Natural Law Colloquium
Fall 2015 Lecture

The Law, Science, and Ethics Behind the Nonhuman Rights Project
and Its Struggle to Achieve Fundamental Legal Rights for Nonhuman Animals

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CLE COURSE MATERIALS
Of Elephants and Embryos: A Proposed Framework for Legal Personhood
Jessica Berg
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What We Talk About When We Talk About Persons: The Language of a Legal Fiction

Matter of Nonhuman Rights Project, Inc. v. Stanley
Of Elephants and Embryos:  
A Proposed Framework for Legal Personhood

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It is not true . . . that the legal order necessarily corresponds to the natural order . . . ; it is a policy determination whether legal personality should attach and not a question of biological or ‘natural’ correspondence.¹

INTRODUCTION

What is a person? What responsibilities or obligations do we have to entities that we recognize as persons under the law? These are not simply theoretical questions. Louisiana recently became the first state to statutorily designate ex utero embryos as “juridical persons,” with rights to sue and liability to being sued.² The battle over stem cell³ legislation is at base a battle over whether the embryos destroyed to harvest cells should be considered persons.⁴ The international “Great Ape Project” seeks to imbue non-human primates with attributes of legal personhood—specifically “protections of the right to life, the freedom from arbitrary deprivation of liberty, and protection from torture.”⁵ The Defense Advanced Research Projects Agency (DARPA) is pushing the limits of human-machine interfaces in an attempt to create better

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persons, or even replacement "persons" that can perform jobs in lieu of human beings.\(^6\)

One might easily imagine the creation or discovery, in the near future, of an entity that is of equal moral status with human beings, but not genetically human.\(^7\)

Far from being mere science fiction, questions of legal personhood have already faced courts and legislatures and are likely to become more relevant as technology advances.

Although many philosophers have struggled with the concept of moral personhood, legal personhood has largely been ignored outside of the corporate context. Yet as the issues raised above indicate, there is a pressing need to answer the question of what constitutes a person. While this Article deals indirectly with questions about moral status, its focus is on legal status and the ways in which the law should recognize rights and interests of certain entities.\(^8\)

In Part I of this Article, I argue that two bases for according legal personhood status (either natural or juridical) exist, and that distinct rights and protections flow from each status. The first basis rests on the interests of the entity in question. The second basis rests on the interests of currently recognized human persons. In both cases, the rights and protections that follow from legal personhood status should be limited by the justification for granting the status in the first place. In Part II, I apply and consider the implications of the proposed framework to various entities including embryos and fetuses, non-human animals, and machines with artificial intelligence. Part III offers a brief conclusion. The result of the analysis provided should be three-fold: a richer understanding of legal personhood as currently applied (e.g., to human beings and to corporations), the development of a framework for evaluating the personhood status of novel or not currently recognized entities, and a better theoretical reconciliation of some apparently inconsistent laws regarding persons.\(^9\)

I. THE LAW OF PERSONS

Before discussing categories of legal personhood, it is worth considering whether there is such a thing as "personhood" law in the first


\(^7\) Consider machines with artificial intelligence or extraterrestrials (E.T.): should E.T. or artificially created persons be considered legal persons? See generally Robert A. Freitas, Jr., The Legal Rights of Extraterrestrials, 97 ANALOG SCIENCE FICTION/SCIENCE FACT 54, 67 (1977) (noting that an extraterrestrial would not have the status of personhood and would have no legal rights but that Congress could decide to create a new legal classification—the "pseudo-person"—which grants the E.T. a measure of rights and responsibilities).

\(^8\) I will adopt an interest theory of rights in this Article, rather than competing "choice" or "will" theories. See generally THEORIES OF RIGHTS 9 (Jeremy Waldron ed., 1984).

place." It could be that there are simply a number of different areas of law that define persons in different ways depending on the purpose of the law, but no cohesive "law of persons." The argument for this view may be similar to ones that have taken issue with new categorizations of specialty areas of law, such as Internet law. These arguments maintain that the issues arising out of technological developments break down into basic legal areas such as contract, tort, or criminal law, and there is no unifying theme that justifies a special label. It is certainly true that there is no express definition of "person" in the Constitution, nor has the Supreme Court proffered one. Moreover, different state and federal statutes define "person" differently, depending on their goal. Focusing

10. See, e.g., Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction, 114 Harv. L. Rev. 1745, 1746 (2001) (stating that "although no coherent body of doctrine or jurisprudential theory exists regarding [the legal metaphor "person"], a set of rhetorical practices has developed around it"). See also Jane English, Abortion and the Concept of a Person, 5 Can. J. Phil. 233, 233 (1975) (pointing out that there is no clear agreement regarding the concept of "person").

11. See, e.g., Lawrence Lessig, The Law of the Horse: What Cyberlaw Might Teach, 113 Harv. L. Rev. 501, 502 (1999) (arguing that there may be no specialized law of the Internet, there is something to be learned by examining the legal regulation of cyberspace).

12. See, e.g., Philippe Ducor, The Legal Status of Human Materials, 44 Drake L. Rev. 195, 199 (1996) (arguing that although "the notion of a 'constitutional person' is uncertain," that "all persons certainly have...a minimum bundle of constitutional rights, which can never be suppressed without challenging the person's very dignity and existence," and that "no U.S. case law exists on the equivalent of the hard nucleus" but claiming "it would include the right to due process, the right to own property, the right to bodily integrity, the right to live, and the right not to be owned"); Kathleen Guzman, Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth, 31 U.C. Davis L. Rev. 193 (1997). Although there may well be a core of rights of persons, I will not analyze whether Ducor's list is correct. Furthermore, Ducor takes the position that "everything short of a person will be considered an object" — a framework I clearly reject because I argue that embryos can be considered both subjects and objects of rights. Ducor, supra, at 200. However, since Ducor makes clear he is coming from a continental/civil law perspective it is possible that our disagreements stem from our familiarity with, and embedding in, different legal systems. Moreover, he explicitly "categorizes the embryo or fetus in the womb with other body parts before their separation from the person." Id. at 206. He rejects the notion of giving embryos outside the womb interim status and holds they are objects. Id. at 211. Living fetuses are to be considered subjects while they survive outside the womb (as are viable fetuses after delivery — e.g., babies). Id. at 212.

our attention on a personhood law as a whole, however, is a useful endeavor. It is likely to lead to greater clarity in a variety of areas of law (e.g., corporate law, animal law), as well as provide a framework under which we can consider the application of current laws to new developments, such as artificial intelligence. As a result, conducting an in-depth evaluation of legal personhood is both necessary and useful.

Even if there is a coherent law of personhood, why focus on that as opposed to merely evaluating the issue in terms of legal rights, without the “personhood” label, or with a new “pseudo-person” label? First, our current system of laws is set up to focus exclusively on the rights of persons and not of other entities. Persons have rights, duties, and obligations; things do not. Although there have been challenges to this binary framework, thus far the United States legal system has maintained the distinction. As a result, creating new legal categories to address the rights of entities along a moral continuum would entail great educational and other costs. Second, as will be made clear by the arguments below, currently existing personhood categorizations are flexible enough to accommodate a variety of different levels of rights, and thus there is little need to create a new category of rights holders.

A. LEGAL CATEGORIES

There are two legal categories of persons: natural and juridical.
“Natural person” is the term used to refer to human beings’ legal status. Certain legal rights adhere automatically upon birth, and the designation of “natural person” may be taken as shorthand for identifying entities that are entitled to the maximum protection under the law. Nonetheless, not all natural persons have the same legal rights—children, for example, are afforded fewer legal rights than adults. Additionally, the wording of the Constitution suggests that the Framers were careful in their choice of terms and recognized different rights of different types of natural persons. Thus Section 1 of the Fourteenth Amendment of the U.S. Constitution distinguishes between the rights of “persons” and the rights of “citizens.” Likewise, the Supreme Court’s determination in Roe v. Wade that fetuses are not persons under the Fourteenth Amendment did not answer the question of whether or not they should be considered persons with respect to other areas of law. Thus states have sometimes considered fetuses persons under tort or criminal statutes. In fact, should the Court overturn Roe, it is not likely to decide that fetuses are persons under the Fourteenth Amendment, but rather will leave the issue up to the states. So the law already appears to recognize different types of persons.

In contrast to “natural person,” the designation “juridical person” is used to refer to an entity that is not a human being, but for which society chooses to afford some of the same legal protections and rights as accorded natural persons. Corporations are the best example of this category, but juridical persons may also include other entities.

20. U.S. Const., amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added). Thus, there appear to be certain fundamental rights of all persons, although citizens may have additional protections compared to non-citizens (as do residents versus non-residents of a particular state).


22. See, e.g., Holzapfel, supra note 13.

23. The Court is understandably wary of recognizing new constitutional rights. Thus, for example, in the recent physician-assisted suicide cases the Court found that there was no federal constitutional right at stake, and thus states would have to decide whether or not to create a state constitutional or statutory right. See Vacco v. Quill, 521 U.S. 793, 797 (1997); see also Washington v. Glucksberg, 521 U.S. 702, 705-06 (1997).


25. See, e.g., 1 U.S.C. § 1 (2000) (stating that the word “person” in any Act of Congress includes, unless the context indicates otherwise, “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”); see also N.C. G.S. § 12-3(6) (1986) (defining “person” to include political bodies and corporations).
Both designations, "natural" and "juridical," signify legal personhood as opposed to moral personhood. But the terms also signal two important distinctions. The first is that an entity labeled a natural person is genetically human. The differentiation between genetically human persons and other persons may become more important as additional entities lay claim to the latter categorization. Juridical persons may be genetically human, but there are no non-human natural persons. Second, natural persons are entitled to priority over juridical persons in a hierarchy of rights. This is not to say that juridical persons might not be granted equal rights with natural persons, but that such allocation of rights would have to be justified by the interests involved. In other words, natural persons function as the baseline against which other rights allocations are judged. Our society was developed by and for natural persons, and thus legal rights focus on this group.26

B. NATURAL PERSONS

Currently the legal category of natural persons is limited to human beings once they are born.27 Because rights entail corresponding obligations on the part of other rights-holders to respect those rights, recognizing another entity as a natural person would necessarily limit the rights of currently recognized natural persons.28 In some cases the rights at issue may even be diminished if additional entities share the rights. Voting is one example. If more entities are given the right to vote, the value of any previously recognized person's right to vote is weakened, from a quantitative perspective.29 Because of this effect, there must be some basis for according legal personhood status to new entities that justifies the potential diminution of rights for current status holders. Such limitation could be justified either by the interests of the entity itself, or by the interests of currently recognized natural persons in protecting their rights. That is to say, it could be that in order to protect the rights of currently recognized persons, the new entity must also be afforded the same rights as persons. To continue with the voting example from above, the extension of the right to vote to entities that should have a voice in an election may be necessary to achieve a legitimate outcome, and thus

26. I do not intend to take issue with this assertion, although one could certainly argue that the preference for natural persons is an artifact of their power at the time we initially created legal protection (had there been non-human persons in power at that time, those other entities may well have had priority in a rights hierarchy). This is an argument for another piece, and thus I start my evaluation of legal personhood from the initial premise that natural persons are entitled to priority.
28. Ronald Green, Toward a Full Theory of Moral Status, Am. J. Bioethics, Nov.-Dec. 2005, at 44-45 (2005) (noting that "[b]estowals of status reflect what moral agents allow each other to do with the entities in question, or what is the same thing, what limitations agents are willing to impose with respect to such entities on each other's liberty of action").
function to protect the rights of currently recognized voters. Another way to put this is to say that even though the addition of new voters diminishes the value of any one person's vote quantitatively, it increases its value qualitatively, by strengthening the validity of the entire process. So the shorthand "interests of currently recognized persons" includes both the interests of currently recognized persons individually, and aggregate (and broader) "societal interests," such as according rights fairly. I will develop this idea in later sections examining the interests of others. The following two subsections focus on exploring the two bases in the context of natural personhood.

1. Interests of the Entity in Question

A full analysis of the philosophical debate regarding moral status or moral personhood is beyond the scope of this Article. For our purposes, it is important only to recognize that there are a number of different factors that have been proposed as a basis for according moral status. Characteristics that have been used, either singly or in combination, include: biological life, genetic humanness, brain development, ability to feel pain, consciousness/sentience, ability to communicate, ability to form relationships, higher reasoning ability, and rationality. Bonnie Steinbock and Mary Anne Warren both provide excellent reviews of the different proposals, each pointing out the limitations of the varying approaches for determining either moral status, or moral personhood.

30. Some authors talk about moral status and some talk specifically about (moral) personhood. The term "person" when used in a moral context is not necessarily coterminous with "human being." See, e.g., H. TRISTRAM ENGELHARDT, JR., THE FOUNDATIONS OF BIOETHICS 104 (1986) ("Persons, not humans, are special."). Engelhardt goes on to argue that persons have higher moral standing than other living creatures, including human embryos and fetuses. Id. at 110. His test for personhood revolves around membership in a moral community and specifically "capacity to be self-conscious, rational, and concerned with worthiness and blame and praise." Id. at 107. He also notes that non-humans can be persons, such as extraterrestrials. Id. Other commentators have argued that certain higher reasoning animals should be considered moral persons. Whether these entities are entitled to legal status is an issue I will touch on below. See discussion infra Part II.B.

31. See English, supra note 10, at 234-35 (noting that no single criterion can capture the concept of a person but that a "person is a cluster of features, of which rationality, having a self-concept and being conceived of humans are only part"). Interestingly, English goes on to point out that "a fetus lies in the penumbra region where our concept of a person is not so simple. For this reason I think a conclusive answer to the question of whether a fetus is a person is unattainable." Id. See generally EMBRYO EXPERIMENTATION: ETHICAL, LEGAL AND SOCIAL ISSUES (Peter Singer et al. eds., 1990). For a bibliography of different moral personhood arguments see James Park, Personhood Bibliography, http://www.tc.umn.edu/-parkx023/B-PERSON.html (last visited Nov. 4, 2007).

32. See, e.g., Park, supra note 31. Whether or not one can determine moral status solely on evaluation of characteristics is beyond the scope of this Article. See generally George Khushf, Owning up to Our Agendas: On the Role and Limits of Science in Debates About Embryos and Brain Death, 34 J.L. MED. & ETHICS 58, 59 (2006) (arguing that science will not answer the questions about the moral status of embryos).

33. See generally BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES (1992) (listing and analyzing the different arguments); MARY ANNE WARREN, MORAL STATUS: OBLIGATIONS TO PERSONS AND OTHER LIVING THINGS (1997).
Their work will not be repeated here.

According to the prominent legal philosopher Joel Feinberg, an entity must have interests to have moral status. Steinbock adds that "interests" is a term of art which refers to the capacity of an entity to have a stake in things, and this capacity is contingent on the entity being sentient, or consciously aware. "Interests" in this sense refers to an entity having "a sake or welfare of its own" and "the expression . . . is intended to emphasize the stake that conscious, sentient beings have in their own well-being." One need not agree with Feinberg or Steinbock about whether "interests" are necessary for moral status to acknowledge the role they play in legal personhood designations. If an entity does not have interests in the sense identified above, then legal personhood cannot be based on the protection of those interests. In other words, we cannot claim that an entity without interests has a claim to legal personhood for its own sake, or because it has interests that must be protected. Instead, a determination of legal personhood must be based on the protection of the interests of others. Legal personhood based on the interests of others may be more limited than legal personhood based on the interests of the entity itself. I will return to this point in more detail in subsections below.

Interests likely develop over a continuum, as the entity develops, rather than appear as a single-point-in-time event. How legal personhood should track this development is a different question. One might designate a single point in time for granting legal personhood protections, even though the entity has not fully developed all the characteristics in question. This is essentially what the Supreme Court did in Roe when it stated that the constitutional protections of the potential human life become stronger as a pregnancy progresses. See Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833, 869 (1992).

34. JOEL FEINBERG, HARM TO OTHERS 34 (1984).
35. STEINBOCK, supra note 33, at 40-41. Identifying the exact point at which moral personhood applies to a developing human may be important, but is not necessary for the arguments made in this Article. An entity may or may not meet the criteria for moral personhood, but that does not answer the question of whether legal personhood rights should be recognized.
36. Id. at 18, 20.
37. Steinbock spends quite a bit of time in her book discussing the implications of the "interests" approach as well as different uses of the word "interests." Id. at 14-41. I will not repeat those arguments here, but will accept the use of the term as defined by her.
38. I am considering whether to apply legal personhood status in the first place, not how to evaluate whether that status has been lost or how it should be handled for individuals who were previously identified as natural persons but have currently lost the ability to form interests.
39. The interests of others can include an interest related to an entity without interests. That is to say, I might have an interest in something happening to my car (which itself does not have interests). Likewise, assuming without argument that plants do not have interests, I might have an interest in preventing the death of my plants.
40. This is consistent with the Supreme Court's recognition that state interests in protecting potential human life become stronger as a pregnancy progresses. See Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833, 869 (1992).
41. STEINBOCK, supra note 33, at 85.
Fourteenth Amendment apply at birth.\footnote{Roe v. Wade, 410 U.S. 113, 162 (1972).} But the lack of constitutional protections prior to that point does not determine whether other legal protections apply. For example, using birth as the single-point-in-time event for granting human beings any legal rights may create problems because it fails to recognize the significant personhood interests of late-term fetuses. The approach of jurisdictions that allow tort and criminal prosecutions for injury to \textit{in utero} fetuses indicates that birth is not always the line at which any and all legal rights start.\footnote{See, e.g., Note, supra note 10, at 1763–64 (describing the conflict between different notions of personhood inherent in abortion and feticide laws). It may be that the application of tort and criminal law to actions involving fetuses are based on concerns about other's rights and are not tied to whether the fetus is a person under the law. Lawrence C. Becker, \textit{Human Being: The Boundaries of the Concept}, 4 Phil. \\& Pub. Aff. 334, 348–50 (1975) (noting that "[a] duty not to kill... may be justified by reference to the consequence for the agent or society" rather than "reference to the victim's ability and title to lay claim to the duty"). It is also possible that the jurisdictions that have such apparently conflicting statutes are in error and one or the other approaches should be reconsidered.} I will return to this issue later in Part II.A. For now, it is sufficient to reiterate that legal personhood based on an entity's interests is not possible until the entity has actually developed interests. Prior to that development, legal personhood must be based on concerns about protecting the interests of others.

\section*{2. \textit{Interests of Others}}

Natural personhood status need not depend solely on the interests of the entity in question. We consider all human beings, once born, to be natural persons, regardless of whether they actually have interests. Anencephalic infants, for example, are born without a brain cortex and thus completely without any cognitive ability;\footnote{Taber's medical dictionary defines "anencephalus" as a "[c]ongenital absence of brain and cranial vault, with the cerebral hemispheres completely missing or reduced to small masses." \textsc{Taber's Cyclopedic Medical Dictionary} 100 (17th ed. 1993). Interestingly it goes on to state that the condition "is incompatible with life." \textit{Id}. In fact, anencephalic infants may survive for some short period after birth, if the brain stem is present and with a variety of technological interventions. Cognition, however, remains impossible. Nor do such infants feel pain. \textit{See infra} note 103 and accompanying text.} they cannot, by Feinberg's definition, have interests.\footnote{See, e.g., Lawrence J. Nelson \\& Michael J. Meyer, \textit{Confronting Deep Moral Disagreement: The President's Council on Bioethics, Moral Status, and Human Embryos}, Am. J. Bioethics, Nov.-Dec. 2005, at 33, 35 (2005) (providing a general theory of moral status that gives born human beings the same moral status as moral agents, even if they lack moral agency).} Nonetheless we still treat them as natural persons.\footnote{STEINBOCK, supra note 33, at 30–36.} The American Medical Association's (AMA) opinion in 1994 that, while still living, these infants be considered appropriate organ donors was met with considerable resistance—prompting the AMA to reverse its recommendation and issue an opinion reverting to its 1992 standard, which asserted that anencephalic infants be treated as
other natural persons are for purposes of transplantation. Since anencephalic infants lack interests under the model suggested above, the basis for the natural personhood status would have to be the protection of the interests of other currently recognized persons. The interests here are broader than simply the interests of the anencephalic infant’s parents, although their interests play a role. There is general societal value in granting full legal personhood protections to all human beings at least at birth, regardless of the interests of the entity in question. While some infants may have failed to develop any relevant characteristics because of impaired growth, making distinctions between neonates is extremely difficult. Perhaps the complete absence of any cognitive ability, such as the case with anencephalic infants, can function as a bright line; but almost any other attempt at distinguishing based on cognition will be impossible given the limited capacity of all newborns.

As discussed above, society has thus far been unwilling to deny even anencephalic infants the protections of personhood. Perhaps because all human babies share the same external form and because there is a societal interest in encouraging specific caring behaviors towards all infants (and discouraging other behaviors such as infanticide), we include even anencephalic infants in the category of natural persons.


48. Yet even as our legal system accepts that at birth humans are entitled to full legal protection, it does not truly afford babies and even children equal status with competent adult human beings. Part of the difficulty is certainly the need to have someone else articulate and promote the rights of children since they are unable to do so for themselves. But another part of the lack of equal status is the continued recognition of parent’s property interests. Property interests attach at the initial developmental stages of the embryo. They do not extinguish, but rather are progressively limited by the development of personhood interests as the entity matures. For an interesting discussion of parental rights relating to children (although not termed as property rights) see Harry Brighouse and Adam Swift, Parents’ Rights and the Value of the Family, 117 ETHICS 80 (2006).

49. Human infants are commonly referred to as neonates during the first six weeks of life after birth.

50. Or, to put it another way, we have limited capacity to test newborns for cognitive ability.

51. Jane English concludes that some of the restrictions on late-term abortions or infanticide can be justified not because the entity in question is a person, but because “[o]ur psychological constitution makes it the case that for our ethical theory to work, it must prohibit certain treatment of non-persons which are significantly person-like . . . [l]est we undermine the system of sympathies and attitudes that make the ethical system work.” English, supra note 10, at 241; see also PETER CARRUTHERS, THE ANIMALS ISSUE: MORAL THEORY IN PRACTICE 115-16 (1992); CARSON STRONG, ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE: A NEW FRAMEWORK 57-58 (1997) (discussing the external form and similarity arguments); A.V. Townsend, Radical Vegetarians, 57 AUSTRALIAN J. PHIL. 85, 93.
This "form" argument is not simply about external appearances, however. A doll that looks extremely lifelike would not be entitled to personhood protections. The basis of the argument is the effect of the designation (or lack thereof) on the rights of currently recognized persons. The more similar an entity is to other entities that are designated legal persons, the more likely we are to treat them the same. Anencephalic infants are too much like other newborn babies to treat as if they were not full legal persons. Likewise, while we may stop treatment when someone is declared brain dead, we do not bury her while still warm and breathing. A warm body is too much like a living person.

Apart from anencephalic infants, who share all characteristics with other newborns except presence of the brain cortex, and previously recognized persons who are temporarily or permanently unable to form interests (e.g., unconscious or incompetent individuals), there appear to be no other situations where natural personhood rights are granted to an entity that does not itself have interests. This is an important point. Granting natural personhood status provides the entity in question the highest level of rights and protections, and thus limits the rights of other natural persons (since their rights are limited by the rights of the newly recognized natural persons). Justifying such limitation on the protection of the rights of existing persons seems counter-intuitive. Protection here does not necessarily mean protection of any one individual's rights, but protection of the concepts underlying the rights—that which makes the right meaningful. In fact, it may be that the inclusion of anencephalic infants in the category of natural persons using this reasoning is mistaken. I will return again to this point in Part II.C.2, but full exploration of this particular debate is beyond the scope of this Article. Nonetheless, the analysis provided here may afford insight into a variety of other contexts in which the rights and protections of legal personhood are a matter of controversy. For our purposes, the crucial point is that under the current legal framework, natural personhood status is only appropriate where the entity in question is genetically human and either the entity has interests of its own that justify the designation or, in rare situations, protection of the interests of other natural persons justifies the designation.

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52. Legal death, or brain death, is determined by the absence of brain function even though artificial means may be in use to maintain heartbeat and respiration (traditionally death was determined by the absence of heartbeat and breathing).

53. Interestingly, although newborn gorillas are also reminiscent of newborn humans we do not afford them legal personhood protections. Perhaps their form is not close enough, or perhaps it is a mistake not to afford them protections. I will talk about non-human animals in more detail in Part III.

54. It is beyond the scope of this Article to evaluate how personhood status should be handled for entities that have lost the ability to form interests. My focus here is on the initial assignment of personhood status.
C. Juridical Persons

Unlike the designation of natural person, there appear to be few, if any, legally established limitations either on what kind of entity can be labeled a "juridical person," or what rights follow. An initial review of the jurisprudence suggests that states have broad authority to designate juridical persons and to define the extent of their powers under the law. Despite the lack of legal limitations, I suggest that the rights accorded a particular juridical person should follow from the reason for the designation, although in many of the legal cases there is little or no discussion of this point. As a result, not all juridical persons will necessarily have the same legal rights. The rationale for restricting juridical persons' rights based on the justification for granting them arises from the impact on existing persons' rights. As stated above, the inclusion of any additional entities in the category of legal persons may limit the rights of previously recognized persons: first because they now have to respect the rights of the newly recognized persons, and second because in some contexts the value of a pre-existing right may be diminished. If juridical personhood is necessary to protect the interests

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55. It may not be true that a state could designate any entity a juridical person. Even if it could, using the juridical person label for an entity without any justificatory basis as defined here, and thus creating an entity with a label but no real rights, may undermine the use of the term in other contexts. In other words, if a state can simply decide to call anything a "person," even something with no rights at all, the label "person" carries less weight.

56. Many of the constitutional guarantees in the Bill of Rights have been held to apply to juridical persons (usually corporations), including the Fourteenth Amendment Equal Protection and Due Process Clauses with respect to property interests and First Amendment freedom of speech protections. See First Nat'l. Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978). Corporations can have privacy interests that protect them from unreasonable searches under the Fourth Amendment. See Dow Chem. Co. v. United States, 476 U.S. 227, 235 (1986). Corporations are also afforded double jeopardy protection, but not self-incrimination, under the Fifth Amendment. At least since 1886 in Santa Clara County v. Southern Pacific Railroad Co., 118 U.S. 394, 396 (1886), the Supreme Court has consistently held that the Fourteenth Amendment assures corporations equal protection of the laws, and that it entitles them to due process of law, at least since 1889 in Minneapolis & St. Louis Railway Co. v. Beckwith, 129 U.S. 26, 28 (1899). Justice Douglas, dissenting in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 577-78 (1949), argued that the Equal Protection Clause, intended to remedy "gross injustice and hardship" against the "newly emancipated negroes," applied only to human beings. It was never intended to protect corporations "from oppression by the legislature." Id. at 578. On the other hand, the Privileges and Immunities Clause is not applicable to juridical persons, as are some other "personal" rights. See Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936); see also United States v. White, 322 U.S. 694, 698 (1944) (holding that neither the Fourth or Fifth Amendments apply to juridical persons). But see Cook County, Ill. v. United States ex rel Chandler, 538 U.S. 119, 125 (2003) (holding that the False Claims Act applies to corporations because they are equally capable of defrauding or exploiting the exercise of federal spending power). The state's powers to grant or withhold rights to a juridical person, however, are not unlimited. See, e.g., R.R. Co. v. Harris, 79 U.S. 65, 81 (1870) (noting that a corporation is limited by the terms of its charter). And states are not free to enact laws that would arbitrarily favor individuals over corporations. See Bellotti, 435 U.S. at 777 (1978); see also Frost v. Corp. Comm'n, 278 U.S. 694, 698 (1944).

57. Using the example from above, if a state gives corporations the right to vote in elections, it would dilute the votes of natural persons. See Dworkin, supra note 29.
of the entity, the rights that follow should be those that actually protect the interests at stake. Likewise, if juridical personhood is necessary to protect the interests of others, the rights that follow should be those that actually protect those interests, so as not to risk infringing on other rights. Similarly, even the rights of natural persons are understandably limited by the rights of other natural persons; the rights and interests of others must be factored in. The sections below consider how the interests of the entity and the interests of others function in the context of juridical personhood.

1. Interests of the Entity

Unlike the debate about natural personhood, historically discussions of juridical personhood rarely involved a discussion of the moral status of the entity in question. Nonetheless, some commentators studying corporate personality theory\(^\text{58}\) have suggested that it would make more sense to base juridical personhood on the interests of the entity in question, thereby mirroring the debates about natural persons above.\(^\text{59}\) One author states that personhood is appropriate when the entity in question “behave[s] in those ways that, by and large, are explainable by appeal to a coherent set of true empirical generalizations.”\(^\text{60}\) He goes on to assert that the generalizations cluster around the primary state of intentionality, which is ascribed based on “observed outward manifestations or behavioral evidence.”\(^\text{61}\) On this basis he claims that corporations are moral persons.\(^\text{62}\) An expert in business ethics, Thomas Donaldson, takes the argument a step further and states that if corporations are moral persons, then they also should have the rights that natural persons have.\(^\text{63}\) He then considers and rejects the notion that

\(^{58}\) In drawing from the literature on corporate personality theory I do not mean to imply that embryos are like corporations, but merely that it is useful to examine previously developed legal theory regarding juridical persons.

\(^{59}\) For example, Alexander Nekam states that any entity, real or imagined, can be recognized under law as a subject of rights, regardless of its characteristics, so long as it is “looked upon by the community as a unit having interests which need and deserve social protection.” Alexander Nekam, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY 26 (1938). Nekam distinguishes between administrators and subjects of rights. He notes that “[w]hile every right needs an administrator and such administrator can only be a human being not deprived of his will, the subject of the right, the beneficiary [sic] of legally protected interest, can be, on the contrary, anything which the community regards as a unit having socially important interests needing and deserving juridic protection.” Id. at 33; see also Peter A. French, Collective and Corporate Responsibility 34 (1984) (noting that some commentators argue that “juridical person” is simply a label applied to all entities that are the subject of rights).

\(^{60}\) French, supra note 59, at 88.

\(^{61}\) Id.

\(^{62}\) Id. at 93. French does not want to distinguish moral persons as a subset of persons. Rather he thinks that intentional agency is sufficient to be considered a person and thus a moral person. Id. He would likely take issue with my distinctions between natural persons and juridical persons.

\(^{63}\) Thomas Donaldson, Corporations and Morality 18 (1982).
corporations are moral persons. Instead he argues that corporations are sometimes moral agents. Still others find it problematic that we would ever use the terminology of persons in the context of an entity that is not a moral actor.

Although moral corporate personality theory provides a natural starting place for discussions of juridical personhood, there are two problems with drawing directly from this literature to develop a broader theory of legal personhood. The first is that most commentators focus exclusively on corporate entities, leaving little room for a broader theory of juridical persons that might be applied to non-associative entities. The second is that the interests deemed important by the commentators for moral agency and thus juridical personhood may not be found even in entities we comfortably include in the category of natural persons (e.g., very young children or developmentally disabled adults). In fact, we have little in the corporate personality literature that helps identify when it is appropriate to use juridical personhood as a basis to protect the entity in question. As a result, such analysis will have to be fleshed out in the context of each specific entity under consideration, and more insight may be gained in drawing from general moral philosophy, then specifically from moral corporate theory. I suggest some initial steps in Part II.

2. Interests of Others

In contrast to the corporate personality theories discussed above, most discussions about corporate personality develop the concept of juridical personhood using the interests of already recognized natural persons. There are two related arguments for according juridical personhood based on the interests of others. First, categorization as a juridical person may be necessary for practical reasons, since the law requires an object upon which to act. In other words, currently recognized natural persons may have an interest in identifying entities as legal actors who can have rights or obligations, who can sue or be sued. Alternatively, one might recognize entities as juridical persons (and give them some of the same rights as natural persons) because the failure to do so would undermine the rights of currently recognized natural persons.

64. Id. at 23.

65. Id. at 30 (noting that “embody[ing] a process of moral decision-making” requires “(1) The capacity to use moral reasons in decision-making [and] (2) The capacity of the decision-making process to control not only overt corporate acts, but also the structure of policies and rules”). Corporations that fail to meet these requirements should not be considered to be moral agents and also “fail to qualify as a holder of rights or responsibilities.” Id. at 32.

66. See, e.g., ELIZABETH WOLGAST, ETHICS OF AN ARTIFICIAL PERSON 88–95 (1992) (summarizing debates about corporate personality and arguing that it is morally hazardous to separate moral accountability from personhood designations and concluding that corporations should not be treated as persons).
The notion of practical necessity is drawn from early articulations of corporate personality theory—fictional entity theory and real entity theory—that were based not on suppositions about the moral character of corporations, but on the need to create an entity to which the law could apply. Fictional entity theory states that corporations are completely creatures of law.67 Real entity theory, by contrast, acknowledges that there is an actual entity, which is termed the "corporation."68 Both the fictional entity theory and the real entity theory are compatible with broad discretion on the part of states in determining what rights to accord. But although the theories function descriptively, they provide no basis for understanding whether and when a particular entity should be considered a juridical person. Moreover, instead of articulating a basis,70 the judicial cases using the theories rely on circular analysis, asserting that corporations have a particular legal right because they are juridical persons.71 Explaining this lack of normative reasoning, John Dewey asserted that the term "person" in law might merely be "a synonym for a right-and-duty-bearing unit."72 The

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67. See Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of N.Y., 170 N.E. 479, 482 (N.Y. 1930) (noting that the concession theory states that corporate personality is "invariably the gift and creature of the state" and holding the law determines when the life (legal personality) of an artificial person has been terminated, conditioned by the juristic quality of the cause for termination); see also McCabe v. Ill. Cent. R. Co., 13 F. 827, 830 (N.D. Iowa 1882) (holding a corporation is a citizen only in the state of its creation because it cannot exist away from the law which created it); City of Baton Rouge v. Bernard, 840 So. 2d 4, 7 (La. Ct. App. 2003).

68. This theory is based upon the idea that "even in the absence of a charter or other token of the will of government there are groups so natural and so spontaneous as to evoke legal recognition of a corporate existence." Petrogradsky, 170 N.E. at 482. The legal recognition or lack of recognition of the corporation does not extinguish its existence.

69. See Morton Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. Va. L. Rev. 173 (1985) (pointing out that these theories functioned to set guidelines as corporate doctrine developed, and arguing that they were both affected by social developments and, in turn, themselves shaped historical development); see also David Millon, Frontiers of Legal Thought I: Theories of the Corporation, 1990 Duke L.J. 201, 204, 241–51 (discussing Horwitz's arguments).

70. See, e.g., Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 Hastings L.J. 577, 620–51 (1990) (discussing the application of the Bill of Rights to corporations and arguing that the Court has put forth no coherent theory to justify its decisions).

71. See generally Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935) (suggesting that these questions of law regarding rights of corporations would be better decided based on either empirical evidence or ethical argument, rather than recourse to circular arguments of legal terminology).

72. John Dewey, The Historic Background of Corporate Legal Personality, 35 Yale L.J. 655, 656 (1926). Although it is true that to the extent we live in a society governed by law there may be no practical distinction between those entities recognized as legal persons because they are natural persons or those that are artificial persons—both are "legal" persons. But there may be fundamental differences between the rights of entities that can claim moral status and the rights of entities that cannot, regardless of official legal status. Moreover, while Dewey's point about historical artifacts of corporate personality theory obfuscating debates about the law applied to associations is important, the current question of whether legal personhood should be recognized for entities which meet none of the characteristics of corporations and only one (genetics) with natural persons, should lead us to reexamine the idea that the state can determine the whole of what it means to be a person under the
law must have an object upon which to act and that object must be a
"person." Thus, Dewey argued, the development of the term "corporate
personality" and the accompanying theories are a historical anomaly. Dewey
may be correct in his analysis of the historical development of
corporate personality theory; I will take no stand on this debate. But
unlike corporations, the categories of embryos, fetuses, non-human
animals, and machines with artificial intelligence are clearly not
"fictional" entities. The potential application of juridical personhood to
these entities makes it necessary to reconsider the possibility of a
normative justification for juridical personhood based on social
interests. On the other hand, these new entities may not be actors
functioning in the legal or social marketplace, so there may be less basis
for categorizing them as juridical persons on this rationale alone.

An alternative possibility likewise draws on the interests of natural
persons, but not in terms of practical needs of the legal system. Steinbock
argues that the symbolic value of potential persons, while less important
than the moral value of actual persons, functions as a basis to afford
some protections to embryos and fetuses. The term "symbolic value"
refers to the consideration of the interests of currently recognized
persons. However, there are many things that we might recognize as
having symbolic value, but to which we would not think to grant juridical
personhood. The American flag is one example. Moreover, the concept
of symbolic value is itself limited, since not only would it be
inappropriate to designate some things with symbolic value "juridical
persons," but some currently recognized juridical persons—
corporations—do not necessarily have symbolic value. So although the
notion of symbolic value is theoretically appealing, it is of limited use.
This is not to imply that embryos lack symbolic value, but the concept of
symbolism cannot (alone) form the basis for a framework of personhood

73. Id. Hohfeld's system applied only to persons. See Hohfeld, supra note 16, at 74-75.
74. See Dewey, supra note 72, at 658 (discussing F.W. Maitland, The Corporation Sole, 16 L.Q.
Rev. 335 (1900)). As a result, Dewey concludes that discussions of personhood should be divorced
from theoretical conceptions of natural or artificial personality. Id. at 669. Thus he would prefer not to
use the term "person" to characterize the debate. Id. at 662. I think, however, that given the common
use of the term in our language it serves as a good proxy for the underlying issues and brings with it an
already developed legal framework.
75. Frederick Hallis, writing from an English law perspective, points out that a legal theory of
corporate personality should take into account the real nature of the entities that will be considered
juridical persons, as well as pragmatic concerns about how the law will function. See Frederick
Hallis, Corporate Personality xxxvii (1930). Hallis argues that there are three elements required to
be a juridical person: (1) "It must be an organized collectivity capable of acting as a whole in
furtherance of an interest which the law will protect"; (2) "it must have a directing idea, a definite
aim" that "controls its internal and external activities"; and (3) it must have "a social value by virtue of
pursuing an interest worthy of legal protection." Id. at 241-42.
76. Steinbock, supra note 33, at 196-97.
status and rights.

Rather than concentrate on the symbolism of a particular entity, I would argue that one should consider broadly the effect on natural persons of granting rights of juridical personhood. Recognition of rights of juridical persons ultimately may benefit or harm the rights of natural persons. This is an empirical question and should be evaluated in a particular context. Thus granting free speech rights to a particular corporation may help or harm the rights of natural persons.

But making inquiries in each case may be too costly or time consuming. Instead of adopting such an act-utilitarian approach, one might prefer a rule-utilitarian approach that asks generally whether granting a particular right to a juridical person benefits or harms the rights of natural persons. Again, as with all utilitarian inquiries, this is an empirical issue, and gathering data, particularly generalizable data, may be difficult. Corporations are already observable in the marketplace, but we have no means of gathering empirical information on the effect of granting or withholding certain rights from embryos or fetuses or non-human

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77. For example, the nexus of contracts theory justifies corporate personhood, and the resulting rights that adhere, based on the freedom of contract rights of the natural persons who make up the corporation. Thus the theory functions as a limit on state interference with corporations due to the limits the state generally has in interfering with the freedom of natural persons to contract. In order to enter into such a contract, a group of people “must organize, assume a name and choose from their number trustees” to become an artificial person “with the general rights and powers, and subject to the obligations and duties of a natural person, having power to exist, notwithstanding there be a complete change in its membership.” Miller v. Milligan, 1881 Ohio Misc. LEXIS 12, at *8 (Ohio Common Pleas). But see William W. Bratton, The “Nexus of Contracts” Corporation: A Critical Appraisal, 74 CORNELL L. REV. 407, 409–10 (1989) (arguing that the nexus of contracts concept is not entirely accurate and suggesting a replacement model); David Graver, Personal Bodies: A Corporeal Theory of Corporate Personhood, 6 U. CHI. L. SCH. ROUNDTABLE 235, 239–40 (1999) (arguing that the nexus of contracts theory “stretches unduly the notion of contracts” and “fails to account for the ways corporations act in the world”).

78. Graver notes that the courts have not been willing to examine the specific motivations of corporations in the same way they’ve been reluctant to examine the motivations of natural persons exercising constitutional rights. Graver, supra note 77, at 247. However, he argues that the situations are different and we should “draw sharp distinctions among fictional bodies of various types of organizations and accord each type of body constitutional rights based on the benefits or harms such rights for such bodies will bestow on humans.” Id.

79. Rule-utilitarianism seeks to effectuate rules that will generally result in the greatest good (e.g., a rule that physicians should keep patient confidences). Act-utilitarianism, on the other hand, focuses on individual acts and in each case evaluates what action will lead to the greatest good (which may or may not result in the physician maintaining confidentiality). See Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 345–45 (5th ed. 2001). Richard Lippke provides an example of this approach when he develops his theory of business ethics (and thus identifies the limits that society should place on corporate actions) based on the extent to which things advance or restrict individual autonomy. See generally Richard Lippke, Radical Business Ethics (1995).

80. See, e.g., Tara Radin, 700 Families to Feed: The Challenge of Corporate Citizenship, 36 Vand. J. Transnat’l L. 619, 653 (2003) (suggesting that the courts chose not to extend constitutional protections against double jeopardy and self-incrimination to corporations because the result would have been unjust).
animals.

In the absence of data, one might compare the characteristics of the entity in question to natural persons and infer whether excluding a particular protection would necessarily affect the rights of natural persons, based on similarities between the entity and natural persons. This is not a question about whether the Framers envisioned the entity in question as a "person," but whether the concept of "person" would or should encompass the entity given our current understanding of the term. 81 To the extent that an entity matches the relevant characteristics of entities which have all the characteristics of persons—e.g., adult competent human beings—that entity should be afforded personhood protections because to do otherwise would both be inconsistent and would undermine the rights sought to be upheld. Slavery is a good example. Even though the Framers did not envision slaves with constitutional rights (in fact many of the Framers themselves owned slaves), the entities they did envision as protected shared all relevant characteristics with slaves except skin color. The exclusion based on such a nominal characteristic undermined the strong protections for which the Constitution stands. In contrast to slaves, 82 corporations are not human beings and their exclusion from certain constitutional protections may not undermine the precepts upon which the Constitution is based, although this may have to be evaluated for each right in question. 83

D. Summary

In sum, determinations of both natural and juridical personhood rest on the evaluation of two issues: (1) interests of the entity, and (2) interests of others. Concerns about protection of the interests of others further breaks down into two issues. First, currently recognized natural persons may have an interest in identifying entities as legal actors who can have rights or obligations. The basis for this rationale is practical need, and it is not sufficient for according natural personhood. Since the goal is to protect the interests of currently recognized persons, the mere need to recognize a legal actor is not enough to limit the rights of other natural persons by including additional entities in the categorization.

81. This point is often confused. See, e.g., Mayer, supra note 70, at 657 ("A theory of original intent provides no basis for extending rights to corporations because these entities are never mentioned in the Constitution."). Mayer conflates original intent with textualism. Compare id., with David Graver, supra note 77, at 243-44 (advocating a constitutional theory of personhood which he calls "embodied consciousness" focusing on the Framers' intent, and highlighting "three elements: interiority, exteriority, and autonomy").

82. The rights of slaves, of course, are linked to their own moral status as well as the implications for other persons, whereas the rights of corporations are linked only to the interests of persons with moral status.

83. For a list of constitutional rights that have been applied to corporations see Radin, supra note 80, at 652.
Second, one might recognize entities as legal persons because the failure to do so would undermine the rights of currently recognized natural persons. This rationale is strong enough to provide a basis for either natural or juridical personhood. However, if the personhood designation is necessary to protect a particular right of previously recognized natural persons, then the rights of the newly recognized juridical person should be limited to those actually necessary to protect the threatened right, and should not infringe upon other rights to the extent possible.

Determining whether natural or juridical personhood is appropriate based on concerns about undermining the rights of currently recognized persons will not be simple. One needs to evaluate whether the entity in question is sufficiently similar to currently recognized natural persons. The earlier discussion of anencephalic infants provides one of the few examples where the entity is almost identical to currently recognized natural persons (e.g., normal infants who have interests and thus a claim to natural personhood protections), but is granted the natural personhood designation due not to its own interests, but based upon concern about protecting the interests of others. As noted previously, to argue that the interests of other natural persons cannot be sufficiently protected except by recognizing the new entity as a natural person itself cannot avoid a limitation of the rights of the currently recognized natural persons, because now these newly recognized natural persons will have equal rights. Rarely should this be the case, and anencephalic infants may be the only example. In most other situations, recognition of lesser legal status (e.g., juridical personhood) and fewer legal rights will suffice. The following section considers the implications of this personhood framework.

II. APPLICATION OF THE FRAMEWORK

I turn now to the application of the above analysis to two general "categories" of entities that have raised personhood questions: genetically human entities before birth and non-human entities such as animals or machines with artificial intelligence. The following subsections address the questions of legal personhood status for each entity in turn, primarily developing the concepts with respect to

84. See Mark Sagoff, Extracorporeal Embryos and Three Conceptions of the Human, Am. J. BioETHICS, Nov.-Dec. 2005, at 52, 54 (2005) (stating that, with respect to extracorporeal embryos, "[t]o determine ... moral status ... society cannot consult biological landmarks but must debate what is ethically permissible and culturally appropriate in view of the practical consequences and expressive properties of our decisions" and that "[f]rom a Kantian perspective we may help secure our own humanity by treating embryos with great respect").

85. And perhaps this is a reason to think that the legal treatment of anencephalic infants is incorrect and they should not be regarded as natural persons. Evaluation of this claim is beyond the scope of this Article.
embryos and fetuses, but also including some initial thoughts about the implications for non-human entities.

A. **Genetically Human Entities Prior to Birth: Embryos and Fetuses**

The logical place to begin is with the question of whether embryos are natural persons. If the answer is yes, it follows that all later developed stages (e.g., fetus) would also be natural persons. If the answer is no, then we must determine whether embryos/fetuses should be designated juridical persons, and at what stage of development the entity in question should be considered to be a “natural person,” and thus entitled to the full panoply of legal rights.

Currently, natural personhood designations are limited to human beings after birth. So the question for embryos is really a question of whether that designation (and all the rights that accompany it) should apply at some earlier stage of development prior to birth. If the answer to that is no, then we might consider whether the embryo should be given rights as juridical persons, and at what stage of development these rights should apply. Both inquiries begin with evaluation of the interests of the entities in question, and then move to evaluation of the interests of others in providing protections.


87. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (holding that the state’s interest in protecting the fetus becomes compelling at viability). There have been a few recent cases challenging the status of embryos or fetuses as persons under different areas of law. Although most of these address the actions of pregnant women, a few do not. For example, in one case a judge dismissed a suit filed against a stem cell research lab which tried to claim embryos were persons. See *California Judge Dismisses Lawsuit Against CIRM*, BNA Med. Res. Law & Pol’y Reporter, Nov. 16, 2005, at 22. In another case a judge rejected a claim that a pregnant woman and her fetus constitute two persons for purposes of driving in an HOV lane. See *NPR: Judge: Fetus Doesn’t Count in HOV Lane* (NPR radio broadcast Jan. 12, 2006), available at http://www.npr.org/templates/story/story.php?storyId=5151368. There are also some IVF cases that claim embryos are persons, although these claims have generally been rejected. See, e.g., Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1259 (Ariz. Ct. App. 2005) (holding that three day old pre-embryos are not persons under wrongful death statute).
I. Embryos

Unlike later developed fetuses or even some non-human animals, embryos exhibit none of the relevant criteria for having interests such as a brain or neural system (embryos are a mass of largely undifferentiated cells), sentience, consciousness, pain and pleasure perception, capacity to relate to others, or ability to communicate. However, embryos are genetically human and do have the potential to develop these various capacities. As one author puts it, embryos are not yet human beings, but are “human becomings.” Is genetic humanness and potentiality sufficient for according embryos the rights and privileges of either natural or juridical personhood? The biggest problem with using genetic humanness and potentiality as a standard is its broad implications. The advent of cloning technology means that any cell in the human body that contains a full complement of DNA has the potential to develop into an entity with interests, and eventually a person. These clones would...
arguably be legal and moral persons in their own right. If potential to become a full moral person is the basis for legal personhood, then every human skin cell, for example, would have a claim for personhood status. Potentiality is thus far too broad a basis for according personhood. Even the more specific characterization of “potential to develop into a unique individual” would not be a useful standard. Cloned individuals would be unique individuals, because of differences in environmental factors. Genetically identical twins are considered unique individuals, despite their shared genetic code. Moreover, embryos are not necessarily genetically unique since twinning is still possible. Therefore, potentiality alone should not be the basis for according legal status.

Since embryos themselves do not have interests and the potential to develop those interests is not sufficient, the only basis for legal personhood would be the interests of other currently recognized persons. Perhaps embryos should be designated as juridical persons because of the need to identify a legal actor? It is difficult to understand why this would be the case. Embryos have no interests (as defined by Feinberg and Steinbock) of their own that need protecting and there is no evidence that the interests of other persons suffer if embryos are not recognized as persons. To the contrary, recognition of embryos as persons may limit, and thus undermine, the rights of currently recognized persons.

Moreover, evaluation of whether embryos are the type of entity that should be covered by legal personhood protections leads to the same conclusion. Embryos share one characteristic with natural persons—they are genetically human, and clearly the U.S. Constitution is designed to deal with human entities. Nonetheless, despite the fact that embryos have the potential to share all characteristics with adult competent

93. Insoo Hyun and Kyu Won Jung distinguish between biological and circumstantial potential. See Insoo Hyun & Kyu Won Jung, Human Research Cloning, Embryos, and Embryo-Like Artifacts, 36 Hastings Center Report 5, 34 (2006). The first is “potentiality in the biological, quasi-Aristotelian sense of an entity’s gradually actualizing its preexisting potential.” Id. at 39. Circumstantial potential, by contrast, depends on circumstance and choice. Hyun gives the example of a medical student’s potential to become a physician. Id. Extracorporeal embryos may have biological potential (not all of them may be viable), but not necessarily circumstantial potential since they may never be implanted. Id.

94. Despite popular belief, clones would be unique individuals. Environment plays a significant role in development of identity. Thus, at most one could assure that the clone would be genetically identical, as are identical twins, but s/he would not be the same person. Even more complicating, some cells taken from an adult will have mutated, so each of those cells would in fact be unique, again creating a too inclusive standard for personhood.

95. See also David DeGrazia, Moral Status, Human Identity, and Early Embryos: A Critique of the President’s Approach, 34 J.L. Med. & Ethics 49, 53 (2006) (arguing that embryos are “precursor” organisms, not potential humans).

96. See supra notes 33-36 and accompanying text.
human beings, they remain easily distinguishable from the entities that are covered. Their exclusion from the protections normally afforded to "persons" would not do damage to the concept itself by creating arbitrary distinctions because embryos are vastly different from other protected persons both in terms of capacity and form. Embryos share no characteristics with infants, children, or adult competent human beings except genetics. The characteristic of shared genetics, however, is not sufficient by itself, since the resulting grouping would be both too broad (it would include every human cell) and too narrow (it would exclude a number of creatures who have significant interests, such as non-human animals). Nor do embryos share any characteristics except genetics with any other entities which are considered persons. Moreover, we exclude a variety of entities that share genetic characteristics with currently recognized natural persons from legal personhood protections. For example, cells and tissues from the human body are not considered persons, despite their genetic make-up. And sentient non-human animals that share over 98% of their genetic code with humans are not considered persons. In fact, granting embryos legal rights may do damage to the underlying precepts by limiting the rights of those who more clearly fit the framework.

In sum, there are neither interests of embryos, nor interests of currently recognized persons, that would justify granting legal personhood protections to embryos. Debates about embryo disposition should thus be primarily addressed through the application of property theory, as I have discussed elsewhere. Embryos should not be afforded

97. In this respect embryos are unlike corporations or other entities that have fixed characteristics.
98. John Nobel Wilford, Almost Human and Sometimes Smarter, N.Y. TIMES, Apr. 17, 2007, at F1 ("[J]ust a 1.23 percent difference in their genes separates Homo sapiens from chimpanzees...").
99. See Jessica Berg, Owning Persons: The Application of Property Theory to Embryos and Fetuses, 40 WAKE FOREST L. REV. 159, 162 (2005). My argument starts from the novel position that recognizing property interests in an entity does not preclude their recognition as persons. Thus, something might have legal personhood status and also be subject to property interests of other persons. At least one author has suggested that corporations are also both "persons" and "things." See Katsuhito Iwai, Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance, 47 AM. J. COMP. L. 583, 585 (1999). I argue that property rights are the appropriate basis for legal analysis of embryo disposition, asserting that property theory provides a conceptually better fit than the competing procreative liberty framework. See Berg, supra, at 163. Not only is the property framework conceptually accurate, it is normatively compelling; application of utilitarian, labor, and personality theories of property leads to the conclusion that individuals (specifically progenitors) can have property interests in embryos, fetuses, and even children. Id. Finally, property law provides both a descriptively accurate explanation of courts' decisions in embryo cases and also allows judges to draw on an existing framework of law to resolve disputes. Id. These arguments are developed and explored in my previous article. Id. For the current Article, the important point is that individuals have property interests in their offspring that must be considered in evaluating legal rights, and these property interests do not disappear upon the development of the entity's personhood interests. Id.
rights, the exercise of which would infringe on the rights of currently recognized natural persons. Thus while a state may choose to designate an embryo as a juridical person for certain, very limited, purposes, there is no compelling legal rationale for doing so, and thus no rights that must follow. Despite states' theoretical ability to do so, thus far only Louisiana has chosen to designate embryos "juridical persons." Furthermore, there may be significant limitations to what rights can be granted an embryo, as recognition of embryo rights will necessarily infringe upon the rights of natural persons. In some situations the infringement may be unconstitutional. As the embryo develops, however, it will develop interests, and those may form the basis for juridical or (eventually) natural personhood status.

2. Fetuses

The Supreme Court in Roe v. Wade held that a fetus is not a "person" under the Fourteenth Amendment of the U.S. Constitution. The resulting furor over the case, and subsequent three decades of jurisprudence, plunged this country into a battle for which the lines seem to be clearly and irrevocably drawn. At the base of these debates is the question of fetal personhood. Contrary to popular belief, the Supreme Court's pronouncement in Roe did not forestall all state determinations of legal personhood. Moreover, even if Roe is overturned, as some believe to be possible given changes in the composition of the Supreme Court, there will still be significant questions left unresolved about the legal status of fetuses and embryos. In other words, not only is the legal status of embryos and fetuses an open question under the current law of Roe v. Wade, but it will remain an open question even if the case is overruled. At the very least, if Roe is overruled, the Court is highly likely to allow the states to determine for themselves whether to accord fetuses legal status, rather than decide legal status itself as a matter of federal constitutional law.

If embryos should not be considered either natural or juridical persons, while infants once born are natural persons, there are two remaining issues for fetuses. The first question is at what point should the fetus be considered a natural person—should the relevant legal line remain at birth or be earlier? The second question is whether prior to the recognition of natural personhood, the fetus should be designated a juridical person with some, but not all, of the rights of natural persons. The previous section explored the limits of potentiality arguments, and

100. For a description of Louisiana law and the development of the statute, see Jeanne Louise Carriere, From Status to Person In Book 1, Title 1 of the Civil Code, 73 Tul. L. Rev. 1263, 1263-86 (1999). Other states, however, have attempted to define when life begins for purposes of feticide or child abuse statutes. See, e.g., Wis. Stat. Ann. §§ 48.01(1)(bg)(2), 48.02(1)(a) (1998).
they will not be repeated here. To the extent that the argument for recognizing legal personhood for fetuses rests on their potential to develop interests or to become a natural person at some future time, it fails for the reasons stated above.

Since the focus of this paper is on legal, not moral status, the evaluation of fetal interests is constrained. Legal and moral evaluations are intertwined, but not necessarily equivalent. As stated previously, moral status, or the lack of it, does not determine legal personhood status. An entity may lack moral status, but still be considered a legal person. Conversely, an entity may have moral status but not be considered a legal person. In such a case, the lack of legal recognition would not negate the entity's moral status, and the absence of legal obligations would not imply the absence of moral obligations.

The concern is not with determining at what point the fetus develops any interests, but at what point those interests should form the basis of legal personhood. This is a question of line drawing—legal personhood must come into play at some point in time even though fetal interests likely develop along a continuum. The law is a rather blunt instrument. Although there may be a way to achieve a somewhat nuanced legal approach by recognizing juridical personhood at an early stage of fetal development, and subsequently natural personhood at a later stage, both designations still must be based on fairly easily identifiable standards—in other words, we must still draw lines. The final determination of whether and how to draw distinctions between different developmental levels of human beings may depend on practical needs in identifying clear legal lines. If this is the case, then the lack of legal personhood recognition will not negate the moral claims of the entity in question. The entity may still have certain moral rights, and others will have moral obligations to respect those rights.

There are a number of possible biological events that can be used to determine legal status, each having significance in different ways. I will not go through all the potential biological landmarks in the subsections that follow. Rather, this section considers the legal significance of, and interplay between, three important factors in fetal development: sentience (consciousness), birth, and physical development. I choose not to focus on viability since it is a changing line (as technology improves, viability will push back towards conception), as well as an incredibly imprecise standard—does the standard mean viable for a minute, an hour, a day, a week, a month, or longer?

a. Sentience

Prior to the development of sentience, which occurs in the latter part of the second trimester, the fetus does not have interests of its own and thus does not have the requisite basis for natural personhood. Sentience,
or conscious awareness, is necessary to feel—for example, fetuses cannot perceive pain prior to sentience (and thus have no interest in avoiding pain).\textsuperscript{103} Sentience cannot occur until the neural system is sufficiently developed to allow for brain functioning and consciousness, at around twenty-two to twenty-four weeks.\textsuperscript{104} While this currently provides a rough match with the present standards for viability, unlike viability the timeline will not change as medical technology advances. Eventually artificial womb technology may suffice to keep the \textit{ex utero} fetus alive from the embryonic stage, and allow development to continue. But prior to sentience the fetus will not have interests, regardless of its location in or outside the body. This is not to say that artificial womb technology should not be used prior to sentience, but merely that its use cannot be based on regard for the fetus's own interests, but must refer to the interests of others.

I have pointed out previously that natural personhood is rarely, if ever, granted merely on the basis of the interests of others. It is hard to understand how the interests of currently recognized people would suffer if we do not include non-sentient fetuses on an equal legal footing. Fetuses are not currently recognized as natural persons, and there is little or no evidence that the legal rights and interests of currently recognized persons have suffered. An argument to recognize fetuses as natural persons should bear the burden of showing that the interests of others are harmed, or else it must rest on the interests of the fetus itself. As noted above, prior to sentience fetuses lack interests of their own, under the Feinberg/Steinbock approach, thus juridical personhood prior to sentience would be inappropriate. Arguably, the Supreme Court jurisprudence recognizing increasing state interests after viability (which maps roughly onto sentience) is compatible with the notion that prior to sentience the interests at stake (those of others, not the fetus) are too weak to provide significant legal protections for the fetus itself. Others are certainly free to reject the Feinberg/Steinbock concept of interests, and attempt to develop a different theory of interests that would apply to fetuses. My point is that if fetuses are to be considered natural persons because of their interests, an argument must be made that they have interests, using a coherent understanding of the term that can be applied across different entities. If fetuses are to be considered natural persons because of the interests of others, there must be some argument about how the interests of others are harmed by the exclusion of fetuses in the category of natural persons. All of this is not to say that fetuses are not

\textsuperscript{103} Pain perception may occur even later than the onset of sentience. See, \textit{e.g.}, Susan J. Lee et al., \textit{Fetal Pain: A Systematic Multidisciplinary Review of the Evidence}, 294 J. A.M.A. 947, 952 (2005) (concluding that given the timeline for neural development, it is extremely unlikely that a fetus perceives pain before twenty-seven to thirty weeks gestation).

\textsuperscript{104} STEINBOCk, supra note 33, at 84–85.
entitled to legal protection, or that juridical personhood is not a possibility, merely that natural personhood prior to sentience is not warranted.

But what happens after sentience? At this point fetuses have claims based on their own interests. What would be the effect of granting natural personhood status to fetuses when they reach the point of sentience? Significantly greater restrictions on abortion would result as states would have an obligation to protect fetuses, just as they now do to protect already-born children. Moreover, designating fetuses as natural persons prior to birth would limit the rights of other currently recognized natural persons—particularly pregnant women whose decisions during pregnancy might be constrained in the same way that parents’ decisions are constrained by the interests of their already born children. Fetal interests at the point of sentience are not strong enough to justify these limitations. Arguably newborn interests at the point of birth are not sufficient either. Rather, the natural person designation at birth is based on protection of the interests of others. However, during the prenatal period, the interests of others are not strong enough to justify granting fetuses full natural personhood status or protections while still in utero based solely on sentience—other factors must also be present. Those who disagree with this position should have the burden of showing that limiting the rights of others (by designating fetuses as natural persons) would be necessary in order to fully protect the rights of currently recognized people.

Would it be appropriate to consider a sentient in utero fetus a juridical person with certain legal protections prior to birth? The answer here is likely yes. It would be a matter of state choice (as are other juridical personhood designations). Those states that choose to afford sentient fetuses juridical personhood status would need to align the rights given to the interests at stake. The fact that sentience is not possible prior to twenty-two and twenty-four weeks gestation does not mean that the fetus has fully developed cognition and perception. At this point, for example, the fetus may not be able to feel pain, and thus has no interest in avoiding pain. If this is so, a state should not be able to require fetal anesthetic use during all abortions at twenty-two weeks based on sentience. Legislation providing specific protections prior to birth, but

105. See Lee, supra note 103, at 952. A few letters written in response to the article questioned the twenty-seven-week cut-off point, but even these individuals did not question the lack of pain perception before sometime late in the second trimester. See Laura Myers et al., Bobbi Lyman, Brian Sites, Letters to the Editor, 295 J. A.M.A. 159, 159–60 (2006).

106. Perhaps there are other interests that might justify such a requirement, although it is a more difficult argument to make. For example, requiring that women be informed after twenty-two weeks, that abortions may cause fetal pain may be based on the state’s interests in preserving fetal life (assuming that some women will choose not to undergo the procedure if told the misleading
after sentience, is an area which states might explore in more detail.

b. Cognitive and Physical Development

The closer to birth, the greater the interests of the fetus, and the greater the interests of others in providing the same kinds of protections as are granted to currently recognized persons such as children. If we give newborn infants legal protections based on these interests, why not fully developed fetuses? It is hard to understand why an entity at this stage should not be considered as having equal legal status as an entity outside the womb. But one problem with a “development” standard is that it does not take into account fetuses that have problems in development. As a result, we might set the standard based on gestational age, rather than “full development.”

At the end of the eighth month of pregnancy (thirty-two weeks), in most cases, all of the fetus's internal and external organ structures have substantially developed. Natural personhood and thus constitutional protections could apply at this late stage of development. The result would change in the analysis of both abortions and forced caesarian-sections after this time point—the rights of the pregnant woman would be balanced against the rights of a “fetal natural person.” I will discuss this in more detail in the following section. While it may be tempting to change the timeline for according natural personhood, there are reasons to be wary. First, fetal age determinations can be inexact. Second, even in the absence of natural personhood protections prior to birth, the fetus is entitled to significant moral status—status which may be recognized under a juridical personhood framework. Pregnancy terminations at this point are highly restricted; except in cases of severe fetal abnormality, they are almost always undertaken with the goal of achieving a live birth (e.g., ending the pregnancy, but not the life of the fetus). In cases of severe fetal abnormality, the issues raised are similar to those raised by neonatal euthanasia. The only difference is the added complication of the pregnant woman’s right of bodily integrity, which plays a significant role in the analysis and does not change if the fetus is considered a natural person. As a result, it may not be necessary to consider the fetus a natural person prior to birth to achieve fetal protections, and may significantly complicate the situation to do so.

107. Additionally, at this point infant mortality rates decrease as compared to preterm births before thirty-two weeks. See Michael Kramer et al., The Contribution of Mild and Moderate Preterm Birth to Infant Mortality, 284 J. A.M.A. 843, 844 (2000).


109. This is not to say that the neonatal euthanasia is simple, but that the situations should be considered comparable. See Carl E. Schneider, Rights Discourse and Neonatal Euthanasia, 76 CAL. L. REV. 151, 175-76 (1988) (discussing neonatal euthanasia).
Juridical personhood based on developmental or gestational age may be appropriate. This is already done implicitly by states which accord fetuses limited rights prior to birth by recognizing a variety of causes of action for harm done to fetuses at different stages of development. Alternatively, gestational age might serve as a bright line cut-off for sentience. Thus a state might explicitly grant juridical personhood protections at twenty-two weeks gestation, on the assumption that for a normally developing fetus that point marks the earliest time at which sentience is possible. For fetuses which are not experiencing normal development, the presumption of personhood could be rebutted—much as is done currently in determining viability or lack thereof.

c. Birth

There are practical reasons for choosing birth as the latest point at which personhood protections adhere, and thus at which the label “natural person” must be applied. Likewise, a fetus born prematurely, but after sentience, should also be considered a natural person and treated as a full-term newborn would be treated under the law. Except in the absence of brain material or brain activity, it is practically impossible to determine sentience using current medical technology, and treatment decisions for premature neonates are based on rough approximations of development, rather than evaluations of sentience. But what about a fetus “born” clearly prior to sentience, as might be the case if artificial womb technology advances?

The answer depends on whether there are interests of others in according legal personhood protections, as is the case with anencephalic infants. Unlike anencephalic infants, however, these entities may not

110. In fact, it may become possible to fertilize and develop a fetus completely outside the womb. See generally ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION (Scott Gelfand & John R. Shook eds., 2006) (discussing ectogenesis).

111. There are also fetuses born prior to viability, which live for a brief period of time. In one case the court determined that the lack of viability meant the fetuses could not be considered “persons” under the Ohio wrongful death statute. See Griffiths v. The Rose Ctr., No. 2005CA00256, 2006 Ohio App. LEXIS 1474, at *10 (Ohio Ct. App. Mar. 29, 2006).

112. Also of interest would be cases of fetal surgery where the fetus is either partially or fully removed from the womb temporarily or the uterus is removed from the woman temporarily. See generally Maggie Jones, A Miracle, and Yet, N.Y. TIMES MAGAZINE, July 15, 2001, at 40-43.

113. Becker identifies the eighth month of development as the time of “metamorphosis.” Becker, supra note 43, at 345. He goes so far as to suggest that a fetus born before metamorphosis is complete, such as an extremely premature infant, should be regarded as the birth of a human becoming. Id. at 345-48. But cf. Nealis v. Baird, 966 P.2d 438, 454 (Okla. 1999) (conceding that there may be a distinction between biological existence and personhood, but rejecting the idea that the distinction extends beyond live birth). There are also issues of when to withdraw legal status protections from a human being that no longer meets the moral status requirements. See Douglas O. Linder, The Other Right-to-Life Debate: When Does Fourteenth Amendment “Life” End?, 37 ARIZ. L. REV. 1183, 1188 (1995) (“When history and constitutional text yield ambiguities rather than answers, constitutional interpretation should be guided by the moral and economic consequences that might follow from
share any form with later developed humans. Would an eight-week old fetus be considered a legal person if in an artificial womb? The interests of others do not seem strong enough to accord natural personhood protections in this case. But this may be a situation in which juridical personhood protections are appropriate. A living but pre-sentient fetus outside the mother's body (in an artificial womb) creates an unusual situation. *In utero* fetuses have the ancillary protections of their mother's legal personhood. But *ex utero* fetuses would not have these protections. While parental property interests would function and may provide a basis for decision making and control (as they do in the *ex utero* embryo context), we may well need the additional identification of the developing *ex utero* fetus as a separate legal actor. As artificial womb technology advances, this question should receive more thought and analysis.

**d. Summary: Juridical to Natural Persons**

Thus far I have argued that sentience is crucial for the development of fetal interests, and birth and external form each play a role in considering the interests of others. The same constraints that limit the scope of juridical personhood rights for embryos function in the pre-consciousness context for fetuses. Granting juridical personhood status to fetuses prior to sentience may undermine the rights of currently recognized persons—for example pregnant women's rights to make a variety of decisions in the first trimester would be limited. Even apart from abortion decisions, if we grant fetuses such status, women may have constraints placed upon their decisions to engage in risky activities, or to partake of legal substances that are harmful to the fetus. In order to justify this, proponents would need to show that the legal recognition was necessary in order to safeguard rights of currently recognized natural persons, and that the result would be a greater protection of the rights of natural persons overall. This is an extremely difficult argument to make, and may fail in many situations. Arguments that the lack of legal recognition of fetal rights prior to sentience harms the rights of people generally, ignores the harm to the rights of people resulting from the recognition itself. Thus prior to sentience the fetus should be considered neither a natural, nor a juridical person. There may be restrictions on what can be done with fetuses born extremely early, either because of an interrupted pregnancy, or because they were never implanted after *in vitro* fertilization, but these limitations are not based on the personhood status of the fetus. The interests of others can function to limit many actions, without resulting in personhood status for the entity in question. Consider, for example, legal restrictions related to actions involving

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114. See Berg, supra note 99, at 214.
endangered species. We may not be allowed to destroy the habitat of a particular type of frog, regardless of whether that frog can make any claim to personhood. The protections are based on the interests of others in maintaining the diversity of species on this planet, not necessarily on the interests of the species itself. Likewise, there may be a variety of restrictions on what can be done to a pre-sentient fetus based on the interests of currently recognized persons.

Birth, after sentience, is sufficient for natural personhood status—not because the interests of the fetus are any greater with the birth, but because the interests of others in affording full natural personhood protections are strong enough to grant natural personhood. This is true regardless of the physical development of the child. Birth without sentience due to developmental problems, but at the point of significantly complete physical development, also provides a basis for natural personhood, again based on the interests of others. Substantially full physical development (eighth month of pregnancy or later) combined with sentience may be sufficient to accord the fetus the protections of natural persons, but careful consideration should be given to the practical effect of such designation.

In the period of time between sentience and natural personhood, there may be reasons to provide fetuses the status and protections of juridical persons. Sentience does not mean that the fetus attains equal status with adult competent human beings, merely that the fetus has characteristics that can form the basis for personhood protections based on its own (rather than other's) interests. Moreover, as the fetus develops closer to a newborn infant, both its interests and the interests of others that form the basis for juridical personhood protections may increase. The following section discusses some initial implications of this proposed framework.

e. Implications

My goal here is not to provide a full analysis, nor even a complete summary of the relevant issues, but rather to begin to refocus, in light of my proposed framework, the debate in some of the most highly contentious areas of law such as abortion and medical interventions on behalf of a fetus. Paradoxically, perhaps, the framework I suggest should

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115. See Sunstein, supra note 15, at 1339-40. Sunstein, however, would argue in favor of legal standing for animals. Id. at 1336.
116. Steinbock, supra note 33, at 24 ("[The interest view] . . . does not locate beings on a scale of moral importance. In particular, it is silent as to whether all beings who have moral status have it equally. Perhaps such features as species membership, rationality, and potentiality are relevant to moral status, providing principled reasons for counting the interests of some beings more heavily than others.").
117. See Strong, supra note 51, at 41-62 (suggesting that moral status increases along with fetal development).
not result in drastic changes in current laws. This is one of the strengths of the proposal, as it should not result in great legal upheaval. The most significant change should be in how the cases are analyzed, and the basis for evaluating future cases that do not fit well under the current model (such as fetuses in artificial womb environments). The shift in focus should clarify the issues that need further evaluation, and move us away from the simplistic, and misguided, assertion that Roe's determination about whether the fetus is a person under the Fourteenth Amendment is the only relevant question.

To begin, I want to make two, interrelated, points. The first is that fetuses are considered persons already under the laws of many states.118 The second is that this recognition should be explicit and fetuses should be labeled juridical persons for purposes of the application of these rights. The status designation serves a number of purposes. It emphasizes that the rights in question are rights of persons, but those of a juridical person, not a natural person. To some extent this clarifies the apparent inconsistency between laws allowing abortions, for example, and laws allowing tort suits for pre-birth injuries. It is not that fetuses are considered persons for some laws and not for others, but that they are considered juridical persons with specific, but not complete, rights. Finally, explicit recognition allows states to identify specifically the rights in question that go with the status, rather than simply assert that the fetus is a “person” (without limitation) for some purposes and not a person for others. This should result both in more detailed policy discussions about allowing fetuses certain “personhood” rights, understanding that the recognition of the rights limits the rights of existing natural persons, and also more attention paid to why we grant certain juridical personhood rights to various entities, and whether those should be limited or even extended. As a result, we may choose to provide personhood protections for sentient fetuses without granting them the same rights as fully recognized natural persons. Juridical personhood is not a unitary concept; there are different kinds of juridical persons and different rights which may adhere. To the extent that states have discretion in determining which entities will be considered juridical persons, they may make different choices about the types of rights which they grant sentient fetuses. This has already proved to be the case, as demonstrated by the vast array of prenatal laws currently in place.

There is little in the above analysis that should change abortion laws which apply prior to twenty-two to twenty-four weeks, that is, prior to the development of sentience, other than to reinforce that the restrictions before this time period cannot be based on fetal interests.119 The above

118. See, e.g., sources cited supra note 100.

119. Most of the statutory restrictions are based on state interests in potential fetal life, not directly
framework may, however, have some implications both for evaluations of abortion restrictions post-viability and for prenatal and medical care decisions made by a pregnant woman towards the very end of the pregnancy. The current “undue burden” test articulated in Planned Parenthood of Southeastern Pennsylvania v. Casey\(^ {120} \) and reaffirmed by Stenberg v. Carhart\(^ {121} \) is based on balancing the interests of the woman making the abortion decision against the interests of the state. Certainly this balance would still be a factor even if the fetus is granted additional legal rights. That is, the state would still have interests which may need to be balanced against the individual’s interests.

Designating fetuses as legal persons, however, would create a situation in which the fetus’s interests would have to be taken into account on their own (not simply indirectly as is now done through the state’s interests in protecting potential life). Thus the analysis would look more like the analysis that takes place in the context of parental decisions regarding minor’s medical care—specifically, refusal of life-sustaining medical treatment. Others have pointed out that the language of “rights” is less helpful in the parental decision-making context, since “parental rights” do not rest on any clear constitutional basis.\(^ {122} \) In contrast, the abortion situation does involve constitutional rights of bodily integrity.\(^ {123} \) Weighing the rights of one natural person against another natural person is difficult. To the extent a fetus is considered a natural person, the abortion debate will have to consider how to weigh the woman’s right of bodily integrity against the fetal right to life. Although a complete analysis is beyond the scope of this Article, we can draw some initial conclusions. Since there are no laws requiring parents to sacrifice their lives for their children, it would be hard to imagine that we would accept a legal requirement to do so in the context of pregnancy. Thus between the woman’s right to life and the fetus’s right to life, the woman’s legal rights should be given preference. Harder, of course, is the balance between the woman’s right to health, and the fetus’s right to health or even life. The varying opinions either allowing or disallowing forced c-sections for almost full-term pregnancies is evidence of the difficulty courts have weighing these issues.\(^ {124} \) The framework I have suggested here should encourage a shift in thinking about these issues to focus on the parallel between this situation and

\(^{121}\) 530 U.S. 914, 938–46 (2000).
\(^{122}\) Schneider, supra note 109, at 157–161.
\(^{123}\) Of course the question will be how extensive that right is and what it entails.
others that involve direct conflicts between the health/life of one person and the health/life of another. Moreover, it should lead to greater evaluation of the concept and extent of so-termed “bodily integrity” rights.\(^{125}\)

My proposal should have three significant advantages over the current mode of analysis. First, it will allow states to “experiment” in finding the best system of recognizing and balancing legal rights in cases involving embryos and fetuses. Since legal personhood should no longer be viewed as a closed question, states should be free to consider how best to accord juridical personhood status. Second, it should allow us to find better and conceptually more appealing answers to new debates in reproductive law. This will be extremely important as reproductive technology advances and the legal cases continue to move away from the traditional abortion context. Finally, it may achieve a compromise position in an area that has thus far been marked by heated and divisive commentaries.

B. NON-HUMAN ANIMALS AND ARTIFICIAL INTELLIGENCE

Although I have focused primarily on embryos and fetuses thus far, the framework suggested here may be applicable to other entities. The idea that we might exclude from legal status an entity that meets all the attribute requirements for equal moral status with currently recognized persons, but that is not genetically human, raises the question of why genetic humanness matters.\(^ {126}\) It seems inconsistent to argue for the extension of legal protection to a non-sentient multi-celled human organism in the beginning stages of development (i.e., an embryo) and withhold such protections from fully developed sentient, and perhaps even rational, non-human animals.\(^ {127}\) If genetics is the sole basis for legal personhood, there must be some explanation as to why this characteristic is so important.\(^ {128}\) Thus far no one has provided a satisfactory argument

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125. Given the post-viability time period, abortions would not be permissible in most states except to save the mother’s life/health, or, in a few states, because of severe fetal abnormalities. The former case involves a balancing of mother’s interests against fetal interests. The latter case may rest on a determination that the fetus in question does not have interests or has lesser interests because of the abnormalities. This determination may be more controversial since it rests on the assumption that we can evaluate sentience/interests based on disability. I have suggested that this is extremely difficult in most cases but perhaps not impossible. See Schneider, supra note 109, at 170 (discussing the conservative dislike of attempts to distinguish between people based on worth).


127. Bernard Rollin takes this a step further and points out that if the potential to become rational is sufficient reason to grant non-rational humans moral status, animals should also be afforded moral status because they have the potential to evolve into rational beings. See Bernard Rollin, Animal Rights and Human Morality 33–34, 50 (rev. ed. 1992).

Apart from concerns about consistency and fairness, withholding legal personhood protections from an entity that clearly meets all criteria for moral personhood is not a priori improper, as long as the interests of the entity in question are respected. The danger, of course, is that society has tried in the past to limit the legal rights of entities that clearly met all requirements for moral personhood—e.g., women and slaves—and the results were highly problematic, not only because violations of moral rights occurred, but because the exclusion of such entities from the system of legal protection per se undermined moral rights. In other words, at some point the moral and legal rights may be so intertwined that it is impossible to respect moral rights without also granting legal rights. But the situations of women and slaves may be unique in that they are groups that are both human and meet the moral requirements for personhood (e.g., they shared all characteristics/capacities with other fully recognized legal persons, except sex or skin color). By contrast, restrictions on the legal status of entities that fail one or the other attributes (e.g., non-human animals) may not prevent recognition of their moral rights.

Part of the difficulty in accepting legal status based on moral claims of non-human entities may stem from a mistaken insistence on "all-or-nothing" designations. Categorically determining what entities lack any moral status, such as a rock, is fairly simple. But most claims of moral status map along a continuum. Using such an approach, many animals would be granted moral status based on interests, but their placement on the moral hierarchy may be lower than that of human persons. Legal

and stating that a criterion of personhood "must have some plausible connection with the possession of certain moral rights" and "[t]here must, therefore, be some reason for thinking that it is in virtue of an entity's possessing just these properties that it has such rights, that these properties mark the crucial watershed between entities with these rights and entities without them").

129. For example, it is common knowledge that humans and chimpanzees share over 98% of their genetic code. See, e.g., Wilford, supra note 98. It is unlikely that the 2% genetic difference is a sufficient basis for according legal personhood, without some consideration of other factors.

130. Of course this was part of what was at issue at the times when women and black people were excluded from legal protections. Both were thought to be intellectually inferior to white men, and lacking the criteria necessary to be considered of equal moral status to white men. Black people were also sometimes referred to as "sub-human," a label which presumably was designed to imply that black people were not even human and thus had even less claim to legal status.

131. Some advocates for animal rights accept the analogy with women and slaves and argue that the denial of rights to "nonhumans endowed with intentionality . . . does not simply deprive the victims of the objects of their rights, but is a direct attack on those very rights themselves." Cavalieri, supra note 126, at 142-43. Others reject the analogy. See, e.g., Richard Epstein, Animals as Objects, or Subjects, of Rights, in Animal Rights, supra note 126, at 143, 151. It will be interesting to consider the future legal status of chimeras (animal-human) mixes, particularly those that are sentient. See, e.g., Jamie Shreeve, The Other Stem-Cell Debate, N.Y. Times Magazine, Apr. 10, 2005, at 42-47.

status might follow this hierarchy. For example, some authors assert that
great apes and dolphins should be considered legal persons based on
their mental and emotional similarities to human beings. Perhaps we
should develop a system of lesser legal status for non-human animals.
The fact that the law as it is currently written does not include non-
human animals does not mean that it could not be altered to recognize
the rights of entities with varying moral status. Rather than do so by
creating new categories, I argue that is what could be done with the
concept of "juridical personhood."

There are good reasons to consider whether sentient animals should
be given juridical personhood protections. These may not be equivalent
for all sentient creatures, but, as with developing human fetuses, may
vary depending on the interests at stake. Thus far no state has chosen
to provide any legal rights directly to animals; animal welfare laws
protect the interests of natural persons in preventing harm to animals.
This, like fetal juridical personhood, is an area ripe for state
experimentation. If animals are to be considered legal persons with specific rights based on their own interests, the protections should reflect and be commensurate with those interests.

It is less appropriate to grant legal status to non-human animals based on concerns about the effect on other persons of withholding such legal status. There is little evidence, for example, that failing to recognize animals as juridical persons, or failing to give them particular rights, harms the exercise of those rights for human persons. The closest argument to this, sometimes used to justify animal welfare laws, is that cruelty to animals is linked (or may lead to) cruelty to humans. Even if this is true, this may not justify granting juridical personhood to animals, but merely laws designed to prevent cruelty to animals. In such a case, the lack of legal recognition would not negate the entity's moral status, and the absence of legal obligations would not imply the absence of moral obligations. Thus we may have a moral obligation not to be cruel to animals, whether or not we have a law against such cruelty.

Additionally, should scientists succeed in creating sentient machines, our society will have to consider whether those machines may also lay claim to legal personhood protections. Here, both justifications for juridical personhood function—some machines may have interests sufficient for legal status, others may be so human-like in form that excluding them from personhood status will harm the interests of current humans. Like the Replicants in Philip K. Dick's novel-turned-movie, Blade Runner, the creation of such entities will challenge our conventional notions of what it means to be a person, and our recognition of what legal rights should follow. Perhaps the creation of such entities will force greater attention to the question of legal personhood status, since the discussion in the context of embryos and

137. Moral obligations may not preclude killing of the entity in question. See, e.g., Ronald Green, supra note 28, at 44 (suggesting that “one can use an entity (embryo; animal) in research, and even kill it when necessary, without necessarily failing to respect the moral claims that the entity has on us”).
140. See BLADE RUNNER (Blade Runner Partnership 1982).
fetuses is marred by the strong feelings underlying the protracted abortion debate.

CONCLUSION

This Article explores and develops a model for according legal personhood, arguing that natural personhood designations are extremely limited and that juridical personhood designations should be explored in greater detail. The work here is by no means complete. The implications are not fully developed—rather I stress how this new framework might function to shift the focus of debate.

The purpose of the work done here is to stress that “legal personhood” is a rich and complex area of law. In the reproductive area, arguments framed in terms of “pro-life” and “pro-choice” have thus far been unsuccessful in moving dialogue forward. Likewise, simplistic assertions of embryo, fetal, or non-human animal personhood, without considering the justifications for such designations, also fail to provide sufficient resolutions. Creative solutions are necessary. The analysis of legal personhood proposed in this Article is an attempt to provide one such solution. Its success will be measured, in part, by the debate it engenders.
The subject of this Note is the object of the law, and in particular the law's use of the term "person" to denote that object. John Chipman Gray observed that "[i]n books of Law, as in other books, and in common speech, 'person' is often used as meaning a human being, but the technical legal meaning of a 'person' is a subject of legal rights and duties." Though a pithy definition of legal personality, it leaves much unsaid. Although Gray's comment raises the problem of law's object, it assumes that this object may be readily identified. This ignores the antecedent problem of what — and who — is governed by the law. Gray's formulation further presupposes a sharp separation between the commonplace understanding of what it means to be a person — that all humans are persons and all persons are humans — and the legal metaphor "person," which may exclude some humans and include some nonhumans. This characterization, however, fails to attend to the relationship between these two meanings. Courts have not been able to distinguish cleanly between these two points of view, alternately treating the issue of personhood as a commonsense determination of what is human or as a formal legal fiction unrelated to biological conceptions of humanity. Furthermore, the expressive dynamic through which law communicates norms and values to society renders impossible a clear divide between the legal definition of "person" and the colloquial understanding of the term. This Note considers the legal metaphor "person" from a transsubstantive point of view, focusing directly on the problems and meaning of legal personality.

* This title was inspired by the title of a Raymond Carver short story, What We Talk About When We Talk About Love, reprinted in RAYMOND CARVER, WHERE I'M CALLING FROM: NEW AND SELECTED STORIES 128 (1988).


2 Though Gray refers to persons as denoting "a subject of legal rights and duties," this Note will use the term "object" to refer to the things to which law applies.

3 Some writers have attempted to address these problems but have generally done so in a highly specific manner, scrutinizing the legal category of "person" only to ask whether it does or should include a particular, borderline entity. See, e.g., Steven Goldberg, The Changing Face of Death: Computers, Consciousness, and Nancy Cruzan, 43 STAN. L. REV. 659 (1996) (considering the legal personhood of individuals in permanently vegetative states); Lawrence B. Solum, Legal Personhood for Artificial Intelligences, 70 N.C. L. REV. 1231 (1992) (artificial intelligence); Michael D. Rivard, Comment, Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species, 39 UCLA L. REV. 1425 (1992) (transgenic humanoid species).
While personhood may not be an inevitable means of identifying law's object, it is unquestionably central to American legal culture. The law uses personhood as a primary means of specifying its object, and although no coherent body of doctrine or jurisprudential theory exists regarding this legal metaphor, a set of rhetorical practices has developed around it. Moreover, the issue of personhood is woven into some of the most essential sources of American law and lies at the center of some of our most wrenching historical and contemporary legal controversies. Through law's expressive function, this metaphor reflects and communicates who "counts" as a legal person and, to some extent, as a human being. Part I examines courts' approaches to the law of the person and then considers examples from three areas in which the American law of the person has developed — human nonpersons, nonhuman persons, and borderline cases — and then reflects on the character of the law of persons expressed in these areas. Part II considers the implications of the current state of the law of the person, noting the disaggregation of the American law of the person in light of law's expressive dimension and suggesting that American law's anxiety in this regard reflects a basic ambivalence about the social status of the object specified and about unitary definitions of personhood and humanity.

I. THE LAW OF PERSONS: THEORY AND PRACTICE

A. Defining the Law of Persons

The phrase "law of the person" can refer narrowly to the meaning of the legal metaphor "person," as courts have interpreted it when construing the common law or an ambiguous statute. For the most part, "person" refers to a living human being, but borderline cases that challenge courts to make statements about legal personhood arise often and create interpretive difficulties. More broadly, though, the law of the person raises the fundamental question of who counts for the purpose of law. Not all laws refer to their objects as persons, or even as human beings, but this does not mean the issue of personhood — or at least the issue of law's object, which personhood specifies — evaporates in the absence of this particular language. Even laws that do not explicitly refer to persons signal the issue by including or excluding

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4 The law could — and does — define its object otherwise, for example, by referring to "citizens" rather than "persons." See, e.g., 28 U.S.C. § 1332(a) (1994) (limiting federal diversity jurisdiction to "citizens" and foreign states). Alternate specifications of law's object, however, may themselves depend on the definition of "person."
certain categories of individuals, either explicitly or through judicial interpretation.5

The question of legal personhood does present problems in most cases precisely because personhood is commonly equated with humanity. The Supreme Court relied on this biological conception of personhood in *Levy v. Louisiana,*6 arguing that "illegitimate children are not 'nonpersons.' They are humans, live, and have their being."7 Yet legal personhood is frequently extended to nonhumans, most conspicuously to corporations. The most difficult issues in the law of the person arise when considerable disagreement exists as to whether the entity in question can be regarded as human. The Supreme Court has famously spoken to this point, emphasizing in *Roe v. Wade*8 that fetuses are not persons within the meaning of the Fourteenth Amendment's Due Process Clause.9

These doctrinal distinctions reflect the absence of a theoretically unified judicial approach to legal personality. Although the literature of legal theory abounds with attempts to make sense of what it means to be a person,10 judicial opinions relating to legal personality have incorporated few, if any, of these ideas. Judges not only fail to invoke philosophical support for their ideas of personality, but also inconsistently apply jurisprudential theory in resolving problems of legal personhood, approaching it more as a legal conclusion than as an open question. The following three examples illustrate the theoretical unmooring and doctrinal disarray of the American law of persons.

B. The American Law of Persons

1. Human Nonpersons. — That slavery raises fundamental issues of legal personality is almost self-evident. If slaves are regarded as persons, how can one reconcile this fact with their treatment as a form of property? Judges tended to adopt robust visions of legal personality in the limited number of situations in which they wanted to treat slaves as legal persons, but readily retreated to a narrower, citizenship-oriented notion of legal personality when that characterization better suited their purposes.

Slaves' treatment under the criminal law provides an example of states' hewing closely to a robust understanding of slaves' personhood.

5 See, e.g., infra p. 1756.
7 Id. at 70.
8 410 U.S. 113 (1973).
9 Id. at 158, 162.
10 See generally, e.g., THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY (Michael Carrithers, Steven Collins & Steven Lukes eds., 1985) (discussing philosophical conceptions of the person).
For the most part, judges read laws proscribing the killing of persons to prohibit the killing of slaves. In many of these cases, courts stressed slaves' essential humanity and — with a lack of irony that astonishes the modern sensibility — reflected on the necessity of so determining a slave's legal personality to maintain a civilized, decent society. However, the ability of judges to inject their own views on the legal personhood of slaves declined throughout the nineteenth century, as emerging slave codes created a body of statutory rules that rendered common law adjudication less necessary. These rules generally sidestepped the issue of legal personality by making it a felony to kill a slave, rather than by taking a position on whether slaves counted as persons for the purpose of the common law crime of murder.

The law also treated slaves as persons by holding them as publicly accountable for their crimes as nonslaves. This broad characterization of slaves' legal personhood permitted an anomalous litigation tactic in which slaves argued that they were not legal “persons” and that they were therefore outside the ambit of the criminal law. In United States v. Amy, for example, a young slave girl stood accused of stealing a letter from a post office in violation of a federal act that prescribed two years' imprisonment for “any person” who committed such an offense. To Amy's argument that she was not a legal person because she was a slave, the prosecutor rejoined, “I cannot prove more plainly that the prisoner is a person, a natural person, at least, than to ask your honors to look at her. There she is.” Sitting as a circuit justice, Chief Justice Taney rejected Amy's reasoning and embraced the robust view of slave personhood, stating that he could conceive of “no

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11 E.g., State v. Coleman, 5 Port. 32, 39 (Ala. 1837); cf. State v. Jones, 1 Miss. (1 Walker) 83, 85 (1820) (holding that the common law crime of murder extended to killing slaves). But see Neal v. Farmer, 9 Ga. 555, 583 (1851) (holding that common law felony murder did not include killing slaves); cf. Mark Tushnet, The American Law of Slavery, 1810–1860: A Study in the Persistence of Legal Autonomy, 10 LAW & SOC'Y REV. 119, 120 (1975) (noting that after the passage of Mississippi's slave codes, the state supreme court held that common law conceptions of personhood did not include slaves).

12 Whether these opinions actually did reflect such generous spirits on the part of their authors is questionable. Cf. ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 158-60 (1991) (questioning whether judges' opinions reflected community views or had any precedential weight). Here, though, the rhetorical value of the opinions' expression of slaves' legal personhood is the real issue, and that value is amply reflected in these documents. See id. at 129-31.

13 The scattershot nature of the law of persons diminished during the final few decades of American slavery, as slave codes replaced common law as the primary source of law. See Tushnet, supra note 11, at 131-37 (1975).

14 See 80 C.J.S. Slaves § 8(a) (1953).


16 Id. at 809.

17 Id. at 795.
reason why a slave, like any other person, should not be punished by the United States for offences against its laws.”

Judges sometimes adopted a narrow view of slave personhood, reading laws that protected “persons” as excluding slaves. For example, while most jurisdictions criminalized the killing of slaves, they held that the common law of assault and battery, which generally prohibited attacks on persons, did not apply to slaves. Judges particularly concluded as much in the context of owners’ beating their slaves. Both Virginia and North Carolina courts held that owners who severely and unjustifiably beat their slaves could not be indicted under the common law. Similarly, the Tennessee Supreme Court determined that assaults against slaves by certain nonowners generally fell outside the ambit of the common law, though the owners of the slaves could recover against the perpetrators of the assault for the resulting loss of property value.

In the civil context, courts tended to adopt the narrow version of slave personhood, reading general grants to persons of civil, social, and political rights as excluding slaves. Rather than stating that slaves were not legal persons for the purpose of a particular law, judges tended to make arguments based on the nature of slavery in ruling that slaves could not enjoy the general grants of rights and privileges that other humans enjoyed. As one South Carolina judge asserted of a slave, “‘Every endeavor [...] to extend [to him] positive rights [...] is an attempt to reconcile inherent contradictions.’ In the very nature of things, he is subject to despotism.”

The discord in the American law of the person in the context of slavery law operated at the theoretical level as well. When courts held that slaves were legal persons, they emphasized the obvious fact that slaves were human beings and relied on this fact to settle the issue. In

18 Id. at 810. Chief Justice Taney had, coincidentally, only months earlier penned an opinion repudiating the idea that slaves were citizens in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).


20 State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829).

21 See James v. Carper, 36 Tenn. (4 Sneed) 397, 402 (1857) (holding that nonowners who had hired the services of a slave possessed “the right to inflict reasonable corporal punishment on the slave”).

22 Id. at 404 (claiming, apparently without irony, that to deny an owner’s action to recover damages for a third party’s assault on a slave would “be justly esteemed a reproach to humanity in any condition of civil society above the level of barbarism”).

23 See, e.g., Bryan v. Walton, 14 Ga. 185, 197–98 (1853) (limiting the property and testation rights of slaves); State v. Van Lear, 5 Md. 91, 95 (1853) (denying the ability of slaves to enter into valid contracts with their masters).

24 *Ex parte Boylston*, 33 S.C.L. (t Strob.) 41, 43 (1847) (quoting *Kinloch v. Harvey*, 16 S.C.L. (Harp.) 508, 514 (1824)) (alterations in original); see also 80 C.J.S. *Slaves* § 7(a) (1953) (using identical language and citing *Boylston*).
State v. Jones, the Mississippi Supreme Court displayed, rhetorically at least, a great solicitude for slaves' humanity in its inclusion of slaves within the scope of persons protected by that state's murder laws, emphasizing that any other result would be "a reproach to the administration of justice." And although the opinion in United States v. Amy did not celebrate the humanity of slaves as robustly, Chief Justice Taney readily accepted the prosecutor's argument that Amy's humanness provided ample proof of her legal personhood.

In sharp contrast to this broad, biological understanding of personhood, some courts insisted that "person" was merely a legal metaphor unrelated to biological notions of humanity and held that slaves were not legal persons. The Kentucky Court of Appeals' general repudiation of the legal personality of slaves clearly reflects an understanding that there is a significant difference between humanness and legal personhood. The South Carolina Supreme Court shared this approach to legal personality, analyzing the issue at a high level of abstraction and declining to regard slaves as persons because it represented an "inherent contradiction." Other cases indicate an attempt to derive an understanding of slaves' status by analogizing to other areas of law; judges who wanted to embrace the narrow version of slaves' legal personhood compared their legal status to that of animals or categorized them as a type of chattel or as real estate.

2. Nonhuman Persons. — That "[the] corporation is a person" remains one of the most enduring and problematic legal fictions. Whether this commonplace notion holds true, however, depends entirely on which aspect of doctrine one considers. In some cases, such as when a statute operationally defines the term "person" as including corporations, the legal personality of corporations is uncontroversial. More complicated cases arise when legal texts fail to indicate whether the term "person" includes corporations. Courts tend to apply a highly variant set of rules, exemplified by the Supreme Court's jurisprudence regarding the inclusion of corporations among the "persons" eligible for constitutional protections.

25 1 Miss. (1 Walker) 83 (1820).
26 Id. at 84–85.
28 See Jarman v. Patterson, 23 Ky. (7 T.B. Mon.) 644, 645–46 (1828).
29 Boylston, 33 S.C.L. at 43.
30 See Tushnet, supra note 11, at 121–22.
34 See infra p. 1752 & n.49.
One area of relative stability in the Court's corporate personhood jurisprudence is its approach to property rights. Despite the summary nature of its original assertion in *Santa Clara County v. Southern Pacific Railroad*\(^{35}\) that corporations counted as persons within the meaning of the Fourteenth Amendment,\(^{36}\) the Court has largely followed this principle in subsequent cases.\(^{37}\) Nevertheless, at the height of legal realism's sway, Justice Douglas, dissenting in *Wheeling Steel Corp. v. Glander*,\(^{38}\) pointed out deep inconsistencies in the Court's complacent acceptance of corporate personhood. He first noted that the framers of the Fourteenth Amendment, who aimed to eliminate race discrimination, almost certainly did not intend to include corporations within the class protected under the Amendment.\(^{39}\) Moreover, extending due process property rights to corporations by including them in the meaning of the Amendment's Due Process Clause threatened interpretive incoherence among its four other references to "persons" or "citizens."\(^{40}\) Despite the analytical appeal of Douglas's assertion that "[i]t requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause,"\(^{41}\) it has not garnered notable support.\(^{42}\)

The Court's corporate personhood jurisprudence has been considerably more confused in the area of liberty rights. Nineteenth-century opinions generally rejected attempts to extend personhood to corporations in settings in which rights seemed to derive from interests that were exclusive to humans. In *Bank of the United States v. Deveaux*,\(^{43}\) for example, while the Court ultimately invented a clever way for corporate litigants to plead as parties for federal diversity purposes, it ex-

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\(^{35}\) 118 U.S. 394 (1886).

\(^{36}\) Chief Justice Waite announced that the Court would not hear argument on the question. *Id.* at 396 ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution ... applies to these corporations. We are all of [the] opinion that it does.").

\(^{37}\) For a list of cases in which the Court has explicitly stated the proposition that a corporation is a person for the purpose of the Fourteenth Amendment's protection of property rights, see Rivard, *supra* note 3, at 1452 n.103.

\(^{38}\) 337 U.S. 563 (1949).


\(^{40}\) *Wheeling Steel Corp.*, 337 U.S. at 578-79. For example, "persons" in the first sentence could not possibly refer to corporations, because they are not "born or naturalized," *id.* at 578, and the Court had previously held that corporations were not "citizens" within the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, *id.* at 579 (citing *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907)).

\(^{41}\) *Id.* at 579.

\(^{42}\) Rivard, *supra* note 3, at 1453 & n.105.

\(^{43}\) 9 U.S. (5 Cranch) 61 (1809).
plicitly rejected the idea that corporations were actually "citizens" within the meaning of the term as used in the Constitution.\textsuperscript{44}

The twentieth century, however, has seen an increasing extension to corporations of Bill of Rights privileges — most, though not all, of which limit their protections to "persons" or "people."\textsuperscript{45} In Hale v. Henkel,\textsuperscript{46} the Court reached a peculiarly divided result in considering defenses raised by a corporation to a subpoena duces tecum. The Court found that corporations counted as persons for the purpose of the Fourth Amendment’s protections against unreasonable searches\textsuperscript{47} but held that corporations were not persons for the purpose of Fifth Amendment protections against self-incrimination.\textsuperscript{48} Since then, however, the right against self-incrimination has been virtually the only part of the Bill of Rights that courts have not extended to corporations.\textsuperscript{49}

Though the Court’s corporate personhood doctrine has been described as "schizophrenic,"\textsuperscript{50} the theoretical underpinnings of the doctrine are even more haphazard. American courts — particularly the United States Supreme Court — have employed various theories to conceptualize corporate personhood. In some cases, courts have emphasized the artificiality of corporations, holding that rights that inhere in humans as humans may not be extended to nonhuman entities; the assumption that legal personhood derives primarily from humanness has clearly animated this approach.\textsuperscript{51} In one of its first pronouncements on corporate personhood, Trustees of Dartmouth College v. Woodward,\textsuperscript{52} the Court limited the power of a corporation to the origi-

\textsuperscript{44} Id. at 86 ("That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States . . . .").

\textsuperscript{45} See, e.g., U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

\textsuperscript{46} 201 U.S. 43 (1906).

\textsuperscript{47} Id. at 76.

\textsuperscript{48} See id. at 75 (reasoning that "a corporation vested with special privileges and franchises, may [not categorically] refuse to show its hand when charged with an abuse of such privileges").


\textsuperscript{50} Mayer, supra note 32, at 621.

\textsuperscript{51} This approach has been termed the "artificial entity" or "creature" theory, envisioning the corporation as a creation of the state, entitled to only those rights and privileges that the state chooses to extend and subject to the withdrawal of any of them if the state so chooses. See, e.g., Schane, supra note 31, at 565–66; Rivard, supra note 3, at 1456–58.

\textsuperscript{52} 17 U.S. (4 Wheat.) 518 (1819).
nal charter granted by the state: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."53

Members of the modern Court have employed this theory as well, most notably in First National Bank v. Bellotti,54 in which both then-Justice Rehnquist and Justice White55 dissented separately from the Court's holding that corporations enjoy First Amendment rights to political speech, arguing that because First Amendment rights extend only to persons as humans, it made no sense to extend them to artificial entities.56

Alternatively, courts have emphasized the human individuals that constitute the corporation, deploying the corporate personhood metaphor as a means of protecting those individuals' rights.57 Early in its history, the U.S. Supreme Court employed this rationale in Bank of the United States v. Deveaux. Despite holding that corporations are not citizens within the meaning of the Constitution for the purpose of diversity jurisdiction in the federal courts, the Court allowed the individuals who constituted the corporation to bring suit on the corporation's behalf.58

A third approach conceives of the corporation as an autonomous entity, with an existence prior to — or at least separate from — its creation by the state or by the individuals that constitute it.59 This theory provides the most robust version of corporate personhood, and courts invoke it when attempting to extend to corporations the full

53 Id. at 636.
56 See First Nat'l Bank, 435 U.S. at 826-27 (Rehnquist, J., dissenting) ("[A]ny particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation."); id. at 802-22 (White, J., dissenting).
57 This approach is commonly called the "group" theory; it begins with the assumption that human beings are the original bearers of rights and concludes that a corporation is only entitled to legal personhood insofar as it protects the rights of the human persons that constitute the corporation. See, e.g., Schane, supra note 31, at 566; Rivard, supra note 3, at 1458-59.
58 Bank of the United States v. Deveaux, 9 U.S. (3 Cranch) 61, 91-92 (1809); see also id. at 87 ("[A corporation] . . . cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character . . . and the individual against whom the suit may be instituted."). More recently, the Court employed this theory in NAACP v. Button, 371 U.S. 415 (1963), ruling that associations and corporations have standing to assert First Amendment rights, largely on the ground that the very act of congregating to form those organizations constituted a constitutionally protected act of political association by human persons. Id. at 431.
59 This perspective has been termed the "natural entity" or "person" theory. See, e.g., Schane, supra note 31, at 566-69; Rivard, supra note 3, at 1459-63.
panoply of legal rights. Though it requires a rather extreme anthropomorphization of corporations, this approach has found increasing favor with courts. For example, in *United States v. Martin Linen Supply Co.*, the Supreme Court included corporations within the Fifth Amendment’s protection against double jeopardy, arguing that such protection was necessary to protect corporations from such quintessentially human experiences as “embarrassment,” “anxiety,” and “insecurity.” Similarly, in extending Fourth Amendment protection from unreasonable searches to corporations in *Dow Chemical Co. v. United States*, the Court seemed to presuppose a surprising degree of humanlike sentience when it claimed that corporations were entitled to a “reasonable . . . expectation of privacy” that “society is prepared to observe.”

As the cases discussed above illustrate, the various theories of the person that American courts can deploy permit virtually any result, from the sharply limited creature of the state in *Dartmouth College* to the worried, anxious, and peculiarly humanoid entity in *Martin Linen*. These different approaches have raised the question whether the Court’s corporate personhood jurisprudence is purely result oriented. At least, it does not seem a coincidence that as the increasingly complex modern corporation has become increasingly dependent on Bill of Rights protections and the American economy has become increasingly dependent on corporations, courts have adjusted definitions of personhood to accommodate the modern corporation’s need for these protections.

3. *Borderline Humans.* — The personhood status of the fetus raises particularly difficult questions, ones not present in cases involving the personhood of corporations or slaves. Whether legal persons or not, it was clear that slaves were human and it is clear that corporations are not, while debate continues to rage about when — if at all — a fetus becomes a human being. The legal personhood of the fetus raises many problems; this section focuses only on legal approaches to

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61 Id. at 569 (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957)).
63 Id. at 236.
64 See Rivard, supra note 3, at 1455 (arguing that because there is no “coherent legal theory for the entitlement of corporations to liberty rights[,] . . . the Supreme Court uses these theories to rationalize its purely result-oriented holdings”).
65 See Mayer, supra note 32, at 605–20. Mayer has argued that the personhood metaphor for corporations may have been apt for the smaller-scale nineteenth-century corporation but bears no meaningful relation to its transnational, monolithic, twentieth-century counterpart. See id. at 642–45.
66 For a broad overview of the legal dimensions of this debate, see generally JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES (2000).
the question whether an attack on a pregnant woman that results in the death of her fetus constitutes murder. This situation raises the issue of legal personhood in two ways: overtly, as when a court interprets a murder statute that includes the word "person," and covertly, as when legislatures criminalize attacks on fetuses in a way that places fetuses on the same level as born humans.

The legal status of the fetus with respect to personhood varies widely from state to state. Twenty-four states criminalize actions against the fetus in some manner; the rest do not. Criminalization of feticide through interpretation of state murder statutes engages the issue of legal personhood most directly. In Commonwealth v. Cass, the Massachusetts Supreme Judicial Court held that a fetus was a "person" within the meaning of the state vehicular homicide statute. Emphasizing that statutory terms should be construed in light of their ordinary meaning, the court argued that "[a]n offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb." The statute's ordinary meaning, and the failure of the legislature to provide any "hint of a contemplated distinction between pre-born and born human beings," effectively created a presumption that fetuses count as persons.

Most states, however, address feticide through various forms of legislation. Some states include in their criminal codes sections that prescribe separate penalties for killing fetuses. The Minnesota legislature, in response to a state supreme court decision that held that fetuses are not "persons" within the meaning of that state's murder statute, created a separate chapter of its criminal code entitled "Crimes Against Unborn Children." This chapter established penalties for various types of violence against the fetus, including murder. Some states have taken a more straightforward approach by merely includ-
ing feticide as a form of murder. Other states use a similar strategy but employ legal personhood as the means of criminalizing feticide. Utah law, for instance, stipulates that “[a] person commits criminal homicide if he . . . causes the death of another human being, including an unborn child.”

A final strategy — and one that prevails in several states that do not formally regard fetuses as persons for the purposes of their murder laws — is to penalize assaults against pregnant women that result in either miscarriage or injury to the fetus. In Delaware, for example, public outrage at a man who strangled his pregnant wife led to the swift passage of a law making it a felony to abuse or assault a pregnant woman. In one sense, these statutes do not address the issue of personhood nearly as directly as does common law interpretation of the term “person” in murder laws, because they do not entail ongoing public considerations of and conclusions about legal personhood. However, these laws can still send a strong message about the personhood status of fetuses. Though Indiana and California extend to fetuses protection from assault while clearly differentiating homicide and feticide, the act of criminalizing feticide, regardless of the method, sends a message about the state’s regard for fetal life and thereby implicitly grants fetuses limited personhood status. And though states that focus on fetal assault from the perspective of protecting the pregnant woman deemphasize the issue of fetal personhood, they cannot avoid it altogether.

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76 Indiana, for example, separately lists as categories of murder “knowingly or intentionally killing another human being,” IND. CODE § 35-42-1-1(1) (1998), and “knowingly or intentionally killing a fetus that has attained viability,” id. § 35-42-1-1(4); see also, e.g., MICH. COMP. LAWS § 750.322 (1979) (criminalizing the killing of an “unborn quick child”).

77 UTAH CODE ANN. § 76-5-201(1)(a) (1999). The statute further specifies that “[t]here shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion,” id. at § 76-5-201(1)(b), presumably to avoid the obvious tension between its expression that a fetus is a human being and the U.S. Supreme Court’s dictum to the contrary in Roe v. Wade, 410 U.S. 113, 158, 62 (1973).


79 Compare IND. CODE § 35-42-1-1(1) (1998) (defining one category of murder as the knowing and intentional killing of a human being), with id. § 35-42-1-1(4) (defining another category of murder as the knowing and intentional killing of “a fetus that has attained viability”).

80 CAL. PENAL CODE § 187(a) (West 1999) (“Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.”).

81 Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, Women’s Rights and Fetal Personhood in Criminal Law, 7 DUKE J. GENDER L. & POL’Y 89, 95 (2000) (“By separating fetal killing from the crime against the pregnant woman, these states implicitly or explicitly accord the fetus at least limited personhood status.”).

82 Although some commentators have argued that such a strategy avoids the personhood morass entirely by declining to state a clear public position on fetal personhood, see Smith, supra
Alternatively, several jurisdictions still construe the term “person” within their murder laws to exclude fetuses. In some states, this interpretation is a result of clear statutory statement, as when the statute defines “person” as “a human being who has been born and was alive.” In the eight states that lack this particular definition of “person,” courts have interpreted “person” as excluding fetuses, largely out of deference to the long-standing common law “born-alive” rule, whereby only humans that were born and alive could be considered persons for the purposes of murder statutes. For example, in State v. Beale, the North Carolina Supreme Court held that fetuses did not count as persons for the purpose of its homicide statute, despite its earlier holding that fetuses counted as persons for the purpose of its wrongful death statute. The court emphasized both the venerability of the born-alive rule, which it claimed prevailed in the “overwhelming majority” of jurisdictions, and the lack of any affirmative indication from the legislature that it intended North Carolina’s homicide statutes to extend to fetuses.

Roe’s famous dictum that fetuses are not constitutional persons has done little to settle interpretive problems regarding personhood in the context of feticide law. Although the Roe dictum rendered fetuses nonpersons for constitutional purposes only, it represented a method of reasoning about fetal personhood that courts use to approach the issue. As this Note argues below, courts have not always applied this approach. Though courts consistently treat the issue of legal personality in feticide law as a matter of statutory or common law interpretation, just as the Roe Court approached the issue as one of constitutional interpretation, strikingly different theories of what personhood does or should mean have animated their interpretive efforts.

In some cases, courts have assumed that all fetuses are human. The Massachusetts Supreme Judicial Court adopted the strongest version of this approach in Cass, when it regarded the issue as resolved by

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note 68, at 1865–67, the statutes still communicate some message about public regard for the value of fetal life, Schroedel, Fiber & Snyder, supra note 81, at 95.

83 E.g., ALASKA STAT. § 11.41.140 (Michie 1998); HAW. REV. STAT. § 707-700 (1993); OR. REV. STAT. § 163.005(3) (1999).


85 376 S.E.2d 1 (N.C. 1989).

86 Id. at 4.

87 DiDonato v. Wortman, 358 S.E.2d 489, 493 (N.C. 1987); see also Beale, 376 S.E.2d at 2 n.3 (acknowledging, but distinguishing, DiDonato).

88 Beale, 376 S.E.2d at 3. By 2000, however, a minority of states retained the born-alive rule. See Smith, supra note 68, at 1848.

89 Beale, 376 S.E.2d at 4. The court also noted that the state legislature had considered and rejected laws criminalizing feticide, id. at 4 n.4, and emphasized the strict construction due penal statutes, id. at 4.

a simple syllogism: all human beings are legal persons; fetuses are human beings; therefore, fetuses are legal persons. The obvious objection to this approach is that it presumes an easy answer to a hard question. Society has not reached a consensus on the issue of when — if at all — a fetus becomes human. This is a point the Levy Court left open in its biological definition of personhood, which did not require that humans be born to possess legal personality.

Further, courts differ greatly in their insistence on whether the term “person,” or at least the question whether fetuses count as persons for the purpose of statutory construction, has to be given a transsubstantive application. In State v. Horne, the South Carolina Supreme Court found it intolerable that the legal personhood of fetuses would differ in the civil and criminal contexts. Other jurisdictions, such as North Carolina in Beale, share no such insistence on a unitary notion of personhood.

Though these different courts approach the determination of fetal personhood through statutory interpretation, their differing treatments of the issue of the transsubstantive consistency of legal personality suggest a deep theoretical divide. To courts that regard similar entities as persons in one area of law but not in another, “person” represents nothing more than a means of indicating a subject of rights and duties that may vary among bodies of law. A refusal to countenance different meanings of “person” among different areas of law, however, implies a rejection of — or at least discomfort with — this analysis. An insistence on consistency may indicate that a court regards the legislative statement of what counts as a “person” not merely as signifying the subject of rights and duties, but rather as expressing some notion of what it means to be a person in an a priori sense that should remain expressively stable.

These examples with respect to the legal status of slaves, corporations, and fetuses provide only an impressionistic sense of the fragmented body of personhood law. Yet each example provides a similar

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91 See Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) (“In keeping with approved usage, and giving terms their ordinary meaning, the word ‘person’ is synonymous with the term ‘human being.’”).
94 Id. at 704.
95 Compare State v. Beale, 376 S.E.2d 1, 2 n.3 (N.C. 1989) (noting its holding in DiDonato that the word “person” in the state wrongful death statute should be interpreted to allow recovery for the death of a fetus), with id. at 4 (declining to read the state murder statute to extend criminal liability to the killing of a fetus). Arizona also maintains different interpretations of fetal personhood in the civil and criminal contexts. Compare Summerfield v. Superior Court, 698 P.2d 712, 724 (Ariz. 1985) (holding that fetuses are considered persons for the purpose of the state wrongful death statute), with Vo v. Superior Court, 836 P.2d 408, 415 (Ariz. Ct. App. 1992) (holding that fetuses are not considered persons for the purpose of the state murder statute).
impression. The question of personhood arises inevitably in statutes and common law alike, inviting — often requiring — interpretation. Such interpretation may take place explicitly, as when a court openly engages the meaning of the word “person,” or implicitly, as when a court presumptively treats certain groups as outside the range of legal subjects affected by a given law. In either case, interpretations vary widely. Although it may be unsurprising that “person” means radically different things within different bodies of law, this reality reflects the fundamental disorganization that characterizes the doctrine of legal personhood.

The doctrinal discord in the law of the person results largely from the lack of a coherent theory of the person. One feature common to each of the current approaches is a disinclination on the part of courts to engage in theoretical inquiry into the nature of personhood as a basis for conclusions about legal personhood. The Supreme Court’s theoretical stance in *Roe*, in which it preemptively disavowed any implication that its decision regarding a fetus’s constitutional personhood reflected at all on the philosophical question of when life begins, epitomized this approach.96 A similar disinclination is evident in each of the decisions discussed above, in which courts relied on assumptions about legal personhood but declined to include in their reasoning any reference to the considerable theoretical literature on this topic. The absence of any coherent theory raises an inference that courts’ determinations of legal personality are strongly result driven, with judges selecting whatever theories of personhood suit the outcomes they desire.97 As one commentator observed, “Personhood is . . . a conclusion, not a question.”98

II. THE LAW OF PERSONS: IMPLICATIONS

A. The Expressive Dimension of Law

It is not a coincidence that personhood occupies a central place in debates over America’s most divisive social issues.99 The idea of per-

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97 Cf. Rivard, supra note 3, at 1465–66 (“Rather than developing a coherent theory of constitutional personhood, the Supreme Court has used only pragmatic concerns to derive a legal conclusion of constitutional personhood. . . . [T]his lack of theory plagues the law of personhood for both natural persons and corporations. . . . [T]he Supreme Court follows a result-oriented approach. . . . Such decisions appear to be made on a case-by-case basis, probably with an eye toward practical effects, without consideration for developing a coherent doctrine.”).
98 Id. at 1466.
sonhood is simply too rich for it to be manipulated without making, or at least intimating, some kind of statement about what it means to "count" for the purposes of law. This point becomes particularly relevant when one considers legal personhood in light of the expressive dimension of law. This approach attends to the social meaning of statements in statutes and judicial opinions, arguing that law does more than regulate behavior: it embodies and signals social values and aspirations.100 Describing this function of law as "expressive," however, understates its importance. In addition to reflecting social ideals, law actually shapes behavior by creating social norms that people use to measure the morality and worth of their actions.101 Eric Posner has argued that when law signals a certain set of values, it works two kinds of changes on the social structure.102 The first is behavioral: by sending a signal about what behavior is unacceptable, law may cause people to engage in those actions less frequently. The second is hermeneutic: through this mechanism, law shapes and changes the beliefs people hold.103

The hermeneutic aspect of law's expressive function bears greater relevance to the law of persons. When the law manipulates status distinctions through the use of the metaphor "person," it necessarily expresses a conception of the relative worth of the objects included and excluded by the scope of that metaphor. These expressions then affect general understandings of personhood and regard for the objects of the law, as the law's values influence society's values.

**B. The Expressive Dimension of Personhood**

The social meaning and symbolism of law are deeply bound up with social understandings of status.104 As one commentator has observed, "law often directly reflects social status or helps preserve status markers. Sometimes law helps constitute hierarchies of social status directly."105 No less than other legal pronouncements, legal statements regarding personhood express normative assumptions about social


101 Sunstein, supra note 100, at 2029-44. Of course, the success of the expressive function of law depends on a number of factors, most importantly the legitimacy of law itself. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352-61 (1997).

102 See POSNER, supra note 100, at 33.

103 See id.; cf. Kahan, supra note 101, at 363-64 (making the same argument exclusively in the context of criminal law).


105 Id. at 2325; see also id. at 2325-26 (discussing slavery as an example).
status. This notion, of course, contradicts Gray's assumption that the metaphor of legal personality exists independently of social understandings of personhood. This Part argues that this long-assumed distinction is untenable. The law of the person entails considerably more than a functional abstraction of a disembodied notion of legal capacity. When law uses the metaphor "person" to define its object, that metaphor acts as a vehicle for expressing beliefs and values about persons, both legal and natural. This phenomenon is evident when courts address or avoid the problem of legal personality in the contexts of slavery, feticide, and corporate law. And because legal personality becomes relevant most obviously in the context of America's most "exquisitely sensitive" social issues, it often expresses a deep anxiety not just about what a person is, but about the basic contradiction inherent in creating and manipulating status distinctions in a highly individualist legal culture.

Though courts say little about legal personhood, what they do say on the subject reflects a basic ambivalence that goes considerably beyond the manipulation of a standard legal metaphor. The Mississippi Supreme Court, for example, extended legal personality to slaves for the purposes of common law murder prohibitions:

In some respects, slaves may be considered as chattels, but in others, they are regarded as men. The law views them as capable of committing crimes. This can only be upon the principle, that they are men and rational beings. . . . In this state, the Legislature have considered slaves as reasonable and accountable beings and it would be a stigma upon the character of the state, and a reproach to the administration of justice, if the life of a slave could be taken with impunity, or if he could be murdered in cold blood, without subjecting the offender to the highest penalty known to the criminal jurisprudence of the country. Has the slave no rights, because he is deprived of his freedom? He is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law, but in vain shall we look for any law passed by the enlightened and philanthropic legislature of this state, giving even to the master, much less to a stranger, power over the life of a slave. Such a statute would be worthy the age of Draco or Caligula, and would be condemned by the unanimous voice of the people of this state, where, even cruelty to slaves, much less the taking away of life, meets with universal reprobation.

Even courts that came to the opposite conclusion shared the Jones court's sentiment that the extension to slaves of legal personality directly implicated society's moral character. In concluding that slaves

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107 Goldberg, supra note 3, at 659.
108 State v. Jones, 1 Miss. (1 Walker) 83, 84–85 (Miss. 1820).
were not persons for the purposes of common law battery when as-
sailed by their masters, Judge Ruffin of the North Carolina Supreme
Court, in *State v. Mann*, 109 expressed deep moral ambivalence about
the result: "I most freely confess my sense of the harshness of this
proposition, I feel it as deeply as any man can. And as a principle of
moral right, every person in his retirement must repudiate it. But in
the actual condition of things, it must be so."110 Had the *Mann* court
not been conscious of the expressive impact of its decision, it would
not have felt compelled to admonish the public to take away precisely
the opposite moral message.

These approaches to legal personality reflect an assumption that
the issue is closely tied to moral and ethical considerations, that what
the law refers to as persons, and the act of the law's referring to enti-
ties as persons, shapes what society thinks of as *human*.111 This link-
age expresses one of the core contradictions at the root of American
slavery: that obviously human entities were regarded by the law as less
than human, or at least, as less than full legal persons.112 Judicial
rhetoric regarding slaves' legal personality, then, discloses anxiety
about personhood itself, raising this category above the level of neutral
abstraction to an expression of social mores.

In contrast to the open discussion of the relationship between per-
sons and social norms in slavery cases, courts attempt to avoid the is-
issue entirely in the context of feticide. Judges seem almost embarrassed
that any pronouncement about the law of persons might have philo-
sophical implications for the broader social meaning of personhood. In
most cases, this attitude manifests itself in the absence of any reflection
on the issue from a theoretical or interdisciplinary perspective, but
sometimes courts make it explicit. The Arizona Court of Appeals
made its reluctance to engage broader issues plain in *Vo v. Superior
Court*:113 "[W]e need to emphasize that this court is not embarking
upon a resolution of the debate as to 'when life begins.' Rather our
task is specifically to determine the legislative intent in defining first
degree murder of a 'person.'"114 Similarly, the Supreme Court pro-

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109 13 N.C. (2 Dev.) 263 (1829).
110 Id. at 266.
111 This argument could work in the opposite direction, as racist judges assumed that slaves' legally inferior status intrinsically resulted from their racial inferiority. See Bryan v. Walton, 14 Ga. 185, 198, 201 (1853).
112 Other cases express this ambivalence. Compare, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426–27 (1856) (holding that slaves were not citizens for the purposes of federal law and the U.S. Constitution), with, e.g., U.S. v. Amy, 24 F. Cas. 792, 809–11 (C.C.D. Va. 1859) (No. 14,445) (holding that slaves were persons for the purpose of a federal criminal law regarding mail tampering). For an interesting historical consideration of the incoherence of slaves' natural and legal personality, see Amy, 24 F. Cas. at 795–805.
114 Id. at 412.
nounced in *Roe v. Wade* that, despite that opinion’s extensive discussion of the biological and historical arguments regarding when life begins:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.115

One can see the same hesitation to acknowledge the expressive value of judicial holdings regarding fetal personhood in the Louisiana Supreme Court’s decision in *Wartelle v. Women’s & Children’s Hospital*.116 Though the Louisiana Civil Code rather clearly resolved the issue,117 the court signaled its concern about the implications of its public statement limiting the rights available to a fetus:

The Louisiana Civil Code’s refusal to accord unconditional legal personhood to a fetus before live birth constitutes no moral or philosophical judgment on the value of the fetus, nor any comment on its essential humanity. Rather, the classification of “person” is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties. “Person” is a term of art . . . .118

When courts insist that holdings on fetal personality have no extralegal implications, they appear to protest too much. If courts were truly confident that they could manipulate and interpret personhood simply as a legal fiction, no protestations to the contrary would be necessary.119 Judges’ reluctance to engage these issues itself suggests that denying or granting legal personality to fetuses sends a strong message about the state’s valuation of fetal life, either by countenancing the visceral moral wrong of feticide120 or by threatening the foundational assumptions of abortion rights.121 The ambivalence and anxiety that courts experience in attempting to determine whether fetuses are legal


116 704 So. 2d 778 (La. 1997).

117 See *LA. CIV. CODE ANN.* art. 26 (West 2000) (“If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.”).


121 Cf. Smith, *supra* note 68, at 1868–69 (discussing opposition to a proposed fetal homicide bill in Kansas because it defined fetuses as “persons” so broadly that it would effectively have classified abortion as first-degree murder).
persons reflect and express society's own strong feelings regarding this issue. In at least three states, for example, when courts defined fetuses out of murder statutes, the public reacted with outrage, and state legislatures passed responsive legislation within two months. The legal personality of fetuses remains tied so deeply to the social debate over fetal humanity that courts cannot manipulate the legal category "person" without expressing certain values, whether they want to or not.

The doctrine of corporate personhood provides another illustration of courts' ambivalence regarding the signals they send in defining legal personhood. Justice Douglas's dissent in *Wheeling Steel v. Glander* questioned whether an intent-based or even a purely textual reading of the Fourteenth Amendment could ever justify equating an artificial entity with a human. Dissenting in *Connecticut General Life Insurance Co. v. Johnson*, Justice Black expressed anxiety about corporate personhood that went far beyond skepticism of jurisprudential method. He observed that the conferral of constitutional personhood on nonhuman entities risked obscuring the constitutional personhood of the natural persons the Fourteenth Amendment was passed to protect:

This Amendment sought to protect discrimination by the states against classes or races. . . . Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent. invoked it in protection of the negro race, and more than fifty per cent. asked that its benefits be extended to corporations.

Justice Black's concern reflects an awareness not only that legal personhood relates to actual social status, but also that status may operate as a zero-sum game; grants of legal personality to corporations may cheapen the social meaning of humans' legal personality.

Though there is no social consensus regarding the effects of increasingly monolithic business entities on American society, there appears to be no abatement to the expansion of freedoms granted corpo-

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122 This happened in California, see Katharine B. Folger, Note, *When Does Life Begin . . . or End? The California Supreme Court Redefines Fetal Murder in People v. Davis*, 29 U.S.F. L. REV. 237, 243-45 (1994); Delaware, see Judge Sentences Waterman, supra note 78; and Minnesota, see Smith, supra note 68, at 1863-64.

123 *See* Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 972 (1995) ("What is a person? When does life begin? These are the questions courts refuse to answer explicitly yet indirectly answer in nearly every opinion cited above."); Schroedel, Fiber & Snyder, supra note 81, at 95 (noting the impossibility of making feticide law without commenting on fundamental issues of personhood).


125 303 U.S. 77 (1938).

126 *Id.* at 89-90 (Black, J., dissenting).

127 *Cf.* Balkin, supra note 104, at 2328 (arguing that social status operates as a zero-sum game).
rate actors, a situation that has raised much concern. As one commentator noted, "it is certain that the conferral of corporate Bill of Rights protections, without any theory, has served an important legitimizing function. Extending these rights has legitimized corporations as constitutional actors and placed them on a level with humans in terms of Bill of Rights safeguards." Calling corporations persons sends a message about the state’s values: by implicitly extending human dignity to artificial business entities, the state cheapens the distinctiveness of legal personhood by overextending its application. The law’s ambivalence toward corporate personality — one best described as a surface appearance of doctrinal unity marked by a strong undercurrent of dissent — reflects concern about the propriety of elevating corporations to the status of persons, both because of reservations about business organizations themselves and because of concern about human uniqueness in an increasingly corporate world.

This anxiety occupies an even greater place in the academic literature. Though there are reasonable arguments that including corporations within the legal construction of personhood does not require much of a conceptual leap, centuries of scholarly debate over this issue suggest otherwise. Moreover, regardless of the metaphor’s descriptive aptness, ascribing personhood to corporations may represent more than mere manipulation of legal categories. Judicial determinations of personhood not only reflect societal values, but also influence individuals’ behavior. Public statements that corporations “are” persons — particularly from organs of government empowered with coercive authority, such as courts — represent an “illocutionary act,”

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128 Mayer, supra note 32, at 650–51.

129 Carl Mayer argues that granting rights to corporations detracts from natural persons’ rights: Too frequently the extension of corporate constitutional rights is a zero-sum game that diminishes the rights and powers of real individuals. Fourth amendment rights applied to the corporation diminish the individual’s rights to live in an unpolluted world or to enjoy privacy. The corporate exercise of first amendment rights frustrates the individual’s right to participate equally in democratic elections, to pay reasonable utility rates, and to live in a toxin-free environment. Equality of constitutional rights plus an inequality of legislated and de facto powers leads inexorably to the supremacy of artificial over real persons. Id. at 658.


131 See Martin Wolff, On the Nature of Legal Persons, 54 L.Q. Rev. 494, 498–99 (1938) (tracing the history of scholarly interest in the personhood of organizations to at least the High Middle Ages). Then-Justice Rehnquist expressed similar skepticism about this metaphor as recently as the 1980s. See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) (“Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”); id. at 35 (“The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.”).
whereby language does not merely describe a state of affairs, but helps bring that state of affairs into existence.\textsuperscript{132}

\textbf{C. Personhood and the Problem of Status}

Legal personhood is more than a metaphor; it becomes, in many cases, law’s repository for expressions of anxiety about powerfully divisive social issues. In the antebellum South, the rhetoric of personhood reflected the moral ambivalence of a society that called itself democratic while still owning slaves. In the context of feticide, the doctrinal confusion regarding legal personhood evidences the two-mindedness of a society that finds fetal murder abhorrent even as it desires to protect the autonomy of pregnant women. In debates about corporate personhood, lasting terminological anxiety expresses the tension between the desire to stimulate the economy by granting constitutional protections to corporations and the fear that unchecked corporate growth may have socially deleterious effects or that unchecked recognition of corporate personhood may cheapen our own.

Courts’ treatment of legal personhood communicates anxiety not only about divisive social issues, but also about the operation of law itself. In highly individualistic modern American legal culture, status distinctions seem to be embarrassing remnants of an illiberal past. However, when courts and legislatures engage problems of legal personhood, they are necessarily interpreting and applying very fundamental notions of status. The law of the person, and especially courts’ ambivalence about it, exposes the uncomfortable but inescapable place of status distinctions in even the most progressive legal systems.

The reluctance of American courts to manipulate status distinctions openly has deep roots. Sir Henry Maine famously articulated one strand of that reluctance when he formulated his foundational theory that “the movement of the progressive societies has hitherto been a movement from \textit{Status} to \textit{Contract}.”\textsuperscript{133} Maine argued that ancient law regarded the basic unit of society as the collective, so much so that the individual was subsumed by a series of status distinctions, each of which was transmitted between generations.\textsuperscript{134} The progression of legal culture realized a shift from status as the basis of rights to an individual capability to transmit property on a personal, contractual ba-

\textsuperscript{132} See Schane, \textit{supra} note 31, at 577-78 (“In a like manner, the Supreme Court, in declaring that it deemed a corporation to be a citizen, by its use of this word, brought to fruition the new legal status so described.”); cf. Mayer, \textit{supra} note 32, at 650 (“Behind doctrines of commercial property and the free market of ideas is hidden the tacit acceptance of the corporation as a person, entitled to all the rights of real humans.”).

\textsuperscript{133} \textbf{HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS} 165 (Univ. of Ariz. Press 1986) (1864).

\textsuperscript{134} See \textit{id.} at 121-23.
If regarding this development as entirely egalitarian may overstate the case, one may at least describe it as strongly individualistic—an evolutionary change that rejects status distinctions including, arguably, personhood as archaic.

The Fourteenth Amendment is a distinctively American manifestation of the great move from a more status-based to a more individual-focused legal system. The status distinctions on which slavery depended rendered hypocritical the egalitarian aspirations of the founding of the American republic. The Fourteenth Amendment repudiated these distinctions—at least distinctions made on the basis of race—in the apparent hope of creating a body of law in which personhood had a single, universal meaning.

The major jurisprudential movements of the twentieth century also shed light on the law’s reluctance to discuss personhood openly. The modernist/legal-realist approach (at least in its second, more skeptical strand) denies the capacity of law to use language to embody an abstraction like “person” independently of social meaning and influence; postmodern legal thought goes a step further, rejecting the possibility of ever overcoming the limitations of social context and language. Both of these perspectives emphasize the centrality of individual experience, rather than connection with overarching institutions or beliefs, as a means to the good life. Hence, the very project of the law, which depends on metaphors to make sense of its rules and to justify its use of force, is as unstable as it has ever been. It is not surprising, then, that in a legal culture characterized by such profound reluctance to recognize universal notions of the person, ascribing any transcendent meaning to personhood—such as a transsubstantive definition of legal personality—seems fraught with troubling normative implications.

Courts’ anxiety about manipulating legal personhood is a product of these trends. However much American legal consciousness may express an inclination to reject status distinctions, particularly in the case of legal personality, to have a law is to have an object on which that

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135 See id. at 248–52.
136 The Fourteenth Amendment clearly repudiates status distinctions among persons. See U.S. CONST. amend. XIV, § 1 (“All persons born in the United States . . . are citizens of the United States . . . . No State shall . . . deny to any person . . . the equal protection of the laws.”).
140 See UNGER, supra note 138, at 35–39. Note that these schools of thought differ importantly in their conceptions of the self; the postmoderns would express much more skepticism at the possibility of the self to overcome its own constructedness.
141 See id. at 48; cf. Feldman, supra note 139, at 675–76 (discussing modernist anxiety).
law acts. And in the case of American law, that object is more often than not a person. Hence, this very basic tension persists: law desires to repudiate transcendent notions of the object yet depends on such notions for its theoretical coherence.

III. CONCLUSION

The law of the person is fraught with deep ambiguity and significant tension, and the problem extends far beyond the standard interpretive difficulties attending the meaning of legal metaphors. The law's use of the fiction "person" to define its object inevitably evokes the anxiety that accompanies social definitions of personhood. This difficulty is exacerbated by the tension between our strongly individualist legal culture and the utter dependence of law on this metaphor. Moreover, social anxiety about personhood matters not only because it exposes ambivalence within the law, but also because the law, through its expressive dimension, signals norms and values that influence ideas and opinions about personhood.

This anxiety is likely to become more acute. Technological and economic progress promise to muddy further the waters of personhood, calling into question the once-stable notion of who counts as a living human. On one front, animal rights theorists and activists argue that the human/nonhuman distinction is founded on illegitimate notions of an absolute hierarchy of worth that places humans above other animals. On another, technology may soon enable the creation of entities that are neither clearly human nor nonhuman, such as transgenic animals, or that closely replicate human consciousness, such as artificially intelligent beings.

The grossly undertheorized character of this field suggests that the problem merits more attention. Such attention would not only aid in understanding the scope and meaning of the law's use of the fiction "person" to define its object, but — considering this metaphor's extralegal implications — would also help law contribute more fully to social dialogue about what it means to be human.

142 See Peter Singer, Animal Liberation 1–23 (2d ed. 1990).
144 Scientists very recently created the first transgenic primate, a monkey with one gene from a jellyfish. Sharon Begley, Brave New Monkey, NEWSWEEK, Jan. 22, 2001, at 50.
145 Solum, supra note 3, at 1250.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HERCULES and LEO,

Petitioner,

-against-

SAMUEL L. STANLEY JR., M.D. as President of State University of New York at Stony Brook a/k/a Stony Brook University and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HABEAS CORPUS

Index No. 152736/15

February 12, 2015

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February 12, 2015
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I. INTRODUCTION

Chimpanzees are autonomous and self-determining beings. They recall their past and anticipate their future, and when their future is incarceration, they suffer the pain of being unable to fulfill their goals or move around as they wish, much in the same way as a human being. In the last twenty-two months, three of the seven of these autonomous, self-determining beings imprisoned in the State of New York have died.

In December 2013, the Nonhuman Rights Project, Inc. (“Petitioner”) filed near-identical petitions demanding that a Supreme Court issue a common law writ of habeas corpus and order to show cause in each of the three counties in which a survivor remained. Oral argument was heard in the State of New York Supreme Court Appellate Division, Third Judicial Department (“Third Department”) on October 8, 2014, in one case involving a chimpanzee named Tommy brought in the Supreme Court Fulton County. The Third Department affirmed the ruling of the lower court denying the petition and held “that a chimpanzee is not a ‘person’ entitled to the rights and protections afforded by the writ of habeas corpus.” *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 NY Slip Op 08531, 2014 N.Y. App. Div. LEXIS 8451, *2 (3rd Dept. Dec. 4, 2014) (“Nonhuman Rights Project v. Lavery”). On December 16, 2014, Petitioner filed a motion for leave to appeal to the Court of Appeals in the Third Department arguing that the Third Department erred as a matter of law in denying personhood to a chimpanzee for the purpose of seeking a common law writ of habeas corpus for the reasons set forth in Section F of this Memorandum of Law. On January 30, 2015, the Third Department entered a Decision and Order on Motion denying Petitioner’s motion for leave to appeal. Petitioner is filing a motion for

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1 Petitioner specifically asked the courts to issue orders to show cause pursuant to CPLR 7003(a), as Petitioner did not demand the production of the chimpanzees.

2 The Third Department granted Petitioner’s motion for a preliminary injunction to restrain the respondents from removing Tommy from the State of New York during the pendency of proceeding or further order of the court. A true and correct copy of the order is attached to the Habeas Petition as Exhibit 4.
leave to appeal with the Court of Appeals of the Third Department’s refusal to grant permission pursuant to CPLR 5602(a).

A second oral argument was heard in the State of New York Supreme Court Appellate Division, Fourth Judicial Department (“Fourth Department”) on December 2, 2014, in a case involving a chimpanzee named Kiko filed in the Supreme Court Niagara County. On January 2, 2015, the Fourth Department entered its memorandum and order affirming the lower court’s dismissal of the petition erroneously concluding that “habeas corpus does not lie” in this case. *Matter of The Nonhuman Rights Project, Inc. v Presti*, 2015 N.Y. App. Div. LEXIS 148, No. CA 14-00357, 2015 WL 25923, *2 (4th Dept. Jan. 2, 2015) (“Nonhuman Rights Project v. Presti”). On January 15, 2015, Petitioner timely filed a motion for leave to appeal to the Court of Appeals in the Fourth Department arguing that the Fourth Department erred as a matter of law in the manner in which it interpreted the relief offered by a common law writ of habeas corpus in the State of New York for the reasons set forth in Section G of this Memorandum of Law. The Fourth Department has not yet ruled on Petitioner’s motion for leave to appeal.

The third petition was filed in the Supreme Court Suffolk County on behalf of Hercules and Leo, the two chimpanzees detained in the case at bar. That court refused to sign the petition on a procedural ground and did not rule on the merits. A true and correct copy of the unsigned proposed order to show cause and writ of habeas corpus is attached to this Verified Petition for a Writ of Habeas Corpus and Order to Show Cause (“Habeas Petition”) as Exhibit 1. The State of New York Supreme Court Appellate Division, Second Judicial Department (“Second Department”) later *sua sponte* dismissed Petitioner’s appeal on a different procedural ground, without reaching the briefing stage. 3 A true and correct copy of the order is attached to the

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3 The Second Department’s dismissal of the appeal on the ground that “no appeal lies as of right from an order that is not the result of a motion made on notice” (see Exh. 2, attached to the Habeas Petition) was plainly erroneous, as CPLR 7011 provides that “an appeal may be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of section 7003” and a petition may be made “without notice.” CPLR 7002(a). Motions to appeal from orders refusing to grant virtually identical petitions were not dismissed in the Third and Fourth Departments.
Habeas Petition as **Exhibit 2**. Petitioner then filed a motion for reargument with the Second Department which was denied by the court. A true and correct copy of the order is attached to the Habeas Petition as **Exhibit 3**. Petitioner now brings this Habeas Petition, which is authorized by New York Civil Practice Law and Rules (“CPLR”) Article 70 and not barred by res judicata, *infra*, seeking the release of Hercules and Leo, who are being unlawfully imprisoned as research subjects at the State University of New York at Stony Brook (“Stony Brook University”).

New York has always recognized the common law writ of habeas corpus and there is no question this Court would release Hercules and Leo if they were human beings, for their detention grossly interferes with their exercise of bodily liberty. The question before this Court is whether Hercules and Leo, like human beings, are “legal persons” under New York habeas corpus common law and thus, CPLR Article 70, possess the common law right to bodily liberty protected by the common law of habeas corpus.

“Legal person” has never been a synonym for “human being.” Instead, it designates Western law’s most fundamental category by identifying those entities capable of possessing a legal right. “Legal personhood” determines who counts, who lives, who dies, who is enslaved, and who is free. Chimpanzees, as autonomous and self-determining beings, must be recognized as common law “persons” in New York, entitled to the common law right to bodily liberty protected by the common law of habeas corpus.

Nine prominent working primatologists from around the world have submitted affidavits (“Expert Affidavits”) demonstrating that chimpanzees possess the autonomy and self-determination that allows them to choose how they will live their own emotionally, socially, and intellectually rich lives.⁴ Pursuant to a New York common law that keeps abreast of evolving

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⁴ The Expert Affidavits attached to this Habeas Petition, which are, with one exception, copies of the affidavits filed in Petitioner’s prior habeas corpus proceeding in the Supreme Court, Suffolk County, are properly before the Court. CPLR 2101(e) (“copies, rather than originals, of all papers, including orders, affidavits and exhibits may be served or filed. Where it is required that the original be served or filed and the original is lost or withheld, the court may authorize a copy to be served or filed.”). *See Rechler Eq. B-1, LLC v. AKR Corp.*, 98 A.D.3d 496, 497 (2d Dept. 2012); *see also Brooke Bond India, Ltd. v. Gel Spice Co., Inc.*, 192 A.D.2d 458, 459-60 (1st
standards of justice, morality, experience, and scientific discovery, New York common law liberty and equality mandate that such autonomous beings as chimpanzees be recognized as common law “persons” entitled to the common law right to bodily liberty protected by the common law of habeas corpus.

The New York common law of liberty begins, as does the common law of every American state, with the premise that autonomy is a supreme common law value that trumps even the State’s interest in life itself, and is therefore protected as a fundamental right that may be vindicated through a common law writ of habeas corpus.

New York common law equality forbids discrimination founded upon unreasonable means or unjust ends, and protects Hercules and Leo’s common law right to bodily liberty free from unjust discrimination. Hercules and Leo’s common law classification as “legal things,” rather than “legal persons,” rests upon the illegitimate end of enslaving them. Simultaneously, it classifies Hercules and Leo by the single trait of their being a chimpanzee, and then denies them the capacity to have a legal right. This discrimination is so fundamentally inequitable it violates basic common law equality. In fact, the New York legislature’s recognition that some nonhuman animals, such as chimpanzees, are capable of having personhood rights by expressly allowing them to be trust “beneficiaries” pursuant to §7-8.1 of the Estates, Powers and Trusts Law (“EPTL”) affirms that personhood may apply to natural persons other than human beings.

Petitioner now requests that this Court recognize Hercules and Leo’s common law right to bodily liberty protected by the common law of habeas corpus, issue the Order to Show Cause & Writ of Habeas Corpus, and immediately release Hercules and Leo from their unlawful imprisonment at Stony Brook University to Save the Chimps, an extraordinary chimpanzee sanctuary in South Florida, where they will live out their lives with numerous other chimpanzees in an environment as close to their native Africa as may be found in North America.

Petitioner further asks this Court to recognize that Hercules and Leo are “persons” within the meaning of New York habeas corpus common law and thus CPLR Article 70, issue the Order to Show Cause & Writ of Habeas Corpus that requires Respondents to provide a legally sufficient reason for their detention, and then proceed according to Article 70.

The Court need not make a judicial determination at this time, however, that Hercules and Leo are “persons” in order to issue the writ or show cause order. Instead, the Court may follow the laudatory procedure used both by Lord Mansfield in his common law habeas corpus ruling in *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), where the great Chief Justice assumed, *without deciding*, that the slave, James Somerset, could possibly possess the right to bodily liberty protected by the common law of habeas corpus, and issued the writ that required the respondent to provide a legally sufficient reason for Somerset’s detention, and by the Court in *In re Tom*, 5 Johns. 365 (N.Y. 1810) (*per curiam*), where it issued a writ of habeas corpus upon the petition of a slave who claimed he had been manumitted and was being unlawfully detained as property.⁵ As in these cases, this Court may assume, without deciding, that Hercules and Leo could be legal persons, and issue the Order to Show Cause & Writ of Habeas Corpus that requires their captors to provide a legally sufficient reason for their detention, and then proceed according to Article 70.

Petitioner does not claim Respondents are violating any federal, state, or local animal welfare law in the manner in which they are detaining Hercules and Leo. The issue in this case is not the chimpanzees’ welfare, any more than the issue would be the welfare of a human being detained against his or her will in a habeas corpus case. The issue in this habeas corpus action is

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whether Hercules and Leo, as autonomous and self-determining beings, may be legally detained at all.⁶

In the following Statement of Facts, Petitioner sets out the facts that demonstrate that Hercules and Leo’s genetics and physiology have produced a brain that allows each of them the capacities of autonomy and self-determination, as well as the generally cognitive and emotional complexity sufficient for common law personhood and the possession of the common law right to bodily liberty protected by the common law of habeas corpus.

II. STATEMENT OF FACTS

The Expert Affidavits submitted in support of this Habeas Petition demonstrate that chimpanzees possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty, as a matter of liberty, equality, or both, most especially autonomy and self-determination. These include possession of an autobiographical self, episodic memory, self-determination, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception, their ability to understand cause-and-effect, the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

Humans and chimpanzees share almost 99% of their DNA (Affidavit of Tetsuro Matsuzawa (“Matsuzawa Aff.”), at ¶10; Affidavit of Emily Sue Savage-Rumbaugh (“Savage-

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⁶ Even if Respondents were violating animal welfare statutes, habeas corpus would still be available, as the courts have made clear that alternative remedies do not alter one’s ability to bring the writ. People v. Schildhaus, 8 N.Y.2d 33, 36 (1960). See also Williams v. Dir. of Long Island Home, Ltd., 37 A.D.2d 568, 570 (2d Dept. 1971) (“The fact that petitioner or the detainee may have had an alternative avenue of relief by way of a statutory remedy in no way alters the right to broach the issue by way of habeas corpus.”). Further, the remedy for a violation of an animal welfare statute does not necessarily entail the release of the animal, further rendering such a statute inapposite.
Chimpanzees are more closely related to human beings than to gorillas (Affidavit of William McGrew (“McGrew Aff.”), ¶11; Affidavit of James King (“King Aff.”), at ¶12; Affidavit of Mathias Osvath (“Osvath Aff.”), at ¶11). Both the brains and behavior of humans and chimpanzees are plastic, flexible, and heavily dependent upon learning (Savage-Rumbaugh Aff. at ¶11a). Both possess the brain asymmetry associated with sophisticated communication and language-like capacities (Matsuzawa Aff. at ¶12). Both share similar brain circuits involved in language and communication (Matsuzawa Aff. at ¶10), and have evolved the large frontal lobes involved in insight and foreplanning (Id.). Broca’s Area and Wernicke’s Area, which enable human symbolic communication, have corresponding areas in chimpanzee brains (Savage-Rumbaugh Aff. at ¶13).

Both share cell types involved in higher-order thinking, and functional characteristics related to sense of self (Matsuzawa Aff. at ¶10; Affidavit of Jennifer M.B. Fugate (“Fugate Aff.”), at ¶14). Both brains possess spindle cells (or von Economo neurons) in the anterior cingulate cortex, involved in emotional learning, the processing of complex social information, decision-making, awareness, and, in humans, speech initiation (Matsuzawa Aff. at ¶14). This strongly suggests they share many higher-order brain functions (Id.). The chimpanzee brain is activated in the same areas and networks as the human brain during activities associated with planning, foresight, episodic memory, and memories of autobiographical events (Osvath Aff. at ¶12, ¶15-16).

That their brains develop and mature in similar ways indicates that humans and chimpanzees pass through similar cognitive developmental stages (Matsuzawa Aff. at ¶10). Brain developmental delay, which plays a role in the emergence of complex cognitive abilities, such as self-awareness, creativity, foreplanning, working memory, decision-making and social interaction, is a key feature of both chimpanzee and human prefrontal cortex brain evolution (Matsuzawa Aff. at ¶11; Savage-Rumbaugh Aff. at ¶11a, ¶12). Chimpanzee development of the use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children; this points to deep similarities.
in the cognitive processes that underlie communication in both species (Jensvold Aff. at ¶9).
Both develop increasing levels of consciousness, awareness, and self-understanding throughout adulthood, through culture and learning (Savage-Rumbaugh Aff. at ¶11d).

Numerous parallels in the way their communication skills develop suggest a similar unfolding of cognitive processes and an underlying neurobiological continuity (Jensvold Aff. at ¶10). The foundational stages of communication suggest striking similarities between human and chimpanzee cognition (Id. at ¶¶10-11). Chimpanzees show some of the same early developmental tendencies and changes in their communication skills as children (Id. at ¶10). Children and language-trained chimpanzees begin communicating using natural gestures before moving to more frequent use of symbols (Id.). In both, the ratio of symbol to gestures increases with age, with the overwhelming majority of gestures serving a communicative purpose (Id.). Both show a primacy of natural gestures in development over learning a symbolic system of communication (Id. at ¶¶9-10).

Chimpanzees and humans are autonomous (King Aff. at ¶¶11; Osvath Aff. at ¶11), which Professor King defines as freely choosing, not acting on reflex, innate behavior, or through any conventional category of learning such as conditioning, discrimination learning, or concept formation, directing behavior based on internal cognitive processes (King Aff. at ¶11). The simplest explanation for chimpanzee behavior that looks autonomous is they are based on similar human capacities (Id. at ¶12). Chimpanzees possess the “self” that is integral to autonomy, being able to have goals and desires, intentionally act towards those goals, and understand whether they are satisfied (Matsuzawa Aff. at ¶15).

Responding differently to one’s own name than to other sounds, showing specific brain wave responses to the sound of one’s name, signifies self in both chimpanzees and humans (Id. at ¶13). Chimpanzees recognize themselves in mirrors (Id. at ¶15), a marker of self-awareness (Anderson Aff. at ¶12; Savage-Rumbaugh Aff. at ¶16). They recognize themselves on television, in videos and photographs, and examine the interior of their mouths with flashlights (Savage-Rumbaugh Aff. at ¶16). They recognize pictures of themselves, and others, when they were very
young (*Id.*). Self-recognition requires that one hold a mental representation of what one looks like from another perspective (Anderson Aff. at ¶12). This capacity to reflect upon one’s behavior allows one to become the object of one’s own thought (Savage-Rumbaugh Aff. at ¶16). Chimpanzees show such capacities that stem from self-awareness, as self-monitoring, self-reflection, and metacognition (*Id.* at ¶15). They are aware of what they know and do not know (*Id.*). “Self-agency,” a fundamental component of autonomy, allows one to distinguish one’s own actions and effects from external events (Matsuzawa Aff. at ¶16). Both chimpanzees and humans share the fundamental cognitive processes underlying the sense of being an independent agent (Matsuzawa Aff. at ¶16; Savage-Rumbaugh Aff. at ¶11e).

Similar brain structures of humans and chimpanzees support the behavioral and cognitive evidence for both human and chimpanzee autobiographical selves (Osvath Aff. at ¶15). Both are aware of their past and envision their future (*Id.* at ¶16). Both share the sophisticated cognitive capacity necessary for the “mental time travel” the episodic system enables (Osvath Aff. at ¶10, ¶12, ¶15; Jensvold Aff. at ¶10). Without understanding one is an individual who exists through time, one cannot recollect past events in one’s life and plan future events (Osvath Aff. at ¶12). Autonoetic, or self-knowing, consciousness allows an autobiographical sense of a self with a past and future (*Id.*).

Chimpanzees delay a strong current drive for a better future reward, generalize a novel tool for future use, and select objects for a much-delayed future task (*Id.* at ¶14). They can remember the “what, where and when” of events years later (*Id.* at ¶12). They can prepare themselves for such a future action as tool use a day in advance (*Id.*). Wild chimpanzees demonstrate such long-term planning for tool use as transporting stones to locations to be later used later as hammers to crack nuts; a captive chimpanzee routinely collected, stockpiled, and concealed stones he would later hurl at visitors when he was agitated (Osvath Aff. at ¶13; Anderson Aff. at ¶16). This ability to mentally construct a new situation to alter the future (in this case the behaviors of human zoo visitors) and plan for events where one is in a different psychological state signals the presence of an episodic system (Osvath Aff. at ¶13).
Autonomous individuals possess a self-control that depends upon the episodic system (Id. at ¶14). Chimpanzees, like humans, delay gratification for a future reward, indeed possess a high level of self-control under many circumstances (Id.). Chimpanzees plan for future exchanges with humans (Id.). They may use self-distraction (playing with toys) to cope with the impulse of grabbing immediate candies instead of waiting for more (Id.).

Perceptual simulations enabled by episodic memory bring the future into the present by braking current drives in favor of delayed rewards, and is available only those who a sufficiently sophisticated sense of self and autobiographical memory (Id.). Chimpanzees can disregard a small piece of food in favor of a tool that will allow them to obtain a larger piece of food later (Id.). They can select a tool they have never seen, guess its function, and use it appropriately (Id.). This would be impossible without being able to mentally represent the future event (Id.).

Chimpanzees re-experience and anticipate pains and pleasures (Id. at ¶16). Like humans, they experience pain around an anticipated future event (Id.). Confining someone in a prison or cage loses its power as punishment if the individual had no self-concept, as each moment will be a new with no conscious relation to any other (Id.). As chimpanzees conceive a personal past and future, and suffer the pain of being unable to fulfill their goals or move about as they wish, like humans they experience the pain of anticipating a never-ending situation (Id.).

Language, a volitional process that involves creating intentional sounds for the purpose of communication, reflects autonomous thinking and behavior (Matsuzawa Aff. at ¶13). Chimpanzees exhibit referential and intentional communication (Anderson Aff. at ¶15). They produce sounds to capture the attention of an inattentive audience (Id.). The development of their use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children, which points to deep similarities in the cognitive processes that underlie communication in both (Jensvold Aff. at ¶9).

They point and vocalize when they want another to notice something and adjust their gesturing to insure they are noticed (Id.). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting, and helping a partner (Id.). They intentionally
and purposefully inform naïve chimpanzees about something (Id.). Wild chimpanzees direct alarm calls to friends arriving on the scene, who cannot see a snake, and stop calling once the others are safe from the predator (Id.).

Chimpanzees demonstrate purposeful communication, conversation, understanding of symbols, perspective-taking, imagination, and humor (Jensvold Aff. at ¶9; Savage-Rumbaugh Aff. at ¶¶14-15). They learn, and remember for decades, symbols for hundreds of items, events and locations; they learn new symbols just by observing others using them (Savage-Rumbaugh Aff. at ¶20). They master syntax (Id.). They understand such “if/then” clauses as, “if you share your cereal with Sherman, you can have some more” (Id. at ¶21). They announce important social events, what that they are about to do, where they are going, what assistance they want from others, and how they feel (Id. at ¶25). They announce what they are going to retrieve from an array of objects they’ve seen in another room (Id.). They recount what happened yesterday (Id. at ¶27).

There is no essential difference between what words chimpanzees learn mean to them, and what words humans learn mean to them (Savage-Rumbaugh Aff. at ¶20). They understand there is no one-to-one relationship between utterances and events, that there are infinite linguistic ways of communicating the same or similar things (Id. at ¶22). They use symbols to comment about other individuals as well as about past and future events (Jensvold Aff. at ¶10). They purposefully create declarative sentences and combine gestures with pointing to refer to objects (Id.).

Language-trained chimpanzees spontaneously use language to communicate with each other (Jensvold Aff. at ¶12; Savage-Rumbaugh Aff. at ¶15). Those who understand spoken English answer “yes/no” questions about their thoughts, plans, feelings, intentions, dislikes and likes (Savage-Rumbaugh Aff. at ¶15). They answer questions about their companions’ likes and dislikes and tell researchers what other apes want (Id.). They use symbols to express themselves and to state what they are going to do, in advance of acting, then carry out their action (Id. at ¶17). An example is statements made by two language-trained chimpanzees trained with abstract
computer symbols, Sherman and Austin, who told each other the foods they intended to share, and told experimenters which items they were going to give to them (Id.). With the emergence of the ability to state their intentions, Sherman and Austin revealed that, not only did they recognize and understand differential knowledge states between themselves, but language allows beings to bring their different knowledge states into accord with their imminent intentions and to coordinate their actions (Id. at ¶¶18-19).

Sherman and Austin would state “Go outdoors,” then head for the door, or “Apple refrigerator,” then take an apple from the refrigerator (rather than any of the other foods in the refrigerator) (Id. at ¶18). To produce statements about intended actions for the purpose of co-coordinating future actions with others, one must be able to form a thought and hold it until agreement is reached between two parties (Id. at ¶20).

The chimpanzee Loulis was not raised with humans and was not taught ASL by humans (Jensvold Aff. at ¶12). Nor did humans use ASL in his presence (Id.). But he was the adopted son of Washoe, a signing chimpanzee. Loulis acquired signs from observing Washoe and other signing chimpanzees, as well as when Washoe molded his hands into the appropriate signs (Id.). Not only did Washoe’s behavior toward Loulis show she was aware of his shortcomings in the use of signs as a communication skill, but she took steps to change that situation (Id.).

True communication is based on conversational interaction in which the participants takes turns communicating in a give-and-take manner and respond appropriately to the other’s communicative actions (Id. at ¶11). When a conversation becomes confusing, participants make such contingent adjustments as offering a revised or alternative utterance/gesture or repeating a gesture or sign to continue the conversation (Id.). ASL-using chimpanzees demonstrate contingent communication with humans at the same level as young human children (Id.).

When a human conversation has broken down, they repeat their utterance and add information (Id.). Chimpanzees conversing in sign language with humans respond in the same way, reiterating, adjusting, and shifting their signs to create conversationally appropriate rejoinders; their reactions to and interactions with a conversational partner resemble patterns of
conversation found in studies of human children (*Id.*). When their request is satisfied, they cease signing it (*Id.*). When their request is misunderstood, refused or not acknowledged, they repeat and revise their signing until they get a satisfactory response (*Id.*). As in humans, this pattern of contingency in conversation demonstrates volitional and purposeful communication and thought (*Id.*).

Chimpanzees understand that conversation involves turn-taking and mutual attention and will try to alter the attentional state of the human (*Id.*). If they wish to communicate with a human whose back is turned to them they will make attention-getting sounds (*Id.*). If the human is turned to them, they switch to conversational sign language with few sounds (*Id.*).

Both language-using and wild chimpanzees understand conversational give-and-take and adjust their communication to the attentional state of the other participant, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture (*Id.*). Even wild and captive chimpanzees untutored in American Sign Language string together multiple gestures to create gesture sequences, and combine gestures into long series, within which gestures may overlap, interspersed with bouts of response waiting or be exchanged back and forth between individuals (*Id.*).

When Sherman and Austin communicated, they paid close attention to the other’s visual regard (Savage-Rumbaugh Aff. at ¶22). If Austin was looking away when Sherman selected a symbol, Sherman would wait until Austin looked back. Then he would point to the symbol he used. If Austin hesitated, Sherman would point to the food the symbol symbolized. If Austin’s attention wandered further, Sherman would turn Austin’s head toward the keyboard. If Sherman was not attending to Austin’s request, Austin would gaze at the symbol until Sherman took note (*Id.*). Both recognized the speaker had to monitor the listener, watch what he was doing, make judgments about his state of comprehension, and decide how to proceed with conversational repair (*Id.*).
In a manner similar to two-through-seven year olds, sign-language trained chimpanzees and chimpanzees trained to use arbitrary computer symbols to communicate, sign among themselves and exhibit a telltale sign of volitional use of language, signing to themselves or “private speech” (Jensvold Aff. at ¶12; Savage-Rumbaugh Aff. at ¶14). Private speech has many functions, including self-guidance, self-regulation of behavior, planning, pacing, and monitoring skill, and is a part of normal development of communication (Jensvold Aff. at ¶13). Children use private speech during creative and imaginative play, often talking to themselves when playing imaginative and pretend games (Id. at ¶14). The more frequently children engage in private speech, the more creative, flexible, and original thought they display (Id.).

Imagination is a key component of mental representation, metacognition, and the ability to mentally create other realities (Id. at ¶15). Both captive and wild chimpanzees engage in at least six forms of imaginary play that are similar to the imaginary play of children ages two through six (Id.). These include Animation, Substitution, and imaginary private signing (Id.). Animation is pretending that an inanimate object is alive, such as talking to a teddy bear; substitution is pretending an object has a new identity, such as placing a block on the head as a hat (Id.). In imaginary private signing, chimpanzees transform a sign or its referent to a different meaning, whether it is present or not (Id. at ¶14). An example is placing a wooden block on one’s head and referring to it as a hat (Id.). Chimpanzees use imagination to engage in pretend-aggression (Savage-Rumbaugh Aff. at ¶31). Sherman pretended that a King Kong doll was biting his fingers and toes and would pretend to be in pain, when he poked a needle in his skin and out the other side, being careful to just pierce the thick outer layer of skin (Id.).

Deception and imaginary play require behaviors directed toward something that is not there and often involve modeling mental states (Jensvold Aff. at ¶16). They are closely related and by age three chimpanzees engage in both (Id. at ¶15; Savage-Rumbaugh Aff. at ¶16). For example, a chimpanzee who cached stones to later throw at zoo visitors engaged in deception by constructing hiding places for his stone caches, then inhibiting those aggressive displays that signal upcoming throws (Osvath Aff. at ¶13).
Chimpanzees display a sense of humor, and laugh under many of the same circumstances in which humans laugh (Jensvold Aff. at ¶17).

Together these findings provide evidence for cognitive similarities between humans and chimpanzees in the domains of mental representation, intentionality, imagination, and mental state modeling – all fundamental components of autonomy (Id.).

Chimpanzees are attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others (Anderson Aff. at ¶15; Fugate Aff. at ¶16; Matsuzawa Aff. at ¶¶17-18). They possess mirror neurons, which allow them to share and relate to another’s emotional state (Fugate Aff. at ¶14). These specialized cells respond to actions performed by oneself, but also when one watches the same action performed by another, which forms the basis for empathy, the ability to put oneself in another’s situation (Fugate Aff. at ¶14; Matsuzawa Aff. at ¶17). They have some theory of mind; they know they have minds, they know humans have minds, thoughts, intentions, feelings, needs, desires, and intentions, and they know these other minds and state of knowledge differ from what their minds know (Savage-Rumbaugh Aff. at ¶32). They know when another chimpanzee does not know something and inform the other about facts he does not know (Id.).

Chimpanzees observing another trying to complete a task anticipate their intentions (Matsuzawa Aff. at ¶17). They know what others can and cannot see (Id.). They know when another’s behavior is accidental or intentional (Id.). They use their knowledge of others’ perceptions to deceive them (Id.). In situations where two chimpanzees are competing for hidden food, they employ strategies and counter-strategies to throw each other off the trail and obtain the food for themselves (Id.). When placed in a situation where they must compete for food placed at various locations around visual barriers, subordinate chimpanzees only approach food they infer dominant chimpanzees cannot see (Anderson Aff. at ¶15). They can take the visual perspective of a chimpanzee competitor, and understand that what they see is not the same thing their competitor sees (Id.). When ASL-trained and wild chimpanzees adjust their gestures and gestural sequences to the attention state of the individual they are trying to communicate with,
using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture, demonstrating visual perspective-taking and mental state modeling (Jensvold Aff. at ¶11).

The capacity for self-recognition has been linked to empathy, which is the identifying with, and understanding of, another’s situation, feelings and motives. Several lines of evidence indicate chimpanzees possess highly developed empathic abilities (Anderson Aff. at ¶13).

When tested in similar experimental situations using video stimuli, chimpanzees show contagious yawning in much the same way as humans do (Anderson Aff. at ¶18; Matsuzawa Aff. at ¶18). That chimpanzees yawn more frequently in response to seeing familiar individuals yawning compared to unfamiliar others supports a link between contagious yawning and empathy (Id.). Chimpanzees shown videos of other chimpanzees yawning or displaying open-mouth facial expressions that were not yawns, showed higher levels of yawning in response to the yawn videos but not to the open-mouth displays (Matsuzawa Aff. at ¶18). These findings are similar to contagious yawning effects observed in humans, and are based on the capacity for empathy (Id).

In the wild and in captivity, chimpanzees engage in sophisticated tactical deception that requires attributing mental states and motives to others (Anderson Aff. at ¶14). This is shown when individuals console an unrelated victim of aggression by a third-party (Id.). They show concern for others in risky situations. When a chimpanzee group crosses a road, the more capable adult males will investigate the situation before more vulnerable group-members cross, and take up positions at the front and rear of the procession (Id.). Knowledge of one’s own and others’ capabilities is probably at the origin of some instances of division of labor (Id.). This includes sex differences in cooperative hunting for live prey, and crop-raiding; these activities often lead to individuals in possession of food sharing it with those who do not (Id.).

One consequence of self-awareness may be awareness of death; chimpanzees demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living, in a manner similar to humans when a close relative
passes away, which strongly suggests that chimpanzees, like humans, feel grief and compassion when dealing with mortality (Anderson Aff. at ¶19).

An important indicator of intelligence is the capacity for tool-making and use (McGrew Aff. at ¶¶14-15). Tool-making implies complex problem-solving skills and evidences understanding of means-ends relations and causation, for it requires making choices, often in a specific sequence, towards a goal, which is a key aspect of intentional action (McGrew Aff. at ¶15; Fugate Aff. at 17).

Wild chimpanzees make and use tools of vegetation and stone for hunting, gathering, fighting, play, communication, courtship, hygiene and socializing (McGrew Aff. at ¶15). Chimpanzees make and use complex tools that require them to utilize two or more objects towards a goal (Id. at ¶16). They make compound tools by combining two or more components into a single unit (Id.). They make adjustments to attain their goal (Id.).

Chimpanzees use “tool sets,” two or more tools in an obligate sequence to achieve a goal, such as a set of five objects – pounder, perforator, enlarger, collector, and swab – to obtain honey (Id. at ¶17). Such sophisticated tool-use involves choosing appropriate objects in a complex sequence to obtain a goal they keep in mind throughout the process (Id.). This sequencing and mental representation is a hallmark of intentionality and self-regulation (Id.).

Chimpanzees have taken tool-making and use into the cultural realm (Id.). Culture is normative (represents something most individuals do), collective (characteristic of a group or community), and socially-learned behavior (learned by watching others) (Id. at ¶18). It is transmitted by social and observational learning (learning by watching others), which characterizes a group or population (Id.). Culture is based on several high-level cognitive capacities, including imitation (directly mimicking bodily actions), emulation (learning the results of another’s actions, then achieving those results in another way) and innovation (producing novel ways to do things and combining known elements in new ways), all of which chimpanzees share (Id.). Under natural conditions, different chimpanzee cultures construct
different rule-based social structures which they pass from one generation to the next (McGrew Aff. at ¶19; Savage-Rumbaugh Aff. at ¶11f).

Three general cultural domains are found in humans and chimpanzees: 1) material culture, the use of one or more physical objects as a means to achieve an end, 2) social culture, behaviors that allow individuals to develop and benefit from social living, and 3) symbolic culture, communicative gestures and vocalizations which are arbitrarily, that is symbolically, associated with intentions and behaviors (Id.).

Each wild chimpanzee cultural group makes and uses a unique “tool kit,” which indicates that chimpanzees form mental representations of a sequence of acts aimed at achieving a goal (McGrew Aff. at ¶20; Anderson Aff. at ¶16). A chimpanzee tool kit is a unique set of about 20 different tools, often used in a specific sequence for foraging and processing food, making comfortable and secure sleeping nests in trees, and personal hygiene and comfort. (Id.). These “tool kits” vary across groups, are passed on by observing others using them, and found from savannah to rainforest (McGrew Aff. at ¶20).

Tool-making is neither genetically determined, fixed, “hard-wired,” nor simple reflex (Id.). It depends on the mental abilities that underlie human culture, learning from others and deciding how to do things. Each chimpanzee group develops its own culture through its own behavioural choices (Id.). At least 40 chimpanzee cultures across Africa use combinations of over 65 identifiable behaviors (Id.).

Organic chimpanzee tool kits are not preserved in the archaeological record. But chimpanzee, like human, stone tools are. (Id. at ¶21). The foraging tool kits of some chimpanzee populations are indistinguishable in complexity from the tools kits of some of the simplest human material cultures, such as Tasmanian aborigines, and the oldest known human artefacts, such as the East African Oldowan Industry (Id.). Chimpanzee stone artefacts excavated in West Africa demonstrate there was once a chimpanzee “Stone Age,” just as there was a human “Stone Age,” that is at least 4,300 years old. This predates settled farming villages and Iron Age technology in West Africa (Id.). In one chimpanzee population, chimpanzee tool-making culture
has been passed down for 225 generations (Id.). With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next (Id. at ¶22; for examples, see id.). Wild chimpanzees demonstrate symbolic element key to human (Id. at ¶23). Thus, in one chimpanzee group, arbitrary symbolic gestures communicate desire to have sex, in another group an entirely different symbolic gesture expresses the same sentiment (Id.).

Human and chimpanzee cultures are underwritten by a common set of mental abilities (Id. at ¶24). The most important are imitation and emulation. Learning by observation is key to both (Id.). Chimpanzees copy methods used by others to manipulate objects and use both direct imitation and emulation, depending on the circumstance (Id.). Imitation, which involves copying bodily actions, is a hallmark of self-awareness, as it suggests the individual has a sense of his own body and how it corresponds to another’s body, and can manipulate his body in accordance with the other’s actions (Id.). Chimpanzees precisely mimic the actions of others, even the correct sequence of actions to achieve a goal (McGrew Aff. at ¶24; Anderson Aff. ¶17).

Chimpanzee and human infants selectively imitate facial expressions (Anderson Aff. at ¶17). Chimpanzees directly imitate another’s way to achieve a goal when they have not figured out their own way to achieve that same goal (McGrew Aff. at ¶24; Anderson Aff. ¶17). When chimpanzees have the skills to complete a task they tend to emulate, not imitate (McGrew Aff. at ¶24). These findings demonstrate that chimpanzees make choices about whether to directly copy someone else’s actions based on whether they think they can figure out how to do the task themselves (Id.).

Chimpanzees know when they are being imitated, and respond as human toddlers do (Id.). Both “test out” the behavior of the imitator by making repetitive actions and looking to see if the imitator follows (Id.). This is similar to how chimpanzees and toddlers test whether an image in a mirror is herself (Id.). Called “contingency checking,” this is another hallmark of self-awareness (Id.). Chimpanzees engage in “deferred imitation,” copying actions they have seen in the past (McGrew Aff. at ¶24; Anderson Aff. at ¶17). Deferred imitation relies upon more
sophisticated capacities than direct imitation, as chimpanzees must remember the actions of another, while replicating them in real time (McGrew Aff. at ¶24).

These capacities for imitation and emulation are necessary for “cumulative cultural evolution” (McGrew Aff. at ¶25; Anderson Aff. at ¶17). This cultural capacity, found in humans and chimpanzees, involves the ability to build upon previous customs (McGrew Aff. at ¶25). Chimpanzees, like humans, tend to be social conformists, which allows them to maintain customs within groups (Id.). The evidence suggests a similarity between the mental capacities of humans and chimpanzees in the areas of observational learning, imitation (and thus self-awareness), decision-making, memory and innovation (Id.).

Chimpanzees have moral inclinations and some level of moral agency; they behave in ways that we would interpret as a reflection of moral imperatives in humans (Id. at ¶26). They ostracize individuals who violate social norms (Id.). They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same task (Id.). When given a chance to play such economic games as the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so (Id.).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system (Id. at ¶27). They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success (Id.). They share meat from prey (Id.). Males cooperate in territorial defense, and engage in risky boundary patrolling (Id.).

Numerosity, the ability to understand numbers as a sequence of quantities, requires both sophisticated working memory (in order to keep numbers in mind), and conceptual understanding of a sequence (Matsuzawa Aff. at ¶19). This is closely related to “mental time travel” and planning the right sequence of steps towards a goal, two critical components of autonomy (Id.). Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols (“2”, “5”, etc.) represent discrete quantities (Id.).

Sequential learning is the ability to encode and represent the order of discrete items occurring in a sequence (Id.). It is critical for human speech and language processing, learning
action sequences, and any task that requires placing items in an ordered sequence (Id.). Chimpanzees count, sum arrays of real objects or Arabic numerals, and display ordinality and transitivity (if \( A = B \) and \( B = C \), then \( A = C \)) when engaged in numerical tasks, demonstrating they understand the ordinal nature of numbers (Id.). Chimpanzees understand proportions (e.g., \( 1/2, 3/4, \) etc.) (Id.). They can name the number, color and type of object shown on a screen (Id.). They use a touch screen to count from 0 to 9 in sequence (Id.). They understand the concept of zero, using it appropriately in ordinal context (Id.). They count to 21 (Savage-Rumbaugh Aff. at ¶29). They display “indicating acts” (pointing, touching, rearranging) similar to what human children display when counting a sum (Matsuzawa Aff. at ¶19). Both chimpanzees and children touch each item when counting an array of items, suggesting further similarity in the way both conceptualize numbers and sequences (Id. at ¶20).

Chimpanzees have excellent working, or short-term, memory (Id.). Working memory is the ability to temporarily store, manipulate, and recall items (numbers, objects, names, etc.) (Id.). It deals with how good someone is at keeping several items in mind simultaneously (Id.). Working memory tasks require monitoring (manipulation of information or behaviors) as part of completing goal-directed actions in the setting of interfering processes and distractions (Id.). The cognitive processes needed to achieve this include attention and executive control (reasoning, planning and execution) (Id.). When chimpanzees are shown the numerals 1-9 spread randomly across a computer screen (id.), the numbers appearing for just 210, 430, and 650 milliseconds, then replaced by white squares, they touch them in the correct order (1-9) (Id.). In another version of the task, as soon as chimpanzees touched the number 1, the remaining numbers were immediately masked by white squares (Id.). They had to remember the location of each concealed number and touch them in the correct order (Id.). The performance of a number of the chimpanzees on these seemingly impossible memory tasks was not only accurate, but better than human adults (Id.). Chimpanzees have an extraordinary working memory capability for
numerical recollection, better than adult humans, which underlies a number of mental skills related to mental representation, attention, and sequencing (Id.).\(^7\)

Chimpanzees are competent at “cross-modal perceptions.” They obtain information in one modality such as vision or hearing, and internally translate it to information in another modality (Savage-Rumbaugh Aff. at ¶26). They match an audio or video vocalization recording of a familiar chimpanzee or human to her photograph (Fugate Aff. at ¶16). They translate symbolically encoded information and into any non-symbolic mode (Savage-Rumbaugh Aff. at ¶26). When shown an object’s picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol (Id.).

On June 26, 2013, the National Institutes of Health (“NIH”) announced the agency’s decisions with respect to recommendations concerning the use of chimpanzees in NIH-supported research by The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils’ Recommendation. (Affidavit of Steven M. Wise (“Wise Aff.”) annexed as Exhibit A). These included acceptance of the following recommendations of The Working Group:

1. Working Group Recommendation EA1: “Chimpanzees must have the opportunity to live in sufficiently large, complex, multi-male, multi-female social groupings, ideally consisting of at least 7 individuals. Unless dictated by clearly documented medical or social circumstances, no chimpanzee should be required to live alone for extended periods of time. Pairs, trios, and even small groups of 4 to 6 individuals do not provide the social complexity required to meet the social needs of this cognitively advanced species. When chimpanzees need to be housed in groupings that are smaller than ideal for longer than necessary, for example, during routine veterinary examinations or when they are introduced to a new social group, this need should be regularly reviewed and documented by a veterinarian and a primate behaviorist.” (Wise Aff. Exh. A, p. 5).

\(^7\) These remarkable similarities between humans and chimpanzees are not limited to autonomy, but extend to personality and emotion (King Aff. at ¶¶12-28).
2. Working Group Recommendation EA4: “Chimpanzees should have the opportunity to climb at least 20 ft (6.1m) vertically. Moreover, their environment must provide enough climbing opportunities and space to allow all members of larger groups to travel, feed, and rest in elevated spaces.” (Wise Aff. Exh. A, pp. 8-9).

3. Working Group Recommendation EA5: “Progressive and ethologically appropriate management of chimpanzees must include provision of foraging opportunities and diets that are varied, nutritious, and challenging to obtain and process.” (Wise Aff. Exh. A, pp. 9-10).


5. Working Group Recommendation EA8: “Chimpanzee management staff must include experienced and trained behaviorists, animal trainers, and enrichment specialists to foster positive human-animal relationships and provide cognitive stimulation[.]” (Wise Aff. Exh. A, pp. 11-12).

Sitting on 190 acres in Fort Pierce, Florida, Save the Chimps provides permanent homes for roughly 260 chimpanzees on twelve three-to-five-acre open-air islands that contain hills and climbing structures and that provide the opportunity for the chimpanzees to make choices about their daily activities. (Affidavit of Molly Polidoroff (“Polidoroff Aff.”) at ¶7, ¶10). Chimpanzees who previously lived alone or in very small groups for decades become part of large and natural chimpanzee families. (Id. at ¶7). Grass, palm trees, hills, and climbing structures allow the chimpanzees places to run and roam, visit with friends, bask in the sun, or curl up in the shade, or whatever else they may wish to do. (Id. at ¶10). Save the Chimps has over 50 employees including two full time veterinarians that provide 24-hour coverage with a support staff of technicians and assistants. (Id. at ¶9, ¶15).
III. ARGUMENT

A. PETITIONER HAS STANDING TO FILE THIS PETITION.

For centuries, Anglo-American common law and statutory law have recognized that third parties may bring habeas corpus cases on behalf of detained persons. CPLR 7002(a) provides: “[a] person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance.” (emphasis added). E.g., Somerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (unrelated third parties sought common law writ of habeas corpus on behalf of black slave imprisoned on a ship); Case of the Hottentot Venus, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (Abolitionist Society sought common law writ of habeas corpus to determine whether an African woman was being exhibited in London of her own free will).

New York has long recognized broad common law next friend representation in habeas corpus cases. See Lemmon v. People, 20 N.Y. 562 (1860) (as he had in other cases, the free black abolitionist dock worker, Louis Napoleon, sought a writ of habeas corpus on behalf of eight detained slaves with whom he had no relationship); Holzer v. Deutsche Reichsbahn Gesellschaft, 290 N.Y.S. 181, 192 (Sup. Ct. 1936) (“[i]n 1852 Mrs. Lemmon, of Virginia, proceeded to Texas via New York, with eight negro slaves. . . . Upon her arrival in New York a free negro, as next friend, obtained a writ of habeas corpus which was sustained”), aff’d in part, modified in part, 277 N.Y. 474 (1938); In re Kirk, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (as he would in Lemmon, supra, the dock worker, Louis Napoleon, sought a writ of habeas corpus on behalf of a slave with whom he had no relationship); People v. McLeod, 3 Hill 635, 647 note j (N.Y. 1842) (“every Englishman . . . imprisoned by any authority . . . has an undoubted right, by his agents or friends, to . . . obtain a writ of habeas corpus”) (citations omitted, emphasis added). See also People ex rel. Turano v. Cunningham, 57 A.D.2d 801 (1st Dept. 1977) (habeas corpus petition filed by “next friend” of incarcerated inmate); State v. Lascaris, 37 A.D.2d 128 (4th Dept. 1971); People ex rel. Hubert v. Kaiser, 150 A.D. 541, 544 (1st Dept. 1912) (habeas corpus petition filed by “next friend” of incarcerated inmate); People ex rel. Sheldon v. Curtin, 152 A.D. 364 (4th
Dept. 1912) (habeas corpus petition filed by “next friend” of woman detained at the Western House of Refuge for Women); People ex rel. Rao v. Warden of City Prison, 11 N.Y.S.2d 63 (Sup. Ct. 1939) (habeas corpus petition filed by “next friend” of prisoner). In view of these authorities, Petitioner has standing to file the Habeas Petition on behalf of Hercules and Leo.

B. VENUE IS PROPER IN THIS COURT.

CPLR 7002(b) provides, in relevant part: “a petition for the writ shall be made to: 1. the supreme court in the judicial district in which the person is detained; or . . . 3. any justice of the supreme court[.]” (emphasis added). See also People v. Hanna, 3 How. Pr. 39, 41-43 (N.Y. Sup. Ct. 1847) (“a justice of the supreme court has power, under the provisions of the statute, to allow this writ, notwithstanding there may be an officer in the county where the relator is alleged to be restrained of his liberty, authorised to exercise the same power”). The Habeas Petition is therefore properly made to this Court notwithstanding that Hercules and Leo are not detained in New York County.

Further, this Court should make the Order to Show Cause & Writ of Habeas Corpus returnable to New York County. Pursuant to CPLR 7004(c), a writ must be returnable to the county in which it is issued except: a) where the writ is to secure the release of a person from a “state institution,” it must be made returnable to the county of detention; or b) where the petition was made to a court outside of the county of detention, the court may make the writ returnable to such county. Hercules and Leo are not detained in a “state institution” within the meaning of 7004(c) because that section applies only to state institutions that incarcerate inmates or institutionalize mental patients; otherwise the writ should normally be returned to the county of issuance. Hogan v. Culkin, 18 N.Y.2d 330, 333 (1966); Application of Holbrook, 220 N.Y.S.2d 382, 384 (Sup. Ct. 1961). The “purpose of the rule is to relieve the wardens of State prisons of having to transport the inmates to a county other than the county of detention and incur travel expenses to distant courthouses.” People ex rel. Cordero v. Thomas, 329 N.Y.S.2d 131, 133-34 (Sup. Ct. 1972) (return was not required to be made in the county of detention in an Adolescent Remand Shelter, as the “relator is not being detained in a State prison” and thus, the “writ was
properly issued and made returnable in Kings County”). See also State ex rel. Cox v. Appelton, 309 N.Y.S.2d 290, 292 (Sup. Ct. 1970) (holding that a state-run training school for children was not a “state institution” within the meaning of the rule and thus, the writ was properly returned to the county where the suit was filed).

Hercules and Leo are not inmates detained in a prison, state mental institution, or similar state institution. Furthermore, Petitioner is not demanding their production, but is seeking an order that requires Respondents to show cause, within the meaning of CPLR 7003(a), why the persons “detained should not be released.” The provision regarding “state institutions” was added to the statute solely to “obviate the administrative, security and financial burdens entailed in requiring prison authorities to produce inmates pursuant to such writs in a county other than that in which they were detained[.]” Hogan, 18 N.Y.2d at 333 (citations omitted). None of those concerns are present in this case. See Appelton, 309 N.Y.S.2d at 292 (where habeas corpus action was commenced by show cause order because the petitioner’s production was not necessary, the writ was returnable to the county of filing rather than the county of detention). This Court should therefore make the writ returnable to New York County, unless some good reason exists to make it returnable to the Supreme Court Suffolk County.

C. RES JUDICATA DOES NOT BAR THIS PETITION FOR A COMMON LAW WRIT OF HABEAS CORPUS.

Neither issue preclusion nor claim preclusion apply to the New York common law writ of habeas corpus. People ex rel. Lawrence v. Brady, 56 N.Y. 182, 192 (1874); People ex rel. Leonard HH v. Nixon, 148 A.D.2d 75, 79 (3d Dept. 1989); People ex rel. Sabatino v. Jennings, 221 A.D. 418, 420 (4th Dept. 1927), aff’d, 246 N.Y. 624 (1927). CPLR 7003(b) “continues the common law and present position in New York that res judicata has no application to the writ.” Advisory Committee Notes to CPLR 7003(b). Where “a writ of habeas corpus has been dismissed and the prisoner continues to be held in custody, the prior adjudication is held not to be a bar to a new application for a writ of habeas corpus, even though the grounds may be the same as those previously passed upon.” Post v. Lyford, 285 A.D. 101, 104-05 (3d Dept. 1954).
The rule “permitting relitigation . . . after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention.” *Id.* Therefore, “a court is always competent to issue a new habeas corpus writ on the same grounds as a prior dismissed writ.” *People ex rel. Anderson v. Warden, New York City Correctional Instrn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). *See Brady*, 56 N.Y. at 191-92; *Post*, 285 A.D. at 104-05; *Jennings*, 221 A.D. at 420; *Losaw v. Smith*, 109 A.D. 754 (3d Dept. 1905); *In re Quinn*, 2 A.D. 103, 103-04 (2d Dept. 1896), *aff’d*, 152 N.Y. 89 (1897); *People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722 (Sup. Ct. 1961). This is because “[c]onventional notions of finality of litigation have no place where life or liberty is at stake[.]” *Sanders v. United States*, 373 U.S. 1, 8 (1963). The “inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.” *Id. See Post*, 285 A.D. at 104-05.

A court is not required to issue a writ from a successive petition for a writ of habeas corpus if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, and (3) the court is satisfied that the ends of justice will not be served by granting it. CPLR 7003(b). In the case *sub judice*, not one element is satisfied.

First, the legality of Hercules and Leo’s detention has not been determined in a prior proceeding for a writ of habeas corpus by a court of this State. The Supreme Court, Suffolk County construed the first petition for a common law writ of habeas corpus to demand an order to “show cause” presumably within the meaning of CPLR 403 and summarily denied it without a hearing and without issuing the writ, ordering: “The Court finds that pursuant to §2214(d) of the CPLR there is no reason [for] this matter to be brought by means of an OTC [order to show cause].” (Exh. 1). The Second Department then dismissed Petitioner’s appeal on the ground the

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8. The burden is on the party asserting preclusion to demonstrate that any prior determination was on the merits. *Clark v. Scoville*, 198 N.Y. 279, 283-84 (1910); *Litz Enterprises, Inc. v. Stand. Steel Industries, Inc.*, 57 A.D.2d 34, 38 (4th Dept. 1977).
petition was an *ex parte* order to show cause, the denial of which was non-appealable, without providing Petitioner the opportunity of briefing the merits of the habeas corpus claim. (Exh. 2).

Although the Supreme Court suggested that chimpanzees are not “persons” within the meaning of Article 70 (Exh. 1), this was *not* a ruling on the merits. “[W]hen it appears therefrom that the judgment might have been rendered on the merits, or upon a ground not involving the merits, the presumption is that it was not upon the merits.” *Clark*, 198 N.Y. at 283-84. It must appear, “‘by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined.’” *Id.* (citation omitted). That the Second Department concluded that the “order to show cause” was a non-appealable order demonstrates that the prior determination was not a ruling on the merits. As such, Petitioner was not given a “full and fair” opportunity to litigate the legal issue of personhood for Hercules and Leo. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3rd Dept. 1998) (court refused subsequent petition as petitioner had been afforded “a full and fair opportunity . . . to litigate the issues”); *McAllister v. Div. of Parole of New York State*, 186 A.D.2d 326, 327 (3rd Dept. 1992) (court refused subsequent petition as petitioner “had a full and fair opportunity to litigate the timeliness issue in the habeas corpus proceeding”).

Moreover, the order summarily dismissing the first petition did not state that it was dismissing it “as a matter of law.” (Exh. 1). The “presumption is that it was not upon the merits.” *Clark*, 198 N.Y. at 283-84. *Cf. Mays v. Whitfield*, 282 A.D.2d 721 (2d Dept. 2001) (dismissal of a prior action for failure to prosecute is not a dismissal on the merits and does not bar a second action based upon the same facts unless the order specifies otherwise); *San Filippo v. Adler*, 278 A.D.2d 402 (2d Dept. 2000) (same); *Galvo v. Teplitz Tri-State Recycling, Inc.*, 254 A.D.2d 253, 253-54 (2d Dept. 1998) (trial court’s failure to dismiss action with prejudice or on the merits cannot be construed as a dismissal on the merits); *Lewin v. Yedvarb*, 61 A.D.2d 1025 (2d Dept. 1978) (dismissal for failure to prosecute when trial court does not specifically state it was with prejudice, or on the merits, is not a dismissal on the merits); *Struve v. Bingham*, 244 A.D.2d 178 (1st Dept. 1997) (same); *Nems Enterprises, Ltd. v. Seltaeb, Inc.*, 24 A.D.2d 739 (1st Dept. 1965).

“Vexatious and harassing repetition of invalid claims already heard and decided, or purposeful withholding of alternative grounds for the writ in an earlier application ‘in the hope of being granted two hearings rather than one or for some other such reason’” are also grounds to dismiss successive habeas corpus applications. *People ex rel. Leonard HH*, 148 A.D.2d at 80-81. With respect to the case at bar, no court in the State has determined the legality of the detention of Hercules and Leo. The first proceeding was decided on a procedural ground and not on the merits. Petitioner’s claims are colorably valid. Hercules and Leo remain unlawfully confined and no court has required Respondents to justify their detention of them. Most importantly, no appellate court has heard and decided the legality of the merits. *Cf. People ex rel. Bravata v. Morhous*, 273 A.D. 929, 929 (3rd Dept. 1948).

In *McNeill*, the petitioner had made four prior applications for habeas corpus to the court, and in “none was he successful.” 219 N.Y.S.2d at 724. Nevertheless, the court ruled that “the ban of res judicata cannot operate to preclude the present proceeding.” *Id.* Significantly, this second attempt to invoke a common law writ of habeas corpus on behalf of these chimpanzees is necessary only because the Second Department erroneously concluded the Petitioner was unable to appeal. Most importantly, this Court should grant the petition and issue the Order to Show Cause & Writ of Habeas Corpus because justice so requires. The Habeas Petition, attached Expert Affidavits, and supporting Memorandum of Law demonstrate that Petitioner is presenting a meritorious argument. The intense local, state, national, and international news coverage of the Petitioner’s New York habeas corpus litigation on behalf of chimpanzees over the previous twelve months also demonstrates that the issues raised are of great public interest.

If Petitioner is correct in its assertion of personhood and is refused the opportunity for a full and fair hearing, Hercules and Leo will be condemned to a lifetime of imprisonment in small
cages, biomedical research, the destruction of their autonomy, social isolation, intellectual, emotional, and social stunting, severe emotional distress, feelings of hopelessness, and more. Requiring Respondents, for the first time, to justify their detention of Hercules and Leo is their only remedy. See CPLR 7008 (“The [return] affidavit shall fully and explicitly state . . . the authority and cause of the detention . . .”). See People ex rel. Anderson, 325 N.Y.S.2d at 833.

D. A PERSON ILLEGALLY IMPRISONED IN NEW YORK IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS.

1. “Person” is not a synonym for “human being,” but designates an entity with the capacity for legal rights.


“Whether the law should accord legal personality is a policy question[.]” Byrn, 31 N.Y.2d at 201 (emphasis added). “Legal person” is not a biological concept; it does not “necessarily correspond” to the “natural order.” Id. It is not a synonym for “human being.” See Paton, supra, at 349-350, Salmond on Jurisprudence 305 (12th ed. 1928) (“A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,”); IV Roscoe Pound, Jurisprudence 192-193 (1959). “Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol.” George Whitecross Paton, A Textbook of Jurisprudence 393 (3rd ed. 1964). “There is no difficulty giving legal rights
to a supernatural being and thus making him or her a legal person.” Gray, supra Chapter II, 39 (1909), citing, among other authorities, those cited in Byrn, supra.

“Person” is a legal “term of art.” Wartelle v. Womens’ & Children's Hosp., 704 So. 2d 778, 781 (La. 1997). Persons count in law; things don’t. See Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction, 114 Harv. L. Rev. 1745, 1746 (2001). “[T]he significant fortune of legal personality is the capacity for rights.” IV Roscoe Pound, Jurisprudence 197 (1959). “Person” has never been equated with being human and many humans have not been persons. “Person” may be narrower than “human being.” A human fetus, which the Byrn Court acknowledged, 31 N.Y.2d at 199, “is human,” was still not characterized by the Byrn Court as a Fourteenth Amendment “person.” See also Roe v. Wade, 410 U.S. 113 (1973). Human slaves were not “persons” in New York State until the last slave was freed in 1827. Human slaves were not “persons” throughout the entire United States prior to the ratification of the Thirteenth Amendment to the United States Constitution in 1865. See, e.g., Jarman v. Patterson, 23 Ky. 644, 645-46 (1828) (“Slaves, although they are human beings . . . (are not treated as a person, but (negotium), a thing”). Women were not “persons” for many purposes until well into the twentieth century. See Robert J. Sharpe and Patricia I. McMahon, The Persons Case – The Origins and Legacy of the Fight for Legal Personhood (2007).

“Person” may designate an entity broader or qualitatively different than a human being. Corporations have long been “persons” within the meaning of the Fourteenth Amendment to the United States Constitution. Santa Clara Cnty. v. Southern Pacific Railroad, 118 U.S. 394 (1886). An agreement between the indigenous peoples of New Zealand and the Crown, p.10, ¶¶ 2.6, 2.7, and 2.8, recently designated New Zealand’s Whanganui River Iwi as a legal person that owns its

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9 E.g., Trongett v. Byers, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property), Smith v. Hoff, 1 Cow. 127, 130 (N.Y. 1823) (same); In re Mickel, 14 Johns. 324 (N.Y. Sup. Ct. 1817) (same); Sable v. Hitchcock, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (same).

In short, the struggles over the legal personhood of human fetuses, slaves, Native Americans, women, corporations, and other entities have never been over whether they are human, or whether they are able to bear duties and responsibilities, but whether justice demands that they count in law. That Hercules and Leo are chimpanzees does not mean they may never count as legal persons. Who is deemed a legal person is a “matter which each legal system must settle for itself.” *Byrn*, 31 N.Y.2d at 202 (quoting Gray, *supra*, at 3). The historic question before this Court is whether Hercules and Leo, two unlawfully imprisoned chimpanzees, are legal persons who “count” for the purpose of a common law writ of habeas corpus in the state of New

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12 Compare *Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property), *Smith v. Hoff*, 1 Cow. 127, 130 (N.Y. 1823) (same), *In re Mickel*, 14 Johns. 324 (N.Y. Sup. Ct. 1817) (same); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (same) with *Lemmon*, 20 N.Y. 562 (slaves are free) and *Somerset*, 98 Eng. Rep. at 510 (slavery is “so odious that nothing can be suffered to support it but positive law”) (emphasis added).

13 *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (Native Americans are “persons” within the meaning of the Federal Habeas Corpus Act).

14 *In re Goodell*, 39 Wis. 232, 240 (1875) (women could not be lawyers); Blackstone, *Commentaries on the Law of England* *442* (1765-1769) (“By marriage, the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage . . .”).

York. In the following sections, Petitioner will demonstrate that, both as a matter of New York common law liberty and common law equality, Hercules and Leo should “count” and be recognized as legal persons possessed of the common law right to bodily liberty that the common law of habeas corpus protects.

2. **New York recognizes the common law writ of habeas corpus.**

Hercules and Leo are entitled to a common law writ of habeas corpus. The New York “common-law writ of habeas corpus [is] a writ in behalf of liberty, and its purpose [is] to deliver a prisoner from unjust imprisonment and illegal and improper restraint.” *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890). It “is not the creature of any statute . . . and exists as a part of the common law of the State.” *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). *E.g.*, *People ex rel Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987) (“The ‘great writ’, although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State”); *People ex rel. Patrick v. Frost*, 133 A.D. 179, 187-88 (2d Dept. 1909); *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907) (“A writ of habeas corpus is a common law writ and not a statutory one. If every provision of statute respecting it were repealed, it would still exist and could be enforced.”), *aff’d*, 195 N.Y. 610 (1909). *See* Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013).

In New York, the common law writ of habeas corpus “lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence.” *McLeod*, 3 Hill at 647 note j. Its “scope and flexibility . . . its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes- have always been emphasized and jealously guarded by courts and lawmakers.” *Harris v. Nelson*, 394 U.S. 286, 291 (1969). *See, e.g.*, *People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966).
The procedure for using the common law writ of habeas corpus is set forth in Article 70, CPLR 7001-7012. However, “[t]he drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law.” Vincent Alexander, Practice Commentaries, Article 70 (Habeas Corpus), In General (2013). E.g., Koehler, 129 A.D.2d at 30.

3. Common law natural persons are presumed free and Respondents must therefore prove they are not unlawfully imprisoning Hercules and Leo.


The common law of England, incorporated into New York law, was long in favorem libertatis (“in favor of liberty”). Francis Bacon, “The argument of Sir Francis Bacon, His Majesty’s Solicitor General, in the Case of the Post-Nati of Scotland,” in IV The Works Of Francis Bacon, Baron of Verulam, Viscount St. Alban And Lord Chancellor 345 (1845) (1608); 1 Sir Edward Coke, The First Part of the Institutes of the Laws of England sec. 193, at *124b (1628); Sir John Fortescue, De Laudibus Legum Angliae 105 (S.B. Chrimes, trans. 1942 [1545]). See, e.g., Moore v. MacDuff, 309 N.Y. 35, 43 (1955); Whitford v. Panama R. Co., 23 N.Y. 465, 467-68 (1861) (“prima facie, a man is entitled to personal freedom, and the absence of bodily

16 CPLR 7001 provides in part: “the provisions of this article are applicable to common law or statutory writs of habeas corpus.”
17 References to the overarching value of bodily liberty may be found as early as Pericles' Funeral Oration, Thucydides, The Complete Writings of Thucydides - The Peloponnesian War, sec. II. 37, at 104 (1951).
restraint . . .’); In re Kirk, 1 Edm. Sel. Cas. at 327 (‘In a case involving personal liberty [of a fugitive slave] where the fact is left in such obscurity that it can be helped out only by intendments, the well established rule of law requires that intention shall be in favor of the prisoner’); Oatfield, 14 Johns. at 193; Fish, 2 Johns. Cas. at 90 (Radcliffe, J.); Kelly, 33 Barb. at 457-58 (Potter, J.) (‘Liberty and freedom are man’s natural conditions; presumptions should be in favor of this construction’). New York statutes are in accord with this common law presumption. See N.Y. Stat. Law § 314 (McKinney) (“A statute restraining personal liberty is strictly construed”); People ex rel. Carollo v. Brophy, 294 N.Y. 540, 545 (1945); People v. Forbes, 19 How. Pr. 457, 11 Abb.Pr. 52 (N.Y. Sup. Ct. 1860) (statutes must be “executed carefully in favor of the liberty of the citizen”).

Respondents must prove their imprisonment of Hercules and Leo is legally sufficient. See People ex rel. Lebelsky v. Warden of New York Cnty. Penitentiary, 168 N.Y.S. 704, 706 (Sup. Ct. 1917). After a petitioner makes a prima facie showing of entitlement to the issuance of the writ by meeting the requirements of CPLR 7002(c) (requiring the petitioner to state that the person is “detained” and the “nature of the illegality”), the court must issue the writ, or show cause order, without delay. CPLR 7003(a). The burden then shifts to the respondents to present facts that show the detention is lawful. CPLR 7006(a). The respondents’ return must:

fully and explicitly state whether the person detained is or has been in the custody of the person to whom the writ is directed, the authority and cause of the detention, whether custody has been transferred to another, and the facts of and authority for any such transfer.

CPLR 7008(b). If the respondents fail to set forth the cause of and authority for the detention, the petitioner must be discharged. CPLR 7010(a). See People ex re. Wilson v. Flynn, 106 N.Y.S. 1141 (Sup. Ct. 1907).

In the case at bar, if Hercules and Leo are “persons” for the purpose of a common law writ of habeas corpus because they are autonomous and self-determining, then their detention is unlawful in the absence of positive law. See Somerset, 98 Eng.Rep. 499; Lemmon, 20 N.Y. at 604-05, 617, See also In re DeSanto, 898 N.Y.S.2d 787, 789 (Sup. Ct. 2010).
Accordingly, this Court should issue the Order to Show Cause & Writ of Habeas Corpus on behalf of Hercules and Leo that requires Respondents to provide a reason for imprisoning them and then determine its legal sufficiency after full oral argument.

4. Because Hercules and Leo are being unlawfully detained, they are entitled to immediate discharge.

An unlawfully imprisoned person in New York must be discharged forthwith. *People ex re. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (1911). This may require discharging the person into the care or custody of another. Imprisoned children and incapacitated adults have been discharged from slavery, industrial training schools, mental institutions, and other unlawful imprisonments into the custody of another. Before the Civil War, children detained as slaves were discharged through common law writs of habeas corpus into another’s care. *Lemmon*, 20 N.Y. at 632 (discharged slaves included two seven-year-olds, a five-year-old, and a two-year-old); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841) (seven or eight year old slave discharged into care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (seven-year-old girl discharged into custody of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816) (slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793) (legally manumitted child discharged).


Minors have been discharged from mental institutions pursuant to habeas corpus into the custody of another, People ex rel. Intner on Behalf of Harris v. Surles, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991), as have child apprentices, People v. Hanna, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847) (ordering “discharge” of a minor unlawfully held as an apprentice upon writ of habeas corpus brought on his behalf); In re M’Dowle, 8 Johns 328 (Sup. Ct. 1811), and incapacitated adults, Brevorka ex rel. Wittle v. Schuse, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman showing signs of dementia); State v. Connor, 87 A.D.2d 511, 511-12 (1st Dept. 1982) (“elderly and apparently sick lady”); Siveke v. Keena, 441 N.Y.S. 2d 631 (Sup. Ct. 1981) (elderly and ill man).

That Petitioner seeks the discharge of Hercules and Leo to a chimpanzee sanctuary rather than into the wild or onto the streets of New York does not preclude them from habeas corpus relief. See People ex rel. Brown v. Johnston, 9 N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner’s transfer from a state prison to a state hospital for the insane); People ex rel. Saia v. Martin, 289 N.Y. 471, 477 (1943) (“that the appellant is still under a legal commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.”) (citation omitted); People ex rel. LaBelle v. Harriman, 35 A.D.2d 13, 15 (3rd Dept. 1970) (“Although relator is also incarcerated on the murder charge, a concededly valid detention, and this writ will not secure his freedom, habeas corpus may be used to obtain relief other than immediate release from physical custody.”) (emphasis added); People ex rel. Meltsner v. Follette, 32 A.D.2d 389, 391 (2d Dept. 1969) (“The sustaining of the writ, however, does not require absolute discharge.”) (citing Johnston and Saia); cf. People ex rel. Rohrlich v. Follette, 20 N.Y.2d 297, 302 (1967). The case at bar is exactly analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly, supra.
In *People ex rel. Ardito v. Trujillo*, 441 N.Y.S.2d 348, 350 (Sup. Ct. 1981), the petitioner, an adjudicated incompetent, sought a writ of habeas corpus to obtain a hearing to convert her criminal commitment to civil status. The respondent psychiatric center argued that the “availability of a writ of habeas corpus is rigidly restricted to situations in which the relator seeks absolute release from detention,” citing “cases [then] decided nearly half a century ago[.]” *Id.* The court rejected the respondent’s argument, noting that more recently, “the Court of Appeals has stated that the narrow view of the grounds for habeas corpus relief has . . . undergone a . . . change.” *Id.* (citing *People ex rel. Keitt*, 18 N.Y.2d at 273). The court held that the term “discharge” under CPLR 7010 was broad and that relief “may be other than absolute discharge.” *Id.* (citations omitted). The court made abundantly clear that the fact that the petitioner “is not seeking absolute release from detention does not function as a bar to her application for a writ of habeas corpus.” *Id.*

As such, habeas corpus may even be used to seek a transfer from one facility to another. *See Mental Hygiene Legal Services ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (habeas corpus proper to transfer mental patient from secure facility to non-secure facility); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997) (“habeas corpus is an appropriate mechanism for transfer”); *People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 609 (2d Dept. 1995); *McGrav v. Wack*, 220 A.D.2d 291, 293 (2d Dept. 1995); *People ex rel. Meltsner*, 32 A.D.2d at 391-92 (sustaining writ of habeas corpus and holding that “the respondent should be directed to afford the relator treatment consistent with his sentence or, if such treatment not be readily available at Green Haven Prison, to transfer the relator to a correctional institution where such treatment is available or to release him.”); *State ex rel. Henry L. v. Hawes*, 667 N.Y.S.2d 212, 217 (Co. Ct. 1997) (“this court will direct the immediate transfer of relator from Sunmount to a non-secure facility such as Wassaic.”) (emphasis added). Such has been the law in New York for nearly a century.

Petitioner however is not challenging the conditions of Hercules and Leo’s confinement, nor is Petitioner requesting the transfer of Hercules and Leo from one facility to another. Rather,
Petitioner is seeking their immediate release from Respondents’ unlawful detention and placement in an environment in which their right to bodily liberty may be fully enjoyed. Habeas corpus is therefore available to them and this Court should order their discharge to Save the Chimps forthwith.


1. The term “person” in Article 70 refers to its meaning at common law.

“Person” in Article 70 refers to its meaning under the New York common law of habeas corpus. This conclusion is supported by three reasons: (1) the legislature’s decision not to define “person” in Article 70; (2) the fact that the CPLR, including Article 70 in particular, solely governs procedure; and (3) if Article 70 limits the substantive common law of habeas corpus, it violates the “Suspension Clause” of the New York Constitution, Art. 1 § 4.

First, as the legislature did not define “person” in CPLR Article 70, a court must look to its common law meaning in a common law habeas corpus action. When the legislature intends to define a word in the CPLR, it does. See CPLR Article 105. But it neither defined “person” nor intended the word to have any meaning apart from its common law meaning. Siveke, 441 N.Y.S. 2d at 633 (“Had the legislature so intended to restrict the application of Article 70 of the CPLR to [infants or persons held by state] it would have done so by use of the appropriate qualifying language. A review of certain case law is further indication that the utilization of the writ is not to be so restrictively construed.”).

Generally, in New York, procedural statutes that employ undefined words refer to their common law meaning, particularly where, as here, the action is derived from the common law. See P.F. Scheidelman & Sons, Inc. v Webster Basket Co., 257 N.Y.S. 552, 554-55 (Sup. Ct. 1932) (otherwise undefined, “distress” and “distrain” “must be given their common law meaning”), aff’d, 236 A.D. 774 (4th Dept. 1932); Drost v. Hookey, 25 Misc. 3d 210, 212 (Dist. Ct 2009) (as neither “tenant at will” nor licensee” were defined by Section 713(7) of the New York Property Actions and Proceedings Law, courts look to their common law definitions). This
is true in other states too. *E.g.*, *State v. A.M.R.*, 147 Wash. 2d 91, 94-95 (2002) (en banc) (courts look to common law definitions of otherwise undefined word “person” to determine who may appeal certain orders); *Casto v. Casto*, 404 So. 2d 1046, 1048 (Fla. 1981) (courts look to common law definitions of otherwise undefined words “rendition” of judgment and “entry” of judgment to determine time limit in which to appeal); *Addington v. State*, 199 Kan. 554, 561 (1967) (courts look to common law definition of otherwise undefined word “venue” in habeas corpus petition).

Second, the CPLR governs only procedure and may neither abridge nor enlarge a party’s substantive rights. CPLR 102; CPLR 101. Therefore it may not abridge Hercules and Leo’s substantive common law habeas corpus rights. This necessarily includes the threshold determination of whether Hercules and Leo are “persons” within the meaning of the New York common law of habeas corpus. The *Tweed* Court emphasized, in reference to the procedural habeas corpus statute in effect at the time, that “the act needs no interpretation and is in full accord with the common law.” 60 N.Y. at 569.

Third, to the extent Article 70 limits who is a “person” able to bring a common law writ of habeas corpus, beyond the limitations of the common law itself, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which provides that “[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it.” The Suspension Clause renders the legislature powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). It “cannot be abrogated, or its efficiency curtailed, by legislative action . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion.” *Tweed*, 60 N.Y. at 566. *E.g.*, *Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (Suspension Clause means that legislature has “no power” to “abridge the privilege of habeas corpus”); *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) (by the Suspension Clause, “the writ of habeas corpus is preserved in all its ancient plenitude”); *People ex rel. Whitman v. Woodward*, 150 A.D. 770, 778 (2d Dept. 1912).
(Suspension Clause gives habeas corpus “immunity from curtailment by legislative action”). See also People ex rel. Bungart v. Wells, 57 A.D. 140, 141 (2d Dept. 1901) (habeas corpus “cannot be emasculated or curtailed by legislation”); Whitman, 150 A.D. at 772 (“no sensible impairment of [habeas corpus] may be tolerated under the guise of either regulating its use or preventing its abuse”); id. at 781 (Burr, J., concurring) (“anything . . . essential to the full benefit or protection of the right which the writ is designed to safeguard is ‘beyond legislative limitation or impairment’”) (citations omitted); Frost, 133 A.D. at 187 (writ lies “beyond legislative limitation or impairment”).

The question of who is a “person” within the meaning of the common law of habeas corpus is the most important individual issue that may come before a court. If Article 70 interferes with a court’s ability to determine whether Hercules and Leo are “persons” within the meaning of the common law of habeas corpus, it violates the Suspension Clause. Otherwise the legislature could permanently strip judges of their ability to determine who lives, who dies, who is enslaved, and who is free.\(^8\)

a. The New York common law freely changes when reason, facts, and an evolving sense of justice so require.

Hercules and Leo’s legal thinghood derives from the common law. When justice requires, New York courts refashion the common law – especially the common law of habeas corpus – with the directness Lord Mansfield displayed in Somerset v. Stewart, when he held slavery “so odious that nothing can be suffered to support it but positive law.” Lofft at 19; 98 Eng. Rep. at 510 (emphasis added). “One of the hallmarks of the writ [is] . . . its great flexibility and vague scope.” McCann, 18 N.Y.2d at 263 (citation omitted). Slaves employed the common law writ of habeas corpus to challenge their imprisonment as things. Lemmon, 20 N.Y. at 604-06, 618, 623, 630-31 (citing Somerset); In re Belt, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); In re Kirk, 1 Edm. Sel.

\(^8\) Petitioner argues, infra at Section G, that the recent Fourth Department decision in Nonhuman Rights Project v. Presti amounted to a judicial suspension of the common law writ of habeas corpus.
Cas. 315 (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824)); *In re Tom*, 5 Johns. 365 (*per curiam*). Non-slaves have long employed it in New York, including (1) apprentices and indentured servants, *e.g.*, *People v. Weissenbach*, 60 N.Y. 385, 393 (1875); *In re M'Dowle*, 8 Johns. 328; (2) infants, *Weissenbach; M'Dowle*; (3) the incompetent elderly, *Schuse*, 227 A.D.2d 969; and (4) mental incompetents, *Johnston*, 9 N.Y.2d at 485; *Bennett*, 242 A.D.2d 342; *In re Cindy R.*, 970 N.Y.S.2d 853 (Sup. Ct. 2012).

It is not just in the area of habeas corpus that the New York courts freely revise the common law when justice requires, though habeas corpus law is the broadest and most flexible of all. The Court of Appeals has long rejected the claim that “change . . . should come from the Legislature, not the courts.” *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). See *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998) (“For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*, . . . which stands as an eloquent monument to the fallacy of this view”), aff’d, 267 A.D.2d 233 (2d Dept. 1999). “We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule” the Court in *Woods* declared. 303 N.Y. at 355 (emphasis added). See also *Flanagan v. Mount Eden General Hosp.*, 24 N.Y. 2d 427, 434 (1969) (“we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the legislature has not seen fit to act”) (emphasis added); *Greenburg v. Lorenz*, 9 N.Y. 2d 195, 199-200 (1961) (“Alteration of the law [when the legislature is silent] has been the business of the New York courts for many years”).

The common law is “lawmaking and policymaking by judges . . . in principled fashion, to fit a changing society.” Judith S. Kaye, *supra*, at 729. In response to the question in *Woods* whether the Court should bring “the common law of this state, on this question [of whether an infant could bring suit for injuries suffered before birth] into accord with justice[,]” it answered: “we should make the law conform to right.” 303 N.Y. at 351. The Court of Appeals has explained that “Chief Judge Cardozo’s preeminent work *The Nature of Judicial Process* captures
our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.” *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988) (citing Cardozo, *Nature of Judicial Process*, at 152).

Therefore, in New York, “‘[w]hen the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.’ [The Court] act[s] in the finest common-law tradition when [it] adapt[s] and alter[s] decisional law to produce common-sense justice.” *Woods*, 303 N.Y. at 355 (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). New York courts have “not only the right, but the duty to re-examine a question where justice demands it” to “bring the law into accordence with present day standards of wisdom and justice rather than ‘with some outworn and antiquated rule of the past.” *Id.* (emphasis added) (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)). See, e.g., *Gallagher v. St. Raymond’s R.C. Church*, 21 N.Y.2d 554, 558 (1968) (“the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions”); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508 (1968) (“No recitation of authority is needed to indicate that this court has not been backward in overturning unsound precedent”); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957) (a rule of law “out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing . . . [i]t should be discarded”); *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363 (1972) (“Stare decisis does not compel us to follow blindly a court-created rule . . . once we are persuaded that reason and a right sense of justice recommend its change”); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (1916) (legal principles “are whatever the needs of life in a developing civilization require them to be”); *Rumsey v. New York and New England Railway Co.*, 133 N.Y. 79, 85 (1892) (quoting 1 Kent's Commentaries 477 (13th edition 1884) (“cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error”)).
b. As Hercules and Leo are autonomous and self-determining, they are common law “persons” entitled to the common law right to bodily liberty that the common law of habeas corpus protects.

“Anglo-American law starts with the premise of thorough-going self determination.” Natanson v. Kline, 186 Kan. 393, 406 (1960), decision clarified on den. of reh’g, 187 Kan. 186 (1960). The United States Supreme Court famously held that

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . “The right to one's person may be said to be a right of complete immunity: to be let alone.”

Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (quoting Cooley on Torts 29).


19 This common law right under New York law is co-extensive with the liberty interest protected by the Due Process Clause of the New York Constitution. Matter of Fosmire v. Nicoleau, 75 N.Y.2d 218, 226 (1990); Rivers, 67 N.Y.2d at 493.

Chimpanzees’ capacities for autonomy and self-determination, which subsume many of their numerous complex cognitive abilities, as set forth in the Expert Affidavits, include possession of an autobiographical self, episodic memory, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception; their ability to understand

20 “[I]t is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another.” *O’Connor*, 72 N.Y. 2d. at 530. *But see id.* at 537 (Hancock, J. concurring) (criticizing *Storar* as it “ties the patient’s right of self-determination and privacy solely to past expressions of subjective intent”); *id.* at 540-41 (Simons, J., dissenting) (criticizing *Storar’s* refusal to adopt a substituted judgment rule). In 2002, the legislature adopted a substituted judgment rule, SCPA 1750(2).
cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

In June 2013, the NIH recognized the ability of chimpanzees to choose and self-determine. Accepted Recommendation EA7 states: “The environmental enrichment program developed for chimpanzees must provide for relevant opportunities for choice and self determination.” (Wise Aff. Exh. A, p. 11) (emphasis added). The NIH noted “[a] large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees’ ability to exercise volition with respect to activity, social grouping, and other opportunities.” (Id.) (emphasis added).

Autonomous, self-determined, able to choose how to live their lives, Hercules and Leo are entitled to common law personhood and the common law right to bodily liberty protected by New York common law habeas corpus.

2. Hercules and Leo are entitled to the common law equality right to bodily liberty that the common law of habeas corpus protects.

Hercules and Leo are entitled to common law personhood and the right to bodily liberty as a matter of common law equality, too. Equality has always been a vital New York value, embraced by constitutional law, statutes, and common law.21 Article 1, § 11 of the New York

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21 Equality is a fundamental value throughout Western jurisprudence. See Vriend v. Alberta, 1 R.C.S. 493, 536 (Canadian Supreme Court 1998) (Cory and Iacobucci, JJ) (“The concept and principle of equality is almost intuitively understood and cherished by all”); Miller v. Minister of Defence, HCJ 4541/94, 49(4) P.D. 94, ¶6 (Israel High Court of Justice 1995) (Strasberg-Cohen, T., J.) (“It is difficult to exaggerate the importance and stature of the principle of equality in any free democratic society”); Israel Women’s Network v. Government, HCJ 453/94, 454/94, ¶22 (Israel High Court of Justice 1994) (“The principle of equality, which . . . ‘is merely the opposite of discrimination’ . . . has long been recognized in our law as one of the principles of fairness and justice which every public authority is commanded to withhold”) (citation omitted); Mabo v. Queensland (no. 2), 175 CLR 1 F.C. 92-014, ¶29 (Australian Supreme Court 1992) (“equality before the law . . . is [an] aspiration[] of the contemporary Australian legal system”). See also Alexis de Tocqueville, Democracy in America, Book II, Chapter 1, at 65 (Digireads.com Publishing 2007) (“Democratic nations are at all times fond of equality . . . for equality their passion is ardent, insatiable, incessant, invincible; they call for equality in freedom; and if they
Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment to the United States Constitution, and an anti-discrimination clause. “[T]he principles expressed in those sections [of the Constitution] were hardly new.” Brown v. State, 89 N.Y.2d 172, 188 (1996). As the Court of Appeals explained:

The Equal Protection Clause of the Fourteenth Amendment had been thoroughly debated and adopted by Congress and ratified by our Legislature after the Civil War, and the concepts underlying it are older still. Indeed, cases may be found in which this Court identified a prohibition against discrimination in the Due Process Clauses of earlier State Constitutions, clauses with antecedents traced to colonial times (see [citation omitted] Charter of Liberties and Privileges, 1683, § 15, reprinted in 1 Lincoln, Constitutional History of New York, at 101).

Id.

New York equality values are embedded into New York common law. For example, under the common law, such private entities as common carriers, victualers, and innkeepers may not discriminate unreasonably or unjustly. See, e.g., Hewitt v. New York, N.H. & H.R. Co., 284 N.Y. 117, 122 (1940) (quoting Root v. Long Island R. Co., 114 N.Y. 300, 305 (1889) (“At common law, railroad carriers are under a duty to serve all persons without unjust or unreasonable advantage to any. So this court has said that a carrier should not ‘be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business where the conditions are equal.””)); New York Tel. Co. v. Siegel-Cooper Co., 202 N.Y. 502, 508 (1911) (quoting Lough v. Outerbridge, 143 N.Y. 271, 278 (1894) (“‘His charges must, therefore, be reasonable, and he must not unjustly discriminate against others””)); People v. King, 110 N.Y. 418, 427 (1888) (“By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do”).

The origins of the duty to serve and the recent direction of the case law suggest that a basic concern for individual autonomy animates the duty to serve. This concern recognizes the vulnerability of individuals to the arbitrary and unreasonable power of private entities. Realizing the importance to the individual of some goods, services, and associations, the duty to serve seeks to limit the

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cannot obtain that, they still call for equality in slavery”); United States Declaration of Independence (July 4, 1776) (“all men are created equal”).

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power of the controlling entities by allowing exclusion only when based on fair and reasonable grounds.


The Expert Affidavits demonstrate that genetically, physiologically, and psychologically, Hercules and Leo’s interests in exercising their autonomy and self-determination is as fundamental to them as it is to a human being. Recall the United States Supreme Court’s admonition that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person[.]” *Botsford*, 141 U.S. at 251 (emphasis added). On this ground alone, this Court must hold that, as a matter of common law equality, Hercules and Leo are entitled to bodily liberty, and their right is protected by the common law of habeas corpus.

However, New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Justice Kaye confirmed that the two-way street between common law decision-making and constitutional decision-making had resulted in a “common law decision making infused with constitutional values.” Judith S. Kaye, *supra*, at 747. In harmony with the common law equality principles that forbid private discrimination founded on unreasonable means or unjust ends, the common law of equality embraces, at a minimum, its sister fundamental constitutional equality value – embedded within the New York and the United States Constitutions – that prohibits discrimination based on irrational means or illegitimate ends. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Sweatt*
$v. \ Painter$, 339 U.S. 629, 635 (1950) (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities”).

Common law equality decision-making differs from constitutional equal protection decision-making in that it has nothing to do with a “respect for the separation of powers.” *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). Instead it applies constitutional equal protection values to an evolving common law. The outcomes of similar common law and constitutional cases may therefore be different.

For example, in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), the Court of Appeals affirmed the constitutionality of New York’s statutory limitation of marriage to opposite-sex couples. “The critical question [wa]s whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples.” *Id.* at 358 (emphasis added). The Court held the legislature could rationally conclude that same-sex relationships are more casual or temporary, to the detriment of children, and assume children do best with a mother and father. *Id.* at 359-60. In the face of a dissent that concluded, “I am confident that future generations will look back on today’s decision as an unfortunate misstep,” *id.* at 396 (Kaye, C.J., dissenting), the majority “emphasize[d] . . . we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong.” *Id.* at 366 (emphasis added).

In contrast, a classification’s appropriateness is important to a court deciding the common law. It should decide what is right and wrong. Its job is to do the “right thing.” This Court should recognize Hercules and Leo’s common law personhood. This Court should determine that the classification of a chimpanzee as a “legal thing” invokes an illegitimate end. This Court should decide that Hercules and Leo have a common law right to bodily liberty sufficient to entitle them

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to a writ of habeas corpus and a chance to live the autonomous, self-determining life of which they are capable.


Without such a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological fit: if the means chosen burdens one group and benefits others, then the means perfectly fits the end of burdening just those whom the law disadvantage and benefitting just those it assists.


In *Romer*, the United States Supreme Court struck down the so-called “Amendment 2,” because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation, was illegitimate. 517 U.S. at 626. It violated equal protection because “[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.” *Id.* at 633 (emphasis added). This statute was “simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated *basic equal protection values.*” *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (emphasis added). See *Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007) (noting that *Romer* found that Colorado’s Amendment 2 was “at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board,” the Court struck down an amendment to the Michigan Civil Rights Act that prevented prisoners from suing for a violation of their civil rights while imprisoned as violating federal equal protection); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly “identifies persons by a single trait and then denies them protection across the board”).
As it would be a tautology for the Equal Protection Clause to fail to demand that a legitimate public purpose or set of purposes based on some conception of the general good be the legislative end, it would be a tautology to determine whether class members are similarly situated for all purposes. The true test is “‘whether they are similarly situated for purposes of the law challenged.’” Kerrigan v. Comm’r of Public Health, 289 Conn. 135, 158 (2008) (emphasis added) (quoting Stuart v. Comm’r of Correction, 266 Conn. 596, 601-02 (2003)).

Denying Hercules and Leo their common law right to bodily libertysolely because they are chimpanzees is a tautology. “‘[S]imilarly situated’ [cannot] mean simply ‘similar in the possession of the classifying trait.’ All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test.” Varnum v. O’Brien, 763 N.W. 2d 862, 882-83 (Iowa 2009) (citations omitted). The “equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of law alike.” Id. In Goodridge, the Supreme Judicial Court of Massachusetts swept aside the argument that the legislature could refuse homosexuals the right to marry because the purpose of marriage is procreation, which they could not accomplish. 440 Mass. at 330. This argument “singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage.” Id. at 333. No one doubts that, if Hercules and Leo were human, this Court would instantly issue a writ of habeas corpus and discharge them immediately. Hercules and Leo are imprisoned for one reason: they are chimpanzees. Possessing that “single trait,” they are “denie[d] . . . protection across the board,” Romer, 517 U.S. at 633, to which their autonomy and ability to self-determine entitle them.

The great Yale historian of slavery, David Brion Davis, has recently written that human slaves were “animalized” to justify their brutal treatment and that “[t]he animalization of humans first required the ‘animalization’ of animals.” David Brion Davis, The Problem of Slavery in the Age of Emancipation, 23 (2014). This required human “anthropodenial . . . a blindness to the humanlike characteristics of other animals, or the animal-like characteristics of ourselves.” Id. at 24.
All nonhuman animals were once believed unable to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, not only do the Expert Affidavits and the June 13, 2013 NIH acceptance of The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils’ Recommendation confirm chimpanzees’ extraordinarily complex, often human-like, autonomy and ability to self-determine and expose those ancient, pre-Darwinian prejudices as untrue, but so does the 2011 report of the Institute of Medicine and National Research Council of the National Academies discussing the use of chimpanzees in biomedical research:

Chimpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use). Furthermore, laboratory research has demonstrated that chimpanzees can master the rudiments of symbolic language and numericity, that they have the capacity for empathy and self-recognition, and that they have the human-like ability to attribute mental states to themselves and others (known as the “theory of mind”). Finally, in appropriate circumstances, chimpanzees display grief and signs of depression that are reminiscent of human responses to similar situations.23

The Expert Affidavits attached to the Habeas Petition were submitted by some of the world’s greatest working natural scientists. They confirm chimpanzees’ extraordinarily complex, often human-like, autonomy and ability to self-determine. At every level, chimpanzees are today understood as beings entitled to extraordinary consideration; they have been edging toward personhood.

For centuries New York courts have rejected slavery. See *Jack v. Martin*, 14 Wend. 507, 533 (N.Y. 1835) (“Slavery is abhorred in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man”). The famous *Lemmon* case, 20 N.Y. 562, is acknowledged as “one of the most extreme examples of hostility to slavery in Northern courts[.]” 23

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Finkleman, *Slavery in the Courtroom* 57 (1985). Judges “kn[o]w times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The legal thinghood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, has become an anachronism. 24

Humans who have never been sentient or conscious or possessed of a brain *should* have basic legal rights. But if humans bereft even of sentience are entitled to personhood, then this Court must either recognize Hercules and Leo’s just equality claim to bodily liberty or reject equality. Abraham Lincoln understood that the act of extending equality protects it: “[i]n giving freedom to the slave, we assure freedom to the free, honorable alike in what we give, and what we preserve.” 5 *Collected Works of Abraham Lincoln* 537 (Roy P. Basler, ed. 1953) (annual message to Congress of December 1, 1862) (emphasis in original). The act of denying equality in order to enslave, based on a single trait, jeopardizes the equality of all.

Petitioner claims only that Hercules and Leo have a common law right to bodily liberty protected by the common law of habeas corpus. What, if any, other common law rights Hercules and Leo possess will be determined on a case-by-case basis. In *Byrn*, the Court of Appeals noted that fetuses are “persons” for some purposes in New York, including inheritance, devolution of property, and wrongful death, while not being “persons in the law in the whole sense,” such as being subject to abortion. 31 N.Y.2d at 200. Equal protection can only be defined by the standards of each generation. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L.Rev. 1161, 1163 (1988) (“[T]he

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24 At least twenty-five large private research companies, including GlaxoSmithKline, PLC, Merck & Co., Inc., DuPont, AstraZeneca, PLC, Colgate-Palmolive Company, and Novo Nordisk have committed not to use chimpanzees in research. The Humane Society of the United States, “Companies with Invasive Chimpanzee Research Policies” (February 24, 2014), available at http://www.humanesociety.org/issues/chimpanzee_research/tips/companies_chimpanzee_policies.html#Uwz6CvldWSo (last viewed October 27, 2014). The Board of Editors of *Scientific American* recently called for the end of captivity for such cognitively complex nonhuman animals as great apes, cetaceans, and elephants. “Free Willy – And His Pals,” *Scientific American* 10 (March 2014).
Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.”). The process of defining equal protection . . . begins by classifying people into groups. A classification persists until a new understanding of equal protection is achieved. The point in time when the standard of equal protection finally takes a new form is a product of the conviction of one, or many, individuals that a particular grouping results in inequality and the ability of the judicial system to perform its constitutional role free from the influences that tend to make society's understanding of equal protection resistant to change.

*Varnum*, 763 N.W. 2d at 877-78.

Finally, it is important to emphasize what Petitioner is not seeking. It is not seeking any rights on behalf of Hercules and Leo other than the common law right to bodily liberty that the common law of habeas corpus protects. Once deemed common law “persons” who possess the fundamental right to bodily liberty sufficient to trigger the protection of the common law of habeas corpus, what, if any, other common law rights Hercules and Leo may possess will be explored on a case-by-case basis.

3. The New York legislature has determined that some nonhuman animals are capable of personhood rights.

While this case presents a matter of first impression, it is noteworthy that New York public policy already recognizes personhood rights in some nonhuman animals, including Hercules and Leo. Specifically, New York is among the few states to expressly allow nonhuman animals to be trust “beneficiaries.” *See* EPTL 7-8.1.

Hercules and Leo are beneficiaries of an *inter vivos* trust created by the Petitioner pursuant to EPTL 7-8.1 for the purpose of their care and maintenance once they are transferred to Save the Chimps. A true and correct copy of the trust is attached to the Habeas Petition as Exhibit 5. Consequently, they are “persons” under that statute, as only “persons” may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) (“Beneficiaries may be natural or artificial persons, but they must be persons . . . In general, any person who is capable in law of taking an interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefits of the trust.”), rev’d on other grounds, 99 N.Y. 451 (1885). “Before this statute [EPTL 7-8.1]
trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period.” Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).


In 1996, the Legislature enacted EPTL 7-6 (now EPTL 7-8) (a), which permitted “domestic or pet animals” to be designated as trust beneficiaries. This section thereby acknowledged these nonhuman animals as “persons” capable of possessing legal rights. Accordingly, in *In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998), the court recognized that five chimpanzees were “income and principal beneficiaries of the trust” and referred to its chimpanzees as “beneficiaries” throughout. In *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008), the Appellate Division observed “[t]he range of our laws has been extended to animals in areas which were once reserved only for people. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.”

In 2010, the legislature renumbered EPTL 7-6.1 as EPTL 7-8.1, removed “Honorary” from the statute’s title, “Honorary Trusts for Pets,” leaving it to read, “Trusts for Pets,” and amended section (a) to read, in part: “A trust for the care of a designated domestic or pet animal is valid. . . . Such trust shall terminate when the living animal beneficiary or beneficiaries of

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25 The Sponsor’s Memorandum attached to the bill that became EPTL 7-6.1 (and now EPTL 7-8.1) stated the statute’s purpose was “to allow animals to be made the beneficiary of a trust.” Sponsor’s Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. The Senate Memorandum made clear the statute allowed “such animal to be made the beneficiary of a trust.” Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159.

26 The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York’s report to the legislature stated, “we recommend that the statute be titled ‘Trusts for Pets’ instead of ‘Honorary Trusts for Pets,’ as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute.” N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).
such trust are no longer alive.” (emphasis added). In removing “Honorary” and the twenty-one year limitation on trust duration, the legislature dispelled any doubt that a nonhuman animal was capable of being a trust beneficiary in New York. By allowing “designated domestic or pet animals” to be trust beneficiaries able to own the trust corpus, New York recognized these nonhuman animals as “persons” with the capacity for legal rights.

As EPTL 7-8.1 created legal personhood in those nonhuman animals within its reach, New York public policy already recognizes that at least some nonhuman animals are persons capable of possessing one or more legal rights.

F. THE THIRD DEPARTMENT’S RECENT DECISION IN PEOPLE EX REL. NONHUMAN RIGHTS PROJECT, INC. V. LAVERY WAS WRONGLY DECIDED.

On December 4, 2014, the Third Department erroneously ruled, in a similar case, that a chimpanzee is not a legal person as he is unable to bear the duties and responsibilities it said are required to be deemed a “person’ within the meaning of a common law writ of habeas corpus and Article 70. On December 16, 2014, Petitioner filed a Motion for Leave to Appeal to the Court of Appeals with the Third Department, as the appeal raises novel, important, and complex legal issues that are of great public importance and interest in New York, throughout the United States, and internationally, and because the Third Department committed serious errors of law and fact, as follows:

1. The Third Department applied an incorrect standard of law.

The Third Department wrote that “animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law.” Nonhuman Rights Project v. Lavery, at *3. However, no federal or state court had ever rejected the claim of personhood on behalf of an autonomous and self-determining nonhuman animal for the purpose of seeking common law habeas corpus relief, as no such claim had ever been presented.
None of the cases the Third Department cited supported its proposition quoted above. The decisions were all “standing” cases that were dismissed pursuant to Article III of the United States Constitution or because the specific definition of “person” provided by the enabling statute did not include nonhuman animals. Not one case involved common law claims, as in the case of Hercules and Leo or any of the other imprisoned chimpanzees; all involved statutory or constitutional interpretation. In *Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009), *cert. den.*, 558 US 1125 (2010), the *pro se* plaintiff, untrained in law, claimed her service dog had been given Article III standing to sue under the Americans with Disabilities Act of 1990, a claim the federal court properly rejected. In *Cetacean Community v. Bush*, 386 F. 3d 1169 (9th Cir. 2004), the federal court held that all the cetaceans of the world had not been given Article III standing to sue under the Federal Endangered Species Act and were not “persons” within that statute’s definition of “person.” In *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment*, 842 F. Supp.2d 1259 (S.D. Cal. 2012), the federal district court held that the legislative history of the Thirteenth Amendment to the United States Constitution (which, unlike the Fourteenth Amendment, does not contain the word “person”) makes clear that it was only intended to apply to human beings. Finally, in *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993), the federal district court dismissed the case on the ground of Article III standing, stating that a dolphin was not a “person” within the meaning of Section 702 of Title 5 of the Federal Administrative Procedures Act.

The courts in the above cases however, agreed that a nonhuman animal *could be a “person”* if Congress so intended, but concluded that, with respect to the statutes or constitutional provisions involved in these cases, Congress had not so intended. *Lewis*, 344 Fed. Appx. at 472; *Cetacean Community*, 386 F.3d at 1175-1176; *Tilikum*, 842 F. Supp.2d at 1262, n.1; *Citizens to End Animal Suffering & Exploitation, Inc.*, 842 F. Supp.2d at 49.

Petitioner, which was an *amicus curiae* in the *Tilikum* case *supra*, and whose counsel was plaintiff’s counsel in *Citizens to End Animal Suffering & Exploitation, Inc.*, *supra*, did not bring
the case of Tommy, Kiko, Hercules or Leo in a federal court subject to Article III.27 Nor, importantly, did Petitioner base its claims on federal or state statutes or on constitutional provisions. Petitioner instead sought a New York writ of habeas corpus, which substantively is entirely a matter of common law. See Nonhuman Rights Project v. Lavery, at *3 (“we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ’s reach.”); CPLR 7001 (“the provisions of this article are applicable to common law or statutory writs of habeas corpus”).

Similarly, none of the three cited cases supported the Third Department’s statement that “habeas corpus has never been provided to any nonhuman entity,” Nonhuman Rights Project v. Lavery, at *4, if what that court meant was that no entity that could possibly be detained against its will has ever been denied a writ of habeas corpus. In United States v. Mett, 65 F. 3d 1531, 1534 (9th Cir. 1995), cert. den., 519 US 870 (1996), the federal court permitted a corporation to utilize a writ of coram nobis. In Waste Management of Wisconsin, Inc. v. Fokakis, 614 F. 2d 138, 140 (7th Cir. 1980), cert. den., 449 US 1060 (1980), the federal court refused to grant habeas corpus to a corporation solely “because a corporation’s entity status precludes it from being incarcerated or ever being held in custody.” In Sisquoc Ranch Co. v. Roth, 153 F. 2d 437, 439 (9th Cir. 1946), the federal court held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek a writ of habeas corpus on its own behalf. Finally, in Graham v. State of New York, 25 A.D.2d 693 (3rd Dept. 1966), the Court stated that the purpose of a writ of habeas corpus is to free prisoners from detention, not to secure the return of inanimate personal property, which was the relief demanded.28 In sum, no

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27 Petitioner filed an amicus brief in the Tilikum case in which it argued that the capacity of the orcas to sue should be determined by their domicile, as the Court in Citizens to End Animal Suffering & Exploitation, Inc., 842 F. Supp.2d at 49, had stated.

28 The court in Graham relied on People ex rel. Tatra v. McNeill, 19 A.D.2d 845, 846 (2d Dept. 1963), which held that habeas corpus could not be used to secure the return of an inmate’s funds. There was no argument that the money was a legal person in McNeill, whereas here, the Petitioner has provided ample legal and scientific evidence that a chimpanzee has sufficient qualities for legal personhood.
nonhuman who could possibly be imprisoned has ever demanded the issuance of a writ of habeas corpus, whether common law or statutory in the United States.

The reason there is no precedent for treating nonhuman animals as persons for the purpose of securing habeas corpus relief then is not because the claim has been rejected by the courts. It is because no nonhuman entity capable of being imprisoned (unlike a corporation), certainly not a nonhuman animal, and most certainly not an autonomous self-determining being such as a chimpanzee, has ever demanded a writ of habeas corpus. Petitioner’s cases in the Third and Fourth Departments and the case at bar are the first such demands ever made on behalf of a nonhuman animal in a common law jurisdiction. But the novelty of their claims is no reason to deny Hercules and Leo habeas corpus relief. See, e.g., Crook, 25 F. Cas. at 697 (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a “person” and being awarded the requested habeas corpus relief); Somerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); see also Lemmon, 20 N.Y. 562.

2. When the New York legislature enacted EPTL 7-8.1, it granted personhood to the nonhuman animals within its scope.

Contrary to the Third Department’s statement that nonhuman animals have never “been explicitly considered as persons or entities for the purpose of state or federal law,” Nonhuman Rights Project v. Lavery, at *3, as argued, supra at Section E-3, New York is among the few states that expressly allow nonhuman animals to be trust beneficiaries and that, in addition to making nonhuman animals trust beneficiaries, provides for an enforcer for a nonhuman animal beneficiary who “performs the same function as a guardian ad litem for an incapacitated person [.]” In re Fouts, 677 N.Y.S.2d at 700 (emphasis added). As the personhood of the nonhuman animal beneficiaries is not conditioned upon their ability to bear duties and responsibilities, this statute directly contradicts the Third Department’s assertion that legal personhood in New York
depends on the ability to bear duties and responsibilities and that nonhuman animals may therefore not be legal persons for any purpose.

3. Whether an individual can bear duties and responsibilities is irrelevant to whether that individual can be characterized as a “person” for the purposes of a common law writ of habeas corpus.

As mentioned, supra, the Third Department erred in requiring that a “person” for the purpose of securing a common law writ of habeas corpus be capable of bearing duties and responsibilities; in practical terms, that the claimant be a human being. **Nonhuman Rights Project v. Lavery**, at *4-6. In arriving at this conclusion, the Third Department relied on inapposite cases, cited law review articles that endorse a minority philosophical argument, and ignored not just EPTL 7-8.1, supra, but multiple teachings of the New York Court of Appeals set forth in the **Byrn** case establishing that personhood is a matter of public policy. See argument, supra at Section D-1. In **Lavery**, at *4, the court wrote:


The **Gault** court merely stated that “[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.” 387 U.S. at 20-21. There is no relevance to the case at bar. In **United States v. Barona**, 56 F. 3d at 1093-94, the Ninth Circuit merely noted that resident aliens of the United States
must first show that they are among the class of persons that the Fourth Amendment was meant to protect . . . . Unlike the Due Process Clause of the Fifth Amendment, which protects all “persons,” the Fourth Amendment protects only “the People of the United States” [citations omitted] which “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community” [citation omitted]. The Fourth Amendment therefore protects a much narrower class of individuals than the Fifth Amendment. Because our constitutional theory is premised in large measure on the conception that our Constitution is a “social contract” [citation omitted], “the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear.” [citations omitted] . . . “Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of ‘the people of the United States’ entitled to the full panoply of rights guaranteed by our Constitution.” [citation omitted]. The term “People of the United States” includes “American citizens at home and abroad” and lawful resident aliens within the borders of the United States “who are victims of actions taken in the United States by American officials [citation omitted]” (emphasis in original). It is yet to be decided, however, whether a resident alien has undertaken sufficient obligations of citizenship or has “otherwise developed sufficient connection with this country” [citation omitted] to be considered one of the “People of the United States” even when he or she steps outside the territorial borders of the United States.

This case is not relevant to the case at bar because it: (1) deals with an interpretation of the United States Constitution, rather than New York common law, and (2) concerns the interpretation of the constitutional phrase “the People of the United States,” not the New York common law meaning of the term “person,” which is the issue in the case at bar. Finally, the two law review articles cited by the Lavery court merely set out Professor Cupp’s personal preference for the philosophical theory of contractualism, in support of which he cites no cases.

The writ of habeas corpus has always been applied to aliens and others who may not be a part of the fictitious “social contract.” In Rasul v. Bush, 542 U.S. 466, 481, 482 & n.11 (2004), the United States Supreme Court stated that:

[a]pplication of the habeas statute to persons detained at the base (in

29 The Supreme Court noted that, after the September 11, 2001 attack, “the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it. Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban.” 542 U.S. at 470-71. This Court may take judicial notice that not only were these petitioners not part of any “social contract,” but the United States alleged they desired to destroy whatever social contract may exist. Still they were eligible to seek a writ of habeas corpus.
Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm. See, e.g., King v. Schiever, 2 Burr. 765, 97 Eng. Rep. 551 (K.B.1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); Sommersett v. Stewart, 20 How. St. Tr. 1, 79–82 (K.B.1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); Case of the Hottentot Venus, 13 East 195, 104 Eng. Rep. 344 (K.B.1810) (reviewing the habeas petition of a “native of South Africa” allegedly held in private custody).

American courts followed a similar practice in the early years of the Republic. See, e.g., United States v. Villato, 2 Dall. 379 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); Ex parte D’Olivera, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); Wilson v. Izard, 30 F. Cas. 131 (No. 131 (No. 17, 810); (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

In Jackson v. Bulloch, 12 Conn. 38, 42-43 (1837), the Supreme Court of Errors noted that the first section of the Connecticut Bill of Rights declares that “all men, when they form a social contract, are equal in rights . . . seems evidently to be limited to those who are parties to the social compact thus formed. Slaves cannot be said to be parties to that compact, or be represented in it.” Despite being excluded from the social compact, the petitioner slave was freed pursuant to a writ of habeas corpus. One can imagine numerous other cases where persons who are not able because of culture or disability to be a part of our social compact, as chimpanzees may be, or who may loathe the very existence of our social compact and wish to destroy it, are nevertheless able to avail themselves of a common law writ of habeas corpus.

Moreover, “the words “duty,” “duties,” or “responsibility” do not appear anywhere in the Byrn majority opinion, which concerned the issue of whether a fetus was a “person” within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution. The Third

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30 The words “duty,” “duties, or “responsibility” do not appear anywhere in the Second Department’s Byrn opinion either, with the single exception of the court noting that a lower federal court had upheld a restrictive abortion statute and stated that once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments.
Department ignored the Court of Appeals’ teaching of Byrn that “[w]hether the law should accord legal personality is a policy question.” 31 N.Y.2d at 201 (emphasis added). “It is not true . . . that the legal order necessarily corresponds to the natural order.” Id. “The point is that it is a policy determination whether legal personality should attach and not a question of biological or ‘natural’ correspondence.” Id. (emphasis added). See Paton, supra, at 349-50, Salmond on Jurisprudence 305 (12th ed. 1928) (“A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination”).

Moreover, as has been made clear in legal actions in sister common law countries, an individual may be a “person” without having the capacity to assume any duties or responsibilities. New Zealand’s Whanganui River Iwi was designated a legal person though it has no duties or responsibilities. The Sikh’s sacred text was designated as a legal person though it has no duties or responsibilities. Mosques were designated as legal persons, though they had no duties or responsibilities. A Hindu idol was designated as a “person” though it has no duties or responsibilities.

Esteemed commentators cited both by the Byrn majority and the Indian Supreme Court agree. “Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol.” George Whitecross Paton, A Textbook of Jurisprudence 393 (3rd ed. 1964). Idols have no duties or responsibilities. Indeed, John Chipman Gray, cited by the Byrn Court, makes clear that a “person” need not even be alive. “There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person.” Gray, supra Chapter II, 39 (1909) (emphasis added). Such a being has no duties or responsibilities. As Gray explained, there may also be
systems of law in which animals have legal rights . . . animals may conceivably be legal persons . . . when, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed.

*Id.* at 43 (emphasis added).\(^{31}\)

The Third Department therefore erred in *Nonhuman Rights Project v. Lavery*, by failing to recognize that the decision whether a chimpanzee is a “person” for the purpose of a common law writ of habeas corpus was entirely a *policy* question, and not a biological question. It further failed to address the powerful uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that Petitioner presented in great detail both in that case, the Kiko case, and in the case at bar.

This left the Third Department’s decision as the *first in Anglo-American history* in which an inability to bear duties and responsibilities constituted the sole ground for denying such a fundamental common law right as bodily liberty to an individual - except in the interest of the individual’s *own protection* - much less an entity who is autonomous and able to self-determine, much less an entity who is merely seeking the relief of a common law writ of habeas corpus.

Moreover, the Third Department in *Nonhuman Rights Project v. Lavery* mistook Petitioner’s demand for the “immunity-right” of bodily liberty, to which the ability to bear duties and responsibilities is irrelevant, with a “claim-right.” Linking personhood to an ability to bear duties and responsibilities is particularly inappropriate in the context of a common law writ of habeas corpus to enforce the fundamental common law immunity-right to bodily integrity. The Third Department’s linkage of the two caused it to commit a serious “category of rights” error by mistaking an “immunity-right” for a “claim-right.” See generally, Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L. J.* 16 (1913). The great Yale jurisprudential professor, Wesley N. Hohfeld’s, conception of the comparative structure of rights has, for a century, been employed as the overwhelming choice of courts,

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\(^{31}\) The New York Legislature recognized this when it enacted EPTL 7-8.1, which provided for an “enforcer” to enforce the nonhuman animal beneficiary’s right to the trust corpus.
jurisprudential writers, and moral philosophers when they discuss what rights are. Hohfeld began his famous article by noting that “[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to ‘rights’ and ‘duties’” and that “the term ‘rights’ tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense.” *Id.* at 28, 30.

With the greatest delicacy, Hohfeld gently pointed out, *id.* at 27, that even the distinguished jurisprudential writer, John Chipman Gray, made the same mistake as did the Third Department Court in his *Nature and Sources of the Law*.

In [Gray’s] chapter on “Legal Rights and Duties,” the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of ‘claim.’ Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, ‘right’ and ‘duty.’

The reason is that a claim-right, which Petitioner did not demand in *Nonhuman Rights Project v. Lavery*, in *Nonhuman Rights Project v. Presti*, or in the case at bar, is comprised of a claim and a duty that correlate one with the other. Steven M. Wise, *Rattling the Cage – Toward Legal Rights for Animals* 56-57 (Perseus Publishing 2000); Steven M. Wise, “Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy,” 22 *Vermont L. Rev.* 807-810 (1998). The most conservative, but hardly the most common, way to identify which entity possesses a claim-right is to require that entity to have the capacity to assert claims within a moral community. Steven M. Wise, *Rattling the Cage*, at 57; Steven M. Wise, “Hardly a Revolution,” at 808-810. This is roughly akin to the personhood test the Third Department applied in *Nonhuman Rights Project v. Lavery*.

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32 Gray’s error becomes obvious when one recalls that Gray also agreed that both animals and supernatural beings could be “persons.” *See supra* at 10.
In neither Nonhuman Rights Project v. Lavery, Nonhuman Rights Project v. Presti, nor in the case at bar, is Petitioner seeking a claim-right for a chimpanzee. Instead it is seeking the fundamental immunity-right to bodily liberty that is protected by a common law writ of habeas corpus. This immunity-right is what the United States Supreme Court was referring to when it famously stated that

[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . “The right to one's person may be said to be a right of complete immunity: to be let alone.”

Botsford, 141 U.S. at 251 (quoting Cooley on Torts 29) (emphasis added).

An immunity-right correlates not with a duty, but with a disability. Steven M. Wise, Rattling the Cage, at 57-59; Steven M. Wise, Hardly a Revolution, at 810-815. Other examples of fundamental immunity-rights are the right not to be enslaved guaranteed by the Thirteenth Amendment to the United States Constitution, in which all others are disabled from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is disabled from abridging. One need not be able to bear duties or responsibilities to possess these fundamental rights to bodily liberty, freedom from enslavement, and free speech.

The decision of the United States Supreme Court in Harris v. McRea, 448 U.S. 297, 316-18, 331 (1980) illustrated the difference between a claim-right and an immunity-right. Eight years previous to Harris, the United States Supreme Court in Roe v. Wade recognized a woman’s immunity right to privacy and against interference by the state with her decision to have an abortion in the earlier stages of her pregnancy. The Harris plaintiff claimed she therefore had the right to have the state pay for an abortion she was unable to afford. The Supreme Court recognized that the woman’s immunity-right to an abortion correlated with the state’s disability to interfere in her decision to have the abortion; it did not correlate with the state’s duty to fund the abortion. Therefore she had no claim against the state for payment for her abortion.
Petitioner argues that Hercules and Leo have the common law immunity-right to the bodily liberty protected by the common law of habeas corpus. This fundamental immunity-right correlates solely with the Respondents’ disability to imprison him. The existence or nonexistence of Hercules and Leo’s ability to bear duties or responsibilities is entirely irrelevant; it is irrelevant to every immunity-right. It is particularly inappropriate to demand that, for Hercules and Leo to possess the fundamental immunity right to bodily liberty protected by the common law of habeas corpus, they must possess the ability to bear duties and responsibilities, when this ability has nothing whatsoever to do with their fundamental immunity-right to bodily liberty. It might make sense, for example, if Hercules and Leo were seeking to enforce a common law contractual right. But the ability to bear duties and responsibilities is not even a prerequisite for the claim-right of a “domestic or pet” animal in New York, pursuant to EPTL 7-8.1. Moreover, this statute actually does grant not just Hercules and Leo, who are both beneficiaries of a trust Petitioner created for them prior to the litigation, but every other “domestic or pet” animal in New York, the claim right to the money placed in the trust to which that nonhuman animal is a named beneficiary.33

4. The refusal to recognize the personhood of a nonhuman animal who, the uncontroverted evidence demonstrates, is an autonomous and self-determining being, for the purpose of a common law writ of habeas corpus, undermines the supreme common law values of liberty and equality.

Any requirement that an autonomous and self-determining individual must also be able to bear duties or responsibilities to be recognized as a “person” for the purpose of a common law writ of habeas corpus undermines both the fundamental common law values of liberty and of equality. It undermines fundamental liberty because it denies personhood and all legal rights to an individual who uncontrovertibly possesses the autonomy and self-determination that are supremely valued by the common law, even more than human life itself, Rivers, 67 N.Y. 2d at

33 That “domestic or pet” animals in New York State are “persons” within the meaning of EPTL 7-8.1 does not necessarily mean they are purposes for any other reason, just as Hercules and Leo’s being a “person” for the purpose of the common law writ of habeas corpus would not necessarily mean they are a “person” for any other purpose.
It undermines fundamental equality both because it endorses the illegitimate end of the permanent enslavement of an uncontrovertibly autonomous and self-determining individual, *Affronti*, 95 N.Y.2d at 719 and because “[i]t identifies persons by a single trait and then denies them protection across the board,” *Romer*, 517 U.S. at 633.34

**G. THE FOURTH DEPARTMENT’S RECENT DECISION IN NONHUMAN RIGHTS PROJECT V. PRESTI WAS WRONGLY DECIDED.**

The Fourth Department erroneously concluded in *Nonhuman Rights Project v. Presti* that the detained chimpanzee, Kiko, was not entitled to the relief afforded by a writ of habeas corpus, not because Kiko was not a “person,” but on the mistaken ground that Petitioner was neither demanding Kiko’s immediate release nor claiming that Kiko’s detention was unlawful. Instead, the court erroneously asserted that Petitioner was merely demanding a transfer to a sanctuary, which, in the court’s opinion, was not a remedy for a common law writ of habeas corpus.

In support of this factually and legally incorrect statement, the Fourth Department cited eight cases. Each case, without exception, featured a human prison inmate who had been convicted of a crime and was subsequently attempting to utilize the writ of habeas corpus for some reason other than to procure his immediate release from prison. Each case is therefore inapposite to the case at bar.

Several cases dealt exclusively with whether habeas corpus could be used merely to challenge alleged errors in parole revocation hearings. In *People ex rel. Gonzalez v Wayne County Sheriff*, 96 A.D.3d 1698 (4th Dept. 2012), the court held that habeas corpus relief was

34 In *Nonhuman Rights Project v. Lavery*, at *5, n.3, the Third Department stated: “[t]o be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings.” This is a controversial and minority opinion in the philosophical literature, see, e.g., Daniel A. Dombrowski, *Babies and Beasts – The Argument From Marginal Cases* (University of Illinois Press 1997). It is also entirely irrelevant to the case at bar, as Hercules and Leo are seeking the protection of an *immunity-right* guaranteed by the common law of habeas corpus, to which no corresponding duty exists, and ignores both the teaching of the Court of Appeals in *Byrn, supra*, that personhood is an issue of *policy, and not of biology*, and the Legislature’s grant of claim-rights to “pets and domestic” animals in EPTL 7-8.1 to the extent of being a *trust beneficiary*.
unavailable to a prisoner in his challenge to an administrative law judge’s determination following a final parole revocation hearing. In *People ex rel. Shannon v. Khahaifa*, 74 A.D.3d 1867 (4th Dept. 2010), the prisoner sought habeas corpus on the grounds that “the determination that he violated a condition of his parole was arbitrary and capricious, and the time assessment for the violation was excessive.” In both cases, the court concluded that habeas corpus should be denied where the inmates would not be entitled to release from prison even if errors were committed in connection with parole revocation.

In addition to these inapposite parole cases, the Fourth Department in *Nonhuman Rights Project v. Presti* cited inapplicable criminal habeas corpus cases such as *People ex rel. Hall v. Rock*, 71 A.D.3d 1303, 1304 (3rd Dept. 2010), which involved a prisoner’s inappropriate challenge to the sufficiency of the evidence supporting his indictment. Likewise, in *People ex rel. Kaplan v. Commissioner of Correction*, 60 N.Y.2d 648, 649 (1983), the Court ruled that the inmate was not entitled to habeas corpus because the only remedy “to which he would be entitled would be a new trial or new appeal, and not a direction that he be immediately released from custody.” The same was true in *People ex rel. Douglas v. Vincent*, 50 N.Y.2d 901, 903 (1980), where the Court held that “even if there were merit to the relator's contention that he was denied effective assistance of counsel at trial or on appeal he would not be entitled to habeas corpus relief because the only remedy he seeks would provide him a new trial or new appeal, and not a direction that he be immediately released from custody.” In the above cases, unlike the case at bar, the inmates were not contending that the fact of their confinement was unlawful, but rather, asserted that some procedural error occurred in their underlying trial or hearing. In the present case, Petitioner has consistently maintained that Hercules and Leo’s detention is unlawful, thus entitling them to immediate release.

In another case relied upon by the *Presti* court, *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986), the Court of Appeals in fact, reaffirmed the notion that habeas corpus can be used to seek a transfer to an “institution separate and different in nature from the correctional facility to which petitioner had been committed[.]” (emphasis added) (citing
In distinguishing the case from *Johnston* however, the Court of Appeals explained, “[h]ere, by contrast, petitioner does not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department of Correctional Services is expressly authorized to impose on lawfully sentenced prisoners committed to its custody[.].” (citations omitted, emphasis added). In the case at bar, as in *Johnston* and unlike in *Dawson*, Petitioner seeks the complete discharge of Hercules and Leo from Respondents’ custody into a chimpanzee sanctuary. As noted above, Petitioner’s case is analogous to the case of a juvenile, elderly person, or mentally incompetent adult who simply cannot be released onto the streets of New York following a habeas determination that their detention is unlawful.

The Third Department in *Berrian v. Duncan*, 289 A.D.2d 655 (3rd Dept. 2001) and *People ex rel. McCallister v. McGinnis*, 251 A.D.2d 835 (3rd Dept. 1998), the final cases cited by the *Nonhuman Rights Project v. Presti* court, relied on *Dawson* in concluding that a prisoner could not use habeas corpus to seek release from a special housing unit of a prison. For the reasons set forth in *Dawson, supra*, such a ruling has no bearing here, where Petitioner seeks complete release of Hercules and Leo from their confinement by Respondents to an environment completely “separate and different in nature” from the facility of detention.

Notwithstanding the few cases cited by the Fourth Department in *Nonhuman Rights Project v. Presti*, it is established that convicted prisoners may use habeas corpus to challenge their conditions of confinement without seeking immediate release. See *Johnston*, 9 N.Y.2d at 485; *People ex rel. Jesse F.*, 242 A.D.2d at 342 (“habeas corpus is an appropriate mechanism for transfer from a secure to a nonsecure facility.”); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) (“habeas corpus is available to challenge the conditions of confinement, even where immediate discharge is not the appropriate relief”); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an “individual . . . is entitled to apply for habeas corpus” upon a “showing of a course of cruel and unusual treatment.”); *People ex rel.
**Rockey v. Krueger**, 306 N.Y.S.2d 359, 360 (Sup. Ct. 1969) (“Notwithstanding that relator does not contest the propriety of his confinement on the underlying charge, he may be [sic] a writ raise the issue whether restraint in excess of that permitted is being imposed upon him. . . Since the . . . relator is being held in solitary confinement and that an Orthodox Jew seeking to retain his beard would not be so held, relator is entitled to judgment requiring the respondent to release him from solitary confinement.”); **McGrath**, 61 Misc. 2d at 116 (citing **People ex rel. Smith v. LaVallee**, 29 A.D.2d 248, 250 (4th Dept. 1968) (“the issues of whether a prisoner . . . had in fact been receiving adequate psychological and psychiatric treatment during his imprisonment has been held a proper subject for habeas corpus relief”)).

Kiko is not a prison inmate convicted of a crime. Kiko is not attempting to utilize the writ of habeas corpus for some reason other than his immediate release from unlawful detention. Rather, Kiko is an autonomous, self-determining nonhuman individual who is utilizing the writ of habeas to secure immediate release from imprisonment and procure for himself the greatest amount of freedom he could possibly have given the fact that, as a chimpanzee, he can neither be released directly into the wild or onto the streets of New York State.

The Third Department in **Nonhuman Rights Project v. Lavery**, at *2, accurately stated that “[n]otably, we have not been asked to evaluate the quality of Tommy’s current living conditions in an effort to improve his welfare. In fact, petitioner’s counsel stated at oral argument that it does not allege that respondents are in violation of any state or federal statutes respecting the domestic possession of wild animals[.]” (citation omitted). In contrast, the Fourth Department appears to have misunderstood who Petitioner NhRP is and what it is demanding. No evidence supports any of the court’s four startling statements that (1) Petitioner is “an organization seeking better treatment and housing of, inter alia, nonhuman primates,”35 (2) “the

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35 Petitioner’s mission is “to change the common law status of at least some nonhuman animals from mere ‘things,’ which lack the capacity to possess any legal right, to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.”
petition alleges that Kiko is illegally confined because he is kept in unsuitable conditions,” (3) “petitioner does not seek Kiko’s immediate release,” or that (4) “nor does petitioner allege that Kiko’s continued detention is unlawful.” Nonhuman Rights Project v. Presti, at *1-2.

The uncontroverted facts set forth in the Verified Petition filed by Petitioner in the Supreme Court, Niagara County (Exhibit F to Wise Affidavit) demonstrate that none of the court’s four statements are supported by the evidence, and directly contradict the Fourth Department’s findings:

¶ 1 provides that “This petition is for a common law writ of habeas corpus pursuant to CPLR Article 70. It is an attempt to extend existing New York common law for the purpose of . . . granting [Kiko] immediate release from illegal detention.”

¶12 provides that “[f]or the past 17 years, Petitioner NhRP has worked to change the status of such nonhuman animals as chimpanzees from legal things to legal persons.”

¶9 provides that “Kiko is a solitary chimpanzee being detained by Respondents in a cage located in a cement storefront in a crowded residential area . . .”

¶3 “asks this Court to issue a writ recognizing that Kiko . . . [has] the fundamental legal right not to be imprisoned.”

¶5 states that “this Petition seeks a determination forthwith that Kiko’s detention is unlawful and demands Kiko’s immediate release . . .”

¶17 states that “Petitioner NhRP will demonstrate that under New York law, Kiko, as a legal person, is entitled to the common law right to bodily liberty. Petitioner NhRP asserts that Kiko’s detention by Respondents constitutes an unlawful deprivation of his right to bodily liberty and that he is entitled to test the legality of this detention through the issuance of a common law writ of habeas corpus by this Court.”

The Verified Petition concludes by demanding, in part, “the following relief:  A. Issuance of the attached writ demanding Respondents demonstrate forthwith the basis for the detention and denial of liberty of Petitioner Kiko: B. Upon a determination that Petitioner Kiko is being illegally detained, ordering his release and transfer forthwith to the primate sanctuary selected by the North American Primate Sanctuary Alliance.”

One of four Questions presented in the Brief to the Fourth Department (Exhibit D to Wise Affidavit) was: “4. Is the Petitioner/Appellant chimpanzee, who is imprisoned in a cement storefront building in the State of New York, entitled to have a common law writ of habeas corpus issued on his behalf against the Respondents to determine the legality of his restraint?” In the Brief’s Statement of the Case (Exhibit D), Petitioner stated that “Petitioner/Appellants petitioned the court to issue a writ of habeas corpus and thereafter order the immediate release of Kiko, who was being unlawfully detained in the State of New York by Respondents.”

Finally, the answers to the questions posed to Petitioner’s counsel by the Fourth Department at oral argument, the relevant pages of which are attached as Exhibit E to Wise’s Affidavit, directly contradict the factual assertions made by the court in its decision as well as the legal conclusion that habeas corpus did not lie:36

00:54  JUSTICE: Well, can I ask you a question?  If Kiko were to be let out of where Kiko is currently being held, you’re not asking that Kiko go out in the street, you’re saying that Kiko would still be confined, but in a sanctuary.  Is that correct?

01:12  STEVEN WISE: That is correct.  Kiko would go to Save the Chimps, which is a sanctuary with islands in it and a lake in South Florida.

01:20  JUSTICE: Right, but it would still be confinement. You’re not saying that Kiko should go off into the street?

01:28  STEVEN WISE: That would be dangerous for Kiko and dangerous for us. But he would not be imprisoned. He would not be confined in the way he is confined now. It would be a sanctuary …

01:34  JUSTICE: Right, it would be a better condition, but he’s still not free to go where, where Kiko wishes to go.

01:39  STEVEN WISE: He’s not. He has to go in a place that’s going to be safe for him and safe for the population.

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36 As there is no official transcript of the oral argument, Petitioner’s transcript is unofficial and was transcribed from a recording of the oral argument.
JUSTICE: So he’s confined from … he’s going from one confinement—which is bad—to another confinement, which is better.

STEVEN WISE: Much, much better, and it also takes into account …. it’s a place in which his autonomy and his ability to self-determine will be allowed to flourish in a way that it’s not allowed to flourish now.

JUSTICE: But if Kiko were a person, we wouldn’t say, we’re going to take him from one confinement to another. We would say - Kiko, free to go, wherever Kiko wishes to roam.

STEVEN WISE: Most of the habeas corpus cases have involved an adult human being in which that is the remedy. It’s not the remedy, and it hasn’t been so, in a series of cases throughout the United States and England as well. For, example …. you have …. insane people have used the writ of habeas corpus, children, apprentices, endangered, I’m sorry, indentured servants, slave children, when slavery was legal, who were seven or eight years old. I cite, we cite the Commonwealth vs. Aves case in Massachusetts, the Commonwealth vs. Taylor case. There’s a New York case called Cooper vs. Traynor, involving an eight year old child, a mixed white-black child, and she was living in a brothel. There was a writ of habeas corpus that removed her from a brothel into the custody of her father. So, when you are a … when you are not an adult human being, you will be moved from one place to another place, and it may be permanent. If you’re … an elderly person, who is in some kind of a state that is permanent, you will be permanently moved there, but you will go out of one place, and you’ll be moved into another place. This is especially important because the expert affidavits show clearly that Kiko indeed is a being who is autonomous and can self-determine, and his ability to be autonomous and self-determined is not being allowed to express themselves, and …

JUSTICE: Does it matter what conditions Kiko’s being held, or …

STEVEN WISE: No.

JUSTICE: It could be a wonderful place, but, if his—if you’re right that he’s a person, he, regardless of the conditions, he should go.

STEVEN WISE: Yes.

JUSTICE: He should be free to go.

STEVEN WISE: Absolutely, and, in the Nonhuman Rights Project, we call that the Bill Gates problem. What happens if Bill Gates takes my child and brings him to wherever he is and puts him up and maintains him in a way that’s far beyond a way I would ever be able to do it. Does a judge weigh … is the child going to be better if he’s Bill Gates’ child, or do I get my child back?

JUSTICE: So if you’re right, then you could have a zoo, say the Toronto Zoo or the San Diego Zoo, that has the best accommodations for chimpanzees you can imagine. They have acres and acres, bananas everywhere. If you’re right here, well, someone brings a habe on those animals, and say, they should be released from the zoo?

STEVEN WISE: There comes some point, that if the zoo is treating them in a way that respects their self-determination and autonomy - even then you might want to issue the writ of habeas corpus - because … so that a judge could see
what was going on. But if it turned out that their autonomy and self-determination is being respected already, then the judge would have no reason to issue a writ of habeas corpus. . . .

11:08 JUSTICE: Let me just get back to ... some of the questions that have been asked earlier. You are not seeking complete liberty for Kiko. It seems to me that the New York Court of Appeals, in the past, has required that request for relief in order for a habeas corpus petition to be granted. Why do you say we have the authority to do so in this case?

11:37 STEVEN WISE: Well the cases that we cite in our brief that involve very elderly people, insane people, indentured servants, apprentices; they did not get, ... they did not ask for that relief, and that was not the relief. And then there were two cases from the Supreme Judicial Court of Massachusetts in the middle of the 1830’s and 40’s, which ...

12:00 JUSTICE: Are any of those, do any, are any of those cases New York authority; can you rely on that authority?

12:06 STEVEN WISE: Yes ...you have ...

12:08 JUSTICE: As the intermediate appellate court?

12:09 STEVEN WISE: Uh, no. It’s persuasive authority for you, as a matter of common law. But there is the Cooper vs. Traynor case, and then there are the cases we cite, again, involving apprentices and indentured servants.

12:23 JUSTICE: We understand.

13:38 JUSTICE: Right, but can’t you go to the Legislature? There are laws in New York State that provide how you can treat dogs, okay, as far as dogs are outside there’s very detailed regulations, where the dog can be, the shade, the housing, and everything. Can’t you go the State Legislature and say, there should be a law, if you’re going to have an animal of this nature, that there should be certain minimum requirements for his habitation? And because that’s what you’re concerned about; you’re concerned about Kiko’s living conditions?

14:12 STEVEN WISE: No, no, we are not.

14:15 JUSTICE: You’re not concerned about his living conditions?

14:16 STEVEN WISE: No, no. We are concerned about his being detained, is that, his detention. He is being imprisoned in such a way that his autonomy and his self-determination are not being allowed to express themselves, which happens to be the very reason that a writ of habeas corpus...

14:32 JUSTICE: So if you’re right, there’s no chimpanzees to be held in any zoo, in the United States, they should all be let go?

14:37 STEVEN WISE: There are ... well we would like to take Kiko to Africa, but he couldn’t do that. There’s no record of captive-bred chimpanzees being able to thrive there. So we want Kiko to go to the place in North America where he has the best opportunity to express his self-determination...

In sum, the Verified Petition filed by Petitioner on behalf of Kiko alleged nothing about his welfare. At oral argument, Petitioner’s counsel made clear that the case was brought as a
petition for a writ of habeas corpus in order to secure Kiko’s physical liberty to the greatest extent possible, and had nothing whatsoever to do with his welfare or living conditions.

As a result of its misunderstanding of Petitioner and its claims, the Fourth Department erroneously ignored two centuries of controlling analogous cases the Petitioner brought to its attention in which such individuals as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, none of whom could be immediately released onto the streets of the State of New York any more than Kiko could, were nevertheless released from the custody of one entity and immediately transferred into the custody of another. Its ruling therefore erroneously contracted the Great Writ for both humans and chimpanzees.

This contraction also violated the Suspension Clause, Art. I, sec. 4, of the New York Constitution. As noted supra, at 40-41, to the extent a statute curtails the common law of habeas corpus, it constitutes a suspension of the Great Writ in violation of New York Constitution, Art. 1 § 4, which provides that “[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it.” The Suspension Clause however renders not just the legislature, but the judiciary, equally powerless to deprive an individual of the privilege of the common law writ of habeas corpus. Tweed, 60 N.Y. at 591-92 (“If a court . . . may impose any sentence other than the legal statutory judgment, and deny the aggrieved party all relief except upon writ of error, it is but a judicial suspension of the writ of habeas corpus. That writ is . . . a protection against encroachments upon the liberty of the citizen by the unauthorized acts of courts and judges.”

IV. CONCLUSION

When a 2005 case demanding a writ of habeas corpus pursuant to the Brazilian Civil

37 The Memorandum of Law filed by Petitioner in the Supreme Court, Niagara County is part of the Record on Appeal to the Fourth Department. The relevant pages of the memorandum are attached as Exhibit F to Wise Affidavit.

38 On January 15, 2015, Petitioner filed a Motion for Leave to Appeal to the Court of Appeals with the Fourth Department.
Procedure Code was filed on behalf of a confined chimpanzee named Suica in Salvador, Brazil, the trial judge noted the matter “is worthy of discussion, as this is a highly complex issue requiring an in-depth examination of ‘pros and cons.’” See In Favor of Suica, annexed to the Habeas Petition as Exhibits B and C to the Affidavit of Steven M. Wise. Because Suica died on the eve of the judge’s decision, he was required by statute to dismiss the case. This Court now has the opportunity to examine the matter that is so worthy of discussion and the subject of such great public concern. Hercules and Leo are autonomous and self-determining beings who can choose how to live their lives and who possess dozens of complex cognitive abilities that comprise and support their autonomy. They are entitled to legal personhood as a matter of common law liberty and equality, which in turn, entitles them to a writ of habeas corpus. They are further entitled to their bodily liberty and immediate discharge from what will otherwise be a decades-long imprisonment.

Professor Osvath made it clear that every day of Hercules and Leo’s perpetual imprisonment is hellish, as chimpanzees “have a concept of their personal past and future and therefore suffer the pain of not being able to fulfill one’s goals or move around as one wants; like humans they experience the pain of anticipating a never-ending situation.” (Osvath Aff. at ¶16).

Hercules and Leo cannot be released to Africa or onto the streets of New York State. But they can be released from their imprisonment in New York. This Court should order them discharged from the Respondents’ control and delivered into the care of Save the Chimps in Ft. Pierce, Florida, forthwith, there to spend the rest of their lives living like autonomous, self-determining chimpanzees to the greatest extent possible in North America, amongst chimpanzee friends, climbing, playing, socializing, feeling the sun, and seeing the sky.

Respectfully submitted,

Dated: February 12, 2015

/S/

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/S/

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