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# Of Persons and the Criminal Law: (Second Tier) Personhood as a Prerequisite for Victimhood

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## Michael Vick's Dogs and Beyond

We recently witnessed one of the most (in)famous trials of the present decade—the case of Michael Vick. In 2007, federal authorities publicly unveiled the gruesome details of the football superstar's involvement in dog-fighting. As it turns out, Vick had a penchant for gambling and an infatuation for breeding pit bulls for animal fighting competitions. This infelicitous combination led him to establish a dog-fighting ring in Smithfield, Virginia. The operation, which came to be known as the "Bad Newz Kennels" business venture, was an intricate one. The pit bulls were bred to fight, trained to kill, and slaughtered if they performed poorly during test fighting sessions.[1] Faced with an overwhelming amount of evidence against him and with the prospect of having two of his "Bad Newz Kennels" associates incriminate him, Vick eventually pled guilty in Federal Court to one count of conspiracy to sponsoring dogs in an animal fighting venture.[2]

What is telling about the Vick case, and of particular interest for the purposes of this article, is the peculiar treatment that was afforded to the pit bulls that the police seized from the Smithfield property. Whereas pit bulls seized from unlawful fighting operations are usually euthanized after they are in the custody of the government, Vick's dogs were given a second

* Associate Professor of Law, Pace Law School. I am indebted to David Cassuto for his valuable suggestions and comments.

1. Summary of the Facts, United States v. Michael Vick, Criminal No. 3:07CR274 (E.D. Va. Aug. 24, 2007), *available at* http://sports.espn.go.com/photo/2007/0824/vicksummary.pdf.

2. Vick's conduct constituted a criminal violation of 18 U.S.C. § 371 (1948). *See* Plea Agreement, United States v. Michael Vick, Criminal No. 3:07CR274, ¶ 2 (E.D. Va. Aug. 24, 2007), *available at* http://sports.espn.go.com/photo/2007/0824/vickplea.pdf.

chance at life and were sent to animal rescue organizations in order to be cared for and rehabilitated.[3] Furthermore, the NFL star agreed in the plea deal to "make restitution for the full amount of the costs associated with the disposition of all dogs" that were involved in his illegal operation.[4] It was specified that these expenses were to encompass, but were not limited to, "all costs associated with the care of the dogs involved in that case, including, if necessary, the long-term care and/or the humane euthanasia of some or all of those animals."[5] Vick ended up paying close to one million dollars to fund the various entities that have assumed custody of the pit bulls.[6] According to the agreement, the authority to order such payments stems from 18 U.S.C. § 3663, which allows for the issuance of orders of restitution to victims or other persons harmed by the commission of the offense.[7]

The trial of Michael Vick illustrates how our current criminal laws increasingly treat nonhuman creatures as "victims," with all of the consequences that this entails, including the possibility to order that restitution be paid to the animals. In light of these considerations, it is fair to say that *from a purely descriptive point of view*, nonhuman creatures can qualify for victimhood. This does not mean, however, that this conclusion is normatively appealing. Some have argued that this approach is profoundly misguided, given that the criminal law should only aim to safeguard the rights of humans.[8]

In this article it will be contended that this position is flawed because it is grounded on an artificial definition of personhood that mistakenly makes humanhood the constitutive feature of personhood. Although there may be good reasons for considering that an entity's humanhood should entitle her to more protection from the legal system than nonhuman beings, it does not follow that the lack of such a status should preclude

3. Juliet Macur, *Given Reprieve, N.F.L. Star's Dogs Find Kindness*, N.Y. TIMES, Feb. 2, 2008, at A1, *available at* 2008 WLNR 1991314.

4. Plea Agreement, *supra* note 2, at ¶ 8.

5. *Id.*

6. ESPN News Services, *Jailed Quarterback to Pay for Care of Seized Pit Bulls*, Nov. 28, 2007, http://sports.espn.go.com/nfl/news/story?id=3133102.

7. Plea Agreement, *supra* note 2, at ¶ 8. *See also* 18 U.S.C. § 3663 (2000).

8. *See* MARKUS DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (2002).

access to the protection of the criminal law. The argument will proceed in four parts.

In Part I, I will attempt to define the contours of personhood. This is a particularly difficult task, for the meaning of this concept is notoriously ambiguous. Because of the polysemic nature of the term, its discussion frequently invites confusion, particularly in legal circles. It is not always clear whether it is meant to be used as an alternative to "humanhood,"[9] as a concept that treats humanhood as a necessary but insufficient condition for personhood,[10] or as a legal term that may encompass beings or entities that are not members of the human race.[11]

The problem is compounded by the fact that courts and commentators have frequently appealed to artificial definitions of personhood in order to answer complex normative questions about the rights and obligations of certain creatures. Thus, it has often been stated that whether an entity has constitutional rights depends on whether it can be defined as a "person" according to conventional and historical applications of the term.[12] This is a mistake, for one should not tackle such fundamental questions by appealing to terminological sleights of hand. Ultimately, a being should be considered a person if there are good normative reasons for recognizing that he should be a bearer of rights and obligations, not the other way around. Therefore, as long as many of the statutory and constitutional provisions that confer rights and impose obligations are couched in the language of personhood, we should elaborate conceptions of per-

9. Many penal codes define "person" in a way that is synonymous with "human being." *See, e.g.*, N.Y. PENAL LAW § 125.05(1) (McKinney 2004).

10. *See* DUBBER, *supra* note 8, at 259 ("All persons are humans, but not all humans are persons.").

11. This appears to be the constitutional meaning of "person," for the Supreme Court treats corporations as "persons" in the constitutional sense although they are certainly not human beings. *See, e.g.*, Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906).

12. See Roe v. Wade, 410 U.S. 113, 156-62 (1973), for the Supreme Court's analysis of the historical use of the term "person" in order to conclude that fetuses should not be afforded personhood status. The lack of any substantive arguments that might support the Court's historically based definition of fetuses as non-persons is particularly surprising.

sonhood by appealing to normative rather than definitional considerations.[13]

In Part II, I will take issue with what will be called the "all or nothing" theory of personhood. According to this theory, a being is either a full-fledged person or not a person at all. This conception of personhood is normatively unappealing, for it is plausible, and sometimes desirable, to talk about "partial personhood" alongside with "full-blown personhood." This is what I call the "tiered" theory of personhood, which holds that "personhood" is a concept that admits of degrees and shades of gray. According to this theory, beings should be considered "full-fledged" persons if they should be the bearers of *all* of the rights and obligations that our legal system has to offer. Contrarily, they should be considered "partial" persons if they should only have the privilege to enjoy *some* of the rights that our constitutional and statutory provisions confer to persons. The tiered theory of personhood is normatively appealing, for we sometimes have good reasons to legally discriminate between beings on the basis of their different constitutive features.

In Part III, I will propose four different "tiers" or "levels" of personhood. The first tier of personhood is reserved for born humans and animals that are capable of rationality and self-consciousness, such as chimpanzees, orangutans and gorillas. The second tier is comprised of sentient fetuses and nonhuman animals not falling within the scope of the first tier. The third tier encompasses living non-sentient beings, such as fetuses that do not have the capacity to feel, embryos and trees and plants. Finally, the fourth tier of personhood includes all non-living entities that should be afforded rights in order to further human interests. The chief example of a fourth tier person is a corporation.

13. Another option might be abandoning the language of personhood altogether. As Professor David Cassuto has recently argued, the term "person" carries with it so much baggage and is so inherently vague that it might be better to discontinue its use. David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 LAW & CONTEMP. PROBS. 59, 82-85 (2007). While I am sympathetic to this view, I believe that as long as most constitutional and statutory provisions continue to afford rights to "persons," we unfortunately cannot avoid making reference to personhood as a vehicle for establishing the legal rights of different beings.

In Part IV, I will argue that the fact that certain beings are not born humans should not be an impediment to treating them as victims *and* as (partial) persons. Since sentient animals and fetuses have the capacity to feel pain, they should have a right to be kept free from the unjustifiable infliction of suffering. If so, it would be sensible to attempt to safeguard such rights by making use of the criminal sanction. Therefore, I will conclude that victimhood depends on *second tier* personhood rather than humanhood.

## I. Distinguishing Humanhood from Personhood: Of Definitional Stops and Inherently Hazy Concepts

### A. *Colloquial vs. Legal Meanings of Humanhood and Personhood*

Many people colloquially use the terms "human" and "person" interchangeably. Although at an informal conversational level the conflation of these term is not particularly problematic, things change dramatically when we move into the legal arena. Several of the most sacred provisions of our Bill of Rights afford rights to "persons." Thus, the Fifth Amendment states that "no *person*" shall be tried twice for the same offense, "compelled . . . to be a witness against himself" or "deprived of life, liberty or property without due process of law."[14] Similarly, the Fourteenth Amendment asserts that no *"person"* shall be denied "the equal protection of the laws."[15]

At first glance, one might be tempted to conclude that *personhood* means in the constitutional context the same thing that it means at the colloquial level: *humanhood*. This, of course, as the landmark Supreme Court decision of *County of Santa Clara v. Southern Pacific Railroad Company*[16] demonstrates, is far from clear. As far as the highest court of the land is concerned, the term "person" is not synonymous with "human," for non-corporeal entities such as corporations are considered persons for the purposes of most, if not all, of consti-

14. U.S. CONST. amend. V.

15. U.S. CONST. amend. XIV.

16. 118 U.S. 394 (1886).

tutional provisions.[17] Some have argued that such an interpretation is mistaken and that personhood should be equated with humanhood.[18] Others have claimed that the law has not gone far enough and thus propose that nonhuman animals also be considered persons under the law in much the same way as humans are.[19]

Regardless of what one thinks about these questions, appealing to an *a priori* definition of "personhood" will not help us much when answering the question with regards to whether nonhuman entities should be considered persons for legal purposes. The reason for this is that there is simply no conventional agreement about the specific set of stable attributes that a given entity must exhibit in order for it to qualify as a person. Furthermore, there is widespread disagreement amongst philosophers, scientists, theologians and lawyers regarding the criteria that should be taken into account to determine whether a being counts as a person or not. Therefore, personhood is an imprecise criterial concept. Criterial concepts are imprecise when, because of the very nature of the concept, it is impossible for us to agree on the necessary and sufficient conditions that set forth the criteria for the correct application and use of the term or phrase.[20]

The inherently hazy nature of personhood is particularly apparent when one examines the widely divergent definitions of the term that have heen advanced by scholars from different fields. The philosopher Peter Singer, for example, has argued that there is no necessary connection between personhood and humanhood. Thus, in his much celebrated book PRACTICAL ETHICS, he stated that:

> This use of 'person' is itself, unfortunately, liable to mislead, since 'person' is often used as if it meant the same as 'human being.' Yet the terms are not equivalent; there could be a person who is not a member of our species. There could also be members of our species who are not persons. The word 'person' has its ori-

17. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

18. *See id.*

19. *See* Gary Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 ANIMAL L. REV. 75, 83-87 (1997).

20. RONALD DWORKIN, JUSTICE IN ROBES 9 (2006).

> gin in the Latin term for a mask worn by an actor in classical drama. By putting on masks the actors signified that they were acting a role. Subsequently 'person' came to mean one who plays a role in life, one who is an agent. According to the *Oxford Dictionary*, one of the current meanings of the term is 'a self conscious rational being.' This sense has impeccable philosophical precedents .... I propose to use 'person,' in the sense of a rational and self-conscious being, to capture those elements of the popular sense of 'human being' that are not covered by 'members of the species 'Homo sapiens.'[21]

Many, of course, disagree with Singer's definition of "person" as a "self-conscious rational being," for it leads to excluding many infants and some humans with brain damage from the definition of "person." This is particularly the case with theologians, who, for the most part, consider that humanhood is a necessary and sufficient condition for personhood.[22]

Courts and legal scholars have also put forth diverse definitions of personhood. Some courts, for example, have stated that the meaning of (legal) personhood should not be ascertained by appealing to biological data. Thus, the New York Court of Appeals once asserted that, as far as personhood is concerned, "[i]t is not true, however, that the legal order necessarily corresponds to the natural order."[23] Contrarily, some scholars, such as Markus Dubber, have contended that "[a]ll persons are humans but not all humans are persons."[24] For him, a being should only be considered a person if, in addition to being human, he possesses capacity for autonomy.[25]

These discrepancies in the way in which different people define personhood reveal that there is no widely agreed upon set of criteria that must be satisfied in order for a being to qualify as a person. Furthermore, it shows that there is disagreement with regards to whether *humanhood* should be considered a prerequisite for *personhood*. As a result, it appears that there

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21. PETER SINGER, PRACTICAL ETHICS 87 (2d ed. 1993).

22. *See* Peter Kreeft, *Human Personhood Begins at Conception*, 4 J. BIBLICAL ETHICS MED. 9 (1997), *available at* http://www.catboliceducation.org/articles/abortion/ab0004.html.

23. Byrn v. New York City Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972).

24. DUBBER, *supra* note 8, at 259.

25. *Id.*

is no necessary *conceptual* connection between the terms "human" and "person."

In light of the inherently vague nature of the concept, the question about who should count as a person is an open one. Therefore, scholars are free to argue, as they frequently have, that certain nonhuman entities should be treated as persons under the law. More importantly, since personhood is an imprecise criterial concept, the soundness of their arguments should be measured by their normative appeal rather than by their compatibility with an artificial definition of "person." Ultimately, as Peter Singer has persuasively argued, questions about personhood and the rights that should be conferred to different entities raise "substantive issue[s], the answer[s] to which cannot depend on a stipulation about how we shall use words."[26]

### B. *Personhood and Rights: Beyond Humanhood*

Since there is no clear-cut set of conventionally agreed upon attributes that one can appeal to in order to determine whether a being should be considered a "person" under the law, it follows that such questions are *moral* or *evaluative* questions, not conceptual or definitional ones. Thus, the determinative inquiry in such cases should be whether the being at issue *should* have rights rather than whether he should be considered a member of the human species, as philosopher Roslyn Weiss has convincingly argued:

> Considerations regarding the definition and application of the term 'human' are not essential in themselves, but as a means to a further end; the *end* is plainly the ascription of rights . . . . Once the appeal to the definition of humanity is revealed as a concern about rights, the following natural, logical, inescapable question arises: If it is rights we are after, why seek definitions of humanity? Unless there is some *necessary* connection between being *Homo Sapiens* and having rights, it is far more productive . . . to tackle directly *this* question: What sort of thing has rights? This is a *moral* question—not a question of biological fact—and hence far more appropriate in this context. For . . . differences in species are not in themselves morally relevant differences, and since what we seek *is* a morally relevant difference, our distinc-

26. SINGER, *supra* note 21, at 87.

> tion must be drawn not between "humans" and "nonhumans" but rather between entities that have rights and entities that do not, between "persons" and "nonpersons."[27]

The interrelationship between rights and personhood reveals that, as far as the realms of legal and moral theory are concerned, the term "person" is a purely normative concept that is free of all biological or descriptive content.[28] Thus, for all legal purposes, saying that someone is a "person" is equivalent to claiming that such a being has rights under the law.[29] This conception, however, does not entail, as the case of corporations demonstrates, that only human beings qualify for personhood. One may, of course, advance arguments against the proposition that nonhuman entities such as corporations should be considered legal persons. Nevertheless, the soundness of such arguments is to be gauged by their normative appeal rather than by their ability to capture the conceptual or definitional essence of "personhood."

## II. Towards a Tiered Theory of Personhood

### A. *The "All or Nothing" Theory of Personhood*

Most philosophers, courts, legislatures and legal scholars appear to believe that a being is either a full-blown person or not a person at all. This is what I call the "all or nothing" theory of personhood. According to this theory, an entity is considered a person only if he or she passes a particular litmus test. Any being that fails to pass this test would automatically be considered a non-person.

Take, for example, Markus Dubber's conception of personhood. For him, an entity is a person only if he is a human being and is capable of autonomy. Thus, we are presented with a stark "all-or-nothing" approach to humans that are not capable of autonomy: they are either full-fledged persons or not persons at all. Since Dubber contemplates no intermediate options, and given that he believes that the capacity for autonomy is an essential component of personhood, he is forced to

27. Roslyn Weiss, *The Perils of Personhood*, 89 ETHICS 66, 67-68 (1978).

28. Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37, 40 (1972).

29. *Id.*

conclude that such humans should be excluded from the status of "persons."[30] The same logic leads him to reject affording personhood status to corporations and nonhuman animals.[31]

State courts often adopt an all-or-nothing approach to personhood when addressing the problem of whether fetuses should be considered persons in the constitutional sense. Hence, most jurisdictions have concluded that fetuses should only be considered persons postnatally. Prior to birth, however, they are typically not considered persons at all. This, of course, was the same approach adopted by the Supreme Court in *Roe v. Wade*.[32] The dichotomous nature of this way of conceiving the personhood of fetuses is apparent. Given that no alternative categories of personhood are envisioned by such precedents, fetuses must either be considered full-fledged persons or total non-persons.

### B. *From An "All or Nothing" Theory of Personhood to a "Tiered" Theory of Personhood*

This "all-or-nothing" approach to the personhood of fetuses might explain why the Supreme Court balked at concluding that fetuses were "persons" protected under the Fourteenth Amendment. Since the Supreme Court believed that the consequences of considering the unborn to be full-blown persons for the purpose of the Fourteenth Amendment would be unpalatable, it concluded that it would be prudent to treat them as non-persons. In *Roe*, the Court framed the problem in the following manner:

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of

30. DUBBER, *supra* note 8, at 259.

31. *Id.* at 218-19 (discussing the non-personhood status of corporations); *id.* at 258 (discussing his view of animals as non-persons).

32. 410 U.S. 113 (1973).

> line with the Amendment's command? There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out . . . that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?[33]

The Court's analysis would be unobjectionable if the only option that it had available was the "all-or-nothing" determination of considering that the fetus was either a full-blown person or a total non-person. Undoubtedly, if a fetus were considered a full-fledged person, his killing would need to be punished as murder, not as an abortion, for punishing the killing of some full-blown persons less than other full-fledged persons would certainly violate the equal protection of the laws.

What the Court failed to consider, however, was that adopting the all-or-nothing conception of personhood was not their only available option. They could have adopted a more flexible approach to personhood that would allow them to differentiate between different levels or "tiers" of personhood. Under such an approach, a born human could be considered a "first tier" person with full Fourteenth Amendment rights, whereas an unborn fetus could be considered a "partial" or "second tier" person with less constitutional protections.

Such a "tiered" conception of personhood has much to commend it, for it allows us to incorporate into the legal landscape what appear to be morally relevant differences between different beings. In contrast, the rigidity of the "all-or-nothing" theory of personhood will almost inevitably lead to glossing over many of the normatively relevant similarities and incongruities that exist amongst the beings that could plausibly be considered persons. Thus, as Professor Jessica Berg has recently pointed out, questions about the rights of nonhuman entities have unfortunately been plagued by a "mistaken insistence on 'all-or-

33. *Id.* at 157 n.54.

nothing' designations" of personhood that overlook the fact that "most claims of moral status map along a continuum."[34]

The tiered conception of personhood that is defended here avoids oversimplifying the solution to cases in which it is claimed that certain beings such as fetuses or animals should be considered persons by recognizing that it is sometimes sensible to differentiate between kinds of persons. This flexible approach to personhood allows for the recognition of more rights to beings that are considered full-blown persons and less rights to entities that, although similar in some regards to full-fledged persons, are sufficiently different from them to warrant different legal treatment.

## III. Conceptions of Tiered Personhood

### A. *Natural Persons vs. Juridical Persons*

Taking a cue from Supreme Court jurisprudence, Professor Berg proposed in a recent article that we distinguish between the rights of natural and juridical persons. According to her framework, a "natural person" is a an entity that is "entitled to the maximum protection under the law."[35] This class is comprised of all post-natal human beings.[36] In contrast, a "juridical person" is a nonhuman entity "for which society chooses to afford *some* of the same legal protections and rights as accorded natural persons."[37] The paradigmatic example of a "juridical person" is a corporation, for it enjoys some of the rights afforded to natural persons (i.e. due process,[38] equal protection,[39] etc.) but not others (i.e. privilege against self-incrimination[40] and certain Fourth Amendment rights[41]). This does not mean, however, that juridical personhood must be necessarily reserved for corporations and similar entities. Several years ago, for example, Louisiana afforded juridical personhood status to *in vitro*

34. Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 403 (2007).
35. *Id.* at 373.
36. *Id.*
37. *Id.*
38. Minneapolis & Saint Louis Ry. v. Beckwith, 129 U.S. 26 (1889).
39. County of Santa Clara v. S. Pac. R.R., 118 U.S. 394 (1886).
40. Hale v. Henkel, 201 U.S. 43 (1906).
41. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

fertilized human ova.[42] Although the Louisiana statute did not confer to such entities all of the rights that are typically afforded to natural persons, they were granted the right to sue or be sued in state courts (i.e. standing)[43] and the right not to be farmed or cultured for research or other purposes.[44]

Although Berg believes that granting juridical personhood to *in vitro* fertilized ova is injudicious,[45] she suggests that other beings should be afforded such status either by legislative action or constitutional decision. Thus, Berg considers that *sentient* fetuses should be considered juridical persons with "specific, but not complete, rights."[46] Chief amongst the rights that should be conferred to such beings would be the right to be legally protected from unjustifiable inflictions of pain. Furthermore, Berg has proposed that sentient fetuses be afforded more rights as they approach the moment of birth.[47] It should be noted that this analysis roughly maps unto the Supreme Court's treatment of fetuses under its abortion jurisprudence, for the constitutionally significant moment of "viability"[48] is close to the moment in which the fetus starts developing the capacity to feel pain (i.e. sentience).[49] Consequently, sentient fetuses usually have more constitutional protection than non-sentient fetuses. Furthermore, the Supreme Court has suggested that the interests of fetuses grow stronger as they approach the moment of birth.[50]

The considerations that lead Berg to conclude that there are sound reasons for treating sentient fetuses as juridical persons also lead her to claim that many nonhuman animals should be afforded the same status.[51] Since most nonhuman animals have the capacity to feel pain, she argues that they should

42. LA. REV. STAT. §§ 9:121, 9:123 (1999).
43. *Id.* § 124.
44. *Id.* § 122.
45. Berg, *supra* note 34, at 391-92.
46. *Id.* at 400.
47. *Id.* at 399.
48. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1994).
49. Berg, *supra* note 34, at 393-94.
50. See Harris v. McRae, 448 U.S. 297, 313 (1980) (quoting Roe v. Wade, 410 U.S. 113, 162-63(1973)), for the Supreme Court's assertions that the governmental interest in protecting the fetus "'grow[s] in substantiality as the woman approaches term.'"
51. Berg, *supra* note 34, at 403-05.

have a right to be protected from the infliction of unwarranted suffering. Berg also contends that the rights of different sentient animals should "vary depending on the interests at stake."[52] Therefore, the fact that elephants may suffer from post-traumatic stress disorder in a way that other animals do not, might provide us with good reasons to afford to elephants a right to be kept free from psychological trauma while simultaneously denying such right to other creatures.[53]

B. *Self-Conscious vs. Conscious Beings*

Peter Singer believes that self-conscious beings should be afforded more rights than the entities that he calls "conscious being[s]."[54] In general terms, a self-conscious being is an entity that is self-aware, has a "sense of future" and "the capacity to relate to others."[55] Most humans and some animals, such as chimpanzees, gorillas and orangutans, qualify as self-conscious beings.[56] However, newborn infants and some people with severe brain damage do not. "Conscious beings," on the other hand, are entities who are "sentient and capable of experiencing pleasure and pain" but are not rational and do not have self-awareness or a sense of the future.[57] Most nonhuman animals and some humans, such as sentient fetuses, babies and intellectually disabled people, are conscious beings.

For Singer, self-conscious beings have a more robust right to life than merely conscious beings.[58] The reason for this difference lies partly in the fact that, since only self-conscious beings are capable of understanding that they exist over time, killing them frustrates their desire to continue living.[59] However, since conscious beings do not have the ability to understand their continued existence, they are not capable of harboring desires to live in the future. Therefore, causing the death of such creatures does not frustrate a desire to continue living. As a result, the killing of a self-conscious being is, all

52. *Id.* at 404.
53. *Id.*
54. *See* SINGER, *supra* note 21, at 101.
55. *Id.* at 86.
56. *Id.* at 86-87, 101, 115-16.
57. *Id.* at 101.
58. *Id.* at 132.
59. *Id.* at 95-99.

things being equal, a greater wrong than the killing of a conscious being.[60]

This, of course, does not mean that conscious beings should have no rights at all. Since such beings have the capacity to feel pain, they should have a right to be protected from unjustifiable inflictions of suffering. Furthermore, they should have a right to life, albeit more limited than the one afforded to self-conscious beings. Therefore, although one should as a general rule abstain from killing both types of beings, justifying causing the death of self-conscious entities would be more difficult than justifying the killing of conscious beings.

### C. *A Four-Tiered Conception of Personhood: Some Concrete Proposals*

If we amalgamate the ideas of Berg and Singer, one can surmise at least four conclusions with regards to the rights that should attach to different entities. First, as a general rule, born humans and other self-conscious beings should have access to all of the rights that the legal system has to offer. Second, nonhuman sentient entities should have a right to be protected from unjustifiable inflictions of pain in much the same way as self-conscious beings. However, it is sensible to deny them some rights in light of the fact that they lack a sense of self and of the future. Thirdly, non-sentient living entities should have different rights than beings that have the capacity to feel pain. Lastly, the rights of non-living entities should be commensurate with the benefits that society will reap by granting such rights. Each of these cases warrants separate consideration.

#### 1. Self-Conscious Beings and the Line-Drawing Problem

There seem to be good reasons to consider that self-conscious beings should be entitled to the maximum amount of legal protection. Since most humans are self-conscious entities, it makes sense to protect them more than other beings.[61]

60. *Id.* at 101, 132.

61. I acknowledge that some animal law scholars may object to my proposal because it might be interpreted as affording rights depending on the degree of similarity that exists between nonhuman creatures and human beings. *See, e.g.*, Taimie Bryant, *Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?*, 70 LAW & CONTEMP. PROBS.

It should be noted, however, that although it is true, as Singer has argued, that some humans lack the capacity for self-consciousness, the law could still have good reasons to afford to those beings the same rights as it affords to self-conscious entities. The reasons for this are pragmatical in nature. It is sometimes painstakingly difficult to distinguish between self-conscious and merely conscious beings. It is equally difficult to determine when a developing being has become self-conscious and when a decaying entity has lost such capacity. Faced with such difficult questions, perhaps it would be wise for the law to adopt a bright rule of demarcation that leaves no doubt to the citizenry with regards to the beings that should be afforded maximum protection under the law and those that should not.

Although such line-drawing is inherently arbitrary, it is probably less arbitrary than allowing for *ad hoc* case by case determinations of self-consciousness by judges or other professionals. Ultimately, the benefit that society will reap from easily identifiable standards probably outweighs the costs that

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207 (2007). Thus, it might be "prone to speciesism because it fails to validate "otherness," instead rewarding human analogs when and if they appear in other beings." Cassuto, *supra* note 13, at 86.

In spite of this possible criticism, the view I propose here should not be rejected as speciesist *because the distinctions drawn here are not grounded on the basis of the being belonging to a particular species, even if it is claimed that some species deserve more protection than others.* Ultimately, the amount of legal protection is dependent on the being's capacity for self-consciousness and awareness of the future, not its belonging to a particular species. The fact that human beings typically share those traits is beside the point, for what really matters are the traits, not the species. *See* Singer, *supra* note 21, at 61 (stating that it is not speciesist to claim that human life has more value than animal life because of the human capacity for self-consciousness because "it is not on the basis of the species itself that one life is held to be more valuable than another").

These traits matter because beings that are self-aware and have a sense of the future are more prone to suffering than creatures lacking these features. Self-conscious beings, for example, fear death not only because of the possible pain that the process of dying might cause, but also because of the suffering that having advanced knowledge of one's demise might cause (think of the suffering of a prisoner in death row who agonizes when he contemplates his future death). Furthermore, since self-conscious beings that are aware of the passage of time make plans for the future, killing them entails not only terminating their existence, but also taking from them the possibility to fulfill their plans and aspirations. Killing beings lacking these characteristics does not harm them in the same way. Given that they have no awareness of the future, they are not conscious of the significance of their death. Since they lack the ability to plan for tomorrow, they have no sense of the momentous transience of their own existence.

might be generated by engaging in a more nuanced and flexible approach to these issues. As a result, I propose that full legal protection be afforded to *all* human beings after birth,[62] regardless of whether they are individually capable of self-consciousness. Furthermore, I propose that the same status be afforded to *all* great apes, for the scientific evidence demonstrates that such beings are as a general rule capable of self-awareness and rationality.[63]

2. Sentient Beings

There appear to be sound reasons to afford to other sentient beings some rights, albeit less than those granted to the above-mentioned entities. This category of beings should be comprised of sentient fetuses and sentient animals. Since these beings have the capacity to feel pain, they should, at a minimum, be legally protected from the unwarranted infliction of suffering. In the case of fetuses, this should lead to making sure that abortions, even when they are necessary, be carried out as painlessly for the fetus as possible. As Singer has pointed out, this is an issue that does not usually receive the attention that it deserves.[64]

Serious consideration should also be given to affording to sentient fetuses and animals standing to sue, for this is the only

62. I realize that it is somewhat arbitrary to exclude some developed fetuses from this category. This is a product of the line-drawing problems of the law. This decision, however, is probably justified, for, as Professor Berg has argued:

> The concern is not with determining at what point the fetus develops any interests, but at what point those interests should form the basis of legal personhood. This is a question of lime drawing—legal personhood must come into play at some point in time even though fetal interests likely develop along a continuum. The law is a rather blunt instrument. Although there may be a way to achieve a somewhat nuanced legal approach by recognizing juridical personhood at an early stage of fetal development, and subsequently natural personhood at a later stage, both designations still must be based on fairly easily identifiable standards—in other words, we must still draw lines. The final determination of whether and how to draw distinctions between different developmental levels of human beings may depend on practical needs in identifying clear legal lines.

Berg, *supra* note 34, at 393.

63. See authorities cited in SINGER, *supra* note 21, at 110-18, for a discussion of the scientific evidence showing that all great apes are capable of self-awareness and rationality.

64. SINGER, *supra* note 21, at 151.

meaningful way in which one can secure that their (limited) rights will be fully vindicated. On the other hand, in light of the arguments advanced in the previous subsection, they should not have such a robust right to life as born humans do. Thus, although conscious beings should have a prima facie right to live, justifying causing their death should be less difficult than justifying causing the death of born humans.

3. Non-Sentient Living Creatures

There might be considerations that justify affording distinct rights to certain non-sentient living entities such as embryos and some fetuses. Embryos and non-sentient fetuses are considerably different from born humans and other sentient beings, for, unlike most humans, they do not have the capacity to understand their continued existence, and, unlike sentient fetuses and most animals, they cannot feel pain. As a result, it is sensible to afford to such creatures significantly less rights than the ones granted to humans, sentient fetuses, and animals. However, embryos and non-sentient fetuses could be provided with a limited set of rights in light of their potential for eventually developing consciousness and self-consciousness. This is what Louisiana has done in the case of *in vitro* fertilized ova.

4. Non-Living Entities

Non-living entities, such as corporations, should be afforded rights insofar as doing so promotes societal interests. By the same token, their rights should be curtailed when it is in the interests of society to do so. Therefore, unlike with other entities, the degree of legal protection afforded to corporations should depend on whether conferring such protection would be advantageous for the citizenry, not on the similarities or differences that exist between a corporate entity and sentient and self-conscious beings. Furthermore, corporations should, as a general rule, be afforded fewer rights than those granted to born humans, for one must not forget that corporate beings exist to help humans achieve their goals, not the other way around.

5. Summary: Four Tiers of Personhood

In light of the aforementioned considerations, I propose a four-tiered approach to legal personhood. First tier persons should have access to all of the rights that the law has to offer. This category of personhood should be reserved for born human beings and the great apes. If there is conclusive scientific evidence that suggests that other nonhuman animal species have the capacity to be self-conscious, then we should consider extending the protections of first-tier personhood to them as well.

On the other hand, second tier persons should have access to some, but not all, statutory and constitutional rights. At a minimum, they should have a right to be kept free from unjustifiable inflictions of harm and perhaps they should have standing to sue in order to vindicate their legally recognized interests. Furthermore, they should have some right to life, albeit not as strong as the one afforded to first tier persons. This category of personhood should include sentient fetuses and most nonhuman animals.

There might be considerations that lead society to create additional tiers of personhood. In this vein, embryos and nonsentient fetuses might be treated as third tier persons. Regardless of the legal protection that we decide to provide to such beings, they should have significantly less rights than either first or second tier persons.

A fourth tier of personhood might be created to deal with the legal status of non-living entities that exist in order to further human interests. Corporations are the paradigmatic instances of these types of beings. The rights of such entities can be expanded or restricted depending on whether doing so is beneficial for society.

Finally, it should be noted that discriminating between persons on the basis of the tier of personhood that they belong to does not violate basic principles of equality, for there are normatively relevant differences between the members of the various tiers. Such differences justify affording differentiated legal treatment to beings depending on the tier that they belong to. Thus, adoption of the tiered conception of personhood proposed here would have avoided the "dilemma" that the Supreme Court identified in *Roe v. Wade* with regards to the legal status of fetuses. If one conceives of fetuses as second-tier persons and

born humans as first tier persons, there would be nothing perplexing in treating such entities differently. There would also be no impediment to affording to fetuses some due process rights, albeit less than those afforded to humans.

## IV. Tiered Personhood and Victimhood

The tiered conception of personhood is helpful for answering questions with regards to who should count as a victim for the criminal law. It may also be helpful in determining the rights that should be afforded to different victims. It has been frequently asserted that a victim is a "person" that has been harmed by a crime.[65]

The problem with this definition is that it is plagued by ambiguity, for "personhood" is an inherently hazy concept. Thus, the question about who should qualify as a person that can be wronged by a crime is left unanswered. Furthermore, as I have attempted to demonstrate here, the issue with regards to who should count as a person is normative, not definitional or conceptual. Consequently, the relative merits of alternative definitions of victimhood should be gauged by their normative appeal rather than by their compatibility with an *a priori* definition of personhood.

Ultimately, questions about who should qualify as a victim are inextricably linked to questions about which entities should have rights whose protection it would make sense to secure by way of the criminal law. Such questions cannot be answered without a theory about personhood and about the rights that should attach to different beings. The tiered conception of personhood advanced here constitutes one such theory. According to this theory, first tier persons should have access to *all* of the rights that our legal system has to offer. Thus, it would be perfectly sensible for society to protect the rights of first tier persons by way of the criminal law. As a result, born humans and certain animals capable of self-consciousness should undeniably qualify as candidates for victimhood.

Second tier persons should have access to *some* legal protections, but not all. More specifically, since the constitutive feature of second tier persons is their capacity to suffer, they

65. *See generally* DUBBER, supra note 8.

should have a right to be kept free from unjustifiable inflictions of pain. If this is the case, I see no reason why we should abstain from making use of the criminal law as a vehicle for safeguarding such interests. As I have argued elsewhere, anti-cruelty offenses were primarily enacted for the purpose of avoiding the suffering of sentient animals.[66] This strikes me as a perfectly legitimate use of the criminal sanction. Since the animals protected by these statutes are sentient creatures, inflicting pain on such creatures can plausibly be characterized as legally relevant harm. If so, there should be no impediment to treating sentient animals as the true victims of such offenses. The same can be said of sentient fetuses. Their capacity to feel pain provides us with sound reasons to afford them rights to be kept free from unwarranted suffering. Thus, safeguarding such interests by way of the criminal law is perfectly sensible.

As has been mentioned, however, first tier and second tier persons warrant distinct legal treatment in light of their differences. Thus, it makes sense for the criminal law to protect the former type of person more than the latter. The morally relevant differences between first and second tier persons might explain, for example, why murder is almost universally punished more severely than abortion and animal cruelty. Furthermore, it might also explain why harm to human interests is criminalized much more frequently and pervasively than harm to non-human animals.

The case in favor of treating third tier persons such as embryos and non-sentient fetuses as victims is much weaker. Since such beings do not have the capacity for consciousness and sentience, it is doubtful that they have an interest in not being injured or destroyed. Therefore, criminal laws that protect non-sentient entities are more appropriately conceived as statutes that further a goal that is independent of safeguarding whatever interest, if any, such beings might have in being kept free from injury. As a result, third tier persons do not constitute adequate candidates for victimhood. The real victim in cases of injury to non-sentient beings, if there is one, would be

66. Luis E. Chiesa, *Why is it a Crime to Stomp on a Goldfish? – Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. (forthcoming 2008), *available at* http://ssrn.com/abstract=1104494.

the first or second tier person whose interests are harmed by the injury or destruction of the third tier person.

Lastly, whether fourth tier persons such as corporations should be treated as victims is unclear. Although I am not sure what the right answer is to this question, I think that it should depend on whether society would benefit by protecting the corporation as a victim regardless of whether the individuals who have ties to the entity have suffered harm. In an article published in this symposium issue, Professor Gómez-Jara Díez has argued that they should.[67] If he is right, then it could plausibly be contended that corporations should be considered candidates for victimhood. In any case, the matter is debatable.

In sum, I believe that the tiered conception of personhood defended here provides us with a vehicle to better tackle the difficult question about who should be counted as a victim. Many people believe that only "persons" can qualify as victims. Given the vague nature of the concept of personhood, such an answer is unsatisfying. If by such an assertion it is meant that only humans should qualify as victims, then I believe that it is mistaken. Sentient fetuses and most nonhuman animals have interests that may be vindicated by making use of the criminal sanction. Ultimately, I have no problem with claiming that only persons can be considered victims, as long as it is made clear that use of the term "person" in this context includes both first *and second tier persons*.

## Michael Vick's Dogs: A Second Look

At the outset of this article it was stated that the most telling aspect of Michael Vick's case was that he was ordered to pay one million dollars in restitution to ensure that the dogs that he had harmed as a result of his illegal operation were properly cared for. The reason why this feature of the case is of siguificance is because it reveals what I believe is an irreversible tendency towards a more nuanced approach to questions about personhood and victimhood. By ordering that restitution be paid in this case, the trial court implicitly rejected the notion that humanhood should be a prerequisite for being considered

67. Carlos Gómez-Jara Díez, *Corporations as the Victims of Mismanagement: Beyond the Shareholders vs. Managers Debate*, 28 PACE L. REV. 795 (2008).

either a victim or a person. Furthermore, by directing that the money be used to enhance the quality of life of the dogs, the District Court was also tacitly recognizing that nonhuman animals have a legally cognizable interest in living as free from suffering as possible. This interest, of course, stems from their sentience.

Nevertheless, it would be mistaken to believe that the Court's ruling necessarily entails that nonhuman animals are as much legal persons as humans are. The Court's decision should be understood for what it is: an express recognition that sentience is a sufficient condition for access to *some* of the protections that the legal system has to offer: victimhood status and candidacy for restitution. Therefore, as far as the judge presiding over the Vick case was concerned, *second tier* persons should qualify as victims. Some might find this conclusion disappointing. I, on the other hand, find it unassailable.