

Folk Concepts and the Effective Regulation of New Technologies

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Abstract

One argument that is at times adduced against proposals for legal change, such as granting personhood to autonomous agents, is that the change in question will be inefficacious if it takes the law too far from the folk world of people. By contrast, in this article we argue that legal concepts and folk concepts are more malleable than we tend to assume. We turn to (legal) history to demonstrate that the relationship between legal concepts and folk concepts is not one-directional, which means that changes in the law can and have influenced folk psychology as well as vice versa. This has implications for debates around the regulation of new technologies: the ‘lack of efficacy’ argument is not a strong one and mere reference to current folk concepts cannot suffice in such debates. Moreover, the efficacy argument does not, and cannot, replace normative arguments in this respect, so the malleability of folk concepts needs to be considered by legal decision-makers. Current conceptual apparatuses (legal or folk) are not immutable, and reification of the current status quo should not be presupposed.

Keywords: Legal reform; *de lege ferenda*; folk concepts; legal concepts; relationship between folk and legal concepts; law for tech; regulating artificial intelligence.

1. Introduction

A pressing current debate concerns how law can and should respond to the increasing role played by artificial intelligence (hereafter also AI, or autonomous agents) in our society, from air traffic control to healthcare systems and autonomous vehicles and weapons. In this debate, different proposals are encountered, from using existing product liability regimes to awarding AI legal personhood and expanding the law of agency to establishing entirely new forms of liability or personhood.¹ Questions of (moral) personhood, agency and responsibility are intricately linked to the conceptually sharp distinction between objects or things on the one hand, and persons or agents on the other. What entity falls into which category, object or person has changed over time with, for example, the status of enslaved individuals or of women changing. Emerging technologies such as autonomous agents, however, seem to fundamentally question the distinction itself: these new entities do not appear to fall neatly into one or the other category.²

1.1 Introducing the Efficacy Argument

When it comes to *legal* regulation of emerging technologies, the situation is both easier and potentially more complex. With regard to the possibility of holding AI liable, for example, Brozek and Jakubiec identify the two extremes on the spectrum of answers as ‘restrictivism’ and ‘permissivism’. Restrictivism ‘denies the possibility of holding autonomous machines legally responsible on purely metaphysical grounds’, holding that an entity must be conscious, capable of intentional action, possessing

¹ For example, Chopra, A Legal Theory for Autonomous Artificial Agents; Pagallo, “Vital, Sophia, and Co.,” 230–241; Barfield, Research Handbook on the Law of Artificial Intelligence. Throughout this article, we will talk of liability and personhood. While these are distinct concepts, our argument takes place at a level of abstraction high enough to apply to both *mutatis mutandis*.

² Gunkel, Person, Thing, Robot.



free will or similar. Permissivism, meanwhile, ‘imposes no restrictions on the possible legal constructions’, maintaining that, from a (purely) technical point of view, it is possible to hold anyone or anything liable or a legal person because ‘the law is a conventional tool of regulating social interactions’, and thus flexible.³ Naffine makes a similar distinction with regard to legal personhood specifically (in general, but encompassing the possible personhood of autonomous agents), namely between ‘legalists’ and ‘realists’: legalists consider the legal person a purely technical construct with no necessary metaphysical basis; realists hold that there are objective (metaphysical) criteria for personhood, such as rationality or intentionality or sentience, and that the law cannot and should not regard any entity that does not have the relevant metaphysical characteristics as a legal person.⁴ For the debate regarding the regulation of emergent technologies, these different positions imply different consequences: a restrictivist or realist approach holds that the ways in which AI can be regulated are limited by the nature of the autonomous agent in question, while a permissivist or legalist approach posits no such limits. That there are no technical limits under the permissivist/legalist approach does not mean that its adherents unequivocally argue for holding AI liable or recognising it as a legal person. Permissivists/legalists answer the question of whether this *can* be done in the affirmative, which does not mean that they think it also *should* be done. Bryson and colleagues, for example, argue that while it is possible, it should not be done as it would invite abuse and allow others to escape or shield themselves from liability.⁵ Others, such as Brożek and Jakubiec, argue that while the technical possibilities exist, introducing liability or legal personhood for autonomous agents would remain inefficacious, as it would take law and its concepts too far from the concepts of the people it governs:

We have argued that autonomous machines cannot be granted the status of legal agents. Although this is quite possible from purely technical [sic] point of view, since the law is a conventional tool of regulating social interactions and as such can accommodate various legislative constructs, including legal responsibility of autonomous artificial agents, we believe that it would remain a mere ‘law in books’, never materialising as ‘law in action’. The reason is that the law, and in particular such a fundamental institution as legal responsibility, must be comprehensible for the people who are subject to legal rights and obligations. Meanwhile, as we have argued, our perception of human action and responsibility – i.e. our folk psychology – is not suited to see autonomous machines as the authors of their actions.⁶

While we see this argument used in the context of how emerging technologies can and should be regulated, it is not new: similar arguments can be found regarding reforms of the criminal justice system, for example holding that moving to a more restorative and less punitive system is ‘not a proposal that societies will or should adopt’, given that ‘a majority of individuals in the society would strenuously resist the abolition of punishment because the impulse to punish serious wrongdoings is deeply ingrained’.⁷ We call this type of argument against legal reform the ‘efficacy argument’, with the following argumentative structure:

Premise 1: If law departs too far from the worldview of the general populace, the law will remain inefficacious.

Premise 2: The change in question – whatever it may be – takes the law too far from the worldview of the general populace.

Conclusion: The change in question will remain inefficacious and therefore should not be implemented.

This argument silently presumes that the law should be efficacious (which is a defensible presupposition, in our view) and that if it is clear that a legal change will not be efficacious, it should not be implemented. In other words, a reason that is adduced against legal change is that the change would remain inefficacious and that this is the case because the proposed change would lead to a gap between legal concepts and folk concepts. This reason, then, connects the efficacy of legal rules to the worldview of the general populace and presumes that if the law departs too far from the life world of ordinary people, it cannot become efficacious. Is it the case, however, that implementing legal reforms that would introduce liability or personhood for autonomous agents would remain inefficacious for the reason that it would take the law too far from the life world of people? That is the claim we seek to investigate in this article. This is ultimately an empirical claim, and we will not conclusively settle it here, either in general or with regard to autonomous agents. Instead, we will argue against the efficacy argument by positing that the worldview of the general populace is more malleable than the efficacy argument presupposes, and that it can be influenced by changes in the law. In short, we argue that the link between legal change becoming efficacious and proximity to the lifeworld of ordinary people does not hold in the way presumed by the efficacy argument.

³ This is clearly the case for positive law. We will remain agnostic on the question of whether all positive law, and only positive law, is law.

⁴ Naffine, “Who are the Law’s Persons?,” 346–367; Naffine, “Hidden Presuppositions and the Problem of Paradigm Persons.”

⁵ Bryson, “Of, For, and By the People,” 286.

⁶ Brożek, “On the Legal Responsibility of Autonomous Machines,” 303.

⁷ Robinson, “Intuitions of Justice.”

1.2 Roadmap

We use historical examples to support the point mentioned above, with a focus on examples concerning concepts that are relevant for the regulation of autonomous agents, such as legal capacity and personhood (section 2).⁸ In section 3, we briefly consider some of the implications of our argument, before concluding in section 4. This critical reflection on the efficacy argument is directly relevant to debates of personhood and liability for autonomous agents, but section 2 does not refer to the issue of regulating AI directly. We close the circle and return to the issue of AI in section 3. Before diving in, it is useful to set the stage for our argument by considering legal concepts and ordinary folk concepts in more detail.

1.3 Folk Concepts

What do we mean when we write about ordinary or folk concepts? In general, we use the terms ‘ordinary concepts’, ‘folk concepts’ or ‘ordinary folk concepts’ to refer to those concepts that ordinary people have – that is, non-legal or non-technical concepts. Terminologically, we draw from folk psychology (also called common sense or naïve psychology) here,⁹ although a folk physics (that is, our commonsense impression of how things or matter – as opposed to agents – behave) might also exist.¹⁰ Kurek distinguishes between two meanings of ‘folk psychology’. The term can, first, refer to the prescientific, conceptual framework used by ordinary people, including concepts such as belief or intention. In its second meaning, the term refers instead to the practice of predicting and explaining behaviour.¹¹ We are interested here in the first meaning – that is, in the prescientific conceptual framework used by ordinary people and its relationship to the conceptual framework of law. In this connection, Tobia reviews a number of empirical studies regarding the proximity of legal concepts to ordinary folk concepts.¹² This review finds that for many legal concepts – such as intent, knowledge, consent, reasonableness and causation – there is considerable overlap with the ordinary concept. There is evidence, accordingly, that ‘ordinary concepts are at the heart of a diverse array of legal concepts’.¹³ This could be seen as support for the argument that legal and folk concepts should coincide, but this is not necessarily the case: as Tobia notes, the finding that they *do* correspond raises normative questions about whether they *should* – and, if so, to what extent. We posit that current proximity or correspondence between legal and folk concepts does not indicate that these concepts are not malleable or that the relationship of influence between them is a one-way street, with folk concepts shaping legal concepts, but not vice versa. To support this claim, we turn to (legal) history. After considering three historical examples, we will turn to the implications thereof for the efficacy argument and thus also for debates about how to regulate AI in which the efficacy argument plays a role.

2. The Relationship Between Folk and Legal Concepts in Historical Perspective

The following three examples from (legal) history invite, in our view, critical reflection on the relationship between folk and legal concepts. The first of these examples, taken from National Socialist Germany in the 1930s, demonstrates the circular way in which changing political views can influence legal norms, which lead to an adaptation of legal concepts, which subsequently influence public views and which are again reflected in the changing political views.¹⁴ The flexibility of legal concepts and the (possible) connection to ordinary folk concepts becomes particularly apparent in the second example, which explains the concept of civil death as it existed in ancient Germanic law and Napoleonic French law. The third set of examples deals with the debate concerning full legal capacity of married women and the debate regarding the prohibition of divorce by mutual consent, both of which went on in the Netherlands for many years. These examples show us how social reality or folk concepts can affect legal norms and subsequently legal concepts.¹⁵ All three examples show us the malleability of both legal concepts and folk concepts, and the interplay between the two, which has implications for the efficacy argument.

⁸ Since both authors are trained and employed at a continental European university, our examples *mutatis mutandis* follow the European civil law narrative. This should not be taken to imply exclusivity, preclude other perspectives or limit the scope of the overarching argument only to civil law jurisdictions.

⁹ Hutto, “Folk Psychology as a Theory.”

¹⁰ Greene, “For the Law, Neuroscience Changes Nothing and Everything,” 1782.

¹¹ Kurek, “Law, Folk Psychology and Cognitive Science,” 55–85.

¹² Most of these studies were conducted in a common law – and a western, educated, industrialised, rich and democratic (WEIRD) – context.

¹³ Tobia, “Law and the Cognitive Science of Ordinary Concepts,” 86–96.

¹⁴ Some (e.g. Aalto-Heinilä, “Animals, Slaves and Beyond”) have argued that examples of National Socialist law, as well as other immoral institutions such as slavery, should not be used to illustrate conceptual developments in law, since these examples could be qualified as *lex iniusta non est lex*. Although we do wholeheartedly subscribe to the moral evaluations of the aforementioned authors, we do not agree with their assessment concerning the usability of such examples. Immoral though these examples are, they do show the conceptual thinking of which humans are capable, which makes the question regarding morality even more pressing.

¹⁵ In this article, we have chosen to focus on examples concerning natural persons. This does not mean that other examples are not possible. Current legal systems recognise business entities as legal persons and historically (and perhaps in the future as well), animals could be regarded as such as well. However, we do believe that the chosen examples illustrate our argument particularly well: that one and the same human being can be regarded both (legally) dead and alive shows the malleability of the human mind and its folk concepts.

2.1 The Jewish Director

On 24 February 1933, the German film production company Ufa signed an agreement with director Erik Charell, with regard to the adaptation of the novel *Die Heimkehr des Odysseus* (The Return of Ulysses) for the screen. While Ufa bought the rights, Charell was hired to direct the movie, using the screenplay he had written. As agreed, Ufa paid Charell a down-payment of 26,000 RM on 1 March 1933. However, about a month later, the film studio annulled the agreement, invoking article 6 of the agreement, which stated that the agreement could be annulled in case Charell was not able to direct the movie due to ‘illness, death or a similar reason’ (*‘durch Krankheit, Tod oder ähnlichen Grund’*). Charell was furthermore summoned to refund the down-payment he had received. In the ensuing legal procedure, all courts – including the Supreme Court (Reichsgericht) – decided in favour of Ufa. However, Charell was not ill or dead, and what could possibly be regarded as a ‘similar reason’? According to the Court of Appeals (Kammergericht) in Berlin, the phrase ‘similar reason’ had to be interpreted in a broad sense, including all conditions concerning Charell’s ‘person’ (*‘eine[n] in seiner Person liegende[n] Umstand’*) that would hinder him in the fulfilment of his contractual duties.¹⁶ And the personal condition that would – as of 24 March 1933 – hinder him most was the fact that he was Jewish.

On 23 March 1933, the German Parliament had adopted the *Ermächtigungsgesetz*¹⁷ (Enabling Act), which subsequently came into force the following day. In the *Charell* case, the Supreme Court stated that this law provided the constitutional basis for the reconstruction of the German nation, presumably in the spirit of National Socialism. According to the Supreme Court, the ‘liberal’ notion that every human being had legal personality, regardless of race, had been abandoned when the Nazis seized power. According to the National Socialist *Weltanschauung* (roughly, conceptual framework or world view in a broad sense), personhood, and everything that came with it, depended on whether one belonged to the German or kindred blood.¹⁸ This was a radical departure from the interpretation that underlay the concept of *Rechtsfähigkeit*¹⁹ in the German Civil Code.

The German Civil Code of 1900 presumed the unity of the individual human being and legal capacity. This can be traced back to the writings of Savigny, whose ideas extensively influenced the basic principles of the Civil Code.²⁰ Savigny, amongst other things, had been influenced by Kantian moral philosophy and the idea that humanity should never be treated as mere means, but always as an end in itself.²¹ *Rechtsfähigkeit*, in this sense, contains the entire concept of legal personhood, regardless of whether one has full legal capacity to conduct juridical acts. When being inextricably bound up with the notion of ‘human being’, the concept is generally (but not exclusively) understood to mean ‘being the bearer of rights and duties’, thereby turning that bearer into a legal subject as opposed to a legal object. In the German Civil Code of 1900, the concept of *Rechtsfähigkeit* was indeed inextricably bound up with the notion of ‘human being’, thereby implying: (1) that *all* human beings held equal legal capacity; and (2) that one only ceased to have legal capacity in case one ceased to exist – that is, when one died. However, since National Socialism called into question this natural law portrayal of humankind, this interpretation of legal capacity was called into question as well.

One of the key elements of National Socialism was the idea of a *Volkgemeinschaft*, which was supposed to replace the classical notion of statehood. According to Hitler, the concept of statehood was centred upon the idea of a group of individuals sharing a common language and living under a constant governmental supervision.²² In a *Volkgemeinschaft*, however, the public interest would prevail over the rights and interests of the individual. The primary goal of this *Volkgemeinschaft* was the preservation of the *Volk*, the Aryan race. The concept of *Volk* in the National Socialist sense assumed a racial community in which blood was the binding factor.²³ In the *Volkgemeinschaft*, the individual no longer existed, but was replaced by *Volksgeossen* (members of the *Volkgemeinschaft*), who were no longer considered to be *Rechtspersonen an sich* (legal persons as such), but *Gliedpersönlichkeiten* (member personalities), who no longer had subjective rights but *Gliedschaftsrechte* (membership rights). Legal personhood was therefore no longer attached to being a human being, but to the level of membership of the *Volkgemeinschaft*.²⁴ This concept was inherently racist and excluded all Jewish nationals.

¹⁶ Reichsgericht, 27 June 1936.

¹⁷ Gesetz zur Behebung der Not von Volk und Reich 1933.

¹⁸ Reichsgericht, 27 June 1936.

¹⁹ For the purpose of this article, we will use the term ‘legal capacity’ as translation for the German legal concept ‘*Rechtsfähigkeit*’, which is the official translation offered by the German Ministry of Justice.

²⁰ Rüthers, “Die unbegrenzte Auslegung,” 9–10.

²¹ See for an excellent explanation of Kant’s influence on Savigny Ewald, “Comparative Jurisprudence (I),” 1889–2149.

²² Hitler, *Mein Kampf*, 426–427.

²³ Carp, *Beginselen van Nationaal-Socialisme*, 20–25.

²⁴ Siebert, “Subjektives Recht, konkrete Berechtigung, Pflichtenordnung,” 23–31.

Jews were considered not to be *rechtsfähig*, and because of that were not considered persons in the eyes of the law.²⁵ Such a condition could be compared to being ‘dead’ in the eyes of the law – a conception previously known as ‘civil death’, to which we will return in more detail in the next example. The notion of ‘civil death’ could subsequently be regarded as a ‘similar reason’ as formulated in the original agreement between Charell and Ufa.

This interplay between National Socialism and legal norms, which subsequently redefined legal concepts, formed a leitmotif in legal practice during the Nazi era. Over the years, the new National Socialist *Weltanschauung* was used repeatedly as justification for redefining legal norms and legal concepts, thereby influencing general public consensus about the existence of such concepts. The evolving decisions taken by registrars concerning the conclusion of mixed marriages illustrates this. Even though a legal prohibition of marriages between Jews and people of ‘German or kindred blood’ was only adopted as of 15 September 1935,²⁶ more and more registrars already refused to marry mixed couples before that moment on the grounds of ‘general national principles’. This was done in anticipation of an adaptation of the legal concepts to the changed political beliefs, which seemingly had influenced public beliefs in this matter too. Officially, this practice was condemned. In 1934, Reich Minister of the Interior Wilhelm Frick stated in an official memorandum that the law, although not ‘[fully] conform[ing] to National Socialist views’, should be respected.²⁷ This point of view was at the time confirmed by the Supreme Court.²⁸ Registrars, however, continued to refuse to conclude mixed marriages and were supported in this by the lower courts. The reasoning given by these courts is particularly interesting in this respect. The Petty Court (*Amtsgericht*) of Bad Sülze stated in July 1935 that the general conviction by those who had to perform marriages was that although ‘mixed marriages’ were not literally prohibited by the law, they violated ‘the most important laws of the nation, which consist of cultivating German blood and maintaining its purity’.²⁹ In June of the same year, the Petty Court of Wetzlar had already ruled that after the National Socialist assumption of power, the foundations of the National Socialist *Weltanschauung* formed the foundations of the new *völkisch* German Reich. The National Socialist legal conceptual framework (‘Nationalsozialistische ... Rechtsanschauung’) implied that every individual had to focus their inner attitude and outward conduct in life on the welfare of the *Volk* and subordinate themselves to its interests. According to the court, this rule had to be considered legally binding.³⁰ The County Court (*Landgericht*) of Königsberg added to this by stating that legal principles were not binding because of their status as laws, ‘but rather because they are established on the basis of a general sense of justice’, which in this case meant that ‘no one can be in any doubt that a marriage between a Jew and an Aryan woman is contrary to the German view of the law’.³¹

It is, of course, always difficult to unequivocally establish how far people intrinsically approve of certain concepts and whether that approval stems from a free and informed choice. The general opinion right after the end of the Nazi reign was that National Socialism had constituted an inherently top-down governing structure, taking away all civil freedom and forcing people to obey, thereby implying that common German citizens were not to be considered guilty of the atrocities committed in their name.³² A few decades later, however, this conviction changed, whereby the high level of endorsement the Nazis received by the German population was emphasized, up to the point where the Third Reich could be called a ‘Zustimmungsdiktatur’, a dictatorship by consent. This was primarily caused by already existing feelings of antisemitism coupled with a growing consensus that Jews were indeed no true Germans and did not belong to the *Volksgemeinschaft* on the one hand and a significant

²⁵ This inevitably leads to the – quite reasonable – question of how it was possible that Charell acted as one of the parties in the civil court case, given that he supposedly had no legal capacity. In the same vein, one can question how it was possible that Charell could be considered owner of anything, including the down-payment he had received, and therefore whether it was possible to request him to refund it. However, research repeatedly shows that although the Nazis tried very hard to frame their extraordinary concepts in a systematic way, the definitions and explanations they came up with were seldom logically sound. In this respect, we can look at the *First Supplementary Decree to the Reich Citizenship Law 1935*, which defined someone as Jewish when that person had three or four full-Jewish grandparents. The reason to look at family trees rather than check whether someone identified as Jewish (e.g. by checking whether that person belonged to the Jewish religious community) was because the Nazis considered Jewishness to be a racial rather than a religious matter. However, grandparents were considered to be full-Jewish when they (had) adhered to the Jewish religious community, which – considering the aforementioned – was a rather unusual factor to take into consideration, even though it was in practice the most assignable factor. For more information on this particular issue (and other examples of legal inconsistencies adopted by the Nazis), see Lenaerts, *National Socialist Family Law*, 81–85.

²⁶ *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre 1935*.

²⁷ Gruchmann, ‘“Blutschutzgesetz” und Justiz,’ 423–424; Müller, *Hitler’s Justice*, 92.

²⁸ *Reichsgericht*, 12 July 1934.

²⁹ *Amtsgericht Bad Sülze*, 8 July 1935.

³⁰ *Amtsgericht Wetzlar*, 17 June 1935.

³¹ *Landgericht Königsberg*, 26 August 1935.

³² Evans, ‘Coercion and Consent in Nazi Germany,’ 53–56. See also Neumann, *Behemoth*, 65–66, stating that despite all ideological analyses concerning the pivotal role of the *Volk* as the germ cell of the nation, the interests of the National Socialist Party – which ultimately consisted of opportunistic individuals – took centre stage.

dose of opportunism on the other.³³ This conclusion might be a bit too self-depreciative; after all, there is ample evidence of several forms of coercive measures applied by the Nazis.³⁴ Additionally, the use of propaganda played a significant role. The degree of coercion or consent is a matter of ongoing research and debate, and not settled yet. However, it seems safe to assume that the truth lies somewhere between the two extremes of the spectrum we have sketched above.³⁵ Therefore, throughout the above-mentioned judgments, we see a circular way of reasoning: political views have changed, which have changed legal norms, which have changed the content of legal concepts (even though not formally yet), which have changed the public view. But the political views are no more than a reflection of the public views, which brings us full circle. This same mental exercise was performed by the Supreme Court in the *Charell* case. Therefore, the Supreme Court considered the annulment by Ufa justified and ordered Charell, who by then had already fled to the United States, to refund the down-payment of 26,000 RM.³⁶

2.2 Civil Death

The Nazis were not the first to come up with the notion of pronouncing a living human being legally dead. Ancient Germanic laws at the beginning of the Common Era had already used the concept by means of an additional consequence attached to a conviction. In case of treason, which was considered a crime against the entire tribe rather than a violation of a personal right,³⁷ the court could declare a convict an outlaw – someone who was no longer protected by the law of the tribe. By being ousted from the tribe, such an outlaw literally fell ‘outside of the law’. Since personhood was attached to membership of a tribe,³⁸ an outlaw was no longer considered a person. Instead, he was regarded a pest, an animal that had to be fought and controlled. An outlaw was equated with a wolf, at the time the most pestilent creature on earth in the eyes of many. In the ancient Salic law, an outlaw was referred to as ‘wargus’ and English sources from the twelfth and thirteenth centuries tell us that an outlaw was considered to ‘wear a wolf’s-head’. The consequence of the implication was that anyone was entitled (but not required) to kill an outlaw as if he were a wolf.³⁹ Another consequence of being outlawed and losing personhood was the severance of all family ties, meaning that women whose husbands were outlawed suddenly were considered widows and their children orphans. No one was permitted to help an outlaw, who was no longer allowed to stay and live in the community.⁴⁰ This legal measure was not used as an additional form of punishment, because an outlaw was generally given the opportunity to show a clean pair of heels.⁴¹ However, although alive and kicking, for all intents and purposes the outlaw was considered dead in the eyes of the law.

In more modern times, we again encounter this legal concept, this time explicitly as an additional form of punishment. Article 22 of the French *Code Civil* of 1804 mentioned ‘*la mort civile*’: taking away all civil rights by means of punishment.⁴² The consequences of this civil death were listed in article 25: those who were declared civilly dead lost all claims on as well as the competency to transfer property. Furthermore, they were no longer competent to enter into marriage and existing marriages

³³ Bajohr, “The ‘Folk Community’ and the Persecution of the Jews,” 183–206 and Bajohr, “‘Consensual Dictatorship’ (Zustimmungsdiktatur) and ‘Community of the People’ (Volksgemeinschaft),” 521–526.

³⁴ See, in this regard, Evans, “Coercion and Consent in Nazi Germany,” criticizing the term ‘Zustimmungsdiktatur’ precisely because of the use of coercion and violence. Additionally, he rightfully criticizes those who point to the plebiscites and elections that were held every now and then, in which the Nazis regularly scored approval rates of over 90 per cent (pp. 71–72). Just as the number of Russians who vote for Putin in national ‘elections’ do not tell us anything about the true appreciation Russians feel for their dictator, the results of these plebiscites tell us nothing about the approval rates the Nazis received.

³⁵ See also Broszat, *Der Staat Hitlers*, 306–307, in which he explains how little the civil servants were affected by, for example, the *Gesetz zur Wiederherstellung des Berufsbeamtentums* vom 7. April 1933, *Reichsgesetzblatt* (1933), I, 175. Even Neumann admitted to the possibility that civil servants had joined the Nazi ranks, even if was done only out of convenience and not conviction: Neumann, *Behemoth*, 62. However, it is precisely that kind of opportunism to which Bajohr refers when he talks about ‘the conformity of individual and state interests’: Bajohr, “The ‘Folk Community’ and the Persecution of Jews,” 188.

³⁶ *Reichsgericht* 27 June 1936.

³⁷ van Binsbergen, *Inleiding Strafrecht*, 6. Fockema Andreae, *Het Oud-Nederlandsch Burgerlijk Recht*, 130–133 gives some examples of outlaws convicted of crimes such as homicide and perjury. These are all examples from the low countries from the fourteenth and fifteenth centuries.

³⁸ Monté ver Loren, “Leven en dood in de rechtsontwikkeling,” 39.

³⁹ Brunner, *Deutsche Rechtsgeschichte*, 234–225; Monté ver Loren, “Leven en dood in de rechtsontwikkeling,” 41.

⁴⁰ Brunner, *Deutsche Rechtsgeschichte*, 233–234; Monté ver Loren, “Leven en dood in de rechtsontwikkeling,” 41–42.

⁴¹ van Binsbergen, *Inleiding Strafrecht*, 6.

⁴² *Code Civil Article 22*: ‘Les condamnations à des peines dont l’effet est de priver celui qui est condamné, de toute participation aux droits civils ci-après exprimés, emporteront la mort civile’.

were dissolved, turning wives into widows and children into half-orphans.⁴³ In 1854, France abolished this legal concept.⁴⁴ Because the Netherlands had adopted the French Civil Code in 1811, the concept of civil death had acquired legal ground there as well, although it was already largely abolished in 1813 when the *Gesel- en worgbesluit* (Resolution Concerning Whipping and Strangulation) was adopted. Article 7 of this resolution abolished perpetual forced labour as a means of punishment. As civil death was an automatic consequence of being sentenced to perpetual forced labour, the number of cases of civil death subsequently dropped as a result of this measure.⁴⁵ With the adoption of a Dutch Civil Code in 1838, the legal concept was abolished entirely in the Netherlands, as article 4 explicitly stated that no punishment could result in civil death or the loss of civil rights.⁴⁶ By the time the Netherlands formally abolished the civil death as means of punishment, it had already lost some of its popularity. In earlier times, however, it had played a significant role – especially in ancient Germanic law, as is apparent from ancient court documents (*dingtalen*) and statutes.⁴⁷

This example illuminates both the flexibility of the concept of ‘personhood’ and the fact that legal concepts can be determined by legal norms, irrespective of whether it shows any connection to an ordinary folk concept. Where, as mentioned in the previous example, Savigny connected the legal concept ‘personhood’ unequivocally with the folk concept ‘human being’, this example shows that the concept of ‘personhood’ can be regarded in a more abstract sense. In this case ‘personhood’ did not equal ‘human being’, but ‘(human) member of the tribe’, thereby tying ‘personhood’ not to one’s mere existence, but to an assumed role in life.⁴⁸

2.3 For Better or Worse: Folk Concepts in Dutch Marriage Law

History also provides us with examples of the reverse situation: social reality or folk concepts determining a legal norm and subsequently legal concepts, although the examples below excel in slowness when it comes to adapting the legal concept to an already existing folk concept.

On 1 January 1957, after a long tug of war, married women were granted full legal capacity.⁴⁹ Before this amendment, married women in the Netherlands were legally incapable of performing juridical acts without permission of their husbands,⁵⁰ apart from regular household expenses.⁵¹ The ratio behind this rule was the idea that you cannot have two captains on one ship. And since Article 160 of the Old Civil Code declared the husband the head of the family, he put on the captain’s hat as well.⁵² However, this legal concept was far removed from everyday life. In practice, women constantly performed juridical acts, and

⁴³ Code Civil Article 25: ‘Par la mort civile, le condamné perd la propriété de tous les biens qu’il possédait; sa succession est ouverte au profit de ses héritiers, auxquels ses biens sont dévolus, de la même manière que s’il était mort naturellement et sans testament. Il ne peut plus ni recueillir aucune succession, ni transmettre, à ce titre, les biens qu’il a acquis par la suite.

Il ne peut ni disposer de ses biens, en tout ou en partie, soit par donation entre-vifs, soit par testament, ni recevoir à ce titre, si ce n’est pour cause d’alimens.

Il ne peut être nommé tuteur, ni concourir aux opérations relatives à la tutelle.

Il ne peut être témoin dans un acte solennel ou authentique, ni être admis à porter témoignage en justice.

Il ne peut procéder en justice, ni en défendant, ni en demandant, que sous le nom et par le ministère d’un curateur spécial, qui lui est nommé par le tribunal où l’action est portée.

Il est incapable de contracter un mariage qui produise aucun effet civil.

Le mariage qu’il avait contracté précédemment, est dissous, quant à tous ses effets civils.

Son époux et ses héritiers peuvent exercer respectivement les droits et les actions auxquels sa mort naturelle donnerait ouverture’.

⁴⁴ Monté ver Loren, “Leven en dood in de rechtsontwikkeling,” 42. See also Kunst, Historische ontwikkeling van het recht, 19.

⁴⁵ Domela Nieuwenhuis, “Het strafstelsel van het Nederlandsche Strafwetboek van 1881 (part 2),” 168–169.

⁴⁶ Old Dutch Civil Code Article 4: ‘Geenerlei straf heeft den burgerlijken dood of het verlies van alle de burgerlijke regten ten gevolge’. See also Asser, Het Nederlandsch Burgerlijk Wetboek vergeleken met het Wetboek Napoleon, 17–18; Kunst, Historische ontwikkeling van het recht, 19.

⁴⁷ Fockema Andreae, Het Oud-Nederlandsch Burgerlijk Recht, 129–133; Brunner, Deutsche Rechtsgeschichte, 232–245.

⁴⁸ This seems to be an excellent example of what Ross calls intermediary concepts: in order to obtain ‘personhood’, certain conditions need to be fulfilled, after which certain consequences apply. See Ross, “Tû-tû,” 812–825.

⁴⁹ Jansen, “De Lex-van Oven,” 1256–1260; Lokin, Tussen droom en daad, 51–67. The amendment was called the ‘Lex-van Oven’, after the Minister of Justice who initiated it and who had defended its main ideas with fervour for decades.

⁵⁰ Old Dutch Civil Code Article 163: ‘De vrouw, al is zij zelfs buiten gemeenschap van goederen getrouwd, of van goederen gescheiden, kan, zonder bijstand van haren man in de akte, of zonder zijne schriftelijke toestemming, niets geven, vervreemden, verpanden, verkrijgen, het zij voor niet, het zij onder eenen bezwarenden titel.’

⁵¹ Old Dutch Civil Code Article 164: ‘Ten opzigte van handelingen of verbindtenissen, door de vrouw aangegaan, wegens alles wat de gewone en dagelijksche uitgaven der huishouding betreft, alsmede ten opzigte van arbeidsovereenkomsten, door haar als werkgeefster ten behoeve van de huishouding aangegaan, vooronderstelt de wet dat zij de bewilliging van haren man heeft bekomen’.

⁵² Lokin, Tussen droom en daad, 51–52.

the validity of those acts was always fully acknowledged.⁵³ The legal position of married women had already had a firm place on the agenda since the end of the nineteenth century. Despite this, it would take roughly another 60 years⁵⁴ before what already had been reality for decades was finally embedded in law, with the exception that the husband formally remained the head of the family, albeit without a captain's hat.⁵⁵

Another example, in which social reality in the end dictated the legal norm (although the law fervently tried to push social reality in a different direction), is the so-called Big Lie of Dutch divorce law.⁵⁶ Article 263 of the old Dutch Civil Code explicitly prohibited divorce by mutual consent. However, on 22 June 1883, the Dutch Supreme Court ruled that in divorce cases the normal provisions regarding default and confessions as set in Article 1962 of the (Old) Civil Code, which stated that a judicial confession provided full evidence, and Article 76 of the Code of Civil Procedure, which stated that when the defendant went by default, the applicant's claim was sustained, were applicable.⁵⁷ This meant that when the defendant confessed to the allegation of adultery or went by default and did not contradict the allegation, this had to be considered as evidence, thereby holding the adultery proven. In practice, this opened the way for divorce by mutual consent, as it allowed spouses who wanted to divorce to simply agree that one of them would confess adultery or would go by default, after which the divorce would be granted. Despite social reality and judicial practice accepting divorce by mutual consent, the statutory norm was not changed until 1971, when it was adapted to already existing social and judicial practice.⁵⁸

3. Implications for Autonomous Agents: Closing the Circle

We have turned to (legal) history to demonstrate that there is reason to believe that folk concepts and the lifeworld of people regarding what entities they do or do not consider (legal) persons and/or possessing legal capacity are flexible – folk concepts certainly shape the law, but they are also shaped by the law in turn. While our reasoning here is inductive, we posit that these examples provide a solid basis for the following:

1. They show us the malleability of folk concepts: as self-evident as it seems to be to, for example, equate legal personhood with being human, history shows us that the human mind is quite capable of separating those concepts, opening the way to accept other entities as legal persons as well. The same can be said of the more limited concept of legal capacity.
2. We have shown that changes in legal concepts and folk concepts can be induced both from the top down as well as from the bottom up. The Nazis imposed a different way of classifying humans, which found its way into folk psychology, while social reality and folk concepts concerning legal capacity in the end dictated the legal concept in the Netherlands.
3. If history shows us anything, it is that although the malleability of folk concepts aids the efficacy of laws, this does not necessarily imply that the consequences that result from this efficacy are morally justifiable. Unfortunately, history equally teaches us that the human mind is quite capable of accepting the questionable consequences of this malleability of folk concepts.

These points are not new, nor is our historical-inductive approach the only way to make these points: one can also find arguments from social psychology⁵⁹ or comparative law,⁶⁰ to name two examples. Consequently, we take our argument not as standing alone, but as contributing an additional element to that debate. Taken together, these arguments have implications for debates about legal change in general, and debates about regulating autonomous agents more specifically. We want to highlight some implications of our argument for the debates surrounding autonomous agents in particular:

1. It is not clear or obvious that introducing liability or legal personhood for autonomous agents would be inefficacious.

⁵³ van Oven, "Het ontwerp-huwelijksvermogensrecht," 454; van Oven, "De handelingsbekwaamheid der gehuwde vrouw" (1949) 765, 767; Jansen, "De Lex-van Oven," 1259.

⁵⁴ To gain an overview of the dragged-out discussion and all proposed (and rejected) amendments, see van Oven, "Het ontwerp-huwelijksvermogensrecht," 453–476; van Oven, "De handelingsbekwaamheid der gehuwde vrouw" (1949), 765–775; van Oven, "De handelingsbekwaamheid der gehuwde vrouw," (1955), 1–12.

⁵⁵ Lokin, *Tussen droom en daad*, 66. See also Jansen, "De Lex-van Oven," 1256–1260. This notion was only changed in 1970, when Book 1 of the new Dutch Civil Code was enacted.

⁵⁶ Briët, "De groote leugen," 214–216.

⁵⁷ *Hoge Raad*, 22 June 1883.

⁵⁸ Huussen, "The Discussion About the Extension of Divorce in the Netherlands, 1870–1970," 320.

⁵⁹ Brožek, "Can Artificial Intelligences Be Moral Agents?," 101–106 considers such arguments and their implications for the moral status of artificially intelligent agents.

⁶⁰ Ewald, "Comparative Jurisprudence (I)," 1889–2149 makes the point for comparative law, admittedly also with recourse to (legal) history.

2. The folk conceptual apparatus of people with regard to autonomous agents is malleable, and can be influenced by legal reform, but it can also drive legal reform.
3. The efficacy argument does not and cannot replace normative arguments about the desirability of introducing legal personhood or liability for autonomous agents. Instead, the malleability of folk concepts needs to be considered as part of the (normative) argument.
4. More generally, our current conceptual apparatuses – both legal and folk – are not immutable; instead, they are ‘arbitrary, alterable, and at least something that needs to be submitted to critical investigation and reappraisal’.⁶¹

The clearest implication of our analysis for the regulation of autonomous agents is that it is not obvious that introducing liability or legal personhood for autonomous agents would be inefficacious. This is also the implication that is most limited in scope: it holds nothing more or less than that the efficacy argument cannot be presumed. To hold liability or personhood for AI should not be introduced for the reason that this would not be efficacious because it departs from the folk concepts or lifeworld of people does not follow as such. If we are right to say that these folk concepts are flexible and that the relationship between them and law goes both ways, this implies that regarding artificial agents as legal persons or possessing legal capacity in the law may impact the lifeworld and folk concepts of people. The ‘mere’ fact that something is not part of our current folk psychology does not preclude efficacy because our folk psychology can change – and can change because of changes in the law.

In our view, this puts additional (normative) pressure on legal decision-makers in two ways. First, they have to weigh not only the desirability of different regulatory constructions, but also consider the impact these regulatory constructions may have on the folk concepts of people. If we accept that it is possible to do radical things with law that influence the worldviews of people as well, a broadly construed normative assessment becomes inevitable. History has shown us both the positive and the negative outcomes of the interplay between legal concepts and folk concepts, and the malleability of how we regard the world and everything in it. Because of the potential negative consequences, and the severity of these negative consequences, the question of whether changing a legal norm – for example, potentially granting legal personhood to artificial agents – always has to answer the question of whether this is the right thing to do as well, looking not only at the impact on the legal conceptual apparatus, but the potential socio-cultural impact as well. Second, legal decision-makers should also take account of the human propensity to anthropomorphise or take an the intentional stance towards entities that give the appearance of intentionality or otherwise resemble (or are made to resemble) us.⁶² This human propensity is currently demonstrated in the way many people are responding to large language models such as ChatGPT, further highlighting the need for awareness on the side of legal decision-makers in this regard.⁶³

More generally, our argument also implies that our current conceptual apparatuses – both legal and folk – are not immutable, and as such cannot be taken for granted. Arguments one finds in the literature, such as that ‘given that AI systems are artefacts, tools built for a given purpose, responsibility can never lie with the AI system because as an artefact, it cannot be seen as a responsible actor’,⁶⁴ rely on and reify current conceptual apparatuses, while underestimating or disregarding their malleability.

4. Conclusion

In this article, we have evaluated the efficacy argument, which plays a role in debates about legal change such as debates about how to regulate AI in the future and whether to award it legal capacity or personhood. We have shown that both legal concepts and folk concepts are more malleable than the efficacy argument assumes. In doing so, we have falsified the first premise of this argument and, because of this, we have argued that a presumed lack of efficacy for reasons of divergence from folk concepts is not a strong argument against legal change, including change in regulating artificial intelligence. We have turned to (legal) history to demonstrate that the relationship between legal concepts and folk concepts is not one-directional, which means that changes in the law can and have influenced folk psychology.

From this, we have drawn the following conclusions for the regulation of AI:

1. It cannot be assumed that introducing liability or legal personhood for autonomous agents would be inefficacious.

⁶¹ Gunkel, *Person, Thing, Robot*, 10.

⁶² Farah, “Personhood and Neuroscience”; Marchesi, “Do We Adopt the Intentional Stance Toward Humanoid Robots?”

⁶³ Saunders, “Evolution is Making Us Treat AI Like a Human, and We Need to Kick the Habit.”

⁶⁴ Dignum, *Responsible Artificial Intelligence*, 2.

2. The folk conceptual apparatus of people with regard to autonomous agents is malleable and can be influenced by legal reform, but it can also drive legal reform, which brings with it additional responsibilities for legal decision-makers to take this into account.
3. Indeed, the efficacy argument does not and cannot replace normative arguments about the desirability of introducing legal personhood or liability for autonomous agents. Instead, the malleability of folk concepts needs to be considered as part of the (normative) argument.
4. More generally, our current conceptual apparatuses – both legal and folk – are not immutable, but rather malleable. Reification of the current status quo should not be presupposed.

The argument of this article is not suited to actually providing answers when it comes to concrete questions such as whether AI can and should be granted a particular legal status such as personhood, or whether it can be held liable. Instead, it is an invitation to critically reflect on the relationship between folk and legal concepts as well as on moral intuitions with a view to the development of a normative framework that is suited to answering these more concrete regulatory questions in a way that can stand the test of time.

Disclosure statement

The authors report there are no competing interests to declare.

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