

INTRODUCTION

EMPATHY WITH ANIMALS: A LITMUS TEST FOR LEGAL PERSONHOOD?

By
Carter Dillard*

This is one of the fundamental questions that frame the study of animal law: To what extent should nonhuman animals be considered legal persons? Of course, this question presupposes that we share or can arrive at a common and stable conception of legal personhood. In fact, there are a variety of conceptions of legal personhood. This Introduction will explore one in particular and, in the process, question the extent to which simply being born Homo sapiens satisfies the potentially complex and demanding requirements of being a legal person. This argument will lead us to reframe animal law a bit and question whether we protect animals by focusing on their status or whether we are better off focusing on the status of humans—and not so much who we are but who, as legal persons that constitute legalities, we ought to be.

- I. INTRODUCTION 1
- II. A THICK CONCEPTION OF LEGAL PERSONHOOD 4
- III. VULNERABLE SUBJECTS AND THEIR LEGAL SYSTEM 12
- IV. CONSTITUTIONAL PRINCIPLES FOR VULNERABLE SUBJECT SYSTEMS 14
- V. CONCLUSION 21

I. INTRODUCTION

In the movie *Blade Runner*, the earth is occupied by both humans and by artificial humans created to serve.¹ The artificial humans do not enjoy the same legal rights as the humans—they are not full legal

* © Carter Dillard 2012. Visiting Scholar, Vulnerability and Human Condition Initiative, Feminism and Legal Theory Project, Emory University School of Law. This Introduction is dedicated to Alexandra Freidberg-Strauss, whose vision of an effective legal system inspired much of this work.

¹ *Blade Runner*, DVD 2:52 (Warner Bros. Pictures 1982).

persons. They are, however, almost physically indistinguishable from humans, and can only be identified through psychological evaluations in which they are closely monitored for psychological responses to the questions asked of them.² In a famous scene, a subject is carefully questioned about how he would respond to seeing a turtle that is lying trapped on its back in the desert, baking in the hot sun.³ Only true humans are expected to react to the image with empathy,⁴ and to feel a strong and physiologically detectable impulse to save the creature. In this scene, the subject being questioned feels nothing and is therefore not human.

This is an odd way of thinking about things, considering the constancy with which humans willingly inflict suffering and death upon animals in factory farms, laboratories, hunting preserves, and abusive and neglectful homes. Presuming that those willing to inflict suffering and death upon animals also display less empathy—which at least one recent study might suggest⁵—a good portion of humans alive today would be relegated to lesser status under *Blade Runner's* test.

Yet, consider that being a legal person is a matter of degree rather than an all or nothing standard. The degree reflects which particular bundle of legal rights and duties one has (e.g., minors have different bundles than parolees, temporary residents, or corporations) such that each is to some lesser or greater degree a legal person.⁶ Persons con-

² *Id.* at 20:00.

³ *Id.* at 7:00.

⁴ Empathy, the blurring of the line between self and other, is a relatively objective concept that can be measured in humans and animals and is now the subject of dozens of empirical and neurological studies. See Jean Decety, *The Neuroevolution of Empathy*, 1231 *Annals N.Y. Acad. Sci.* 35, 38, 41–42 (2011) (discussing human and mammal sensitivity to the suffering of others); Frans de Waal, *Putting the Altruism Back into Altruism: The Evolution of Empathy*, 59 *Annu. Rev. Psychol.* 279, 285 (2008) (outlining the connection between empathy and directed altruism); Clifton P. Flynn, *Acknowledging the "Zoological Connection": A Sociological Analysis of Animal Cruelty*, 9 *Soc. Anim.* 71, 74 (2001) (an overview of animal cruelty as a product of social interactions); Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 *Iowa L. Rev.* 1, 66–68 (2001) (detailing psychiatric literature regarding the link between empathy, animal cruelty, and antisocial behavior); Charles Siebert, *The Animal-Cruelty Syndrome*, *N.Y. Times Mag.* 42, 51 (June 13, 2010) (explaining that neuroscientists are beginning to understand the physical underpinnings of empathy).

⁵ Daniel R. Hawes, psychologytoday.com: Quilted Science Blog, *Empathy Really Sets Vegetarians Apart (at Least Neurologically Speaking)*, <http://www.psychologytoday.com/blog/evolved-primate/201005/empathy-is-what-really-sets-vegetarians-apart-least-neurologically-speak> (May 31, 2010) (accessed Nov. 17, 2012).

⁶ See Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 *Hastings Bus. L.J.* 103, 103–04 (2012) (discussing how corporations gained the right to political speech); Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 *N.Y.U. L. Rev.* 1403, 1412 (2009) (explaining how lawful permanent residents and citizens have different rights); Lindy K. Lucero & Jeffrey P. Bernhardt, Student Authors, *Thirty-First Annual Review of Criminal Procedure*, 90 *Geo. L.J.* 1087, 2005 (2002) (noting that criminal convictions deprive citizens of their freedom and many constitutional rights); Bruce A. Wagman et al., *Animal Law Cases and Materials*, 62–63, 69–70 (4th ed., Carolina Academic Press

victed of animal cruelty—and especially those incarcerated for the crime—may lose many of their rights and much of their legal personhood, in part because they lacked empathy, or at least failed to respond and act upon it.⁷ They are indeed relegated to lesser status and, in some cases, excluded from society entirely.

Cruelty and the lack of empathy it entails are grounds not only for removing persons from full participation in the legal system, but also for preventing *admission* to the legal system by serving as a bar to immigration into the United States (U.S.).⁸ To the extent children are not full legal persons, not fully “admitted” to the system of full rights and duties that most adults enjoy, they too are first taught to empathize with animals, through our prevalent and mandatory humane education laws.⁹ Though compliance with the teaching is hardly a bar to admission, the intent is clear.

Whether it is empathy or some other concept we wish to assign as the placeholder, there appears to be some relationship between being other-regarding—that is, the empirically measurable capacity and disposition or tendency to place one’s self in another’s position (even or perhaps especially in the very different position of an animal) and alter one’s behavior in response—and the concept of legal personhood. This Introduction will touch upon that relationship, asking: (1) whether a thick conception of legal personhood explains the link and whether, when we value legal personhood, we are really valuing empathy;¹⁰ (2) whether legal systems (or “legalities”),¹¹ which are presumably made up of legal persons, ought to then be made up of persons actually disposed, to some minimum degree, to empathize with others in their day to day lives;¹² and (3) what the fore-

2010) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (discussing parental liberty to control one’s children)).

⁷ Hawes, *supra* n. 5; see also Siebert, *supra* n. 4, at 50 (describing studies in the neurophysiology of empathy and its relation to the abuse of animals, both human and nonhuman).

⁸ See Nora V. Demleitner, *Thwarting a New Start? Foreign Convictions, Sentencing and Collateral Sanctions*, 36 U. Toledo L. Rev. 505, 506–09 (2005) (detailing various crimes, the past commission of which bar admission into the U.S.).

⁹ See Marcia Goodman Kramer, *Humane Education, Dissection, and the Law*, 13 Animal L. 281, 295–96 (2007) (outlining the ability of children to avoid classroom dissections due to moral qualms).

¹⁰ Very little has been written about the relationship between empathy and law. The leading scholarship focuses on how empathy has played a role in certain judicial opinions (rather than as a possible replacement for sanctions). See Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1576 (1987) (rejecting “the assumption that legality—by which I mean the dominant belief system about the Rule and role of Law—and empathy are mutually exclusive concepts”).

¹¹ I borrow the term from Scott Shapiro. See generally Scott Shapiro, *Legality* (Belknap Press of Harvard U. Press 2011) (exploring the nature of law).

¹² This discussion could also be framed around what the “rule of law” calls for in terms of personhood and model legal-system constituents (specifically amending the rule of law condition “list” to add one element), rather than around the concept of legal systems more generally. Lon Fuller described eight elements that comprise “the morality that makes law possible”: (1) generality; (2) notice or publicity; (3) prospectivity; (4)

going would entail for basic constitutional principles in such a legal system.¹³

The question addressed in this Introduction is not the commonly addressed question of whether animals are or should be legal persons, though by now it is well known that they display something similar to the empathy that humans display.¹⁴ The question addressed here is whether, to be consistent when applying the rationale we use to exclude animals from being legal persons, we must also limit legal personhood to certain humans in ways very different from the way we do now. While those interested in animal law may find an exploration of human personhood beside the point, rigorous thinking about humans' role in the nonhuman world demands thinking about who we are as a species—and, more importantly—who we ought to be.

II. A THICK CONCEPTION OF LEGAL PERSONHOOD

Bearing in mind that legal personhood is a matter of degree depending on which rights and duties one has—one can be more or less a legal person according to whether one is a prisoner, minor, parolee, probationer, future person, intending immigrant, corporation, animal, etcetera¹⁵—there may be an *ideal* of legal personhood that creates the continuum along which these various points fall.¹⁶ Thinking about le-

clarity; (5) consistency; (6) conformability; (7) stability; and (8) congruence. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. Rev. 781, 784–85 (1989) (citing Lon Fuller, *The Morality Of Law* 157 (rev. ed. 1969)). As will be made clearer within this section, the arguments made here suggest adding a ninth element—constituency/continuity—that is, that the consequences of the rule of law ought to be legal, as opposed to political and economic.

¹³ To answer the second question above, I will take as an example of a legal system the kind envisioned by Martha Fineman. This legal system is made up of vulnerable subjects seeking to become more resilient—as opposed to autonomous subjects seeking to become free—though both systems may lead to the same answer. See generally Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J.L. & Feminism 1 (2008) (discussing the concept of vulnerability as an alternative to the traditional equal protection analysis).

¹⁴ See e.g. Marc Bekoff & Jessica Pierce, *Wild Justice: The Moral Lives of Animals* 85 (U. Chi. Press 2009) (describing an occurrence of mice displaying empathy towards each other).

¹⁵ *Supra* n. 6.

¹⁶ One aside and disclaimer: The following discussion is meant to generate thoughts about legal personhood and constituency among those interested in animals and the law, by using modern, everyday concepts like law, economics, and power. It is not an attempt to articulate a new normative or descriptive theory on the concept or nature of law or normativity (which may be impossible in light of the rooms of literature that exist on the subject), though notions of a thick conception of legal personhood, and of legalities as comprised of such persons, are novel. Also, this discussion skirts the mountains of social science literature relating law to human behavior. See e.g. Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 Va. L. Rev. 1603, 1603–07 (2000) (examining the interaction of law and norms). I feel it is appropriate to do so because that literature primarily attempts to describe actual human behavior, in economic and other terms, whereas the arguments made here are primarily conceptual and normative, logically deriving claims from basic, widely shared concepts and ideals.

gal personhood as an ideal differs from how we normally think about legal personhood: for example, legal persons have the capacity to sue and be sued, to own property, and to be a party to a contract. John Chipman Gray reminds us that, normally, legal personhood is simply whatever particular bundle of legal rights and duties lawmakers say we have.¹⁷ The law says minors cannot vote, corporations can own property, people should not torture dogs (dogs have legal personhood in the limited sense that humans owe the legal duty not to torture them), etcetera. Thus, whatever bundle is assigned defines the different entities' degree of legal personhood.

But we can think of legal personhood as something beyond whatever lawmakers arbitrarily say it is. We can think of it as a person's actual relationship to the thing we call law itself: whether the person can read or hear and then understand the law, interpret it in different ways, comply with it, communicate it to others, make it, etcetera. Lawmakers can say what they wish about legal personhood, but it will not really change whether someone can actually do those things—that is, how persons actually relate to the law itself—much the way lawmakers cannot really change whether we are proficient in Spanish or act as great parents to our children. Rather than taking legal personhood as whatever lawmakers say it is, the *ideal* of legal personhood is a thick conception, both descriptive and evaluative. It is not just whom lawmakers designate as a legal person, but what we would value about a particular person in their relation to the law itself. That is, in a thick conception of legal personhood, an ideal legal person would be one who embodies all of the abilities we intuitively think (when thinking about every day and commonly accepted notions of “the law”) ideal legal persons ought to have.

Our own federal legal system can be taken as an example to place the ideal in context: because that system is communicated through written language, the ideal legal person would have to be literate. Because that language has likely not been translated in its entirety into a language other than English, the person would have to be literate in English (had it been written in French, they would have had to be literate in French). Also, because federal laws and regulations are written at a relatively high reading level—at any rate, higher than the average reading level in the U.S.—the person would have to read at a “legal” level.¹⁸

¹⁷ See generally John Chipman Gray, *The Nature and Sources of the Law* 12 (2d ed., Columbia U. Press 1921) (noting that an individual's legal rights are those which society will enforce).

¹⁸ As an aside, any argument for the constituents of a legal system reading at such a level flies in the face of the Supreme Court's holding on the matter. In *Wisconsin v. Yoder*, the Court held, over Wisconsin's objection and despite the Justices' own extensive schooling, that an eighth grade education was sufficient to meet the interests of the state, if not the ideals of a democratic society. *Wis. v. Yoder*, 406 U.S. 205, 224–25 (1972). “The independence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country

Because simply reading and understanding the law would not guarantee that a person has mastered it as an ideal legal person would, he or she would also have to be able to engage in complex legal analysis to consistently apply the law correctly in various contexts.¹⁹ Of course, persons could and usually do use lawyers or some other form of representative as proxies to approach the ideal. But this begs the question: Is the proxy or lawyer then closer to the ideal? Surely, a legal system cannot be premised on members always using others to function. Yes, lawyers may assist after a legal dispute has arisen. However, representatives are not very useful in an ideal system because a good portion, if not the majority, of rules in any legal system purport to guide members' behavior so that disputes do not arise. The law purports to regulate a great deal of how we live, and we cannot live by proxy; one cannot consult others to decide every action that would be subject to law. Rather, a person that understands the law and can, through accurate legal analysis, direct their behavior in perfect compliance with it seems the ideal legal person.²⁰

Would it also matter *why* persons comply with the law and legal norms? Readers may remember another movie, *The Island of Doctor Moreau*. In it, Dr. Moreau busily transforms animals into humans and tests their progress, in part, by seeing whether they can comply with "the law."²¹ He seems eager that they should do so without coercion, without being sent to "the house of pain."²² When he must coerce them, he has failed; they are not becoming human after all.²³

To try to answer the question, we can unbundle law conceptually from politics and economics and examine what the ideal constituents of a legal system *per se* might look like. That is, what does valuable legal personhood, versus economic or political personhood, look like—if there are such things once law is disentangled from them? Keep in mind that we are not describing our legal system today, which bundles together law, politics, and economics. Rather, to the extent that law is distinct conceptually, we are asking what that distinction entails. I do

are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education." *Id.* at 226–27. The Court lauded Jefferson's ideal of the "sturdy yeoman," which is a term commonly used to refer to a subordinate worker. *Id.* at 225.

¹⁹ Cf. Ronald Dworkin, *Law's Empire* 245 (Belknap Press of Harvard U. Press 1986) (discussing what the law requires of an ideal "Herculean" judge).

²⁰ Is it enough that persons can perfectly comply with the law? Can they do more to approach the ideal? To truly interact with a system of laws, the ideal legal person could share in the process of making law, and perhaps in the case of the U.S., serve in Congress. Much like using a lawyer to understand the law, using representatives in government as proxies to vote on laws seems to diminish one's role in the legal system, pushing one away from the ideal. To approach the ideal, persons must make, understand, and comply with the law.

²¹ *The Island of Dr. Moreau*, DVD 46:30 (MGM 1977).

²² *Id.* at 58:59.

²³ See *id.* at 42:06 (Dr. Moreau whips a "human" for showing affection towards a natural animal).

believe it is distinct because “you ought not to trespass” is conceptually distinct from any attached sanction such as, “you will be jailed and fined if you do.” This inquiry may not tell us much about what law is, vis-à-vis morality for example, but it will tell us what law is not, namely political or economic in nature.

To be an ideal legal person—part of a legal system as opposed to a political or economic system—persons should comply with the norms without extraneous reasons like the threat of sanction or the coercion or material incentives and disincentives that are often tied to legal norms to ensure compliance. Again, there is a hard and intuitive distinction between the norms we find in law, “you ought not to trespass,” for example, and the sanction that is attached “you will be jailed and fined if you do.” A legal person, *Homo legalis*, would comply with the norm; in contrast, *Homo politicus* and *Homo economicus* would also require the sanction. An ideal legal person does not shoplift (or price gouge, for that matter), not because he or she will be arrested or fined, but because there are legal norms against shoplifting and price gouging. If there is a distinction between law, politics, and economics, or between legal, political, and economic systems, there is also a distinction between the reasons members in each system act or do not act. An ideal legal person acts for legal reasons.²⁴

²⁴ This point is based simply on the distinction between everyday understandings of law, politics, and economics. Arguing descriptively and conceptually, we could make a number of claims. First, conceptually, law differs from politics (or power, including coercion and/or any sense of fealty or obligation to norm-makers/authorities), as well as economics (materiality). This is one way that it differs: Law—as an “ought”—always requires as a condition and implies the interest(s) of at least one other person. Politics and economics do not. Second, law (and legal norms by implication) therefore seems to be more other-regarding than politics and economics. Law is more other-regarding than sanctions involving power and materiality, which refer to the interests of the person to whom they are directed. Third, legal norms differ from the actual interests of other persons in that the norms merely express those interests. Also, the actual interests of other persons are more stimulating to norm-subjects than the norms themselves, which again are expressive or instructive in nature. Fourth, others’ interests are the stimuli primarily operative in the distinct concept of legal norms, a phenomenon we can reasonably label “empathy.”

Arguing normatively, or from an ideal, one would claim that ideal legal persons ought to follow law without sanction. This is what Raz calls “angels.” Joseph Raz, *Practical Reason and Norms* 159 (Hutchinson & Co. Ltd. 1975); see also Grant Lamond, *Coercion and the Nature of Law*, 7 *Leg. Theory* 35, 36, 46–47 (2001) (noting that sufficiently socialized people follow the law irrespective of sanctions). Ideal legal persons ought to follow the law because, in our shared idyllic vision of a perfect legal system, each and every one of those ideal legal persons actually cares about us. In that idyllic vision, we want those persons to pay their taxes, not because they will be fined and jailed if they do not, but because that money benefits us by providing public services we use and need.

With these two arguments in mind, we could then claim that a necessary condition for something to be law—in addition to any of the other necessary conditions that distinguish it from morality—is that it must be more normative due to the empathetic response of the legal norm-subject to others than due to the legal norm-subject’s response to sanctions (any power or economic stimuli).

We can thus unbundle law from politics and economics, look at the norms in isolation (the rule against trespass rather than the sanctions for doing so), and look for reasons persons might comply with the norms themselves. The threat of sanctions—either the coercive power of the stick, or the economic incentives and disincentives of the carrot—are presumably self-regarding reasons. Power-subjects and economic-subjects comply because they regard, with pleasure or displeasure, the consequences for themselves of doing or not doing so. They operate from the fear of coercion, the desire for wealth or the absence of economic deprivation, or concerns over social status and rank where power and economics overlap.²⁵ Alternatively, legal subjects, and thus the ideal legal person, would need no other reason but the law itself—they need “you ought not trespass,” not “you will be jailed and fined if you do.” If sanctions are stripped out of the law, the ideal legal person still complies. Why? Intuitively, if we are thinking about *ideal* legal persons and we are moving away from self-regarding reasons like sticks and carrots, we might want other persons to follow legal norms *because* those norms benefit us—because those other persons care about us.²⁶ That would be ideal, but not impossible; we may

Note that this permits a combination of behavioral causes, but requires that empathy, or whatever other conception we wish to use for that which makes us other-regarding more than self-regarding, be the greatest cause.

²⁵ See e.g. Nestor M. Davidson, *Property and Relative Status*, 107 Mich. L. Rev. 757, 769 (2009) (asserting that property functions in the development of individual identity by allowing control over the material world).

²⁶ These arguments differ from claims others have made regarding sanctionless legal systems for several reasons: (1) these arguments can be purely normative, premised on a shared vision of an ideal legal system; (2) a thick conception of legal personhood is very much focused on why persons actually comply with norms, not the various reasons the legal system gives to comply; and (3) a thick conception of legal personhood, for the specific reasons given above, rejects power and economic stimuli as central to the concept of a legal system. For an alternative view of sanctionless legal systems, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 Yale L.J. 252, 259, 270–72, 277–83 (2011) (discussing the Icelandic institution of outlawry and the Catholic sanction of excommunication in canon law and accepting—at least arguendo—that law must be enforced with power and economic stimuli).

That said, claims resembling mine have been made by theorists following varied traditions of legal theory. See e.g. Hans Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 Am. J. Juris. 71, 73 (1976) (“My central thesis is that neither sanctions, coercion, nor coercive sanctions are necessary features of legal systems.”); Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga. L. Rev. 1, 26 (2008) (“I believe this pervasive emphasis on self-application is definitive of law and that law is therefore sharply distinct from a system of rule that works primarily by manipulating, terrorizing or galvanizing behavior.”). Others who discuss legal systems without sanctions have (as I do below) noted the expressive and educative—or, for them, coordinative—role legal norms would play. See Raz, *supra* n. 24, at 159 (“Even a society of angels may have need for legislative authorities to ensure co-ordination.”); Tony Honoré, *The Dependence of Morality on Law*, 13 Oxford J. Leg. Stud. 1, 3 (1993) (“Even a society of well-disposed angels, uniformly anxious to do right, needs a system of laws in order to know the right thing to do.”).

at times find ourselves following the law for these reasons because we care about the person whose privacy our trespass would invade.²⁷

If we eliminate sanctions—which are extremely self-regarding stimuli—as reasons, one alternative is that the ideal legal person follows the norms themselves because they are stimulated by empathy, the other-regarding feeling of being impelled by others' interests. If we are impelled by others' interests, the law or norm could serve the function of simply informing us of what those interests are.²⁸ Under a norm or law against crossing property lines, the ideal legal person would not trespass because he or she relates to the property owner's desire for privacy, and is informed by the norm that the property line is where the invasion of privacy begins.

As an ideal legal person, you would obey the sixty-five miles-per-hour speed limit even if there were no police, and therefore no chance of being sanctioned via the power of arrest or the economics of a fine. You would do so because, having been educated by the law or norm regarding a speed limit, you would believe it to be the best expression of your shared interest with others in being kept safe and getting places quickly. As an ideal legal person, your desire for others' interests to be kept safe would trump your interest in having and displaying power over others by forcing them out of the way so that you can speed past. Under law, as opposed to politics and economics, you would value and be stimulated by others' interests more than by power and material incentives and disincentives.²⁹ As an ideal legal person, you would value paying taxes and would be more stimulated by others' interest in that money—for example, to subsidize meals for the indigent—than by the things you could buy if you hid that money from the state. You would value paying your employees the legal wage more than the power you would have over them by making full payment conditional upon performance.

This conception of a legal system and ideal legal persons complying with its norms, whose function is primarily to inform, comes close to what is called legal expressivism³⁰—or law as effective because it is an authoritative expression of collective values, rather than a roadmap to avoid sanctions. Such a system is more other-regarding than a self-regarding sanction-based system. This is because its expressivist sub-

²⁷ See *supra* n. 24 (discussing the reasons for which an ideal legal person acts).

²⁸ *Id.* (noting the instructive role of norms).

²⁹ *Id.*

³⁰ See e.g. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363, 1380 (1999–2000) (discussing the concept of “a norm” as essential to legal expressivism); *id.* at 1372–73 (discussing the overlap between scholarship on the expressive nature of law and scholarship on the role of the law in shaping social norms). See also Amy L. Wax, *Expressive Law and Oppressive Norms: A Comment on Richard McAdams's “A Focal Point Theory of Expressive Law”*, 86 Va. L. Rev. 1731, 1733 (2000) (discussing McAdams's game theoretic model and theory of expressive law that depends upon law's ability to create norms and expectations of how to perform). Legal expressivism has, however, apparently been limited to a descriptive theory of normativity rather than used—as it is here—in conjunction with a normative theory of legal personhood.

jects are “watching” for and stimulated by shared values and interests: the norm that the property line is where an invasion of privacy begins for persons in that system, rather than simply watching for the self-regarding reason of the carrot or stick.

With all of this in mind, the ideal of legal personhood and the ideal legal person would be embodied in something like a combination of Joseph Raz’s “angels” (who follow the law without the threat of sanction) and Ronald Dworkin’s “Hercules” (who has mastered the interpretation of law and also participates in making it).³¹ The ideal legal person thus makes law, understands law, and complies with the sanction-free norms of law itself, in the interests of others. A legal system premised on an ideal of legal personhood would demand more of its constituents, as compared to political and economic systems, whose subjects only have to be able to jump at sticks and carrots.

Such ideal legal persons would not need the threat of sanction to avoid inflicting suffering and death upon animals. In fact, other-regarding and especially empathetic persons might find the prospect of causing animals to suffer, or killing them, physically revolting; they are psychologically compelled by the interests of the animal not to suffer.³² They would then be informed by the legal norm that the animal is capable of suffering (and would suffer) in ways that matter, and that the animal might be subject to certain specified actions (such as overdriving) or inactions (deprivation of water), and would suffer as a result. That suffering and death would, for the ideal legal person, negatively outweigh the economic or social value dead animals represent.

Empathy with animals could thus prove part of a litmus test for legal personhood conceptually, apart from the empirical studies showing cruelty to animals being a precursor to antisocial behavior.³³ This is because a particular person’s propensity to reduce animals to pure property—the model of a self-regarding relationship between oneself and another—might show that he or she is more politically or economically minded and is stimulated more by power or material incentives and disincentives than “legally minded” as discussed herein.³⁴ That is, legally minded individuals are stimulated by the interests of others

³¹ Raz, *supra* n. 24, at 159; Dworkin, *supra* n. 19, at 239–75.

³² See e.g. Hawes, *supra* n. 5 (noting that many vegetarians avoid animal products on ethical grounds). This raises a question, which I credit to Kate Fletcher: In this case, are persons acting to avoid their own experience of physical revulsion rather than acting in the animals’ interests? If so, is it then a matter of self-interest? No, because empathy is the blurring of the line between self and other. Empathetic responses will seem self-serving, but they are prompted by, and need as a condition precedent, others’ interests.

³³ Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 *Animal L.* 65, 68 n. 10 (2009) (citing Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders–IV* 94, 97 (4th ed., text rev. 2004) (discussing conduct disorder, a prerequisite to antisocial disorder, as involving cruelty to animals)).

³⁴ *Supra* nn. 24–26 and accompanying text.

and even those entities most “other”—animals. If law demands that we be more *other-regarding* than politics or economics calls for, it might call for our regarding and empathizing with those *most* other—animals.

Once we have grasped this thick conception of legal personhood, it should become clear that in an ideal legal system we could not arbitrarily draw a line between humans and animals. Law, as described herein, requires much of its true subjects, more than simply being human. Its subjects must be able to understand law, communicate the law, make law, and comply with the sanction-free norms of law itself, all in the interests of others. The thought of animals going to court seems ridiculous because they cannot relate to the law. The same problem, however, arises with the many humans who have difficulty understanding, communicating, and making law, and who would not comply with the law, assuming they grasped it, without sanctions. If we use a thick conception of legal personhood to draw the line, rather than the line arbitrarily designated by lawmakers, and depending on how close we wished to get to the ideal of the angelic Hercules, we might exclude many humans along with animals from being considered legal persons. If we exclude animals because they primarily respond to sticks and carrots, we might do the same with some humans.

Based upon the arguments above, most animals (though perhaps not all) would fall so far from the ideal of legal personhood that they would not qualify as legal persons, depending upon where we drew the margin or margins. But for animals it might be worth trading animal legal personhood for a thick conception of human legal personhood, one that excludes many humans who are not particularly other-regarding and not particularly disposed to comply with norms.³⁵

A conception of legal personhood premised on the ideal legal person does not comport with traditional notions of legal personhood today; legal persons are simply designated by law, and need not understand nor be willing to comply with the law in the absence of a

³⁵ Animals would not need to be legal persons to benefit from a system that calls for particularly other-regarding subjects. Being a legal person is not the only alternative to being property, which in essence means being under the exclusive use and control of others. See e.g. *Black's Law Dictionary* 1335–36 (Bryan A. Garner ed., 9th ed., West 2009) (defining property as including the “right to possess, use, and enjoy a determinate thing”). Animals could simply exist outside of the system, enjoying complete autonomy in wilderness. See Carter Dillard, *The Primary Right*, 29 *Pace Env'tl. L. Rev.* 860, 883 (2012) (arguing that because the human right to exit any polity implies the right to exit all polities, the human right of exit requires the restoration and preservation of non-polity—or what we would call the nonhuman world or wilderness). Despite our fixation on domestic animals (whose attachment to us is the exception in the animal kingdom, proving the rule), the ideal relation between humans and animals may be for us to simply, and literally, leave them alone. We can also derive a concept of law and legal systems devoid of sanction (either coercion or material incentives/disincentive), as well as a concept of ideal legal personhood as discussed herein, from the primary right itself. This is because the right implies people who will comply with its correlative duties in non-polity; that is, the absence of any sanctioning authority.

sanctioning system of sticks and carrots. While the ideal legal person is other-regarding, and can understand and comply with the law itself, traditional legal personhood suffices with arbitrarily designated self-regarding constituents (like corporations) that need do none of these things.

III. VULNERABLE SUBJECTS AND THEIR LEGAL SYSTEM

Are there arguments that legal systems call for a particular choice between (1) traditional legal persons designated as such by lawmakers, or (2) persons at least approaching the ideal of legal personhood as described above?³⁶ That is, are there arguments other than the argument that a legal system should have legal, rather than political and economic, subjects?

Let us take, for example, Martha Fineman's view of legal systems as comprised of vulnerable subjects, which reconceptualizes humans from autonomous agents seeking freedom, to a more realistic conception of interdependent agents sharing universal vulnerability and striving to become more resilient.³⁷ Theorists like Fineman and Ani Satz premise their view of a just and functional legal system on the state and its institutions' proclivity to recognize and respond to universal vulnerability.³⁸

But only natural persons physically constitute society, and therefore comprise the construct of the state and its institutions. Only natural persons can physically recognize and respond to vulnerability. This raises the question: Can a society of purely self-regarding persons comprise a state and occupy institutions, which recognize and respond to universal vulnerability, when the persons themselves cannot? How would that occur?

States and state institutions do not create themselves and they are not made up of anything but natural persons.³⁹ If those persons

³⁶ When considering the notion of "persons approaching the ideal of legal personhood," one should not assume that the norms in a system comprised of such persons would look anything like the legal norms we are familiar with today, in the U.S. for example.

³⁷ See Fineman, *supra* n. 13, at 12–13, 20 (describing shared vulnerability and asserting that institutional systems can offer individuals resilience in the face of vulnerability). For similar arguments applied to systems made up of autonomous agents seeking to maximize their valuable autonomy, see Carter Dillard, *Antecedent Law: The Law of People-Making*, 79 Miss. L.J. 873, 878–79 (2010) (identifying a state interest in valuable autonomy and arguing that antecedent law can "enable a state to maximize autonomy by regulating the creation and susceptibility to law . . . of its citizens").

³⁸ See Fineman, *supra* n. 13, at 12–13, 16, 20 (positing that the state must be more responsive to, and responsible for, vulnerability); Satz, *supra* n. 33, at 74 (arguing that legal protections for animals should flow from their moral status as vulnerable subjects).

³⁹ Student Author, *Regulating Eugenics*, 121 Harv. L. Rev. 1578, 1597 (2008); see also *Black's Law Dictionary*, *supra* n. 35, at 1537 (defining "state" as "the political system of a body of people who are politically organized"); *id.* at 1538 (providing that "[a] state or political society is an association of human beings established for the attain-

cannot recognize, and are not disposed to respond to vulnerability, the state and its institutions will not either. A society of psychopaths (the extreme of self-regarding and a disorder often characterized as a lack of empathy),⁴⁰ though they themselves are vulnerable, could never create a state that recognizes and responds to universal vulnerability because psychopaths cannot either perceive such a thing or do not react to it. The constituents of the society, with their capacities and their dispositions, will determine its outcomes, and a constituency that regards others less will be less likely to recognize vulnerability and respond to it.⁴¹

How is this relevant to animals? In one sense, animals are the most vulnerable subjects in a world of shared vulnerability.⁴² In systems of power and materiality (as opposed to systems of norms), animals' relative weakness and coincidental but unfortunate usefulness do not suit them well. Thus, reforming a legal system around a thick conception of legal personhood—around the notion of being more other-regarding than self-regarding—could benefit the animals who are *most* other. Animals would no doubt generally benefit, as a simple consequence, from sharing the world with other-regarding, empathetic persons (able to regard the interests of extremely different others) rather than self-regarding traditional legal persons. Consider two alternative subjects, a wildlife rehabilitator and a hunter. The former, in an other-regarding and perhaps empathetic manner (blurring the line between oneself and other), recognizes and responds to the vulnerability of animals by attempting to make them resilient. The hunter, stimulated by the economic value the animal represents or perhaps even

ment of certain ends by certain means") (quoting John Salmond, *Jurisprudence* 129 (Glanville L. Williams ed., 10th ed. 1947). *Contra id.* at 1258 (defining "artificial person" as "[a]n entity, such as a corporation, created by law and given certain legal rights and duties of a human being").

⁴⁰ Daniel M. Bolt et al., *A Multigroup Item Response Theory Analysis of the Psychopath Checklist-Revised*, 16 *Psychological Assessment* 155, 155 (2004).

⁴¹ As an aside, empirical evidence has begun to show the important role that empathy has played in human evolution—in other words, in improving the resilience of vulnerable human populations. See Marc Bekoff, *The Huffington Post: Huff Post Books Blog, "The Empathic Civilization": Why Animals Deserve Our Empathy Too*, http://www.huffingtonpost.com/marc-bekoff/the-empathic-civilization_b_492316.html (Mar. 10, 2010) (accessed Nov. 17, 2012) (discussing recent books concerning the "importance and prevalence of human empathy"); Frans de Waal, *The Age of Empathy: Nature's Lessons for a Kinder Society* 208–09 (Harmony Bks. 2009) (discussing empathy as an ancient part of humanity that continues to evolve and can be relied upon by society); Frans de Waal, *Primates and Philosophers: How Morality Evolved* 23–24 (Princeton U. Press 2006) (stating that advanced forms of empathy developed evolutionarily and hold survival value). The traditional and simplistic view of humans evolving by dominating the animals and environment around them may not present a completely accurate picture. Instead, someone approaching the ideal legal person—more disposed to regard the interests of others rather than simply oppress and commodify them—may be more helpful to our species. Consider persons that voluntarily reduce their carbon footprint: They contribute less to any risks posed to humanity by climate change than those who do not.

⁴² See Satz, *supra* n. 33, at 80 (suggesting that domestic nonhuman animals' permanent dependency on humans makes them the most vulnerable of all sentient beings).

the sense of power derived from the hunt, exploits the animal's vulnerability for the hunter's self-regarding interests. Animals would likely prefer the former.

Thus, we need not reform the legal system around animal interests;⁴³ animals could benefit simply from reforming the system around an idealized conception of law and legal personhood. In this way it would not be a matter of whether animals are or should be legal persons, but how humans will actually treat them.

Animals aside, any system of interdependent human agents sharing universal vulnerability and striving to become more resilient seems to call for an ideal legal system as I have described it, more than it calls for our traditional legal system. It also calls for persons approaching the ideal legal person rather than whomever the state arbitrarily designates as such.

IV. CONSTITUTIONAL PRINCIPLES FOR VULNERABLE SUBJECT SYSTEMS

How would we shift a traditional legal system towards becoming an ideal legal system, comprised of persons approaching the ideal legal person? While traditional notions of constitutional rules refer to the basic organizing principles of a given society, usually embodied in a single legal instrument like a constitution, we can also recognize rules that actually determine which persons "constitute" a given society. Though it has historically not been differentiated from other forms of law and given its own form, and though legal theorists usually make the mistake of assuming the state cannot or should not influence its future constituency,⁴⁴ we might call this area of law "antecedent law."⁴⁵ This is the law that determines the physical constitution of a given society, as well as whom is granted the particular degrees of legal personhood therein.⁴⁶ The Supreme Court has, historically, identi-

⁴³ To the extent animal protectionism focuses on the shared capacity of humans and animals to suffer, and the morality that it involves, it might lose sight of political questions—like the nature of the social contract—which demand other capacities in humans, capacities that would benefit animals.

⁴⁴ See *e.g.* Student Author, *supra* n. 39, at 1597 ("Liberalism assumes that the citizens exist prior to the state, whether in fact or by hypothesis, and that they create the state to advance their own interests.").

⁴⁵ See *generally* Dillard, *supra* n. 35, at 877–88 ("This 'antecedent law' is simply a body, or form of law. It is law that meets the necessary and sufficient condition of determining the entry of new persons into the polity, and through that, the susceptibility of those persons to law itself.").

⁴⁶ For various reasons not discussed here, antecedent law is distinct from law that takes persons out of society, through imprisonment, banishment, probation, the death penalty, legalized genocide, or otherwise. See *e.g.* Hathaway & Shapiro, *supra* n. 26, at 258–59 (discussing "outcasting" as an enforcement mechanism).

fied a significant—and most likely compelling—state interest in that which determines the characteristics of our future citizenry.⁴⁷

There are, generally, three ways that persons “enter” society, which should more accurately be called “the legality”: through immigration, procreation, and the phase-in periods we generally call emancipation and naturalization. This is how persons physically, and in terms of establishing legal personhood, enter the legality.

A full explanation of “antecedent law” is well beyond the scope of this Introduction, but it can be defined simply (much the way we can simply define contract law or property law) as law that: “[W]hether by proscription, permission (such as a broad constitutional right to procreate), obligation, or omission, determines the creation or presence of people in a given legal system, and through the act of making them present, the attributes or qualities (or civic qualities) they need to be susceptible to law.”⁴⁸

Note that this definition tries to capture not just law as it effectively regulates entry, but also law as it effectively regulates the formation of those attributes or qualities that make the entrant a legal person, as described herein—tying physical entry to legal personhood. Hence, this law is “constitutional” in the sense that it regards the persons that constitute a given legality, but also constitutional in the sense that those persons are considered legal subjects of the constitution (which should be seen as constituting a legality of legal subjects, as opposed to a polity of political subjects or an economy of economic subjects).⁴⁹ That distinction is important, to the extent we can successfully unbundle law from politics and economics. Whereas a polity or economy might have limited interest in the literacy of its subjects, based on maximizing the Gross Domestic Product (GDP) for example, it is hard to envision a real legality where the subjects or *constituents* cannot read and understand their own constitution.

For now, consider the obvious examples of laws that regulate procreation, immigration, and emancipation. These include, for example, laws regulating abortion, contraception, prenatal health care, asylum, education, parental liability, residency, and voting age. These areas of the law, and many more, determine who enters or constitutes a legality, and the various bundles of legal rights and duties they come to

⁴⁷ See *Meyer v. Neb.*, 262 U.S. 390, 401 (1923) (“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear.”).

⁴⁸ Dillard, *supra* n. 35, at 882.

⁴⁹ This form of “constitutionalism” starts from the premise that entry into the social contract (the first law) is, inherently, a move away from the rule of power and economics towards the more other-regarding rule of norms, or law. This implies that members to the contract ought to comply with the norms themselves without the need for coercion, and that each has a highly compelling interest in who and how many norm-compliant members join the contract. See Dillard, *supra* n. 35, at 884–85 (“The test for such a system, one comprised of persons possessing this highest degree of civic quality, would literally be compliance with the legal norms without any associated coercive sanctions, or economic costs or benefits.”).

have. If lawyers were locksmiths, traditional areas of law would involve the study of creating the keys (the rules themselves) while the sort of “antecedent” constitutional law described above would involve the study of the rules that create the locks (the ruled).⁵⁰ In contrast, criminal law, and incarceration in particular, could be considered the opposite—removing people from society for the inability to conform behavior to legal norms.

Given that, to what extent should being, or being likely to become, someone approaching the ideal of a legal person be the criterion for entry into the legality? Should a legality continue or “reconstitute” itself as such? Should a “constitutional” principle be that being, or being likely to become, someone approaching the ideal of a legal person be a condition for admission?⁵¹ Does a system made up of vulnerable subjects seeking to become resilient specifically call for this?

To answer these questions, consider them from the perspective of being a party to the social contract: fundamentally, regardless of how you consider it, it is a grand legal instrument comprised of norms (terms) we all become subject to. Regulating who becomes a party to that contract seems just as important as its terms. The terms are of little value if the other parties cannot read, understand, and apply them to their behavior, or will not comply with them absent coercion. Furthermore, failure to comply with the terms may ultimately lead to the parties’ exclusion from the contract (incarceration). Would you sign a contract with someone whom you knew could not grasp its terms and was likely to abscond with the communal funds if they could? The contract itself, and how members relate to the contract—rather than its particular terms—can act as the crucial criteria for choosing whom we associate with. Can members read or hear it? Can they understand it? Can they amend it? Can they comply with it, *per se*, without extrane-

⁵⁰ There is an obvious connection between family law’s role in “constituting” the legality, and familial empathy, but it will not be discussed here. Suffice it to say that there are arguments based on fairness and reciprocity against using the family as a pretext—as a faux state or private realm where we enjoy the reign of autonomy and empathy regardless of whether we contribute to their reign, or absence, in the real state. The marriage contract with your spouse, your loving relations with your children, and the conditions that make it desirable to have future children are only possible because of the peace, order, and structure of human relations established by the social contract.

⁵¹ Consider this from the perspective of public-interest attorneys mandated, by their civil society organizations, to use the law to prevent as much child or animal (vulnerable subject) cruelty as possible. Logically, would they be able to focus on individual cases without concerning themselves with which, and how many, persons the law applies to generally? Would they be able to do so without concerning themselves with whether and to what degree those persons are susceptible to the law’s influence? Focusing exclusively on individual cases seems to miss the forest for the trees, and presumes much about the functionality of a system that ought not be presumed. Imagine refereeing a soccer match where an untold number of new players are streaming onto the field. They do not have a concept of the rules and would not be disposed to follow them even if they did. If your job were to simply ensure compliance with the rules, how would you spend your time?

ous reasons? The ideal contracting party, like the ideal legal person, calls for particular capacities that can then be used to craft the criteria for entry. While Rawls focused on what he called the principles of justice, rather than a thick conception of legal personhood,⁵² he must have meant something similar when he argued that moral personhood be limited to those who “are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree.”⁵³

To the extent the vulnerable subject system is premised on the need for persons that actually recognize and respond to universal vulnerability, it calls for constitutional principles that admit such persons. Again, states and state institutions do not create themselves and they are not made up of anything but persons.⁵⁴ If those persons cannot recognize and are not disposed to respond to vulnerability, the state and its institutions cannot recognize and respond to vulnerability either.

How do such constitutional principles work in practice? When states decide to give a tax credit or charge a fee for childbearing, legalize or ban abortion, promote or prevent certain forms of immigration, provide or withhold funding for higher education, or do or do not do a myriad of other things, they make choices that can determine the presence of, number of,⁵⁵ and proximity to, the ideal of legal personhood for persons within their borders—and for generations to come. Using the sorts of constitutional principles and a thick conception of legal personhood described herein means establishing thresholds for the various demarcations of legal personhood. It means determining the conditions that tend to “create” such minimal legal persons by examining persons alive today, and the various influences that have worked upon them, and using expressivist methods to eliminate those conditions that do not create persons above the thresholds.⁵⁶

⁵² John Rawls, *A Theory of Justice* § 11, 52–55 (rev. ed., Belknap Press of Harvard U. Press 1999).

⁵³ *Id.* at 442.

⁵⁴ See *supra* n. 38 (referencing the scholarship of Fineman and Satz).

⁵⁵ All other things being equal, there may be an inverse relationship between the size of the population and the ability of society’s most vulnerable persons to organize and orchestrate change. A full discussion of this topic is beyond the limited scope of this Introduction.

⁵⁶ Persons in existing legalities above the thresholds, as well as anyone designated by existing positive law as legal persons or those otherwise emancipated under that law, would be classified as legal persons. The latter would be grouped in with the former because the sort of constitutional principles discussed here involve the entry of persons into the polity, not the deconstitutionalizing removal of existing persons. See *e.g.* Hathaway & Shapiro, *supra* n. 26 (discussing the Icelandic institution of outlawry and the Catholic sanction of excommunication). All others, which would presumably be limited to most—if not all—nonhuman animals, would be classified as non-legal persons. At some point in the future, the legality would then exclude, through expressivist methods, non-legal persons from the legality. This raises the questions of whether, in practice, ideal legalities could ever exist in a world of polities/economies, whether the latter

Again, a detailed analysis of how this “antecedent” body of constitutional principles works is beyond the scope of this Introduction. Suffice it to say that the law can harness, and be designed around, developments in determinism and the social and natural sciences⁵⁷ that predict how rearing influences—in sufficient part to justify the state’s compelling interest—the people we become. The very process of how we are moved from our most vulnerable position as infants to our most resilient as adults may well determine whether or not we are disposed to making others resilient, and whether we will become more or less other-regarding and empathetic.

One could argue that “constitutional law,” as discussed here, is simply an ad hoc creation covertly designed to benefit animals, or that relating it to animals as “others” feels arbitrary. However, it makes sense to explore these questions in the context of animal law and human-animal relations for at least four reasons. First, unlike areas of law that regulate human interaction, animal law makes us step back and consider our species as a whole—what makes us human as distinct from something else. It is looking from the outside in. Second, to the extent constitutional law is analogized to eugenics, or nativism, or other historical examples of exclusion, these occurred in the context of groups of humans dominating each other.⁵⁸ By considering the questions vis-à-vis animals, we can exit that paradigm, and consider our species as a whole. Third, those involved in normative animal law theory are familiar with shifting entrenched paradigms, like humans’ ownership of animals; perhaps they are open-minded enough to rethink how society constitutes itself. To many others with more limited worldviews defined by convention, this form of constitutional law will seem like a reduction. Fourth, because animals are generally not capable of activating the sanctioning aspect of a legal system, by reporting their abusers to law enforcement for example, it makes sense to think about norms that will protect them in the absence of sanctions.

Many arguments exist against using constitutional law as it is described here. Some will argue that this approach interferes with familial privacy. But constitutional law in the sense described here rejects the notion of a private family realm. Families produce persons that become parties to the social contract (not a very private scenario); therefore, all parties to that contract have a compelling interest in families. Others will argue that deterministic predictions are often inaccurate. This misunderstands the relationship between outcomes and law. If the state has a compelling interest in the nature of its citizenry,

would simply overrun the former, and whether constitutional law as described herein must thus be practiced at an international level.

⁵⁷ See e.g. Anders Kaye, *Powerful Particulars: The Real Reason the Behavioral Sciences Threaten Criminal Responsibility*, 37 Fla. St. U. L. Rev. 539, 540–42 (2010) (discussing the ramifications of human behavioral science discoveries on criminal law).

⁵⁸ See e.g. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 304–05 (1986) (addressing constitutional law and nativism); Student Author, *supra* n. 39, at 1580 (addressing constitutional law and eugenics).

it need only further that interest, not further it perfectly. In light of the state's compelling interest in the introduction of new members, obtaining a populace closer to the ideal legal person is enough of a reason for the state to act, even if it cannot get all the way there. Another response to the idea of using this form of constitutional law is that it is *a priori* wrong to use coercion to influence procreation, the formation of families, reproductive rights, etcetera. This critique misses the mark. Because a thick conception of legal personhood may be integral to "antecedent law," perhaps it must operate exclusively through expressivism—that is, through the expression of the communal value of, and others' interests in, the maintenance of only those bearing, rearing, and immigrating conditions that will produce persons approaching the ideal legal person. One can also argue that pointing out the importance of choosing whom we associate with, in terms of membership in the social contract, makes no sense. This is due to the fact that, regardless of who is in the social contract, we can always choose not to associate with certain persons, not admit them, or shut them out from our exclusive contracts, organizations, institutions, etcetera. Hence, the general makeup of the social contract and our legal system, of who is granted legal personhood, is irrelevant. But the argument goes better the other way. Who cares about being able to exclude others from our families, business partnerships, social clubs, and gated communities when those persons hold the power, such as the voting and otherwise participating members of our legal system? They hold the power to change the rules that govern, or to even eliminate, those lesser organizations, to change the only rules that permit violence to be used against us, to send us to war, to institute the death penalty, to seize our property, and to amend our constitution. In other words, granting other persons particular powers over our lives while denying them lesser included powers is *prima facie* illogical; justifying it takes more than saying we are free to exclude other members of our legality when we wish. Yes, we are familiar and comfortable with excluding others from every organization we might be a part of—with the exception of the one that matters most—our legal system.

Ironically, despite these arguments, constitutional law of the sort discussed here has the potential to settle great controversies. Liberals often object to communitarians' lack of appreciation for autonomy and consent. Communitarians object to liberals atomizing or individuating members of society from one another. A robust constitutional law would represent the act of our consenting to one another (to new members of the contract), which might in turn bring us closer together and make us less strange to one another.

Regardless, constitutional law that uses a thick conception of legal personhood as a standard for the admission of new members threatens the interests of various factions in society today, including lawyers that profit from standing between the legal system and persons that do not understand it—lawyers that literally stand between persons and

their just obligations to one another.⁵⁹ A thick conception contrasts with the comparatively thin conception of legal personhood that *Yoder* accepts, that of the “sturdy Yeoman” not requiring further education.⁶⁰ Moreover, a thick conception threatens those factions that simply call for mass reproduction to give the state as many workers, consumers, and soldiers as possible.⁶¹ Such an “open call” for legal personhood invites an influx into the world and our society of as many self-interested, violent, and minimally-educated persons as possible—persons that are intended to serve as cheap labor, mass consumers, and military personnel—promoting and protecting the economic interests of the factions that called for their creation.⁶² In other words, constitutional law of the sort described herein threatens factions or interests that need and benefit from political and economic persons—the more the better. Socially liberal persons that view themselves as the protectors of civil and human rights, and who oppose state intervention into the family realm, may find themselves serving as pawns for these factions.

Regardless of the opposing arguments, this is clear: The introduction of new humans into the world matters to its nonhuman inhabitants. It matters both in terms of how many new humans come into the world, and who those new humans are: In particular, their propensity to eat, wear, experiment upon, hunt, torture, and occupy the habitats of nonhumans. To the extent those humans are not aware of, cannot understand, or do not comply with the norms that purport to control how they treat animals, the introduction of new humans into the

⁵⁹ A critique of a legal system that relies on lawyers—on a special caste of persons standing between everyone else and their most important obligations to one another—is beyond the scope of this Introduction. But intuitively, lawyers seem to attenuate the average person from their obligations to one another.

⁶⁰ See *supra* n. 18 and accompanying text (discussing the Supreme Court decision allowing Amish children to forgo compulsory education beyond the eighth grade and the Court’s rationale that this did not negatively affect the children or the general welfare of society).

⁶¹ See *e.g.* Dillard, *supra* n. 37, at 923–28 (discussing a type of substantive antecedent law, “prenatal nationalism,” which emphasizes the military and economic strength of a nation over the development of ideal legal persons).

⁶² One commentator has argued that:

A nation’s GDP is literally the sum of its labor force times average output per worker. Thus a decline in the number of workers implies a decline in an economy’s growth potential.

Current population trends are likely to have another major impact: they will make military actions increasingly difficult for most nations. . . . Given their few sons, it is hardly surprising that Russian mothers for the first time in the nation’s history organized an antiwar movement, and that Soviet society decided that its casualties in Afghanistan were unacceptable.

Education should be a lifetime pursuit, rather than crammed into one’s prime reproductive years.

Phillip Longman, *The Global Baby Bust*, 83 *For. Affairs* 64, 69–70, 78 (May/June 2004).

world—and who those humans are and will become—is what matters most of all. Creating a system of rules irrespective of the creation and nature of the ruled does little good.

V. CONCLUSION

To some extent, law distinguished from the sanctions we often conflate it with tells us something about who we and our legality—which is really just a collection of individuals—ought to be. If you want to consider animals' position in the legal system, you might consider the distinction between the traditional form of law (rules that regulate extant human behavior) and constitutional or “antecedent” rules that, by action or omission, admit persons into the legal system and which are, in that sense, true constitutional rules. The latter are potentially of more consequence to animals than the former. Since constitutional rules, in this sense, cannot exist without favoring the creation of one sort of person over another, they beg the question of what sort of persons legal systems ought to admit. The distinction between traditional legal systems and ideal legal systems—the latter premised on a thick conception of legal personhood—answers this question. Logically, the consequences of a legal system ought to be legal persons, or persons at least approaching the ideal of a legal person. This goes doubly for systems of vulnerable subjects—especially those including animals—which call for persons that actually recognize and respond to the extreme vulnerability of those most other.

