

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 78

NOVEMBER 2003

NUMBER 5

SPEECH

UNCOMMON HUMANITY: REFLECTIONS ON JUDGING IN A POST-HUMAN ERA

JEFFREY L. AMESTOY*

In this speech delivered for the annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, Vermont Supreme Court Chief Justice Jeffrey Amestoy uses the recent landmark Vermont decision of Baker v. Baker—the “same-sex marriage” case—as an occasion for deeper reflection on what it means to be human. In this “post-human” era—an era in which genetic manipulation, artificial intelligence, and cloning alter the human entity itself—courts face unprecedented legal issues. Judges, as well as the rest of us, increasingly are forced to consider what to protect from such biotechnological advances, and where to draw lines among humans, animals, and chimera. The Chief Justice cautions that judges should not do so without consideration of what makes us human. This will require judges not to define humanity, but to describe and recognize it with, as Justice William Brennan urged, an awareness of the range of human experience. By imagining humanity—not through reason alone, but in a way that the heart can recognize—judges will be a humanizing counterweight in the legal challenges that lie ahead.

In Freeman Dyson’s book *Disturbing the Universe*, Dyson recounts the story of the physicist Leo Szilard, who tells a fellow physicist that he was thinking of keeping a diary “to record the facts for the information of God.” “Don’t you think God knows the facts?” his friend asks. “Yes,” replies Szilard, “He knows the facts, but He

* Chief Justice, Vermont Supreme Court. B.A., 1968, Hobart College; J.D., 1972, Hastings College of Law, University of California; M.P.A., 1982, John F. Kennedy School of Government, Harvard University. This speech was delivered on February 6, 2003 at New York University School of Law for the annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice. I would like to extend my thanks to staff attorney Len Swyer, to my law clerk Charlotte Gillingham, and to student interns Lilian Abboud and Jessica Cook for their able assistance in preparing this lecture.

does not know *this version of the facts*.”¹ Fortunately, to a degree that has not been characteristic of my eight distinguished Brennan Lecture predecessors, the remarks this evening may be described—with full appreciation of its limited value—as this speaker’s “version of the facts.”

The introduction generously made reference to my role in *Baker v. State*,² which has been called in Vermont (and beyond) the “same-sex marriage” case.³ When the opinion was first issued, it prompted, as decisions about controversial issues do, much comment.⁴ Still does. I initially took comfort in knowing that many who were very critical of the opinion had not read it. That solace was offset, however, by the realization that many who praised the decision had not read it either.

The language of the *Baker* opinion most often quoted in media accounts of the decision is its final sentence: “The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.”⁵

The phrase “our common humanity” as it is used in that sentence is in one sense self-evident and, in another, perhaps less obvious. When the concluding sentence of *Baker* stands alone, the words “our common humanity” have been understood—as they should be—as recognition of what is decent, humane, and worthy of protection in human relationships.

But there is another sense that I intended to convey with the words “our common humanity.” That meaning was foreshadowed by the sentences immediately preceding the final one. And, if I may pre-

¹ Freeman Dyson, *Disturbing the Universe*, at ix (1979).

² 744 A.2d 864 (Vt. 1999).

³ For a discussion of *Baker* and same-sex marriage, see generally Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 *Vt. L. Rev.* 15 (2000); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 *B.C. L. Rev.* 73 (2001); Frederick Bever, *Lawmakers Weigh Impact of Same-Sex Marriage Ruling*, *Rutland Herald*, Dec. 22, 1999, <http://rutlandherald.com/search/categories/article/2357>; Julian Borger, *US Courts Grant Equal Rights to Gay Couples*, *The Guardian* (U.K.), Dec. 21, 1999, at 11; Carey Goldberg, *Vermont Town Meeting Turns into Same-Sex Union Forum*, *N.Y. Times*, Mar. 8, 2000, at A18.

⁴ Williams, *supra* note 3, at 75 (describing decision as “a major, national news story in much the same way as landmark decisions of the United States Supreme Court” and as “extremely important . . . as a contribution to the national discussion of the issues surrounding marriage of same-sex couples”).

⁵ *Baker*, 744 A.2d at 889.

sume upon your courtesy one more time, I take the liberty of quoting those lines:

The past provides many instances where the law refused to see a human being when it should have. The future may provide instances where the law will be asked to see a human when it should not. The challenge for future generations will be to define what is most essentially human.⁶

That challenge is one that I devoutly hope will not be left solely to judges. And yet who among us with some experience in “case and controversy” can doubt that in this society, courts stand at the corner of law and life? In the twenty-first century—for better or worse—judges are, in the words of Leon Kass, at “the intersection . . . of biology and biography.”⁷

In the context of the subject I address this evening, “Judging in the Post-Human Era,” the *Baker* opinion (issued ten days before the end of the twentieth century) may be said, at least in a limited respect, to be an example of a case at that intersection. Whatever the merits—or lack thereof—of the legal analysis in *Baker*, it cannot be disputed that the court was responding to a controversy involving aspects central to the human persona—one in which attributes of the individual’s reason, spirit, and body are indivisibly linked. Indeed, if the mail I received after the decision issued is an indication, the extent to which the court’s opinion was seen as sanctioning the physical relationships of persons of the same sex was to some the greatest affront. Yet the driving force behind the “same-sex marriage” case was the “biology,” if you will, of the six plaintiffs that were before the court. They had bodies, and to a degree surely unique to each individual—and equally surely none of the court’s business—each plaintiff’s rational and emotional self was bound together by the ardor and desire of their physical beings. In this respect, although the sexual preferences of the plaintiffs could not be ascribed to a majority of Vermonters, the issue (and here, I am describing a perspective that is intended to help inform these remarks and not the legal framework of *Baker*) was whether Vermonters would find in the “biographies” of these plaintiffs—and others similarly situated—an aspect so central and so common to humanity as to compel inclusion in the Vermont community as a matter of right and justice.

Indeed, part of the court’s rationale for rejecting the plaintiffs’ argument that their claim ought to be resolved by determining that

⁶ Id. (internal citations omitted).

⁷ Leon R. Kass, Foreword to *Human Cloning and Human Dignity: The Report of the President’s Council on Bioethics*, at xviii (2002) [hereinafter Report of the President’s Council].

homosexuals constitute a suspect class was that the very act of classification would prevent Vermonters from seeing the whole persona of persons with differing sexual orientations. Hence, I noted in the majority opinion, “[t]he artificiality of suspect-class labeling should be avoided where, as here, the plaintiffs are afforded the common benefits and protections of Article 7 [of the Vermont Constitution], not because they are part of a ‘suspect class,’ but because they are part of the Vermont community.”⁸

In any event, Vermonters did decide that persons like plaintiffs were entitled to the same benefits, protections, and responsibilities as married couples, and on July 1, 2000, Vermont’s civil union law became effective.⁹

My point here is not to justify the analytic framework of the *Baker* majority. You will find cogently argued criticisms in the concurring opinion, where one of my colleagues argued that the failure to utilize the suspect classification analysis was a significant error,¹⁰ and in the partially dissenting opinion of another colleague, who asserted that the plaintiffs were constitutionally entitled to a marriage license.¹¹

My purpose, rather, in introducing my remarks through the prism of the “same-sex marriage” case is to suggest that it was a case that, for this Justice at least, prompted the realization that, in ways that are just beginning to dawn on us, judges will confront fundamental questions about what it means to be human.

It is interesting that references to the phrase “post-human” are— if the reaction of my Vermont friends is any indication—novel enough to prompt the sensible query, “What does ‘post-human’ mean?” In contrast, the term “post-human” is so much a part of the lexicon of biotechnology and artificial intelligence research that the social philosopher Francis Fukuyama found it unnecessary to define the term in his recent book, *Our Posthuman Future: Consequences of the Biotechnology Revolution*.¹² Nor does Leon Kass, in his book *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics*, pause to

⁸ *Baker*, 744 A.2d at 878 n.10.

⁹ See Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2002).

¹⁰ See *Baker*, 744 A.2d at 889, 893-97 (Dooley, J., concurring) (stating that majority’s failure to moor its analysis within framework of fundamental rights and suspect classifications provides no guidance to predict outcome of future cases).

¹¹ See *id.* at 897-98 (Johnson, J., concurring in part and dissenting in part) (asserting that it is court’s duty to redress violations of constitutional rights and that therefore requested relief should be granted).

¹² See generally Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (2002) (describing potential consequences of biotechnology and its effect on commonly held concepts of human nature and dignity).

define “post-human,” though he leaves a reader with little doubt as to what is at stake:

Human nature itself lies on the operating table, ready for alteration, for eugenic and neuropsychic “enhancement,” for wholesale redesign. In leading laboratories, academic and industrial, new creators are confidently amassing their powers and quietly honing their skills, while on the street their evangelists are zealously prophesying a posthuman future. For anyone who cares about preserving our humanity, the time has come to pay attention.¹³

I cannot speak to the attentiveness of a research scientist who looks up from her work one day to see a fully cloned replicated being, and says to herself, “Ah yes, I thought it might come to this,” but I don’t suppose her reaction would be alien to a state appellate judge who, in reviewing cases assigned to him, finds among the landlord-tenant case, the search-and-seizure issue, and the boundary dispute, the question of whether a human-animal chimera—a genetically engineered creature comprised of human and animal genes—has standing to assert a claim for damages from medical experimentation.

The extraordinary difficulty of the issues being raised in this context has done nothing to dampen the peculiar and continuing American faith in the capacity of law to channel technology constructively.¹⁴ Thus, for example, a Note in the *Berkeley Technology Law Journal* observes that patent applications could be tailored to seek patents on chimeras “[a]ssuming . . . that the courts develop a suitable definition of what it means to be human.”¹⁵ This is a sentence that ought to have stopped the author. It should stop us all. But, of course, we won’t stop. We probably cannot—that may be our most human quality. In any event, one welcomes the opportunity to pause.

If ever there was a time to test the wisdom of Justice Brennan’s view that judges must bring to their work “the range of emotional and intuitive responses to a given set of facts or arguments . . . which often

¹³ Leon R. Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* 4 (2002).

¹⁴ Carrie F. Walter, *Beyond the Harvard Mouse: Current Patent Practice and the Necessity of Clear Guidelines in Biotechnology Patent Law*, 73 *Ind. L.J.* 1025, 1026 (1998) (“The economic and social benefits will eventually far outweigh the costs involved with patenting transgenic animals and human gene sequences.”); see also Ryan M.T. Iwasaka, Note, *From Chakrabarty to Chimeras: The Growing Need for Evolutionary Biology in Patent Law*, 109 *Yale L.J.* 1505, 1508 (2000) (proposing reform of patent law by introducing rules and tests “based on principles of evolutionary biology”).

¹⁵ Thomas A. Magnani, Note, *The Patentability of Human-Animal Chimeras*, 14 *Berkeley Tech. L.J.* 443, 450 (1999).

speed into our consciousness far ahead of the lumbering syllogism of reason,"¹⁶ it will be the time almost upon us: the post-human era.

For purposes of these remarks, "post-human issues" may be defined as the range of legal issues that may be raised by scientific or technological alteration of the human entity. This includes but is not necessarily limited to genetic manipulation, artificial intelligence, and cloning.¹⁷

There is a further attribute that characterizes the "post-human era," at least as I have come to understand it. It is that the science of the post-human endeavor seeks to separate some facet of the human persona. That separation is most strikingly apparent in the work of researchers in robotics and artificial intelligence. Recently, *Harper's Magazine* reported on a Stanford University Conference of robotocists, engineers, and computer scientists gathered to address the question of whether or not spiritual robots will replace humanity by 2100.¹⁸ The article noted that not only did some scientists think this was possible, but that perhaps the separation of mind from body was not to be regretted.¹⁹

However remote the prospect of the creation of nonbiological, sentient, intelligent entities may seem to us, we would do well to remember that the prospect seems least remote to those most familiar with the science. Another example that illustrates how the division of the human persona may be close at hand is that the "recipe" to clone a human being is readily available.²⁰ It is some measure of the

¹⁶ William J. Brennan, Jr., Reason, Passion, and "The Progress of the Law," 10 *Cardozo L. Rev.* 3, 9 (1988).

¹⁷ N. Katherine Hayles proffers that "[i]n the posthuman [world], there are no essential differences or absolute demarcations between bodily existence and computer simulation, cybernetic mechanism and biological organism." *How We Became Posthuman* 3 (1999). Furthermore, Hayles states that "[t]he posthuman subject is an amalgam, a collection of heterogeneous components, a material-informational entity whose boundaries undergo continuous construction and reconstruction." *Id.*

¹⁸ Ellen Ullman, *Programming the Post-Human: Computer Science Redefines "Life,"* *Harper's Mag.*, Oct. 2002, at 60-62.

¹⁹ *Id.* at 66-70 (noting that "suspicion of the flesh" and desire for "disembodied intelligence" persists among artificial-life researchers).

²⁰ A report from the President's Council on Bioethics outlines the cloning process:

1. Obtain an egg cell from a female of a mammalian species.
2. Remove the nuclear DNA from the egg cell, to produce an enucleated egg.
3. Insert the nucleus of a donor adult cell into the enucleated egg, to produce a reconstructed egg.
4. Activate the reconstructed egg with chemicals or electric current, to stimulate the reconstructed egg to commence cell division.
5. Sustain development of the cloned embryo to a suitable stage in vitro, and then transfer the resulting cloned embryo to the uterus of a female host that has been suitably prepared to receive it.
6. Bring to live birth a [clone]

immensity of the issues that confront us that the President's Bioethics Council found it much easier to provide the recipe than, in the words of its report, to locate the "wisdom and prudence [we seek] regarding these deep human matters."²¹

There are, I suspect, few appellate judges who do not welcome as much guidance on the subject as can be provided. Take, for example, a California appellate court confronted with a case in which the husband of a dissolved marriage claimed no duty of child support where the child of the marriage had been born to a surrogate from an embryo genetically unrelated to either husband or wife.²² The appellate court observed, "As jurists, [judges] recognize the traditional role of the common . . . law in applying old legal principles to new technology."²³ Though the court noted that the legislature, "with its ability to formulate general rules based on input from all its constituencies, . . . is the more desirable forum for lawmaking,"²⁴ it decided that it nonetheless must "conclude the business at hand."²⁵

As former Justice Stewart Pollock noted in his superb Brennan Lecture, "The Art of Judging," the lawyer-turned-poet Archibald MacLeish wrote that "the business of poetry" is "to compose an order which the bewildered, angry heart can recognize . . ." and "[t]o imagine man."²⁶ "The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity."²⁷

The tension between order and dignity, between reductionism and scope, is not, of course, new business for judges. But we have never faced what we are about to face.

I start with a bias as to what I would seek to protect. It is put well, I think, by Professor Fukuyama in *Our Posthuman Future*: "What is it that we want to protect from any future advances in biotechnology? The answer is, we want to protect the full range of our complex, evolved natures against attempts at self-modification. We do not want to disrupt either the unity or the continuity of human nature"²⁸

Report of the President's Council, *supra* note 7, at 69.

²¹ *Id.* at xvii.

²² *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

²³ *Id.* at 293.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. Rev. 591, 614 (1996) (quoting Archibald MacLeish, *Art and Law*, in *Riders on the Earth: Essays and Recollections* 82, 85-86 (1978)).

²⁷ *Id.*

²⁸ Fukuyama, *supra* note 12, at 172.

I have a bias, too, as to how judges might contribute to that protection. The law would do what C.S. Lewis vainly hoped a new philosophy of science would do: "When it explained it would not explain away. When it spoke of the parts it would remember the whole."²⁹

The challenge of remembering the whole while speaking of the parts was certainly apparent in *Moore v. Regents of the University of California*,³⁰ a 1990 decision of the California Supreme Court. *Moore* implicates many of the issues that may come to characterize cases in the post-human era: personal autonomy, scientific inquiry, technological development, entrepreneurial investment and profit, and the promise of medical advances in curing disease and relieving suffering.

The plaintiff in *Moore* was diagnosed with hairy-cell leukemia, a rare disease that produces certain blood components that are scientifically and commercially valuable.³¹ Plaintiff's complaint alleged that defendant doctors at the UCLA Medical Center were aware of that value and removed blood and other body parts, including plaintiff's spleen, without informing plaintiff that they were being used in research.³² Further, the complaint alleged that for a period of seven years, the plaintiff had to travel from his home in Seattle to Los Angeles, for what the doctors represented were necessary treatments, but were actually performed to provide the defendant doctors with additional samples of blood, sperm, and bone marrow for their research.³³ The doctors, through the Regents, applied for and received a patent on a cell line derived from the plaintiff-patient's blood products.³⁴ Reports in biotechnology industry periodicals estimated the potential market for the cell line and associated products to be in excess of \$3 billion.³⁵

Plaintiff Moore attempted to sue under thirteen causes of action, including breach of fiduciary duty, lack of informed consent, and conversion.³⁶ The superior court dismissed the complaint.³⁷ The Court of Appeal reversed, holding that the complaint did state a cause of action for conversion,³⁸ a decision that the California Supreme Court reversed in part.³⁹ It found that plaintiff had stated a cause of action

²⁹ C.S. Lewis, *The Abolition of Man* 85 (Simon & Schuster 1996) (1944).

³⁰ 793 P.2d 479 (Cal. 1990).

³¹ *Id.* at 481.

³² *Id.* at 483.

³³ *Id.* at 481.

³⁴ *Id.* at 481-82.

³⁵ See *id.* at 482.

³⁶ *Id.*

³⁷ *Id.* at 482-83.

³⁸ *Id.* at 483.

³⁹ *Id.* at 497.

for breach of fiduciary duty and lack of informed consent, but upheld the trial court's ruling that the patient did not have a cause of action for conversion.⁴⁰

The conversion issue divided the court, for it led directly to the issue of whether body parts should be considered property. Here, then, was a state appellate court confronted with a case on the cusp of the post-human era. Without pretending that I do justice to the subtleties of the majority, concurring, and dissenting opinions, I take the license of identifying that which I believe will continue to frame the post-human case.

In deciding that defendant's unauthorized use of plaintiff's cells could not constitute the tort of conversion, the majority observed that to hold otherwise "would affect medical research of importance to all society."⁴¹

The co-discoverer of DNA, James Watson, has said, "What the public wants is not to be sick, and if we help them not to be sick, they'll be on our side."⁴² The fear of illness—to say nothing of death—and the desire to alleviate physical suffering are powerful human emotions. Increasingly, in the post-human era the right to harvest physical properties of the human body will be justified, as in *Moore*, with the compelling rhetoric of medical advancement.

A more compelling need—that of remembering the whole when speaking of parts—was also present in *Moore*. It was, in fact, a former Brennan lecturer, the late Justice Stanley Mosk, who, in dissent, warned of the dangers that accompany "a biotechnological research-industrial complex" that fails to "acknowledge a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona."⁴³

That Justice Mosk's recognition of plaintiff's cause of action for conversion only—in the words of Justice Arabian's concurrence—"illuminat[ed] the problem, not the solution,"⁴⁴ does not minimize the value of the dissent. Indeed, the issue Justice Mosk posed by considering the whole was precisely stated by the concurrence: "Does it uplift or degrade the 'unique human persona' to treat human tissue as a fungible article of commerce?"⁴⁵ While Justice Arabian recognized

⁴⁰ Id. at 483, 488.

⁴¹ Id. at 487.

⁴² Kass, *supra* note 13, at 7 (quoting James Watson, Remarks at the Engineering the Human Germline Symposium (Mar. 20, 1998), Summary Report at <http://www.ess.ucla.edu/huge/report.html>).

⁴³ *Moore*, 793 P.2d at 515 (Mosk, J., dissenting).

⁴⁴ Id. at 497 (Arabian, J., concurring).

⁴⁵ Id. at 497-98.

that “[t]he question implicates choices which not only reflect, but which ultimately define our essence,” he further reasoned that “complete resolution” could be provided by the legislature.⁴⁶

In the dozen-plus years since *Moore* was decided, no legislature has, of course, resolved the question of whether human parts should be commodifiable. But in that span of time, mammals have been cloned.⁴⁷ Even someone like Professor Margaret Radin, who has written extensively about the implications of property rights in the human body, concedes that she has just begun to think about cloning and commodification.⁴⁸

Given that legislatures and scholars have yet to come to any sort of consensus on the issue, it may be understandable why state appellate judges with less time to think broadly, and more responsibility to decide narrowly, are most comfortable when speaking of parts. Hence, for example, the Supreme Court of Tennessee, in deciding who should get custody of frozen pre-embryos when a husband and wife divorced, concluded that “pre-embryos are not, strictly speaking, either ‘persons’ or ‘property,’” and quickly moved to a “task familiar to the courts[:]. . . consider[ing] the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”⁴⁹

I respectfully submit that before we glibly apply “balancing tests,” we ought to understand what we have put in the balance.

I do not intend to suggest that a state appellate court confronted with a case implicating post-human issues should use an opinion for a metaphysical discourse on personhood. Speaking for myself, my response to the writing of, say, Kant is captured in Huck Finn’s reac-

⁴⁶ *Id.* at 498.

⁴⁷ See John Charles Kunich, *The Naked Clone*, 91 Ky. L.J. 1, 8-9 (2002-03) (discussing birth of cloned sheep Dolly, first mammal successfully cloned using somatic cell nuclear transfer).

⁴⁸ Margaret Jane Radin, *Cloning and Commodification*, 53 *Hastings L.J.* 1123, 1123 (2002). Other scholars have contemplated the ethical implications of these issues. See Margaret R. McLean, *Seeing Double: The Ethics of Human Cloning*, 53 *Hastings L.J.* 1049, 1054-55 (2002) (suggesting that reproductive cloning could lead to commodification of children, and that children “might become to be seen as manufactured and fungible goods, rather than unique, priceless human beings”); Radhika Rao, *What’s So Strange About Human Cloning?*, 53 *Hastings L.J.* 1007, 1009-11 (2002) (discussing consequences of human reproductive cloning and postulating that cloning might cause parents “to view the cloned child more as an object manufactured according to precise specifications than as an independent person”); Laura J. Hilmert, Note, *Cloning Human Organs: Potential Sources and Property Implications*, 77 *Ind. L.J.* 363, 366-67, 381-86 (2002) (examining various methods of procuring human organs, including nonreproductive cloning, and concluding that people should be granted property interest in organs cloned in laboratory).

⁴⁹ *Davis v. Davis*, 842 S.W.2d 588, 597, 603 (Tenn. 1992).

tion to *Pilgrim's Progress*: "The statements was interesting, but tough."⁵⁰

There is, however, value in remembering the whole human persona—reason, emotion, and body—when deciding a claim to a part. The theory of market commodification may be able to place a price on an eyeball, but the true value of a human part is unquantifiable. In a Texas lawsuit, a plaintiff sued for damages when a medical worker negligently allowed his surgically removed eyeball to be washed down a drain;⁵¹ it is unlikely in this case that the plaintiff's reaction was "Hey, watch it, that eyeball was worth \$400." The claim was for mental anguish, because human beings have not lost their capacity to shudder. Yet.

And where, despite explicit and clear direction to the hospital that no postmortem examination or autopsy be performed, a stillborn nonviable fetus that plaintiff had carried for nineteen weeks was dissected, a Connecticut trial court found that plaintiff had stated a claim for negligent infliction of emotional distress.⁵² The trial court concluded that the fetus was not a person, nor property, nor tissue but occupied an "intermediate category" that at a minimum could not be dissected in the face of plaintiff's express instructions to the contrary.⁵³ One does not have to agree with the trial court's legal analysis to recognize that the emotional claim to what is or has been a physical part of one's self exerts a compelling force of its own.

"[In] the world of our creatureliness and affection," wrote the poet Wendell Berry, "we live beyond words, as also we live beyond computation and beyond theory."⁵⁴ "We have more than we can know. We know more than we can say."⁵⁵

State court judges may, for example, in the *human* era, be confronted with an intellectually coherent argument for the extension of "rights" to chimpanzees and apes on the basis of their cognitive capacities.⁵⁶ Indeed, Steven Wise, one of the foremost advocates of animal rights, has observed that "[s]ince 'animal law' is primarily a matter of

⁵⁰ Mark Twain, *Adventures of Huckleberry Finn* 137 (Victor Fischer and Lin Salamo eds., Univ. of Cal. Press 2001) (1884) (spelling in original).

⁵¹ *Mokry v. Univ. of Texas Health Sci. Ctr.*, 529 S.W.2d 802, 802-04 (Tex. Civ. App. 1975) (reversing trial court's determination that plaintiff's claim did not constitute valid cause of action).

⁵² *Janicki v. Hosp. of St. Raphael*, 744 A.2d 963, 964, 974 (Conn. 1999).

⁵³ *Id.* at 971.

⁵⁴ Wendell Berry, *Life is a Miracle: An Essay Against Modern Superstition* 45 (2000).

⁵⁵ *Id.*

⁵⁶ See generally Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. Rev. 623 (2002) (defending argument proffered in Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000) that basic legal rights should be afforded to chimpanzees, bonobos, and other nonhuman animals).

state concern, the battle for the legal personhood of non-human animals will have to proceed on fifty state fronts.”⁵⁷

But that “battle,” if combat is the right analogy, won’t occur in a world in which the dividing line between humans and animals is clear. The *post-human* world will—if those who know the science are to be believed—contain creatures that are part human and part animal.⁵⁸ It will contain machines that may be sentient and likely will have greater cognitive capacities than animals *or* humans.⁵⁹ How then does the current premise of animal-rights theory—that personhood should be predicated on cognitive capacity—contribute to the protection of “the full range of our complex, evolved natures against attempts at self-modification[?]”⁶⁰

The point here is not to detail what lines should be drawn to protect humans, animals, and chimeras. It is that line-drawing should not occur without consideration of what makes us human. That humanity is defined by more than the capacity to reason is captured by Judge Posner’s observation that most of us would think it downright offensive to give greater rights to monkeys—let alone computers—than to the mentally disabled based on a showing that the monkey or computer has a greater cognitive capacity than a profoundly disabled human being.⁶¹

In the post-human era, the attempt to apply the law on the basis of a separate facet of the human persona will be more than offensive—it will be dangerous—to advocates of human rights *and* advocates of animal rights. Thus, for example, animal rights proponents have vigorously opposed animal patents because of concerns that species engineering will increase the exploitation of animals.⁶² The appreciation of the human persona is significant not just for what it allows us to protect, but for what it allows us to recognize.

⁵⁷ Steven M. Wise, *Animal Thing to Animal Person—Thoughts on Time, Place, and Theories*, 5 *Animal L.* 61, 62 (1999).

⁵⁸ See Magnani, *supra* note 15, at 446 (explaining that while human-animal chimera has never been created, some scientists believe one could be created if human embryo was combined with that of animal of close genetic relation to humans, such as monkey).

⁵⁹ See Bill Joy, *Why the Future Doesn’t Need Us*, *Wired*, Apr. 2000, at 238, 244 (explaining that we may have technological capability of producing intelligent robots in next thirty years, and expressing strong discomfort with idea that we “may be working to create tools which will enable the construction of the technology that may replace our species”).

⁶⁰ Fukuyama, *supra* note 12, at 172.

⁶¹ Richard A. Posner, *Animal Rights*, 110 *Yale L.J.* 527, 532 (2000) (reviewing Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000)).

⁶² David Manspeizer, Note, *The Cheshire Cat, the March Hare, and the Harvard Mouse: Animal Patents Open Up a New, Genetically-Engineered Wonderland*, 43 *Rutgers L. Rev.* 417, 440-43 (1991) (asserting that animal welfare advocates object to animal patenting because of their belief that it will increase animal suffering).

The reconfiguration of life is sanctioned by the law. The United States Supreme Court's opinion in *Diamond v. Charkrabarty* acknowledged that Congress, in enacting the Plant Patent Act, considered the relevant patent law distinction to be "not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions."⁶³ The *Charkrabarty* decision was issued in 1980. After 2030, the technology of robotics may make it possible for a robot species to replicate itself.⁶⁴ The belief that we can control what we make—or indeed that we will be the only intelligent entity making things—appears unsupportable in the twenty-first century.

In his book *Darwin Among the Machines*, George Dyson warns that "[i]n the game of life and evolution there are three players at the table: human beings, nature, and machines. I am firmly on the side of nature. But nature, I suspect, is on the side of machines."⁶⁵

Patent law may not consider the distinction between living and inanimate things to be relevant, but I cannot escape the belief—intuitive though it may be—that Joseph Krutch, in his essay *The Colloid and the Crystal*, identified a view of the world more relevant to the post-human era:

If I wanted to contemplate what is to me the deepest of all mysteries, I should choose as my object lesson a snowflake under a lens and an amoeba under the microscope. To a detached observer . . . the snowflake would certainly seem the "higher" of the two. Against its intricate glistening perfection one would have to place a shapeless . . . glob, perpetually oozing out in this direction or that but not suggesting so strongly as the snowflake does, intelligence and plan.⁶⁶

[I]f life is strange there is nothing about it more strange than the fact that it has its being in a universe so astonishingly shared on the one hand by "things" and on the other by "creatures" No other contrast . . . is so tremendous as this contrast between what lives and what does not.

. . . Order and obedience are the primary characteristics of that which is not alive. . . .

. . . Because the snowflake goes on doing as it was told, its story up to the end of time was finished when it first assumed the form

⁶³ 447 U.S. 303, 313 (1980).

⁶⁴ Joy, *supra* note 59, at 244.

⁶⁵ George B. Dyson, *Darwin Among the Machines*, at ix (1997).

⁶⁶ Joseph Wood Krutch, *The Colloid and the Crystal*, in *The Oxford Book of Essays* 444, 448 (John Gross ed., 1991).

which it has kept ever since. But the story of every living thing is still in the telling.⁶⁷

“Perhaps,” reflects the essayist, “the inanimate is beginning the slow process of subduing us again.”⁶⁸

Only in a law review could one find the statement that the fate of certain biotechnological applications “appears destined for resolution by the courts.”⁶⁹ That the future of the human persona will not be resolved by judges is as certain as our destiny to get cases that raise issues of the post-human era.

What then can be said of the role of the state judiciary? If biotechnology can be dehumanizing in the profoundest sense, the courts of the common law can be a humanizing counterweight reflecting the essence of humanity. Not by defining it but by describing it; not by reconfiguring it but by recognizing it; not by dividing it but by divining it.

We won’t get there by reason alone.

The finest mind ever to sit on the Supreme Court of the United States once wrote, “It is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind.”⁷⁰ There is logic in those words of Justice Oliver Wendell Holmes. But there is wisdom in Justice William Brennan’s insistence that judges should have “awareness of the range of human experience.”⁷¹

Over half a century ago in his prescient lecture *The Abolition of Man*, C.S. Lewis said:

At the moment . . . of Man’s victory over Nature, we find the whole human race subjected to some individual men If the fully planned and conditioned world . . . comes into existence, Nature will be troubled no more by the restive species that rose in revolt against her so many millions of years ago, will be vexed no longer by its chatter of truth and mercy and beauty and happiness. . . . [I]f the eugenics are efficient enough there will be no second revolt, but all snug beneath the Conditioners, . . . till the moon falls⁷²

In the post-human era, Archibald MacLeish would not, I think, divide the business of poetry and law. I’m not sure that Justice Brennan ever did. In his admonition that we remain sensitive to

⁶⁷ Id. at 447-48.

⁶⁸ Id. at 450.

⁶⁹ Iwasaka, *supra* note 14, at 1532.

⁷⁰ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

⁷¹ Brennan, *supra* note 16, at 10.

⁷² Lewis, *supra* note 29, at 76-77.

“one’s intuitive and passionate responses,”⁷³ Justice Brennan reminds us all of our common responsibility to this world and the brave new one: to imagine humanity the heart can recognize.

⁷³ Brennan, *supra* note 16, at 9.