and this capacity must be perceptible to others. When, additionally, the person can no longer breathe or physically function without constant medical assistance, we call it a vegetative state, making a linguistic comparison to organic matter that is not, for humans, “alive.” These kinds of issues have certainly led to legal conflicts, but they point to an even broader concern regarding the way humans categorize, and the indispensability of categorization as a practice.

Though there is a risk of appearing overly simplistic, it can be stated plainly: people are incapable of thinking without categories. Any idea of what a thing is *entails* what it isn't. Anyone who has communicated with a small child can instantly understand how the cognitive contours that construct every element of our daily lives do not exist a priori but are instead constructed. A young child might ask: what is the difference between a towel and tablecloth? A bed and a trampoline? A library and a bookstore? A chimpanzee and a sibling? There are instantly recognizable continuities among all these things, as there are features that have been determined to be importantly differentiating. The features that are at any given time considered fundamental to the definition of an item are what constitutes its category. The category “towel” consists of the features thick water-absorbing fabric, a particular size, sewn borders, etc. These features are all shared by the category “tablecloth,” but the detailed qualities of the fabric type may change, the size may change, and most importantly, the *use* changes. A towel is for absorbing water, a tablecloth is for protecting a table.<sup>31</sup> In the case that various fabrics are available, there remains the possibility of specialization, where we can deem some kinds of fabric to be outside of the category of towel. The child setting the table with a bath towel would be reprimanded and told to replace it with a proper cloth. Should supplies become scarce, however, one item could easily assume all the required functions. ‘Table covering’ as a feature could then suddenly jump into the category of ‘towel.’

If the conglomerate of humanness or personhood is a category, so too are all of its constitutive elements. As discussed above, however, humans are extremely ‘assisted’ creatures, using eyeglasses, vehicles, prostheses of all kinds in order to function in our daily lives. If a person with artificial legs takes them off, are they still ‘her’? Is she herself without them? Don't the musician's instrument, the athlete's tennis racket, the carpenter's hammer, in some sense each become part of them? What about donated eggs or sperm or organs? Aren't they part of one body and then another? Once moved, do they lose all relation to the previous body? Psychological research in the field of epigenetics posits that trauma in human lives produces permanent epigenetic modifications of DNA that can result in changes in gene expression, endocrine function and metabolism. These changes are passed on in the genes from one generation to another.<sup>32</sup> So, if the effects of trauma physically cross generations, to whom does trauma belong?

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<sup>31</sup> For a moving example of the creative poetry inherent in how children see the objects of the world and their definition-through-use, see Krauss (1952).

<sup>32</sup> Neuroscientist Rachel Yehuda and psychiatrist Bessel van der Kolk did the foundational research upon which Mark Wolynn based his best-selling book, *It Didn't Start with You: How Inherited Family Trauma Shapes Who We Are and How to End the Cycle*, Wolynn (2016).



The silver lining, so to speak, of all of this apparent confusion, is that human flexibility and creativity with regard to our categorizations of the world and ourselves are far from random. We might say they are *instrumental*, with all the layered implications the word conveys. Each choice of inclusion or exclusion of a given feature to a given category is made with a view to particular ends. The towel is deemed such because we have the goal/end in mind of absorbing liquid. Weightier categories like “natural person” have taken on or discarded features with a view to seeking the protection of universal dignity, or preventing ownership of persons, or creating equality of gender. Typically, the ends that gather in relation to a group of means are multiple in part because they are the direct outcome of our experiences. It is only when there is an obstacle to “natural” reproduction that assisted means are dreamed up, developed, delivered. It is only when societal attitudes shift towards a view of sexual practices as divisible from procreation that contraceptives become possible solutions. It is only when children are no longer seen as miniature adults that ideas about protecting their developmental stages through law lead to their inclusion in concepts of natural person.

The Right to Be Forgotten cases are an illustration of just this kind of human endeavoring to pull into the fold of agency the ability to mold our *future* lives, including their online ‘appendages,’ which are increasingly not appendages at all, but fully within the categorical boundaries of self. This occurs because the instrumentality of categories is driven by the need for sense-making. We categorize in order to understand, we invent in order to solve problems, we formulate and reformulate as part of human becoming, a process which continues at least until the organism ceases to exist.<sup>33</sup> The changes that constantly take place in environments are connected in a circular loop with human experience and action. Humans simultaneously seek to understand changes and put them into motion. The means that are available change the ends that are pursued, and vice versa. The Right to Be Forgotten becomes an issue only now that we have technology that never forgets.

Furthermore, past categorization schemes are fundamental to the creation of new ones. Forgetting is old tech, so to speak. It comes from the fallibility of the human brain’s memory capacity, but it is a mechanism that can be useful, both in pre-digital and post-digital environments, particularly if we think of forgetting as leaving behind, or setting aside. The various transitions required in moving from pre- to post-digital environments illustrate this plainly: we must set aside old habits related to in-person encounters if we are to take advantage of the benefits of communicating digitally with people who are physically distant from us. We cannot afford to believe that digitally produced words or images are “not real” now that they have overwhelmed those on paper or in person. There is no comparing the power and reach of the lone voice on Twitter vs the lone voice on a London Speaker’s Corner. More profoundly: as technology advances, people who are physically distant can nevertheless exist in our lives as closer, more present, than those nearby. Digital communications do not contain touch between people, but the voice and visuals they enable, the instantaneous and limitless qualities they embody, the semi-elimination of time zones and other obstacles to older forms of communication can in some ways increase intimacy between people. These new means allow people to achieve old ends: maintaining ties with family members and friends, enriching social networks, collaborating with others, and create new ones. Shifts in our ideas

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<sup>33</sup> There are those who argue that human immortality will be the next condition afforded by technology as the means to “upload” human consciousness to some kind of digital platform will create the next iteration of humanity. But see Di Paolo (2020), again, for a rich and complex analysis of the human becoming within an enactive phenomenology.

about how we achieve our goals require what can be termed ‘categorical migrations,’<sup>34</sup> meaning, the movement of some features from outside a categorical framework to inside, and vice versa. If digital expression is to be legitimated, features relating to the importance of material bodies must be moved outside the category; we can no longer demand in-person contact in every instance.<sup>35</sup> Performing migrations across categories can, nevertheless, sometimes be the cause of societal stress and conflict. The field of medicine abounds with controversies on issues such as euthanasia, abortion, posthumous sperm extraction, and so on, which highlight the difficulties inherent in determining where to draw lines around individual bodily autonomy. Human cloning has been widely rejected at least in part due to our inability to accept a definition of humans that includes biological manipulation that is completely different from “natural” human reproduction.<sup>36</sup> New ideas that throw old ones into relief often generate knee-jerk refutations.<sup>37</sup>

The risk in denying categorical migrations, however, is that we may inadvertently betray the very possibilities we were trying to protect through the creation of the original category. Imagine, for example, a new response to the excess of fake news and online impersonation/account hacking which declares that personal digital expressions of political views are no longer reliably genuine and therefore only politicians, certified through some additional technology, can express their views on Twitter. There would likely be a universal outcry against this move as a blatant violation of freedom of speech. The category of online political expression *must* include political constituents as well as political leaders, at least in a democracy. And yet, there is a line to be traced through case law related to individual agency online that does not seem to move in this direction. In another essay,<sup>38</sup> I have addressed the case of *Ewa Glawischnig-Piesczek v. Facebook Ireland Limited* in which an Austrian politician won the right to have the comments of one of her detractors removed from all global platforms. There was no question at all about whether the comments were part of the commentator, the way intellectual property, for example, is held to be part of its creator. More interesting to the Court was the stickiness between the political figure and her reputation, deemed worthy of protection. The final decision held to an older conception of defamation and in so doing protected the politician over her critic. But is silencing political critique online compatible with freedom of information? Freedom of expression? The inconsistency between insisting that negative information must remain online in one case and must be removed in another demonstrates the tension that results from rattling the bars of our categorical cages. It also shows our uncertainty about what aspects

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<sup>34</sup> Ricca (2014).

<sup>35</sup> This has become a massively present understanding in the Spring of 2020 thanks to the global outbreak of Covid 19, generating unprecedented levels of online replacement of previously in-person tasks.

<sup>36</sup> Which has, nevertheless and in large numbers, not been carried out in a natural way from a traditional organically human point of view for at least the last 50 years, thanks to contraception, legalized abortion and assisted reproduction.

<sup>37</sup> One classic such issue in the area of reproduction is male contraception. Male hormonal treatments were developed and tested 30 years ago and were found to have a 90-95% efficacy rate, however pharmaceutical companies have been unwilling to fund further research. For the moment, the category of responsibility for human reproduction seems to have been assigned to women alone. As one article posits, “Because the direct health benefits of pregnancy prevention for men are less tangible, male contraceptive development faces additional challenges because agents used for this purpose might be used by healthy individuals over many years. Therefore, acceptance of side effects, or even potential side effects, is very low.” See Page, Amory, and Bremner (2008).

<sup>38</sup> Vazquez (2020).

of personhood should be protected, and therefore how we define personhood, but this is certainly not only a concern of the law.

## 6. Religion, Personhood and Virtual Reality

When it comes to an openness to the non-bodily aspects of personhood, among the oldest authorities are surely the ancient religions. Differing conceptualizations of a human spirit that is independent of the body are at the heart of all of the major world religions.<sup>39</sup> Despite their differences, there are significant similarities regarding the importance given to the human spirit over that of the body. In each, the spirit lives on after the death of the body and must be attended to, before and after death. There are complex and varied rituals to be performed to assure a peaceful passing to the next realm, and in some traditions ongoing rites aim to safeguard the wellbeing of spirits no longer on earth. Reincarnation is pivotal to many Eastern religious traditions particularly Tibetan Buddhism, whose central leader is himself considered to be cyclically reincarnated. The principal rites and rituals of Christianity look towards the rewards to be reaped after life on earth, and the doctrine of the Holy Trinity posits that the divinity is a tripartite entity, three indivisible but distinct parts of the Godhead, the Father, the Son, and the Holy Spirit.<sup>40</sup>

The major religions, specifically Catholicism, have from the beginning based the concept of person on the unit body/mind, or body/soul, the individuality resulting from this ontological connection was always intended in a relational way.<sup>41</sup> Personhood, in this tradition, is understood to transcend the individual self. Theological doctrine identifies the individual as a path to a greater end; its authentic purpose is its relationship to Otherness via solidarity, which together are pointed towards the achievement of common good. It is only through this relationship that individuality obtains the genuine features of the 'person,' which cannot be ontologically considered outside the relationship of the individual to God, and therefore to Otherness; so too does the person embody God, as a part of divine creation.<sup>42</sup> The distinction between the natural/human person and the legal

<sup>39</sup> Among the great chroniclers of comparative religion is Mircea Eliade. His massive histories of religious ideas provide broad and deep perspective, but for a slimmer volume perhaps more targeted to the concerns of this essay, see Eliade (1963). See Ries (1994) for a compelling argument for *homo religiosus*, a conception of humankind in which a religiously oriented instinct predates the major religions. Otto is among the cornerstones of modern theology regarding the phenomenological character of transcendent experiences and understandings, in some ways anticipating from a religious perspective the explorations to follow in the development of embodied cognition theory. See Otto (1959). Interestingly, there is a new thread of scholarship called "cyborg theology" which addresses issues of the posthuman from a theological perspective. See supra at Note 14, but also Waters (2016), Midson (2018) and Spadaro (2014).

<sup>40</sup> St. Augustine was of course among the original sources of interpretation of the Christian concept of Trinity, translated for the 21st century in E. Hill (1991). A comprehensive historical treatment of the concept of the Trinity is offered by Marmion and van Nieuwenhove (2011).

<sup>41</sup> On Christian anthropology and the body/soul relationship see AA.VV (2007), Baker (2000), Cooper (2000, 2001, 2009, 2015), Repole (2018), Scola, Marengo, López (2000). As regards the legal canonistic implications of the theological-anthropological approaches see, in a vast literature, Lo Castro (1974, 1985, 2011), Ries (1995).

<sup>42</sup> De Luca describes this inter-relationship between God and the individual in the Christian tradition succinctly: "Subjectivity is the image of God's interiorization within man and, at the same time, of his transcendence." Translation

person was already put forward by the medieval decretists, specifically Huguccio of Pisa, defining legal personhood to be only a fiction (*persona ficta*)<sup>43</sup>. However, even the category natural/human person was not static. Catholic theology and Canon law have always understood personhood as something linked to but not entirely absorbed by the material individuality of the body (that is, its status as a unit divided from the world, from other human beings, from community)<sup>44</sup>. Precisely for this reason, both Catholic theology and Canon Law came to recognize non-bodily entities as having the capacity to be imbued with corporeity in metaphorical terms (e.g., the Church ontologically intended as the mystical body of Christ); or in metonymical terms, whereby, for example, relics, graves, funerary mausoleums, sacred stones, etc., were ‘suffused’ with the personhood emanating from a human person.<sup>45</sup> From this point of view, religious theological doctrine and Canon law can offer analogies that are germane to modern concerns of personhood. Religious resources can be mined for their capacity and creativity in addressing perceptions that cross cultures and times regarding the exceedances of human personhood.

Moreover, though we can historically trace a shifting in the West from Christian views of mind/body/soul to a growing reliance on scientific processes and beliefs which turned towards the body-as-machine metaphor, there was no clean break in which one ontology replaced the other. Multiple ontologies for the body have always existed in parallel<sup>46</sup> and continue to do so. Again, the care shown around rituals of death in nearly every tradition of the world (including secular ones) imply a shared agreement with religious traditions that there is more to life than the body. Without such beliefs, whither funerals, memorial services, and gravestones<sup>47</sup>? And why bring such practices online?<sup>48</sup> If the body is merely a machine, why invest any effort in it once the machine has ceased to function? Instead, the care invested in cemeteries and online memorials offer visual illustrations of a persistent belief that something of the person may, should or could live on after death. The continuity between the last will and testament and religious ideas of afterlife offers further evidence. Even the most secular person demonstrates a belief in some non-bodily expression of self when she respects the terms of a will, otherwise why honor it at all? The law, for its part, and as has already been argued, supports and furthers the legitimacy of a personhood that exists beyond the life of the

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mine. Original: “La soggettività è l’immagine della interiorizzazione di Dio nell’uomo, e, al tempo stesso, della sua trascendenza.” De Luca (1984) at 24.

<sup>43</sup> For a detailed analysis of medieval decretists’ development of ideas of *ius naturale* and the evolution of the conceptualization of human personhood and related rights see, Tierney, 1997.

<sup>44</sup> Coughlin (2003) offers a concise analysis on Canon Law and personhood. See also Lo Castro (1974, 1985).

<sup>45</sup> As a follow up to his widely read, *We Have Never Been Modern*, the inimitable French philosopher-sociologist-anthropologist Bruno Latour proposed a bold comparison between religious icons and fetishes and “scientific objective facts.” In a relentless critique of critique, Latour suggests the need to mediate between subject and object (fabricated and real) across both religious and scientific fronts, yielding revelatory contradictions and productive comparisons. Latour (2010).

<sup>46</sup> Harris and Robb (2012), 671.

<sup>47</sup> For a fascinating archeologically based study on the changing importance of Euro-American grave sites as a reflection of changing social attitudes towards the importance of social identity, see Mytum (2006).

<sup>48</sup> See Brubaker (2013), Lingel (2013).

body<sup>49</sup>. This is evidenced by hereditary law, the existence of the crime of desecration, notions of intellectual property, and more.

The underpinning and deep penetration these ideas and values provide to modern Western legal systems is equally important when we consider the value of religious ideas (understood anthropologically) to the legitimacy of these systems. Among the more important elements that are currently being largely overlooked in the digital projection of legal personhood are a series of implicit cultural assumptions underlying the natural person/legal person divide, and the conceptualization of its components. I think this divide originates in an antecedent theological distinction, but the historical secularizations that followed caused it to lose semantic proximity—so to speak—with its roots. As I have written elsewhere—joining what has become a kind of vast modern chorus—secularism turns out not to be the absence of religion, quite the contrary<sup>50</sup>. Secularism takes different shapes and forms around the modern world, but in every case, the religious past of each legal system remains palpable in the values that underpin these systems. From conceptions of truth to contracts to punishment, religiously rooted concepts sit in the foundations and determine many of the possibilities and limits of these systems. This is relevant because if we can benefit from the fluidity of religious thinking regarding personhood to be found in traditional Christian ontologies (as just one example), these conceptualizations are likely to find ready resonance in the legal systems that are themselves heir to these traditions. To be clear: this is not a “religious argument.” It is an argument for the semiotic potentiality to be found in alternative (which here are paradoxically traditional) approaches to the transcendence/exceedance of personhood. Though it may seem contradictory, only a secularization that can recognize and accept the continued resilience of religion within its categories can liberate itself from their influence and put certain issues in dialogue, such as the unity of mind/body in relation to personality, that are among the thornier problems troubling us today.

For all the modern insistence on religion as something that is being left behind by moderns, there is nevertheless a persistent need to make sense of dispersed aspects of human personhood. Attempts at sensemaking often overlap with religious ontologies<sup>51</sup>. Another interesting example of this is the phenomenon of “dispositions for the soul” recited in church. This is an ancient part of the Catholic tradition in which believers, often but not always concerned about the length of a potential stay in purgatory after death, left behind financial contributions to the church to carry out masses on their behalf. In some cases, these requests extended for as many as 150 years after the person’s death. This may appear to be a uniquely religious phenomenon, and an outdated one at that, and yet today it remains ensconced not only in Canon law, but in no less than the secular Italian Civil Code (CC 629) which states, “The provisions in favor of the soul (1) are valid if the goods are determined or the sum to be used for that purpose can be determined. They are regarded as an obligation of the heir or

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<sup>49</sup> A concise yet wide-ranging essay collection on law and the body in the Italian experience can be found in D’Agostino (ed) (1984).

<sup>50</sup> For an excellent overview of current scholarship on secularism in the West, see Calhoun, Jurgensmeyer and VanAntwerpen (2011).

<sup>51</sup> In his popular treatise *The Heresy of Self-Love*, Paul Zweig provides a kind of anthropology of the concept of self, touching on the radical and threatening proposals of the Gnostics, then St. Augustine’s defense of the Christian idea of abdication of individual will humbled before the authority of God’s representative on Earth, and then to St. Paul’s conception of man as a mirror for divine light. The book is, however, centered on the myth of Narcissus, and the human struggle over the ages with what he terms “subversive individualism.” Zweig (1968/1980).

legatee, and Art. 648(2) applies. The testator may appoint a person to perform the provision, even in the absence of an interested party who can request the performance [700](3).<sup>52</sup> Dispositions for the soul offer a perfect instance of the imbrication of religious and secular conceptions of personhood<sup>53</sup>.

Whether we consider these dispositions, or the various digital programs intending to leave lasting regular communications behind, or any of the other practices considered in this essay, all share a desire for human becoming that transcends a materialist view of the life of the organic body. The Right to Be Forgotten is invoked not as a plea to have one's existence wiped off the earth, quite the contrary: it is nothing less than a wild cry to preserve the possibility of changing the experiential dimension of being alive. It is a call for new conceptualizations of subjectivity that function as axes on which to hang the relationship between ends (how people want to live and be seen) and means (the myriad ways they make this happen).

The idea that conceptualizations of subjectivity might be open and multiple is neither new nor exclusive to a single ontology. Theologians and scientists alike demonstrate a creative attitude towards reality making whether they are identifying ways to shape lives with a view to the afterlife or with a view to DNA improvements. Once we acknowledge that any definition of the human is constructed, then a new continuity is visible between what is artificial and what is natural; what we call "natural" is the result of our creative reality-making. This recognition of our creativity, however, leads to a kind of pulling back of the curtain. Behind the proscenium of our daily theatre, acting as if life just exists, a priori, is the constructed theatre set, the scaffolding which consists of our cognitive categories. If the artificial and the natural are on a continuum, then the categories which invoke these features, including those of personhood, must necessarily be open to being changed.

Even those at the cutting edge of these philosophical forays, modern anthropologists, can be prone to an occasional categorical blindness. While they have been busy undoing the hegemonic and univocal frames historically applied to the study of Others through the so-called material turn which encourages a focus on multiple ontologies (an enterprise I deeply support), they are perhaps missing the ways in which people are one step ahead in their categorical creativity. In an illuminating and astute anthropological article that lays out a theory of multiple ontologies, the authors make a point I have reiterated above: humans are perfectly capable of living with contradictory ontological models. In support of this point, the authors seek to offer examples of things that Others might believe: "on a different plane of reality people can become pregnant without sexual intercourse, arise and live again after death, heal others magically, and so on."<sup>54</sup> These are proffered as examples of alterity, and yet all of them are demonstrable conditions of modern life. Even modern Western people *can* become pregnant without sexual intercourse thanks to IVF technologies, they *can* arise and live again after death thanks to medical resuscitation. And is there a manifest difference between talk-therapy that cures anorexia, depression, and other bodily maladies and shamanistic spells?

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<sup>52</sup> Italian Civil Code 629, translation mine.

<sup>53</sup> De Luca (1984) is among the very few to propose a modern critical legal analysis of dispositions of the soul through a comparative study exploring the historical roots of personhood in both Canon Law and Italian Civil legal experience. Dillon (1896), provides a robust historical legal perspective of the legal provisions in this regard in the United States, as does Guelfi (1886) in Italy.

<sup>54</sup> Harris and Robb (2012), 672.



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## 6. Personhood in Conclusion?

All of these developments arise from a desire to strive towards a maximal form of human becoming, a pursuit that becomes impossible without a willingness to interrogate and deconstruct assumed categories like personhood. If we are “data subjects” we are also autochthons, souls, bionic people, YouTubers, influencers, Tik Tokkers, Instagrammers, commentators, and whatever form human subjectivity takes next. The semiotic significance of a human life is not found in only one static place. The body is a kind of icon, made up of a bundle of activities that are only part of the human person. Human expression, online and off, is also a bundle of activities. If personhood is detached from the activities of the person, what remains? Such a separation would cause changes in all of its aspects, material and immaterial, and these changes would affect their signification, and thus their ontological ‘matter.’ It is for this reason that we cannot in good conscience limit legal rights to a vague notion of data subjects any more than we can make broad declarations about what the public has a right to know, over and above the people they wish to know about. Nor should we ignore the insights to be gained from religious understandings of the immaterial aspects of personhood. It may always have been the case, but with the current potential to live, at least in some respects, forever online, personhood is never a conclusion but always a horizon.

Rest assured: this is not a call for an “anything goes” attitude to personhood. If we make our experiences embody our generalizations which subsequently lead to experience in an endless Peircean circle, then an openness to adding new features to the category of personhood will have consequences. Steps toward new conceptualizations of personhood should be taken slowly and carefully since we cannot predict every effect. Past conceptualizations undoubtedly have something to teach us about which values were previously included, why, and what means were and might be entailed in order to reach particular ends. We should not limit our view of traditional ideas of personhood to their morphological or material appearances but should instead dig deeper to try to understand what our old categories were trying to put in action. New iterations, too, must be examined to see where there is continuity, and where it is lacking. From this perspective, it is not obvious to say where the line lies between the soul and the human avatar, intended in the broadest sense, when it comes to personhood. If we can accept that nothing less than this question is at stake, should Google (or any other corporate tech giant) be in charge of molding the contours of future personhood? Of determining what expression will be protected and what will not? Does it behoove us to draw a line in the sand between data subjects and human beings?

Alarm bells have been sounded already for quite some time regarding the exponential growth in capacity of artificial intelligence and our philosophical and ethical unpreparedness for the unknown consequences. Regardless of the position taken in this regard, there is little doubt that human-digital entanglement will only increase. Algorithms are doing far more, these days, than tracking our shopping habits. A deep learning algorithm developed at MIT was trained to analyze the structure of 2,500 molecules to evaluate their anti-bacterial properties. It then searched a library of 100 million molecules to predict their ability to combat specific pathogens, and ultimately discovered a molecule that is structurally divergent from conventional antibiotics and can eliminate previously drug-resistant

bacteria.<sup>55</sup> In this little case, algorithms have surpassed human capacity to address human medical ailments. Does this have ramifications for how we understand human personhood?

The path that led to our current form of modernity has been repeatedly traced across a wide range of literature and in various disciplines: individual human capacity as a basis for natural rights at least from the Enlightenment; a move away from divine hierarchies towards human ones linked to rationality, becoming then a kind of turnkey for freedom; rational man as the recipient of freedom, dignity and respect as a consequence of his rationality, following Cartesian reasoning; and ultimately a predominance of the importance of the individual and her capacity to determine her own life. And yet, individual human capacity today is tremendously reliant on a myriad of technological and digital assistance and networked environments, and this seems to present a new level of challenges. Our digital presences keep evolving and yet remain linked to our past selves. As I have tried to argue, what we *are* should be understood within a continuum that includes all the multiple and complex variations of what we have been. The key issues I have attempted to bring to the fore are not new. They have long been wrestled with by some of the greatest thinkers from religious, scientific and philosophical domains across diverse religious and cultural traditions. Digital developments only exacerbate tensions that have existed from the beginning of humankind in our quest for understanding our place in the terrestrial sphere and in any transcendent realm beyond. I have tried to demonstrate that it would be a mistake to overlook the creativity that abounds in both religious and secular forms when it comes to addressing questions of personhood. From the ancient concepts of the soul to the experiments of geneticists and biologists to the ongoing evolution of online avatars, human personhood is always straining at the bounds of possibility, seeking new means of agency, asking unanswerable questions. The request for the Right to be Forgotten is better understood as a hope for the right to become, one that is ignored at our peril.

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<sup>55</sup> Stokes, Yang, et al (2020).

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