

FROM AUTONOMY TO HABEAS CORPUS:  
Animal Rights Activists Take the Parameters of Legal Personhood to Court

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**Abstract:**

Activists advocating for a better treatment of animals have been using various platforms to promote the welfare or the rights of animals. In recent years, some have proposed to extend “legal personhood” to animals. This strategy would allow animals to get direct access to the special category of “persons” which legal systems associate with a plethora of the most robust kinds of protections and rights. By contrast, the sluggish incorporation of ethical concerns about animals within legal frameworks seems to have trouble moving past the recognition that animals are sentient beings that should not be treated cruelly and into a normatively more stringent set of entitlements that would grant proper consideration to animal needs. Legal personhood is, therefore, a much coveted golden ticket to our political community.

In this article, I examine the arguments deployed to obtain it through judicial channels by an American animal rights group (the Nonhuman Rights Project). I focus on a 2015 judicial decision rejecting their petition for a writ of *habeas corpus*, as this case is the most detailed and representative of their assimilationist stance. This kind of animal rights activism aims at showing that animals are “like us” and should therefore be treated “like us”.

I will explain the philosophical foundations implicit to the position defended by the animal rights group in order to test their internal coherence and reveal their inherent limitations. Most of my arguments will cast doubts on this assimilationist strategy. In doing so, I draw from the disciplines of law and moral philosophy in order to recognize both the importance of legal strategies for animal rights advocacy and the difficulties that arise from capitalizing on moral theories and values cherry-picked because of their rhetorical purchase within legal and political discourses.

**Key Words:**

Legal Activism, Animal Liberation, Animal Rights, Equality, Legal Personhood, Assimilation, Social Contract

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## 1. Introduction

“Running away won’t help,” Horse neighed (...) “We will always be hunted. They don’t see us as free living creatures, they see us as slaves and as food.” (...) “Justice!” exclaimed Ox. He shouted again and again, “Justice! Justice! We deserve justice!” And the beasts began to chant together. A slow rumble turned into a towering thunder of voices, “Justice! Justice! Justice!” Their hearts began to rise (...) hope began to ascend in their eyes, and they ventured off to the King’s Court together.”

*The Animals’ Lawsuit Against Humanity* (10th century Iraqi Fable)

An American civil rights organization has recently brought a proceeding for a writ of *habeas corpus* on behalf of two individuals held at a research institution. The courts have so far refused to grant the writ of *habeas corpus* to verify the lawfulness of their detention, on the grounds that the individuals are not... persons.

Up to the word “persons”, the description suggested a grave, unchecked, violation of human rights. The petitioner in this case, the Nonhuman Rights Project (NHRP) calls itself a “civil rights organization” rather than an “animal rights” group. However, “animal rights activists” they very much are. Their stated mission is to:

“change the legal status of appropriate 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” (NHRP website)

In order to improve the well-being of animals through litigation, the NHRP has adopted the bold, unprecedented, legal strategy of bringing a proceeding for a writ of *habeas corpus* on behalf of two chimpanzees held at Stony Brook University, on the basis of their legal personhood and corollary fundamental rights to bodily integrity and liberty. This group, its cases, and its preferred legal strategies are part of a broader movement aiming at “animal liberation”. The NHRP has endorsed novel ways of challenging the legal order that deserve a serious theoretical examination, not least because they raise questions that go to the heart of various normative concepts (equality, autonomy and personhood) that mainstream liberal thought seldom problematizes.

My critical analysis of their most recent, and qualifiedly “successful” 2015 case, *Matter of Nonhuman Rights Project, Inc. v. Stanley* [hereinafter *NHRP v. Stanley*] has three parts. The first part defines the sort of exclusion that their strategy is helpfully attacking head-on. The second part examines the limits of their position, which I understand to be mostly assimilationist. The third part examines the limits of the legal solution they propose: extending legal personhood to specific animals through a legal fiction.

The scope of this article extends beyond the frontiers of American law for two reasons. First, because legal personhood and animal rights may be negotiated in an assimilationist way in various legal systems. Although the NHRP is American, this case law has the potential to illuminate discussions on animal rights throughout the world, as most jurisdictions have only just begun to problematize the legal status of animals. Indeed, the NHRP announced its ambition of “branching out globally” in the pages of this Journal (Wise and Prosin, 2014, p.2). The second reason is that my comments deal with the philosophical merits of the NHRP’s position, while not losing sight that legal strategists must also have pragmatic considerations in mind. Moral analysis of legal arguments is particularly suitable in cases such as this one where petitioners have carried out “seven years of intense research, study, theorizing, and preparation” before launching their litigation campaign (Wise and Prosin, 2014, p.1). My analysis of this case points, more broadly and theoretically, to issues of conceptual coherency and accuracy that animal rights activists using legal channels are facing. It also pursues the practical goal of enabling such activists to confront the theoretical barriers they set up for themselves by choosing specific theoretical commitments and legal strategies, and weigh their options.

#### *The Golden Ticket of Legal Personhood*

The strategy of claiming legal personhood would allow animals to get direct access to the special category of “persons” which legal systems associate with a plethora of the most robust kinds of protections and rights. By contrast, the sluggish incorporation of ethical concerns about animals within legal frameworks seems to have trouble moving past the recognition that animals are sentient beings that should not be treated cruelly, and into a normatively more stringent set of entitlements that would grant proper consideration to animal needs. Legal personhood is, therefore, a much coveted golden ticket to our political community.

While the Project used an unprecedented strategy to get their hands on this “golden ticket”, their attempt at securing legal personhood for animals is not an isolated venture. It overlaps with the Great Ape Project’s ambition to vindicate legal personhood for great primates.<sup>2</sup> As far as I know, however, there is no case in the world of an animal being granted *legal personhood*. There was ample media coverage of such a precedent, from Argentina in 2014. The case<sup>3</sup> seemed similar to the NHRP’s case because the petitioners were said to have filed a *habeas corpus* petition to protect an Orangutan and, in appeal, succeeded to have the animal transferred to a sanctuary (Román, 2015; Regan, 2014). It is hard to imagine how the court of appeal may have granted a *habeas corpus* without implying that the Orangutan, Sandra, had legal personhood. However, global medias apparently reported the case

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<sup>2</sup> The Great Ape Project is an “international movement that aims to defend the rights of the non-human great primates - chimpanzees, gorillas, orang-utans and bonobos, our closest relatives in the animal kingdom” (Great Ape Project website). See also Paola Cavalieri and Peter Singer (1994).

<sup>3</sup> Case *Orangutana Sandra s/ Habeas corpus* (2014).

in a misleading way. Steven Wise, from the NHRP indicates that “Sandra has not been granted personhood, the right to *habeas corpus*, nor any other legal right, and [the processes that followed were only] a regular animal welfare investigation” (Wise, March 2015). To be fair to the medias that reported the news, the Court did note the following: “...through a dynamic rather than static legal interpretation, we must recognize that animals have the status of a subject of rights”<sup>4</sup>. Wise notes a few issues that make this statement irrelevant, notably that the Court lacked jurisdiction and that the aforementioned claim would be an ineffective *obiter dictum* unfounded on laws or case law. There seems to be an additional problem with the Court’s statement. The literature to which the Court refers to justify its “dynamic” interpretation of the law seems to associate animal rights with the “rights of nature”, which suggests a very different approach from NHRP’S.<sup>5</sup>

Granting legal personhood is fundamentally different from granting “weak” legal rights, protections or entitlements, insofar as legislators can posit various rules protecting any object without endorsing the idea that these object are “persons” or matter for their own sake. Countless laws regulate the treatment of animals, but one can hardly find a germ of personhood in laws regulating the *use* of animals (e.g., the import/export of animals or the proper treatment of food). Many more recent laws have been enacted to more explicitly protect the welfare of animals.<sup>6</sup> In Switzerland, the constitution itself was amended in 1992 to recognize the importance of protecting the welfare of animals.<sup>7</sup> In 2015, the Canadian province of Quebec’s National Assembly passed Bill 54, “An Act to improve the legal situation of animals”, which had the effect of amending the *Civil Code of Quebec* to explicitly provide that animals were sentient beings that have biological needs rather than “things”.<sup>8</sup> However, this change does not amount to granting legal personhood to animals.<sup>9</sup> Arguments for extending legal personhood to non-human entities have also been made by environmentalists proposing to grant it to natural objects such as trees and rivers (Stone, 2010). For instance, the New Zealand Crown and the Whanganui Iwi people have signed an agreement in 2012 according to which the Whanganui river was a “living being” with “physical and metaphysical

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<sup>4</sup> The original text was: “...a partir de una interpretación jurídica dinámica y no estática, menester es reconocerle el carácter de sujeto de derechos...”: Case *Orangutana Sandra s/ Habeas corpus* (2014)

<sup>5</sup> The Argentinean Court only refers to Zaffaroni (2011), who grounds his “constitutional ecology” in the rights of “Earth-mother” (*Pachamama*), themselves rooted by the interdependence of all the parts of an ecosystem. This outlook is reminiscent of Aldo Leopold’s environmental ethics (Leopold, 1949), that inspired, and was formalized in, the work of, J. Baird Callicott. I am not suggesting that we cannot ground legal standing on such theoretical foundations: consider J. Baird Callicott & William Grove-Fanning (2009), but I note that it is not clear whether it allows us to capture what is distinctive about animals. To extend legal standing as it currently exists to everything in nature would cause strange results: how would plants exercise their right to vote, adopt a child, or freedom of expression? These questions reveal potential terminological confusions. Things do not become easier if we posit “legal personhood” as the right to make claims yet to be defined according to one’s particular “form of life”. To give such a generic status to the whole of nature would only delay hard questions of morality and justice without telling us how to answer them.

<sup>6</sup> For instance, here is a list of recently enacted or updated provincial laws in Canada: Animals for Research Act (1990), Animal Protection Act (2000), Animal Care Act (1996), Society for the Prevention of Cruelty to Animals Act (1973), Animal Protection Act (2008), Animal Health and Protection Act (1988).

<sup>7</sup> Federal Constitution of the Swiss Confederation of 18 April 1999, art.80.

<sup>8</sup> Bill 54: An Act to improve the legal situation of animals (2015). The new Civil Code of Quebec (art. 898.1) stipulates: “Animals are not things. They are sentient beings and have biological needs.”

<sup>9</sup> Its most important normative effect is to be found in the Quebec *Animal Welfare and Safety Act* (2016) enacted under Bill 54: this Act provides obligations of care that respond to this conception of animals as sentient beings with biological needs.

elements” that would be statutorily recognized as “a legal entity with standing in its own right” (Agreement Between the Whanganui Iwi and the Crown, 2012, § § 1.2, 1.13 and 2.1.2).

In spite of the evolving legal landscape, the “distinct” legal status that many jurisdictions have granted to animals falls short of legal personhood and still allow “humane” harmful use of animals. To be conceptualized as a rare or beautiful thing worth preserving in the name of natural diversity or cultural heritage<sup>10</sup>, and even more to be recognized as “sentient being”<sup>11</sup>, seems like a step up from being conceptualized as a tool or food, but the legal implications are less impressive than one may think. The “right” to be preserved does not denote that “right”-holders matters for their own sake. Food, for instance, also needs to be rationed. Something that is protected because it is beautiful and rare might have intrinsic value, unlike food. But does the moral status of “nature” or “cultural heritage” fit animals? For one thing, protecting a “species” may ignore the distinctiveness of each of its individual members and preclude thinking in terms of individual rights. Personhood, on the other hand, has traditionally been the golden standard of moral status: the one endowing its owner with the greatest amounts of moral rights. Legal personhood, its legal cousin (overlapping to different extents with moral personhood, depending on one’s theoretical allegiances) similarly implies the strongest, most protective, sort of standing that one can have in the legal order.

### *Terminology*

The notions of “moral status” and “person” are ineliminably controversial: they are “essentially contested concepts” (Gallie, 1956). For the sake of this argument, I will assume that *legal status* and *moral status* refer to the status that a being has in the eyes of the law and of moral agents, respectively. They are normative concepts because they give reasons to treat a being in this or that way. I will also assume that conceptions of legal and moral *personhood* are kinds of legal and moral *statuses*. They are, as I explained, the “golden ticket” of statuses. In fact, it is often assumed that moral status, legal status, moral personhood and legal personhood are necessarily possessed simultaneously. The intellectual tradition stemming from the Enlightenment holds that a moral person is also a moral agent, a moral patient, a subject of justice and a legal subject/person. Moreover, this tradition also holds that beings have either a “full” moral status or nothing.

Some worry that non-scalar conceptions of moral and legal statuses, however traditional and successful they have been in social struggles for equality, are not making our moral discussions richer.<sup>12</sup> No matter how politically

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<sup>10</sup> E.g. *Federal Constitution of the Swiss Confederation*, art.78-79.

<sup>11</sup> E.g. *New Zealand’s Animal Welfare Amendment Act* (No 2) 2015.

<sup>12</sup> This all-or-nothing view of moral status has come under intense scrutiny in recent years. Consider Warren (1997) and McMahan (2002).

powerful the concept of “person” is, we can only expand it so far. The NHRP is certainly avoiding many pitfalls by relying on it instead of other theoretical grounds. Yet, if animals matter, it is possible that we need more conceptually nuanced theories of moral and legal statuses to recognize it, rather than venerable, gilt-edge concepts like “persons”.

There is ample controversy regarding which conceptions of moral/legal status/person are the best ones and on what properties they should supervene. Fortunately we can bracket these questions, because when the NHRP discusses legal personhood, they either assume that it should supervene on autonomy (roughly speaking), or that it should be posited. When discussing the former case, I will use “moral status/person” and “legal status/person” interchangeably. When discussing the latter case, I will refer only to legal personhood. I think this corresponds to NHRP’s own position.<sup>13</sup>

## 2. The Nonhuman Rights Project’s Case for Hercules and Leo

NHRP is the only organization in the United States that works “to achieve actual legal rights for members of species other than our own” (NHRP Website). Since 2013, the Nonhuman Right Projects (NHRP) has filed various petitions for a writ of *habeas corpus* in different jurisdictions in the United States. They asked courts to recognize the legal personhood of four chimpanzees, Tommy, Kiko, Hercules and Leo. They are now considering filing a similar petition with regard to elephants.<sup>14</sup> The Hercules and Leo case, *NHRP v. Stanley*, is the most significant one for the purposes of a legal and philosophical analysis, because it showcases empirical and normative arguments, legal strategies, and judicial responses to them. Judge Barbara Jaffe, sitting on the New York County Supreme Court, delivered her judgement on it in July of 2015.

NHRP petitioned for a *habeas corpus* on behalf of Hercules and Leo, two chimpanzees “in the custody of” Stony Brook University. I put “custody” between quotes. I will not put many expressions used in the case between quotes, but I do not aim at taking a side by not doing so. The use of quotes suggests a metaphorical, idiosyncratic or otherwise questionable use of a term. It begs the question. Not putting quotes, however, equally begs the question. Whether “habeas corpus” or other legal terms generally reserved for humans can also be used for animals is precisely what lies at the heart of this case. And the acceptance, by Jaffe J., to use this legal language to describe the claims and discuss the matters is already a pregnant choice.

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<sup>13</sup> Because its argument based on chimpanzees’ capacities could also ground moral rights, whereas its second argument (according to which legal personhood could also be posited as a legal fiction) is strictly legal. This is not to say that moral status or moral rights could not be “posited”, only that I do not think this is what NHRP has in mind. In any case, I will also discuss how moral agents can posit a robust moral status even though it does not supervene on personal properties, because it sheds light on the potential weaknesses of both posited moral and legal statuses.

<sup>14</sup> See the NHRP website for a description of the court cases, State by State.

This is why the NHRP has interpreted the decision as a success. They commented that the case was “one small step for a judge, [but] one giant leap for the Nonhuman Rights Project”. This may sound surprising since Judge Jaffe ultimately held that she was bound by a previous case that decided that chimpanzees did not qualify for receiving the status of legal personhood and denied the petition for a writ of habeas corpus and dismissed the proceeding.<sup>15</sup>

The NHRP considered that this case was successful in three regards. First, the judge signed the petitioner’s “order to show cause”. An order to show cause is issued after a *habeas corpus* proceeding is brought to court. The writ of *habeas corpus* is a legal recourse sought by individuals who seek to be freed from unlawful detention. Courts issue this order to a detained individual’s custodian, so that the detained individual be brought before the court to determine the legality of her or his detention. This legal action is protected in both the United States and the New York Constitutions, and its proceeding is regulated by the *New York Civil Practice Law and Rules* (§ 7003), which stipulates that:

“The court to whom the petition is made shall issue the writ without delay (...) or, where the petitioner does not demand production of the person detained (...), order the respondent to show cause why the person detained should not be released.”

Once an “order to show cause” had been issued, therefore, Stony Brook University had to show that the person was not illegally detained. Justice Baffe’s willingness to sign the petitioner’s order to show cause, unlike the judges sitting in NHRP’s previous lawsuits, was a meaningful step forward in the following sense. It implied that animals could *potentially* acquire legal personhood. While legal personhood was not granted in this case, this possibility was considered by the court as one that “may [some day] succeed” (*NHRP v. Stanley*, p.32). A small step indeed, if we contrast it with progressive theoretical views on the moral status of animals. An even smaller one, if we consider that the direction taken by NHRP by seeking a “legal fiction” may have inherent limitations (I will discuss this issue below). Be that as it may, it is worlds apart from not even accepting to examine the merits of the NHRP’s unprecedented position, as previous justices did by declining to sign the petitioner’s order to show cause “on the ground that a chimpanzee is not a person for whom a writ of habeas corpus may be sought” (*NHRP v. Stanley*, p.6). Using this justification begged the question since what was at stake was precisely whether animals could have legal rights.

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<sup>15</sup> This was so because of the legal doctrine of *stare decisis* or precedents, according to which courts are bound by past decisions delivered by other judicial instances from a same or higher level.

In the rest of this section, I discuss the issue of procedural exclusion and connect it to notions in role theory and critical theory, in order to give the reader a sense of how radical the *exclusion* of animals from our legal order is. This serves to suggest that an equally radical reconceptualization of animal status is needed to change the *status quo*.

It may be helpful to distinguish two types, or levels, of exclusion from the legal order to make sense of the problem: substantive and procedural. Once people, like you and me, experience discrimination on the basis of our gender or age, for instance, we can seek protection or compensation under anti-discrimination legislation. Courts may then assess if our exclusion from a workplace or an organization is justified or if it is the product of arbitrary prejudices.

Legal personhood does not confer absolute rights. Even if our rights to equality or non-discrimination have been violated, courts may decide that this violation is justified under a legislative scheme that allows balancing individual and collective interests, such as a charter of rights or a human rights convention. For instance, courts may find that a statutory requirement of mandatory retirement is justified considering the physical and dangerous nature of one's work, or that gender discrimination is acceptable when a man is refused access to a shelter for women escaping domestic violence. Nevertheless, you and I will have benefitted from a fair hearing. Our legal status at least entitles us to stand in a court and claim equal protection under the law. Let us call this exclusion from certain benefits, protected groups or privileges "substantive" to distinguish it from "procedural" exclusion.

By this latter term, I wish to draw attention to situations where individuals are prevented from participating as actors within legal procedures. For instance, a person with cognitive disabilities may be prevented from acting as a witness if she is found to have insufficient mental capacities to fulfill the truth-finding function of a trial. Procedural exclusion affects people's capacity to act in various legal capacities. Such an exclusion can sometimes itself be the product of socially entrenched prejudices and become the object of an appeal in *substantive* law.<sup>16</sup> Procedural exclusion, in its most historically harmful and insidious form, can affect not only someone's legal capacities, privileges or rights, but also their very capacity to act as, or to be, a legal subject. This could be called "radical" procedural exclusion. (For instance, telling a slave that she cannot *argue* for her liberation, at least, not in front of courts.)

Let me borrow the concept of a "master status", from role theory in the field of sociology, to shed conceptual clarification on the distinction I am making. Role theory examines the normative boundaries, expectations and privileges associated with various roles, and describes the conditions of access to, and retention or abandon of,

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<sup>16</sup> For instance, this has been the case with regard to witnesses with cognitive disabilities in the Canadian case *R. v. D.A.I.* (2012).

these roles.<sup>17</sup> A “master status” is a role that will influence all the roles within an individual’s life. Such master roles include, for instance, gender and disability. Assuming that we can illuminatingly apply role theory to animals, species membership would clearly constitute such a role, since it affects all other “roles” that animals currently occupy (e.g. as pets, cattle, wildlife, medical instruments, etc.) or may come to occupy (e.g. as members of a shared *polis*, as fellow living beings sharing a same ecosystem, or fate, etc.). With regard to the legal order, specifically, it affects one’s status as a legal subject. Being deprived from the status of legal subject is the most extreme form of procedural exclusion. Unlike other status-based procedural exclusions, it may be used to bar access to courts. As I mentioned, the procedural/substantive dichotomy that I presented frequently collapses: procedural exclusion on the basis, e.g., of family status, can be the object of an appeal examining whether this exclusion is justified. By contrast, decreeing that certain category of people or beings are not legal subjects has often, historically, been a fiat evading legal scrutiny. When this happens, there is no room, from within the legal order, to argue that this exclusion is unfair.

When faced with this kind of radical status-based exclusion, marginalized parties can only emphasize the arbitrariness of refusing to examine the justifiability of such an exclusion. A concern on the part of courts refusing to examine these cases on the merits may be that the mere act of *hearing* the party as though it could, potentially, have a legitimate claim to make, already grants legal personhood to this party and therefore prejudges the issue at stake. This position, however, is not congruent with the common practice of appealing a decision made on one’s legal standing. To dismiss the possibility of such an appeal out of hand should also raise suspicions considering how large-scale, systemic discrimination has often expressed itself through exclusivist legal concepts and by barring specific groups from accessing justice. NHRP was careful to argue that “the court need not make an initial judicial determination that Hercules and Leo are persons in order to issue the writ and show cause order” (*NHRP v. Stanley*, p.1). Justice Jaffe accepted this argument.<sup>18</sup>

Animals, like women, foreigners, people with disabilities, and various other groups nowadays (and even more flagrantly in the past) are expelled at the periphery of a legal order, that has difficulty, in its current form, to claim authority over them. Requests to adapt the legal order for these outsiders threaten its structural integrity and represent a threat to current relations of domination. Scholars from various critical schools therefore postulate that “abnormal” potential subjects are either assimilated, subjugated or marginalized in order to avoid the cost of modifying the *status quo* (Oliver, 1990; Pateman, 1988; Mills, 1997). I am flagging this criticism, well-rehearsed by Foucauldian, marxist, feminist, and critical legal scholars, to set the background for my argument below. One

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<sup>17</sup> For an introduction to the theory, see, e.g., Fellows, S. and Kahn, W.A. (2013).

<sup>18</sup> It seems odd that the petitioners suggest that Justice Jaffe may issue the writ of habeas corpus on another basis than legal personhood, but offer no other argument for granting it.

of the two main aspects of the NHRP case that I wish to problematize is connected to the multifaceted issue of assimilation. As Roberto M. Unger (1996, p.50), one of the founder of the critical legal theory movement, has suggested, a mainstream mode of legal argumentation takes the form of “retrospective rationalization” that aims at polishing exceptions or abnormalities away, thus retroactively making law an “intelligible scheme of policy and principle”. My concern is that well-meaning endeavours to integrate animals within the legal order through assimilationist arguments may fail to deploy the kind of legal imagination that Unger and other radical thinkers hope social reformists may achieve. The reliance of NHRP on the powerful civil rights discourse is a double-edged sword. It may still be that one edge of the sword is sharp enough to make it worthwhile for the NHRP to use, but I wish to at least present the theoretical and practical costs and conceptual limitations of their strategy.

### 3. What’s Wrong with Assimilation?

“Assimilation” has a pejorative ring to it, which makes this sound like a rhetorical question. However, capitalizing on sameness is a strategy that has been used by most liberationist / civil rights movements. The integrationist syllogism is simple and compelling:

- (1) A (whites / males / humans) deserves respect, concern or rights.
- (2) B (nonwhites / women / animals) is like A “in relevant ways”.
- (3) B deserves respect, concern or rights.

This compelling (in part because of its simplicity) argument is not premised on the importance of increasing opportunities for outliers to participate in socially valued roles, but rather on the importance of treating like cases alike, which is the hallmark of impartiality. Impartiality matters “because because of the prior idea that, morally speaking, albeit at an abstract level, everyone counts equally”.<sup>19</sup> The ideal of grounding entitlements (e.g. rights) impartially is congruent with moral theories that associate morality with impartiality, though this idea has also been criticized for granting insufficient weight to special duties and relations within moral deliberations.<sup>20</sup> While a properly moral point of view ought to be an impartial one is open to debate, the powerful idea that public institutions should treat its subject impartially is well entrenched in contemporary politics.

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<sup>19</sup> Brian Feltham, “Introduction: Partiality and Impartiality in Ethics” in Brian Feltham and John Cottingham, eds, *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford: OUP, 2011) at 16.

<sup>20</sup> For introductions to this topic, see Albert W. Musschenga, *The Debate on Impartiality: An Introduction*, and Jollimore, Troy, “Impartiality”, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2014/entries/impartiality/>.

The syllogism also draws its appeal from the cultural importance that the ideal of equality has come to acquire in the Western world. NHRP's focus on the values of equality and liberty cannot be fully understood in abstraction from the fact that NHRP is an activist organization seeking to free animals from imprisonment and medical experimentation by securing their legal rights to bodily integrity and liberty. The writ of *habeas corpus* is premised on the value of liberty, whereas the syllogism above is premised on the value of equality. Capitalizing on the fact that equality and liberty are democratic values are at the heart of American identity or "way of life" is a *prima facie* promising liberationist strategy. As the NHRP writes, commenting on the case:

"We have no doubt that our substantive arguments, based as they are on the overarching, ancient, and cherished principles and values of liberty and equality, will prevail, as state high courts are continually confronted by rational and well-supported claims." (Wise, August 2014)

Calling upon these values is a political strategy likely to rally segments of the population committed to social struggles for equality and liberty. However, the intellectual and emotional sympathies aroused may be short-lived if the NHRP fails to show why, in the case at hand, the values of equality and liberty require courts to grant legal rights to chimpanzees. No one is disputing the value of liberty and equality. The disagreement is about whether these values are best served by integrating animals in our community, granting them legal personhood, giving them access to legal recourses such as the writ of *habeas corpus*, and so on. The success of the petitioner's claim hinges on the success of the syllogism outlined above.

This political platform (the syllogistic assimilationist argument) produces its most beneficial results when A (the outliers) were excluded from the moral and political community because of an empirical failure to properly measure the capacities they actually had. Nonwhite people and women, it can be empirically shown, can govern themselves just as well as white males, and should consequently have just as much of a right to vote (insofar as this right is predicated on self-governing capacities). Assimilating has helped large marginalized groups of less-than-full persons and second-rate citizens to gain full moral status and legal recognition as a person.

Let us look at how this syllogism is used in the NHRP case. Justice Jaffe interprets the argument advanced by NHRP thus:

"Chimpanzees should be accorded rights consonant with their abilities, and that their autonomy and self-determination merit the right to be free from illegal detention, and to that extent, the status of legal personhood." (*NHRP v. Stanley*, p.26)

The petitioner relies on scientific research to support this assimilationist claim and emphasize the similarity between chimpanzees and humans with regard to the following traits (*NHRP v. Stanley*, p.5):

- genetic material (both species share 99% of DNA);
- brain structure and cognitive development (e.g. communication skills including sign language, imagination)
- self-awareness (e.g. capacity to recognize oneself in mirrors and images)
- capacity for empathy (e.g. attuned to external emotions; imitate and emulate others)
- capacity for moral inclinations (e.g. compassion, mourning, cooperative social life)
- capacity to engage in play and humour.

Emphasizing *sameness* occupies two functions within the NHRP's argument.

First, fostering the idea that some animals are relevantly identical to us triggers the sort of empathy or solidarity that may prompt us to grant them more serious consideration. This may, in turn, motivate us to grant them certain legal rights. As justice Jaffe puts it:

“The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.” (*NHRP v. Stanley*, p.32).

The strategy of provoking empathy by relying on sameness need not be a facile psychological “trick” played on people. Feelings and empathy have a function to play in morality, though the scope of this function is controversial. However, it is not clear how philosophical positions that underlie the use of empathy or solidarity in animal ethics could be reconciled with the petitioner's approach, which seems to be mostly autonomy-based, as I am about to explain. Furthermore, feelings may render the granting of legal personhood to animals “understandable”, as the judge writes, but does it make it a moral and legal *requirement*? It is probable that the NHRP (as well as activists and theorists taking a similar path) are only hoping that the affective and conative dimensions of dispositions such as empathy, solidarity or concern for animals may affect the individual preferences of legal and political actors. This seems a fickle basis for moral status, as I will claim in the next section, though we must remain open to the possibility that it would be a sufficient basis for the specific legal rights the petitioners are seeking.

Emphasizing that Hercules and Leo are similar to humans also pursues the goal of securing their rights to bodily integrity and bodily liberty and, therefore, their standing to exercise them through the writ of *habeas corpus*. However, the previous list of similarities does not in and of themselves justify the existence of rights. Having

capacities and needs does not necessarily confer negative or positive *rights* to exercise these capacities or have these needs fulfilled. A normative explanation must bridge the “capacity to enjoy X” to the “right to enjoy X”. Let us examine the explanations offered by the petitioner. NHRP (*NHRP v. Stanley*) argued that:

(1) Human beings possess the fundamental rights to liberty and equality. (p.22)

(1’) Human beings possess the right to access the legal recourse of *habeas corpus*. (p.8-9)

(1’’) Human beings generally (but not necessarily) possess the attributes grounding legal personhood. (p.21)

(2) Hercules and Leo are like human beings in the following relevant ways: they are autonomous, self-aware, and self-determining. (p.22)

Therefore:

(3) Hercules and Leo ought to be granted the rights to liberty and equality.

(3’) Hercules and Leo should be granted the writ of *habeas corpus*.

(3’’) “Hercules and Leo possess attributes sufficient to establish legal personhood”, translating in rights to bodily liberty and bodily integrity. (p.2 and 8)

The crucial step of their argument is the second one. It establishes that chimpanzees are autonomous and self-determining, which are two mainstream requirements to justify granting moral personhood, and legal subjecthood, in both philosophical and legal literature.

This argument is congruent with NHRP’s goal of securing rights to equality and liberty for chimpanzees. *Autonomy* is closely connected to the ideal of *liberty*, mentioned above. As for *equality*, it is not jettisoned: animals are said to be *equally* entitled to autonomy-based rights, on the grounds of their equal (or sufficiently similar) capacities. The three versions of the first step of the argument are also coherently related: steps (1’) and (3’), concerning *habeas corpus*, can themselves be grounded on steps (1) and (3), concerning liberty.

Both ideas are also connected to legal personhood, which the NHRP interprets narrowly as encompassing only the rights to bodily liberty and bodily integrity. Moral personhood and legal personhood could have grounded many more rights and have had a myriad of normative consequences. However, the petitioner denies that it seeks any other procedural or fundamental rights (such as human rights). Its claim is therefore paradoxically bold and circumscribed: the NHRP “contends that the law can should employ the legal fiction that chimpanzees are legal persons solely for the purpose of endowing them with the right of *habeas corpus*”. (*NHRP v. Stanley*, p.21).

Maybe the strategy of asking courts to recognize a legal fiction that would be a narrow version of legal personhood writ large is based on pragmatic considerations. First, such a modest (but still revolutionary) incremental change, if granted, could be used as a lever for future broader claims. One can certainly be skeptical that courts or legislators would concede to grant an exhaustive list of human-rights-like entitlements to animals. A narrower claim corresponding to a delineated public controversy (the use of animals in research) is far more likely to be successful, while still appearing improbable. Second, the petitioner is hoping to draw an analogy with other circumscribed situations where animals were given person-like entitlements, such as the case of pets that can legally named as testamentary beneficiaries (*NHRP v. Stanley*, p.22). Such expected benefits may, on the whole, make it worthwhile to pursue the argumentative strategy developed by the NHRP. Nonetheless, I am raising two kinds of concerns in the remainder of this essay. In the next section, I will deal with the criticism that positing personhood as a legal fiction may not be a pragmatically sturdy enough - or theoretically accurate - way to meet our ethical obligations toward animals. In the remaining part of the current section, I want to emphasize that assimilationist strategies have a dark side. Their defenders will call them “egalitarian” instead of “assimilationist”. My point here is not to challenge the moral appeal of impartiality and equal treatment, but rather to show that one is not treating “like cases alike” if the “cases” are actually *not* alike but one pretends they are. I do not conclude that the assimilationist syllogism should be abandoned, but only that NHRP should be aware of its limitations. Even if my criticism carries some weight, animal rights activists may chose to keep using assimilation for politico-legal strategic reasons.

*Is Autonomy Too Anthropocentric a Starting Point to Justify a Robust Status for Animals?*

We have seen how the NHRP relies on two values that are, as Alexis de Tocqueville noted in 1835, central to the American democratic culture: equality and liberty. Equality is presupposed by the integrationist syllogism, and liberty is the value for which equal protection is sought. The importance of liberty is related to the importance of the notions of autonomy and self-determination. Liberty is generally taken to protect an individual from external interferences, whereas autonomy qualifies an individual capacity to choose her direction in life, to select, among her preferences, those that are most important to her, to set goals for herself, and to be held accountable for failures and successes that are the outcome of her autonomy rather than of fortune. In other words, a slave can lack liberty but still have autonomy, while a submissive man fearing the disapproval of his parents may be free from interference but lack autonomy.

At the collective level, some political theories have used autonomy as a personal feature allowing people to collaborate in spite of their disagreements about conceptions of the good life. Acknowledging both our ineliminably diverging preferences and values, and our capacity to be autonomous, prompt us to imagine political

stable arrangements of peaceful and mutually beneficial co-existence. Constructivist theories of the State, from the 17th century English philosopher Thomas Hobbes, at the dawn of liberalism, of which he was a precursor, to contemporary ones, such as John Rawls's, hold that we can organize society around rules that are the product of a reasonable procedure to which only autonomous beings are able to take part. The most defining characteristic of mankind in modernity is probably the capacity that individuals have to create their own life, as well as the political world they inhabit. Autonomy has become the invisible background of moral discussion taking place in the Western world. It informs our existential and political benchmarks, and may limit the horizon of what many of us can imagine for ourselves and our community.

A criticism of autonomy would be no small agenda, given its cultural centrality. What could be more readily criticized are the less defensible ideologies and myths that have developed *alongside* the value of autonomy, such as the myths of independency, self-sufficiency, and the corollary dismissal of central aspects of our phenomenal lives, including vulnerability and caring for the weak and the dependent. A rapidly expanding literature (including feminist, communitarian, relational and disability-informed approaches) has criticized the notion of autonomy and either tried to detach it from harmful ideologies, broaden it, or decentralize it. All these scholars share the common goal of debunking mainstream understandings of autonomy when these have come to contribute to the marginalization or oppression of some groups or individuals. Much of their work consists in attending the fine grain of human relations that have been neglected from mainstream liberalism and to reveal how relations of domination and oppression can find their way through simplistic understandings of autonomy (e.g., Christman and Anderson, 2005; Mackenzie, 2014; Nedelsky, 2012, chap.3; Veltman and Piper, 2014).

Let me state my criticism of assimilation metaphorically. When the "Other", understood as radically different from, if not the opposite of, the idealized legal subject, knocks at the door of our ideologically sustained house, and its very presence (and our current incapacity to accommodate her) sheds light on how crooked and fragile our contingent political and legal architecture is, we have three options. First, we can repress, kill, or exclude this outsider, or otherwise humanely marginalize it, metaphorically speaking, by building a shed in the backyard. Social resources rarely make their way to the "shed": we primarily built it to maintain our *status quo*, not to improve the welfare of outliers. Second, we can take this moment of lucid self-awareness as an opportunity to challenge and reconstruct our political arrangements. This ideal solution is often expressed in critical literature along with a spectrum of hope/cynicism concerning its feasibility but unfortunately seldom accompanied by concrete steps. The "hammer" of critical thinkers (from Nietzsche and Foucault to various contemporary critical legal theorists) is sometimes criticized for leaving ruins behind. The third solution is to squeeze the newcomer in as well as one can.

Civil rights activists may, and perhaps should, for the sake of efficiency, endorse both the second and third responses simultaneously. The *advantage* of assimilating animals to the normatively fecund figure of the “autonomous subject” is to capitalize on the currently prevailing liberal ideology. The *risk* associated with this third strategy, however, is that it sustains rather than challenges the rationales underlying mainstream exclusivist structures. In other words, the third strategy may hinder the second one. This only becomes a problem if the second one is ultimately the most promising. I suggest that it may be.

I make this suggestion on the historical and conceptual bases that some outliers defy assimilation, or that assimilating the portion of their identity that *can* be assimilated would not result in a satisfying integration or would not sufficiently protect their welfare. I mentioned that the “integrationist syllogism” has long been a powerful instrument for civil rights movements. However, assimilationist strategies may not be as fruitful for individuals whose agency, capacities, needs and form of life are significantly different from those of the “normal” group, the “inliers”. The assimilationist agenda incorporates or excludes outliers based on a benchmark that it does not modify. The result is a failure to show proper concern for beings who do not quite fit the normal mould, by failing to recognize their morally salient characteristics. For instance, it would not be properly respectful to only attend to the needs of women that can be assimilated to the benchmark of the group of men. Other “feminine” virtues, capacities, values and ways of valuing have long been disparaged. Especially since the seventies, feminist thinkers have vindicated their moral and political significance (Gilligan, 1982). Similarly, the rights granted to Indigenous peoples in various countries have historically been framed within integrationist agendas (Anaya, 2004). The integration provided by constitutional rights and international law is already an improvement over social exclusion and exploitation, but it falls short of recognizing indigenous peoples’ particular customs and institutions. Disabled people can also be conceptualized as capable participants of society’s joint venture, in spite of David Gauthier’s and John Rawls’s opinions to the contrary. However, this may be an optimistic stretch for some severely disabled individual (Nussbaum, 2006; Kittay, 1999). Moreover, even when severely mentally disabled people *can* be made to look enough like the traditional liberal subject of justice, one can ask, like Eva Kittay, whether they should not be integrated on other grounds that more accurately reflect the nature of the moral duties that society owes them. While marginalized groups may opportunistically adopt the available language of moral and political entitlements, they will still suffer from other forms of exclusion and exploitation<sup>21</sup>, because the only portion of their selves, worth, values and needs that will be recognized is the one that can be assimilated.

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<sup>21</sup> For instance, women’s caring work will be underpaid and indigenous people’s territorial entitlements will not be translated into enforceable property rights. It can be said that problems like these can be, and have been, addressed incrementally, but such piecemeal changes will implicitly challenge the benchmark requirements for being owed moral considerations and legal rights.

It is therefore at first sight surprising that animal rights activists would endorse an assimilationist strategy considering its inherent limits. The more different the outliers are from the traditional “autonomous liberal subject”, the less suited assimilation is to effectively extend moral and legal statuses and corollary right to these outliers. If assimilation can do a disservice to women and disabled people by failing to attend to their particular values, and embodied and social experiences, it would seem that it risks failing much more greatly beings whose embodiments and forms of life are even more different from able-bodied white males. Assimilationist strategies, by definition, have no recourse to articulate the moral response we should have toward alterity, that is, towards a being who can, precisely *not* be reduced to ourselves.

Charles Taylor, to illustrate one of many alternatives, would not attempt to include animals within the category of “person”. According to him, a person is an agent for which things matter in an original way (Taylor calls this a “respondent”). Things matter to agents in an “original” way because “we can attribute purposes, desires, aversions to them in a strong, original sense”, by opposition to an object or a machine which may have a “user-relative” or “derivative” purpose, but not an “original” one. Both persons and animals are “respondents”: both “can be addressed and [they] can reply, i.e. they are conceived as the “point of origin” of their life plan, choices and sense of self”. Both are agents for which things matter in an original way. What differentiates a person from an animal is the sort of things that matter specifically to humans. As Taylor puts it, all agents are “subjects of significance”, but there are certain distinctively human “matters of significance”, unshared with animals. What sort of things matter specifically to humans? Taylor answers that “matters of pride, shame, moral goodness, evil, dignity, the sense of worth, the various human forms of love, and so on” are distinctively human concerns (Taylor, 1985). It could be said that animals too have “matters of significance” even though these may need to be conceptualized differently than for persons, both in terms of content, and in terms of how they affect “animal agency”. Should we not reflect on these, instead of how similar to *us* animals may be?

While some philosophers would take Taylor’s (and similarly richly textured) understanding of personhood as implying that animals do not matter, it need not be the case. On the contrary, it may encourage us to pay attention to the peculiar features of animal lives and to endeavour to understand how their unique embodiment and social interactions affect their own welfare and dignity just like humanity colours ours. This is why an understanding of *human* rights and *human* dignity that would pay attention to valuable features of *human* life (such as our inclination to care for vulnerable members of our community or our practical reasonableness) need not preclude that animals, too, have rights and dignity, even if they do not partake of these human goods. Although most animal rights

activists deploy (1) compassion-based strategies<sup>22</sup> and (2) assimilationist strategies (like the NHRP), theorists should endeavour to ask what *animal* dignity, flourishing and rights look like. Scholars engaged in that challenging field warn us, however, that “imagination can be a very self-serving instrument” (Nussbaum, 2006, p.353). Indeed, we may imagine that the proper way to respect animals is to bring them under human dominion, or we may project certain anthropomorphic traits or concepts onto these animals or our relations with them.

Similarly, when we reflect on what we, human moral agents, owe to animals from other species, it would be artificial to carry this reflection in abstraction of intra- or inter-species relations. Most assimilationists do not believe that these cultural and biological considerations, roles, or relations are morally informative. For instance, Peter Singer (1975) and Tom Regan (1983) would associate these relational considerations with speciesist ones, and suggest they should be discounted. However, reductionist approaches focusing on non-relational traits possessed by both humans and non-humans, such as being “sentient”, or being a “respondent” or a “subject-of-a-life”, have also been criticized for impoverishing our moral discourses. As Cora Diamond writes, “[t]he Singer-Regan approach makes it hard to see what is important *either* in our relationship with other human beings *or* in our relationship with animals.” (Diamond, 1978, pp.466-7). This is because it seems hard to build moral, political or legal accounts of rights on the basis of individual traits alone. The origin, purpose and practice of individual capacities and needs often only make sense within the social matrix of relations within which they arise.

There is no space to rehearse the arguments on both sides of this issue. Beside, animal rights activists are confronted by a more pragmatic question than whether Diamond’s meta-ethical neo-wittgensteinian views should prevail over the kind of moral individualism endorsed by most philosophers arguing that animals should be given a stronger moral status (e.g. Singer, 1993 and Rachels 1990). A more opportunistic question would be: is it better for legal activists concerned with the well-being of animals to aim at some “equal rights” for animals by capitalizing on their sameness, or to start developing a richer language to demand that we extend a better informed moral consideration, if not an “unconditional hospitality” that does not require guests to identify themselves (Derrida, 2002), to this Other? This duty of adopting a welcoming disposition toward alterity is already present in liberal writing. Anita Silvers and Leslie Francis (2005), for instance, have considered the problem of political “outliers” in their work, by defining them as those who defy expectations of sameness and should nonetheless be incorporated within the realm of justice. Working out the parameters of what could be a universal concern for all living things, as well as the normative implications of such a concern (e.g. a duty to make reasonable efforts to understand non-human forms of life and how our actions affect it) also falls beyond the scope of this paper. I am

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<sup>22</sup> Which is not to say that moral progress cannot occur through sentiments and empathy, but rather that in mainstream strategies, affective rhetorics make use of a debased versions of such sentiments and of other emotional reactions like outrage or pity in a way that is self-serving and ultimately provides poor basis for explaining the moral status of animals.

only illustrating how legal activism could head in a different direction from the NHRP's assimilationist, autonomy-based one.

It would also be possible for the NHRP to maintain their normalizing strategies but tinker more heavily with personhood-conferring criteria. For instance, Gary Francione, a prominent contemporary animal liberationist, concedes that “[h]uman and nonhuman cognition may be different in many respects, including with respect to autonomy”. However, Francione does not think that this “has any normative significance whatsoever”; in fact, he seems suspicious of potential anthropocentric biases that would feed strategies focusing on “humanlike self-awareness and the ability to make long-term life plans” to ground personhood. Francione would rather ground animals’ rights not to be treated as property on their interest in their life and their “continued existence” (Francione and Garner, 2010, p.193).

It seems that the NHRP's normalizing strategy deploying traditional autonomy-based justifications for legal rights explains why their cases have failed so far, and why future cases may also fail. The crucial move in rejecting NHRP's argument in the earlier *People ex rel Nonhuman Rights Project, Inc. v. Lavery*, was the Court's holding that animals could not plausibly be part of society, understood through the prism of social contract theory:

“Further, although the dispositive inquiry is whether chimpanzees are entitled to the right to be free from bodily restraint such that they may be deemed "persons" subject to the benefits of habeas corpus, legal personhood has consistently been defined in terms of both rights and duties.

(...)

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.” (*NHRP v. Lavery*, 2014, p.151-2; *NHRP v. Stanley*, p.6, 26-7)

Justice Jaffe did not discuss the merits of this argument (which bound her because of the doctrine of *stare decisis*), but she wrote that

“Even were I not bound by the Third Department in *Lavery*, the issue of chimpanzee's right to invoke the writ of habeas corpus is best decided, if not by the Legislature, then by the Court of Appeals, given its role in setting state policy.” (*NHRP v. Stanley*, p.6, 31)

The petitioners have, in a sense, set the stage for this counter-argument by casting animal rights in terms of rights owed to autonomous and self-determining subjects under a relatively traditional understanding of our “cherished” values of liberty and equality.

This “story” may nonetheless resonate with the public and arouse empathy for animals, though I cannot evaluate the likelihood of this possibility. As Richard Rorty remarked, Harriet Beecher Stowe’s novel, *Uncle Tom’s Cabin* did more for the anti-slavery movement than any piece of Kantian philosophy would have (Rorty, 2011, 125, 128). According to some philosophers, moral attitudes like empathy are the alpha and omega of moral life (e.g. Slote, 2010), but it is not controversial even amongst these authors that relying on arousing empathy is a strategy that could backfire. Perhaps this tale of animal liberation, as a literary endeavour, will strike a cord in the public ears that has little to do with the philosophical or legal merits of the case. As such, it might provide NHRP with a parallel political battlefield. Indeed, as Courts have told the NHRP up to now, they may have to address *legislative* rather than *judicial* actors. The only Canadian case dealing with the legal status of animals in the context of medical research similarly suggests that this status is up to the legislature to decide (*Harvard College v. Canada*, 2006).<sup>23</sup> This is because this reinterpretation of legal personhood would be the kind of moral revolution within our legal order that judges can hardly downplay to being just a mere increment (even a bold one) to past jurisprudence rather than a radical departure from it.

Another assimilationist strategy consists in pleading for the integration of animals by conceptualizing human beings a little bit more like chimpanzees (rather than the other way around). This assimilationist approach could make use of the increasingly important scholarship on vulnerability found in feminist and care ethics (e.g. Mackenzie, 2014). These insights are also present in political (e.g. Kittay, 1999) and legal scholarship (e.g. Fineman, 2008), which endeavours to destabilize the traditional liberal conception of the legal subject. This strategy, however, also endeavours to capitalize on sameness rather than contemplate seriously the moral and legal pulls of alterity. That said, if one is going to argue sameness, it might be easier to bring animals in our moral community on the basis of traits like vulnerability than by thinking of them like downgraded versions of Bertrand Russell.

Furthermore, emphasizing ethical notions like vulnerability and care, may defeat claims according to which we should only help animals if they can help us (e.g. Machan, 2004). This “tit-for-tat” contractual conception of social

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<sup>23</sup> In this case, the Supreme Court was only asked whether Harvard College could patent the Harvard “oncomouse”, that is, a genetically modified mouse, with a cancer-promoting gene. The Court only had to decide on whether the *Patent Act* included higher form of life in the notion of “manufactured matter” that could be patented (“manufactured” and “composition of matter”), and it found that this would be too broad an interpretation; this considerable change in the regime of Canadian patents involved questions of policy that were left for the legislature to decide.

obligations (that found its way, as we saw, in the NHRP case law) has been problematized by the aforementioned scholarship. Feminists and care ethicists make room for asymmetrical relationships involving dependent parties that are not able to offer a reciprocal benefit to their carer. Contractualist versions of these arguments show that these caring structures are useful to society as a whole (e.g. Silvers and Francis 2005; Kittay 2005). Other arguments have reconceptualized responsibility toward vulnerable people as resting on domestic or international unfair structures. For instance, this has allowed Iris Marion Young (2011) to argue that various social actors are responsible for systemic injustice and for harms incurred by distant others. The extension of this systemic contractualist logic to other participants of an ecosystem is not as fanciful as the Appellate Division of the Supreme Court of New York in the *Lavery* case assumed. It does require, however, to reinterpret the social contract tradition before asking whether animals can be integrated to it.

Finally, finding assimilationist grounds other than autonomy may help to attenuate the marginalization of less humanlike species, those for whom there is insufficient empirical evidence of complex cognitive abilities that would sustain a plea for autonomy-based rights. The NHRP is currently focussed on the following species as categories of plaintiffs: great apes, elephants, dolphins and whales.<sup>24</sup> In addition for being bad news for pigs and the rest of the animal kingdom, it seems to conflict with the other foundation suggested by the NHRP for granting animals legal personhood: our sheer desire to legislatively do so. I now turn to this argument.

#### 4. Positing Personhood as a Legal Fiction

The petitioner is only seeking a minimalist legal personhood for chimpanzees.<sup>25</sup> It would not include human rights, or an exhaustive list of rights, but only the right to bodily integrity and freedom underlying the writ of *habeas corpus*:

“[Petitioner] contends that the law can and should employ the legal fiction that chimpanzees are legal persons solely for the purpose of endowing them with the right of habeas corpus, as the law accepts in other contexts the “legal fiction” that nonhuman entities, such as corporations, may be deemed legal persons, with the rights incident thereto. The determination of legal personhood, it maintains, is a matter of policy and not a question of biology...” (*NHRP v. Stanley*, p.21-2).

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<sup>24</sup> Our plaintiffs will be animals for whom there is clear scientific evidence of such complex cognitive abilities as self-awareness and autonomy. Currently that evidence exists for elephants, dolphins and whales, and all four species of great apes. So, for the foreseeable future, our plaintiffs are likely to come from these three groups [great apes, elephants, dolphins and whales].

<sup>25</sup> I note that one could keep the notion of agency as central to a theory of animal rights, but reinterpret agency in a broader, less demanding way. Sue Donaldson and Will Kymlicka (2011) are currently marking out this avenue. Whether this focus on agency remains essentially anthropocentric is one of the main objections that this line of reasoning must deal with. In any case, even if successful, this broadened understanding of autonomy would require a radical change to the sort of autonomy normally associated to the legal subject.

While I suspect that the NHRP meant that animals should not be *rejected* on the basis of their animal biology, their argument, as previously presented, capitalized on *biological* facts about chimpanzees: their humanlike cognitive capacities, especially autonomy. The legal argument claiming that chimpanzees should benefit from a *legal fiction* independently from their biology therefore struck me as being at odds with their main assimilationist strategy.

The assimilationist theoretical strategy essentially makes use of liberals' well-rehearsed normative implications of being an autonomous being. The theoretical background of the claim that moral agents have the power to postulate and enforce legal fictions is significantly different. Both arguments are ultimately rooted in autonomy and its normative consequences, but the former emphasizes the autonomy of animals, whereas the latter emphasizes the legislative powers of moral agents.

In the former case, animals would be conceived as autonomous beings that demand respect and rights. Justifications for this vary. Two mainstream ones, associated with the contractarian and contractualist strands of social contract theory, are, respectively, that autonomous beings ought to be granted rights because they can take part in our collective social endeavours or because other moral agents are bound to respect their shared agency, for instance, because they mutually recognize their capacities to give reasons to one another.<sup>26</sup> Both are echoed in the NHPD case law (*NHRP v. Stanley*, p.26).

In the latter case (positing personhood as a legal fiction), moral agents mutually recognize their autonomous capacity to pursue certain ends. This mutual recognition of what we may call agential authorship calls for respect of what moral agents value. "What matters to me," Christine M. Korsgaard writes, "really matters, and is worth pursuing, because I matter." What would justify that our legal fictions be taken seriously by ourselves and other members of our community is that "[w]e regard ourselves as sources of value—that is to say, as sources of normative claims that are binding on ourselves and others." (Korsgaard, 2004, p.93)

In her *Tanner Lectures on Human Values*, Korsgaard grounds animals' moral status on this normative power. We, moral agents, have to treat the grounds of our actions as reasons that we and other agents can take seriously. Such a legislative power can be used, she argues, to protect ourselves from certain painful treatments, and the reasons underlying this protection should equally apply to animals since they share our fate of sentient beings:

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<sup>26</sup> The most influential contemporary representative of the contractualist (Kantian) strand would be John Rawls (1971). The best known representative of the contractarian (Hobbesian) one would be David Gauthier (1986).

“[We may] demand that we not be tortured, injured, hunted, or eaten, not just because of the assault on our autonomous nature, but because of the assault on our animal nature; therefore we should not treat our fellow animals in those ways. Autonomy puts us in a position to make the demand, but it is not the reason for the demand.” (Korsgaard, 2004, p.100-1)

Assessing the respective merits of philosophical endeavours (such as Korsgaard’s) within these constructivist<sup>27</sup> positions to ground the moral status of animals falls beyond the scope of this paper. I only want to present the constructivist justification on which the petitioner’s argument in favour of a legal fiction may be helpfully based. I should also mention that constructivist endeavours to provide legal rights for animals are not necessarily doomed to fail, in spite of my critical stance toward the petitioner’s claims. Of course, the NHRP may want to leave the merits of the legally posited fictions unexamined and keep using the analogies with corporations in hopes of making their claim for personhood sound more modest than the judicial coup it apparently is. After all, if it does bring about statutory prohibitions of the captivity and instrumentalization of “autonomous animals”, there will be ample opportunities to revisit said prohibitions and their underlying meaning. Be that as it may, the lack of attention to underlying values and rationales behind legislative frameworks will not solve the potential tensions in the NHRP position, nor will it help them to articulate arguments susceptible to convince legislators and judges wedded to these values and rationales.

Let me sum up the tension I highlighted. The NHRP simultaneously argues (1) that chimpanzees ought to be granted legal rights because they are autonomous beings like us and (2) that courts should use the tool of a “legal fiction” to extend legal personhood and/or specific rights to specific animals because such a power has been exercised, *inter alia*, for pets and corporations. Although (2) can be used to meet the requirement set out in (1), why request a fiction at all if the petitioner’s position is that animals *do* have the attributes required to ground legal personhood?

One explanation, as mentioned, is that it might be less destabilizing to a court used to the concept of legal fictions but new to rights claims on behalf of nonhumans. However, this positivist strategy may harm the petitioner’s position like their assimilationist did. While the latter caused the court to answer that animals do not seem to be plausible participants in a “social contract”, the former risks reducing the intrinsic worth of animals to very little by placing them next to objects and non-living things who can benefit from a “guest” legal status because that is deemed to be instrumentally beneficial to people. Since the NHRP’s goal is to steer animals away from the status of “things” or “property”, it may be risky to associate the status of animals with the fictitious status of “artificial person” granted to entities independently from their non-instrumental properties (that the petitioners have

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<sup>27</sup> Both the contractarian and neo-Kantian positions mentioned above fall under this appellation.

painstakingly described) (NHRP v. Stanley, p.5). Such legal fictions may comfort, rather than challenge, the current anti-cruelty paradigmatic understanding of our duties toward animals.

Furthermore, the petitioner relies on caselaw and statutes protecting pets. For instance, the New York Estates, Powers and Trusts Law provides that “a domestic or pet animal may be named as a beneficiary of a trust” (NHRP v. Stanley, p.25). This seems to be in tension with the NHRP’s position that elephants, dolphins and chimpanzees, rather than pigs, dogs and ponies, merit equal protection of their right to bodily integrity and liberty under the law. This is not only because the legal sources they are referring to are concerned with different species, but because the rationale underlying this body of law is to cater to human feelings and arbitrary wishes rather than to the generally underestimated moral status of animals. For instance, one case refers to a dog’s owner being entitled to “emotional distress damages for the wrongful destruction and loss of her dog” (NHRP v. Stanley, p.25). The trial judge herself in the Hercules and Leo case opens her concluding statement thus:

“The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.” (NHRP v. Stanley, p.32)

It is worrisome that Justice Jaffe recalls nothing of the petitioner’s central assimilationist, autonomy-based, argument at this stage. This is not to say, I repeat, that emotions have no role to play in moral theory, and in Justice Jaffe’s mind as she reflects on social struggles for recognition (e.g. for LGBT, women, and African Americans). My goal is to point to the tension in the petitioner’s argument and to ask whether it is worth diluting or contradicting their former autonomy-based argument if that is their main platform. Perhaps the NHRP is hoping that their assimilationist argument will work at a “deeper” normative level, as a moral principle, to convince judges (or, eventually, legislators) to agree with their basic position, whereas their constructivist/positivistic argument will work on a more “superficial” or formalistic level, as a rule that is a more manageable fit to the existing legal framework, by providing legal actors with concrete legal tools to accede to their demand. It seems to me, however, that both of these positions (assimilationist principle and positivist legal fiction) have “deep” and “superficial” dimensions, i.e. they both have theoretical underpinnings and concrete normative implications. This theoretical cherry-picking dilutes the conceptual coherency of the argument. Even as a legal strategy speaking to popular/judicial preferences for “cherished” values like equality and liberty (at the theoretical level) and for incrementally extending “artificial” rights through a legal fiction (at the methodological one), it is not clear that this mix-and-match has (or will) serve(d) the NHRP.

Let me comment on both the practical and theoretical hard questions that the NHRP should ask itself.

My first set of remarks relate to practical concerns. The NHRP needs to consider the likelihood of success and alternative avenues of influence on the legal order. Here are three *loci* of legal and political actions to improve the situation of animals:

1. Using the legal order “as is”: animals are property that cannot be harmed *for no good end*. In Canada, the Canadian Council on Animal Care and its guidelines incorporated in several provincial laws endorse this view. Similar guidelines and legislations exist in various jurisdictions: this is the *status quo*. Animals are instruments that have a right against cruel, unnecessary treatments.
2. Reforming the legal order “from the inside”, by using existing legal concepts and arguments such as personhood as a legal fiction and seeking incremental changes of the law through judicial intervention (e.g. the NHRP cases).
3. Reforming the legal order “from the outside”: promoting shifts of paradigms, enforcement of new policies, through political/legislative changes. (e.g.: illegal acts and civil disobedience; manifestations and lobbying.)

Most case law, such as the lawsuits brought forward by the Animal Legal Defense Fund (Animal Legal Defense Fund Website), an American association, happens within the first paradigm of animal activism. Very often, strategies (1) and (3) are pursued simultaneously. Lawyers are trained to hear only the legally relevant facts within an otherwise messy and emotionally troubling story. Many animal rights groups work on both fronts. For instance, the Animal Legal Defense Fund can make a very “small” claim (e.g. by denouncing the failure of the university to disclose information regarding a medical project funded by tax-payers) but their *publicity* around cases emphasize the traumatic, gruesome, or callous aspects of the medical experiment. The grounds for public outrage, however, do not match the bases of their legal cases.

It seems fair to say that only the first and third categories of interventions have gathered significant activists’ and theorists’ efforts and have led to some palpable outcome. This is why the NHRP cases drew my attention as innovative, bold, and holding the potential to profoundly destabilize our legal order. The NHRP cases point to an untapped avenue for social reform of animal law. The second strategy is often used by private parties or oppressed groups seeking to circumvent their legislative exclusion through judicial channels by relying on legal rights that belong to a higher order binding domestic legislators, such as constitutional or quasi-constitutional texts or regional and international conventions. However, seismic legal changes - like recognizing or denying the personhood of women, slaves or foetuses - are rare historical events. One wonders if animal rights activists are making the best use of their time speaking a legal language that has already precluded the validity of the point they are trying to

make. It is not that their claims will never be accepted in the future. The question is whether their time would not be better spent by using the first or third sort of recourses to bring about social and legal changes.

Moreover, unlike assimilationist cases claiming that slaves are “persons”, the NHRP case is dealing with beings that *are* very different from human legal subjects, whereas the anti-slavery point is that slaves are essentially not different from their masters. The sameness of animals may certainly be morally informative, but it seems odd to proceed to their integration on this basis alone. An ethics of alterity seems better suited to accommodate the fact that they make moral claims on us *in spite of* not being the same as us.

That said, the NHRP should not be derided for celebrating its failure. Bringing about these cases and losing may draw collective attention on the limitations of our current legal frameworks. Consider the 1928 case *Reference re meaning of the word "Persons" in s. 24 of British North America Act*, in which the Canadian Supreme Court decided that women were not “persons” in the qualified sense of being entitled to hold senatorial office or the infamous *Dred Scott v. Sandford* (1857) decision, in which the American Supreme Court decided that all people from African ancestry could never acquire the political status of citizen and the legal standing to sue. The former case was reversed by the Judicial Committee of the Privy Council (*Edwards v. A.G. of Canada*, 1930) and the latter one is probably the most successful failure in the history of adjudication.

My second set of remarks raise theoretical concerns about legal fictions. Granting animals a “guest” legal status on the basis of our *preferences* (e.g. our feelings, or even our use of them) rather than on the basis of their actual capacities (including not only autonomy, but also their inter- and intra-species relational capacities) provides quite a fickle basis for legal rights. Some disagree. For instance, Andrew Cohen (2007, p.191) has suggested that we grant a “secondary” moral status to animals, in the sense that it would be posited by moral agents able to do so. Cohen’s strategy is to say that ‘the only difference [between primary and secondary moral standing] is in the genesis of the standing’, and that this genesis does not matter: the standing obtained is as metaphysically strong. First, one could answer, simply, that it is rather as metaphysically *weak*. It is a natural reply to his argument against the criticism that, in his example of Peter extending ‘direct moral regard’ to Emma because James makes this contractual demand to him, James could change his mind, and stop asking anything from Peter. ‘Nontuist that he is’, Cohen writes, the contractor (Peter) ‘would stop extending [the beneficiary party - say, Emma is a disabled child] any moral regard’.

A problem with this view, Christopher Morris (1991, p.195) notes, is that we cannot satisfactorily explain, on this contractual account of status, why children, for instance, would have a strong status vis-à-vis their parents. Morris concludes that “[i]t appears that someone need not have moral standing in relation to the agent(s) who is the vehicle

for one's secondary moral standing". This is an admission that a contractarian account cannot offer an account of why parents should intervene contractually to protect their child rather than to honour neckties. "If that is their choice", Cohen concedes at one point, "so be it". Yet, Cohen attempts to circumvent (if not solve) the problem of optionality in three ways. First, he suggests that there may be other non-optional grounds for moral standing outside of contractarianism, which does not solve the issue of optionality from a contractarian point of view. We would still need to argue what these grounds are with regards to animals. Second, he makes the familiar claim that others will care for children if their parents do not. This is a descriptive rather than normative claim and it therefore does not explain why this concern is morally warranted and even stringent. As far as *animals* are concerned, moreover, this claim would mostly only help "endearing", Walt-Disney-ish animals. Cohen's third argument borrows from Simon Blackburn's "projectivist quasi-realism" and suggests that "[c]ontractors *ought* to extend direct moral regard to any being with a particular characteristic(s) such as sentience or a distinct capacity to flourish" (Cohen, 2006, p.191, 193 and 197). I find this last point to be the most convincing one, but I note that it takes us away from the constructivist idea that we have the option to grant specific legal rights to certain animals through our legislative authority to decree guest passes to our legal community.

Some human rights theorists, like Richard Rorty, would think very little of my criticism of "legal fictions". I am essentially making the point that it might not be wise to grant animals personal rights simply through an arbitrary decree willing this special status into existence, *if* we can establish a much stronger foundation for this rights-conferring status. Rorty would criticize me for resenting the strategy of telling sappy, sad, pitiful stories to the powerful until they deign turning their "piggy eyes" (to use Rorty punchy terms) on the fate of people and creatures left behind. He would think that one must get over this platonist/religious hope for a foundation that would "prove us right" and fight the good fight in whichever way we can. It is hard not to think of Rorty's reference to art and propaganda moving people to be more compassionate as one notes that the NHRP is currently advertising a documentary on its work to be presented at international festivals from May 25, 2016 onward (NHRP Website). To be sure, NHRP itself is certainly ideally committed to defend a non-contingent foundation for animal rights, and therefore Rorty's committed anti-foundationalism would find something to say against their ambition and would perhaps encourage them to stick to movie-making.<sup>28</sup> Alternatively, a similar pragmatic recommendation would be that NHRP keep using the strategy of requesting a legal fiction, not because it appropriately reflects the complex statuses of animals, but because broader reforms may be too politically onerous or legally radical to be realistic. Insisting on the *right answer* may not yield the *right outcome*. NHRP must assess its options and this is simply as tricky and cloudy a business as forecasting which way judicial or legislative bodies will go.

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<sup>28</sup> I understand Rorty himself to be abdicating morality as traditionally pursued and encouraging us to make peace with what sounds like manipulation. However, I note that many "sentimentalists", including those he quotes, develop robust moral theories that give its due place to emotions and empathy within morality. Rorty would not be able to embrace such theories insofar as they do not abandon the effort of grounding rights on solid (affective) foundations.

My main concern is not that if the NHRP succeed in obtaining the imperfect legal fiction they are after, this may distract us from more ideal reforms. On the contrary, their potential success would go a tremendously long way in bolstering our “animal rights culture” and would probably encourage such further reforms. My concern is rather that they will not succeed and keep hitting a wall, a wall made up of heavy bricks (the inherent limits of their assimilationist approach) and hardened cement (the limits of judicial authority to bring about such a reform through legal interpretation).

## **5. Conclusion**

The Non-Human Rights Project is a novel and bold endeavour to address the longstanding exclusion of animals from our legal order. It falls within a broader moral and political agenda of reflecting on how our actions affect the well-being of animals and what we owe to them.

Incidentally, I encourage the discussion of its case law within jurisprudence courses. It allows students to reflect on equality, respect, moral status and personhood. The marginal case of chimpanzees poses a challenge to liberal theories that favour a kind of moral and legal subject with universally shared properties and favour expanding moral and legal consideration by broadening the range of such properties. It invites us to question our commitment to equality and assimilating strategies. The exclusion of animals from the realm of legal and political subjecthood can also be used to think about other historical cases of exclusion from (moral and legal) personhood, by distinguishing the particularities of each of these situations. Additionally, this case illustrates how conceptually challenging it can be to resist scalar conceptions of moral and legal statuses. Finally, it invites us to reflect on the legitimacy of opportunistically trading off some of the coherency or accuracy of one’s theoretical position for a greater rhetorical purchase in the context of legal activism.

I have provided two main criticisms of what I take to be the NHRP’s simultaneously assimilationist and positivist stands. The first criticism asked whether their assimilationist stand paid enough attention to the irreducible alterity of animals. Protecting only humanlike animals, on the basis of their sameness, and by gesturing toward a liberal theoretical apparatus that has had its share of problems when dealing with “social outliers” or “otherness”, is a strategy with inherent limitations. The second criticism examined their proposal to grant specific species a narrow legal personhood, understood as a legal fiction. I addressed potential tensions between this latter positivist stand, and their former, assimilationist one. I also asked whether this position is able to sustain a robust enough legal status for animals.

I suggest that the hard questions and concerns I have raised partly explain the NHRP's lack of success, while acknowledging that the success of legal activism is not only a matter of internal theoretical coherency. Coherency issues aside, I showed how courts used the barriers that the NHRP set up for itself to reject some of its claims. My goal was to theorize, situate and problematize the tools that animal rights activists such as the NHRP choose to work with. The values they invoke and the argumentative strategies they deploy have a long history. They have been used for oppression, liberation, sometimes both at the same time and, very often (as Foucault suggests) unwittingly so.

In conclusion, I reiterate that animal rights groups trying to capitalize on "cherished" liberal values such as liberty, equality or on the social contract tradition would do well to pay attention to recent academic efforts to reformulate these notions in a way that captures species-specific forms of embodiment and the historical relational contexts within which animals and humans have come to coexist. Paying attention to the peculiarities of animal lives and to their interactions with each others and with humans will help us to resist the anthropocentric siren calls paving the way to "zoopolis". Regrettably, the only relational insight that has made it to Justice Jaffe's ear is the "empathy felt for a beloved pet". It is hard to get to a writ of *habeas corpus* from there.

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