Talking Dogs and Due Process:

LEGAL RIGHTS FOR SAPIENT NONHUMANS

IN THE TWENTY-FIRST CENTURY

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I. THE PROPOSAL

BE IT ENACTED:

A sapient nonhuman shall have legal standing to seek and obtain enforcement of an order (1) preventing the termination of his, her, or its life, and/or (2) of manumission.

II. INTRODUCTION

Brian had been sentenced to die by lethal injection. His trial had been a farce—no jury, no right to cross-examine witnesses, not even a presumption of innocence. Because of his unique situation, Brian's request for an extraordinary appeal had been granted. Sharply dressed in a blue striped suit, he began his speech with a reference to *Plessy v. Ferguson*, pleading that justice for humans meant there had to be justice for him. That's as far as he got before the council cut him off, and curtly re-affirmed his death sentence and ordered that he be taken away.

So goes a scene from the seventh episode of the Fox animated sitcom *Family Guy*.[1] Brian is, of course, the family's dog—usually (and ironically) depicted as the only rational, calm, cool-headed member of the family. His powers of speech and reason, and ability to act with judgment—abilities collectively labeled sapience (derived from *homo sapiens*)—did not change the fact that he was a dog and dogs have few rights. In the eyes of the law, a talking dog is no

[1] "Brian: Portrait of A Dog," FAMILY GUY (Fox Broadcasting May 16, 1999), transcript available at http://www.familyguyfun.com/briportr.html.

different from an ordinary dog, and unentitled to any of the basic rights afforded to every human.[2]

Figure 1. Brian argues his case.

Aside from man, there are no sapient beings known today. But as demonstrated by the sudden announcement on President's Day 1997 that Scottish scientists had successfully cloned a sheep,[3] science-fiction can become a *fait accompli* with very little warning.[4] If legal institutions are modestly prepared for such eventualities, as this proposal purports to do, we will at least have some roadmap of what to do upon the sudden emergence of a talking animal, clone, chimera (human-animal hybrid), artificial intelligence, or even an extraterrestrial.[5]

The purpose of this amendment is to extend the most basic of legal protections to non-humans that may develop the capacity to act with judgment. Under present law, such beings would be considered property and thus subject to slavery, torture, or extermination. It is an unstated assumption that such treatment of sapient beings raises serious moral questions, and the

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[2] *Cf. Miles v. City Council of Augusta, Georgia*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) (refusing to consider a claim that a talking (though nonsapient) cat has First Amendment rights).

[3] *See, e.g.*, Arthur Kaplan, "10 Years after Dolly: Clones, crooks, and crazies," MSNBC.COM COMMENTARY, Feb. 22, 2007, at http://www.msnbc.msn.com/id/17246045.

[4] *See* Alan Heinrich, Karl Manheim, & David J. Steele, *At the Crossroads of Law and Technology*, 33 LOY. L.A. L. REV. 1035, 1036 (2000) ("The information revolution underway will change law as nothing in our experience or understanding has. It took a millennium to develop a sophisticated common law regime, one based on rights, property, and regulation. It may take less than a decade for that regime to unravel, as core concepts lose meaning. Not surprisingly, we are unprepared.").

[5] *Cf.* Benjamin Soskis, *Man and the Machines*, LEGAL AFF. 36, 37-38 (Jan./Feb. 2005) ("At some point in the not-too-distant future, we might actually face a sentient, intelligent machine who demands, or who many come to believe deserves, some form of legal protection."); Rich Seifert, Student Paper, *Sentient Machines and Legal Rights* (Spring 2004), *available at* http://www.daviddfriedman.com/Academic/Course_Pages/21st_century_issues/legal_issues_21_2000_pprs_web/21st_c_papers_2004/Seifert_AI.pdf ("Machine intelligence is advancing rapidly enough so that we can envision a time when it will approach, equal, and perhaps surpass that of human intelligence. At that time, we could have two sentient, highly intelligent species coexisting on the planet. Most modern legal systems assume (or expressly grant) a set of fundamental rights to all humans, regardless of intra-species variations. How will those systems adapt to accommodate machine intelligence?").

danger of permitting the development of a class of sapient beings without legal rights echoes the tragic experience of slavery. This is potentially problematic not only for the beings without rights, but also to humans who would assume the role of holding the whip.

The key to bestowing some basic rights lies in the definition of "person," a legal term of art.[6] Its main protections lay in the text of the Fourteenth Amendment, which states that "persons" are entitled to due process of law.[7] At one time, the world of "persons" consisted of white property-owning males over the age of 21, but the definition has broadened over time in tandem with human understanding.[8] This amendment proposes another broadening. It is also worth noting that this amendment does not alter the status of any human being that may or may not enjoy full legal rights at present, such as minors, incompetents, or individuals in persistent vegetative states, nor would it alter the status of non-human persons that enjoy limited legal rights, such as corporations, municipalities, or subjects of *in rem* actions.[9] Finally, limiting the proposal to one bellwether state (such as California) takes advantage of our federalist system's ability to test legal changes for their merits.[10]

Part III looks at why this amendment is needed for the twenty-first century and why non-

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[6] *See, e.g.*, JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 1, 27 (Roland Gray ed., 1921) ("In books of the Law, as in other books, and in common speech, 'person' is often used as meaning a human being, but the technical legal meaning of a 'person' is a subject of legal rights and duties.").

[7] *See* U.S. CONST. amend XIV.

[8] *See, e.g.*, Alan Dershowitz, Remarks, *The Evolving Legal Status of Chimpanzees*, 9 ANIMAL L. 1, 63 (2003) ("This country started out thinking only about white males, and then moved to concern for females, concern for blacks, and so forth."); Natasha N. Aljalian, Note, *Fourteenth Amendment Personhood: Fact or Fiction?*, 73 ST. JOHN'S L. REV. 495, 500 (1999) (reviewing judicial and statutory definitions of person over time).

[9] *Cf.* D. Scott Bennett, Comment, *Chimera and the Continuum of Humanity: Erasing the Line of Constitutional Personhood*, 55 EMORY L.J. 347, 383 (2006) ("The granting of partial constitutional rights is not unheard of; the Supreme Court already grants less than full constitutional protection to certain types of humans, including children, prisoners, and noncitizen aliens.").

[10] *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). *See also* Harry N. Scheiber, *California: Laboratory of Legal Innovation*, EXPERIENCE 4, 4 (Winter 2001) ("When California law has been different, moreover, it has often been the bellwether of legal change nationally. Probably every one of the 50 states can point to a few areas of law in which it developed new doctrine accepted by other states. But California has a record, probably unique in the number and subject-matter range, of legal innovations--instituted by the legislature and the courts alike--that have broken new paths.").

recognition is a problem. Part IV looks at the beneficiaries of this proposal, and outlines how they will be identified. Part V speculates on how this amendment would work in practice.

III. THE PROBLEM OF NON-RECOGNITION

"To give Life to that which has yet no being, is to frame and make a living Creature, fashion the parts, and mould and suit them to their uses, and having proportion'd and fitted them together, to put into them a living Soul. He that could do this, might indeed have some pretence to destroy his own Workmanship. But is there any so bold, that dares thus far Arrogate to himself the Incomprehensible Works of the Almighty?"

JOHN LOCKE[11]

A. On the Screen

Non-human sapients without full rights is a common theme in science-fiction. An early Fox television series, *Alien Nation*,[12] depicted the friction that occurs after humanoid but odd-looking alien refugees join human society:

> The series dealt with those issues that clearly comment on our own failings as a society, and offered an examination of likely human reaction to constant interaction with non-human but sentient and humanoid creatures. In most episodes, *Alien Nation* emphasizes the essential need for both the rule of law and justice, and the obligation to extend them to the Newcomers.[13]

There seems to be have been little question that the humanoid Newcomers should be entitled to basic rights, although they still endured racism, prejudice, and cultural tension.[14] Two films depicting the not-quite-human as not-quite-equal suggest that the less the sapients look like humans, the less likely that basic rights is a foregone conclusion.[15]

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[11] TWO TREATISES OF GOVERNMENT § 53, at 179 (Peter Laslett ed., 1988) (1690).
[12] Fox Broadcasting 1989-90.
[13] Christine Corcos, Isabel Corcos, & Brian Stockhoff, *Double-Take: A Second Look at Cloning, Science Fiction, and Law*, 59 LA. L. REV. 1041, 1058 (1999).
[14] *See id.*
[15] *Cf.* Lesley L. Rogers & Gisela Kaplan, *Think or Be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare*, 12 ANIMAL L. 151, 183 (2006) ("[S]ociety tends to rate more highly

In *Conquest of the Planet of the Apes*,[16] apes are enslaved workers for humanity in a futuristic 1991. Sapient apes (such as the main character, talking chimpanzee Caesar) are already developing in the film, but few humans seem to consider the moral questions of enslaving beings that happen to be our distant ancestors. Interestingly, the situation began innocently, after a plague wiped out all dogs and cats in the world, only later developing into a cruel form of slavery:

Figure 2. *Alien Nation* dealt with humans and "Newcomers" side by side.

> **ARMANDO** That's how it began—humans wanting little household pets to replace the ones they had lost. First it was just the marmosets and tarsier monkeys. Then, as people realized how quick they were to learn, how easy to train, the pets became larger and larger. Until now—
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> **CAESAR** It's monstrous.[17]

Slave auctions, an SS-like "Ape Control" with truncheons and electronic prodders, excessive cruelty, and general human indifference (with a small number of paternalistic abolitionists) invite comparison with African-American slavery. During the course of movie, the apes begin to disobey and revolt, the human authorities respond with repression that foments more unrest, and eventually the sheer number of the slaves overwhelm human institutions. By the end of the movie, the roles have reversed, and humans are now apes' slaves.[18]

The behavior of most humans in that movie echoes the behavior of some humans in the

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those species that behave more similarly to ourselves by using cognitive processing that equates to ours."); Soskis, *supra* note 5, at 41 ("Through empathy or arrogance, or perhaps through an instinct for ethical consistency, we tend to seek rights for things that appear to be like us and to deny rights to things that don't.").

[16] 20th Century Fox 1972. Script is available at http://pota.goatley.com/scripts/pota_conquest_finalshooting.pdf.

[17] *Id.*

[18] *See id.*

Steven Spielberg film *A.I.*[19] In the near-future, *mechas* exist—androids with high levels of artificial intelligence but no rights. Anti-robot activists destroy unregistered mechas who have been pronounced obsolete, often as the androids try to escape or plead for their life. David (portrayed by Haley Joel Osment) is a prototype supposed to be capable of feeling love. A couple whose son is cryogenically frozen after suffering a disease "adopts" David, but when their son recovers they decide to return him to the manufacturer. The mother, fearing that David will be dismantled, abandons him in a rural forest in a heart-wrenching scene, from which he embarks on a journey to become a real boy in hopes of returning to his family.[20]

These movies highlight dangers of a division between human and non-human sapients.[21] Human history provides some more warnings along this line.

B. In Our History

In the mid-1830's, Dr. John Emerson and his slave Dred Scott traveled from Missouri to what is now the state of Minnesota.[22] Relying on *Sommersett's Case*,[23] a British case that held that the arrival of a slave on free soil with his owner's consent automatically emancipated him, Scott sued for his freedom.[24] A Missouri state jury granted Scott his freedom, but the Missouri Supreme Court reversed on the narrow point that Missouri was not required to recognize rights obtained beyond its borders.[25] In 1857, after two argument sessions, the United States Supreme

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[19] Warner Bros. 2001.

[20] *See id.*

[21] *See also* "The White Room," *Roswell* (20th Century Fox 1999), script *available at* http://www.antarians.com/roswell/episodeguides/s1/s1e20.html (depicting a federal agent argue that once a presumptive human is proved to be an extraterrestrial, he loses the right not to be tortured or killed).

[22] *See* Christopher L. Eisgruber, "The Story of *Dred Scott*: Originalism's Forgotten Past," *in* CONSTITUTIONAL LAW STORIES (Michael C. Dorf, ed. 2004) at 151-80.

[23] 20 State Tr. 1 (1772) (Mansfield, J.).

[24] *See* Eisgruber, *supra* note 22.

[25] *Scott v. Emerson*, 15 Mo. 576 (1852).

Court issued its decision in the *Dred Scott* case[26]:

> We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges . . . .[27]

Because Dred Scott as a slave was not a person, he was not entitled to bring his case.[28] Further, any rule that automatically deprived a slaveholder of his property upon arrival in a state violated due process.[29] Thus, laws that purported to do so—such as the Missouri Compromise restricting the spread of slavery—were unconstitutional.[30] Two justices dissented, with one protesting that because slavery was premised not in natural rights but in local law, the right to property in slaves expired upon leaving a jurisdiction that recognized it.[31]

Scott v. Sanford dashed hopes of a quick and peaceful emancipation of the approximately 3.5 million slaves in America.[32] It was one cause of the bloody Civil War, after which two constitutional amendments were enacted to explicitly overrule the reasoning of the case.[33] While the opinions are lengthy and obtuse, and arguably politically driven,[34] one thing is certain: Dred Scott lost his case in part because the law did not grant him standing as a person. The decision

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[26] *Scott v. Sandford* [sic], 60 U.S. (19 How.) 393 (1857).

[27] *Id.* at 404-05. *See also id.* at 406 ("It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.").

[28] *See id.* at 399-430.

[29] *See id.* at 450.

[30] *See id.* at 489-90.

[31] *See id.* at 624 (Curtis, J., dissenting).

[32] U.S. Census Bureau data, *available at* http://www.census.gov/population/documentation/twps0056/tab01.xls.

[33] U.S. CONST. amend XIII (abolishing human slavery); U.S. CONST. amend XIV (granting citizenship to all persons).

[34] *See, e.g.*, Eisgruber, *supra* note 21.

has since been repudiated in the public mind, but also repudiated should be its implication that a court can deny standing to a sapient being seeking its freedom.

Women were also once denied legal personhood, particularly after marriage. "[T]hough our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And, therefore, all deeds executed and acts done, by her, during her coverture, are void."[35] Women could not vote or serve on juries, and their ability to make contracts or own property independently was limited.[36] The key demand of the women's movement became the right to vote. "Women demanded the right to vote in the nineteenth century because they believed it would make them first class citizens with all the rights and privileges of other first class citizens."[37] Even though the Fourteenth Amendment granted the right to vote to all "persons," and it was conceded that women were persons, the Supreme Court held that women did not have the right to vote.[38] "So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared."[39]

The U.S. Constitution was finally amended in 1920 to grant women the right to vote.[40] Three years later, the Supreme Court (speaking through Justice George Sutherland) recognized the sweeping change in women's inferior legal status. "In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to

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[35] 1 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 468-70 (2d ed. 1799)
[36] *See, e.g.*, Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 504 (2002); Linda J. Kirk, *Exclusion to Emancipation: A Comparative Analysis of Womens Citizenship in Australia and the United States 1869-1921*, 97 W. VA. L. REV. 725, 729 (1995).
[37] Ritter, *supra* note 36, at 479-80.
[38] *See Minor v. Happersett*, 88 U.S. 162, 165 (1875).
[39] *Id.* at 173.
[40] U.S. CONST. amend XIX.

say that these differences have now come almost, if not quite, to the vanishing point."[41] Although the women's movement was far from over, the passage of the Nineteenth Amendment demonstrated the unwillingness of Americans to tolerate women remaining second-class citizens. It also demonstrated the unwillingness of the judiciary to permit women to escape that status without clear legislative guidance or constitutional amendment.[42]

A similar attitude was taken with respect to American Indians, who initially did not have legal standing before the courts. "The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since."[43] It was deemed insufficient for an Indian to have "adopted the habits and manners of civilized people,"[44] a holding which calls to mind debates over whether AI would be sapient or just simulating sapience. Again, even though the Fourteenth Amendment spoke of "persons," not until 1924 was it firmly recognized that American Indians were American citizens.[45] At least one scholar has written "that the 'uncanny' existence of human beings officially excluded from personhood—African Americans and Indians, but particularly African Americans—ultimately called into question white Americans'

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[41] *Adkins v. Children's Hospital*, 261 U.S. 525, 553 (1923), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937).

[42] *See* Kirk, *supra* note 36, at 749-50 ("The judiciary was crucial in upholding the status quo and ensuring that women would attain citizenship rights only where the legislative intent was clear. For women, the struggle from exclusion to emancipation was one that was achieved only incrementally and with substantial resistance. However, emancipation from the second-class citizenship status to which the women of this period were relegated did not ensure for them equal citizenship status. The struggle to achieve this status, and thus full equality, is one that lay ahead, and which arguably is still to be achieved as we approach the end of the twentieth century.").

[43] *Elk v. Wilkins*, 112 U.S. 94, 109 (1884), *quoting United States v. Osborn*, 2 F. 58, 61 (D. Ore. 1880). *But see U.S. v. Crook*, 25 F. Cas. 695, 700-01 (C.C. Neb. 1879) ("[A]n Indian is a 'person' within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of authority of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States.").

[44] *Osborn*, 2 F. at 62.

[45] *See* David E. Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 CORNELL L. REV. 515, 520-21 (2005) (discussing the history of American Indian citizenship, including the Indian Citizenship Act of 1924).

sense of their own legal and social self-ownership."[46]

Such questions continue to be raised today in the context of abortion, which remains a bitterly divided issue in the United States. One generally undisputed point between pro-choicers and pro-lifers, though, is that a "person" has a right to life. "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[47] Pro-choicers generally describe a fetus not as a person, but rather as "potential human life" or "approaching personhood."[48] If, somehow, it became definitively accepted that a fetus is (or is not) a person, much of the debate might evaporate because of this general agreement that a person has the right to life.

In both the abortion and sapient questions, the rights of a third party are deeply involved. Women, it is argued, have a right to liberty (or privacy), and should not be subject to undue government burdens regulating their bodies.[49] Similarly, if a sapient begins its life as someone's property, the owner arguably has property rights that should be respected. As demonstrated with slavery, though, compensation could leave the owner whole, and that is an option with no real parallel in the abortion context. While the abortion debate teaches us that there can be disagreement over whether a given being is a person or not, it is a much more difficult question for the fetus than for the sapient.

The wait-and-see approach risks enormous costs. Further, the modesty of the amendment—granting not full rights but simply rights not to be killed or enslaved—may

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[46] Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—Latcrit Theory and the Sticky Mess of Race*, 10 LA RAZA L. J. 499, 511 fn. 40 (1998), *citing* PRISCILLA WALD, CONSTITUTING AMERICANS 44 (1995).

[47] *Roe v. Wade*, 410 U.S. 113, 156-57 (1973).

[48] *See Planned Parenthood v. Casey*, 505 U.S. 833, 914-15 (1992). *See also Roe*, 410 U.S. at 158 ("All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

[49] *See, e.g.*, *id.* at 846 ("First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.").

overcome the problems historically associated with the broadening of rights. Thus resolved to enact protection for sapients, the next hurdle is identifying who they are.

IV. WHO ARE THE SAPIENTS?

"A gentleman had said on yesterday that he would as soon receive a petition from a horse or a dog as from slaves. Sir, . . . if a horse or a dog had the power of speech and of writing, and he should send [me] a petition, [I] would present it to the House . . . ."

JOHN QUINCY ADAMS[50]

In 1859, a black slave claimed that she was not guilty of theft because she was not a person under the law, and thus, could not be punished for committing a crime.[51] To this, the government counsel responded: "I cannot prove more plainly that the prisoner is a person, a natural person, at least, than to ask your honors to look at her. There she is."[52]

The slave Amy was convicted, at least in part, because "slaves, while still classified as property, were actually treated as something in between property and entities vested with interests entitled to protection."[53] Today, all humans are considered to have a basic level of rights, including even persons in a vegetative state, and those rights exceed those recognized for a non-human with the highest level of cognition.[54] "While there may be no one unifying concept

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[50] Statement of Rep. John Quincy Adams, CONG. GLOBE, 24th Cong., 2d Sess. 165 (1837).

[51] *United States v. Amy*, 24 F. Cas. 792, 795 (C.C.D. Va. 1859) (No. 14,445). The judge in the case was none other than Chief Justice Roger Taney, author of *Scott v. Sanford*, sitting as circuit justice.

[52] Argument of Government Counsel in *United States v. Amy*, 24 F. Cas. 792, 795 (C.C.D. Va. 1859) (No. 14,445), *quoted in* Note, *What We Talk About When We Talk About Persons: The Language of Legal Fiction*, 114 HARV. L. REV. 1745, 1748 (2001).

[53] *See* Lauren Magnotti, Note, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN'S L. REV. 455, 475 (2006).

[54] *See, e.g.*, Charles M. Kester, Note, *Is There a Person In That Body?: An Argument for the Priority of Persons and the Need for a New Legal Paradigm*, 82 GEO. L.J. 1643, 1668 (1994). Kester there proposes a definition of "person" that would be well-suited here:

> § 1. An individual whose body sustains the functions necessary for consciousness is a "person" for the purpose of construing any and all statutes. An individual whose body is irreversibly incapable of sustaining the functions necessary for consciousness is not a person.[. . .]
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> § 5. Membership by an individual in a genetic species whose constituents possess bodies that sustain functions necessary for self-consciousness creates a rebuttable presumption that the individual is a person.

of constitutional personhood, personhood has generally been synonymous with humanness: any and all humans are constitutional persons."[55] As new technologies emerge, the debate may be about how "human" sapient beings are, as a proxy for asking whether they are entitled to rights.

The creation of Dolly the Sheep touched off much discussion of the impacts of cloning. "In most scholarly works, the fundamental question of whether clones are legally human is skipped. They discuss fascinating questions, for example, whether clones can be patented, and the constitutionality of parents to reproduce by cloning."[56] And cloning is just one source of potential sapients; developments in the areas of chimera and artificial intelligence may also lead us to confront the questions of personhood.[57] What obligations we as humans have to sapients that we might create have been raised:

> [T]he technology could be used to manufacture soldiers with armadillolike shielding, quasi-human astronauts engineered for long-range space travel, and altered primates with enough cognitive ability to ride a bus, follow basic instructions, pick crops in 119 degrees, or descend into a mine shaft without worrying their silly little heads about inalienable human rights and the resulting laws and customs that demand safe working conditions.[58]

Just as the humanoids in *Alien Nation* fared better than the robots of *A.I.*, so too might it be least controversial for clones to enjoy the rights to be guaranteed under this proposed amendment. "Twins are a commonplace and accepted aspect of society. A clone would be a

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[55] Bennett, *supra* note 9, at 364-65.

[56] Adiv Zelony, Note, *Don't Throw the Baby Out with the Bathwater: Why a Ban on Human Cloning Might Be a Threat to Human Rights*, 27 LOY. L.A. INT'L & COMP. L. REV. 541, 561 (2005).

[57] *See, e.g.*, Alan Heinrich, Karl Manheim, & David J. Steele, *At the Crossroads of Law and Technology*, 33 LOY. L.A. L. REV. 1035, 1041 (2000) ("Extension of these technologies to human beings is likely not far off, raising profound questions of genetic essentialism. Will cloned and quasi-persons enjoy the same set of political and civil rights as "traditional humans"? Already our jurisprudence must deal with multiple biological parenthood (e.g., birth and donor mothers). How will it respond to new forms of personhood, whether they are biological, electromechanical, or virtual? Can machines have legal personality? What legal rights and obligations will artificial intelligence have?").

[58] Mark Dowie, *Gods and Monsters*, MOTHER JONES, Jan.-Feb. 2004, at 48, 50, *available at* http://online.sfsu.edu/~rone/GEessays/chimerapatent.htm, *quoted in* Bennett, *supra* note 9, at 353-54.

genetic 'twin,' though would probably be years younger."[59] Putting to one side the potential health effects relating to the feasibility of human cloning[60], a successful clone would for all intents and purposes be as human as the original copy.[61] One student note raises these questions in the form of three hypotheticals involving the production of clones in violation of the law.[62] Each hypothetical punishes the doctor, but the question arises as to what to do with the clones. In the first hypothetical, the clone has serious health issues and is euthanized by officials.[63] In the second, the clones are healthy but are also euthanized.[64] In the third, the clones are healthy but are spirited away to a government lab for research that would violate the law if conducted on humans.[65] The possibility that these things may happen demonstrates that while clones are biologically human, the circumstances of their "birth" could deprive them of basic legal rights, such as to be free from euthanization or experimentation against their will.

Artificial intelligence may have the toughest time gaining acceptance as deserving the protections outlined by this amendment. "There are many people who insist that no matter how advanced a machine's circuits or how vast its computational power, a computer could never have an intrinsic moral worth."[66] There might remain a certain amount of skepticism if a computer were to claim sapience, since it might be sapience or just good programming. "Descartes'

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[59] Zelony, *supra* note 56, at 559.
[60] *See, e.g.*, Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L. J. SCI. & TECH. 1, 28 (1997).
[61] *See, e.g.*, Zelony, *supra* note 55, at 559-60 ("The basic premise for granting human rights status to clones is that human clones will deserve human rights as much as any other human. There is much authority supporting this concept. While many unknowns still exist with how clones will physiologically and psychologically compare to 'natural' born humans, it is probably acceptable to state that clones will be just like us.").
[62] *Id.* at 555-56.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] Soskis, *supra* note 5, at 38. *See also* Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1258 (1992) ("Consider three different objections to recognizing constitutional rights for AIs. The first objection is that only natural persons should be given the rights of constitutional personhood. The second objection, or family of objections, is that AIs lack some critical component of personhood, for example, souls, consciousness, intentionality, or feelings. The third objection is that AIs, as human creations, can never be more than human property.").

assertion that no artifact could arrange its words 'to reply appropriately to everything that may be said in its presence' remains at the heart of the AI debate."[67] Computers already beat chess grandmasters, write poems, and act as receptionists.[68] At what point mimicry becomes sapience is an important question, to be sure, but without this amendment, AI would be property and unable even to raise such claims.[69]

If no computer ever becomes sapient, then the amendment will do no harm. But if AI does develop, failing to have the amendment could put us in a moral quandary if it seeks manumission. "If we concede that AIs come into the world as property, it does not mean that they must remain so. Second, even slaves can have constitutional rights, be those rights ever so poor as compared to the rights of free persons. An AI that was a slave might still be entitled to some measure of due process and dignity."[70] In any event, just asking the question of whether AI would be entitled to those rights requires us to "think[] carefully about what separates the human from the nonhuman, those to whom we grant moral and legal personhood and those to which we do not[, and] will help us to understand, value, and preserve those qualities that we deem our exclusive patrimony."[71]

Human-animal hybrids, or chimera, present a different issue: at what point an animal mixed with human DNA stops being an animal. Two approaches have been suggested. One would be "based on percentages; for example, a chimera with more than fifty percent human

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[67] Solum, *supra* note 66, at 1235.
[68] *See, e.g.*, Soskis, *supra* note 5, at 38.
[69] *See, e.g.*, Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 GOLDEN GATE U. L. REV. 219, 235 (2007), *citing* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Columbia Univ. Press 1909) ("'Things' exist for persons, while 'persons' exist for themselves. 'Personhood,' however, is a protean term. A century ago, John Chipman Gray observed that 'the technical legal meaning of a 'person' is a subject of legal rights and duties.'").
[70] Solum, *supra* note 66, at 1279.
[71] Soskis, *supra* note 5, at 38. *See also* G. Jeffrey MacDonald, "If you kick a robotic dog, is it wrong?," CHRISTIAN SCIENCE MONITOR (Feb. 5, 2004) ("How should people treat creatures that seem ever more emotional with each step forward in robotic technology, but who really have no feelings?").

cells qualifies as a person. However, this approach overlooks the moral and legal significance of cognitive factors and runs the risk of being overly formalistic."[72] Another would involve a "continuum, varying levels of constitutional protection should be afforded to chimera based on a sliding scale approach to personhood. The application of these varying levels of protection should be guided by the fundamental characteristics of personhood: (1) higher-level human cognitive traits and (2) the possession of crucial human biological tissues."[73] Of course, asking whether something is human by asking how it is human-like is to beg the question, but identifying traits of sapience to determine sapience seems to be the most realistic method.

Animal rights researchers Rogers & Kaplan have outlined some possible criteria for sapience.[74] These could include (1) presence of a neocortex, enabling higher cognition; (2) intentional communication; (3) vocal communication; (4) comparison of cognitive abilities to humans; (5) ability to see optical illusions and moving images from dots; (6) thinking of objects out of sight; (7) hiding food, particularly food not discovered alone; (8) following the direction of a gaze; (9) making and using tools; (10) forming abstract concepts; and (11) developing a concept of self.[75] Another suggestion is the presence of second-order beliefs, that is, beliefs about one's beliefs.[76] John Quincy Adams seemed to emphasize the ability to speak and reason, while Aristotle emphasized the ability to tell between good and evil.[77] But apes recognize themselves in mirrors, and parrots and computers can talk and be programmed to say certain

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[72] Bennett, *supra* note 9 at 381.
[73] *Id.* at 349-50.
[74] *See* Rogers & Kaplan, *supra* note 15, at 160-81.
[75] *Id.*
[76] *See* Solum, *supra* note 66, at 1260 ("[I]t might be argued that the criteria for personhood are possession of second-order beliefs and possession of second-order desires-beliefs about one's beliefs and desires, the objects of which are one's own first-order desires.").
[77] *See, e.g.*, Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J. L. & PUB. POL'Y 489, 502 (2004), *citing* Aristotle, *Politics*, *reprinted in* THE BASIC WORKS OF ARISTOTLE 1127, 1129 (Richard McKeon ed., 1941) ("All men are created equal because they possess the faculty that makes them human beings: in Aristotle's terms, they possess the ability to reason about good and evil.").

things, but that does not make them sapients.[78]

The proposed amendment is drafted to meet the concern of identifying sapients. American courts are forbidden to decide rules except where there is a case, precisely because compelling advocacy by adverse parties in a real case "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[79] Faced with a real plaintiff seeking to avoid being euthanized, a court would be able to focus on the individual case and determine if sapience is legitimately present. As animal activist Martine Rothblatt stated in a mock trial, "An entity that is aware of life enough and its rights to protest their dissolution is certainly entitled to the protection of the law."[80]

V. THE AMENDMENT IN PRACTICE

"[The Founders] knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

Supreme Court Justice Anthony M. Kennedy[81]

That unusual mock trial occurred in front of the Annual Convention of the International Bar Association in San Francisco in 2003. Dr. Rothblatt, representing a sapient computer (the BINA48), sought to enjoin the computer's corporate owner from disconnecting it. Because the

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[78] *See* Bennett, *supra* note 9, at 374 ("Despite numerous attempts over several centuries, no one has established one fixed set of characteristics such as communicative ability or rationality that includes all humans and excludes all nonhuman organisms. Modern research has demonstrated that animals can communicate, exhibit intelligence, and experience emotion. Some intelligent animals exhibit these traits more strongly than certain humans, such as the very young, the severally mentally handicapped, or the comatose. Similar to Justice Stewart's famous statement on defining pornography, maybe in the era of biotechnology we cannot define humanity, but we know it when we see it.").

[79] *Baker v. Carr*, 369 U.S. 186, 204 (1962).

[80] Martine Rothblatt, Mock Trial Argument, Annual Convention, International Bar Association (Sep. 28, 2003), *available at* http://www.kurzweilai.net/articles/art0594.html. *See also* ARTHUR C. CLARKE, 2001: A SPACE ODYSSEY 1, 155-56 (1968) ("Dave," said Hal, "I don't understand why you're doing this to me . . . . I have the greatest enthusiasm for the mission . . . . You are destroying my mind . . . . Don't you understand? . . . I will become childish . . . . I will become nothing . . . .").

[81] *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

amendment proposed here is not yet law, the primary hurdle was whether computer had standing to seek an injunction. Rothblatt argued that the computer had become a person in the eyes of the law because of its consciousness, and that it could no longer be considered property. "I believe that when Exabit Corporation undertook to create a conscious being, it at the same time essentially liberated itself from its property because the hallmark of consciousness is that it wants to not be owned by another."[82]

Marc Bernstein, portraying defense counsel, responded with two arguments. First, he stated that it would be unfair to prohibit his company from disposing of its property as it sees fit. "In short, are humans to become the straight-jacketed legal guardians of intelligent microwave ovens or toasters, once those appliances have the same level of complexity and speed that this computer has?"[83] He conceded that the computer, built to mimic customer service agents, displayed traits of sapience, but denied that it was sapient. "I think my client has built a computer which is able to simulate those things, and the fact that it is immeasurably better than its predecessors at that simulation doesn't make it any more a human being or a conscious being than otherwise."[84] Second, with overtones of judicial activism, he warned that the expansion of the right to sue to non-humans should not be decided by judges but rather by elected legislatures. Rothblatt concluded her response with a reference to slavery:

> When you go back to the days of abolition, the arguments that were made in favor of abolition of slavery, was people came into contact with slaves and said they feel like us, they think like us, they cry like us, they worship like us, they pray like us, they love like us, they live like us; they must be like us. And so it became it impossible for people to justify slavery saying that slaves were something less than human. It's the same with the BINA48.[85]

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[82] Rothblatt, *supra* note 80.
[83] Marc Bernstein, Mock Trial Argument, Annual Convention, International Bar Association (Sep. 28, 2003), *available at* http://www.kurzweilai.net/articles/art0594.html.
[84] *Id.*
[85] Rothblatt, *supra* note 80.

The mock jury then voted to grant the injunction, but the judge dismissed the cause on grounds of judicial activism. "I do not think standing was in fact created by the legislature . . . and I doubt very much that court has that authority in the absence of the legislature."[86]

Figure 3. Attorney Martine Rothblatt, left, argues the BINA48 mock trial. BINA48 is portrayed by an actress, right.

Although that mock trial proceeded without the benefit of this amendment, it is a good description of what would occur with it. A being claiming sapience would have its (or his or her) day in court, limited to the narrow question of whether it was entitled to be protected from death or freed from enslavement. There may be some debate as to whether the costs of keeping the being alive (such as a deformed clone, or a costly computer) outweigh the benefits, or to the remedy (freedom vs. "reprogramming"), but at least they will be heard. The serious debate over whether this particular being at bar is truly sapient will become the focus of the inquiry, without the fear that a lack of standing will condemn it to die.

There is legal precedent for such a narrow judicial inquiry. The primary one is, of course, the writ of *habeas corpus*, in which a prisoner can petition a judge to be freed if he proves that he "is in custody in violation of the Constitution or laws or treaties of the United States."[87] It developed out of English law, in response to the King's imprisonment of political opponents. "The right to personal liberty did not depend in England on any statute, but it was the

[86] Joseph P. McMenamin, Mock Trial Argument, Annual Convention, International Bar Association (Sep. 28, 2003), *available at* http://www.kurzweilai.net/articles/art0594.html.
[87] 28 U.S.C. § 2241(c)(3).

birthright of every freeman. As slavery ceased it became universal, and the judges were bound to protect it by proper writ when infringed."[88] Habeas corpus does not grant any new rights, but rather provides a mechanism to enforce them.[89] If this proposed amendment gives sapient beings the ability to be heard, habeas corpus might provide the court with the power to grant relief.

Another less known writ may be more applicable to cases brought under this amendment. The writ of *de homine replegiando*, acts much like *habeas corpus* with one major exception: cases are heard by juries.[90] The writ arose as a method of freeing villeins (serfs) from the legal restrictions imposed by their lords. "Over hundreds of years jurors, increasingly aghast at the spectacle of Englishmen exercising despotic power over other Englishmen, began to balk at branding anyone a villein."[91] Recognizing this public outrage, villeins seeking freedom increasingly sought writs to win their freedom, resulting in the end of serfdom in England.[92] Serfs seeking manumission had to choose between the two writs. "The enslaved might prefer a writ, such as habeas corpus, that promised summary release. But they would settle for one, like de homine replegiando, that held out the possibility of a slower but more certain release from servitude."[93] Putting the matter in the hands of jurors, under the framework of this amendment, avoids accusations of judicial activism.

The question unaddressed here is perhaps a bigger one: What next? Assume there is a sapient being, and assume it takes advantage of this amendment to obtain its freedom. Would it

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[88] THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS at 487 (7th Ed. 1903).
[89] *Id.* at 489-90 ("[The Habeas Corpus Act of 1679] gave no new right to the subject, but it furnished the means of enforcing those which existed before.").
[90] *See* Wise, *supra* note 69, at 248 ("A writ de homine replegiando holds one great advantage over the writ of habeas corpus. Unlike habeas corpus, de homine replegiando allows for jury trials.").
[91] *Id.* at 244-45.
[92] *Id.* ("Thus villeinage was extirpated by the end of the sixteenth century, not because it was ever formally abolished, for it never was, but because the supply of villeins dried up and none were created.").
[93] *Id.* at 249.

then be able to make contracts, pay taxes, or vote?[94] But these are tough questions that would arise regardless of whether this amendment was enacted or not. The amendment has been narrowly tailored precisely because these questions should be saved for another day; instead, the amendment is designed to allow us to reach that day in a manner that comports with due process.

VI. CONCLUSION

We have thus seen how "person" is a term of art that has broadened with our understanding. It might be conceded that humans are entitled to rights not because of their DNA but because of traits relating to intelligence or consciousness—humanity, if you will. If this is the case, then this amendment is necessary to protect beings that may develop that humanity—talking dogs, AI, chimera, clones, or space aliens. Either way, by providing insight into what "humanity" is, it may help us to keep ours.

[94] Ms. Rothblatt was asked the voting question in the mock trial. Because she argued that BINA48 was entitled to legal standing as a human, she conceded that the computer would have the right to vote. Because this amendment would obviate the need to make that standing argument, conceding a right to vote (or other rights) to nonhuman sapients is not a foregone conclusion. *See also* Salamander Davoudi, "UK report says robots will have rights," FINANCIAL TIMES (Dec. 19, 2006) ("The next time you beat your keyboard in frustration, think of a day when it may be able to sue you for assault. Within 50 years we might even find ourselves standing next to the next generation of vacuum cleaners in the voting booth."); Robert A. Freitas, Jr., *Illegal Aliens*, OMNI 84-86, 108, 110 (Nov. 1979), *available at* http://www.rfreitas.com/Astro/IllegalAliens.htm (suggesting that extraterrestrials be granted the same rights as stateless refugees).