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The Pedagogic Value of Science Fiction: Teaching about Personhood and Nonhuman Rights with Planet of the Apes

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I Introduction

Legal research and science fiction are often maligned, though for different reasons. Legal research is criticized as being too academic to be practical, while science fiction has been painted as too lowbrow to be taken seriously.¹

In the latter half of 2017, I had the opportunity to teach legal philosophy for a semester. The challenge I anticipated was convincing students that a unit with the word ‘philosophy’ in the title could be 1) exciting and 2) relevant to real people in real contexts. I explained early that the two core questions of jurisprudence, as I see them, are law’s most fundamental (a ‘fundament’ on which we build): 1) what is law? and 2) what is justice? Those questions can take us anywhere within the legal field: even to the question of what a ‘real person’ is.

Those who malign legal philosophy as a creature of the ivory tower neglect the fact that the ivory tower is a good vantage point from which to do things that are very

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problematic ‘in the trenches’: predict, speculate, and imagine. Stewart writes:

Legal scholars are able to do things that judges and lawyers do not have to do, and that often legislators do not have the incentive to do: look forward to future disputes, ones that don’t exist yet but are almost certainly going to arise. We can inform the debates of tomorrow – the legislative proposals, the regulations, the judicial opinions – by looking at legal dilemmas that are almost certain to arise based on the rapid advance of technology.²

If the precedent-bound, analogy-driven, backwards-looking discipline of law³ has a dearth of imagination at a non-academic level,⁴ though, that raises an important question: how to engage those who might be ‘turned off’ by academia. Ironically, that brings us back to students. Perhaps legal academics need to borrow from other fields, where speculation is not deviant behaviour but the point of the exercise and engagement has a higher priority. A prime example is science fiction (‘sci-fi’).⁵

In this article, I explain how I employed science fiction – ‘an important and understudied site through which to make sense of the territory of the legal’⁶ – to make the jurisprudence of personhood accessible for legal philosophy students.⁸ In particular, I describe how I used the 1968 film Planet of the Apes⁷ to help the class analyse two cases on nonhuman personhood: People ex rel Nonhuman Rights Project Inc v Lavery, 124 AD 3d 148 (Sup Ct, 2014) (‘Lavery’) and Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746 (Sup Ct, 2015) (‘Stanley’).⁸ I demon-

²Ibid 438. See also 441, 462, ‘While most of us would do well to keep our feet on the ground, there is value in some of us keeping our eyes on the skies’: at 463.
⁵See Stewart, above n 1, on ‘how science fiction can inform the future of media law scholarship’ (at 462): conceding that ‘there is, to be sure, some doubt about the wisdom of letting future policy debates be informed by speculation of creative writers’. See also, J H de Villiers and M Slabbert, ‘Never Let Me Go: Science Fiction and Legal Reality’ (2011) 32(3) Literator 85, 87–8.
⁶Sheryl N Hamilton, “‘Human No Like Smart Ape”: Figuring the Ape as Legal Person in Rise of the Planet of the Apes’ (2016) 10 Law and Humanities 300, 302 (speaking of ‘speculative fiction’ more broadly).
⁷Planet of the Apes (Directed by Franklin J Schaffner, APJAC Productions, 1968). The film is based on the book La Planète des Singes by Pierre Boulle, but has a somewhat different plot.
⁸I was interested to note that in Paul R Joseph’s ‘A Course Whose Time Has Come: Using
strate that science fiction is a genre that is all about playing with possibilities: thus, an excellent tool not just for having students imagine how the law might respond to a changing world, but for problematising notions of the existing world so fundamental that we have difficulty thinking outside of them.

II Science Fiction: The Art of Unlimited Possibility

Science fiction is not easy to define.\footnote{On science fiction as a genre, Hrotic writes: ‘SF is too heterogeneous to be comprehended as a genre, and too large to support intelligent design in its evolution (in the sense that no one editor or author can impose their vision on it). The boundaries that defined it have eroded. And the utopia of a technological future has become the depressing present’ Steven Hrotic, ‘The Evolution and Extinction of Science Fiction’ (2014) 23 Public Understanding of Science 996, 1009, and see 1001-3. See also; Chip Stewart, ‘Do Androids Dream of Electric Free Speech? Visions of the Future of Copyright, Privacy and the First Amendment in Science Fiction’ (2014) 19 Communication Law and Policy 433, 439-40; Mitchell Travis, ‘Making Space: Law and Science Fiction’ (2011) 23 Law and Literature 241, 242-6.} It has a long history relative to human mortality (dating back to at least the 1920s),\footnote{Travis, above n 9, 242, noting Hugo Gernsback’s introduction of the term ‘scientifiction’ in Amazing Stories in April 1926, but also noting that Gernsback was drawing on an earlier body of work. See also; Hrotic, above n 9, 998 and generally. Stewart traces sci-fi’s roots to 1818, and the publication of Mary Shelley’s Frankenstein: Stewart, above n 9, 450.} though perhaps not literature. It can be ‘hard’ or ‘soft’. It can be ‘mainstream’ or ‘genre’.\footnote{Hrotic, above n 9.} It has numerous sub-genres. Its pretensions are grand: it ‘invites an encounter between imagined possibilities, historical reality and our future’.\footnote{Hamilton, above n 6, 303.}

For the purposes of this article, I define ‘science fiction’ in a way that no doubt seems calculated to aggravate true scholars of the genre: loosely and broadly. At its core, it is fiction that explores how human beings might act and interact in a world where the possibilities are different than our own\footnote{Travis, above n 9.} (that is, engages with

Science Fiction Materials to Teach Law’ (1997) 22 Alternative Law Journal 111, he describes using science fiction texts (like Philip K Dick’s Do Androids Dream of Electric Sheep, on which the film Blade Runner is based) to teach about personhood for a different class: androids (‘replicants’). As I shall explain, that would be an even more worthwhile endeavour now (20 years later).
‘societal counter-factuals’). I will cast the net wide, and catch texts in which those alternate realities are not the product of hard science, but social engineering: where, for example, ‘an imagined alternative ... is scientifically possible, yet not credible given our contemporary reality of constitutionality and culture of human rights’.15

Some, like Margaret Atwood, would reserve the label ‘science fiction’ for ‘books with things in them that we can’t yet do, such as going through a wormhole in space to another universe’ (or just ones with ‘talking squids in outer space’),16 and use a different label (like ‘speculative fiction’) for realities plausible in today’s terms.17 I will leave that debate for others. My goal is not to elevate one neatly defined, well-policed genre of popular culture over other imaginative works. It is to show how texts bound by certain themes, and certain insights, can be harnessed in a classroom.18

‘Good science fiction concerns human nature’, and asks us ‘to consider our values and our place in the universe’, no matter how impressive the aliens or the robots on screen.20 Because it is so varied, and so creative, the possibilities are vast. Indeed,

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14 Charli Carpenter, ‘Rethinking the Political / Science Fiction Nexus: Global Policy Making and the Campaign to Stop Killer Robots’ (2016) 14 Perspectives on Politics 53, 54, speaking of the relationship between popular culture and foreign policy.
15 Villiers, above n 5, 93–4, speaking of Kazuo Ishiguro’s Never Let Me Go, in which clones are created to be organ donors.
18 Atwood, above n 16.
19 That is not to say such debates are not worth having. See, for example, Mancuso, above n 17, ‘The widespread acceptance of the term “speculative fiction”, as Atwood has defined it, would spell the end for continuing efforts to legitimize science fiction as a genre. The resulting schism, presented as a defensive measure to protect works from the “literary bigots,” would plunder genre-transcendent texts like The Handmaid’s Tale to fill the snobbish stables of “speculative fiction” and leave “science fiction” to describe only much-derided 50s pulp novels’.
‘the rich imaginary terrain offered by science fiction allows it to cover almost any
legal issue and it is this use of the imagination that helps us to consider new
approaches to – and directions in – law’.21

Science fiction is often (maybe even paradigmatically) forward-looking. It can be
‘a toolkit for thinking about the relationship between technological change and
humanity’.22 As Paul Joseph described it when explaining his course on law and
popular culture: ‘Science fiction creates alternate realities, future possibilities, and
alien races ... It speculates about culture, morality, politics, and technology. It
expresses our hopes and fears about humanity’s journey.’23 Within science fiction,
opportunities are opened up, bringing abundance, leisure, interplanetary travel ...
even immortality.24 Threats are opened up, too, such as overpopulation, habitat
destruction, depersonalisation, admixture of embryos,25 and xenomorph26 inva-
sion.27 The author constructs a narrative of humanity’s response. Thus, we have
‘familiarity of the human, coupled with the strangeness of the environment or situ-
aton’.28 The reader gets an aspirational model, a cautionary tale,29 or simply food
for thought.

Of course, if we live long enough, the possibilities of our own world change. Many

21Mitchell Travis and Kieran Tranter, ‘Interrogating Absence: The Lawyer in Science Fiction’
22Doctrow, quoted in Stewart, above n 1, 439-40. See also Hrotic, above n 9, 997: ‘Science
fiction represents an extended conversation about the progress of science, and (more significantly)
about the societal impacts of new technologies.’
23Paul R Joseph, ‘A Course Whose Time Has Come: Using Science Fiction Materials to Teach
24Early science fiction was largely positive about the impact of technological change. Post-
World War II, it became more negative (understandably). Hrotic, above n 9, 996, 998, 1003-4.
25This example is used in Travis, above n 9, at 242. An admixed embryo has both human and
animal DNA..
26Xenomorphs are killer extra-terrestrials from the Alien franchise.
27Dystopian fiction, obviously, is heavily concerned with law: specifically, its breakdown or
absence. See Travis, above n 21, 24.
28Travis, above n 9, 245.
29Carpenter, above n 14, On the purportedly negative impact of ‘technophobic’ science fiction
on the public’s view of autonomous weapons, see.
things that were science fiction not too long ago have become simple fact. Gene manipulation is no longer restricted to a slow process of selective breeding. The ethics of cloning for medical purposes is more than a purely academic debate. Climate change threatens climate devastation. Words like ‘post-human’ (and ‘post-humanism’) appear in academic articles and make a kind of sense.\footnote{See, for example, Amanda McAllister, ‘Stranger than Science Fiction: The Rise of AI Interrogation in the Dawn of Autonomous Robots and the Need for an Additional Protocol to the UN Convention against Torture’ (2017) 101 Minnesota Law Review 2527, 2531 (defining ‘post-humanism’ as ‘the ideology that moves away from the human as possessing an essential element and speaking to the coevolutionary spiral of technology and humanity as intertwined, thus calling into question conceptions of autonomy and agency’); Stewart, above n 9, 460 (‘as unlikely as it may seem, the post-human era may very well begin within the next twenty years of communication law and policy (from 2014), as projected by science fiction authors and futurists’). Susan W Brenner, ‘Humans and Humans+: Technological Enhancement and Criminal Responsibility’ (2013) 19 Boston University Journal of Science and Technology Law 215, For a truly sci-fi breakdown of different categories of near-human – including ‘enhanced humans’, ‘trans-humans’, and ‘post-humans’ – in a legal context, see; See also David Lawrence, ‘More Human than Human’ (2017) 26 ambridge Quarterly of Healthcare Ethics 476, ruminating on whether different categories of allegedly ‘post-human’ people – ‘intelligent androids, synthezoids, even alternate-substrate sentences’ (at 476) – need to be treated differently to human people. ‘Arrival of truly intelligent novel beings is merely a waiting game, and it is not infeasible that they might walk among us in the (reasonably) near future’: at 479. Cassandra M Kirsch, ‘Science Fiction No More: Cyber Warfare and the United States’ (2012) 40 Denver Journal of International Law and Policy 620. Other examples of sci-fi becoming sci-fact I came across while researching for this article include cyberwarfare; Re Eichner (Fox), 73 AD 2d 431, ‘genetic recombination, microsurgery, transplantation of organs and tissues’ (Sup Ct, 1980); Villiers, above n 5, see also; Stewart, above n 9; copyright dystopia; and wearable and implantable computer devices raising privacy concerns; A less ‘sexy’ example is Internet advertising Travis, above n 9, 247-8.}

In 1992, Lawrence B Solum began an essay in the North Carolina Law Review on legal personhood for artificial intelligences with an assurance that ‘as of today, this question is only theoretical’\footnote{Lawrence B Solum, ‘Legal Personhood for Artificial Intelligences’ (1992) 70 North Carolina Law Review 1231, 1231.}. In 2011, F Patrick Hubbard declared ‘it is time to address in detail’ whether a machine that claims personhood should be granted it (also discussing ‘modified’ humans and animals).\footnote{Hubbard, above n 20, 407. He singles out science fiction as a ‘useful source for addressing personhood for artifacts’, ‘given the limited nature of the current state of development of artifacts with the physical capacity necessary for personhood’: at 455.} The previous year, Gabriel Hallevy asked, in the Akron Intellectual Property Journal, ‘Can thinking machines be subject to criminal law?’\footnote{Gabriel Hallevy, ‘The Criminal Liability of Artificial Intelligence Entities —From Science} – and immediately cited a case from 1981 in which
a robot at a motorcycle factory ‘erroneously identified [an] employee as a threat to its mission, and calculated that the most efficient way to eliminate this threat was by pushing him into an adjacent operating machine’ (killing him).\textsuperscript{34} No longer does that sound like an outlier, or a stretch. We are warned, seemingly daily: artificial intelligence can think – really think.\textsuperscript{35} This is perhaps the most prominent example of a very prominent anxiety: a lot seems to be happening, very fast.\textsuperscript{36}

New possibilities invite new thoughts. (New anxieties invite dark thoughts.) A lot of those thoughts are moral. Now that we can create thinking machines, the question is whether we should. Equally difficult thoughts are legislative and judicial. Should it be lawful to create a thinking machine? What sort of treatment should it receive? Can it be accommodated within existing law – say, by recognising its ‘personhood’ (thus, legal rights)? Does it require not just new laws, but new jurisprudences – that is, new sciences or philosophies of law – so we can frame the...
issues in a workable way? As Travis notes, ‘By highlighting possible futures, science fiction enables law to consider different strategies for dealing with new events and scenarios.’ In the words of Hamilton, it provides ‘resources for legal thought experiments’: ‘for a rethinking of the order of things between people and between people and things’, grounding ‘a transformed and transformative legal imagination’.

The ‘imagined and imaginative worlds’ of science fiction, Sarat writes, ‘are valuable precisely because they are radically other. Their otherness challenges us to think beyond the here-and-now, to break from taken-for-granted assumptions and ways of understanding law’. Not all of those worlds are future worlds, though, and not all of the possibilities are future possibilities. Science fiction can be a means through which to examine the present. Many works of science fiction ‘take place in worlds similar to the author’s environment, albeit with the addition of new contexts or situations that add a sense of alterity’, which can be as simple as permitting what is forbidden or vice versa. Even if the backdrop is the far future, the problem can be contemporary, such as discrimination, misogyny, or environmental destruction. In its alternate realities, sci-fi ‘confronts contemporary problems in futuristic and sometimes fantastic settings ... Through it, we can learn about ourselves and our times.‘

A world of changed possibilities might alienate us from our reality just enough
that we see the parts of it that are usually hidden precisely because they are our reality: because, that is, they are not what we see but how we see.\textsuperscript{44} The dystopian society of Gilead, for example – from Margaret Atwood’s novel The Handmaid’s Tale\textsuperscript{45} (which has a movie adaptation and a recent television adaptation) – is one with different possibilities than ‘our own’ (in the modern secular West). The possibilities for women, in particular, have been narrowed. They can be incubators for the children of powerful men (the Handmaids), servants (the Marthas), sex workers for Gilead’s hypocritical elite (the Jezebels), complicit oppressors over other women (the Aunts), or ‘Econowives’. Those roles have real-life analogues, though: and the viewpoints which make them feasible (like a view of women as ‘for’ sex, or ‘for’ domestic labour) are familiar. The ‘fiction’ is that such a society arose out of the modern United States. The reader (or viewer) is invited to contemplate exactly how far that fiction is from (women’s) reality today: and therefore, to see their world in a new light (albeit from a place of ‘narrative safety’).\textsuperscript{48}\textsuperscript{46}

These ‘new’ possibilities, which are uncomfortably close to actualities, spark uncomfortable thoughts. How close is Gilead, or Ingsoc, or Thunderdome to becoming reality? How strong are the barriers? How confident are we that they can hold back the tide? Are our old understandings – of gender relations, of authoritarianism, of nuclear proliferation, of entertainment – inadequate to the task? Science fiction has the capacity to ‘disrupt and problematise the law through narrative’.\textsuperscript{47}

It is into this category of thought-provoking sci-fi that I put the 1968 film Planet of the Apes: at least when we recontextualise it against the contemporary struggle

\textsuperscript{44}See Stewart, above n 9, 439; Travis, above n 9; Alternatively, one could simply use sci-fi to illustrate concepts in, say, international law because one’s students are ‘more likely to know about Klingons than Croatians’ Joseph, above n 23, 111.

\textsuperscript{45}Margaret Atwood, \textit{The Handmaid’s Tale} (Vintage, 1996) On her reservations about the use of the term ‘science fiction’ (especially for her own work), see above nn 18–21 and accompanying text.

\textsuperscript{46}A term used by AnnaLee Newitz, the editor in chief of science fiction site io9.com, quoted in Hubbard, above n 20, 456.

\textsuperscript{47}Villiers, above n 5, 87.
III  THE PLANET OF THE (NONHUMAN) APES: HEARING WITHOUT SPEAKING

Planet of the Apes is set in 3978. A ship carrying hibernating astronauts crash lands on a harsh, desolate world, leaving them in dire peril. After some exploration, they encounter a group of lifeforms who look ‘more or less human’, primitive and mute: causing the film’s protagonist, Taylor, to remark, ‘If this is the best they’ve got around here, in six months we’ll be running this planet.’ As it turns out, it is not: as the crew discover when they are caught up in a hunt carried out by intelligent, gun-wielding gorillas on horseback. One crewmember, Dodge, is killed; the other two, Landon and Taylor, are captured. Taylor is thrown into a cart for transport back to the ape settlement, as the gorillas pose for photos with their kills.

In the settlement, sophisticated gorillas, chimpanzees and orangutans co-exist, albeit uneasily. (The first thing we learn about the film’s primary antagonist, Dr Zaius – an orangutan – is that he ‘looks down his nose at chimpanzees.’) Taylor, who has been shot in the throat, has been rendered mute, like the other humans. He is handed over for experiments to a facility where ‘the foundations of scientific brain surgery are being laid ... in studies of cerebral functions of these animals’ (humans). His attempts to talk – dismissed by other apes as a case of ‘human see,

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48Planet of the Apes (Directed by Franklin J. Schaffner, APJAC Productions, 1968) 29:12. The timestamps in these references identify the beginning of the relevant segments (as near as I could pinpoint them with a DVD player).
49Ibid 29:35.
50Ibid 35:55.
human do – and ‘ape-like’ characteristics make him an object of fascination for Dr Zira, an animal psychologist (and chimpanzee), and eventually her fiancé, Dr Cornelius. Both hold heretical views on the links between ape and man in a society where science is not permitted to deviate from faith: and in which a key point of the faith is that ape is separate from and above man. Zaius – simultaneously Minister of Science and Chief Defender of the Faith, and rabidly anti-human – exemplifies this belief.

After a number of failed attempts to communicate, Taylor steals a notepad from Zira and writes ‘MY NAME IS TAYLOR.’ Zira shows Taylor’s notes to Cornelius, who is initially obstinate, stating ‘It’s a stunt. Humans can’t write.’ Zira admonishes him for being a scientist who refuses to believe his own eyes. When communicating directly with Taylor, Cornelius is sceptical of the man’s story, exclaiming, for example, that ‘Flight is a scientific impossibility’ (inspiring Taylor to make a paper plane) and that ‘No creature can survive in the Forbidden Zone’ (which the crew crossed on their journey). Asked by Taylor (in writing) ‘Then how do you account for me?’, Cornelius replies, ‘I don’t. And I’m not going to try.’

At this point, we discover that Cornelius, despite all his objections, has views even more profane than Zira’s on the closeness of ape and human. Having travelled into the Forbidden Zone and uncovered evidence of an ancient culture, he developed the theory that ape evolved from ‘a lower order of primate, possibly man.’ However,
he has come to denigrate his own hypothesis, largely because Dr Zaius and ‘half of the Academy’ called it heresy.\textsuperscript{61} We get our strongest indication thus far of the relationship between scientific fact and the ape society’s foundation myths.

Cornelius: Do you want to get my head chopped off? Zira: Don’t be foolish. If it’s true, they’ll have to accept it. Cornelius (laughing mirthlessly): No, they won’t.\textsuperscript{62}

Taylor may be the proof Cornelius needs – the ‘missing link’\textsuperscript{63} – but that raises a problem.

Cornelius: Well, if he were a missing link, the sacred scrolls wouldn’t be worth their parchment. Zira: Well, maybe they’re not. Cornelius (laughing): Oh, no, thank you. I’m not going to get into that battle.\textsuperscript{64}

Proof and truth, Cornelius knows, are dangerous things in a society not ready for them: and he and Zira have their futures to think of.\textsuperscript{65} Indeed, even the paper plane (or what it represents) may be too much for ape society to bear, as illustrated by Zaius’s symbolic crushing of it during an unexpected visit.

Unfortunately for Taylor, Dr Zaius orders him gelded. Taylor escapes, sparking a chaotic chase through the settlement: during which he sees humans apparently preserved and on display in some sort of museum. His crewmate, Dodge, is among them. Eventually he is brought down by the joint efforts of townspeople (or ‘town-schimps’) throwing objects and the gorillas who are chasing him. As a gorilla comes to take him away, just over 57 minutes into the movie, he finally finds his voice and snarls his iconic line, ‘Take your stinking paws off me, you damn dirty ape!’\textsuperscript{66}

\begin{footnotes}
\item[61]Ibid 49:39.
\item[62]Ibid 49:07.
\item[63]Ibid 49:50.
\item[64]Ibid 50:02.
\item[65]Ibid 50:18.
\item[66]Ibid 57:34.
\end{footnotes}
Taylor is returned to his cage, and separated from his mute human companion, Nova (‘gifted’ to him by Dr Zira when he was, himself, mute). Staring at her from behind bars, he ponders whether she loves him ... and whether she can love him.\(^\text{67}\) After some reminiscing on the loveless world he left, he is once again dragged off, as Nova frets.

Taylor is deposited in an official-looking chamber: which, we discover, is to be the site of a hearing.\(^\text{68}\) It is described as an ‘ad hoc tribunal of the National Academy’,\(^\text{69}\) and conducted by three orangutan leaders: the President of the Academy, the Commissioner for Animal Affairs, and Dr Zaius. Zira and Cornelius are also there. However, it is not clear what the hearing’s purpose is. The state’s case is conducted by an orangutan ‘prosecutor’ – Dr Honorious, Deputy Minister of Justice – and Taylor is called the ‘accused’ – meaning, as Zira points out, that ‘Your Honours must think him guilty of something’.\(^\text{70}\) Dr Honorious, however, asserts that Taylor is a man, not an ape, and ‘therefore he has no rights under ape law’\(^\text{71}\) (not even the right to keep his rags for the sake of modesty, or the right to his own name – he is referred to by the moniker Zira gave him, ‘Bright Eyes’). Cornelius suggests that working out whether Taylor is a man, or something else, might be the point of the proceedings.\(^\text{72}\) Zaius, however, states: ‘The creature’s not being tried. He’s being disposed of. It is scientific heresy that is being tried here.’\(^\text{73}\)

Taylor tries to speak in his own defence, but the tribunal will not hear him, ordering

\(^{67}\)Ibid 59:58.
\(^{68}\)This scene is analysed in Yasco Horsman, ‘Braying, Howling, Growling for Justice: Animal Personhood in Law, Literature, and Cinema’ (2016) 28 Law and Literature 319, ‘against the background of the Arendtian tension between voice and mask’ (at 322). He describes it as hovering ‘between the silly and the dignified’: at 330.
\(^{69}\)Schaffner, above n 48, 1:02:12.
\(^{70}\)Ibid 1:03:57.
\(^{71}\)Ibid 1:03:20.
\(^{72}\)Ibid 1:03:35.
\(^{73}\)Ibid 1:04:02.
the bailiff to ‘silence the animal!’ Dr Honorous then outlines the state’s case, saying it is based on their ‘first article of faith’:

That the almighty created the ape in his own image. That he gave him a soul and a mind. That he set him apart from the beasts of the jungle and made him the lord of the planet. These sacred truths are self-evident.

He then admonishes ‘certain young cynics’ – like Cornelius and Zira – for diverting from ‘the proper study of apes’ (that is, apes), attacking these ‘perverted scientists who advance an insidious theory called evolution’. He concludes by accusing Zira and an accomplice of performing experimental brain surgery on Taylor, turning him into ‘a speaking monster’.

Zira, angrily refuting the lie, points out that ‘Not only can this man speak, he can think! He can reason!’ Honorous decides to disprove this by questioning Taylor directly: which the tribunal allows, after warning him ‘do not turn this hearing into a farce’. Honorous’s line of questioning does not give Taylor much of a chance: he is asked only about points of the ape religion. Taylor admits he knows nothing of their culture, and Honorous considers his point proved: ‘Of course he doesn’t know our culture, because he cannot think!’

Taylor passes a message to Cornelius to read to the tribunal, recounting his story,
but it is dismissed as a joke. However, Honorious has assembled the surviving humans captured in the hunt, and the tribunal moves to examine them. Taylor identifies Landon, his crewmate, and is told to speak to him: but Landon bears a horseshoe-shaped surgical scar indicating where the apes cut into his brain, and is catatonic.

Taylor lashes out, and is subdued. He is dragged back to the chamber. Zaius tells the tribunal that the surgery was to repair a skull fracture, and that the beast could not speak.\textsuperscript{85} Taylor fires back, ‘You cut out his memory, you took his identity, and that’s what you wanna do to me!’\textsuperscript{86} He is gagged. Finally, Cornelius speaks earnestly: stating that, while Taylor cannot be from another planet, he must certainly be from the Forbidden Zone.\textsuperscript{87} He reveals to the tribunal that he uncovered evidence of a simian culture predating the sacred scrolls.\textsuperscript{88} Zira also speaks, explaining that she has ‘found no physiological defect to explain why humans are mute’.\textsuperscript{89} Dr Honorious throws out objections, which the tribunal sustains as its three members adopt an almost comical ‘see no evil, hear no evil, speak no evil’ pose (with their hands covering the offending organs or orifices).\textsuperscript{90} Zira demands, ‘Sustain all objections, but face the truth!’\textsuperscript{91} The hearing adjourns after Zira and Cornelius are indicted for contempt, malicious mischief and scientific heresy.

Taylor is summoned to meet with Dr Zaius, who reveals that Zira and Cornelius will be tried for heresy:\textsuperscript{92} and that Taylor actually did the state a service by provid-
ing the opportunity to expose them.93 Taylor’s own fate was ‘preordained’,94 as his show trial would indicate. Given over to Zaius’s custody, he will be emasculated, then subject to experimental brain surgery that will rob him of his higher functions and reduce him to a state of ‘living death’ ... unless he gives up the tribe of mutants Zaius believes he is actually from.95 Taylor points out that this is what Zira and Cornelius believe, and Zaius is speaking heresy, which Zaius concedes.96 In the course of questioning the man, Zaius calls Taylor by his true name (though not as a kindness), for which Taylor thanks him.97 Taylor asks, ‘How in hell did this upside-down civilisation get started?’98 Zaius points out that it looks upside down to Taylor because he is on the bottom level.99 Zaius gives Taylor six hours to make a full confession, and calls for the guards to take him away.100 As he is being dragged out, Taylor tells Zaius he can cut pieces out of him, but ‘You do it out of fear!’101 and asks, ‘What are you afraid of, doctor?’102

Taylor and Nova escape, with the help of Dr Zira’s nephew, Lucius. They meet up with Zira, who explains that they may be able to get away since ‘all men look alike to most apes’.103 They then rendezvous with Cornelius. They make their way to the Forbidden Zone and the site of Cornelius’s excavations, where Zira and Cornelius hope to find evidence of their theories to refute the heresy charge. However, they are pursued. Zaius and his soldiers arrive just as Cornelius shows Taylor a cave he found on his prior expedition. After a stand-off, Cornelius tells

93Ibid 1:14:06.  
94Ibid 1:14:04.  
95Ibid 1:14:34.  
96Ibid 1:15:37.  
97Ibid 1:16:01.  
98Ibid 1:16:15.  
100Ibid 1:17:12.  
101Ibid 1:17:25.  
102Ibid 1:17:29.  
Zaius of the cave and the wonders within; Zaius dismisses them.\textsuperscript{104} Taylor points out the contradiction of Zaius’s position: being Chief Minister of Science, he is ‘honour-bound to expand the frontiers of knowledge’, but he is also Chief Defender of the Faith (the implication being he is defending a lie).\textsuperscript{105} Zaius replies, ‘There is no contradiction between faith and science – true science.’\textsuperscript{106} Taylor invites him to prove it: to enter the cave, and let the heretics make their case. Zaius agrees.\textsuperscript{107} Cornelius outlines his findings and speaks of the artefacts he uncovered, and Taylor explains some of them, but Zaius rebuts the both of them.\textsuperscript{108} Ultimately, though, Zaius is confronted with a piece of evidence he cannot explain away: a human doll that speaks the word ‘mamma’.\textsuperscript{109}

The group is interrupted by gunshots; the gorillas have assaulted the camp. Taylor takes Zaius hostage and forces them to withdraw. He ties Zaius up, none too gently. Zira chastises him; Taylor points out the hypocrisy, given how he was treated.\textsuperscript{110} Cornelius responds, ‘That was different. We thought you were inferior.’\textsuperscript{111}

Taylor confronts Zaius, accusing him of having known the truth about the forgotten civilization and potential of man all along.\textsuperscript{112} Zaius responds that he knows man to be dangerous: to apes, to man himself, to the world.\textsuperscript{113} He reveals, ‘All my life I’ve awaited your coming and dreaded it, like death itself.’\textsuperscript{114} Taylor asks why Zaius has hated and feared him from the start.\textsuperscript{115} Zaius states, ‘From the evidence, I believe

\textsuperscript{104}Ibid 1:28:50.
\textsuperscript{105}Ibid 1:29:04.
\textsuperscript{106}Ibid 1:29:10.
\textsuperscript{107}Ibid 1:29:14.
\textsuperscript{108}Ibid 1:30:57.
\textsuperscript{109}Ibid 1:34:05.
\textsuperscript{110}Ibid 1:37:37.
\textsuperscript{111}Ibid 1:37:50.
\textsuperscript{112}Ibid 1:38:19. There are hints of this earlier in the film. For example, he deliberately eradicates some writing Taylor drew in the sand in an attempt to communicate: at 44:14.
\textsuperscript{113}Ibid 1:38:29, 1:41:44.
\textsuperscript{114}Ibid 1:41:31.
\textsuperscript{115}Ibid 1:41:37.
man’s wisdom must walk hand in hand with his idiocy. His emotions must rule his brain. He must be a warlike creature who gives battle to everything around him, even himself.116 He reveals that the Forbidden Zone was a paradise until man made a desert of it.117 Taylor rides off after Zaius warns him not to look for an answer, as he may not like what he finds.118 Zaius orders the cave destroyed, and informs Cornelius and Zira they will be tried for heresy, breaking his promise.119 Lucius asks him, ‘Why must knowledge stand still? What about the future?’120 Zaius replies, ‘I may just have saved it for you.’121 Zira asks, ‘What will he find out there, doctor?’122 Zaius responds, ‘His destiny’.123 The meaning of Zaius’s cryptic words, and the mystery of the planet, are revealed in the film’s closing scene (and another iconic moment): as Taylor and Nova come upon the ruins of the Statue of Liberty.124

IV IS THE PROBLEM OF APEHOOD THE PROBLEM OF PERSONHOOD?

Taylor has a broad problem, and a narrow one, though both are ‘big picture’. The broad problem is that the apes simply refuse to accept the possibility of an intelligent, ensouled human: a concept which undermines not just their scripture, but the underpinnings of their society. Taylor fights to be recognised as something other than a deviant, a mutant, or an experiment. The evidence will never – could never – be enough. It is hard to attack a truth taken as ‘self-evident’.126

119 Ibid 1:43:01.
120 Ibid 1:43:29.
121 Ibid 1:43:35.
122 Ibid 1:43:40.
123 Ibid 1:43:43.
124 Ibid 2:04:58.
The narrow, institutional problem – a legal one – is straightforward to frame. To be heard in an ape court (in the loose sense which includes the tribunal hearing), one must be an ape. In strict biological terms – at least as 21st century human scientists draw the lines – Taylor is an ape (a great ape – a large primate without a tail). However, the other apes do not see it that way. As such, he has no right to be heard: indeed, no rights at all. He can literally be disposed of if the tribunal decides that is the right way to deal with him.

As Horsman notes, on its release in 1968 in the US, the film was read against its social context – civil rights protests and high racial tension – and a historical context – slavery, and a legacy of not viewing slaves and African Americans as full legal persons or fully human\(^\text{125}\) (as in *Dred Scott v Sandford*).\(^\text{126}\) In Planet of the Apes, non-apes are denied rights under ape law, just as African-Americans ‘had no rights which the white man was bound to respect.’\(^\text{127}\) With the Stanley and Lavery decisions, and a new frame through which to approach animal protection, there is now another way to read it: as a mirror image of the barriers to recognition of non-human personhood.

How apehood is defined in the world of Dr Zaius and Dr Honorious, when one moves beyond the specific (man does not have it, orangutans do) to the general,

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\(^{125}\) Horsman, above n 68, 323-4.

\(^{126}\) 60 US (19 How) 393 (1857) (which denied that descendants of African slaves could have citizenship or standing to sue in federal court). See Ibid.

\(^{127}\) *Dred Scott v Sandford*, 60 US (19 How) 393, 407 (Taney CJ) (1857), quoted in Ibid 324. A fuller quotation is needed to fully appreciate how those of African descent were viewed at the time of the case. ‘They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.’
is unclear. It involves aspects of rationality, revelation, and communication. Obviously Taylor is ignorant of revealed truths, so if the second is important (as Honorious believes), he does not have much hope.

Of course, Taylor can speak, and does show the capacity to reason in the hearing. It does not matter. He is quickly shut down. Not being an 'ape', one of the rights he lacks is the right to speak before the tribunal. He cannot even argue the point. To the extent he does or could have a common grammar with the tribunal to argue towards a new understanding of apehood, he cannot exploit it. He relies on Cornelius and Zira: but despite their good intentions, they do not understand what he is or unreservedly accept his story. Moreover, the tribunal considers them presumptively wrong, or at least suspect, for the mere fact of taking him seriously.

The problem is not correctable mistakes, but highly motivated reasoning. The tribunal members are committed to a particular worldview. They do not want to entertain new possibilities. They do not want to acknowledge Taylor’s voice, or his capacities. Their primary concern is how to deal with a threat to their reality while causing as little disruption as possible. They do not ignore the evidence of their own eyes. They actively refute it. The apes are so keen to maintain their separateness from humanity that they define apehood in opposition to it: meaning a man proving himself to be an ape is a contradiction in terms.

Save for the fact Taylor has a sophisticated concept of justice, and thus can frame an experience as injustice, his predicament is not unlike that of nonhuman animals in common law countries. The threshold for having rights is one of 'law’s own
dearest fictions’.128 ‘personhood.129 Humans have it,130 though not, in the absence of specific (and very controversial) foetal personhood laws,131 until they are born. Some non-humans have it132 (like corporations) – there are ‘artificial’ or ‘juristic’ people.133 Non-human animals (generally) do not.134 ‘Like slaves under Roman law, [animals] are the objects of the law, without being its subjects.’135 They are invisible to the civil law the way a human slave was once invisible in the United

128Sheryl N Hamilton, “‘Human No Like Smart Ape”: Figuring the Ape as Legal Person in Rise of the Planet of the Apes’ (2016) 10 Law and Humanities 300, 304; David Bilchitz, ‘Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals’ (2009) 25 South African Journal on Human Rights 38, See also; Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746 (Sup Ct, 2015).

129Hamilton, above n 128, 304 (referring to ‘the high price of participation in the legal order of beings’); Joseph, above n 23, 112. ‘Legal personhood is the capacity to possess at least one legal right; accordingly, one who possesses at least one legal right is a legal person’; Steven M Wise, ‘Legal Personhood and the Nonhuman Rights Project’ (2010) 17 Animal Law 1, 1.

130Not necessarily all humans, depending on the era we are looking at. Slaves, women, children and the mentally impaired have all been denied personhood. See Hamilton, above n 128, 308; However, ‘being a member of the human species has generally been seen to be both a necessary and sufficient condition for being a natural person in law’ Bilchitz, above n 128, 43.

131One such law – the notorious ‘Zoe’s law’ – was proposed recently in New South Wales, but ran into stiff opposition for fear of the precedent it might set and its implications (for example, in abortion law). Ultimately, the Bill failed. See Hannah Robert, ‘The Bereavement Gap: Grief, Human Dignity and Legal Personhood in the Debate over Zoe n’s Law’ (2014) 22 Journal of Law and Medicine 319.

132‘Legal personhood” is not necessarily synonymous with being human’ Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746, 763 (Sup Ct, 2015).

133Bilchitz, above n 128, 41; Becky Boyle, ‘Free Tilly?: Legal Personhood for Animals and the Intersectionality of the Civil and Animal Rights Movements’ (2016) 4 Indiana Journal of Law and Social Equality 169, 186; Horsman, above n 68, 320; More esoteric examples of nonhumans accorded personhood include ‘a river, a sacred text, a mosque, and a religious idol’ Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746, 768-9 (Sup Ct, 2015); Re Nonhuman Rights Project Inc v Lavery, 152 AD 3d 73, (denying the relevance of such examples to the proceedings). (Sup Ct, 2017); See also Alexia Staker, ‘Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals’ (2017) 6 Transnational Environmental Law 485, 485 n4.

134See Horsman, above n 68, 332 on the qualifier; But see Hamilton, above n 128, 311: “There have been a variety of legislative efforts to personify apes in a number of jurisdictions; most target and/or are motivated by the use of great apes in scientific experimentation, and although a number flirt with notions of animal personhood, virtually none extends the law’s conception of the person that far.’ See further Bilchitz, above n 128, 66, 72; Daniel Davison-Veccioine and Kate Pambos, ‘Steven M Wise and the Common Law Case for Animal Rights: Full Steam Ahead’ (2017) 30 Canadian Journal of Law and Jurisprudence 287; Lawrence, above n 30, 482-3; Staker, above n 133.

135NCSPCA v Openshaw (462/07) [2008]ZASCA 78 (RSA) (30 May 2008) [39](Cameron JA). See Bilchitz, above n 128, 48. ‘Those seeking to dismantle the human–animal divide and bring an end to the categorization of animals as property’ have been called ‘abolitionists’; Staker, above n 133, 493; see also Boyle, above n 133, 174-5.
States before the passage of the Thirteenth Amendment and in England, before the famous Somerset v. Stewart case was decided in 1772. They might be protected by legislation in some regards (for example, by animal cruelty statutes), but they do not have the general bundle of rights people do. ‘Law stubbornly continues to render animals property’, so that humans may ‘claim personhood in and through the containment of animals in the infinite space of thing-ness’. It is an ‘all or nothing’ binary where the rules are simple: ‘Persons have rights, duties, and obligations; things do not. ‘Only legal persons count in courtrooms, or can be legally seen, for only they exist in law for their own benefits.’

Lacking personhood, and rights, nonhuman animals also lack standing to bring a case before a court (despite the US being responsible for intriguingly named cases like *Cetacean Community v Bush*, brought on behalf of ‘all of the world’s whales, porpoises, and dolphins’). Generally, it is the person affected by an

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137 The ‘rights’ they may have include ‘the right to be free from physical abuse and other mistreatment’ and ‘the right to humane living conditions’ *Re Nonhuman Rights Project Inc v Stanley*, 49 Misc 3d 746, 765 (Sup Ct, 2015).

138 Hamilton, above n 128, 308; see also Bilchitz, above n 128, 40, 43, 67 and generally; *Re Nonhuman Rights Project Inc v Stanley*, 49 Misc 3d 746 (Sup Ct, 2015); ‘Law has been very tenacious in the boundary work of preserving the sanctity of the human, despite the scientific, social and legal acceptance of evolutionary theory:’ Hamilton, above n 128, 308.

139 The language here is adapted from Jaffe J’s judgment in *Re Nonhuman Rights Project Inc v Stanley*, 49 Misc 3d 746, 765 (Sup Ct, 2015); See also Wise, above n 136, 5, referring to the ‘high, thick legal wall that separates all humans from all nonhumans’.

140 Jessica Berg, ‘Of Elephants and Embryos: A Proposed Framework for Legal Personhood’ (2007) 59 Hastings Law Journal 369, 372; quoted in *Re Nonhuman Rights Project Inc v Stanley*, 49 Misc 3d 746, 765 (Sup Ct, 2015); See also Boyle, above n 133, 173; Davison-Vecchione, above n 134, 289-90, the status of animals as property arose from ancient philosophical and religious beliefs that animals are a mere means to human ends’.

141 Wise, above n 129, 1, cf *Re Nonhuman Rights Project, Inc v Lavery*, (NY Ct App, No 2018-268, 8 May 2018) slip op 03309, where Judge Fahey suggests the correct question is not whether a chimpanzee is a person but simply whether they have a right to liberty. ‘The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a “person” or relegated to the category of a “thing” amounts to a refusal to confront a manifest injustice.’

142 See Wise, above n 129; Wise, above n 136.

143 386 F 3d 1169 (9th Cir, 2004).

144 Ibid 1171. On the complexities that case brings to the standing question, see *Naruto v Slater*, 888 F 3d 418 (9th Cir, 2018). I would be remiss not to mention *Tilikum ex rel People for the
act that has the right to seek redress. If a nonhuman animal suffers injury, the ‘person affected’ most directly is not a person at all. For obvious practical reasons, nonhuman animals cannot conduct a case themselves; but if they did have personhood and rights, the law could allow actions to be brought on their behalf, just as it accommodates human persons who cannot press their rights for lack of capacity.\footnote{On the possibility that such litigants might favour their own interests over those of the animal, see \textit{Naruto v Slater}, 888 F 3d 418 (9th Cir, 2018).} As it stands, their defenders can be led into some tricky, and artificial, manoeuvring to establish that humans were injured because nonhumans were.\footnote{\textit{Ethical Treatment of Animals Inc v Sea World Parks and Entertainment Inc}, 842 F Supp 2d 1259 (SD Cal, 2012): brought to free Tilikum, Katina, Corky, Kasatka and Ulises (all orcas) from purportedly unconstitutional slavery. The case is discussed in depth in Boyle, above n 133, see 177-8 on ‘plaintiff-listing’ strategies.}

Whether the distinction drawn between humans and most, but not all, nonhumans is more sensible than the distinction the apes draw between themselves and Taylor is debatable. It is difficult to know what the principle is, if one exists.\footnote{Note \textit{Re Nonhuman Rights Project Inc v Stanley}, 49 Misc 3d 746, 767, ‘The determination of whether an entity or being counts as a legal person is largely context-specific, and not necessarily consistently made.’ (Sup Ct, 2015).} A corporation and a human are very different beasts. Corporations do act and think through humans,\footnote{\textit{Re Nonhuman Rights Project Inc v Stanley}, 49 Misc 3d 746, 764 (Sup Ct, 2015); \textit{Re Nonhuman Rights Project Inc v Lavery}, 152 AD 3d 73, 78-9 (Sup Ct, 2017).} but their decision-making processes do not ‘synch up’ with the model of individual, human, moral agents. A commercial corporation is legally obliged to pursue its own self-interest (if ‘its’ interest is identified with its shareholders’), whatever the empathy of its directing minds; a human who considered nothing but their own self-interest would be accused of psychopathy. Chimps are more human in that regard (that is, more empathetic).

Nonhuman animals could not benefit from all of a human’s rights. ‘In the same way that infants do not have the right to vote, it would be meaningless for a
chimpanzee to be granted such a right.\textsuperscript{149} As Bilchitz notes, though, they could benefit from a lot of them.

The right to be free from all forms of violence, and not to be tortured, are critically important both for infants and for a chimpanzee: these are often referred to as rights to bodily integrity. Animals may also require certain rights to live in a habitat appropriate to their needs (a variant of the right to property), the right not to be deprived of the means of living (certain socio-economic rights), and the autonomy to live lives that are good in their own terms without undue human interference (certain freedom rights would thus be applicable to them).\textsuperscript{150}

That is also true of the human/corporation divide. We do not extend all human rights to corporations. They cannot make use of them. ‘A company may need certain rights to privacy or to property but it cannot really have a right not to be tortured or the right to vote.’\textsuperscript{151} We extend the rights which are appropriate. The law is already sophisticated enough to process the thought that not all people have the same needs and need the same rights.\textsuperscript{152}

Why humans have personhood and nonhuman animals do not might seem like the kind of question academics write papers on, but ordinary people do not think about. (Arguably, fewer of us would be omnivores if we stopped to think about how close cows are to people.)\textsuperscript{153} Different distinguishing marks have been proposed though: such as ‘the ability to use language in a sophisticated manner’, ‘the

\textsuperscript{149}Bilchitz, above n 128, 68.
\textsuperscript{150}Ibid.
\textsuperscript{151}Ibid.
\textsuperscript{152}Note Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746, 763–4 (Sup Ct, 2015): ‘petitioner denies that it seeks human rights for chimpanzees. Rather, it contends that the law can and should employ the legal fiction that chimpanzees are legal persons solely for the purpose of endowing them with the right of habeas corpus, as the law accepts in other contexts the “legal fiction” that nonhuman entities, such as corporations, may be deemed legal persons, with the rights incident thereto.’ See also 767–8. (Sup Ct, 2015).
\textsuperscript{153}Likewise, we would not be so quick to use nonhuman animals for clothing, research or entertainment: see Staker, above n 133, 501.
ability to enter into complex and abstract rational thought’, ‘the capacity for fully autonomous action’\textsuperscript{154} and ‘dignity’.\textsuperscript{155} \textsuperscript{156} A corporation cannot meet those directly as an entity, though its agents can and the corporate form does allow it to ‘act’ in its own interests. One or more of these criteria could ground the distinction between human and nonhuman animals, in which case, we have two main questions: 1) is the standard sensible?\textsuperscript{157} and 2) to use Mackinnon’s language, ‘Why should animals have to measure up to humans’ standards for humanity before their existence counts?’\textsuperscript{158}

If one or more of these criteria should matter, the definition of ‘person’ should be contestable if it can be shown that the law’s assumptions about what nonhuman animals are capable of are poor. We know that Taylor had a problem on a like front. He could meet some of the apes’ standards for apehood: he could speak with them, and he could debate with them. But even as he was speaking and debating – showing the capacities the apes assumed humans lacked – he was not listened to. He debates on whether he has reason, which should prove the point: but it does not. The question of whether he has apehood is ‘silly’, because everyone knows it is. Is the same true of the question of whether nonhuman animals have

\textsuperscript{154}Wise speaks of ‘practical autonomy’, which ‘has three elements. First, one must be cognitively complex enough to want something. Second, one must be able to act intentionally to achieve one’s desires. Third, one must have a sense of self complex enough so that it matters to whether one achieves one’s own goals’: Wise, above n 136, 1283.

\textsuperscript{155}See Bilchitz, above n 128, 53 and generally. Cf \textit{Re Nonhuman Rights Project, Inc v Lavery}, (NY Ct App, No 2018-268, 8 May 2018) slip op 03309 (Judge Fuhey): ‘I agree with the principle that all human beings possess intrinsic dignity and value ... but, in elevating our species, we should not lower the status of other highly intelligent species.’

\textsuperscript{156}That is a big question, in some cases. Bilchitz, for example, has a lot to say about dignity and points out the ‘wide range of mental phenomena’ the concept of ‘rational agency’ might cover, only some of which are human-exclusive and which nonhumans might have in various combinations, to various degrees Ibid 55–6.

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personhood? Are there opportunities to challenge something so fundamental to
the common law that it comes across as extra-legal common sense: opportunities
to provoke a crisis of Taylor-esque proportions?

Taylor is forbidden from making his case himself, and his ‘advocates’ are not
skilled at making the right arguments for others. Nonhuman animals are even
more reliant on their advocates: and whoever speaks for them does so in a far
more comprehensive sense than one who takes instructions. Real world courts do
not, as a rule, entertain arguments about whether animals are people, and real
world lawyers do not press the case.\textsuperscript{159} But rules are made to be broken.

V THE NONHUMAN RIGHTS PROJECT AND THE ‘CHIMP
PERSONHOOD’ CASES

The Nonhuman Rights Project (NRP) is an American group advocating for the
rights of non-human animals. It claims to be ‘the only civil rights organization
in the United States working through litigation, public policy advocacy, and edu-
cation to secure them legally recognized fundamental rights’.\textsuperscript{160} It was formed in
2007, by ‘animal slave lawyer’\textsuperscript{161} Steven Wise.\textsuperscript{162} It also has the most fascinating
list of objectives a teacher of legal philosophy could hope for.

1. To change the common law status of great apes, elephants, dolphins, and
whales from mere ‘things,’ which lack the capacity to possess any legal right, to
‘legal persons,’ who possess such fundamental rights as bodily liberty and bodily

\textsuperscript{159}See Staker, above n 133, 488, 499–500 (noting the willingness of courts to dismiss some of
these cases on ‘technical’ or procedural grounds without delving into the substance).

\textsuperscript{160}Nonhuman Rights Project, \textit{Nonhuman Rights Project} <https://www.nonhumanrights.org/>

\textsuperscript{161}Wise, above n 136, 1280.

\textsuperscript{162}Staker, above n 133, 494.
integrity.\textsuperscript{163}

2. To draw on the common law and evolving standards of morality, scientific discovery, and human experience to consider other qualities that may be sufficient for recognition of nonhuman animals’ legal personhood and fundamental rights.

3. To develop local, national, and global issue-oriented grassroots campaigns to promote recognition of nonhuman animals as beings worthy of moral and legal consideration and with their own inherent interests in freedom from captivity, participation in a community of other members of their species, and the protection of their natural habitats.

4. To build a broad-based coalition of organizations and individuals to secure legally recognized fundamental rights for nonhuman animals.

5. To foster understanding of the social, historical, political, and legal justice of our arguments and the scientific discovery of other species’ cognitive and emotional complexity that informs them.\textsuperscript{164}

The upshot of recognising personhood for nonhuman animals is that they would be owed rights. In Wise’s own words, the NRP ‘is preparing litigation intended to persuade a common law high court that a nonhuman animal, like a human, is a legal person – a “rights container” – an entity with the capacity for legal rights.’\textsuperscript{165}

\textsuperscript{163}David Judd and James Rocha, ‘Autonomous Pigs’ (2017) 22(1) \textit{Ethics and the Environment} 1, David Judd and James Rocha have an interesting article that considers whether pigs – ‘incredibly intelligent animals that are routinely massacred for our culinary pleasure’ – are owed moral duties if the bar is set against the ‘incredibly high’ standard of autonomy: [2, 1 and generally. That could be a very fiery conversation, in light of the outrage over the eating of dogs in South Korea that marked the 2018 Winter Olympics. See Chas Newkey-Burden, ‘Offended by Koreans Eating Dog? I Trust You’ve Never Had a Bacon Butty’, \textit{The Guardian (online)}, \texttt{<https://www.theguardian.com/commentisfree/2018/feb/15/korea-eating-dog-meat-animals-food-west>>}.

\textsuperscript{164}Nonhuman Rights Project, \textit{Nonhuman Rights Project} \texttt{<https://www.nonhumanrights.org/>}, Davison-Vecchione, above n 134.

\textsuperscript{165}Wise, above n 136, 1281; see also Wise, above n 129, 5.
Nonhuman animals would not be owed all the rights of their human counterparts, because again, they do not need them. They would have rights appropriate to their species. This could include freedom from arbitrary detention, protected by a writ of habeas corpus.\textsuperscript{166}

The Nonhuman Rights Project is strategic. It does not make its case anywhere, at any time, throwing as many arguments out as possible and hoping one hits the mark. It surveys the scene and works out where it has the highest chance of success.\textsuperscript{167} This is why, for example, it favours using the common law of the American states, rather than federal law (based largely in legislation), hoping to use the creative power of case law to bolster its claims.\textsuperscript{169}

In recent years, the NRP has launched multiple proceedings in New York\textsuperscript{170} hoping to free a number of chimpanzees from captivity.\textsuperscript{171} These included Tommy, a chimp in private hands,\textsuperscript{172} and Hercules and Leo, chimps that were being used for research into primate locomotion at the University of Stony Brook. Tommy was the subject of Lavery.\textsuperscript{173} Hercules and Leo were the subjects of Stanley.\textsuperscript{174} To benefit from habeas corpus relief, as the NRP intended, the chimps would have to be people.\textsuperscript{175}

Neither Tommy, nor Hercules and Leo, were judicially recognised as people in

\textsuperscript{166}The common law writ of habeas corpus, as codified by CPLR (New York Civil Practice Law and Rules) article 70, provides a summary procedure by which a “person” who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention: \textit{Lavery}, 124 AD 3d 148, 150 (Sup Ct, 2014).

\textsuperscript{167}See Wise, above n 129, 1288; Wise, above n 136, 5, 10. The strategy has levels. It goes right down to the judges making the decisions. ‘We do not want to encounter justices who are instinctively hostile to what we are trying to accomplish, and we do not want to encounter justices who view the common law as rigid and cramped.’ To avoid that possibility, their ‘Sociology Working Group has identified every known sociological characteristic that academic research has correlated with how a judge rules’, and their ‘Predictive Analytics Working Group is involved in the long and complex task of developing algorithms that might assist us in better understanding how a judge might rule based upon her judicial writings’; On the unique susceptibility of American courts to ‘litigant activism’ from pressure groups, and the difficulty of applying the approach in other jurisdictions, see Davison-Vecchione, above n 134, 307-8.
the litigation, probably inducing more disappointment than surprise\(^{168}\) (though not enough to prevent the NRP trying again with elephants in Connecticut).\(^{169}\) Staker refers to the courts as having shown ‘a stubborn unwillingness to expand legal categories’ and having ‘relied on unconvincing legal arguments to mask the fact that they simply did not want to recognize the legal rights and personhood of animals’.\(^{170}\) Whether or not that was their motive, there is something highly unsatisfying about the judgments. They are not ‘filling’. They touch on tantalising issues, but the judges do not sink their teeth in very far: raising the appetite for some truly imaginative jurisprudence, but in no way sating it.

*Lavery* is a particularly thin gruel. It has little in the way of rationale or explanation beyond the passage quoted below. There is some elaboration in *Re Nonhuman Rights Project Inc v Lavery*\(^{171}\). However, the decisions are more assertive than argumentative: as if taking the issues seriously would be farcical.

One judge who did take the matter seriously was Judge Fahey, in the Court of Appeals decision denying leave to appeal. He concurred in the result, for lack of new grounds to consider, but expressly noted that was no statement on the claim’s merits. Indeed, he emphasised the distinct lack of persuasive reasoning in the prior

\(^{168}\) Davison-Veccione and Pambos describe the judgments as ‘deeply unfortunate, even if predictable’ Davison-Veccione, above n 134, 305.

\(^{169}\) Their names were Beulah, Minnie, and Karen. Again, it was a writ of habeas corpus that was sought. The court denied the petition ‘on the ground that the court lacks subject matter jurisdiction and the petition is wholly frivolous on its face in legal terms’. The court pointed to the state’s animal cruelty laws ‘as a potential alternative method of ensuring the well-being of any animal’: *Nonhuman Rights Project Inc v R W Commerford and Sons Inc*, (Conn Super Ct, No LLICV175009822S, 26 December 2017).

\(^{170}\) Staker, above n 133, 500; see also Ewasiuk, above n 4, 74-5 on the historically political, shifting boundaries of the habeas corpus writ. Staker’s claim resonates with an ‘epiphany’ Wise had in 2008, while arguing before the Vermont Supreme Court that a client should be able to sue for noneconomic damages like loss of companionship and emotional distress after losing cats to veterinary malpractice. ‘In the middle of oral argument, I realized I was involved in a conspiracy with the judges to pretend their decision would be made on strictly legal grounds, when we all knew – but no one acknowledged – that it would not’ Wise, above n 136, 1288.

\(^{171}\) 152 AD 3d 73 (Sup Ct, 2017), dealing with the same issues and the same chimp (plus ‘Kiko’, another of the NRP’s ‘clients’).
cases,\textsuperscript{172} and opined that ‘the question [whether a non-human animal can benefit from habeas corpus] will have to be addressed eventually’.\textsuperscript{173}

Stanley is more comprehensive than Lavery; it deserves closer attention. In Stanley, Justice Barbara Jaffe explicitly recognised how close humans and chimpanzees are in numerous traits: brain structure, ‘cognitive development,\textsuperscript{174} including a parallel development of communications skills’,\textsuperscript{175} the capacity for self-awareness, self-reflection, empathy, morality, compassion,\textsuperscript{176} depression, ‘imaginary play’ and humour, and ‘cooperative social life’.\textsuperscript{177} She acknowledged expert evidence that ‘humans and chimpanzees share almost 99\% of their DNA, and chimpanzees are more closely related to human beings than they are to gorillas.’\textsuperscript{178} Curiously, though, she viewed those similarities as inspiring only ‘the empathy felt for a beloved pet’.\textsuperscript{179}

In any case, the judge considered herself bound by the precedent in Lavery, which,

\textsuperscript{172} Re Nonhuman Rights Project, Inc v Lavery (NY Ct App, No 2018-268, ) slip op 03309.
\textsuperscript{173} Ibid.
\textsuperscript{174} ‘Human no like smart ape’ is a line from Rise of the Planet of the Apes (in the rebooted franchise): an indication, perhaps, of how important intelligence is to the boundary between the human and the nonhuman. Sheryl N Hamilton took it as the title of her article ‘“Human No Like Smart Ape”: Figuring the Ape as Legal Person in Rise of the Planet of the Apes’ Hamilton, above n 128.
\textsuperscript{175} On the importance of ‘voice’ in Planet of the Apes (both the book and the film), see Horsman, above n 68; see also Hamilton, above n 128, especially 313–18.
\textsuperscript{176} As for what morality and compassion might involve in thechimp world, Re Nonhuman Rights Project Inc v Lavery, 152 AD 3d 73 (Sup Ct, 2017) cited some interesting examples (at 77): ‘protecting others in risky situations, such as when relatively strong chimpanzees will examine a road before guarding more vulnerable chimpanzees as they cross the road’; ‘choosing to make fair offers and ostracizing chimpanzees who violate social norms’; and ‘showing concern for the welfare of others, particularly their offspring, siblings, and even orphans they adopt’.
\textsuperscript{177} Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746 (Sup Ct, 2015); see also Hamilton, above n 128, 310–12. Hamilton notes that great apes are ‘behaviourally, biologically and semiotically even closer to the legally sacred boundary that guards human exceptionalism’ than dogs and cats: at 307.
\textsuperscript{178} Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746 (Sup Ct, 2015); On the ‘great faith’ placed ‘in the ability of scientific evidence to convince the courts that legal boundaries should be shifted’, see Staker, above n 133, 499; Also see Wise, above n 136, 1284: ‘I read science books and journals, including Science and Nature, every week. Every animal rights lawyer should! As lawyers we may spend significant time theorizing about the law, but if we do not understand and cannot present complicated scientific facts about the nonhuman animals in a way that fact-finders understand, we will not win.’
\textsuperscript{179} Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746 (Sup Ct, 2015).
tapping a ‘social contract’ analysis, asserted that

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights that have been afforded to human beings.

The Court did acknowledge, in a footnote, that ‘some humans are less able to bear legal duties or responsibilities than others’ – ‘young children, the senile and persons with mental incapacities’, to adopt Bilchitz’s list, bearing little responsibility – but declared, without arguing, that since human beings ‘collectively’ have those capacities, it did not affect their analysis. The NRP responded by arguing

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180 Lavery, 124 AD 3d 148, 151–2 (Sup Ct, 2014). Note also LexisNexis Australia, Encyclopaedic Australian Legal Dictionary (at 16 February 2018) (definition of ‘legal person’): ‘An entity on which a legal system confers rights and imposes duties’ (emphasis added). See further Bilchitz, above n 130, on the use and implications of this distinction, and cf at 50: ‘A person is clearly in our [South African] law an entity that is capable of having either rights or duties (not necessarily both).’ In Naruto v Slater, 888 F 3d 418, 432 n 6 (9th Cir, 2018), Judge Smith gave the following example of right-duty reciprocity regarding a monkey having copyright in its ‘selfies’. ‘One must pay taxes on profits from a royalty agreement for use of a copyrighted image. Are animals capable of shouldering the burden of paying taxes?’

182 See also Re Nonhuman Rights Project Inc v Lavery, 152 AD 3d 73, 77 (Sup Ct, 2017); Corporations, however, can bear duties in exchange for rights People ex rel Nonhuman Rights Project Inc v Lavery, 124 AD 3d 148, 152 (Sup Ct, 2014).


184 This is why I would hesitate to endorse Bauer and Svolba’s claim: ‘To its credit, the court then explicitly recognizes the looming challenge of marginal cases’ Bauer, above n 183, 53 n 4. They might see it, but they ignore it. See also Davison-Vecchione, above n 134, 297, noting the unsatisfactory state of things here (and proceeding to draw potential justifications from ‘relevant ethical literature’); Staker, above n 133, 500; Judge Fahey did acknowledge the challenges of the marginal cases (but did not address them, since leave to appeal was denied) in Re Nonhuman Rights Project, Inc v Lavery (NY Ct App, No 2018-268, ) slip op 03309.

185 People ex rel Nonhuman Rights Project Inc v Lavery, 124 AD 3d 148, 152 (Sup Ct, 2014); Cf Lawrence, above n 30, 483; The same brute assertion appears in the 2017 judgment. ‘Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community’ Re Nonhuman Rights Project Inc v Lavery, 152 AD 3d 73, 78 (Sup Ct, 2017); Again,
both that the capacity to bear duties is not necessary for personhood, and that chimpanzees can take up responsibilities in chimp and human communities.\footnote{186}

That was to no avail: it does not seem to be what the Court was getting at. While the ‘contract’ analysis of society cracks more egregiously the closer one expects society to resemble an actual contract, one would anticipate, at a minimum, (the conceit of) an agreement in the nature of an exchange. Chimpanzees would have things to trade (like their labour or their liberty), but no understanding that they were trading (and bound by the terms of the deal). From a contract perspective, it is difficult to see how there could be a legal community incorporating chimps.\footnote{187}

Ultimately, the chimpanzees are in no better position than Taylor. The entry point for legal rights is at least as human-centric as Dr Honorious’s standards are ape-centric. Apes provide a lot to humans – in the way of entertainment, like Tommy, or research, like Hercules and Leo – and while they will not be tried if

\footnote{\textit{which has links to relevant affidavits and submissions} , \textit{Client, Tommy (Chimpanzee, Non-human Rights Project} <https://www.nonhumanrights.org/client-tommy/>; See also Staker, above n 133, 495-6; \textit{In Re Nonhuman Rights Project Inc v Lavery}, 152 AD 3d 73, 75 the Court denied that its counterpart in the earlier Lavery decision had taken ‘judicial notice that chimpanzees cannot bear duties and responsibilities’. (Sup Ct, 2017); See Davison-Vecchione, above n 134, 299–301, on some of the ‘citizenship’-style arguments that can be used with nonhuman animals.}

\footnote{It is not necessarily the case that, under a contract analysis, only the contractors can benefit from the arrangements reached or have rights. See Bauer, above n 183, for an account in which ‘whether an individual falls within the scope of the social contract depends not on whether that individual is a person, but, rather, on whether that individual is related to persons in the right way’, at 57. Craig Ewasiuk has taken a sustained look at nonhuman animals and modern social contract theory, arguing that the latter does not preclude granting legal rights to animals because of the ‘duties’ hurdle; he also questions how the judges in Lavery, 124 AD 3d 148 (Sup Ct, 2014) applied some of the allegedly unfavourable precedents, and their use of Richard L Cupp Jr’s scholarship. See Craig Ewasiuk, ‘Escape Routes: The Possibility of Habeas Corpus Protection for Animals under Modern Social Contract Theory’ (2017) 48(2) Columbia Human Rights Law Review 69, He makes the following, very interesting, point (at 74): ‘What duties could Lakhdar Boumediene, an Algerian-born citizen of Bosnia and Herzegovina and enemy combatant held at Guantanamo Bay, have assumed to the United States that entitled him to a writ of habeas corpus in \textit{Boumediene v. Bush}? Is it the case that habeas corpus was granted to African Americans after the Civil War because there was a change in opinion regarding whether they could assume duties?’}

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they murder a human (because they can bear no responsibility as far as the law is concerned), they could very well be killed for it. But it is not part of the ‘give and take’ that marks a society because internally, they do not process it as giving and taking, as the hypothetical contractor would. On the strength of that distinction, they are a thing – a special thing, perhaps, not to be abused, but still a thing to be used.

VI USING PLANET OF THE APES AND THE NRP IN THE CLASSROOM

I will not argue here that Stanley and Lavery were wrongly decided; nor will I comprehensively review the wide-ranging, multi-disciplinary literature on nonhuman personhood. My purpose in this article is to show how Planet of the Apes and the ape personhood cases can be used to frame the issues for students in an engaging way. In this section, I will describe how I employed them in the classroom, and helped the students unpack the assumptions behind the stance that ‘all humans, simply by virtue of their species membership, are entitled to a special status and treatment within our law’.

I began by asking the students which of these three descriptions best suits their own views: 1) (nonhuman) animals are things 2) animals are greater than things but less than people 3) animals are people. Unsurprisingly, there was little support

\[188\] Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the “capacity to understand the proceedings against him or to assist in his own defense”’. \textit{Re Nonhuman Rights Project Inc v Lavery}, 152 AD 3d 73, 78 (Sup Ct, 2017).

\[189\] On the distinction between that and personhood status, see Bilchitz, above n 128.

\[190\] Legal things, living and inanimate, exist in law solely for the sakes of legal persons’ Wise, above n 129, 1.

\[191\] Bilchitz, above n 128, 50.

\[192\] Before having them answer, I showed a picture of a friend’s puppy, bringing us into the realm of the ‘affect-laden hybrid of personal property and personality that is the cherished companion.
for the third view. As Bauer and Svolba assert, ‘Most of us believe that we may
do things to animals that we may not do to fellow human beings, for example,
owning them, having them spayed or neutered, or sometimes even eating them.’\textsuperscript{193} However, there was also little support for the first view.\textsuperscript{194} I pointed out how curious that was, since 1) is the basic position, at law.\textsuperscript{195}

I then asked the ‘big picture’ question, ‘What makes a person a person?’ I noted there might be different answers depending on whether we are looking at this from a philosophical (broadly considered), moral or legal perspective. We then brainstormed some likely candidates. The result was a whiteboard full of terms one might expect: reason, autonomy, choice, conscience and so forth.\textsuperscript{196} My experience paralleled that of Joseph, teaching his students about ‘personhood’ through reflecting on androids: ‘When we started, the students thought the question was easy. They were surprised to find that they had different views.’\textsuperscript{197}

Next, I introduced the legal definition of personhood, and the range of things it extends to. We discussed which terms on the board could apply to different types of person. For example: can a corporation act according to ‘conscience’?

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{193}Bauer, above n 183, 51.
\item\textsuperscript{194}This bolsters Staker’s claim: ‘It is clear that the categorization of animals as property is becoming increasingly unpalatable to modern-day conceptions of morality’ Staker, above n 133, 503.
\item\textsuperscript{195}Bauer, above n 183, 52.
\item\textsuperscript{196}One word we did not write up is ‘recognition.’ Bauer and Svolba have a contract-type account they think accommodates the marginal cases, in which ‘the scope of the social contract will extend to everyone in whom the contractors can recognize themselves’ Ibid 58 and generally. When contracting behind a ‘veil of ignorance’ (not knowing the life one will live), the contractor can imagine living the life of the marginal case, or at least realizing that ‘there but for the grace of X go I’, and thus, extends protection to those in that position. They cannot do those things with, say, a cat. ‘In attempting to imagine ourselves as cats, we succeed only in imagining a rational mind trapped inside a cat-shaped body’: at 59. Interestingly, much like the court in Lavery, they did end up footnoting a case with troubling implications: that of the foetus (at 64 n 19).
\item\textsuperscript{197}Joseph, above n 23, 113.
\end{enumerate}
\end{footnotesize}
Is that incompatible with its structure or purpose? If ‘reason’ is a key factor, what of ‘marginal cases’, like very young children or those with severe mental impairments? What if they are ‘part way there’ (have partial capacity): are there grades of reason? If autonomy and choice matter, is a coma patient no longer a person? Is their personhood ‘suspended’ for the duration? After brainstorming some of these threads, we added layer after layer of complexity to the base question: demonstrating for the students how much nuance had to be buried to maintain their easy assumptions about who is a person and who is not.

We were then ready to meet the Nonhuman Rights Project. As I anticipated, the students did not immediately take to the notion that chimpanzees are ‘people’, but I asked them to dig into why that is. Can chimpanzees ‘reason’? They can solve problems; they can exercise a choice between alternatives based on individual preference. What more is needed? If chimps or other nonhuman primates can demonstrate emotion and empathy, and are inherently social, does that mean they can make moral decisions: in the sense, perhaps, of decisions directed at another’s welfare? If the distinguishing factor is something like dignity or a soul, how do we establish who has it or has one, if not through brute assertion?

The class was now prepared for the ape personhood cases: Lavery and Stanley. Lavery, in particular, provided a good opportunity to link the issues back to questions of law’s fundament. Why do we have rights and obligations under law in the first place? Predictably, given most were raised in a representative democracy, the class drew it back to ‘consent’ – the beginnings of a contractual analysis. We drill down: what does ‘consent’ mean, or entail? No actual agreement was ever reached – certainly none you, individually, had a part in. You never negotiated terms; you may not know what the terms are; you never had a choice to enter; you do not have a free choice to leave. Most of us are so massively ignorant of
how our incredibly complex systems work that fully informed consent – based on full appreciation of the consequences of our choices – would not be feasible. It is not only the people for whom consent would be possible that have rights, in any case. You have them before you reach capacity, and you have them if you lose it (if you have not also lost your life). Perhaps we are not looking at what you did agree to, but what you would have: if you were rational, and informed, and were asked. But if we can imagine what non or less rational human beings would agree to, and base our understanding of their rights and obligations on that, why not non or less rational nonhumans?

It was at this point – the point of productive confusion, when the students’ preconceptions were thoroughly muddled – that I delivered the hearing scene from Planet of the Apes as a coup de grace. Here is a creature like themselves – possessed of reason, empathy and autonomy, of the same type as their own, and worthy, in their own eyes, of the same moral status – being denied not just the most basic rights of liberty and bodily integrity, but the right to argue he should have rights. The reason is that he is pre-judged, despite the evidence of the tribunal’s own eyes and ears, as lacking capacities which either he does have, like the power to think, or which do not matter, like scriptural competence. The ‘million dollar question’ for our class discussion became: were the courts in Lavery and Stanley – and were the students in their own assumptions – guilty of the same sins?

This discussion was linked to an assessment piece: a reflective journal. It was one of a number of things the students could write an entry on. I know from reading those journals that there were not many converts to the ‘apes are people’ point of view (though a number did admit they were struggling not against the logic, but their ‘gut reaction’). Students also tended to balk at the notion that carving apes or other nonhuman animals out of the category of ‘people’ could be likened
to what occurred under Nazism with non-Aryans, or apartheid South Africa with non-Whites.\textsuperscript{198} It was, however, a very popular choice for reflection: and it made for an easy segue into more orthodox debates over personhood, like that on the foetal personhood Bill ‘Zoe’s Law’.\textsuperscript{199} I did not encounter any of the trivialising effect campaigners against ‘killer robots’ fear when drones are viewed through the lens of The Terminator.\textsuperscript{200} Using a combination of the cases and the sci-fi, and forcing the students to articulate the distinction they instinctively believed existed, helped them realise that the issue has more intellectual heft than they appreciated.

VII Conclusion: The Pedagogy of Sci-Fi

Science fiction is the best of two worlds. It is entertainment, but part of the entertainment comes from making the audience think. Planet of the Apes, and its problematising of personhood, is just one example.\textsuperscript{201} With the defining mark of the genre being limitless possibility, and with so many entries spread over so

\textsuperscript{198}One of their required readings made the following claim. ‘If we develop another (privileged) class that is equally unjustifiable (as Aryans under Nazism or Whites under apartheid), and we exclude from our legal system those that are entitled to decent treatment, we continue to perpetrate injustice that is akin to that committed in the name of Nazism or apartheid’ Bilchitz, above n 128, 52. See also 66: ‘Prior to 1993, South African law was replete with arbitrariness between black and white people, men and women. It is not surprising therefore that the law arbitrarily distinguished between the human and the non-human in terms of their legal status and entitlements.’

\textsuperscript{199}See Robert, above n 131; Lawrence describes the foetal personhood debate as ‘a vicious argument with huge investment and emotion on both sides’ which ‘serves well to illustrate the primacy of the regard in which we hold personhood in Western society’ Lawrence, above n 30, 482; In the future, I may talk about admixed embryos see Travis, above n 9, 255 and whether the enhanced capacities of posthumans could grant them a higher moral status than ourselves; see also Lawrence, above n 30; Carpenter discusses the argument that ‘science fiction can be a way of easing into challenging conversations where others disagree, dampening the resistance to a particular viewpoint by removing it slightly from real-world stakes’ Carpenter, above n 14, 62. Engaging with personhood first in the context of chimps, then in the context of foetuses – the latter raising, as a rule, more emotion than the former – might have some of that logic.

\textsuperscript{200}See Carpenter, above n 14, 59-61.

\textsuperscript{201}See Hamilton, above n 128, 303: sci-fi is ‘especially well suited to exploring law’s capacity to think and rethink persons’.
many years, its capacity to inspire students to think in new ways – about new or old things – is exciting. With the defining mark of legal study being, some would say, tedium, it is, in any case, a welcome break from the norm.\textsuperscript{202}

Recognising the personhood of nonhuman apes might seem unthinkable now.\textsuperscript{203} Humans define themselves against nonhumans.\textsuperscript{204} The ‘high, thick legal wall’ they built between the two\textsuperscript{205} both reflects and maintains a conceptual wall. To go from being X, rather than Y, to one of many Ys or even just a less exclusive club of X’s, is no small thing. But perhaps what we have here is a failure of imagination. Equality between the sexes was unthinkable while females were imagined as lesser in so many fields. A similar point holds for racial equality.\textsuperscript{206} Justice Jaffe recognised as much in Stanley.\textsuperscript{207}

The concept of legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States. Not very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution. Tragically, until passage of the Thirteenth Amendment of the US Constitution, African-American slaves

\textsuperscript{202}See Joseph, above n 23, 113, outlining positive experiences akin to my own: ‘The readings and viewings were accessible to students and analogies drawn from the science fiction to the law helped them to talk about some very difficult legal issues.’ Interestingly, Travis notes that ‘science fiction is often presented in case law as the pastime of the mentally unstable, listed as the hobby of, amongst others: rapists, pedophiles, and the mentally ill’ Travis, above n 9, 247). If that prejudice still applies, I hope I have redeemed the genre somewhat in the eyes of the reader.

\textsuperscript{203}The unsuccessful outcomes in (cases like Lavery) are likely to be attributable to the simple fact that society is not yet ready to abandon the human–animal divide' Staker, above n 133, 501.

\textsuperscript{204}See Ibid.

\textsuperscript{205}Wise, above n 136, 5.

\textsuperscript{206}Boyle discusses the parallels and intersections between racial and animal civil rights movements Boyle, above n 133. On the (anti-slavery) Thirteenth Amendment to the US Constitution, which changed ‘the legal status of an entire tract of the population from property to persons’, she writes: ‘The provision was inconceivable at the time, with slavery’s vast economic benefits to those in power as well as society as a whole, not to mention the fundamental perceptions of slaves as nonhuman’ at 192.

\textsuperscript{207}She followed this up by stating: ‘The past mistreatment of humans, whether slaves, women, indigenous people or others, as property, does not ... serve as a legal predicate or appropriate analogy for extending to nonhumans the status of legal personhood’: at 765. However, her conclusion included the line, ‘Efforts to extend legal rights to chimpanzees are ... understandable; some day they may even succeed’ at 772–3. Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746 (Sup Ct, 2015); See also Boyle, above n 133, 191-2; Lawrence, above n 30, 447; Staker, above n 133, 485-6.

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were bought, sold, and otherwise treated as property, with few, if any, rights. Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins.

As a child, I do not think I could have ‘imagined’ same-sex marriage would come to be in my home country of Australia (partly because no one would have asked me to imagine it). As of late 2017, it was a reality. In *Obergefell v Hodges*, Justice Kennedy wrote: ‘If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.’ ‘Law is evolutionary and the great social justice movements have taken time to achieve just laws.’ Unthinkable things are only unthinkable until people start working on ways of thinking them.

Even chipping away at our certainty that nonhuman animals are not people is valuable. Uncertainty can change our moral calculations. David Judd and James Rocha, in their article ‘Autonomous Pigs’, set out to show not that pigs are autonomous creatures – ‘an impossible task given the inability to communicate

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208 Another example can be found in Hallevy, above n 33, 200: ‘Although corporations in their modern form have existed since the fourteenth century, it took hundreds of years to subordinate corporations to the law, and especially, to criminal law.’

209 135 S Ct 2584, 2602 (2015): this was quoted by Justice Jaffe in *Stanley*, 49 Misc 3d 746, 765 (Sup Ct, 2015).

210 Bilchitz, above n 128, 69.

211 Boyle speaks of finding ‘the weaknesses in the “immutable” belief that nonhuman animals lack rights or personhood’: Boyle, above n 133, 192; This is where Staker sees the (present) value in the nonhuman rights cases. They may have failed to budge the legal barriers (and indeed, might have had a negative impact in setting unfavourable precedents). However, the ‘legitimizing and humanizing’ litigation opens up discussions and sociocultural space which can help move the needle. See Staker, above n 133, 503, 501-6; (We should note that, despite the unfavourable outcome of the litigation, it was decided Hercules and Leo would be moved to a chimp sanctuary anyway: an indirect, but welcome, effect of their case. See Ewasiuk, above n 187, 77; see also Boyle, above n 133, 184-5 on the way PETA’s orca-slavery case helped put pressure on SeaWorld to change its policies.) Hamilton warns against the ‘self-congratulation in much legal personhood discourse, with its origin stories of the extension of legal personality to women and former slaves, a seemingly historically self-evident (and inevitable) telos simultaneously confirming law’s progress and progressiveness’: Hamilton, above n 128, 319. She argues that ‘the concession of personhood is demanded, and forced from, reluctant states rather than magnanimously awarded’: at 320. Indeed, ‘rarely is the category of legal person expanded prior to previously unrequited demands and eventual violent conflict’: at 318. Hopefully if chimpanzee personhood is recognised it does not come at the end of a ‘War for the Planet of the Apes.’
with them or read their minds’ – but ‘that we are not sure enough that pigs are not autonomous to make it morally permissible to cause them grievous harms for our own pleasure.’

> A similar point could apply to nonhuman apes. A human living the life of Tommy, Hercules, or Leo would be thought a wretched thing. A confined human is pitied no matter the quality of the cage, and research on human subjects is tightly controlled (as the author discovered when he foolishly suggested his Honours student conduct a simple survey on community attitudes as part of his thesis). If there is a possibility that Tommy, Hercules and Leo are so human-like that the considerations which prevent humans being caged and experimented on also apply to them, there is a possibility that what we are doing is monstrous. Even a slight chance of that should give us pause.

To adopt some of Lawrence’s language, ‘The fact that [nonhuman personhood cases] have been considered at all – and in some instances been successful to greater or lesser extent – speaks volumes.’

‘The parameters of legal personhood’, Justice Jaffe declared, ‘have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law.’

The jurisprudence necessary for nonhuman personhood, though, needs development. In a 2012 lecture, Wise stated:

I have been practicing ‘animal slave law’ for thirty-five years. I do not want to practice ‘animal slave law’ anymore; I want to practice ‘animal rights law’. When I teach, I do not teach ‘animal slave law’, I teach ‘animal rights jurisprudence’. This jurisprudence does not yet exist; it is a jurisprudence that is struggling to come into existence.

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212 Judd, above n 163, 2.
213 If there’s a non-negligible chance that pigs are autonomous, it will be quite hard to morally justify requiring their slaughter to increase bacon-eating pleasure’ Ibid see also 14.
214 Lawrence, above n 30, 483.
215 Re Nonhuman Rights Project Inc v Stanley, 49 Misc 3d 746, 765 (Sup Ct, 2015).
216 Wise, above n 136, 1280.
To get beyond the limits of traditional jurisprudence may require critical tools, or at the very least impetus, from beyond it (particularly if, as Wise claims, ‘People do not read law review articles.’)\textsuperscript{217} There needs to be a space to hone some of these ideas: to make them thinkable. The imaginative space of sci-fi may be a very good testing ground.

It has been suggested that the question of our relationship to nonhuman animals might have to be addressed in ‘half-serious mode’, because ‘we can never be sure whether our empathy produces a true “understanding” of the animal in its very animality, or whether such “understanding” is the product of a slightly ridiculous projection of our own feelings onto them’.\textsuperscript{218} If that is the case, then perhaps legal philosophy should make room for some silliness: even ‘world full of talking apes’ silliness. Learning philosophy involves self-reflection: and reflecting on how absurd our thoughts really are seems to this author like a necessary, and under-used, exercise.

\textsuperscript{217}Ibid 1281. Of course, that also depends on how one defines ‘people’.
\textsuperscript{218}331 Horsman, above n 68, discussing lectures by J M Coetzee on animal rights incorporated into Elizabeth Costello: Eight Lessons (Vintage, 2003).