Minding the Gap: Why we need an intermediary between legal personhood and property, by Sharisse Kanet

There has been a recent push to expand the circle of legal personhood to include certain non-human life-forms. I will consider to what extent our current definition of personhood can accommodate new groups of living things. I will argue that legal personhood, while useful, is not sufficient to accommodate the range of considerable beings on the planet, and that we need a new legal category roughly equivalent to the philosophical concept of moral patiency. Thus, certain non-human entities may be entitled to, among other things, the right to life and the right to liberty, although they are not legal persons.

I. What is a Person?

Personhood is a topic which been under contention for many years. Calling someone a person is roughly synonymous with saying that being deserves citizenship, liberty, and equality. In other words, to be a person is to count morally. ¹

Who should count as part of our sphere of moral consideration? This is the heart of the personhood question. It is relevant in a large number of discussions from slavery and women’s rights, to abortion and corporate personhood. My focus here will be how this concept is or is not applied to non-humans. In this first section, I wish to briefly review some of the more influential accounts of personhood, both in a philosophical and legal framework, and make clear some of the central contentions in the debate.

There are several influential Western traditions which we should be aware of. The “naturalist” tradition, which includes Descartes and Locke, holds that a person is any being who possesses a continuous consciousness, and is capable of representing the future. (Taylor 1985) We determine whether a being adheres to these criteria by observation. This has some obvious drawbacks. A being may

¹ There are other qualities that legal persons are said to have, including rights, privileges, and responsibilities, but these can be understood as aspects of the above list. (Taylor 1985)
appear to be formulating complex plans about the future without doing so (e.g. a GPS), or may seem to be incapable of doing so, or perhaps even seem unconscious, while still possessing a rich mental life (e.g. a fully paralyzed human). An alternative way of verifying these criteria would be by defining them scientifically. While potentially a strong argument, we are still a long way from being able to define such slippery terms as consciousness, never mind verify the presence of them (Van Gulick 2014), and so this method is not a solution for the present.

Another way to distinguish persons is by an underlying personal unity. This is akin to the sense that most of us have that we are one person, who has many sensations, thoughts, feelings, and so on, that are somehow unified in that they are all ours. Both Francis Beckwith (2001) and J.P. Moreland (1990) hold versions of this view. More specifically, Moreland says that "It is because an entity has an essence and falls within a natural kind that it can possess a unity of dispositions, capacities, parts and properties at a given time and can maintain identity through change." (p. 72) This definition is rather broad, and does not place the limits on personhood that others do.

Harry Frankfurt offers another intriguing definition of personhood that is tied to the notion of free will. In Frankfurt’s conception, free will is an essential quality of personhood, and is roughly defined as having the freedom to act on one’s higher order desires. (Frankfurt 1971) Higher order desires are essentially desires concerning one’s first order desires, so that if your first order desires control you, your will is not free. So, for example, I might have a first order desire I want chocolate, and a second order desire I do not want to want chocolate. When I am
capable of having this higher level of desire, and also capable of adhering to it over the lower level desire, then my will is free. Frankfurt contends that most animals only have first order desires, and are therefore automatically outside the realm of personhood.

The last definition I’ll mention is Peter Singer’s, which is that a person is any being who is conscious, thinking, and has self-awareness. (Singer 1985) If this is the definition we use, then the self-awareness clause may perhaps be the most restrictive, and would have interesting implications for both humans and non-humans. It is important to reiterate that the term ‘consciousness’, upon which several definitions of personhood rely, is itself a problematic term, subject to many debates. I have only mentioned a few of the many definitions, but central to them is the idea that personhood requires and rich and complex cognitive life.

So why does the designation of personhood matter? According to U.S. law, only natural persons or legal personalities (corporations, partnerships, or associations) have rights, protections, privileges, responsibilities, and legal liability. (Taylor 1985) There are a variety of things that US law recognizes as persons, and one would be hard-pressed to find attributes that delineate exactly that set. While most adult humans possess all the qualities described by the philosophers, many legal persons do not. For example, comatose humans often do not have self-awareness (though they have the potential for it). Another example is corporations, or “legal personalities”, which do not themselves have a sense of identity over time, though they are made up of humans who do. Then there are certain humans who will never have these traits, such as the severely mentally disabled, but it would be
unacceptable in our culture to prevent them from the same consideration as normal adult humans. This view is exemplified by Carroll Campell, who says, “If being human is not enough to entitle one to human rights, then the very concept of human rights loses meaning” (2011, para. 10) This is a reflection of the fact that the question has long been, not “Who/what deserves personhood?” but “Who/what is it practical to call a person?” If something is not considered a legal person, then it has no standing in U.S. law; that is, it is not entitled to protection of any kind unless it is the property of a person (like a pet) or given special consideration by lawmakers (like national forests). Thus, there is a very clear line distinguishing those with rights and those without.

II. Why is Personhood Important?

In recent years, there has been a move to expand the circle of those considered worthy of rights, and therefore those considered persons, to all sentient beings. (Francione 2005) One of the criticisms of such a move is that personhood has long been considered distinct from sentience as something involving autonomy and other higher level cognitive faculties. To define the personhood in terms of sentience would make the concept so broad as to lose its usefulness. But, conversely, others have argued that personhood as it is currently defined is not useful. That is, that being in possession of higher cognitive faculties does not constitute a relevant moral distinction. (Francione 2013) For instance, we would not wish to remove rights from a human with a low IQ merely because there existed humans with
higher IQ's. From that point of view, delineating those who deserve rights along cognitive lines is just as haphazard as drawing them along an arbitrary IQ line.

It is an important question: what is the point of personhood? Answering this question will help us a great deal in deciding first, whether we even can use the category, second, what do members of the category get, and third, who/what belongs in it? In a nutshell, the purpose of personhood in U.S. law seems to be to delineate a group that has (read: should have) both rights and responsibilities. (French 1979) It is not really that simple, but the basic idea is sufficient for present purposes. Rights provide certain freedoms, and responsibilities restrict other freedoms. It does seem that there are certain things only sufficiently cognitively advanced beings should take part in. Voting is a good example of this. If a being does not have the mental capability of grasping what leadership is, never mind some of the intricacies of what that leadership entails, and so on, then that being should probably not have the right to vote. So the distinction of a certain class of beings does have its uses. I do not think that many people would question this. Rather, the question is whether or not we have taken this useful category and expanded its application far beyond what are practical and morally acceptable boundaries. In other words, do only persons matter?

III. Why Might Personhood Be Not Very Important?

For many philosophers, activists, etc., the morally relevant distinguishing factor is not advanced cognition, but rather the ability to suffer. Although some definitions of personhood include the ability to suffer (or more often, assume it),
suffering can be taken as sufficient in itself to grant a being legal rights. Now the
definition of suffering is not without its controversies, but there is no space here for
that discussion. (See Nay & Fetherstonhaugh 2012, for an example). Another issue is
that we don’t yet know whether some animals (or even plants) suffer at all. While it
is generally accepted that all mammals and birds have the neural hardware
necessary to feel pain\(^2\), and that insects and “lower” animals do not, there is an
active debate among philosophers, biologists, and others, regarding whether fish,
reptiles, amphibians, crustaceans, etc. can suffer.\(^3\) It is likely, though, that we will
discover that some animals do not suffer, at least in any way we can understand. If
that is the case, those animals will not be considered persons under even such an
expanded definition.

Another, broader way we might define personhood is in terms of having an
ability to flourish. Under this conception, any being that is capable of flourishing, or,
inversely, declining, should be given the chance to flourish. (Heeger & Brom 2001)
Flourishing is often viewed as an intuitive notion. We can all agree what it looks like
for a tree to flourish, and what it looks like for it to decline. On the other hand, a rock
does not seem like the type of thing that can flourish. However natural it is for us to
identify what it is to flourish does not in itself constitute a rigorous definition for use
in a legal context. Some, therefore, try to spell out exactly what it is to flourish, and
this is often done in terms of the notion of well-being. The most well-known of these
is Martha Nussbaum’s “capabilities approach.” Nussbaum and Amartya (1993)

\(^2\) Technically speaking, “pain” and “suffering” are not coextensive (Hall 1989), but the
distinction is not important for the present discussion.

\(^3\) For example, Victoria Braithwaite (2010) holds that fish do feel pain, and James Rose
(2012) does not.
identify what basic principles, and measures thereof, would give a human a life of dignity. For example, some of the things that would enhance human well-being would be being well-nourished, well-housed, and educated. (Sen 1992) Her view can easily be extended to include non-humans and so can made to accommodate a much larger group than persons. (Kleist, Global Ethics: Capabilities Approach).

IV. Chimpanzees

Even so, some are forging the way for non-humans to be included in this all-important legal category. Of non-humans, chimpanzees may represent the least controversial group with a claim to personhood. This is attributable to several factors. First, chimpanzees are our nearest relatives. Second, they look and act an awful lot like humans. Finally, they have some of the most advanced cognitive capacities in the animal kingdom. It may seem that these three reasons are similar, but they are, in fact, quite distinct. For example, the first is a scientific consideration, the second is a social one, and the third is comparative. That chimpanzees have advanced cognition relative to the animal world is undeniable. There is some debate however, over which specific abilities they possess, and to what degree they possess them.

Steven Wise and his group, the Non-human Right Project (NhRP) have filed a writ of habeas corpus on behalf of four NYC chimps (Tommy, Kiko, Hercules, and

4 Though, depending on what measure is used, bonobos may be said to be just as close. (De Waal? XX)
5 For example, one of the more controversial topics is whether chimps are capable of true deception. Wise believes they do, while others, like Call and Tomasello (2008) believe they do not.
Leo). Their mission statement asserts their commitment 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." (Nonhuman Rights Project 2014) Their case is based primarily on the cognitive capacities of these animals which comprises autonomy, the ability to be self-directed. The affidavit filed on behalf of Tommy claims that "chimpanzees possess such complex cognitive abilities as autonomy, self-determination, self-consciousness, awareness of the past, anticipation of the future and the ability to make choices; display complex emotions such as empathy; and construct diverse cultures." (Preliminary statement, section 1) There is not room here to evaluate the validity of each of these claims. For argument’s sake, let us grant that normal adult chimpanzees do possess these abilities. What follows? The affidavit goes on to say “The possession of these characteristics is sufficient to establish common law personhood and the consequential fundamental right to bodily liberty.” (Preliminary statement, section 1)

Thus Wise has a specific conception of personhood, which is largely consistent with Singer’s, which Wise believes entitles Tommy to basic rights. Importantly, Tommy and the other chimps are not entitled to so-called “human rights,” but to what he terms “chimpanzee rights.” They may not be getting the right to vote anytime soon, but the category of bodily liberty would include things such as the right not to be harmed, imprisoned, or killed without just cause. (Greenwood,
2013) As we learn more and the public comes to know exactly what chimpanzees are capable of, we may decide to grant more rights to these beings.

It bears noting that chimpanzees are often compared to four-year-old humans in terms of mental capabilities. Whether or not this comparison is justified is an issue of contention among animal cognitivists. (Pro: Tomasello, M., Savage-Rumbaugh, S., & Kruger, A. C. 1993; Con: Knapp 2009). But, whatever the right comparison is, if indeed there is any, chimps will likely be viewed as beings who deserve protection, but not necessarily as beings who can or should direct their own lives.

Another point worth noting is that part of the argument for personhood of young humans and fetuses is that they are *potentially* normal adult humans. (Stone 1987) Chimpanzees can never make good on such a claim. It may be more practical to compare chimpanzees to humans who are not “normal” such as the mentally disabled; however, there are many issues with that approach as well. (Groce & Marks 2000) Wise and others, although they occasionally use comparisons, do not rely on comparisons for the bulk of their arguments. Rather, they believe that each species should be decided on a case by case basis, according to the abilities of that animal. The important thing about chimps is not that they are *like us*, but that they are what *they* are. And their treatment should be based on their species typical capabilities, which in Wise’s eyes, includes many high-level cognitive functions.
V. A Missing Link

There are three categories acknowledged by today's legal system: persons, property, and that which is neither. Persons are the only beings with rights, and property is only protected because it belongs to persons or because persons care about it. This longstanding tradition draws a false dichotomy between beings that have the advanced cognition associated with personhood, and beings that do not. As we’ve seen, legal personhood in the United States includes controversial groups such as corporations. But regardless of what the correct conception of personhood is, personhood cannot be the only valid consideration when determining rights. The landscape of beings that exist on this planet is far too varied and their abilities far too nuanced to be subject to the cleaver of personhood. In fact, we may posit that one of the reasons that personhood is starting to be ascribed to natural things, such as the Whanganui river in New Zealand that was recently granted that distinction, is because we lack the correct legal framework for protecting non-persons. (Whanganui Iwi and the Crown, 2012) If a river is either a person or a thing with no rights, then better to call it a person in order to assure it some recourse under the law.

The crux of the problem seems to be that the concept of personhood appears to encompass several different, not fully overlapping moral categories. Most authors take it to mean something like “moral agent”, but others use it to refer to the presumably larger category of “moral patient”. Moral patients are beings which not regarded as having moral responsibility for their behavior because they are not able
to adhere to moral principles or rules. However, they still deserve moral consideration because they are capable of suffering. (Blackwell 2004)

This notion is not a new one in philosophy, but has not been incorporated into our legal system. Generally, small children, the mentally disabled, and other “fringe” groups are considered moral patients by philosophers, but are not distinguished from full-fledged persons in the law except by certain restrictions. Conversely, some animals are protected by law from cruelty (Animal Cruelty Act), or from being killed (Endangered Species Act), or even from unnecessary harm (Animal Welfare Act). But in each of these cases the animals themselves are not the holders of rights. What is lacking is a legal category that is akin to the philosophical moral category of “moral patient.”

Cognitively speaking, it is much easier to be a moral patient than a moral agent. Steven Wise bases his argument for chimpanzee personhood on their ability to be moral agents, while the New Zealand river seems to have been granted personhood because it is a moral patient. This issue is mirrored in the question, “Who deserved rights?” The reciprocity thesis argued that only those who are able to reciprocate can be part of a moral community, i.e. only those who can follow the laws and fulfill the legal responsibilities of a particular group, are deserving of rights within that group. At the same time, though, we clearly acknowledge those who are less capable as having rights in our communities, such as babies, because they matter morally, and not because of their cognitive abilities. Indeed, if we are to make sense of expanding legal personhood, it is the latter sort of consideration which will
allow us to do so consistently and effectively. That is, there may be creatures who
deserve to *receive* care who themselves are not capable of *giving* care.\(^6\)

In all of these acts of legislation, it is the government who is “wronged” when
there are violations, not the animal. For example, when it comes to the Endangered
Species Act, “The provisions... shall be enforced by the Secretary, the Secretary of
the Treasury, or the Secretary of the Department,” (section 11.e) and any fines
resulting from the violation of that act are also paid to the Federal government in
one form or another. \(^{Pender 2010}\) The animals themselves do not have rights in
any of these cases.

This seems to me to be the heart of the problem with our current legal
treatment of animals. We are missing a category between legal person and property
that would include moral patients, that would give us a legal commitment to
treating each level according to its morally relevant characteristics. I will not
address the question of whether any non-humans deserve to be full-fledged legal
persons. While some, like Wise, believe that apes, cetaceans, and elephants deserve
that designation, which species end up in which category is not the present concern.
What is undeniable is that there are non-humans which are both non-persons and
capable of experiencing suffering and pain.\(^7\) \(^{Our beloved cats and dogs may be good
examples of this. And while there are numerous laws in this country giving
protection to such animals, again, they are technically not the possessors of rights.\(^\)

\(^6\) At least not in the traditional sense. There may be a broad construal of “care” under which
an animal’s or species’ survival and flourishing are beneficial to us, and thus care for us. But
I will not explore the point further here.

\(^7\) Certainly mammals and birds can feel pain. Whether or not amphibians, fish, and reptiles
can is still up for debate. \(^{See for example Sneddon (2012); Elwood (2001); and Sømme
2005}\)
What is the difference between being protected and having rights? And what would such an intermediary category look like? To be protected against some form of action means that others are restricted in certain ways. For example, the illegality of selling a member of an endangered species imposes a restriction on the would-be purveyor, and if that person violates the law, he or she is held responsible. What that protection does not entail is the right of the animal not to be sold. A right is a just or legal claim on something or on some action. If the animal were to have a right, it would be the animal itself who would have been wronged (not the government), and the animal (presumably with the help of a human advocate) would be able to bring a claim to court.

One of the objections to giving animals rights is that they are not part of our reciprocal moral community. That is, we can agree not to harm a tiger, but the tiger cannot agree not to harm us. While many scholars agree that rights entail duties, the tiger example shows a misunderstanding of that connection. A right in one being entails a duty in another being, not in that same being. For example, my right not to be killed entails a duty for you not to kill me. (Fieser, 1992) It does not, by itself, entail that I have a duty not kill you. Small children are instances of this as well. A child has the right not to be harmed, but is not held responsible for the harm it may inflict on others, precisely because it is not yet part of the reciprocal moral community.

Today, when an animal is harmed in violation of the law, the only remedy is punishment for the human. Our legal system is based on an adversarial model which means that each party makes claims about its rights, and the ways in which the
other party violated them. In the case of non-person moral patients, there is no one to speak for the injured party, only against the injuring party on behalf of the state or federal government. The judge can decide what should be done with the injured party, but a judge is rarely qualified to make judgments regarding animal welfare. If the animal were to have an advocate, it would mean that the animal’s interest would be considered, not just from a species typical perspective, but from an individual perspective as well. The advocate may recommend any number of solutions, including being released into the wild, being sent to a sanctuary, being given another home, or receiving veterinary care. All this would take place at the expense of the violating party.

It is my opinion that all beings which can suffer or feel pain should have such rights. A full defense of such a stance cannot be presented here, but it seems to me sufficiently obvious. However, saying that all who can suffer deserve rights does not mean that their rights would trump human needs in every case, or even in most cases. For example, if lab rats were given the right not to experience unnecessary harm during experimentation, that would not preclude harming them under certain scenarios. But there would be measures in place, not only to prevent human from acting in certain ways, but acknowledging the rights of animals not to be subject to unnecessary suffering.

IV. Conclusion

The only beings with rights today are legal personalities. These include corporations and humans. Such beings are considered moral agents because they
are capable of making moral judgments and are able to be held responsible for those judgments. Even though the identification of persons is important, it is not sufficient. There are many beings who are capable of suffering who should receive legal protection, not just because they are useful or valued by legal persons, but because all beings who can suffer should have moral standing under the law. This would mean that they would be provided with legal advocates to seek punitive damages on their behalf. To what extent these beings would be protected, and how to resolve conflicting interests between moral agents and moral patients is another topic for another day. But I hope that it has become sufficiently clear that another category is needed in order to better accommodate the continuum of life forms that exist on this planet.
References


