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# Aristotle and Animal Law: The Case for Habeas Corpus for Animals

By CHARLES EDWARD ANDREW LINCOLN IV\*

## Introduction

THIS ARTICLE ARGUES THAT, ONTOLOGICALLY, the right to habeas corpus comes from an ability to have a cognitive capacity. This is not intended as a scientific journal but rather a philosophical and legal argument. Arguments have been made using theoretical and philosophical bases for animal rights—as well as natural philosophical rights in general. Aristotle has provided a foundation for analyzing the character and structure of natural rights.<sup>1</sup>

The definition of the soul—to Aristotle—includes three levels.<sup>2</sup> This theory of Aristotle’s soul is not novel; it has influenced thinkers from pre-Christian times and beyond. This theory was also featured in the U.S. Supreme Court decision *Roe v. Wade*, regarding abortion rights.<sup>3</sup> The first level of the soul is the nutritive aspect, which enables

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1. Ana Marta González, *Natural Right and Coercion*, in *THE THREADS OF NATURAL LAW: UNRAVELLING A PHILOSOPHICAL TRADITION* 85, 86 (2013).

2. “Aristotle . . . focused on empirical biological investigations and defined the soul as ‘an actuality of the first kind of a natural organized body.’ Aristotle also viewed humans as having a sequence of souls (vegetative, sensitive, and intellectual), the sensitive soul being acquired sometime after fertilization.” Brendan (Bo) F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 141 (2013). See Aristotle, *Aristotle De Anima*, (R.D. Hicks trans., Cambridge Univ. Press Warehouse 1907) (in Book II of *De Anima*, Aristotle accounts for the three parts of the soul as falling into five categories: nutritive (θρεπτικόν), sensory (αισθητικόν), appetitive (ὀρεπτικόν), locomotive (κινητικόν), thinking (διανοητικόν).

3. *Roe v. Wade*, 410 U.S. 113, n.22 (1973), *modified*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, *Hist.Anim.* 7.3.583b; *Gen.Anim.* 2.3.736, 2.5.741; Hippocrates, *Lib. de Nat. Puer.*, No. 10. Aristotle’s thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was

living things to nourish themselves—this aspect of the soul is shared by all living things, including plants.<sup>4</sup> The second part of the soul, the locomotive, distinguishes animals from plants. The locomotive portion of the soul allows animals to “engage in goal-directed behavior in order to achieve their conscious and unconscious goals.”<sup>5</sup> Whereas the third, the rational part of the soul, which enables “reasoned purposeful conduct,” distinguishes humans and animals.<sup>6</sup>

Whether one accepts Aristotle’s conception of the soul—perhaps more accurately translated as psychology or “aspects-of-existence”—is

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reached at conception, the animal at “animation,” and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers. The theological debate was reflected in the writings of St. Augustine, who made a distinction between embryo inanimatus, not yet endowed with a soul, and embryo animatus. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, *De Origine Animae* 4.4 (Pub.Law 44.527). See also W. Reany, *The Creation of the Human Soul*, c. 2 and 83–86 (1932); Huser, *The Crime of Abortion in Canon Law* 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D.C., 1942). Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the *Decretum*, published about 1140. *Decretum Magistri Gratiani* 2.32.2.7 to 2.32.2.10, in 1 *Corpus Juris Canonici* 1122, 1123 (A. Friedberg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917. For discussions of the canon-law treatment, see Means I, pp. 411-412; Noonan 20-26; Quay 426-430; see also J. Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* 18-29 (1965).

*Id.*

4. Christopher Shields, *Aristotle’s Psychology*, *STANFORD ENCYCLOPEDIA PHIL.* (Jan. 8, 2016), <https://plato.stanford.edu/entries/aristotle-psychology/> [https://perma.cc/TK7S-T3YY]

The broadest is nutrition, which is shared by all natural living organisms; animals have perception in addition; and among natural organisms humans alone have mind. Aristotle maintains that various kinds of souls, nutritive, perceptual, and intellectual, form a kind of hierarchy. Any creature with reason will also have perception; any creature with perception will also have the ability to take on nutrition and to reproduce; but the converse does not hold.

*Id.*

5. *Id.*

Thus, plants show up with only the nutritive soul, animals have both perceptual and nutritive faculties, and humans have all three. The reasons why this should be so are broadly teleological. In brief, every living creature as such grows, reaches maturity, and declines. Without a nutritive capacity, these activities would be impossible (*De Anima* iii 12, 434a22–434b18; cf. *De Partibus Animalium* iv 10, 687a24–690a10; *Metaphysics* xii 10, 1075a16–25). So, Aristotle concludes, psychology must investigate not only perceiving and thinking, but also nutrition.

*Id.*

6. Ralph F. Gaebler, *On the Incompatibility of Political Virtue and Judicial Review: A Neo-Aristotelean Perspective*, 34 *HAMLIN L. REV.* 263, 274–75 (2011).

arguably a subjective question. Considering its relevance to modern legal debate, *Roe v. Wade* appears to cite to Aristotle's hierarchical theory as a method of determining whether human life has arisen. The Supreme Court seems to argue that if the fetus is capable of partaking in the rational aspect of the soul, then the fetus should be accorded rights.<sup>7</sup> This frame of analysis was not key to the ultimate Court decision but it does provide a compelling method of analysis: If a being partakes in what Aristotle deems the rational aspect of the soul, then that being should be accorded rights.

The rational aspect of the soul is key to human behavior, as it allows for the ability to speak and communicate with one another. Regarding humans and the soul, Aristotle writes:

The proper function of man, then, consists in an activity of the soul in conformity with a rational principle or, at least, not without it. In speaking of the proper function of a given individual we mean that it is the same in kind as the function of an individual who sets high standards for himself.<sup>8</sup>

However, it is true that many animals partake in the rational portion of the soul. Throughout their lives, animals utilize this aspect of the soul to perform survival functions and to move.<sup>9</sup>

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7. Such arguments are not novel. Adam Fulginiti, *The Soul and Its Impact on Life and Death Choices: A Constitutional Study of Abortion, the Right to Die, and Other Bioethical Dilemmas*, 11 RUTGERS J.L. & RELIGION 459, 466–67 (2010).

8. Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, n.97 (1995); see also *id.* at n.5 (Aristotle writes that we share certain aspects of the soul with other animals and beings, but it is the proper function of a humans to act according to reason and rationality.).

9. Aristotle further suggests that there could be divisions even in the rational aspect of the soul—among these including perception. See Shields, *supra* note 4.

Perception is the capacity of the soul which distinguishes animals from plants; indeed, having a perceptive faculty is definitive of being an animal (*De Sensu* 1, 436b10–12); every animal has at least touch, whereas most have the other sensory modalities as well (*De Anima* ii 2 413b4–7). In broad terms at least, animals must have perception if they are to live. So, Aristotle supposes, there are defensible teleological grounds for treating animals as essentially capable of perceiving (*De Anima* ii 3, 414b6–9, 434a30–b4; *De Sensu* 1, 436b16–17).

*Id.*

Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 105 n.33 (2002).

Professor Nussbaum criticizes Wise's characterization of Greek history and asserts that "there is no evidence that [Aristotle] believed in [the view that there was] a universal teleology of nature, such as the 'Great Chain of Being.'" Nussbaum, *supra* note 31, at 1517. Professor Nussbaum references the hundreds of statements in Aristotle's biological writings suggesting that each animal's goal is its own life and flourishing to counterbalance Aristotle's oft-cited remark that animals exist for human's sake. *Id.* at 1519. For a selection of Aristotle's writings that include the inferential statements that "[nature] has made all animals for the

As such, both animals and humans should be afforded habeas corpus rights. Animals partaking in the locomotive and rational part of the soul should be granted certain legal rights, such as habeas corpus. In short, habeas corpus allows an individual to challenge unlawful imprisonment and maintain one's liberty.<sup>10</sup> Habeas corpus is particularly relevant right because it is a right enshrined in the U.S. Constitution and other constitutions around the world.<sup>11</sup> Moreover, as in cases involving the freedom of slaves, habeas corpus was recognized as a prime example of self-determination of freed persons.<sup>12</sup> Likewise, it has been argued that if animals are self-aware, then they should be granted habeas corpus rights.<sup>13</sup> But still, questions remain: How should rationality be demonstrated, and by what rule or system of characterization of rationality should the law accord the right of Habeas Corpus? These questions can be answered through evidence and science. This Article argues that such characterization could be consistently and effectively applied using Aristotle's hierarchy of the soul outlined in *De Anima* (Greek: *Περὶ Ψυχῆς*).

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sake of man," see Aristotle, *Animals and Slavery*, in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* 109—10 (Tom Regan & Peter Singer eds., Prentice-Hall, Inc. 1976).

*Id.*

10. *Habeas Corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019)

[H]abeas corpus [Law Latin "that you have the body"] (18c) A writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal (habeas corpus ad subjiciendum). In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review of (1) the regularity of the extradition process.

*Id.*

11. U.S. CONST. art. 1, § 9, cl. 2.

12. *Somerset v. Stewart* (1772) 98 Eng. Rep. 499 (U.K.). In this case, the English Court of King's Bench determined that slavery was not supported by the common law tradition and statutory law in England (slavery was still sanctioned by law in other parts of the British Empire). *Id.*

13. One such argument is seen in a case from New York:

Chimpanzees also demonstrate self-awareness, recognizing themselves in mirrors and photographs and on television, and have the capacity to reflect on their behavior. They manifest a capacity for empathy, are attuned to the experiences and emotions of others, and imitate and emulate others. They behave in ways that reflect moral inclinations, and demonstrate compassion and depression when a member of their community or familial group dies. They also have a cooperative social life, engage in imaginary play, and display a sense of humor. Based on this research and the belief that chimpanzees are autonomous and self-determining beings entitled to such fundamental rights as bodily liberty and equality, petitioner seeks the issuance of a writ and a determination that [the chimpanzees] are being unlawfully deprived of their liberty.

In re Writ of Habeas Corpus, *The Nonhuman Rights Project, Inc., ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S. 3d 898, 902 (Sup. Ct. 2015).

This article is divided into three substantive sections. Section I delineates Aristotle's theory of the soul as laid out in *De Anima*. Section II defines habeas corpus as a legal concept and demonstrates under what circumstances it should be granted. Section III applies Aristotle's theory of the soul as a structure whereby animals could be granted habeas corpus rights.

## I. Aristotle's Theory of the Soul

In Aristotle's *De Anima*, Aristotle breaks down the concept of the soul into three constituent parts.<sup>14</sup> The three parts are the vegetative aspect of the soul, the sensitive (locomotive) aspect of the soul, and the rational aspect of the soul.<sup>15</sup>

The vegetative aspect of the soul has the qualities of reproduction, growth, and nurturing for existential purposes.<sup>16</sup> Generally, plants can be described within the vegetative aspect of the soul because plants do not generally engage in activities that are characteristic of the locomotive aspects of the soul. According to Aristotle, the locomotive soul carries the whole animal<sup>17</sup>. Aristotle would not consider oceanic sponges<sup>18</sup>—despite being made of animal cells—to partake in the locomotive aspects of the soul. Such classification is made because a sponge cannot move on its own to a different location. Indeed, there could be exceptions to this rule, as may be the case with

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14. Adam Fulginiti, *The Soul and Its Impact on Life and Death Choices: A Constitutional Study of Abortion, the Right to Die, and Other Bioethical Dilemmas*, 11 RUTGERS J.L. & RELIGION 459, 466 (2010) ("Aristotle also employs a three-fold notion of the soul that has particular significance.<sup>31</sup> The three "types" of souls he refers to are the nutritive soul, the sensitive soul and finally, the rational soul.").

15. *Id.*

16. Bill Davis, *Rebuilding the Wall*, 7 ANIMAL L. 221, 231—32 (2001) ("[w]hereas Aristotle believed that some animals possessed only the 'most primitive' 'nutritive' and 'reproductive' souls, 'certain living beings [i.e., humans]—a small minority—possess[ed] calculation and thought that made them superior to animals that lacked these superior forms of soul.'").

17. ARISTOTLE, ON THE SOUL III, in ON THE SOUL. PARVA NATURALIA. ON BREATH. 140, 197–99 (W.S. Hett trans., Harvard Univ. Press 1936).

18. See *Speyer v. United States*, 14 Cust. Ct. 91, 94 (Cust. Ct. 1945) ("Van Nostrand's Scientific Encyclopedia (1938) contains the following under 'sponge': An animal of the phylum Porifera."); see *Porifera*, STEDMANS MEDICAL DICTIONARY 712090 (defines a sponge as "a phylum of the Metazoa, comprising a group of sessile, aquatic animals possessing an endoskeleton and many branching canals, lined by flagellated collar cells; communication of the canals with the surface is made through many pores or through larger openings and oscula."); see I. Sponges—Phylum Porifera 50 C.F.R. § Pt. 622, App. A.

the Venus flytrap,<sup>19</sup> which tends to have movement ascribed to it. As such, they can be said to partake—at least in part—in the sensitive part of the soul in an Aristotelian sense.

The sensitive or locomotive aspect of the soul accounts for the mobile and sensational aspects of the soul.<sup>20</sup> Animals, for the most part, partake in this aspect of the soul, as well as the vegetative. Here, one can start to see the creation of a ranking amongst the various aspects of Aristotle's conception of the soul. However, the creation of a ranking or hierarchy was not necessarily the goal of Aristotle's conception, but rather an attempt to categorize the differences. There is no indication that Aristotle saw a preferential hierarchy, but rather a categorization—like a Venn Diagram—where certain aspects of the soul of a being engages with others. However, for the soul to fully mature, it is necessary for each “step” to partake in each of the former step(s). The sensitive soul must partake in the vegetative soul. Likewise, the rational soul must partake in both the sensitive (locomotive) soul and the vegetative soul.

Finally, there is the rational aspect of Aristotle's soul, which partakes in both the sensitive and the vegetative aspects of the soul. This aspect of the soul involves thought and reflection, as well as some further levels of memory, imagination, and self-propelled motion. The curious thing about some aspects of the rational soul is that there can be overlap between humans and animals—for example, both humans and animals can take part in perception and understanding.<sup>21</sup> Even Aristotle admitted this.<sup>22</sup> Although Aristotle envisioned humans as

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19. For a definition of the functions of a Venus flytrap see William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25, 36 (1993).

Yet another rain forest plant, the Venus'-flytrap, secretes a sweet nectar that lures insects into the midrib of its leaf. On the margins of these leaves are rows of spines that mesh when the leaves snap shut around an unsuspecting insect. The Venus'-flytrap then devours the insect in a reversal of the normal roles of plant and animal.

*Id.*

20. Robert F. Blomquist, *Cloning Endangered Animal Species?*, 32 VAL. U.L. REV. 383, 398 (1998) (“Aristotle did not find any evidence that plants performed key functions performed by animals, like locomotion, sensation, and appetite. Rather, Aristotle saw these functions as ‘characteristic powers of the animal soul, called by him the “sensitive soul” because sensation is the source both of animal desire and animal movement.’”).

21. Klaus Corcilius & Pavel Gregoric, *Separability Vs. Difference: Parts and Capacities of the Soul in Aristotle*, 39 OXFORD STUD. ANCIENT PHIL. 81, 92 (2010) (“[a]ll living beings endowed with perception (animals), whether or not they are also in possession of the locomotive and the thinking capacity, have the nutritive capacity of the soul.”).

22. *Id.*

partaking in the rational soul primarily, he admitted that certain animals “learn” within their lifetimes, propelling their intellectual progression.<sup>23</sup> Such progression is demonstrated by certain individuals within Japanese macaque troops, which have been found to learn new behaviors from generation to generation—e.g. cleaning/washing behaviors; revenge against other family groups who have previously wronged their own.<sup>24</sup>

In *De Anima*, Aristotle continues discussing the rational soul from the perspective of an “intellect” existing.<sup>25</sup> However, Aristotle separates the concept of the intellect from the physical and biological mind existing in humans—often conceptualized as “the ghost in the machine.”<sup>26</sup> Following Aristotle’s mode of analysis, medieval thinkers such as Averroes and St. Thomas Aquinas had varying interpretations of Aristotle’s concept of the intellect existing separately from the physical mind in a religious sense.<sup>27</sup> Indeed, St. Thomas Aquinas took Aris-

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23. ARISTOTLE, *HISTORY OF ANIMALS: BOOKS 7–10*, 59 n.c (D. M. Balme ed. & trans., Harvard Univ. Press 1991) (Balme notes that in Aristotle’s conception, “animals do not have the same kind of art and wisdom as humans, and their capabilities in this area can only be compared analogically with the human capabilities.”).

24. Paul H. Robinson et. al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1658 n.97 (2007).

See, e.g., Filippo Aureli et al., *Kin-oriented Redirection Among Japanese Macaques: An Expression of a Revenge System?*, 44 ANIMAL BEHAV. 283, 289-90 (1992) (“Macaques might have an indirect revenge system in which kin relationships play a decisive role.”); Frans B.M. de Waal & Lesleigh M. Luttrell, *Mechanisms of Social Reciprocity in Three Primate Species: Symmetrical Relationship Characteristics or Cognition*, 9 Ethology & Sociobiology 101, 114 (1998) (“Only this species exhibits what may be called a revenge system: chimpanzees tend to intervene against individuals who intervene against themselves.”).

*Id.*

25. Lawrence B. Solum, *Virtue Jurisprudence: An Aretaic Theory of Law* 10 (Sept. 25, 2007) (working paper), [https://www.researchgate.net/publication/228459813\\_Virtue\\_Jurisprudence\\_An\\_Aretaic\\_Theory\\_of\\_Law](https://www.researchgate.net/publication/228459813_Virtue_Jurisprudence_An_Aretaic_Theory_of_Law) [<https://perma.cc/T9A6-WBE6>] (“The intellectual virtues are excellences of mind or intellect—what Aristotle calls the rational part of the soul; the moral virtues pertain to character and emotion—the part of the soul that cannot itself reason but is nonetheless capable of following reason.”).

26. Dov Fox, *The Right to Silence as Protecting Mental Control*, 42 AKRON L. REV. 763, 794 (2009).

Following Plato and Aristotle’s speculations that the faculties of intellect or soul are distinct from the physical organism, Descartes argued for a divorce of mind from body, distinguishing mental phenomena such as consciousness and self-awareness from material organs such as even the brain. On this account, the mind directs the body like a “ghost in the machine.”

*Id.*

27. Robert Pasnau, *The Islamic Scholar Who Gave Us Modern Philosophy*, NAT’L ENDOWMENT FOR HUMANS. (Nov. 2011), <https://www.neh.gov/humanities/2011/novemberdecember/feature/the-islamic-scholar-who-gave-us-modern-philosophy> [<https://perma.cc/M8W3-MYEQ>].



totle's construct and applied it to Christian theology.<sup>28</sup> In this sense, St. Thomas Aquinas applied the concept of the intellect to humans partaking in the belief of the existence of God and thus informing the existence of our rational soul. Correspondingly, animals that partake in the rational aspect of the soul also would be ascribed intellect through engaging in the belief of the existence of God.

Such arguments are not *per se* germane to the conception of whether or not habeas corpus should be applied to certain animals. However, it does stand to show that Aristotle's theories on the soul and intellect can apply to different philosophies and systems of analysis—such as theology or law.

However, Aristotle's categorizations of the soul do not necessarily explain why there are variations in the behaviors of different animals. Thus, this theory of Aristotle's "soul" is not so much a theory of why

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Many of Averroës's interpretations of Aristotle were deeply contentious, especially since they were often incompatible with core teachings of Christianity. When Thomas Aquinas returned to Paris in 1268 for an unusual second term as master of theology, he had to deal with the so-called "Averroists" among the philosophy professors who defended the very views that had been controversial a century earlier in Muslim Spain. Against Averroës, then, Aquinas argued that the world has not always existed, but was brought into existence anew by God, that the very bodies we possess now will be resurrected in the life to come, and that we each possess our own intellect, making us distinct individuals with our own individual destiny.

*Id.*

28. Allen N. Sultan, *Judicial Autonomy Under International Law*, 21 U. DAYTON L. REV. 585, 664 n.143 (1996).

Stumpf credits Aquinas' esteem for his Greek sage to his mentor and fellow Dominican known to history as "Albert the Great." Pointing out that Aquinas studied under Albert in both Paris and Cologne, Stumpf describes Albert's view of Aristotle in the following manner: Albert's particular objective was to make Aristotle clearly understandable to all of Europe, hoping to put into Latin all of Aristotle's works. He considered Aristotle the greatest of all philosophers, and much of the credit for the dominance of Aristotle's thought in the thirteenth century must be given to him. It was inevitable, under these circumstances, that his pupil Thomas Aquinas would also see in Aristotle the most significant philosophical support for Christian theology.

*Id.*

David A.J. Richards, *Covert Fundamentalism*, 1 WAKE FOREST J.L. & POL'Y 281, 284 n.16 (2011).

See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 25—26 (1922) (discussing St. Thomas Aquinas's role in adopting the Aristotelian distinctions of justice into modern legal philosophy); BAMFORTH & RICHARDS, *supra* note 1, at 155 (explaining that St. Thomas Aquinas's philosophical theology relied on Aristotle's biology, psychology, and ethics).

*Id.*

different types of animals exist but a way to categorize their existence in the world.

This concept of existence in the world is consistent with the idea of “entelechia,” as expressed in Aristotle’s writings, which he explains as something having an end in itself.<sup>29</sup> A translator of Aristotle has written:

Aristotle invents the word by combining entelchs (“complete, full-grown” [ἐντελής]) with echein (hexis, to be a certain way by the continuing effort of holding on in that condition), while at the same time punning on endelecheia (“persistence” [ἐνδελέχεια]) by inserting “telos” (“completion” [τέλος]). This is a three-ring circus of a word, at the heart of everything in Aristotle’s thinking, including the definition of motion.<sup>30</sup>

In the same translation of Aristotle, Joe Sachs suggests this concept can be roughly translated into English as “being-at-work-staying-

29. Jörg Kammerhofer et. al, *The Benefits of the Pure Theory of Law for International Lawyers, or: What Use Is Kelsenian Theory?*, 12 INT’L LEGAL THEORY 5, 18–19 (2006).

Natural law—taken by its word, if you will—necessarily entails a breach of the Is-Ought dichotomy. A very clear example of such a breach can be found in Aristotle’s teleological theory (adapted for international law by Alfred Verdross): For Aristotle, all entities are striving toward their perfection, because only if and when they have reached that goal (telos), will they have reached their true nature (physis). Thus, all beings or entities have an imminent purpose (or goal)—this purpose-oriented nature is their entelechia. This, then, is their objective nature. The teleological metaphysics of Aristotle alone, however, do not yet amount to much in the sphere of practical philosophy. The crucial “twist” is added when Aristotle considers the nature of humans. Human telos somehow is (forms) a norm which humans have to observe in order to reach completion—the goal prescribes the means. Thus, an Is (human nature) alone supposedly creates an Ought (an objective norm). Human nature is societal (man as a zoon politikon, as a state-building being): “[Human beings] thus by their nature are directed towards community with other humans.”

*Id.* Cf. Slavoj Žižek, *Ideology Between Fiction and Fantasy*, 16 CARDOZO L. REV. 1511, 1531 (1995).

To make this point clear, one should bear in mind what is perhaps the fundamental lesson of postmodern politics: far from being a “natural” unity of social life, a balanced frame, a kind of Aristotelian entelechia towards which all previous development advances, the universal form of Nation-State is rather a precarious, temporary balance between the relationship to a particular ethnic Thing (patriotism, pro patria mori, etc.) and the (potentially) universal function of the market. On the one hand, it “sublates” (in the Hegelian sense of *Aufhebung*) organic local forms of identification into universal “patriotic” identification; on the other hand, it posits itself as a kind of pseudonatural boundary of the market economy, delimiting “internal” from “external” commerce—economic activity is thus “sublimated,” raised to the level of the ethnic Thing, legitimated as a patriotic contribution to the nation’s greatness.

*Id.*

30. JOE SACHS, *ARISTOTLE’S PHYSICS: A GUIDED STUDY* 245 (Rutgers Univ. Press 1995).

itself.”<sup>31</sup> Sachs combines the meanings of the words *entelecia* and *energeia* by stating that, “[j]ust as *energeia* extends to *entelecheia* because it is the activity which makes a thing what it is, *entelecheia* extends to *energeia* because it is the end or perfection which has being only in, through, and during activity.”<sup>32</sup>

This somewhat harkens to a teleological argument for evolution, which is not necessarily in contrast with Charles Darwin’s theory of evolution. Indeed, Aristotle’s categorization of the soul on its own does not overlap or contradict Darwin’s theories on natural selection and evolutionary biology espoused in *On the Origin of Species*.<sup>33</sup>

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31. *Id.*

32. Joe Sachs, *Aristotle: Motion and Its Place in Nature*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/aris-mot/> [https://perma.cc/C99T-5A3P].

33. It is interesting to note that one possible translation of “On the Origin of Species” is into Ancient Greek as “Peri Genesis Toin Eidion.” “Peri genesis ton edion”/ περί γένεσις τοῖν εἰδοῖν Peri/ περί meaning around or about, genesis/γένεσις meaning genesis/origin, ton/τοῖν meaning the/article eidion/εἰδοῖν, εἰδωλον meaning form/species (but used in Plato to indicate an everlasting form that never changes.) The Greek translation with its Biblical reference seems to have the exact opposite implication of a Darwinian evolutionary implication—yet at the same time maintains a teleological option for evolution. Cf. Joan DelFattore, *Speaking of Evolution: The Historical Context of Kitzmiller v. Dover Area School District*, 9 RUTGERS J.L. & RELIGION 1, 3 (2007).

Even 1859 is a late start for a discussion of evolution theory, since that general idea may be found in such early sources as the writings of Empedocles in the fifth century B.C.E. and those of Aristotle in the fourth century B.C.E. In the introduction to *On the Origin of Species*, Darwin remarked that although Aristotle did not understand natural selection in any comprehensive sense, he touched on the basic concept. Darwin noted, for instance, that Aristotle recognized that sharp teeth for biting and flat teeth for chewing had developed in accord with their respective uses. Nor would it be accurate to suggest that the study of evolution in modern scientific terms originated with Darwin, since his work was preceded and accompanied by that of other scientists, notably the French botanist, Jean-Baptiste Lamarck; Darwin’s grandfather, Erasmus Darwin; and his contemporary, Alfred Wallace. Darwin’s contribution, and the source of the furor surrounding his work, was his description of the specific mechanism of evolution: natural selection, including the struggle for existence and the survival of the fittest. This view of the origin of species struck many of his contemporaries as mechanistic, dehumanizing, and above all atheistic in its substitution of what they saw as random chance and brutality for a divine plan. As Kitzmiller amply demonstrates, that reaction has by no means run its course even after the world has had more than a century and a half to get used to Darwin’s ideas.

*Id.* at 28–29.

## II. Theories of Habeas Corpus

Habeas corpus, as a term, comes from the medieval Latin phrase roughly translated as “you have the body.”<sup>34</sup> In Medieval Latin, the word *habeas* was used as a second person singular present/active subjunctive form of the infinitive form of *habere*, which means “to have” or “to hold.”<sup>35</sup> The Latin word *corpus* can mean “body,” “form,” or “substance,” but in this context, it translates to “body” in the singular.<sup>36</sup> A reader would then fill in the missing words, as “[we command] that you should have the [detainee’s] body [brought to court].”<sup>37</sup>

The earliest reference to the idea of habeas corpus comes from the 14th century, in an Anglo-French document. It states:

Praecipimus tibi, quod corpus A.B. in prisiona nostra sub custodia tua detentum, ut dicitur, una cum causa detentionis suae quocunque nomine idem A.B. con- seatur in eadem habeas coram nobis apud Westm. die Jovis prox. post Octabis S. Martini ad subiiciendum et recipiendum ea quae curia nostra de eo adtunc, et ibidem ordinari contigerit in hac parte, et hoc, nullatemus, omitatis periculo incumbente, et habitai ibi hoc breve.<sup>38</sup>

This can be roughly translated as:

We say/command you/your body A.B. under your care, if held in the/a prison of our own, as we said, one of the detention of the covenant of the day, and the confiscation and the cause of his own, no matter by what the aforesaid A.B. is judged to be in the same, you may have to us . . . to subdue and gain before him at the time and in the same place and the order of receiving what is to happen to our court, in this point of view. This way bypass risk of damages/penalty. And there is this writ.<sup>39</sup>

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34. *Habeas Corpus*, BLACK’S LAW DICTIONARY (11th ed. 2019); Charles Alan Wright, THE LAW OF FEDERAL COURTS § 53, at 350 (5th ed. 1994) (quoting *Secretary of State for Home Affairs v. O’Brien*, [1923] A.C. 603, 609).

The writ of habeas corpus, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity. After a checkered career in which it was involved in the struggles between the common-law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the Habeas Corpus Act of 1679. Today it is said to be “perhaps the most important writ known to the constitutional law of England”

*Id.*

35. *Habeas corpus*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/habeas%20corpus> [<https://perma.cc/8ES2-H2H2>].

36. *Id.*

37. *Id.*

38. Edward Koroway, *Habeas Corpus in Ontario*, 13.1 OSGOOD HALL L.J. 149, 149 (1975).

39. Author’s translation.

However, the notion of habeas corpus may have been broached in as early as 1215. The Magna Carta provided a similar but not thorough provision in section 39, which stated, “Nullus balivus ponat aliquem ad legem, simplici sua loquela, sine testibus fidelibus ad hoc aductis.”<sup>40</sup> This can be roughly translated as: “no bailiff shall commence/start a legal proceeding without faithful/reliable testimony against the person on the specific issue.”<sup>41</sup> Justice Anthony Kennedy of the U.S. Supreme Court wrote, “[i]mportant as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. [William] Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled.”<sup>42</sup>

The United States adopted the concept of habeas corpus from English common law. The U.S. Constitution, Article 1, Section 9, Clause 2 (known colloquially as the Suspension Clause) states that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>43</sup> The federal habeas corpus statute is codified under 28 U.S.C. § 2241.<sup>44</sup>

Aside from the United States, there is a rich history from various parts of Europe adopting a similar remedy to habeas corpus. This includes the 1526 provision of *Fuero Nuevo of the Señorío de Vizcaya* (*New Charter of the Lordship of Biscay*) or the Crown of Aragon in the concept of *manifestación de personas*. Likewise, in 1430, King Władysław II Jagiełło of Poland created a similar provision to habeas corpus called *neminem captivabimus nisi iure victum*. There are various other modern examples, as well.

The most remarkable impression of habeas corpus at the international level is within Article 3 of the Universal Declaration of Human Rights, which provides that “everyone has the right to life, liberty and security of person.”<sup>45</sup> Article 5 of the European Convention on Human Rights also states that “[e]veryone who is deprived of his lib-

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40. 1215: *Magna Carta (Latin and English)*, ONLINE LIBR. LIBERTY, <https://oll.libertyfund.org/pages/1215-magna-carta-latin-and-english> [https://perma.cc/EZ2M-7XYS]. See John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 337 n.4 (1997).

41. Author’s translation.

42. *Boumediene v. Bush*, 553 U.S. 723, 740 (2008).

43. U.S. CONST. art. I, §9, cl. 2.

44. 28 U.S.C. § 2241 (2020).

45. See Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 U.N.T.S. 221; *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

erty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”<sup>46</sup>

Ontologically, the right to habeas corpus comes from an ability to have a cognitive capacity. As stated above, this is not intended as a scientific journal to explore animals’ cognitive capacity, but rather a philosophical argument for additional animal rights. Arguments have been made for theoretical and philosophical bases for animal rights—as well as philosophical natural rights in general. Aristotle has provided a foundation for analyzing the nature of rights in general.<sup>47</sup>

### III. Why Should Animals Have Habeas Corpus Rights?

In recent years, the recognition of “personhood” (as well as the corollary rights thereto) has been demanded for great apes.<sup>48</sup> An often debated subject, personhood is the quality of being recognized under law as having rights equal to other members of a society.<sup>49</sup> Personhood for great apes could reduce their suffering,<sup>50</sup> protect their dignity,<sup>51</sup> and promote equality in the animal kingdom.<sup>52</sup> Spain has been at the forefront of pushing legislative changes that have extended human rights to great apes via the personhood argument.<sup>53</sup>

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46. *Id.*

47. See Huss, *supra* note 9.

48. Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 164 (2001).

Calling the effort the Great Ape Project (“Project”), a number of scholars, scientists, and activists have organized to demand recognition of moral and legal rights for great apes. In the category of great apes, the Project includes chimpanzees, bonobos, orangutans, gorillas, and, surprisingly or not, humans. Supporters of the Project would like to see radical changes in the ways we treat great apes. These changes, if enforced globally, would mean an end to most biomedical experimentation on great apes; would largely eliminate the potential use of great apes for organ donations; would prohibit, or at least require dramatic improvements, in the keeping of great apes in zoos; and would eliminate the use of great apes as a source of food.

*Id.*

49. Emily A. Fitzgerald, *[Ape]rsonhood*, 34 REV. LITIG. 337, 338 (2015).

50. Alexandra B. Rhodes, Note, *Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Animal Law System*, 20 ANIMAL L. 191, 193–94 (2013).

51. Ariel L. Bendor & Hadar Dancig-Rosenberg, *Animal Rights in the Shadow of the Constitution*, 24 ANIMAL L. 99, 116–17 n.127 (2018).

52. Antionette Duck, *Welcome to Primates’ Paradise, Human Rights Not Allowed: Unraveling the Great Ape Project*, 7 REGENT J. INT’L L. 165, 169–70 (2009).

53. *Id.* at 169 (“The approach taken in Spain—to push for legislative changes that will preserve human rights for great apes and ensure their personhood—reflects a larger goal as well: obtaining a United Nations resolution declaring the fundamental rights of great apes.”).

Indeed, there have been earlier studies that nonhuman great apes—those apart of the Hominidae taxonomic family of primates—meet the philosophical criteria for personhood; such a test involves rationality and intellect to some degree.<sup>54</sup>

However, it seems that these cavalcades of philosophical inquiry are not as rigorously based. Aristotle's theory of the soul provides a logically concise account for the "psychological" levels of animals. Such a test and categorization can be systematically applied to different animals.

As discussed above, Aristotle's theory that the complete soul contains three levels is not novel. This theory has influenced a variety of thinkers from pre-Christian times to modern Supreme Court Justices.<sup>55</sup> The first level is the nutritive aspect of the soul, that includes plants. The locomotive aspect of the soul distinguishes animals from plants. The rational part of the soul distinguishes humans and animals and is what makes the human soul human based on the ability to think, feel, theorize and reflect. Another key example of the rational aspect of the soul comes from the ability to speak.<sup>56</sup> But speech and cognitive ability are not the only prerequisite for rights.<sup>57</sup> Regarding humans and the soul, Aristotle writes,

[t]he proper function of man, then, consists in an activity of the soul in conformity with a rational principle or, at least, not without it. In speaking of the proper function of a given individual, we mean that it is the same in kind as the function of an individual who sets high standards for himself.<sup>58</sup>

However, it can be demonstrated that many animals—such as the Japanese macaque—partake in this part of the soul.<sup>59</sup>

This is because animals partake in Aristotle's conceptualization of the rational part of the soul. The rational part of the soul provides for the ability to not only contemplate, but also the ability to think and

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54. See Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1, 18–27 (2000).

55. See generally Pons, *supra* note 2.

56. See Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69, 110 n.12 (2017).

57. See generally Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 11 n.34 (2010). See *Care & Prot. of Beth*, 587 N.E.2d 1377, 1382 (Mass. 1992) (meaning that rationality per se and a level of logic should not be the only measure of granting rights. "The Supreme Judicial Court's statement that 'cognitive ability' is not a prerequisite for rights, along with similar judicial pronouncements, is evidence that autonomy so powerfully underlies the quality of dignity, which is sufficient to generate fundamental human rights, that courts use legal fictions to find it.").

58. Kyron J. Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1480 n.97 (1995).

59. Robinson et al., *supra* note 24.

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reflect, as well as the ability to use memory, imagination, and self-propelled motion—the types of things that we associate with feelings of emotions, thought, and rationale. These attributes are the values we see in humans that justify certain rights. Therefore, because animals have such capabilities, they should be granted the types of rights afforded to humans, such as habeas corpus.

### **Conclusion**

Because Aristotle's conception of the soul provides a systematic way to evaluate the philosophical basis of rights, it could add another method of inquiry that is fruitful and helpful for establishing further personal rights for animals. Based on this precedent, such an analysis could be a useful tool for not only analyzing animal and human rights, but also—should the case arise—rights for sentient artificial intelligence.



