

*Personhood, Property and Legal Competence**

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Legal Rights for Great Apes

The Declaration on Great Apes requires that we extend the community of equals to include all great apes: human beings, chimpanzees, gorillas and orang-utans. Specifically, the Declaration requires the recognition of certain moral principles applicable to all great apes – the right to life, the protection of individual liberty, and the prohibition of torture.

If these principles are going to have any meaning beyond being statements of aspiration, then they must be translated into legal rights that are accorded to the members of the community of equals and that can be enforced in courts of law. Indeed, the Declaration itself suggests that moral principles would be enforceable in courts of law.

Those who support these principles as *legal* rules, and not just as moral statements, must recognise that the laws of most countries, and certainly American law, present very serious conceptual obstacles to such a position. The American legal system is replete with categories and attaches negative consequences to those categories based on race, sex, sexual preference, age, nationality and disability.¹ But there are no more serious consequences than those attached to classification based on *species*.

For example, although experimentation involving a human being requires the person's informed consent (or the consent of a legal guardian if the person is incapable of giving consent), and is subject to legal scrutiny on a number of different levels, animal experiments (in the United States) may be performed on any animal for any purpose that is approved by a committee of other animal experimenters, and the concept of informed consent obviously has no applicability. Moreover, there is no need - as there is in virtually every instance of human experimentation - to demonstrate that the experiment will benefit the experimental subject. Once some being is placed on the other side of the species barrier, the law provides virtually no protection for that being, and humans may harm that being in ways that would be unthinkable if applied to even the most disadvantaged members of human society.

In this chapter, I want briefly to examine the notion of animals as property to explain the species discrimination reflected in virtually all legal systems. Next, I will argue that even the most conservative understanding of the concept of equal protection requires that all great apes be regarded as 'persons' under the law. Finally, I will examine some problems concerning the integration into the legal system of rights for all great apes.

Animals as Property

The reason for the differential treatment accorded to nonhumans has to do with the fact that as far as the legal system is concerned, animals and humans occupy completely different positions. Human beings are regarded by the law as capable of having rights; nonhumans are regarded as incapable of having rights. Although there is an increasing social awareness about nonhuman animals and a consensus that animals possess at least some moral rights that ought to be recognised by the legal system, animals still have the status of being the *property* of human beings – just as slaves were once regarded as the property of their master, or women as the property of their husbands or fathers.

* In PAOLA CAVALIERI & PETER SINGER (eds.), *The Great Ape Project* (New York: St. Martin's Griffin, 1993), pp. 248-257.

¹ See M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Cornell University Press, Ithaca, NY, 1990).

There is, however, general consensus that animals ought not to be subjected to 'unnecessary' pain or 'unjustified' killing. Although animals are viewed as property that cannot possess rights, there are many laws that purport to provide some level of protection for animals in a variety of different circumstances. The problem is that when humans try to determine whether suffering or death is 'necessary', they inevitably engage in 'hybrid' reasoning in which they balance human interests, including the legal fact that humans are regarded as having rights, and especially rights in property, and animal interests, which are unsupported by accompanying claims of right.² And nonhumans are a form of property that humans seek to control. Under this framework, animals can virtually never prevail as long as humans are the only rightholders and animals are merely regarded as property - the object of the exercise of an important human right.

The treatment of animals as property is illustrated in a legal case, *State v. LaVasseur*.³ Kenneth LeVasseur was an undergraduate student at the University of Hawaii. In January 1975, he began to work at the university's marine laboratory at Kewalo Basin, Honolulu, as a research assistant. His primary responsibilities involved repairing and cleaning the laboratory's dolphin tanks, and feeding and swimming with the dolphins. In May 1977, after working with the dolphins for over two years, LeVasseur decided that the dolphins were in great danger as the result of their confinement in the laboratory tanks. He and several other people removed two dolphins from their tanks at the laboratory and released the animals into the ocean. LeVasseur was charged and convicted of first-degree theft, and he appealed.

The primary issue in LeVasseur's appeal was whether the trial court had erred in ruling that LeVasseur could not use a 'choice of evils' defence. This defence, which has different formulations depending upon the jurisdiction, provided under Hawaii law that certain conduct, otherwise criminal, could be justified if the actor believes that conduct 'to be necessary to avoid imminent harm or evil to himself or to *another*' if '[t]he harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged'.⁴

LeVasseur argued that he was trying to prevent greater harm to *another* in two senses. First, he argued that the dolphins should be included within the term *another*. The appellate court rejected this argument because the statute defined 'another' as a *person*, and although corporations and associations can be considered as 'persons' under the law, the court ruled that dolphins could not be so considered.

Second, LeVasseur argued that the term 'person' was also defined under Hawaii law to include the United States. LeVasseur maintained that the policy of the federal Animal Welfare Act⁵ was to prevent cruelty to animals, and that by releasing the dolphins, LeVasseur was trying to protect the humane treatment policy of the United States. Although the court accepted that the Animal Welfare Act 'and its accompanying regulations manifest a national policy to protect the well-being of laboratory animals like the instant dolphins',⁶ the court held that LeVasseur had acted improperly because he should have contacted the federal government and reported the life-threatening condition of the dolphins, and should not have deliberately chosen theft as his means of helping the animals.

In the court's view, the crime of theft of property was as great an evil as the evil that LeVasseur sought to prevent - the death of the dolphins. This decision is completely

² I am currently at work on a book in which I explore more fully the difficulties presented when animals are treated as property.

³ 613 P.2d 1328 (Haw. Ct. App. 1980).

⁴ 613 P.2d at 1332 (emphasis added).

⁵ The Animal Welfare Act is the primary American statute concerning the treatment of animals used for experiments. It is found in Title 7 of the United States Code, at sections 2131 to 2157.

⁶ 613 P.2d at 1333.

understandable given the fundamental premise of the Animal Welfare Act and other current legislation concerning animals - that nonhumans are the *property* of humans, and can be exploited for human benefit. Given a characterisation of nonhumans as property, the researchers at the university were only exercising one of their *rights*, the right of private property. It should not, therefore, be surprising that even though the court recognised that the policy of the federal Animal Welfare Law was to treat animals humanely, the evil that LeVasseur had sought to avoid - the inhumane treatment of the animals - was no greater (and, indeed, was a lesser evil) than the evil that he had actually caused - the violation of the university's *property* rights.

The animal interest, even when it is substantial from the animal's point of view, is virtually always accorded less weight than the most trivial of human interests because, for the most part, human beings have absolutely no way of looking at nonhumans except as some form of property. Most human/animal conflicts arise because some human is trying to exercise his or her rights of property over some nonhuman, and the conflict ostensibly requires that we balance the human and animal interests. In doing so, however, we are comparing the interests of humans, which are supported by claims of legal right, and especially the legal right to exercise control over property, with the interests of nonhumans, which are unsupported by claims of legal right *because* the animal is regarded as the property of the human whose interest is at stake.

This balancing of completely dissimilar but peculiarly related legal entities accounts for why animals virtually always lose in the balance. For example, we condemn the 'unnecessary' suffering of animals, but we tolerate the use (which is synonymous with 'the abuse') of chimpanzees in circuses. There is no way that the use of chimpanzees in circuses can be squared with our rejection of 'unnecessary' animal suffering without understanding that such animal abuse is made 'necessary' merely by the existence of the right of property in the chimpanzee - and in Western societies, that property right is seen as a very powerful right.

Legal Personhood

If the Declaration on Great Apes is to have any meaning as far as chimpanzees, gorillas and orang-utans are concerned, then it is necessary that the concept of *legal personhood* be extended to them, and they must cease to be treated or viewed as the *property* of humans. It is only then that apes may be regarded as legitimate holders of *legal* rights.

Some may argue that the concept of legal personhood cannot, as a conceptual matter, be extended to anything but human persons. Indeed, it is the common lay view that humans have legal personhood and that only humans can be persons. A brief examination of legal doctrine, however, demonstrates that this view is incorrect. Not all humans are (or were) regarded as persons, and not all legal persons are human.

Slaves in the United States and elsewhere were clearly human, but did not enjoy legal personhood; they were regarded as property in much the same way that nonhuman animals are regarded today.⁷ Similarly, women in the United States were once regarded as the property of their husbands, and in some nations, women still suffer significant legal disabilities. Children have certain rights and are not, strictly speaking, the property of their parents; they are, nevertheless, disabled under the law from full legal personhood.

Just as not all humans are regarded as persons, not all persons are human. In the *LeVasseur* case, the defendant argued, in part, that the definition of 'another' should include dolphins because 'another' would include corporations and the exclusion of the dolphins was unjustifiable. Under common law, corporations are regarded as 'persons' with full rights to sue,

⁷ See A. Watson, *Slave Law in the Americas* (University of Georgia Press, Athens, GA, 1989).

be sued, hold property, and so on. Indeed, it would not be an exaggeration at all to suggest that much American law concerns the activities of corporations, and the practice of most American lawyers contains at least some corporate work. When an economic system finds it advantageous, its notion of 'personhood' can become quite elastic.

Bioethics is currently preoccupied with the question of legal person-hood as that term applies to fetuses and to the incompetent elderly. The Supreme Court has held that personhood may not, as a matter of constitutional law, be extended to a fetus that is not viable, and viability usually occurs in the third trimester of pregnancy.⁸ An earlier incarnation of the legal person would violate the woman's right of privacy, which includes her right to terminate an unwanted pregnancy. Similarly, there is a great deal of litigation and discussion about when 'death' occurs in the ill or elderly for purposes of determining when life-support measures may be withdrawn by the family or the state.

What is peculiar about many of the discussions of legal personhood is that the attributes of personhood often the focus of debate as to whether this or that being is a 'person' are *clearly* present in *all* great apes. For example, one of the more exhaustive sets of attributes of human personhood is presented by bioethicist Joseph Fletcher, who sets out a list of fifteen 'positive propositions' of personhood. These attributes are: minimum intelligence, self-awareness, self-control, a sense of time, a sense of futurity, a sense of the past, the capability of relating to others, concern for others, communication, control of existence, curiosity, change and changeability, balance of rationality and feeling, idiosyncrasy and neocortical functioning.⁹ Although we may doubt that chimpanzee, gorilla or orang-utan fetuses (or even very young chimpanzees, gorillas or orang-utans), or the incompetent elderly chimpanzees, gorillas or orang-utans exhibit all of these attributes, we are no longer able to doubt that *all* great apes (except fetuses, and perhaps the very young or the incompetent elderly) possess these characteristics.

Moreover, the great apes possess these characteristics in substantially similar ways. That is, there is a high degree of similarity among the great apes in terms of mental capabilities and emotional life - characteristics which, for most of us, are central to the notion of 'personhood'. And it is in this respect that exclusion of any great ape from the community of equals must be viewed as being arbitrary and irrational, and not merely morally unjustifiable.

Philosophers such as Tom Regan¹⁰ and Peter Singer¹¹ have demonstrated convincingly that there can be no moral justification for what Richard Ryder has called 'speciesism', or the determination of membership in the community of equals based upon species. Many opponents of the attack on speciesism offer the supposed rebuttal that if we reject species as a criterion for determining membership in the community of equals, it will be impossible to 'draw the line' as it were. Although I personally find this position unconvincing, and believe that a coherent moral view requires that we draw the line at *sentience*, which would result in the inclusion within the community of equals of a broad range of beings, I also recognise that it is difficult to accuse someone who disagrees with my view of being 'irrational' (simply on the basis of that disagreement).

Wherever we decide to draw the line, however, it is clear that all great apes belong on the same side, and that it would be irrational to place some great apes on one side, and some on the other. Interestingly, such an approach is thoroughly consistent with the most conservative of the tests employed in the interpretation of equal protection guarantees under American law. That is, when someone challenges a government classification as violative of equal protection,

⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

⁹ J. Fletcher, 'Humanness', in *Humanhood: Essays in Biomedical Ethics* (Prometheus, New York, 1979), pp. 12-16.

¹⁰ T. Regan, *The Case for Animal Rights* (University of California Press, Berkeley and Los Angeles, 1983).

¹¹ P. Singer, *Animal Liberation*, 2nd edn (New York Review of Books, New York, 1990).

the challenger has the burden of showing that the classification is irrational and not related to any legitimate government interests. (There are instances when the government has the burden of demonstrating a compelling interest, and the government's claim is subject to strict judicial scrutiny. This more stringent test is applied when the classification affects a fundamental right, such as the right of free expression. There are also other tests that fall in between the 'irrationality' test and the 'strict scrutiny' test. For example, classifications based on gender receive 'heightened' scrutiny.)

Any classification of 'person' that excludes some great apes entirely from the sphere of 'personhood' is, based on the clear and indisputable mental and emotional similarity among *all* great apes, thoroughly irrational. This irrationality is exacerbated by the fact that the United States Constitution permits 'persons' to include thoroughly dissimilar entities, such as corporations.

In this sense, the argument for including great apes within the scope of our moral concern is a most powerful one. The argument does not require the inclusion of all sentient beings within the scope of our moral concern as *persons*, but only requires that we include those beings who are so substantially similar to human beings that their exclusion would be completely irrational - as irrational as creating a classification of human beings based on hair colouring.

Guardianship and Criminal Liability

There are two further issues that I wish to raise in connection with the issue of inclusion of all great apes when viewed from a legal perspective.

(a) The Use of Guardians to Protect Legal Rights

Critics of the inclusion view may argue that if all great apes are given certain fundamental legal rights, it will be impossible to enforce these rights because only humans can resort to the use of courts to enforce their rights. The standard response to this objection is that we could appoint guardians for those great apes who are unable to assert their own legal claims. For example, many people with profound mental disabilities and children are human beings who cannot themselves vindicate their legal rights. In such cases, courts appoint guardians for these 'wards', and the guardians represent their interests in court.

Although I generally agree with this 'standard response', there are clearly some difficulties with the guardianship model that have as yet gone unaddressed. One concern involves identifying who (i.e. what human) will be assigned the task of serving as the guardian. In the cases of people with mental disabilities and children, the legal system assumes that some family member can be identified who we assume will act in the best interests of the ward. This assumption may be unwarranted in many cases, and the family member may not always have the ward's interest at heart, but, at least in theory, and in most cases in practice, the system does work.

In the case of chimpanzees, gorillas and orang-utans, on the other hand, it seems difficult to provide criteria for identifying the appropriate guardian. Under the system now in existence, nonhumans are owned, but we certainly cannot rely on the owner of the animal to act in the nonhuman's best interests; indeed, as discussed above, the human/ animal conflict generally arises in the context of the assertion of a property right over an animal by the owner or someone acting on behalf of the owner. In a community of equals, nonhumans will not be owned at all, so the solution is completely inapplicable.

One possible answer is to entrust the guardianship to people or organisations who have

demonstrated an interest in, or knowledge about, animal issues. For example, we might entrust guardianship to members of animal protection organisations. Such an approach would, however, engender endless controversy and dispute even among animal advocates, who often disagree about what *is* in the best interests of nonhumans.

One possible answer to this difficulty may be found by carefully describing the rights accorded to nonhuman great apes, thereby limiting the range of discretion that would need to be exercised. As the range of discretion is limited, the identity of the guardian becomes less important. That is, in the case of human 'wards', legal issues generally concern what is in the 'best interests' of the ward. These issues are often very complex because it is not always clear what is in the 'best interests' of a human. For example, if a guardian has to determine whether to place the minor ward in a different school, or the mentally disabled ward in a different institution, it may not be clear, even after much investigation, what is in the 'best interests' of the child or the mentally disabled person.

If, however, we conscientiously provide to great apes the rights articulated in the Declaration – the right to life, liberty and freedom from torture - then, in most instances, we will know what is in the 'best interests' of the nonhuman ape. Indeed, a 'strict construction' of these rights will only serve to benefit the nonhumans because the Declaration is tantamount to an assertion that certain identified states of affairs *are* in the 'best interests' of great apes. For example, if we accept that there can be *no* unwarranted interference with the liberty of any great ape, we can no longer tolerate the incarceration of these nonhumans in zoos or research laboratories. Accordingly, the only role of the guardian would be to seek the immediate release of the great ape unjustifiably restrained or imprisoned. Of course, it may be necessary to resocialise the non-human under certain circumstances, but there is far less disagreement about the methods of resocialisation than there is about whether these animals may be incarcerated at all.

The difficulties in determining what is in the 'best interests' of a great ape arise only when 'speciesism' creeps in, and we provide for the treatment of chimpanzees, gorillas and orang-utans in a way that might conceivably differ from the treatment of humans. This is not, of course, to say that a strict application of the three basic rights articulated in the Declaration will make legal determinations easy. Under the best of circumstances, there will be *very* difficult questions, and there will probably be many of them. The point is only that these questions become easier as we understand the rights of nonhuman great apes as absolute *prohibitions* on what can be done to these beings.

(b) Criminal Liability for Great Apes

The Declaration envisages circumstances where a great ape can be deprived of liberty for committing a crime. If this reference to criminal culpability is intended to apply to humans, and not to chimpanzees, gorillas and orang-utans, then I see no difficulty with the notion. Alternatively, if apes may be detained or incarcerated if they pose a threat to the community, then that notion may also be acceptable under at least some circumstances. For example, if, for whatever reason, a gorilla presently imprisoned in a zoo cannot be returned to the wild, some form of detention may be justified for the safety of both the gorilla and the community.

It is clear, however, that the Declaration would prohibit resurrecting formal criminal liability for *any* nonhuman (great ape or rat).¹² However intelligent chimpanzees, gorillas and orang-utans are, there is no evidence that they possess the ability to commit crimes, and in this sense, they are to be treated as children or mental incompetents. Such treatment is consistent with the use of the guardianship model to facilitate the incorporation into the legal system of rights for nonhuman great apes. We have guardians who represent the interests of wards

¹² See E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (Durton, New York, 1906).

because the wards are deemed, for whatever reason, to be incapable of making responsible choices for themselves. So too, use of the guardian model for nonhuman great apes recognises that these nonhumans lack certain capacities, and one such capacity is the ability to comprehend and use legal rules. It would seem most unjust and unsound to recognise these incapacities for purposes of appointment of a guardian, and then to permit criminal liability to be imposed.

Conclusion

The Declaration of Rights is a sensible attempt to recognise what we have for too long ignored: that certain nonhumans *must* be regarded as 'persons' for purposes of obtaining legal protection of their fundamental rights. Indeed, not to accord such protection to all great apes is irrational in light of the demonstrated mental and emotional similarities among all great apes. It is, moreover, particularly unjustifiable under a legal system that already regards some nonhuman entities as legal persons. These nonhuman entities are regarded as persons not because they share any salient aspect of personhood; rather, their status is derived from the need for modern capitalistic legal systems to provide for investor protection. If, however, we regard the term 'personhood' even in a weakly objectivistic manner (i.e. as a concept with determinative conditions of application) there can be no doubt that personhood is a term that must be applied to all great apes.