



Article

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The Curious Case of Ronald McDonald's Claim to Rights: An Ontological Account of Differences in Group and Individual Person Rights

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Abstract: Performative accounts of personhood argue that group agents are persons, fit to be held responsible within the social sphere. Nonetheless, these accounts want to retain a moral distinction between group and individual persons. That: (1) Group-persons can be responsible for their actions qua persons, but that (2) group-persons might nonetheless not have rights equivalent to those of human persons. I present an argument which makes sense of this disanalogy, without recourse to normative claims or additional ontological commitments. I instead ground rights in the different relations in which performative persons stand in relation to one another.

Keywords: Group personhood; Group rights; List; Pettit; Social ontology; Arbitrary power.

1 A Worrying Trend

“No State shall make or enforce any law which shall [...] *deny to any person within its jurisdiction the equal protection of the laws.*” (U.S. Const. amendment XIV, my italics).

The Equal Protection Clause of the Fourteenth Amendment defends each U.S. person's right to equally exercise important rights within the state.¹ From

¹ Citing *Griswold v Connecticut*, 381 U.S.479 (1965), the Court affirmed that the Fourteenth Amendment protects fundamental rights extending to “personal choices central to individual

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the fight for racial desegregation, to the principle of “one person, one vote” in drawing inter-state voting boundary lines, to the defence of same-sex marriage,² this initial civil rights victory has had a significant reverberating impact on the shape of rights discourse and outcomes in the U.S.

But this notion of the equal rights of all persons, has also led to some more unusual claims in court:

- In 2014 Seattle’s city council approved an ordinance mandating the phased introduction of a \$15 dollar minimum wage.³ In recognition of the challenges faced by smaller businesses, this phasing was to be at a slower pace for companies employing fewer than 500 staff. In 2015 McDonald’s, as part of a consortium of franchises, accused Seattle of violating their constitutional right *as a person entitled to equal treatment with smaller corporate persons*, under the fourteenth amendment. The Supreme Court on this occasion declined to hear the case.⁴
- In 2013 the U.S. government took Hobby Lobby, a corporation of c21,000 employees, to court to attempt to reverse a lower court’s decision to grant the right to refuse certain kinds of reproductive healthcare to employees on the grounds of Hobby Lobby’s religious freedom to object. In 2014 the Supreme Court held that under the Religious Freedom Restoration Act,⁵ *Hobby Lobby had an equal right to other persons to exercise their religious beliefs* and refuse the contraceptive cover, despite this contravening the individuals’ statutory rights otherwise.⁶

The details of the cases are complicated, and often draw on multiple points of law, but the general theme in these cases and others like them, is that the corporation has rights which are specifically owed to that corporation *as a person*.

The concept of legal corporate personhood is widespread, although how this is interpreted varies from nation to nation and even within states. The UK

dignity and autonomy, including intimate choices that define personal identity and beliefs”, but that the “identification and protection” of these rights “has not been reduced to any formula”.

² *Brown v Board of Education*, 347 U.S.483 (1954); *Reynolds v Sims*, 377 U.S.533, 1964; *Obergefell v Hodges*, 576 U.S.__, (2015).

³ Council Bill: 118098; Ordinance: 124490: <http://clerk.seattle.gov/~public/CBOR1.htm>, accessed 26 Oct 2016.

⁴ *International Franchise Association v City of Seattle*, No C14-848 RAJ, 2015 WL 1221490.

⁵ *Religious Freedom Restoration Act*, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. §2000bb – 42 U.S.C. §2000bb-4.

⁶ Hobby Lobby also asked for consideration under the Free Exercise Clause of the First Amendment (U.S. Const. amendment I). The ruling did not however address this claim.

holds to a “directing-mind” principle in which corporate personhood is reducible to that of senior individuals,⁷ whilst the Netherlands treat corporations as full legal persons prosecutable for any crime that a human person might be.⁸ And a summary of legislation in Queensland reveals wide variation in the liability attached to representatives, executives, and employees, depending on the specific law (Richardson 2006).

But whilst other governments make provision for corporations as persons in order to hold them to account, it is in the U.S., with its explicit additional focus on the equal *rights* of persons, where the greatest controversies surrounding corporate personhood have arisen. Whether or not one agrees with the judgement in either of the cases presented here, it is possible to be concerned by the thought that corporate persons with responsibilities might also have rights *as persons* with the potential to override those of individual persons. Legislation that appears valuable for the purpose of assigning responsibility appears to some to have been distorted to disturbing ends.

1.1 An Intuitive, But Inadequate, Response

We may initially feel appalled that a clause originally introduced to protect the severely-curtailed rights of non-white U.S. citizens⁹ against racist lawmakers and enactors, is now being invoked in the cause of big business. But similar, less reasonable-sounding, arguments from origin have also been made in the past. In arguing that state exclusion of black jurors from the potential pool was unconstitutional in denying equal protection to black defendants, for example,¹⁰ the Court nonetheless upheld discrimination against other groups on the basis of sex, age, and qualifications, on the basis that: “We do not believe the Fourteenth

⁷ Lord Denning for the majority in *HL Bolton Engineering Co Ltd v T. J. Graham & Sons Ltd* (1957) 1 QB 159, (1956) 3 All ER 624. Established by precedent in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC705, extended to include broader “senior management” in *The Corporate Manslaughter and Corporate Homicide Act 2007*, s1(3) to address responsibility gaps left by the directing-mind approach, as in high profile cases of unproven corporate manslaughter (*R v HM Coroner for East Kent, Ex p Spooner* (1989) 88 Cr Rep App 10; *R. v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72).

⁸ NETHERLANDS. (1997). *The Dutch Penal Code*. Littleton, Colo, F.B. Rothman, Article 51.

⁹ It was also intended to protect the rights of white Unionists within the Southern states, but this is less often highlighted.

¹⁰ *Strauder v West Virginia*, 100 U.S.303 (1880). This did not extend to a ruling that black jurors should be present on all, or any particular, jury.

Amendment was ever intended to prohibit this”.¹¹ If one believes that these types of verdict were proven wrong by history then, whilst the legacy of equal treatment legislation ought not to be forgotten, the fact that the clause initially acted to protect one category of persons ought not mean that we should balk at extending it to other categories of persons either now or in the future.¹² Moreover, beyond the United States, the legal principle of equal or fair treatment in law often has no such origin story. The UK’s *Magna Carta*, for example, often cited as the origin of western human rights,¹³ was forged to prevent further rebellion by the English white male landed aristocracy against the King; a far less emotionally-compelling argument for continuing to apply civil liberties only to those who were originally intended by the act.

These types of concern have led many to call for an end to the notion that corporations are persons at all. But it is evident that whilst beginning with a discussion of law helps to demonstrate what is at stake, the law is not necessarily the place to look for answers to the questions (a) whether corporations are persons, and (b) if so, what this actually entails – normatively or descriptively – for corporate and human individual person rights.¹⁴

1.2 Approach

I therefore intend to take a different approach. Instead of assuming that unpalatable rights outcomes follow and arguing against group personhood, I take as starting point an account of personhood – performative personhood (hereinafter “PP”) as presented by List and Pettit (LP 2011) – which entails that group agents are persons and fit to be held responsible as moral agents.¹⁵ I do not defend or

¹¹ *Strauder v West Virginia*, 100 U.S.303 (1880). The state’s right to restrict women jurors was reaffirmed in *Hoyt v Florida*, 368 U.S.57 (1961) (reversed in *Taylor v Louisiana*, 419 U.S.522 (1975)).

¹² Also argued by the later Supreme Court, in overturning precedent set in *Baker v Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971) to affirm equal marriage rights in 2015: “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*, 576 U.S. (2015)).

¹³ Identified as “the foundation of the freedom of the individual against the arbitrary authority of the despot” in UK law (Lord Denning, quoted in Danziger and Gillingham 2004, p. 268).

¹⁴ Kusch highlights the nature of personhood as an “essentially contested concept”, providing examples of differing applications (of apparently identical conceptions) from recent history (Kusch 2014, p. 1595–6). His analysis serves well as a hint that we ought not to attempt to understand the nature of corporate rights from what has in fact been held in practice.

¹⁵ One value of holding corporate persons (rather than individuals within them) responsible for a corporation’s actions becomes evident in legal cases. UK law, for example, has faced problems

refute it, but rather ask, if this account is correct, what are the implications for group personhood rights? In particular, can we defend a distinction in rights between group and individual persons once group persons have been admitted into our ontology and allocated moral responsibilities? I examine two broad strategies. The first accepts group personhood as a basis for moral responsibility but tries to adduce additional reasons for denying that groups lack equal moral rights to individual persons. The second – my own – accepts group personhood as the basis for both moral responsibilities and rights and follows the implications through. I argue that in doing so we will find an account of corporate rights which seems intuitively plausible, without resorting to any additional normative claims or indefensible distinctions between the personhood rights of one category of persons (group), and another (individual).

I begin by defining PP, and the way in which group agents meet the criteria for PP, in §2, before outlining the specific tension between the moral responsibilities and rights of group persons in §3. This tension I call DISANALOGY. I then, in §4, consider proposals made by LP (2011) and List (2016) to address the tension and argue that these attempts do not in themselves ground DISANALOGY without further substantive commitment. In §5 I introduce an ontological explanation for DISANALOGY grounded in LP and Pettit's own accounts of both personhood and dominative power. I consider and respond to two key objections to this account in §6, before identifying positive benefits of the ontological account in §7. §8 concludes.

2 Personhood

Ethically, being a person matters. Persons are deserving of respect or recognition in a way that non-persons are not.¹⁶ It matters whether or not animals,

in cases where a “directing mind” could not be found despite clear corporate responsibility (R. v P&O European Ferries (Dover) Ltd (1991)). The revised Corporate Manslaughter and Corporate Homicide Act (2007) seeks to address this through seeking evidence that harm was substantially due to, “the way in which [the corporation's] activities are managed or organised by its senior management” (Corporate Manslaughter and Corporate Homicide Act 2007, s1(3)). The wording of the legislation suggests that – in theory – where there is no traceable event to any one or more individual(s) but the business of the corporation is nonetheless practised in such a way that a breach could be, e.g. foreseeable, the corporate entity itself might be held responsible. Whilst arguably corporations have been held to account at various points in history without a performative personhood account to defend doing so (Kusch 2014, p. 1598), PP offers a philosophically reasoned case for doing so beyond the merely pragmatic; that corporate persons are fit to be held responsible as moral agents.

16 In views ranging from Kant (1788) to Singer (1997).

social robots, and aliens might count as persons. Moral theories are rejected and defended on the basis that they specifically do or do not include within their domain of inquiry those types that we want to include within the category of “person”. We treat persons differently to non-persons in the moral (and legal) sphere, holding them to have responsibilities which non-persons do not. And we believe that persons have rights to do and to expect things which non-persons do not.¹⁷ But despite widespread use of the term, and the practical value placed upon it, ontological accounts of personhood demonstrate a range of occasionally contradictory, ill-agreed upon features.¹⁸

2.1 Performative Personhood (PP)

The performative account of personhood is functionalist (LP 2011). Persons can make, keep, and hold others to commitments: a person is one who can be relied upon by a community of members to “be a knowledgeable and competent party” to a system of reciprocal obligations and entitlements (LP 2011, p. 173). Thus, an agent is a person when she is able to “perform in a certain way” (LP 2011, p. 171). We attribute personhood only to those we believe can be held morally responsible for upholding commitments, whether positively made or negatively implied, through participation in the social sphere. A person is “a suitable candidate for blame or approval” (LP 2011, p. 155) in a way in which a non-person is not, and this makes her fit to be perceived as someone who can enter into commitments with others.¹⁹

Personhood is therefore only recognised socially, on this account. An agent’s personhood status can only exist in practice in the presence of others to whom promises can potentially be made and called upon. This is not to say that persons necessarily disappear under conditions of isolation – perhaps they still have the capability of performing as persons – but rather that what is important about personhood is contained in our interactions with other persons. The performative account therefore implies that it is not only human individuals, with a specific make-up or set of interests and experiences, who can be persons. Rather:

¹⁷ This is not to say that personhood status is necessarily the source of all moral duties or value. See Warren (1997) for a complex interpretation of moral status as derived from principles (including personhood) which may be individually sufficient but not necessary for assigning moral worth.

¹⁸ For a useful discussion of approaches and complications, see “Personhood and Moral Rights” in Warren (1997, p. 90–121).

¹⁹ This meshes to some extent with one common assumption in the legal sphere: that a person can be tried in a court of law precisely because a person is responsible for their actions.

Let the agent be a Martian, or a robot, or a chimp that has been trained or engineered to a higher level of performance. If it proves capable of engaging us on the basis of commonly recognised obligations [...] [w]e have every reason to incorporate it in the community of persons (LP 2011, p. 174).

2.2 Group Persons

On LP's functionalist account, group agents can have an independent mind, desires and beliefs, irreducible to those of the members who constitute that group. I do not intend to examine here the features of LP's agency account. I will only assume that LP sufficiently demonstrate that at least some group agents exist with the features of agency (representational and motivational states, and the ability to intervene to align these) (LP 2011, p. 20); joint intentionality (LP 2011, p. 33); and rational-attitude ascription (LP 2011, p. 39–41) required to ground the basic performative claim.²⁰ These group agents can make normative judgements and decisions, publicly commit to those decisions and promises, and “have the necessary control to make choices based on those judgements” (LP 2011, p. 176).²¹ As such, they “can relate to one another, and also to individual persons, as sources and targets of addressive claims” (LP 2011, p. 176). They are fit to be held responsible in the social sphere of mutual obligations, and are therefore persons.

3 The Concern

Understanding corporate group agents as persons, however, creates a challenge. LP (and many others) want to defend an important disanalogy between individual and group persons:

²⁰ LP's agency account assumes sufficiently complex formal decision-making structures, which allow corporations to act in a causally efficacious, intentional way, such that they may be said to have beliefs, desires and the ability to act to bring those desires about based on their beliefs, irreducible to the actions of their individual members (LP 2011).

²¹ Questions arise on a performative definition, as with any account reliant on agency, with regard to whether or not children might be excluded, and whether or not a human could generally lose personhood due to losing her capability to make and be entrusted with promises etc. LP's notion of “responsibilizable” agents may be one way to respond to concerns (LP 2011, p. 169), but there may also just be other moral duties in which the source of any protections for these humans lies.

DISANALOGY

1. Group agents can be *responsible* for their actions qua persons, in some relevant moral sense, distinct from the responsibilities of individual group members qua individuals; but
2. group agents nonetheless do not have moral *rights* equivalent to those of individual persons.²²

Assuming that we do not want to bite the bullet by denying (2), the performative account needs to explain why it holds. Why is it that “while groups should be held responsible for their actions to the same extent as individuals, they should not have the same rights as individuals?” (Briggs 2012, p. 286).

3.1 Giving up?

I will not defend PP itself further at this stage, other than to say that we ought not to dismiss it in the face of DISANALOGY, for two good reasons.

Firstly, we should not assume that DISANALOGY itself presents an insurmountable *prima facie* normative or intuitive reason to believe that PP is false. Our intuitions with regard to the primacy of individual rights might of course just be false. But more helpfully, PP may have a lot more to say about DISANALOGY than first appears. In §5 of this paper I will argue exactly this: that the performative account of personhood can make relatively straightforward sense of the notion of a difference in the rights we take individuals and group agents to have, in paradigm cases.

And secondly, there might also be good reasons, independently of the treatment of DISANALOGY, to hope that corporate personhood is more than a legal fiction. On the one hand, if group agents can be persons in exactly the same way that individual agents can, we can potentially rely on our best analyses of the epistemic practices, behaviour, and responsibilities of individual persons to also account for those of group persons. This might provide a somewhat parsimonious account of the nature of group belief, knowledge, action, and morality, or at least form the basis for knowing where to look for one. And on the other hand, understanding the personhood rights of a group agent might offer surprising insights into the debate around where individual person rights come from, what grounds them, and why they matter. I will return to this suggestion in §7.²³

²² Note that DISANALOGY does not assert that group agents must have no rights at all, such as those to, e.g. assert property-based claims against the government, although this is a nuance that is more generally missed in the legal debate.

²³ I'm afraid that I can offer no more than this at this point to those who may find the idea of robust group rights a *reductio ad absurdum* against the idea of performative personhood in and

As such, we ought to charitably assume that PP is at least plausible and examine whether it can in fact be reconciled with DISANALOGY.

4 Responding to DISANALOGY

I believe that there is an ontologically-grounded justification for DISANALOGY. I will lay it out in §5. But LP (2011), and List independently (2016), do not take this route. Instead, they present a range of accounts according to which an agent has moral responsibilities in virtue of meeting the criteria for PP, but where there is some other relevant consideration, X, which determines which persons have moral rights. In each case, it is argued that this consideration demonstrates that whilst individual persons have rights, corporate persons do not. Call these types of accounts “PP + X” accounts.

LP (2011) and List (2016) present arguments that the relevant consideration could be derived from:

- I. A theory of the good;
- II. the social contract of creators;
- III. phenomenal consciousness.²⁴

I will briefly examine these three possibilities below to demonstrate the pattern of the flaw which I will suggest all accounts of this form possess.

of itself. But I hope that most readers will be willing to suspend judgement and hold that the retention of clause one of DISANALOGY, and the possibility of a better understanding of the basis of all rights, are sufficient to be willing to entertain the possibility.

24 LP and List do not explicitly break their arguments down into the three categories proposed here (other than in List (2016) with regard to “phenomenal consciousness”), although each can be identified in the text(s). An anonymous reviewer offers that LP’s overall argument might be best summed up as: “Rights are there to protect sentient beings from suffering and promote their interests, welfare and happiness.” If this is correct then it cannot go unsupported of course. The question remains: how is the claim that rights are “for” sentient beings justified (particularly given that whatever this feature is, it does not determine their responsibilities in an equivalent way, on the PP account)? §4.1–4.3 examine what I take to be the best proposals available in LP (2011) and List (2016) for what might justify a distinction. But leaving aside exactly what might prioritise individual sentience as a claim on intrinsic value, it is worth noting that the more general thought – that what is morally relevant can only be that which is in some way beneficial to sentient beings – does not in itself provide a response to DISANALOGY. It is plausible to claim, for example, that assigning moral rights to group persons benefits many individuals (those who are members of, or who benefit from the existence of that group person operating with rights). If what is morally relevant can only be that which benefits sentient beings, and we grant rights to corporate persons in the pursuit of that, we cannot then arbitrarily take those rights away when some *other* individual person determines that this would be for their own particular benefit. An account is owed of whose individual interests are more morally relevant in any given situation in which an individual is up against a corporate person. The account in §5 may help provide a way through this challenge.

4.1 A Theory of The Good

LP support the claim of “normative individualism”. This seems to run roughly as follows:

- TG:P1. Things can only be good or bad for individuals, “or more generally, sentient beings” (LP 2011, p. 182).
- TG:P2. We ought to do what is good, and refrain from doing what is bad, for individuals (implied).
- TG:P3. Giving moral rights to group persons is bad for individuals: “it is extremely unlikely that giving group persons equal status with individuals could be in the interest of individuals” (LP 2011, p. 182).
- ∴
- TG:C1. Moral rights belong only to individual persons.

LP do not give a robust defence of this argument, although they find it “more or less compelling” (LP 2011, p. 182). But the argument does need defence. Firstly, it is not necessarily the case that the sentience requirement must exclude all possible non-individual entities. As Briggs notes, we can conceive of functionalist accounts of pains and pleasures on whose terms “it’s not so obvious that there couldn’t be a group that felt pain” (Briggs 2012, p. 286).²⁵

But secondly, and more importantly, it is difficult to make sense of the idea in TG:P1 that things can be good or bad only for sentient persons (or individuals) at all. There are good reasons for thinking that TG:P1 is false. PP by definition entails that group persons can have desires and goals. At the very least this allows for an objective assessment of whether or not things are good or bad for that group person in terms of those goals being achieved. In LP’s example, *The Economist* newspaper cites its own support for “a variety of liberal causes, opposing capital punishment [...] favouring penal reform” (<https://www.economist.com>, accessed 11 July 2007, cited in LP 2011, p. 41). Amongst other goals, we might assume that

²⁵ After discussing various ways in which things may be good or bad for groups in a morally salient way, Briggs’ own account proposes a non-performative interest-based theory of personhood in which, “a person is the kind of creature for which things can go well or badly” (Briggs 2012, p. 289). Although they do not suggest it, we might alternatively take Briggs’ “being interest-holding” as the X in a “PP + X” type account, (leaving personhood as determined by performative ability). But neither variant of the interest-based approach would necessarily preclude group persons from having rights, as Briggs also notes in self-response (Briggs 2012, p. 291). Corporations might have interests in at least some morally relevant ways – to free speech, free association, equal treatment in comparison with other group agents – for example, which might not allow for DISANALOGY to be established in paradigmatic cases.

The Economist desires these ends and has the goal of supporting them in its editorial content. We can certainly objectively assess whether or not things are going well or otherwise for *The Economist* in terms of the extent to which it is achieving those goals.

LP could respond by arguing that whilst things can be good or bad for group agents in this way there is nonetheless some special sense in which things can only be good or bad for individual (or sentient) beings, and that this is what TG:P1 intends to capture. On this account, TG:P1* would be amended to capture this special sense. But if so, then we need an explanation of why a particular interpretation of what it means for something to be good or bad – one which only applies to sentient beings – takes precedence in apportioning rights. Without this explanation we cannot preclude the additional claim that: “we ought to do what is good, and refrain from doing what is bad, for non-individual entities”, where good and bad are assessed against some other standard. The conclusion that moral rights belong only to individual persons, would then no longer follow even if it turns out to be the case that giving moral rights to group persons is bad for individuals. And so, the argument from a theory of the good fails to gain ground.

LP present a second argument however, which might make more sense of the normative claim that allocation of rights should ultimately be determined by what is good or bad for human persons.

4.2 The Social Contract of Creators

LP's contractarian approach suggests that normative individualism can be defended by appeal to an assumed social contract between the creators, but not the created:

Individual persons create and organise group agents [...]. While the parties to such deliberation might be expected not to settle for less than the equal status of individuals [...] they can certainly be expected to agree to less than equal status for the corporate bodies they construct (LP 2011, p. 181).

This is certainly in line with LP's “methodological individualism”, in which “good explanations of social phenomena should not postulate any social forces other than those that derive from the agency of individuals” (LP 2011, p. 3). But it is also in tension with LP's entire thesis up to this point. Firstly, the social contract is essential to determining that group agents are persons in the first place: we have already agreed that group persons can play the “social contract game”

(Briggs 2012, p. 289). We will need a good reason to suddenly exclude group persons from this specific contractual discussion about what rights they ought to have.²⁶

Secondly, the weight given to individual persons as creators is also puzzling. Having just argued that where one comes from (i.e. whether one is made of human stuff or not) has little to do with substantive moral responsibility in the social sphere, it seems odd to argue that creation is nonetheless relevant to moral *rights* in that sphere. The social contract between creators at first glance then appears to involve an undefended appeal to the priority of one type of person over another on intrinsic grounds.

LP lend a new tint in their “Replies” (2012) however. Corporations and group persons are the result of “social arrangements”. As such:

Whatever ethical view we adopt [...] the interests of the individuals *who stand to benefit or suffer* as a result of social arrangements should ultimately determine the rights and responsibilities to be assigned, not the interests of the corporate entities that these arrangements bring into existence (LP 2012, p. 308, my italics).

The idea now appears to be that group person rights are derivative from those of individual persons on the grounds that these created group persons are brought about *in order to benefit* individual persons. This gives a reason for thinking that the fact of creation matters. Note that it is not only that individual persons benefit from the social arrangements – group persons might also stand to benefit – it is that group persons are created *so that* individual persons might benefit.

This has some initial intuitive appeal. But on close reflection I would argue that this defence is perhaps the most disturbing so far. Why should creator *intention* matter, in the question of rights, in itself? It is not difficult to make the initial counter case on the part of social robots. If human persons created social robotic persons in the near future, perhaps indistinguishable from human persons in the performative sense, specifically for the benefit of human persons, would it be reasonable for humans to continue to determine what rights those persons had, if they had a sufficiently advanced level of awareness? Perhaps an example from fiction will bring the problem into better view.

The British TV show *Black Mirror* delivers a series of vignettes of possible slightly dystopian near-futures (Brooker 2014). In the Christmas special, *White*

²⁶ There may also be flaws in this “social contract” approach of a more ordinary nature. Would individuals agree to group rights for some social kinds of group agent, but not for corporate ones? Would reasoning social robots agree similarly? I assume a full account would need to respond to these.

Christmas, a woman, Greta, undergoes an operation to download a data copy of herself into a “Cookie”. Whilst Human-Greta is anaesthetised, Cookie-Greta experiences the operation as a terrifying out of body experience and “wakes up” to find herself disembodied and confused, believing that she is Human-Greta. All she knows is that she has been taken out of “her” body.

A corporate representative, however, explains to Cookie-Greta that she has been created by Human-Greta, for Human-Greta’s benefit. Her entire reason for being is to use her mind to manage Human-Greta’s household appliances and diary, with no sleep, no food, and no other distractions or social interaction. Cookie-Greta shares Human-Greta’s intelligence, personality, and wants and desires. But for the rest of her existence, she will be a slave to Human-Greta. Cookie-Greta is “just code”, created for the specific benefit of Human-Greta. It is therefore Human-Greta who has the right to determine what Cookie-Greta has a right to, because Human-Greta created her, and she did so, for Human-Greta’s sole benefit.

This is an application of the argument from creator benefit. But if it sounds at all barbaric (as it does to the show’s protagonist) to deny Cookie-Greta her rights on the basis of Human-Greta’s benefits and intentions, then we ought to strongly question the argument.

4.3 Phenomenal Consciousness

Of course the difference, one might argue, is not only that S created T specifically for the benefit of S. It is also that S can feel in a way that T cannot. Cookie-Greta appears to be able to experience panic and fear, and this is why her lack of rights seems barbaric. This is not the case for group persons.

Perhaps *phenomenal consciousness* is doing some work here, as List suggests (2016). An account of DISANALOGY based on phenomenal consciousness must either argue that consciousness is a replacement criterion for personhood itself, or that individual-consciousness is rather an additional consideration for rights. The former is of course incompatible with PP, and List focuses on the second of these. Having developed a distinction between functionalist “consciousness as awareness” and phenomenal “consciousness as experience” (List 2016, p. 5–7), List argues that group persons have the former but lack the latter; there is no “phenomenal consciousness at the collective level” (List 2016, p. 2). And that this in some way entails that group persons lack any rights that are not merely derivative on those of individual persons. Group agents’ responsibilities are non-derivatively grounded in their status as persons, but their rights are “justified in

terms of their contribution to the protection of individual rights and interests” as conscious agents (List 2016, p. 22).

We might question the basic premises. It is to some extent controversial whether there is such a thing as phenomenal consciousness in the sense that List describes, and there is some further debate over exactly which agents might have it, if such consciousness does exist.²⁷ I will not however examine all of the features of List’s account in greater detail here, as it is not necessary to examine the specifics in order to highlight the main flaw with the approach. And this is simply that even if phenomenal consciousness, distinct from functionalist consciousness, exists in the way List suggests it remains unclear why this ought to be the source of all moral rights.

Whilst it may be “pointless to grant rights to something that cannot benefit from those rights” (Briggs 2012, p. 289), this claim alone does nothing to demonstrate that the correct interpretation of “benefit” as used here should be phenomenal. Clearly a more substantive defence will be needed to explain why specifically phenomenal pains and pleasures ground the rights to, e.g. non-violation of private property or free speech, rather than other forms of interest. A defence on the grounds that only individual persons can “feel” in the appropriate way (Hess 2013) is open to the question, “why is this the sense of feeling that matters for certain rights at all?” It is not immediately obvious that having an interest in, e.g. the state not confiscating one’s private property, is something that one can only care about in the right way if one has phenomenal consciousness. And if this sense of feeling is important for moral rights, why is it not also important to personhood itself, or at least, also relevant in allocating moral responsibility?

The point is not that no answers might ever be provided to these questions. But rather, that such answers are needed, and that acceptance of any response offered is far from self-evident.

4.4 Summary of Criticisms of the “PP + X” Approach

Each of the “PP + X” accounts seeks to find a consideration for apportioning rights which could only apply to individual persons and not to group persons, and then use this to argue for a difference in rights between the two types. But

²⁷ List presents his own account as a standard of complexity in information processing, and notes that it is debatable whether or not this standard could never be met by group agents (List 2016, p. 17–19). It is almost certain that it would be met by sufficiently advanced other mammals and social robots. I tend to think, however, that most will find the general defence of a distinction between individual and group person consciousness plausible, based on the evidence presented.

each account requires further defence, given that PP has already been acceded to. None of these considerations serve as a reason to withhold moral rights from group persons, without additional commitment.

Moreover, if these differences are in fact morally relevant to rights at all, why are they not equally relevant for determining moral responsibility, or for personhood itself? As Kusch suggests, these types of account simply “fail to make plausible why we should use the dissimilarities in this way rather than in favour of the conclusion that group agents are not persons” (Kusch 2014, p. 1596). Whilst I do not believe we ought to follow Kusch’s line of thought that these distinctions entail that groups are not persons, the criticism is fair.

It remains open to someone to present an alternative and reasonable “PP + X” account that avoids these challenges, but I believe we have gone far enough into some good attempts to justify looking elsewhere. We ought to now take PP seriously as an ontological claim, and follow its conclusions through. If there really is no non-ad hoc way to support DISANALOGY and if the most worrying of current legal claims do in fact have substantive grounds on a performative account, PP will not be disproven, but this may be good reason to revisit the charitable assumption made in §3: that the performative account of personhood is at least plausible.

I do not think that this will be necessary however. I propose that we take a cue from Pettit’s other work on domination and freedom (Pettit 1996, 2006, 2007), and from some fairly substantial clues elsewhere within LP (2011). And that if we do so, we can find a far more straightforward and simple justification for DISANALOGY.

5 The Ontological Account

To understand any difference in rights, we need to be clearer on how rights are entailed by the performative account of personhood itself. Structurally, I suggest that:

- P1. Personhood grounds personhood rights (new premise).
- P2. Performative roles ground personhood (from LP).
- P3. Group agents demonstrate relevant performative features of persons (from LP).
- ∴
- C1. Group agents are persons (from P2 and P3).
- C2. Group agents have personhood rights (from P1 and C1).

Accepting P2, that “the mark of personhood is the ability to play a certain role” (LP 2011, p. 171), this further suggests that we might derive differences in rights

between persons from relevant differences in persons' abilities to perform that role. Additionally then:

- P4. Relevant differences in performative roles ground relevant differences in personhood rights (new premise).
- P5. There are relevant differences in performative roles between group and individual persons in the typical case (new premise).
- ∴
- C3. Group persons and individual persons have different rights in the typical case (from C2, P4 and P5).

This is an ontological account of the differences between individual and group persons' rights: everything we need for understanding what rights any given person has comes from asking whether that right is entailed by that person being a person at all within the social sphere. Rather than the difference being derived from individuals having properties or fulfilling conditions which group persons never could (phenomenal consciousness; a particular theory of the good as being something which only individual persons can experience), or from pre-existing facts about the relationship between individual and group persons (the creator/created relationship), differences in rights come about when different persons fulfil different performative roles in relation to other persons around them. All persons have the rights that enable them to perform as a person. It is simply that performing as a person entails that some persons have more rights than others.

If this account is sound, then we can explain DISANALOGY whilst avoiding altogether the problems identified with introducing ad hoc normative claims, or ones which rely on ever-widening theoretical assumptions. The challenge is to demonstrate that P1, P4 and P5 hold. I turn to this next.

5.1 P1: Personhood Grounds Rights

Personhood is associated with rights. What appears unclear, or up for dispute, is what rights persons have when those persons are group agents (or alternatively, how they might be restricted). To understand whether there can be any distinction in the rights different categories of persons have, we need to be very clear on how rights are entailed by PP at all.

LP ground personhood *simpliciter* in an agent's ability to "perform effectively in the space of obligations" (LP 2016, p. 173), and to participate in "addressive" claims. One who can do this has moral responsibilities. But the principles of reciprocity in these claims run in both directions; a person can be held to account for promises made, but equally, a person has to be provided with the opportunity to freely enter into promises, else she cannot be said to be a person at all on the

performative account.²⁸ I suggest that this reciprocity is the source of her personhood rights. The only thing that might ground rights, without requiring further normative or metaphysical commitment, can be that *a person must have those rights in order to count as a person fulfilling the criteria for PP itself*. The rights this suggests include the right to free speech, to free association, and to be able to enter into legal contracts, amongst others.

In this way, personhood grounds rights. We do not grant rights. Rather, persons simply have the rights which enable them to perform as a person.

5.2 P4: Differences in Performative Roles Ground Differences in Rights

If rights are grounded in what is needed to perform as a person, then the only differences in rights between any persons can be those that derive from *differences in what is needed to perform as a person*. Personhood is social, and can only be performed relative to other persons (§1). Any differences would derive from relevant differences in being able to perform relative to one another within the social sphere. Call the performance of personhood in relation to others a person's "performative role". When some persons' ability to perform is affected by their relation to other persons, then their performative role may ground more or fewer rights. Do such differences in performative roles exist between individual and group persons?

5.3 P5: Relevant Performative Role Differences Between Group and Individual Persons

Defending normative individualism, LP give reasons why human individual persons *should* restrict the rights of group persons, based in their often having

28 We can analyse this down to the conditions of group agency. Personhood is granted to an agent S who can be held to account as a morally responsible agent. The conditions of agency necessary for this capability are that:

- (i) S must face normatively significant choices;
- (ii) S must have "the understanding and access to evidence required for making normative judgements about the options"; and that
- (iii) S must have "the control required for choosing between the options" (LP 2011, p. 155).

The 'control' in condition (iii) requires both the capability to make normative judgements when faced with them, and respect from other persons, to be able to act on choices based on those judgements. Condition (ii) requires that an agent can make well-evidenced choices about normative considerations. This again entails that no other persons could interfere with her successful execution of that process.

“vastly more power than individuals” (LP 2011, p. 183). But within LP’s functionalist project this kind of normative concern appears to have no place in determining whether or not group persons *do* have rights equivalent to (specifically human) individual persons. The fact that they have advantages such as a “mortality-free time-horizon” and a lack of “anxiety or related emotions” (LP 2011, p. 183), for example, seems to give no more reason to deny rights to a group person than to a Martian person whose biological make-up may be different to our own. However, I suggest that the “power of interfering in individuals’ choices” (LP 2011, p. 183) should not be understood as providing a normative reason to withhold rights from any person, corporate or otherwise. Rather, the presence of this power reflects a difference in performative role, providing an explanation for DISANALOGY.

LP assert that: “When persons seek and exercise [...] permissible influence on one another [...] we say that they display ‘respect’ for one another” (LP 2011, p. 178). But, “[w]hen one agent has an asymmetrical power of interfering with force, coercion, or manipulation in another’s choices... the regime of respect is compromised” (LP 2011, p. 182). In earlier work, Pettit argues that:

Respect has two components: negatively, it requires a framework in which people are denied control over one another; and positively, it requires a disposition to engage with one another in reason-mediated or reason-friendly ways (Pettit 2007, p. 280).

I suggest that these conditions of respect are simply *the reciprocal conditions of being able to perform personhood*. The positive condition of respect is fulfilled when capable agents are treated by others as being fit to be held responsible within the social sphere. What has not been spelled out is the negative condition for personhood. This condition requires that no one person have arbitrary power over another’s ability to freely choose. Without this, an entity S does not have “context-independent decisiveness” (LP 2011, p. 134) to freely enter into obligations grounded in her will (LP 2011, p. 179). She is not able to freely enter into the commitments which determine personhood status. Persons *by definition* have the ability to freely participate in the social sphere, without the threat of arbitrary interference from others.

In §5.1 we saw that personhood rights are grounded in their being needed to perform personhood itself. We have now identified that performing personhood requires that an entity S is not under a position of arbitrary domination by another. A person therefore has rights grounded in her ontological status as a person insofar as these are needed to prevent that. But whilst all persons need the conditions of respect in order to perform as persons, what is entailed in meeting those conditions of respect – what rights a person has – may vary depending on a person’s performative role in relation to another: on whether she has the power to either arbitrarily dominate, or to be arbitrarily dominated by, other persons. This

is therefore a difference in relationally-determined performative personhood role that is relevant to a person's rights.²⁹

As group agents are (generally) in a position to potentially arbitrarily dominate human individual persons for the reasons LP present, there is a *relevant* difference in performative role between group and individual persons. And there are therefore differences in rights. Group person rights are not *restricted* per se, it is simply that individual persons are likely to have *more* rights, on account of their non-dominative performative role, in relation to group persons. In the general case, rather than being curtailed in some way, group persons will simply not have certain rights as these rights are not contained in the conditions needed for them to be able to perform free from non-arbitrary domination by other persons in the social sphere.³⁰ Certain rights are simply not grounded in those persons' personhood.

And so, LP's focus on domination does not introduce an ad hoc normative concern, or one requiring additional arguments to defend it. Rather, it reflects performative role-based rights that those in relative positions of weakness and power have in performing personhood. And this explains DISANALOGY.

Before examining the benefits of this account, I want to first raise two important objections that it might prompt. One relates to an implication, and the other relates to a query regarding its foundation.

6 Objections

6.1 Corporate Executions

Group persons can be bought and sold and “put to death” on a regular basis. And yet: “We find it unacceptable to enslave individual agents” (Kusch 2014,

²⁹ There may be *other* relevant differences in performative roles (or in social relationships more generally) not only that of arbitrary domination, which a more nuanced understanding of PP might lead to. In particular, perhaps there are types of obligations that human persons are able to perform whilst group persons cannot, or that arise within social spheres that necessarily exclude group persons from being able to participate. The commitments of loving relationships or towards a deity may for example be out of reach for group persons. And equally, some of these may be in reach of those that the original version of PP would exclude, such as animals, the cognitively impaired, young children. On this account, rather than a single social sphere, we may have overlapping sub-spheres, or some form of PP scale, in which one can participate to greater or lesser degrees, with responsibilities and rights grounded according to sphere. I cannot explore this here, but I suspect doing so will be enlightening.

³⁰ There are then no restrictions on the extent of any specific group person rights or any rights which fail to extend for group persons, other than insofar as valid rights – whatever they are

p. 1594). It seems evident that human individual persons have a right not to be destroyed or sold, in a way that group persons do not. Does the explanation of rights given here, as being grounded in personhood, imply that contra LP (2011, p. 181) and apparent common sense, group persons have an inviolable right not to be enslaved or destroyed equivalent to that of humans?

Leaving aside the complication of how far this might extend to social robots, the answer is that the ontological approach makes no claim regarding whose personhood we should or should not protect at all. Its reach is somewhat less grand. The argument is not intended to be a defence of the view that persons ought to generally have their personhood protected. It is only that *if* we believe this, *then* we have to recognise that we are stripping agents of personhood when we allow others to have arbitrary power over them. Whether or not we, or the state, or human persons should want to protect a particular entity S's personhood is a distinct issue.

In the case of humans there may be very good prima facie ethical reasons for wanting to preserve personhood status, deriving from aspects of humanity; most ethical views appear to hold that it is important that humans in principle be persons and have this status protected.³¹ We may not believe that these prima facie reasons apply to corporate persons. However, if there is value in engaging with group agents and holding them responsible, then we have a pro tanto reason to preserve their personhood status, recognising that arbitrarily denying it undermines the social contract of all persons, whilst holding that we do not need to enforce perpetual continued personhood for every token instance of a group person.^{32,33} The important point is that any token denial of personhood is serious;

determined to be – may come into conflict between any two persons on any non-absolutist conception of rights. These conflicts can be seen whenever one person's right to freedom of speech comes up against another person's right to non-discrimination, for example. This applies in practice in the general case, given the general relative positions of individual and group persons (but see §7.1 for the broader principle). I am grateful to an anonymous reviewer for asking me to clarify this point.

31 For a contrary perspective, see Singer (1997, p. 87).

32 The same might also be true of token instances of individual persons, if one accepts defence of capital punishment, or allowing soldiers to die in battle for a greater cause. What is undeniable is that these are seen as great sacrifices, in a way in which the dismantling of corporate persons is not. And exceptions are never granted for “transfer of ownership” of a human individual person.

33 An alternative understanding of buying and selling corporations is that the “ownership component” is simply a part of the corporate person itself. And that part which is constituted by the agent's ownership, is simply changed when the corporation is sold.

it risks the social contract which enables personhood to exist at all. Our ethical theories need to therefore consider seriously the conditions under which it is acceptable. Arbitrarily refusing rights would undermine the institution of personhood (and responsibility) itself. Allowing corporate persons to be disbanded under agreed circumstances may not.

6.2 Creation and Control

Individual persons create, manage, and dismantle corporations. Arguably, they can interfere in group person choices at will. Might it be that it is actually individual persons that have dominative power? In which case it is groups, not individuals, that will be found to have additional protective rights, given that the former are dependent on the latter for their creation and sustenance. And this seems to completely reverse DISANALOGY.

Firstly, however, in terms of specific cases in which individual persons might have arbitrary power over group persons, the ontological account may provide a far better way of dealing with these than any of the “PP + X” accounts do. I suggest this in §7.1. And secondly, we should be wary of any attempt to ground the idea of individual person domination in their role as creators. For PP what matters is the role one performs, not the way in which one came to fulfil that role. Just as origin stories do not ground individual-rights claims, nor should they ground corporate or group person rights claims.³⁴

Still, regardless of origin it remains that individual persons make up the membership of corporate persons. As such, are corporate persons under the arbitrary control of individual persons given that their base is continually grounded in individual persons?³⁵ I do not believe so. Individuals have free will, and therefore reciprocally influence corporations, just as they influence other individuals. This in itself does not demonstrate arbitrary power over others. And more equivalently, as Hess argues, the fact that individuals ground corporations is not disanalogous with the way that individuals are themselves grounded by their “physical” base of atoms (Hess 2014). Unless we intend to claim that the fact that individuals are grounded in a physical base entails that they are under the arbitrary control of

³⁴ And not all individuals are involved equally in creation or sustenance: CEO as opposed to factory worker.

³⁵ An anonymous reviewer quite rightly highlights that this is LP's own thesis: group agents supervene non-reductively on individual agents in a multi-level account of causation (LP 2011, p. 162–163).

the ever-changing atoms that make up their being, we ought not to believe it with regard to group person individual-bases.³⁶

We can turn now to the benefits.

7 Benefits of the Ontological Account

The criticisms levelled at “PP+X” accounts do not apply to the ontological account. From within the PP framework we can ground both clauses of DISANALOGY without introducing additional debatable normative concerns or ontological commitments. This speaks in favour of the approach.

7.1 A More Nuanced Approach

But the ontological account also gives a better account of the underlying purpose of DISANALOGY.

We have talked so far of individual and group persons as though members of each category were identical. However this is only a handy gloss. There may be specific individual persons who stand in role relations with group persons, such that they have the potential for truly arbitrary dominative power. The motivation behind DISANALOGY is to guard against abuse by restricting corporate group person rights. But without an understanding of role-based rights, the blunt instruments which “PP+X” accounts propose entail that every group person’s rights are automatically curtailed. And if we rule out group person rights for corporations we also rule them out for non-corporate group agents that we might otherwise want to protect.

During the 2016 U.S. presidential campaign a number of observers and commentators picked up on Donald Trump’s unusual use of the definite article when referring to minority U.S. populations (Murphy 2016). Trump regularly referred to U.S. citizens as “The African Americans”, almost as one would refer to the

36 Granted, neuroscientific results (e.g. Libet 1999) might appear to show that we are somehow “under the control” of our brains in a way that precludes acting freely. However, there are hardly any – if any – philosophers who accept this conclusion; see e.g. Mele 2008. Note that this same logic is also why the asymmetrical dependence of group agency on individual agency is not in itself enough to provide an alternative response to DISANALOGY. Ontological dependence does not determine what rights one might expect to claim. I am grateful to an anonymous reviewer for encouraging me to highlight this point.

population of a distinct nation (e.g. “The British”). Regardless of what this implies about Trump’s perspective on who is (not) encompassed by “The Americans”, on a functionalist account of agency it is extremely unlikely that “The African Americans” make up the kind of structured decision-making body fit to be held responsible in the social sphere. They are not a person.

But we now live in a world in which Trump is the president of the U.S. Imagine that the ethnic minority U.S. population – perhaps out of necessity – collectivise to such an extent that they become a group person: “The Ethnic Minorities”.³⁷ Given President Trump’s position he has the potential to exercise arbitrary dominative power over that group person. On versions of the “PP + X” accounts of moral rights, by default, “The Ethnic Minorities” lack moral rights (distinct from those of the individual members).³⁸ And Trump as an individual retains them. As such Trump retains a free speech power with the ability to damage this “The Ethnic Minorities” person, whilst they themselves are potentially silenced.

The ontological account however, suggests that the nature of the difference in each person’s relative performative role would instead entail that “The Ethnic Minorities” has a right to free speech and to any other rights necessary to prevent Trump from curtailing that right. Similarly, if individual person S has the ability to force the closure of group person T through their control over the stock market then group person T has a right grounded in their performative role that this not happen.³⁹ This, I suggest, demonstrates that the ontological account is a more useful and nuanced way of understanding personhood rights than those provided by “PP + X” accounts.⁴⁰

37 I explicitly imagine a structure with co-ordination and decision-making irreducible to that of its members, not just a group with “collective rights”, which may exist in virtue of individual identity as a member of a socially-oppressed group. If one holds a looser understanding of the kind of structures which might be necessary for there to be a morally responsible group person, this distinction may blur.

38 As with the case of children, a case might be made that we generally have some form of moral duty towards unstructured minority groups which does not stem from that group having rights of its own, but the scope and appropriate target of these types of “duties towards groups” would need to be independently defended, and is not done so here.

39 This can be extended to relations between individual persons, where certain persons achieve positions in which they might hold arbitrary power unless additional rights are held by the majority. Other individual persons may have additional rights in relation to those persons, in order to prevent the potential for arbitrary power, and the ability to prevent them from performing as persons.

40 As an example, if this is unconvincing – if for example, the rights needed can be achieved by individual members of minority groups as a part of their being able to perform as a person without their being a distinct group person – then we can consider instead the case of President Trump versus a standard small corporate person or business attempting to uphold its right to free speech against a hypothetical Trump’s desire to prevent them to protect his own financial interests or political allegiances.

7.2 Corporations are People: Legal Implications

So far, I have highlighted the benefits of the ontological account over “PP + X” variants. But now I want to suggest that the ontological account also gives us good reason to hope that PP itself is correct. If it is, we can derive at least five clear principles of value in law:

- (i) Complete restriction on certain rights.

Wherever a right is not derivable from the conditions required to perform as a person, a group person has no claim to that right. If it emerges that, e.g. one does not need “the right to a private family life” to perform as a person as such (but does require this in order to be a human), then group persons have no claim on such rights.

- (ii) We ought not to generally undermine the personhood rights of others.

Power relations can exist between various types of person (§7.1). In assessing the impact of granting additional rights to corporate persons, courts should always consider whether this would have the impact of restricting any individual person’s ability to perform as a person. This becomes relevant, for example, in considering whether a group person’s free speech claim would prevent individual persons from exercising the will needed to freely enter into commitments and obligations within the social sphere.

- (iii) No erroneous transferring-up of rights.

Corporations really are persons. As such, there can be no erroneous “transferring up” of individual rights. If it is determined that the individuals who make up a group each have a right to, e.g. freedom of conscientious objection, this will not transfer up to the group itself. The courts would need to examine the nature of the group person to identify whether that right was indeed necessary for it to perform within the sphere of obligations.

- (iv) Corporate responsibility without a directing mind.

Corporations really are persons. As such, we do not need to identify intent or negligence within specific individual(s) in order to hold the corporate person to account. In cases in which no single failure point, or set of human actions collectively, can be found there might still be a case against the corporate person for corporate manslaughter.

- (v) Corporate rights are real.

Corporations do have rights to free speech and to private property. These rights appear to be necessary for them to perform as a person. No other person or agency ought to be allowed to take these away *tout court*. Where, for example, the right of a newspaper to publish in the face of the arbitrary power of the state is at stake this right must be seriously weighted, not derivatively on the interests of any individual persons, but on its own merits.

The ontological account therefore provides guidance as to what considerations are in play in legal cases involving group persons. From the confused and sometimes contradictory set of legal interpretations that we currently see, a more unified and consistent set of judgements might begin to emerge; judgements which do not entail, as some recent verdicts arguably have done, that individuals are no longer able to perform as persons.

8 Conclusion: A Pressing Issue Revisited

I began this investigation by introducing two examples of the type of case that have prompted many to question the logic of understanding corporations as people at all. Legal reasoning is not an exact science even with the benefit of clear conceptual understanding. But if the courts had followed the logic of this paper, how might the specific cases I opened with, those of the Seattle minimum wage and Hobby Lobby's religious freedom, have gone in the end?

It remains for society to decide whether the personhood of either corporate agents or individual persons is worth defending in itself. But in denying any particular rights the courts need to be clear that this is what they are potentially committing to. With regard to Seattle, on the assumption that there is good reason to protect the personhood of both individual persons and smaller corporate persons, some of the considerations in the case of *International Franchise Association v City of Seattle* might then have been that:

- (i) Small corporate persons have rights to preserve their ability to perform as persons in competition with larger corporate persons. This right must be balanced against the rights of other individual persons and against the rights of larger corporate persons.⁴¹
- (ii) Individuals have a right to sustenance, which they need in order to perform as a person at all in the social sphere. This right entails being paid a fair living wage in exchange for their labour. This right must be balanced against the rights of other individuals and corporate persons.
- (iii) McDonalds has neither (i) nor (ii). McDonalds has arbitrary power over the ability of both small corporate persons and individual agents to perform as persons, should their rights otherwise fail to be recognised. Therefore McDonalds cannot defend objecting to reasonable steps taken to help protect

⁴¹ Some small businesses may be insufficiently complex to constitute a group person, fit to be held responsible in its own right. Here, the rights of the individual business owners to perform as persons would instead need to be weighed against those of other individual and group persons.

(i) above (nor can it defend refusing to pay an adequate living wage, but this was not up for debate in the specific case).

And in the case of Hobby Lobby:

- (i) The religious belief rights of individual members do not “transfer up” to the corporate person. Hobby Lobby, as a corporate person, lacks rights and interests directly attributable to those of its individual members.⁴²
- (ii) Hobby Lobby may not have a right to religious belief as it does not need this to perform as a person in the particular social sphere within which it is capable of participating, and in which it is structured to participate.⁴³
- (iii) Individuals may have rights to reproductive freedom, necessary in order to perform freely as a person in the social sphere. An individual who cannot control her reproductive choices is not free to make the commitments that she otherwise would want to, and which others may make.
- (iv) Hobby Lobby does not therefore have the right to refuse to provide employees with reproductive coverage.
- (v) Even if Hobby Lobby has a right to religious freedom somehow, this right in itself does not supersede (iii) above. Perhaps the scale of the damage to personhood ought to be assessed when deciding between removing either Hobby Lobby’s or individual persons’ rights in this case.

Whatever other good reasons we might have to challenge the idea that groups and corporations can be persons then, the fact that it entails the existence of corporate rights is not one of them. The disanalogy defended by the group person LP (2011) can be accounted for by incorporating an account of domination supplied by the individual person, Pettit (1996, 2006, 2007). The ontological account I propose here, in which rights are determined by relational performative roles, provides a plausible, ontologically simple, and coherent defence of DISANALOGY. It may also provide far more satisfactory normative guidelines than a blanket rejection of the idea of group agent personhood. As such, it deserves to be taken seriously.

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⁴² This was argued in one of the briefs in *Hobby Lobby* by a number of academics who nonetheless defended corporate personhood.

⁴³ Recalling footnote 29 above.

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Bibliography

- Briggs, R. (2012): “The Normative Standing of Group Agents”. In: *Episteme* 9. No. 03, p. 283–291.
- Brooker, Charlie (writer), Tibbetts, Carl (dir.) (2014): “White Christmas”, *Black Mirror*, episode 7. Aired 16 Dec 2014: Channel 4 (UK).
- Hess, Kendy M. (2013): “‘If You Tickle Us...’: How Corporations Can Be Moral Agents Without Being Persons”. In: *Journal of Value Inquiry* 47. No. 3, p. 319–335.
- Hess, Kendy M. (2014): “The Free will of Corporations (and Other Collectives)”. In: *Philosophical Studies* 168. No. 1, p. 241–260.
- Kant, Immanuel (1788): *Critique of Practical Reason*: Pluhar, Werner (trans.) (2002). Cambridge: Hackett Publishing.
- Kusch, Martin (2014): “The Metaphysics and Politics of Corporate Personhood”. In: *Erkenntnis* 79. No. 9, p. 1587–1600.
- Libet, Benjamin (1999): “Do We Have Free Will?” In: *Journal of Consciousness Studies* 6. No. 8–9, p. 47–57.
- List, Christian (2016): “What is it Like to be a Group Agent?” In: *Nous*, doi: 10.1111/nous.12162, p. 1–25.
- List, Christian and Philip Pettit (2011): *Group Agency: The Possibility, Design, and Status of Corporate Agents*. Oxford: OUP.
- List, Christian and Philip Pettit (2012): “Episteme Symposium on Group Agency: Replies to Gaus, Cariani, Sylvan, and Briggs”. In: *Episteme: A Journal of Social Epistemology* 9. No. 3, p. 293–309.
- Mele, Alfred (2008): “Recent Work On Free Will and Science”. In: *American Philosophical Quarterly* 45. No. 2, p. 107–130.
- Murphy, Lynne (2016): “Linguistics explains why Trump sounds racist when he says ‘the African Americans’”, *Quartz*. <http://qz.com/806174/second-presidential-debate-linguistics-explains-why-donald-trump-sounds-racist-when-he-says-the-african-americans/>, accessed 25 Oct 2016.
- Pettit, Philip (1996): *The Common Mind: An Essay on Psychology, Society, and Politics*. Oxford: OUP.
- Pettit, Philip (2006): “The Republican Ideal of Freedom”. In: David Miller (Ed.): *The Liberty Reader*. Edinburgh: Edinburgh University Press, p. 223–242.

- Pettit, Philip (2007): "Joining the Dots". In: Geoffrey Brennan, et al. (Eds.): *Common Minds: Themes from the Philosophy of Philip Pettit*. Oxford: OUP, p. 215–344.
- Richardson, Kristy (2006): "The Corporation is Criminal and 'Corporate' Individuals are too: A Study of Queensland statutory provisions". Presented at CLTA 2006. <http://www.clta.edu.au/professional/papers/2006.htm>, accessed 25 Oct 2016.
- Singer, Peter (1997): *Practical Ethics* (2nd edition). Cambridge: Cambridge University Press.
- Warren, Mary Anne (1997): *Moral Status: Obligations to Persons and Other Living Things*. Oxford: OUP.