Legal Personhood and Animal Rights

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Abstract: A relatively recent form of animal activism is lawsuits intended to declare some animals as legal persons. A pioneer of this approach is the U.S.-based Nonhuman Rights Project (NhRP). This organization's primary strategy has been to invoke the writ of habeas corpus, which protects the right to personal freedom of "persons." The article criticizes the notion of legal personhood that the NhRP is employing and explains how an alternative understanding of legal personhood could perhaps make nonhuman rights more palatable for courts.

Key words: rights, personhood, legal personhood, personal freedom, habeas corpus

INTRODUCTION

A relatively recent form of animal activism is lawsuits aiming to declare some animals as legal persons. One of the pioneers of this approach is the U.S.-based Nonhuman Rights Project (NhRP), founded by Steven Wise. According to its mission statement, the NhRP works "to change the common law status of great apes, elephants, dolphins, and whales from mere 'things,' which lack the capacity to possess any legal right, to 'legal persons,' who possess such fundamental rights as bodily liberty and bodily integrity" (NhRP, n.d.). The primary strategy of the NhRP has been to invoke the writ of habeas corpus, which protects the right to personal freedom. The writ is normally understood—either implicitly or explicitly—to protect "persons." Hence, the NhRP has argued that it should protect nonhuman animals who meet the criteria of personhood as well. However, most attempts at getting animals recognized as legal persons have faced severe resistance by the courts and have failed in all but one case, which took place in Argentina.[1]

This work has also involved philosophers, most notably in the form of the "Philosophers' Brief" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018), submitted by 17 philosophers in support of the NhRP's case on behalf of chimpanzees Tommy and Kiko, held captive in the state of New York. In the brief, the authors discuss whether certain animals can be understood as persons and scrutinize the personhood conceptions

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employed by courts.[2] They argue that "if the concept of 'personhood' is being employed by the courts to determine whether to extend or deny the writs of *habeas corpus*, they should employ a consistent and reasonable definition of 'personhood' and 'persons'" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 3) and conclude that "when criteria for personhood are reasonable and consistently applied, Kiko and Tommy satisfy the criteria and are entitled to *habeas corpus* relief" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 36).

The NhRP's work has thus brought together legal and philosophical perspectives on personhood and rights. It is these notions—personhood, legal personhood, and rights—as well as their interconnections that I will address in this article. I will offer some theoretical criticism of the premises that the NhRP is basing its work on, criticism that I believe may be highly relevant for animal rights litigation. In particular, I will focus on the notion of legal personhood that the NhRP is employing, which I call the orthodox view of legal personhood. I have recently published a book-length critique of this view and offered an alternative account: the bundle theory of legal personhood (Kurki, 2019). According to the bundle theory, legal personhood consists of numerous elements, not all of which always come together. I cannot recount all of the problems of the orthodox view in this article.[3] Rather, I will focus on issues most pertinent to the personhood trials and explain how an alternative understanding of legal personhood could perhaps make nonhuman rights more palatable for courts. Thus, the arguments offered here are not merely theory for theory's sake; rather, they have important implications for animal rights litigation. I will mention two such implications.

First, the NhRP frames its habeas corpus cases as momentous and historic: Winning a case would turn rightless animals into persons with rights, breaking a legal barrier that goes back to antiquity, as "nonhuman animals had never had legal rights from the time the Romans divided persons from things" (Wise, 2019, p. 368). The stakes are thus extremely high—which I think is a problem. Though some judges are braver than others, very few dare upset the whole fabric of the legal system. But suppose the cases were not about whether animals should receive their first legal rights. What if animals already hold some rights, and now the question is simply: Should they receive the right protected by habeas corpus as well?

Second, I wish to cast some doubt on the legal import of arguments according to which animals meet the criteria of some philosophical conception of personhood. Given that legal personhood is not a monolith, it would be more apt to argue why animals are entitled to some particular rights, rather than to legal personhood more generally.

ANIMAL RIGHTS

Many legal scholars and animal ethicists alike share the notion that animals do not currently hold legal rights (see, e.g., Kendrick, 2018; Shyam, 2015; Staker, 2017). This view typically—though certainly not always—builds on two separate, though interrelated, assumptions.

The first assumption is that there is a strict dividing line between "welfarist" protections of animals on the one hand and "animal rights" on the other. When welfarism is contrasted with the animal *rights* position, it is natural to suppose that welfarism does not result in rights. Though not all thinkers adhere to this division, it is still influential.[4] For instance, according to the welfarist ideology, animals may be reared, used, eaten, and so on as long as they are protected from the infliction of "unnecessary" suffering and/or some forms of "animal cruelty." Many think that welfarism does not result in animal rights. The adherents of "animal rights," on the other hand, are more radical, usually rejecting animal use.

The second assumption builds on a division between legal persons and legal things, in accordance with what I call the orthodox view of legal personhood. According to this view, a legal person is an entity that holds, or can hold, legal rights; a thing is either property or simply an entity without rights (see Kurki, 2017). Given that animals are currently "things," they cannot hold rights.

I am critical of both assumptions. Though the majority of this article will focus on criticizing the prevalent understanding of legal personhood, I should briefly address the welfarism/rights division as well.

Welfarism and Rights

The main reason why I find the welfarism/rights distinction unhelpful is that the term "right" can be used in a variety of ways. In fact, Shelly Kagan (1998) laments that talk of (moral) rights is "horrendously ambiguous" (p. 170; emphasis removed).[5] Thus, the phrase "X has rights" can mean various things, for instance (a) that X has *moral standing*—that X "*counts* from the moral point of view" (Kagan, 1998, p. 170), but also (b) that "there is a constraint of some sort governing how agents are permitted to treat" X (Kagan, 1998, p. 172). Kagan also brings up various other meanings of the term, but I will focus on these two here.

According to Kagan (1998), "Much of the debate concerning the existence of animal rights comes down to disagreement over whether or not animals truly have moral standing in their own right" (p. 171), thus following the first meaning of the term. However, this meaning of "right" is vague, as

> to say of someone or something that they have rights (in the broadest sense of the term), is simply to say that they have some sort of claim against us to be treated appropriately; it is not yet to say anything about the content or the force of the claim. (Kagan, 1998, p. 172)

In this sense of "right," a welfarist should most likely think that animals have rights.[6]

The second meaning of "right," which understands rights as constraints, is normally associated with deontological views of rights. According to such a view, there are certain duties toward right-holders that may not be breached even if they would benefit the "common good." Of course, welfarism mostly rejects the existence of such rights: Animals may be afflicted with suffering, as long as the suffering is not "unnecessary" and does

not constitute "animal cruelty." However, even this understanding of rights as constraints does not need to be antithetical to welfarism.[7] This is the case because rights can be defined and individuated at various levels of specificity. For instance, a welfarist could think that certain forms of animal treatment are so cruel that they are never acceptable. It would follow that animals would indeed hold rights classifiable as constraints, such as the right not to be subjected to some very cruel types of treatment. But, of course, such rights would not be sufficient to satisfy the adherents of the so-called animal rights position. Rather, the adherents of this position argue that animals should hold strong, broad fundamental rights, which preclude various forms of animal exploitation. Hence, describing this position in terms of fundamental rights, rather than rights *simpliciter*, would be more appropriate.[8]

LEGAL PERSONHOOD

As mentioned above, one of the NhRP's objectives is "to change the common law status of great apes, elephants, dolphins, and whales from mere 'things,' which lack the capacity to possess any legal right, to 'legal persons,' who possess such fundamental rights as bodily liberty and bodily integrity." Steven Wise has conceptualized the issue with the help of an "Animal Rights Pyramid," where he takes legal personhood to be a precondition for rights (Figure 1).

Wise has most recently articulated his view in a scholarly article in 2019. It is evident that he remains committed to the notion that legal personhood means "the capacity to have a legal right" (Wise, 2019, p. 371). Furthermore, he thinks one may have the capacity for rights without holding any rights at all. Wise is here echoing a version of the orthodox view of legal personhood. The orthodox view comes in numerous formulations, of which I will mention three here:

1. X is a legal person if and only if X has legal rights or duties (rights-or-duties position).
2. X is a legal person if and only if X has legal rights and duties (rights-and-duties position).

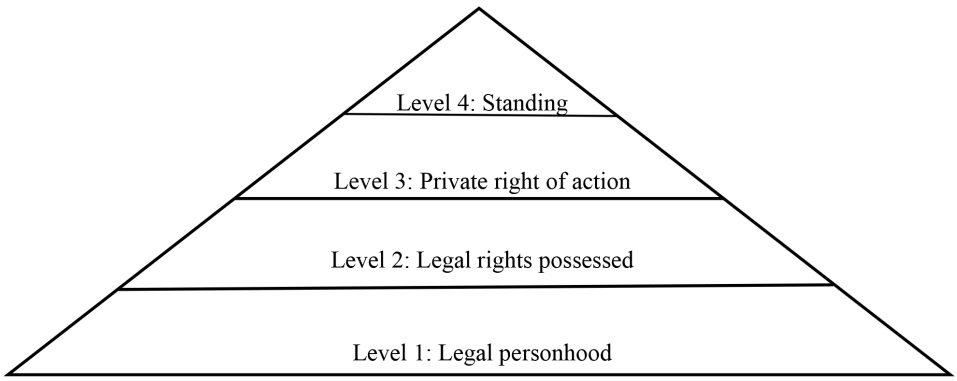

FIGURE 1: The "Animal Rights Pyramid" of Steven Wise (2010, p. 2)

3. X is a legal person if and only if X has the capacity for rights or duties (capacity-for-rights position).

Wise clearly subscribes to the capacity-for-rights position. This formulation shares a number of features with other views falling under the orthodox view. For instance, it connects rights and legal personhood together in a black-and-white manner: One can hold rights if and only if one is a legal person. Thus, there is no "gray area" in between legal persons and nonpersons. Furthermore, the view is decidedly *formal*: Being a legal person does not say anything about one's substantive normative situation, as (the capacity for) any right at all will suffice for legal personhood. It thus resembles the first meaning of "right" distinguished by Kagan (1998), according to which the expression "X has rights" simply means that X has moral standing.

I will next outline some of the problems that afflict the orthodox view.[9]

Contesting the Orthodox View

The most central problem of the orthodox view is what may be termed the *problem of extension*. There are certain widely shared beliefs about the extension of legal personhood (i.e., who or what is a legal person). Generally, only born human beings (natural persons) and corporations (artificial persons) are taken to be legal persons. Furthermore, scholars and jurists widely agree that slaves in the antebellum United States were not legal persons, and that animals are not legal persons. Hence, according to the orthodox view, the following should hold:

- born human beings hold/can hold rights, whereas unborn do not
- corporations hold/can hold rights
- nonhuman animals do not hold rights
- slaves did not hold rights

However, if we don't simply take these rights ascriptions at face value, but rather appraise them in light of contemporary theories of rights, we will discover discrepancies. The most significant theories of what it means to hold a legal right are the interest theory and the will theory.[10] The *interest theory of rights* connects right-holding and the furtherance of interests: Anne holds a right if Ben bears a duty that—very roughly put—typically benefits Anne. This theory of rights is popular among those who argue for animal rights, given that it can easily accommodate such rights. The main opponent of the interest theory is the *will theory of rights*, according to which the holding of a right involves having control over a duty of another. Will theorists of rights are typically more skeptical of animal rights, given that nonhuman animals cannot make decisions over the duties of others.

Now, applying these theories to the cases listed above will yield some strange results. According to the interest theory of rights, slaves in the antebellum United States in fact held some limited legal rights because they were protected from certain types of physical violence. (Slaves bore some legal duties, too, as they could be prosecuted for crimes.) Similarly, animals already hold legal rights, since they are protected by animal welfare statutes. Thus, slaves were and animals are legal persons—a puzzling result. The will theory leads to even more puzzling results. For instance, according to certain versions

of the will theory, young children cannot hold rights.[11] This would mean that children are not legal persons, but slaves were: Slaves could, for instance, appeal their criminal convictions, which is a will theory right.

There are thus discrepancies between the common understanding of who or what is a legal person, and who or what holds legal rights. We must therefore reconsider either the proper extension of legal personhood, our understanding of rights, or the equation of legal personhood with right-holding. For reasons I cannot recount here, I maintain that the most fruitful approach is the last one: Legal personhood and right-holding should not be understood as mutually entailing in the simple, black-and-white manner as the orthodox view would have it.[12]

Now, the reply of an adherent of the capacity-for-rights view would likely be that slaves did not and animals do not, in fact, hold rights. Legal personhood is a legal precondition for rights, and a court or a legislator must first recognize an entity as a legal person before it can hold rights. To reply, we should examine the capacity-for-rights view closer.

First, we should distinguish two types of "capacities to hold rights." The phrase can, first, refer to a *conceptual capacity* to hold rights. Interest and will theorists alike would say that rocks lack the conceptual capacity for rights: Rocks have neither interests nor a will. However, the "capacity for rights" to which Wise adverts is not such a conceptual capacity. Rather, he is referring to a *legal capacity* for rights, which is understood as a status conferred by the legal system. What exactly is this legal capacity?

Explaining legal personhood in terms of the legal capacity for rights stems primarily from 19th-century German theories of private law.[13] Private law deals with issues such as contracts and property. The capacity-for-rights view makes sense in this context: A legal system can determine who has the capacity to acquire private law rights by, for instance, deciding whose agreements to enforce. This is most apparent with corporations. A corporation can normally only enter contracts and own property once it has been registered. It thus receives the capacity to hold private law rights at the point of registration. However, for some reason, this perfectly reasonable explanation of legal personhood in private law has, after the 19th century, expanded to cover all areas of law. It is actually often mentioned in contexts such as private law textbooks, but regardless offered as a general theory of legal personhood.[14] Given that animals can be the beneficiaries of "pet" trusts in certain U.S. states, it may be argued that they already have some kind of limited capacity in private law. Wise has, in fact, occasionally employed such examples to argue that animals are already legal persons in these states.[15] It is puzzling why he thinks that simply having the *potential* to be the beneficiary of a trust makes every affected animal a legal person, whereas actual legal protections in the form of animal welfare legislation do not. Furthermore, the right to contract and own property are not the kind of rights that the NhRP is primarily interested in. The organization works to achieve fundamental freedom for (some) nonhumans, not the right to enter contracts. So the capacity-for-rights view manages to explain one aspect of legal personhood but not the aspect that is most relevant for nonhuman animals.

I myself hold that legal personhood is a cluster property: It consists of numerous elements—*incidents of legal personhood*—that don't always go together. According to the bundle theory, there is not always a clear-cut line between legal personhood and

Table 1. The Incidents of Legal Personhood

Passive incidents of legal personhood		Active incidents of legal personhood
Substantive passive incidents	Remedy incidents	
Fundamental protections: protection of life, liberty, and bodily integrity	Standing in courts and other official bodies	Legal competences: capacity to administer the other incidents without a representative (e.g., the capacity to enter into contracts)
Capacity to be the beneficiary of special rights	Victim status in criminal law	Onerous legal personhood: legal responsibility in criminal law, tort law, and other contexts
Capacity to own property	Capacity to undergo legal harms	
Insusceptibility to being owned		

legal nonpersonhood. Clear cases of legal persons are endowed with all, or nearly all, of these incidents of legal personhood. Historically, women have in many Western countries gradually attained full recognition as legal persons. Though animals indeed hold some legal rights, they are endowed with such a limited number of the incidents that they are not properly classifiable as legal persons.

These incidents can be divided into *passive* and *active*: Even, say, an infant or a nonhuman animal can meaningfully be endowed with passive incidents, whereas the active incidents presuppose more advanced deliberative and agential capacities, which is why only adult humans of sound mind are typically endowed with a full set of active incidents. Two main factors separate the legal status of adult humans of sound mind—who are endowed with the full set of incidents—from that of young children, who are only endowed with the passive incidents. First, adult humans are held legally responsible for their deeds, and second, they can administer their rights and duties by, for instance, choosing to waive or enforce a right.

Though I cannot go through the different incidents in detail here, I should address an issue pertaining to active and legal personhood. Courts have occasionally embraced the rights-and-duties view of legal personhood view to reject claims for animal personhood. They have thus denied that one could be a purely passive legal person, with only the benefits of legal personhood but no duties.

Passive and Active Legal Personhood

Passive legal personhood consists primarily of the most central type of rights—namely, so-called *claim-rights*. According to the analysis introduced by legal theorist Wesley Newcomb Hohfeld (1913), X holds a claim-right toward Y if and only if Y holds a duty toward X.[16] There is thus a logical connection between rights and duties, corresponding with the intuitive idea that "rights and duties go hand in hand." However, this idea can be unpacked in various ways, some of them problematic. The idea can be given a conceptual interpretation: Conceptually, one must be able to bear duties in order to hold rights. The idea can also be interpreted in a substantive manner: Rights *should not*, for some moral or political reason, be conferred to beings that cannot bear duties.

The New York State Supreme Court, Appellate Division, maintained in the Tommy chimpanzee case that "legal personhood has consistently been defined in terms of both

rights *and duties*" (*People ex rel. Nonhuman Rights Project v. Lavery*, 2014, p. 4; emphasis in original). As "chimpanzees can't bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions," it would have been inappropriate to give them "legal rights—such as the fundamental right to personal freedom, protected by the writ of habeas corpus—that have been afforded to human beings" (*People ex rel. Nonhuman Rights Project v. Lavery*, 2014, p. 4). The court thus embraced the rights-and-duties view of legal personhood. We should also note that the claim was primarily substantive rather than conceptual. The court held that the conferral of habeas corpus to chimpanzees would be *inappropriate*.[17] Tackling this substantive claim is a task for moral and political argumentation. For instance, Wise's (2019) point that "millions of New Yorkers and Americans [such as children] are legal persons with legal rights despite their inability to bear duties" (p. 372) puts the court's claim in a strange light. The court tried to preempt this argument with the fascinating claim that children can hold rights because "collectively, human beings possess the unique ability to bear legal responsibility" (*People ex rel. Nonhuman Rights Project v. Lavery*, 2014, p. 5f). This reasoning is picked apart in the Philosophers' Brief. However, when arguing against the New York court's conclusion, Wise takes the court to be endorsing not only the substantive but also the conceptual claim, leading him to make some problematic concessions.

A central counterargument by Wise (2019) is that animals can indeed hold the rights protected by habeas corpus because the rights in question are immunity-rights rather than claim-rights. Wise relies here on a Hohfeldian distinction between two types of normative positions: "Claim-rights" are correlated by duties, whereas "immunity-rights" (or simply "immunities") have to do with someone else's inability to effect a normative change, and are correlated by disabilities.[18] Many constitutional rights have a significant immunity component, as they disempower legislatures from enacting laws that infringe upon the rights protected by the constitution. Thus, immunities are certainly important. Regardless, conceding that animals cannot hold claim-rights would be extremely problematic—because at the core of virtually all meaningful animal rights is a claim-right. For instance, the right to bodily integrity is certainly correlated by the *duty* of others to refrain from infringing said integrity. Of course, this claim-right needs to be protected from change in order to be meaningful. Enslavement would extinguish many of one's claim-rights, and thus freedom from enslavement is certainly an immunity, as Wise (2019, p. 377) notes. Regardless, if claim-rights could only be held by beings that can also bear duties, the project of the NhRP would be compromised. Thus, one should certainly not concede as much, or even sidestep the issue of whether animals can hold claim-rights. Rather, one should argue in favor of why animals can hold claim-rights, and why they therefore can be (passive) legal persons.

I understand claim-rights in line with the interest theory of rights: One's holding of a claim vis-à-vis a duty has to do with one's potential to benefit from the performance of that duty. The interest theory does not presuppose that one can bear or fulfill duties in order to hold rights. Rather, the holding of claim-rights presupposes (unsurprisingly) that one has interests—that one can enjoy benefit or suffer detriment. Animals can therefore

hold claim-rights, and be passive legal persons without a capacity for duties. A claim-right is, of course, always correlated by the duty of *someone*, but this is almost invariably someone other than the right-holder. The will theory does not exactly presuppose the bearing of duties either—but it does presuppose capacities roughly similar to those that make the bearing of duties reasonable, such as the capacity for deliberation. At any rate, the will theory should be rejected. The interest theory has various strengths, of which the capacity to explain animal rights is only one.[19] Thus, animals can certainly be passive legal persons and hold claim-rights (as well as immunities).

IMPLICATIONS OF THE BUNDLE THEORY FOR LEGAL STRATEGY

If we accept the bundle theory of legal personhood, this will have certain significant consequences both for the framing of legal arguments in support of the legal status of animals as well as for the work of philosophers who wish to support such efforts.

The NhRP is exhorting courts to grant the animal plaintiffs their first legal right(s). This is a momentous task: breaking a legal barrier that goes back to antiquity. It takes a very brave judge to dare to do away with this (supposedly) millennia-old tradition. No wonder some judges have resorted to problematic philosophical arguments in denying the claims of the NhRP.

But what if we instead supposed that animals already hold legal rights—meager and weakly enforced, but rights nonetheless? What if the stakes in the habeas corpus trials are not whether animals should be included in the community of legal right-holders, but rather whether certain animals should receive the right to personal freedom, protected by habeas corpus? Such cases would certainly still be a hugely significant issue, but not quite as earth-shattering as the way the NhRP frames its cases. This puts a different perspective on the stakes of the habeas corpus lawsuits and animal rights litigation more generally.

Some judges, both in the United States and other countries, have embraced an approach similar to the one I am proposing. The judge in the *Tilikum v. Sea World* (2012) case, initiated by People for the Ethical Treatment of Animals (PETA), denied that the 13th Amendment of the United States Constitution would apply to nonhumans—but held that animals already hold legal rights:

> Even though Plaintiffs lack standing to bring a Thirteenth Amendment claim, that is not to say that animals have no legal rights; as there are many state and federal statutes affording redress to Plaintiffs, including, in some instances, criminal statutes that "punish those who violate statutory duties that protect animals." (*Tilikum v. Sea* World, 2012, p. 7, quoting *Cetacean v. Bush*, 2004, at 1175)

Similar judicial opinions were voiced in an NhRP-initiated case: At a hearing before the Appellate Court of Connecticut, Wise argued that all animals are already legal persons in the state of Connecticut because the state has a "pet" trust statute. However, one judge explicitly voiced her understanding that animals may very well hold rights in virtue of

both the statute as well as their being protected by animal welfare legislation. She regardless doubted whether this implies their legal personhood. However, Wise insisted that anticruelty statutes do not result in animal rights.[20]

In the legal proceedings surrounding the Swiss cantonal initiative to endow animals with certain basic rights, a court quite aptly noted that the status of animals in private law as "things" (property) does not directly bear upon whether they could hold basic rights under the cantonal constitution (Appellationsgericht, 2019).The decision marks a welcome departure from the understanding of legal personhood dominated by private law.

Personhood and Legal Personhood

The bundle theory also brings to question the legal relevance of the philosophical arguments that animals are persons. It is understandable to think that if, say, chimpanzees qualify as *persons* in a moral or metaphysical sense, then this is sufficient reason to treat them as *legal persons*. But it's not quite that straightforward.

Let us first note that personhood is a very contested concept—so contested that Amélie Rorty (1988) has, in fact, suggested that "there is no such thing as 'the' concept of a person" (p. 31). Accounts of personhood are typically propounded in some particular context: There is something at stake when determining whether an entity is a person or not. Thus, for Peter Singer (1993), "persons" are beings who have an interest in continued existence. Taking the life of a person is therefore "worse" compared to depriving the life of a "merely conscious" being (Singer, 1993, pp. 71–93). Singer thus attaches a specific moral status to personhood. On the other hand, Philip Pettit and Christian List (2011), in their account of group agency, argue that organized human groups are persons because they can "perform effectively in the space of obligations" (p. 173). Though such a capacity certainly has moral significance, Pettit and List are not claiming that because group agents are persons, there would be moral reasons not to "kill" them (whatever that might mean). Many recent accounts arguing for animal personhood have as a direct or indirect goal to provide support for a claim about the moral standing of animals. For instance, Mark Rowlands (2019) ends his book on animal personhood with the suggestion that animals should not merely be understood as mere moral patients:

> Recognition of the other as a person shifts focus from a *treatment* paradigm to a *listening* paradigm. . . . But the fundamental requirement for dealing with persons—a requirement that must be satisfied before one can even raise the question of what to do—is to listen. Instead of simply treating animals as we think best, we might try to ask them what they want. (p. 199)

This is clearly a moral implication.

Similarly, the "Philosophers' Brief" does not scrutinize the personhood conceptions employed by courts merely for the sake of intellectual exercise. Rather, the authors have a specific goal in mind. The brief concludes: "This Court should recognize that when criteria for personhood are reasonable and consistently applied, Kiko and Tommy satisfy the criteria and are entitled to *habeas corpus* relief" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 36).[21] It thus not only makes a claim about the

personhood of certain nonhuman animals, but also seems to posit a connection between personhood and legal personhood: If one is a person, one is entitled to legal personhood, or at least to an element of it.

Here we should note a distinction between "legalist" and "realist" approaches to legal personhood, introduced by Ngaire Naffine (2009). Legalists treat legal personhood as clearly distinct from "real" personhood: One's "legal nature . . . should not be confused with one's nature beyond the confines of law" (Naffine, 2009, p. 19). Realists, on the other hand, posit a strong connection between personhood and legal personhood. Occasionally, the "Philosophers' Brief" seems to treat personhood and legal personhood as the same notion, for instance when it claims that "the concept of 'personhood,' with all its moral and legal weight, is not a biological concept and cannot be meaningfully derived from the biological category *Homo sapiens*" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 8). But even realists must accept that legal personhood is clearly a legal *status* that can be bestowed or rescinded by a legal system. After all, this is what the NhRP is trying to do: to make animals count as a legal persons. Only a diehard natural lawyer—one who denies the legal validity of laws that violate the principles of morality—would claim that persons are legal persons *regardless* of the decisions of legislatures and courts.[22] A more reasonable realist claim would be that legal personhood should track personhood: Persons, and perhaps only persons, should be treated as legal persons. This kind of realist approach is apparent in the conclusion of the "Philosophers' Brief": If chimpanzees are persons, then they should be endowed with legal personhood.[23]

In the courtroom, a realist approach may have a kind of rhetorical force, since it paints the legal personhood of chimpanzees as a necessity—if chimpanzees are persons, then the court must endow them with legal personhood. More specifically, the argument can be constructed as something like this:

> If some X is a person, then it should be entitled to legal personhood.
> Nonhuman animal N is a person.
> Legal personhood includes the rights protected by habeas corpus.
> Therefore, N is entitled to the rights protected by habeas corpus.

However, this argument is problematic, which has to do with the monolithic understanding of legal personhood that underlies it. It is not obvious what "being entitled to legal personhood" even means because legal personhood can take various forms. An animal could enjoy various bundles of the incidents of legal personhood, such as:

- the former companion animal of a deceased owner, now benefiting from a "pet" trust;
- a chimpanzee enjoying the personal freedom and integrity protected by the writ of habeas corpus; and
- "owned" animals having the "living property" status suggested by David Favre (2010), with, for instance, the right to a living space.

However, I cannot see any moral reason for endowing *all* nonhuman animals with *all* of the incidents of legal personhood—much like human beings, as not all humans should

be endowed with all of the incidents either. It may very well be that all animals are morally entitled to some of the incidents—such as fundamental protections and standing in courts—but probably no nonhuman animal should be endowed with the full set of incidents.

Now, if legal personhood were a precondition for rights, then "minimal" accounts of personhood, which simply identify personhood as having moral standing, might be pertinent. Such an account could be used to establish that animals are entitled to *some* legal rights because they are persons. But, as I have argued, legal personhood is not a precondition for legal rights. An entity can hold legal rights without being endowed with "capacity for rights," because such capacity primarily has to do with private law. On the other hand, this notion of capacity for rights is not suitable for most other areas of law. For instance, consider constitutional rights, as with the Swiss case of primate rights. If the legislature wants to endow chimpanzees with constitutional rights, it can just give them these rights directly.[24] What would a constitutional change that gave primates the capacity for constitutional rights, but no actual rights, even mean? Such a capacity would in itself be completely immaterial.

Accounts of personhood may in fact not be very helpful with regard to determining the legal status different animals should be endowed with. As Jonas-Sébastien Beaudry (2019) notes:

> The use of arguing that animals are persons in a legal sense is . . . questionable if one is concerned with negotiating for animals' particular entitlements instead of the list of entitlements typically granted to human beings. So far, the claim that animals are sentient beings with biological needs and a welfare, rather than mere things, has had more success (and received legal recognition in certain jurisdictions) than the claim that they should be legally recognized as "persons." (p. 10)[25]

A more fruitful path would be to focus on the specifics: What particular rights are particular animals entitled to? Instead of concentrating on the question of whether animals are persons, the argument should perhaps address an aspect of personhood: What are the reasons why human beings are entitled to some particular right or some particular incident of legal personhood?[26] Why are the same reasons applicable to (some) nonhuman animals as well? This approach was, in fact, endorsed by Judge Fahey of the Court of Appeals of New York. In his concurring opinion in the Tommy chimpanzee case, Fahey noted that:

> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. . . . The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a "person" or relegated to the category of a "thing" amounts to a refusal to confront a manifest injustice. Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition. (*People ex rel. Nonhuman Rights Project v. Lavery*; Fahey concurring opinion, 2018, 1057–1059)

CONCLUSION

I have in this article argued that welfarism is not antithetical to animal rights, and that animals already hold legal rights, in spite of not being legal persons. Such rights are typically meager and poorly enforced, but rights nonetheless. A court's granting habeas corpus to a nonhuman animal would not transform them from a rightless "thing" to full-fledged legal person. Regardless, such a verdict would considerably improve the animal's legal status by endowing them with certain incidents of legal personhood. Framing the habeas corpus lawsuits on such terms might make the cases an easier sell.

Furthermore, maintaining that animals already hold rights averts a number of typical counterarguments that have to do with the question of whether animals should hold rights at all. For instance, rights are occasionally denied to animals because they do not bear duties. However, such a denial is inapt if animals already hold rights without bearing duties.

In spite of the criticism presented in this article, I find the work of the NhRP extremely important. Though the organization's success in the courtrooms has been limited, it has challenged the legal status quo, brought much attention to the issue of animal rights, and inspired jurists around the world.

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Notes

1. The most significant victory has taken place in Argentina, where the chimpanzee Cecilia was declared a subject of law/rights (*sujeto de derecho*). Expte. Nro. P- 72.254/15, Presentación efectuada por a.f.a.d.a respecto del chimpancé "Cecilia"—sujeto no humano. English translation by Ana María Hernández available at https://www.nonhumanrights.org/content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf. See also Stucki (2016b).

2. The brief has since been expanded into a book (see Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Sebo, 2018).

3. See Kurki (2019).

4. In fact, the notion of "animal rights law," as opposed to "animal law"—which the Cambridge Centre for Animal Rights Law hopes to promote—seems to be based on such a distinction.

5. See also Margaret Gilbert's (2018, pp. 283–89) discussion of Kagan.

6. Unless they subscribe to welfarism purely on indirect terms (i.e., that welfarism is justified only because treating animals cruelly will lead to some other bad consequences).

7. See also McCausland (2014).

8. To me, the most comprehensive account of fundamental animal rights is Stucki (2016a). See also Stucki (2020), as well as the fundamental rights proposal by the Finnish Animal Rights Law Society at https://www.elaintenvuoro.fi/english/.

9. I offer a comprehensive criticism of the orthodox view in Chapter 2 of Kurki (2019).

10. For an overview, see Campbell (2017).

11. This position is held by the so-called "hard" will theorists. See, for example, Steiner (1998).

12. Jeffrey Skopek (2014), for instance, argues (in an academic blog post) that animals should already be understood as legal persons.

13. See Chapter 1 in Kurki (2019).

14. For instance, Wise (2019) himself refers to Peter Birks's *English Private Law* as support for his view.

15. See, for example, Wise (2019, p. 373). Wise and the NhRP seem to shift between the position that animals are already legal persons and that they are not.

16. For a more recent introduction to the Hohfeldian analysis, see, for example, Kramer (1998).

17. We should also note the exact wording of the conclusion: The court did not hold that it is inappropriate to confer *any* kind of rights to chimpanzees, but rather rights that *have been afforded to human beings*.

18. On the import of immunities, see Kramer (2008).

19. For arguments in favor of the interest theory (or against the will theory), see, for instance, Bowen (2020); Kramer (2013); Kurki (2018); and MacCormick (1976).

20. See https://www.youtube.com/watch?v=MVryN9XkgUM (from approximately 34:30). Many thanks to Joe Wills for bringing this to my attention.

21. It should be said that the authors adopt this approach because they take the courts to be applying it as well: "If the concept of 'personhood' is being employed by the courts to determine whether to extend or deny the writs of habeas corpus, they should employ a consistent and reasonable definition of 'personhood' and 'persons.'" (Andrews, Kristin, Comstock, Crozier, Donaldson, Fenton, . . . Walker, 2018, p. 3).

22. Joshua Jowitt (n.d.) has recently put forth this kind of a natural-law argument for the legal personhood of animals.

23. See also pp. 6–8 of the brief.

24. I am using "legislature" in an extended sense to refer to any body that can enact constitutional changes.

25. See also Beaudry (2016).

26. This is, in fact, what I think the NhRP is doing when arguing for the personal autonomy of chimpanzees, for example, and why that entitles them to habeas corpus. The question of whether chimpanzees are persons is a distraction from this core issue.

References

Andrews, K., Comstock, G., Crozier, G. K. D., Donaldson, S., Fenton, A., . . . Sebo, J. (2018). *Chimpanzee rights: The philosophers' brief*. London, England: Routledge.

Andrews, K., Comstock, G., Crozier, G. K. D., Donaldson, S., Fenton, A., . . . Walker, R. L. (2018). Proposed brief by *Amici Curiae* philosophers in support of the petitioner-appellant. https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf

Appellationsgericht des Kantons Basel-Stadt als Verfassungsgericht, Urteil VG.2018.1 vom 15. Januar 2019, A., B. und C. gegen Grosser Rat des Kantons Basel-Stadt, Beschwerde gegen einen Beschluss des Grossen Rates vom 10. Januar 2018 betreffend rechtliche Zulässigkeit der kantonalen Volksinitiative "Grundrechte für Primaten."

Beaudry, J.-S. (2016). From autonomy to habeas corpus: Animal rights activists take the parameters of legal personhood to court. *Global Journal of Animal Law* (1), 3–35.

Beaudry, J.-S. (2019). Are animals persons? Why ask? *Journal of Animal Ethics,* 9(1), 6–26.

Bowen, J. (2020). Beyond normative control: Against the will theory of rights. *Canadian Journal of Philosophy*, 1–17.

Campbell, K. (2017). *Legal rights*. Stanford Encyclopedia of Philosophy. https://plato.stanford.edu/archives/win2017/entries/legal-rights/

Cetacean Community v. Bush, 386 F. 3d 1169 (9th Cir. 2004).

Favre, D. (2010). Living property: A new status for animals within the legal system. *Marquette Law Review, 93*(4), 1021–1071.
Gilbert, M. (2018). *Rights and demands: A foundational inquiry*. Oxford, England: Oxford University Press.
Hohfeld, W. N. (1913). Some fundamental legal conceptions as applied in legal reasoning. *Yale Law Journal, 23*(1), 16–59.
Jowitt, J. (2020). Legal rights for animals: Aspiration or logical necessity? *Journal of Human Rights and the Environment, 11*(2), 173–198.
Kagan, S. (1998). *Normative ethics*. London, England: Routledge.
Kendrick, H. (2018). "Autonomy, slavery, and companion animals." *Between the Species: An Online Journal for the Study of Philosophy and Animals, 22*(1), 236–59.
Kramer, M. H. (1998). Rights without trimmings. In Matthew H. Kramer, N. E. Simmonds, & Hillel Steiner (Eds.), *A Debate over Rights. Philosophical Enquiries* (pp. 7–112). Oxford, England: Oxford University Press.
Kramer, M. H. (2008). Rights in legal and political philosophy." In A. Gregory, R. Caldeira, D. Kelemen, & K. E. Whittington (Eds.), *The Oxford Handbook of Law and Politics* (pp. 1–9). Oxford, England: Oxford University Press.
Kramer, M. H. (2013). Some doubts about alternatives to the interest theory of rights. *Ethics, 123*(2), 245–63.
Kurki, V. A. J. (2017). Animals, slaves and corporations: Analyzing legal thinghood. *German Law Journal, 18*(5), 1096–1090.
Kurki, V. A. J. (2018). "Rights, harming and wronging: A restatement of the interest theory." *Oxford Journal of Legal Studies, 38*(3), 430–50.
Kurki, V. A. J. (2019). *A theory of legal personhood*. Oxford, England: Oxford University Press.
List, C., & Pettit, P. (2011). *Group agency: The possibility, design, and status of corporate agents*. Oxford, England: Oxford University Press.
MacCormick, N. (1976). Children's rights: A test-case for theories of right. *Archiv für Rechts- und Sozialphilosophie, 52*(3), 305–316.
McCausland, C. (2014). "The five freedoms of animal welfare are rights." *Journal of Agricultural and Environmental Ethics, 27*(4).
Naffine, N. (2009). *Law's meaning of life: Philosophy, religion, Darwin and the legal person*. Oxford, England: Hart Publishing.
Nonhuman Rights Project. (n.d.). *Who we are*. https://www.nonhumanrights.org/who-we-are
Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery, 31 N.Y. 3d 1054 (2018) (Fahey, J., concurring).
People ex rel. Nonhuman Rights Project, Inc. v. Lavery, No 518336, 2014 WL 680276 (NY App. Div. 4 December 2014).
Rorty, Amélie. (1988). *Mind in action: Essays in the philosophy of mind*. Boston, MA: Beacon Press.
Rowlands, M. (2019). *Can animals be persons?* Oxford, England: Oxford University Press.
Shyam, G. (2015). The legal status of animals: The world rethinks its position. *Alternative Law Journal, 40*(4), 266–70.
Singer, P. (1993). Practical ethics. Cambridge, England: Cambridge University Press.
Skopek, J. M. (2014). Animals are already legal persons: On Steven Wise, the Nonhuman Rights Project, and misguided personhood debates. *Bill of Health. https://blog.petrieflom.law.harvard.edu/2014/04/24/animals-are-already-legal-persons-on-steven-wise-the-nonhuman-rights-project-and-misguided-personhood-debates/*

Staker, A. (2017). Should chimpanzees have standing? The case for pursuing legal personhood for non-human animals. *Transnational Environmental Law, 6*(3), 485–507.

Steiner, H. (1998). Working rights. In M. H. Kramer, N. Simmonds, & H. Steiner (Eds.), *A debate over rights: Philosophical enquiries*. Oxford, England: Clarendon Press.

Stucki, S. (2020). *Towards a theory of legal animal rights: Simple and fundamental rights. Oxford Journal of Legal Studies, 40*(3), 533–560.

Stucki, S. (2016a). *Grundrechte Für Tiere. Eine Kritik Des Geltenden Tierschutzrechts Und Rechtstheoretische Grundlegund von Tierrechten Im Rahmen Einer Neupositionerung Des Tieres Als Rechtssubjekt*. Baden-Baden, Germany: Nomos.

Stucki, S. (2016b). "Toward hominid and other humanoid rights: Are we witnessing a legal revolution?" *Verfassungblog*.

Tilikum et al. v. Sea World Parks & Entertainment Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012).

Wise, S. M. (2010). Legal personhood and the nonhuman rights project. *Animal Law*, *17*(1), 1.

Wise, S. M. (2019). The struggle for the legal rights of nonhuman animals begins—the experience of the nonhuman rights project in New York and Connecticut. *Animal Law, 25*(3), 367–394.