

The Koko Dilemma

A Challenge to Legal Personality

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The concept of legal personality has developed to embrace all human beings, as well as a variety of non-human entities. Can this concept evolve further in response to societal change? Can legal personality be extended to animals? In the author's view, there is nothing inherent in the concept of legal personality which prevents its extension to animals. The author considers the past and present legal status of animals, and the possibility of altering animals' current status as legal 'non-persons', contending that not only is such change possible, but would be beneficial.

Imagine if you will...

This is a description of a remarkable being.¹ This being understands spoken English and communicates in sign language, employing a vocabulary in excess of one thousand words. She is also learning to read. She has been observed making faces at herself in front of a mirror. If she has misbehaved, she has been known to lie in order to avoid the consequences of her behaviour. She paints and draws, and enjoys imaginary play, alone or with others. She laughs at jokes. Sometimes, if hurt or frightened or left alone, she cries or screams. She can talk about her feelings and about what happens when one dies. She grieves for her cat, who died in a car accident.

This being's name is Koko, and she is a gorilla. Clearly, she is not a human being. Could she be a person?

Bioethicist Peter Singer is among those who would argue that Koko is as much a person as she is a gorilla. This paper explores some issues related to the extension of personhood to include nonhuman animals like Koko. In particular, it focuses on the question of whether there is anything inherent in the

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¹ The author is indebted for this description of Koko to Patterson, F, and Gordon, W, "The Case for the Personhood of Gorillas", in Cavalieri, P, and Singer, P, (eds), *The Great Ape Project: Equality Beyond Humanity*, Fourth Estate, London, 1993, pp 58-9.

concept of legal personality which prevents its extension to animals. Consideration of this question requires examining what it means to be a 'person', and to possess legal personality. This paper considers the current legal status of nonhuman animals and whether their status as legal 'nonpersons' can be altered - and, if it can, whether it is desirable to confer the status of 'person' upon nonhuman animals. The central contention of this paper is that such change is possible and would be beneficial.

Who - or what - is a person?

At the outset, it is necessary to consider what we mean by our use of the term 'person'. In particular, we must examine the meaning of the term in legal parlance in order to understand what it means to say that something 'is a legal person' or 'has legal personality'.

The dictionary definition of 'person' exposes the variety of meanings which the word potentially may bear. Both the *Macquarie Dictionary* and the *Concise Oxford Dictionary* begin with a descriptive definition of 'person' as an individual human being.² In common usage we assume, unless told otherwise, that 'person' is employed as a synonym for 'human being'.³

The corollary of our instinctive identification of 'person' with 'human' is that we tend to view the terms 'person' and 'animal' as representing mutually exclusive categories. This aspect of human thought is highlighted by the *Macquarie Dictionary's* further definition of 'person' as "a human being as distinguished from an animal or thing".⁴ We see ourselves primarily as human *beings*, rather than as human *animals*.⁵ Thus, although we may be aware that, strictly speaking, it is inaccurate to define 'person' (in the sense of 'human') in contradistinction to 'animal', innate anthropocentrism probably has a good deal more to do with our thinking in this regard than does scientific accuracy.

On the whole, we are untroubled by our assumption that 'person' is the equivalent of 'human', and the opposite of

² *Oxford Concise Dictionary* (5th ed), Clarendon Press, Oxford, 1964, p 906; *Macquarie Dictionary* (2nd ed), The Macquarie Library, 1993, p 1270.

³ Sapontzis, S, "Aping Persons - Pro and Con", in Cavalieri and Singer, already cited n 1, p 270.

⁴ *Macquarie Dictionary*, already cited n 2, p 1271.

⁵ As is referred to by the *Macquarie Dictionary* definition.

'animal'. Indeed, we may well be unaware that we hold this assumption until we are challenged by the suggestion that an 'animal' might also be a 'person'. Since our thinking is predicated on the perception that those terms are mutually exclusive, our immediate reaction to this suggestion is likely to be negative.

Yet if we consider some of the other potential meanings of 'person', we find that the term has meanings beyond mere synonymy with 'human being'. We are offered a 'philosophical' definition of 'person' as "a self-conscious or rational being".⁶ Additionally, the etymology of the word is reflected in definitions of 'person' as a character, role or guise assumed either in a play or story, or in real life.⁷

'Person' derives from the Latin *persona*, which originally described the mask worn by an actor, appropriate to the role played by that actor on stage in the ancient theatre.⁸ This was the aspect of the term 'person' which was carried over into the legal world and its concept of the 'legal person'. In the words of Ernest Barker, "just as the parts in a play are created and assigned by the dramatists, so ... *personae* in law are created and assigned by similar agencies" in the state.⁹

It is important to establish what is meant by the use of the term 'legal person'. Although it has no fixed definition, it is commonly described in terms of an entity possessing certain legal rights and freedoms, and bearing certain legal duties and obligations. In this vein, the *CCH Macquarie Dictionary of Law* defines the legal person as "a body with individual legal powers, privileges, rights, duties or liabilities, whether a natural person (a human being) or an artificial person (eg a corporation or an accounting entity)".¹⁰ Similarly, J. A. C. Thomas posits that "[i]n modern legal systems, the term 'person' denotes an entity capable of bearing rights and duties".¹¹ Alexander Nekam

⁶ *Macquarie Dictionary*, already cited n 2, p 1271.

⁷ *id.*, p 1270; *Oxford Concise Dictionary*, already cited n 2, p 906.

⁸ Thomas, J A C, *Textbook of Roman Law*, North-Holland Publishing Co, Amsterdam, 1976, p 387; Fuller, L, *Legal Fictions*, Stanford University Press, 1967, p 19.

⁹ Introduction to Gierke, *Natural Law and the Theory of Society*, Beacon Press, Boston, 1957, p 23, quoted in Melden, A I, *Rights and Persons*, Basil Blackwell, Oxford, 1977, p 228.

¹⁰ *CCH Macquarie Dictionary of Law* (2nd ed), CCH Australia, Sydney, 1993, p 101.

¹¹ Thomas, already cited n 8, p 387.

suggests that 'legal person' is a classificatory term used to designate "anything to which rights are attributed in a legal system."¹² Thus personality, in a legal sense, may be described as "the quality of being a possible subject of rights and duties".¹³

It is evident that jurists generally view the possession of legal rights as a key constitutive element of legal personality. Although some would argue that "there is no generally accepted conception of what it is to have a 'legal right'"¹⁴, Professor Christopher Stone has attempted to delineate what it means to be the holder of legal rights, and hence to possess legal personality. Stone suggests that "an entity cannot be said to hold a legal right unless and until *some public authoritative body* is prepared to give *some amount of review* to actions that are colorably inconsistent with that 'right'."¹⁵ Were this the sole threshold criterion, however, we might say that "all public buildings ... have legal rights".¹⁶ Thus Stone argues that three additional criteria must be satisfied in order for something to be said to be a 'holder of legal rights'. It is necessary that "the thing can institute legal actions *at its behest*"; that "in determining the granting of legal relief, the court must take *injury to it* into account"; and that "relief must run to the *benefit of it*".¹⁷

Stone's 'additional criteria' may be seen as the procedural requirements of legal personality. They do not provide us with any insight into which particular rights and duties are possessed by a particular legal person, nor do they expose the substance of those rights and duties. Those matters are determined by the nature of the particular legal person and its concomitant capacities.¹⁸ Rather, satisfaction of the criteria offers an entity basic legal existence, thus enabling it to enter into legal relations with other legal persons and providing it

¹² Nekam, A, *The Personality Conception of the Legal Entity*, Harvard University Press, Boston, 1938, p 21.

¹³ Thomas, already cited n 8, p 387.

¹⁴ Jamieson, P, "The Legal Status of Animals Under Animal Welfare Law" (1992) 9 *Environmental and Planning Law Journal* 20, p20.

¹⁵ Stone, C, "Should Trees Have Standing? - Towards Legal Rights for Natural Objects" (1972) 45 *Southern California Law Review* 450, p 458.

¹⁶ Jamieson, already cited n 14, p 21.

¹⁷ Stone, already cited n 15, p 458.

¹⁸ The question of capacity is discussed below.

with a measure of visibility in the eyes of the law.¹⁹ In this way, legal personality “[goes] towards making a thing *count* jurally - to have a legally recognised worth and dignity in its own right, and not merely to serve as a means to benefit [the contemporary group of rights-holders]”.²⁰ To Stone, this is the fundamental benefit of conferring legal personality upon an entity. We will return to this powerful argument in due course.

“Sentimental Property”: The current position of nonhuman animals in law

We might ponder for a moment whether Orwell's enigmatic statement that “[a]ll animals are equal, but some animals are more equal than others” is not more or less apt to describe the differential treatment accorded to human and nonhuman animals in our legal system.²¹ Human and nonhuman animals are clearly not equal. While all human animals are *legal persons*, nonhuman animals fall into the category of *property*. Since our system regards legal persons as the only entities capable of possessing rights, nonhuman animals can never possess rights in the manner envisaged by Professor Stone. Instead, they have an extremely limited legal existence as the objects of rights held by legal persons.

Nonetheless, animals appear to fall into an unusual category of property. An American judge, for example, commented that a pet animal “is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”²² Another judge described pet animals as a form of “sentimental property”.²³ Such comments reflect our understandable discomfort with treating living animals, especially those whom we observe exhibiting ‘humanlike’ qualities or to whom we have an emotional attachment, in the same way as we would treat other forms of property.

Animal welfare legislation, which provides for the protection of animals even as against the actions of their owners, could be

¹⁹ This statement reflects the views of Stone, already cited n 15, p 458, and the suggestions of Dr Ngaire Naffine, Reader in Law, University of Adelaide.

²⁰ Stone, already cited n 15, p 458.

²¹ *Animal Farm*, chapter 10.

²² *Corso v Crawford Dog and Cat Hospital Inc* (1979) 97 Misc. 2d 530 at 531 per Friedman J, quoted in Jamieson, already cited n 14, p 20.

²³ *Infante v Leith* (1962) 85 PRR 24 at 37, quoted in Jamieson, already cited n 14, p 25.

seen as a legislative reflection of this sense of uncertainty and discomfort. In South Australia, the *Prevention of Cruelty to Animals Act (SA) 1985* attempts to protect nonhuman animals against ill treatment in the form of cruel or neglectful behaviour at the hands of human beings ('natural persons') and corporations.²⁴ The Act establishes a number of criminal offences and sets out a range of penalties for breach of the legislative provisions.²⁵

It is notable that the Act must specifically exclude human beings from the general definition of an animal in section 3,²⁶ because humans are of course "[members] of [a] species of the sub-phylum *vertebrata*".²⁷ This specific definition, and the general juxtaposition of the terms 'person' and 'animal' throughout the Act, reflect our instinctive sense that 'person' and 'animal' are mutually exclusive concepts.²⁸

It is beyond the scope of this paper to evaluate the effectiveness of animal welfare legislation in preventing cruelty to animals. However, for our purposes, it is important to note that the South Australian legislation neither recognises legal personality in animals nor ascribes to them legal rights. At best, it offers some indirect protection for animals by allowing for the prosecution of legal persons, such as humans and corporations, who ill-treat them.

We are reminded of the indirectness of this protection by Dr Philip Jamieson's analysis of Australian animal welfare legislation in terms of Professor Stone's criteria for the possession of legal rights. In regard to standing, Jamieson notes that animal welfare legislation does not enable animals to institute legal proceedings at their own behest.²⁹ Since the legislation creates offences of a criminal nature, it is concerned predominantly with the punishment of the offending legal person and with "protecting the community from similar

²⁴ Particularly see ss13-15.

²⁵ Including fines of between one and ten thousand dollars or twelve months imprisonment for natural persons, and fines of fifty thousand dollars for corporations - see for example ss13(1), 14, 15, 16, 29(7), 29(8), 29(10), 31, 33(b), 36(2), 40(1).

²⁶ s 3: "a member of any species of the sub-phylum *vertebrata* except (a) a human being; or (b) a fish, and includes any prescribed animal."

²⁷ Note this definition of an animal is itself selective.

²⁸ For example, s 13(1) "A person who ill treats an animal shall be guilty of an offence. Penalty: Ten thousand dollars or imprisonment for twelve months."

²⁹ Jamieson, already cited n 14, p 21.

transgressions by the wrongdoer in the future”.³⁰ The court is unlikely to consider the animal’s injury as an important issue in itself, except in the context of determining the gravity of punishment to be imposed on the wrongdoer. Finally, the legislation does not provide for relief running to the animal’s benefit. The statutory ‘remedies’ relate only to the potential imposition of fines and imprisonment upon the legal persons convicted of an offence under the statute.³¹

In a sense, these shortcomings are not peculiar to animal welfare legislation, but reflect the criminal law’s general focus on the prosecution and punishment of wrongdoers, rather than on providing relief to their victims. Yet unlike other victims of crime, animals are unable to seek compensation for their injuries through civil proceedings against the perpetrator of the crime, or even through an application to the Criminal Injuries Compensation Fund. Since animals are not legal persons, they face the insurmountable obstacle of a lack of standing at common law.

A legal person, such as the owner of an animal, who can demonstrate an invasion of its rights (specifically, its property rights, in the case of an owner) through the actions of some other legal person against an animal could seek reparation for that animal’s injury or death.³² Nevertheless, even if some legal person is willing to take such action, it is more than likely that the court will focus on the economic damage to the proprietary interests of that legal person stemming from the injury to the animal, rather than on the injury to the animal *per se*. Furthermore, the beneficiary of any favourable judgment will not be the injured animal, but rather the legal person who brought the action and whose interests form the primary consideration in the court’s decision.³³

A fascinating anomaly in the history of the law’s treatment of animals as property concerns the curious matter of the criminal trials and capital punishment of animals in mediaeval Europe. Secular trials meted out punishment to domestic animals for the infliction of fatal injuries on a human being, while ecclesiastical trials were designed to “rid the population of natural pests that could not be individually punished”,

³⁰ id, p 24.

³¹ id, p 25.

³² Stone, already cited n 15, p 459.

³³ id, pp 462-3.

through orders to permit the use of remedial curses and exorcism against the pest animals.³⁴

According to Esther Cohen, the mediaeval jurists did not purport to try animals on the basis that they possessed reason, understanding or malicious intent. In this sense, animals were equated with “perpetual minors”.³⁵ Yet it appears that in passing judgment on animal culprits, the mediaeval courts frequently resorted to anthropomorphic language imputing malicious intent to the convicted animal, as though the punishment required some sort of justification.³⁶ Thus a sow was said, for example, to have been “taken *en fragrant delit*, having committed and perpetrated ... murder and homicide”.³⁷

Mediaeval jurists believed that the right of humans to try animals stemmed from the superiority and ‘legal lordship’ of humankind over nature. Since animals were subject to humankind, the jurists reasoned that they must also be subject to the human judicial system.³⁸ Further, mediaeval jurists appear to have felt that if animals were subject to human justice, they were as deserving as humans of the full measure of justice.³⁹

The apparent logic of this belief had some odd, and sometimes brutal, ramifications. Evans reports that animals were sometimes “put to the rack to extort confession” much like a human criminal, not because the judges expected that a confession would be forthcoming, but because they wished to observe the forms prescribed by the law, and “to set in motion the whole machinery of justice before pronouncing judgment”.⁴⁰

However, mediaeval jurists’ desire to accord justice to accused animals also meant that the secular trials “followed the inquisitorial procedure strictly according to human rules”.⁴¹ In a case of homicide, for example, “the crown or town authorities prosecuted the case, presenting the complaint and summoning

³⁴ Cohen, E, *The Crossroads of Justice*, E J Brill, Leiden, 1993, p 110.

³⁵ *id.*, p 132.

³⁶ *id.*, p 112.

³⁷ *ibid.*

³⁸ *id.*, p 128.

³⁹ *id.*, p 124.

⁴⁰ Evans, E P, *The Criminal Prosecution and Capital Punishment of Animals: The Lost History of Europe’s Animal Trials*, Faber & Faber, London, 1987, p 139.

⁴¹ Cohen, already cited n 34, p 111.

the witnesses."⁴² Accused animals, though rarely (if ever) brought into court, were even confined in the same prisons as human defendants⁴³ and subjected to similar forms of capital punishment, including hanging, burning or burial of the 'culprit' alive.⁴⁴

Modern eyes are quick to criticise such mediaeval practices and to attribute them to "the common superstition of the age".⁴⁵ Our abhorrence of the brutality of mediaeval criminal law and procedure is understandable. Nonetheless, it is arguable that there is a sense of fairness in trying an animal for a so-called crime, such as the infliction of injury upon a human being, which our modern methods of dealing with 'dangerous' animals appear to lack. Although animals were still put to death summarily on occasion in mediaeval times, such behaviour was generally disapproved of by mediaeval jurists.⁴⁶

The concept of trying an animal that injures humans or other animals⁴⁷ before 'putting it down' in order to protect the community is foreign to our apparently enlightened society. This is not to suggest that mediaeval law provided the epitome of animal justice, for there is an obvious inequity in its treatment of animals as duty-bearing, "sentient, punishable beings" for the purposes of the criminal law, and as rightless chattels in every other respect.⁴⁸ Rather, the mediaeval example forces us to question the justice of our modern system's treatment of animals, and also serves to highlight the possibility of regarding animals as more than mere property. For if the mediaeval jurists could treat animals essentially as persons with a very limited capacity (limited to the ability to perform legally punishable acts)⁴⁹, is there any reason why we cannot treat them as legal persons?

⁴² *ibid.*

⁴³ *ibid.*; also Evans, already cited n 40, p 142.

⁴⁴ Evans, already cited n 40, p 138. For example, Evans reports that in 1463, two pigs were buried alive as punishment for (apparently) having "torn and eaten with their teeth a little child in the faubourg of Amiens, who for this cause passed from life to death (*etoit alle de vie a trepas*)".

⁴⁵ Cohen, already cited n 34, p 12.

⁴⁶ Evans, already cited n 40, p 35.

⁴⁷ For example, dogs who repeatedly attack sheep in farming communities.

⁴⁸ Cohen, already cited n 34, p 101.

⁴⁹ Capacity can, of course, refer to "the ability to perform ... legally punishable acts" (*CCH Macquarie Dictionary of Law*, already cited n 10, p 25).

Is there a legal barrier to the extension of legal personality to animals?

It has taken centuries to reach the point where the law considers all human beings to be legal persons. As Professor Stone points out, “persons we presently regard as the natural holders of at least some rights” previously had none.⁵⁰ In colourful style, Stone also comments that:

“We have been making persons of children although they were not, in law, always so. And we have done the same, albeit imperfectly some would say, with prisoners, aliens, women (especially of the married variety), the insane, Blacks, foetuses, and Indians.”⁵¹

Even the attribution of rights to individual human beings is a relatively recent development in the history of the law. In ancient times, the family or a similar social group was the usual centre of rights.⁵² As recognition of the individual as a subject of rights grew, legal personality was restricted for a long time to individuals occupying a particular social position (for example, the *paterfamilias* as head of the family in Roman times), or individuals possessing other particular attributes.⁵³

The history of the gradual extension of the concept of legal personality to include all human beings, as well as a variety of nonhuman entities like corporations, reminds us that the concept of legal personality is a legal fiction, in the sense that it is an artificial construct of the law. The law can “choose which persons to create or recognise” just as it can choose “which rights or other relations to create or at least recognise”.⁵⁴

Thus, Nekam asserts that anything “can become a subject - a potential center - of rights, whether a plant or an animal, a human being or an imagined spirit”.⁵⁵ What is required for an entity to become the subject of rights is for the community, and hence the community’s lawmakers, to choose to regard it as such. The corollary of this is that if the community does not

⁵⁰ Stone, already cited n 15, p 450.

⁵¹ id, p 451.

⁵² Nekam, already cited n 12, p 22.

⁵³ ibid.

⁵⁴ Lawson, F H, “The Creative Use of Legal Concepts”, extracted in Smith, J C and Weisstub, D N, *The Western Idea of Law*, Butterworths, London, 1983, p 84.

⁵⁵ Nekam, already cited n 12, p 29.

choose to regard an entity as a subject of rights, it will not become a subject of rights, “whether human being or anything else.”⁵⁶

Legal persons are created as part of the “artificial world” of legal concepts, to serve certain purposes.⁵⁷ It has been said, for example, that legal persons are “mathematical creations” devised to simplify legal processes. Much as mathematicians employ algebraic symbols to simplify mathematical calculations, the concept of the legal person provides the jurist with a basic unit or entity for use in the creation of legal relationships.⁵⁸ Beyond this, however, it is suggested that beings or objects are endowed with legal personality as a form of community recognition that the entity in question is “a unit [with] interests which need and deserve social protection”.⁵⁹ Thus, the key to the concept of legal personality may, as Nekam argues, be seen to lie in the question of whether the community values a particular being or object enough to make of it a subject of rights - that is, a legal person.

It is clear that Nekam does not predicate the conferral of legal personality upon a being or object on the possession of human personality by that being or object. The legal person is “for the logic of the system ... just as much a pure ‘concept’ as ‘one’ in arithmetic” and “just as independent from a human being as one is from an ‘apple’”.⁶⁰ Legal personality “is not the same as human personality”.⁶¹ Nekam reports that in modern legal systems, legal rights have been accorded to the dead, and even to “spirits”, “gods”, “devils” and “idols”.⁶²

In the modern context, corporations are the prime example of a nonhuman legal person. Although the legal treatment of corporations frequently is coloured by anthropomorphic overtones, it is easier to conceptualise the artificial nature of legal personality in the case of a corporation, than in the case of a human legal person. The routine use of the term “artificial person”⁶³ to describe a corporation is a constant reminder that

⁵⁶ id, p 29.

⁵⁷ Lawson, already cited n 54, p 83.

⁵⁸ id, p 85.

⁵⁹ Nekam, already cited n 12, p 26.

⁶⁰ Derham, D P, “Theories of Legal Personality”, extracted in Smith and Weisstub, already cited n 54, p 85.

⁶¹ Lawson, already cited n 54, p 83.

⁶² Nekam, already cited n 12, p 25.

⁶³ *CCH Macquarie Dictionary of Law*, already cited n 10, p 101.

the corporation is the offspring of legal creativity. However, our use of the term “natural person”⁶⁴ in relation to human legal persons tends to serve as a constant, erroneous suggestion that legal personality is “a characteristic inherent in the nature of [human beings]”⁶⁵. It should be remembered that even the application of the word ‘person’ to human beings “was at first metaphorical”,⁶⁶ for ‘person’ derives from *persona* - a word which did not originally mean ‘human’.⁶⁷

Bearing in mind that we have established there is no necessary requirement that a legal person possess human personality, we should note that there is one sense in which there is always a “necessary connection between every right established [which, in order to exist, must be attached to a legal person] and some human being”.⁶⁸ As Nekam points out, every right needs “somebody to dispose of it” and “every interest to be protected” requires “somebody to look after it”. These functions are performed by the “administrator” of the rights and interests, who must have “will” in order to carry out these functions. Nekam concludes that since only humans have “will”, an administrator must always be a human being. Thus, since the rights and interests of every legal person require an administrator to exercise and protect them, and since, according to Nekam, only a human can become an administrator, there is always a certain connection between legal persons and human beings.⁶⁹

However, it is only coincidental that the concepts of the beneficiary of rights and the administrator of those rights “overlap” in the case of the “normal adult person” (presumably by this Nekam means the legal person with full capacity, who is typically an adult human being).⁷⁰ If the distinction between the beneficiary of rights and the administrator of that beneficiary’s rights is not carefully maintained, we will find ourselves confusing the two, and thus assuming that because the administrator of rights must be a human being, able to

64 *ibid.*

65 Nekam, already cited n 12, p 24.

66 Fuller, already cited n 8, p 19.

67 Singer, P, *Rethinking Life and Death: The Collapse of Our Traditional Ethics*, St Martin’s Press, New York, 1994, p 180.

68 Nekam, already cited n 12, p 27.

69 *ibid.*

70 *id.*, p 29.

interact with the courts and the legal system, then the beneficiary of the rights must automatically be human also.⁷¹

The question of whether or not new legal persons *can* be created thus appears a moot point.⁷² It seems, as Lawson argues, that there is probably no “limit in logic ... to the number of legal persons that may be interpolated at any point in human relations”.⁷³ In other words, there is nothing inherent in the concept of legal personality which prevents its extension to animals.

The real question relates to whether an entity will be considered by the community and its lawmakers to be of such social importance that it deserves or needs legal protection in the form of the conferral of legal personality.⁷⁴ Nekam suggests that this decision is based upon the community’s “emotional valuation” of the entity’s need for legal protection.⁷⁵ This is essentially what Lawson refers to as the policy factor inherent in the question of whether new legal persons *should* be created.⁷⁶

The importance of the policy factor in relation to the extension of legal personality to animals must not be underestimated. Lawson suggests that the legislature probably needs to be involved in the extension of legal personality to new entities.⁷⁷ This seems likely to be the case in regard to animals. Although on the whole judges appear more willing than ever before to engage in creative interpretation of the law, they are unlikely to be keen to forge too far ahead of the legislature in regard to the extension of rights to animals, which would no doubt be seen as a contentious social issue best dealt with by the legislature.⁷⁸

⁷¹ See also Nekam, already cited n 12, p 33.

⁷² For example, Nekam and Lawson both appear quite untroubled by the concept of extending legal personality.

⁷³ Lawson, already cited n 54, p 85.

⁷⁴ Nekam, already cited n 12, p 35.

⁷⁵ *id.*, p 42.

⁷⁶ Lawson, already cited n 54, p 85: “Nor is there any limit in logic, though there may be in policy, to the number of legal persons that may be interpolated at any point in human relations”.

⁷⁷ *ibid.*

⁷⁸ It is always possible, though, if more judges step out on a limb, as did Douglas J in dissent in the American conservation case *Sierra Club v Morton* (401 US 907 (No 70-34); 405 US 727, 31 L Ed 2d 636).

Unfortunately, seeking legislative conferral of personality on animals is effectively a Herculean challenge, as legislative measures frequently lag behind societal changes.⁷⁹ Gary Francione makes the cynical, yet pragmatic, point that when “an economic system finds it advantageous”, as with the extension of legal personality to corporations, “its notion of ‘personhood’ can become quite elastic”.⁸⁰ Conversely, legislative change can become “enmired indefinitely” if opposed by powerful vested interests.⁸¹ Those with direct vested interests in maintaining animals’ current legal status as property might range from multi-national pharmaceutical companies who rely on a supply of animals to use as subjects in drug development and testing, to farmers who sell eggs produced by ‘battery hens’.

Yet the failure of an attempt to legislate for the “enfranchisement of animals” might not be solely attributable to the opposition of such vested interests.⁸² In spite of the efforts of animal rights’ activists to raise public awareness of animal rights’ issues, it is conceivable that public interest in the issue of the extension of legal personality to animals would be minimal. It is equally conceivable that the community might actively oppose legislative action to make animals ‘persons’. Such opposition would probably be fatal to the animal cause, for as Bernard Rollin notes, legislative change in favour of animal rights has little chance of success unless “public opinion can be galvanised on its behalf”.⁸³

For this reason, it seems that we must play upon human emotions in order to obtain the community’s support for the legislative conferral of legal personality on animals.⁸⁴ The general disapproval of anthropomorphism expressed by many of those engaged in philosophical discussion of animal rights⁸⁵

⁷⁹ Rollin, B, “The Ascent of Apes: Broadening the Moral Community”, in Cavalieri and Singer, already cited n 1, p 217.

⁸⁰ Francione, G, “Personhood, Property and Legal Competence”, in Cavalieri and Singer, already cited n 1, p 252.

⁸¹ Rollin, already cited n 79, p 217.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ Anthropomorphism may be described as the ascription of “human form or attributes” (emotions, for example) “to beings or things not human” (*Macquarie Dictionary*, already cited n 2, p 114). For example, the description of gorilla Koko at the beginning of this paper is written in anthropomorphic language, as I describe Koko appearing to “laugh at jokes” or “grieve for her cat” - a human reading of the behaviour of a non-

may need to be tempered by pragmatism in order to maximise community support for the extension of personality to animals. Human weakness for animals who exhibit 'human-like' behaviour, such as the use of language by apes, can be used to animal advantage by arousing empathy in human observers.⁸⁶

Peter Singer appears to be attempting to exploit this facet of human nature by employing John Locke's definition of a person in his argument in favour of the extension of personhood to include nonhuman animals.⁸⁷ Locke defined a 'person' as a "thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places".⁸⁸ The intelligent, self-aware, rational being embodied in Locke's definition bears a striking resemblance to the legal person of full capacity in our legal system. This person is typically a 'normal' human adult, whom the law characterises as an "intellectually sophisticated, autonomous [agent]".⁸⁹

Singer argues that the scientific study of animals provides plenty of evidence to suggest that animals like Koko fit Locke's definition of a 'person'.⁹⁰ He claims that the "evidence for personhood" is currently most conclusive for the great apes - gorillas, chimpanzees and orang-utans. These animals'

human animal. Anthropomorphism, though somewhat instinctive (how often do we describe our pets as looking "happy" or sad?), may be used deliberately to engage human sympathy for animals which resemble humans, or appear to exhibit human-like emotions. However, the inherent danger of anthropomorphism, hence its disapproval in much philosophical discussion of animal rights, is that if animal rights are extended by exploiting human sympathy for animals like Koko, then rights for less "lovable" animals, like snakes, will be far harder to achieve. See for example Davis, "The Moral Status of Dogs, Forests, and Other Persons" (1986) 12 *Social Theory and Practice* 27, who would exclude the possibility of personhood for animals who are not sufficiently "like us in a way that can win our empathy" (at 50) (although I note that he is addressing the question of animal personhood in a broader context than this paper aims to do).

⁸⁶ Sapontzis, already cited n 3, pp 276-7.

⁸⁷ I am grateful to Dr Ngairé Naffine (already referred to n 19) for this suggestion.

⁸⁸ Locke, *Essay on Human Relations*, bk.II, ch.9, par 29, quoted by Singer, already cited n 66, p 162.

⁸⁹ Sapontzis, already cited n 3, p 275.

⁹⁰ Singer, already cited n 67, p 182. It is not possible in this paper to canvass the breadth of research which has been conducted into animal behaviour and psychology, and the fascinating results of such research. Suffice it to say that the description of Koko offered at the outset of this paper represents the type of evidence collated by researchers.

(potential) use of language appears to form an integral part of the “evidence for personhood”, for their ability to communicate using sign language enables researchers to attempt to discern, for example, the degree to which they may be said to be self-aware. Our present inability to communicate effectively beyond the level of intuition with other animals seems to prevent the conclusive formulation of “evidence for personhood” in relation to them. Nonetheless, Singer argues that “whales, dolphins, elephants, monkeys, dogs, pigs and other animals may eventually also be shown to be aware of their own existence over time and capable of reasoning”.⁹¹

In a sense, this assertion begs the question of whether a being *must* demonstrate self-awareness, or self-consciousness, and the capacity to reason in order to be eligible for the attribution of legal personality. As noted above, the typical bearer of the full complement of legal rights and duties in our system is a human adult endowed with rationality, sanity and autonomy. Clearly, however, there are far more legal persons in existence than there are so-called ‘normal human adults’ in the community. Apart from nonhuman legal entities like corporations, we must fit into the personality equation, among others, fetuses, children, insane adults, adults suffering from other forms of mental illness, intellectually disabled humans and humans in comas. The fact that none of these ‘persons’ possess the same degree of rationality and autonomy as the characteristic (some would say caricatured) legal person discussed above might be an overwhelming problem, were it not for the variability of legal capacity.

It is not a precondition of legal personality that every legal entity possess a ‘complete set’ of legal rights and obligations. Within the human community of legal individuals, different individuals possess different rights and bear different obligations - yet all remain legal persons. Children, for example, have limited rights and obligations because they are not thought capable of exercising the same level of reasoning and understanding assumed of normal adults.

Thus the concept of the legal entity is a relative one. Legal personality does not require that an entity “have certain minimum rights attributed to it”. It is not an ‘all or nothing’

⁹¹ *ibid.*

approach. We can attribute to a legal entity as little as a single right or obligation, or a wide variety of rights and obligations.⁹²

Arguing that animals should become legal persons, and thus have legal rights, does not equate to a demand that animals should possess every conceivable legal right, or even that animals should have the same rights as human beings. Nor is it necessary that all animals possess identical rights.⁹³

Clearly, the conferral of legal personality on animals would necessitate a careful consideration of which rights and/or obligations would be appropriate to extend to particular animals. It is equally clear, however, that although there is an advantage inherent in being the legal person of full capacity, because this person's interests are those best served by our modern legal system,⁹⁴ that advantage does not translate into a requirement that all legal persons possess, or be capable of possessing, the full complement of legal rights and duties.

Therefore, it seems that Singer's use of the Lockean model of the person, with its focus on reason, intelligence and self-awareness, is in fact a double-edged sword. It helps make his argument as palatable as possible for his human audience by emphasising the fact that animals may possess, though to a lesser degree than humans, qualities such as intelligence, rationality and self-awareness - qualities which we commonly view as 'human' qualities. The inherent danger in Singer's focus on such attributes is that he sets an unnecessarily high standard for admission to the community of persons, which could impede the inclusion of animals other than the great apes.⁹⁵

In response to this potential criticism, Singer has argued that reformers "can only start from a given situation, and work from there", as the alteration of the status quo can only be brought about in stages, with each small progression functioning as a point of transition to the next stage.⁹⁶ Yet without denying the pragmatism of this argument, it is disturbing to note that a consistent application of Singer's standard could require the

⁹² Nekam, already cited n 12, p 42.

⁹³ Stone, already cited n 15, p 457.

⁹⁴ Sapontzis, already cited n 3, p 275.

⁹⁵ Natural objects and the environment would have even more difficulty fitting such criteria!

⁹⁶ Singer and Cavalieri, "The Great Ape Project - and Beyond" in Cavalieri and Singer, already cited n 1, p 309.

withdrawal of legal personality from a number of human persons, such as anencephalic babies, or those who are severely intellectually disabled, or in an irreversible coma. Singer rightly points to the illogicality of including such humans in the community of legal persons, while excluding animals “with equal or superior characteristics and capacities”.⁹⁷ However, attempting to resolve this logical inconsistency by adopting criteria for personhood based on Locke’s definition of the person would constitute a serious assault on the progress made in relation to the human rights of humans like those mentioned above.⁹⁸

It is suggested that this is an unacceptable price to pay, in both moral and political terms, for the extension of legal personality to animals. Arguably it would amount to the replacement of the bias inherent in the concept of legal personality which favours members of the species *Homo sapiens*, with an intellectual bias in favour of beings possessing qualities such as intelligence, rationality and self-awareness. Yet it may not be necessary to pay this price, for, strictly speaking, the law does not impose Singer’s standard upon those to whom it extends legal personality. The concept of legal personality makes allowances for persons possessing varying degrees of intelligence, rationality and self-awareness through the gradation of capacity.

It may be appropriate for animal legal persons to have similar capacity to that of young children, including limitations on criminal liability and contractual capacity.⁹⁹ It is important that they are able to initiate legal proceedings to restrain or to seek compensation for the infringement of their rights. No doubt the substantive content of animals’ new legal rights would be the subject of extensive debate. It suffices to note here that those rights are likely to be limited to basic rights such as the right to freedom from cruel treatment and the infliction of torture or unnecessary suffering, and potentially, though not necessarily, the right to life.¹⁰⁰

⁹⁷ Singer, already cited n 67, p 183.

⁹⁸ See for example Anstotz, “Intellectually Disabled Humans and the Great Apes” in Cavalieri and Singer, already cited n 1, p 160.

⁹⁹ It is suggested that it would be unfair to impose criminal liability on animals who have not been socialised in our society.

¹⁰⁰ These are among the rights outlined in the “Declaration on Great Apes” in Cavalieri and Singer, already cited n 1, pp 4-6.

Arguments for the extension of legal personality to animals

We have established that there is nothing inherent in the concept of legal personality preventing its extension to animals. We will see that there are also good reasons why we should extend legal personality to animals.

Central to this argument is Stone's assertion that legal personality plays an important part in "making a thing *count*" in the eyes of the law. The conferral of legal personality upon rightless objects or beings carries with it legal recognition that those objects or beings have "worth and dignity" in their own right".¹⁰¹ Until we attribute personality to a rightless entity, we are likely to be unable to conceive of it as "anything but a *thing* for the use of 'us' - those who are holding rights at the time."¹⁰² Thus it is suggested that the inclusion of animals in the community of legal persons will dignify them by forcing humans to see and value animals for themselves, rather than seeing them simply as the object of property rights, or as something for humans to 'use and abuse'.¹⁰³

The paradox is that we may be loathe to extend legal personality to animals because we find it difficult to value animals for what they are - but we may continue to have difficulty seeing animals' intrinsic worth and dignity "until we can bring ourselves to give [them] 'rights'".¹⁰⁴ As Stone observes, extending rights to new entities always appears "unthinkable" until the change is actually effected, as we tend to suppose "the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo."¹⁰⁵

Attempting to alter the status quo is never easy. Yet persistence is of the essence, for as Singer highlights, the term 'person' is far from being a "mere descriptive label". In fact, it "carries with it a certain moral standing" which is needed to force us to think of animals as deserving of the basic rights we take for granted.¹⁰⁶ The law's attitude towards animals could be said to amount to a policy statement about human society's

¹⁰¹ Stone, already cited n 15, p 458.

¹⁰² id, p 455.

¹⁰³ id, p456.

¹⁰⁴ ibid.

¹⁰⁵ id, p 453.

¹⁰⁶ Singer, already cited n 67, p 182.

regard, or disregard, for animals.¹⁰⁷ Thus were the law to bring animals in 'out of the cold', where they languish as rightless beings, the objects of rights held by legal persons, and draw them under the umbrella of legal personality, it would ideally encourage the development of more respectful and less exploitative social attitudes towards animals.

The shelter of the legal umbrella would also provide more effective protection of animal interests than is available under current animal welfare law. As legal persons, animals could be recognised as parties to legal actions, because they would have the independent standing that they currently lack. There is no conceptual problem with the fact that animals' inability to speak means that they would require human legal persons to act as their representatives and to interact with the courts and the legal system on their behalf. As I noted above, it is quite acceptable for a legal person's rights and interests to be exercised and protected by another legal person acting as the "administrator" of those rights. Infants are a prime example of legal persons whose rights and interests must be administered by another legal person, usually a parent or an appointed guardian.

In practical terms, a human legal person of full capacity, concerned with the well-being of the animal and willing to represent the animal on a legal level, could be appointed by the court as the guardian and legal representative of that animal.¹⁰⁸ Appropriate guardians might include animal welfare bodies, like the RSPCA, or individuals with a particular interest in, or familiarity with, the animal concerned. The guardian could represent the interests of an individual animal or a group of animals. For example, guardians might represent the rights of grain-destroying cockatoos to a humane death, rather than cruel clubbing, the rights of circus animals to freedom from suffering caused by unnatural captivity, or the rights of marine animals and birds to prevent the indiscriminate killing caused by the use of nets in long-line trawling¹⁰⁹.

The advantage of this approach is that it would require a court to take the animals' interests directly into account as parties to

¹⁰⁷ These are ideas drawn, by analogy from the case of women and rape law, from Faulkner, J, "*Mens Rea in Rape: Morgan and the Inadequacy of Subjectivism*" (1991) 18 *MULR* 60.

¹⁰⁸ Stone, already cited n 15, p 464.

¹⁰⁹ These substantive rights may vary from animal to animal, as noted above.

the legal action, rather than as the object of rights. This is not to intimate that the animals' interests must prevail over those of other legal persons. Rather, this approach would require the court explicitly to acknowledge the animals' interests, as it must acknowledge those of other legal persons party to the proceedings, and weigh their interest against those of the other parties.

This scenario is not far-fetched. The community is already vocal in its disapproval of practices such as long-line trawling, which results in the unnecessary deaths of large numbers of marine animals in the trawler's nets. The prospect that society will demand that the next step be taken may not be far away.

Some objections to the extension of legal personality to animals

Although it was suggested above that an animal's inability to speak need not prevent its becoming a legal person, it might be objected that an animal's inability to communicate its needs to its guardian means that the guardian could not accurately "judge the needs" of its charge. In relation to natural objects and the environment, Professor Stone counters this objection with the argument that the needs of natural objects are frequently quite apparent and "not terribly ambiguous". For example, a lawn in need of water 'conveys' this need quite obviously through its yellow appearance and dry texture.¹¹⁰ The argument is even stronger in the case of animals - and not merely because there are some animals who could potentially communicate their wants and needs to their guardians. An animal's appearance, state of health and non-verbal behaviour may be used as a guide to its needs.

Another objection which might be raised relates not so much to the extension of legal personality to animals as to the notion of making animals 'persons'. This objection might be expressed in terms of general criticism of the use of the term 'person' to describe what is essentially an artificial legal concept. As we noted at the outset, 'person' has various non-legal meanings, which "involuntarily come into mind whenever one uses" the term.¹¹¹ This makes it difficult to avoid anthropomorphism in our dealings with the legal person, because, as Fuller emphasises, humans tend to assume that "where two things

¹¹⁰ *id.*, p 471.

¹¹¹ Nekom, already cited n 12, p 39.

have a common name they must have something in common besides the name".¹¹²

More specifically, it might be objected that the law will appear ridiculous to the community if it calls animals 'persons' because humans will generally be unable to subvert their instinctive equation of 'person' with 'human being' to the more specific legal definition of the term. Clearly, this is not a sufficient reason to deny the extension of legal personality to animals. Nonetheless, it demonstrates why, as Nekam suggests, the law should replace the term 'legal person' with a new term such as 'legal entity' before using that term in reference to animals. A phrase like 'legal entity', having no other meaning in itself, will minimise the danger of exposing the law to ridicule, and will also be less likely to cause confusion, since even within the legal context, the meaning of 'person' may slide between its 'popular' and legal definitions.¹¹³

On balance, we must consider whether making animals 'legal entities', and hence offering them legal rights, really will procure better protection for animal interests. Steve Sapontzis argues that although "rights" constitute our "most powerful moral and legal concept", they are best suited to "the capacities and conditions of intellectually sophisticated agents" - that is, to the legal person of full capacity.¹¹⁴ He suggests that we should employ "concepts suited to the capacities and conditions" of animals, rather than "automatically demanding legal rights for nonhuman animals to (or against) those things which (can, will, would) have an impact on their basic interests". This appears to include strengthening the position of interests which do not amount to legal rights when those interests come into conflict with legal rights, for example, by not allowing the legal rights automatically to override the protected interests.¹¹⁵ The argument appears promising, but the fact that Sapontzis offers no concrete examples of what he calls, in tantalising fashion, "concepts suited to the capacities and conditions" of animals, suggests that they are difficult to formulate. For now, at least, the extension of legal personality to animals remains the best option for greater protection of animal interests.

¹¹² Fuller, already cited n 8, p 18.

¹¹³ Nekam, already cited n 12, p 39.

¹¹⁴ Sapontzis, already cited n 3, p 275.

¹¹⁵ *ibid.*

Some final thoughts

The concept of legal personality, as we have seen, is a construct of the law. As such, it can be extended to animals, or to other objects or beings, if the law so chooses. Ultimately, the question of whether legal personality will be bestowed on animals depends on whether human beings are prepared to acknowledge that animals need and deserve full legal protection for their rights and interests.

The multiplicity of animal beings with whom we share our world deserve to be treated not as means to human ends, but as ends in themselves. Having arrogated to ourselves complete power over our animal kin, their liberation rests in our hands.

As we conclude, it seems apt to reflect on where we began. What would Koko make of all this? What would she think of becoming a 'person'? Perhaps we will never know. Perhaps we should ask her...