Coercing Friendship and the Problem with Human Rights

By Andrew Jensen Kerr*

The only way to be a friend is to have one.
–Ralph Waldo Emerson

I argue in this short essay that the foundational language of “dignity” in international human rights doctrine obscures the actual construction of human rights and limits high-functioning animals from our moral community. This lexicon of dignity lacks discrete content, but it has been almost uniformly interpreted to signal something unique about humans or the human condition. Indeed, the trending People ex rel. Nonhuman Rights Project, Inc. v. Lavery appellate decision from New York reflects how a narrow vision of rights jurisprudence determines practical life outcomes for animals like Tommy (a chimpanzee). I use the prism of friendship to explore how the (awkward) provision of essential emotional goods might subvert reader expectations of how we think about legal distinctions between humans and other animals. The motivating question that informs this essay is thus: should there be a positive right to friendship?

The contour of what class of things should be considered as rights is ever-expanding, now including the internet, plastic surgery, preschool, even civil solidarity. Indeed, this third generation paradigm of community

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rights assumes the fact of social ties that bind individuals within a given space. It is a priori that we must get along with each other if we elect for communal land and group identity. Why choose to share legal title with an indifferent acquaintance, or a twerp? The bases for these rights are manifold. Hannah Arendt connects rights to citizenship; others argue that they pre-exist the polity. Certain human rights are *inviolable*, are *pre-conditional* to the social contract, and might even form Nozickian “side constraints” that cement an autonomous private space beyond the reach of our administrative state. Rights are primordial yet trans-historical; they are our secular religion. Most rights covenants are informed by a sense of core dignity that separates us from inanimate life, or animals, even cunning, gregarious ones like chimpanzees and their ilk. The lexicon ensures itself—it is definitional, is exegetically inherent. Human rights equals human dignity. An algebraic calculus; a communicative property of one sort or another; cancel out the remainder words and they equal one another. In fact, this equation is valorized by the United Nations. Read the tea leaves (or *Lochner v. New York*)—humans enjoy human rights given their human-ness, and therefore humans are entitled to the protection of those rights by their governments. This tautology reflects the trope of “humanity,” an aspirational word choice that underlines our teleological sense as a species.

Governments must even provide for those rights that defy an easy metric. “Progressive realization” of social-economic rights respects the material capacity for operationalizing things like a “right to culture” (Article 15 of the ICESCR). In a previous essay I posit a right to not simply be educated, but to be *cool*. Social media seems formative to the human experience, to our 21st century condition, and thus our governments should

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7. 198 U.S. 45 (1905) (suggesting that the reference to natural rights signals a return to substantive due process); see also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 664–66 (1980) (discussing the conflation of *Lochner*, *Griswold*, and privacy rights as they intersect with friendship and rights to intimate association).


be bound to allow for it. It is a window into the cultural meta-narrative that informs our ability to craft identity, to actualize a self-image by what we click thumbs up or down. It’s the constitutional language of Kenji Yoshino—an equality of positive freedom to “like” the things we want to like.  

But what if the equation was inverted? What if human rights are not born of an internal alchemy of dignity, but are instead rooted in something much more external, reductive, and crude? What if human rights don’t depend on the human herself, but on governments simply having the administrative capacity (even if only a progressive one) to provide for them? What if these items are not individual entitlements, but a mere type of public good amenable to bureaucratization and government delivery? Consider Maslow. His archetypal “hierarchy of needs” remains a standard for thinking about what things are necessary for humans to both survive, and to hopefully achieve their apex of potential. At stage three is Love/Belonging: this includes emotional goods like friendship. Having friends is correlatively less fundamental than bodily integrity (stage two is Safety), but is more fundamental than rights to public education or freedom of religious expression that typify notions of esteem (stage four) or self-actualization (stage five).

Indeed, there is science behind this instinct that friendship is tied to our moral and physical well-being. Strong friendship promotes brain health among older people. Having more than ten friends makes a person four times more likely to survive breast cancer as compared to someone with fewer friends (and no matter how many close family members they have). Friends are our confidants, the keepers of our secrets in a more omnisciently public space—gossip with friends is our personal catharsis, a veritable pièce de résistance against the saturation of Facebook and Tumblr. Friendship provides us a space for autonomy and control, where we can nurture nascent ideas and feelings. As C.S. Lewis noted, transformative social movements

12. Karst, *supra* note 7, at 632 (“[L]et us assume that to be human is to need to love and be loved.”).
14. *Id.*
15. There has been occasional debate as to whether friendship deserves First Amendment protection, not because of the aesthetic/political worth of secret telling, but as friend selection may be a form of expressive associational content. See Jessica Feinberg, Comment, *The Clash Between Safety and Freedom of Association in the Regulation of Prom Dates*, 17 KAN J.L. & PUB. POL’Y 168, 176 n.65 (2000) (summarizing relevant literature on First Amendment law and friendship).
like the Renaissance, communism, and abolition were all friend-based movements. Friendship is arguably priceless, but is this a reason to jettison it from our tomes of code and common law?

Ethan Leib of Fordham is the representative—and most elegant—voice in law today for the reconstitution of “friendship law” as part of the scholarly discourse. The lacuna is damming. Why do we have survey courses, law reviews, and court systems dedicated to the legal protection and regulation of the family, but—until very recently—have generally ignored friendship? Leib’s Friend v. Friend argues for revisions to the current legal framework to promote friendship at a systemic level. The basic analysis should be intuitive to we humans, Aristotle’s social animal—friendship is good for society, and so the law should work to facilitate the creation and continuity of friendships. We don’t choose most of our family (or necessarily like them), but we hopefully like our friends. It makes sense to encourage things people like.

Perhaps one issue pervading this juxtaposition of law with friendship goes to precision in language. A definition for friendship has been perennially elusive. Even Socrates seemed to retreat to a kind of Potter Stewart Rorschach Test: “I’m not sure what genuine friendship is, but I know it when I see it.” Professor Leib picks up on the Aristotelian view of “virtuous” friendship as being a non-instrumental, altruistic relationship and provides it additional content (voluntary, reciprocal, trust-based, non-familial). Another critical index of friendship is that it is organic, or occurs over time. Relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty; see also Ethan Leib, Friendship & the Law, 54 UCLA L. REV. 631, 678 (2007) (“The citizens of the Soviet Union were said to treat friendships as precious in large measure because they helped develop personal integrity and dignity when the state otherwise could not.”).

17. Leib, supra note 13, at 39.


19. Laura A. Rosenbury, Friends with Benefits?, 106 MICH. L. REV. 189, 212 (2007) (“Family law’s silence is thus more than silence. It also labels friendships as insufficiently intimate, thereby implicitly privileging relationships other than friendship as the preferred form of attachment and connection.”).

20. Perhaps “not surprisingly” is the more appropriate word choice here. Socrates is, of course, responsible for our eponymous pedagogic method of iterative questioning meant to achieve a rarefied form of student uncertainty.


This again goes to the problem of definition—do we have to ask each other if we’re friends yet? If we’re still friends even if we haven’t chatted for months and the last time we hung out was at that Swans concert several years ago? Do we need to announce we’re steady by some kind of public affirmation? We might not want the law policing the intimacy of our friendships and requiring us to draw lines, and sometimes we ourselves might be unsure of where we want our relationships to fall on the spectrum of acquaintance to pal. (Maybe they’re a “frenemy” that we are only pretending to like!).

This promise of organic reciprocity seems very reasonable and common to understandings of friendship. However, for this essay I’m going to leave out this constraint. Instead of asking Leib’s broader question of how the law can promote and protect friendship, I posit something much more local and discomfiting: should the state provide friends for the lonely? My starting point is the Bowling Alone thesis of Robert Putnam—Durkheim and his existential universe of anomie has returned, despite us having all this stuff. Sure, we have a bazillion Instagram followers, but according to the UK Guardian, 1 out of 10 Brits (with whom we Americans share our own “special” relationship) claim to not have any close friends[23]. This seems like a frighteningly large minority of the British population. And at least some of them would probably wish to have blokes or chums. Martha Nussbaum also suggests this possibility of a positive right to playmates. Should governments be in the business of providing for this Maslowian necessity, this basic human need?

I don’t have the space—or mental gymnastics—to write out a subterfuge for how the government-employed friend-maker can trick the lonely into trusting the sincerity of this friendship courting. But we can think of some analogues—the social worker; the social butterfly—that might already perform a less defined task of relationship-building out of varying degrees of altruism. Is it a qualitative leap to make these people befriended for pay?[25]


24. An interesting nod to the possibility of a positive right to friendship comes from Martha Nussbaum and her “capabilities” project, which builds on the foundation of laureate development economist Amartya Sen. Her enumeration of central human capabilities includes “affiliation” or “being able to live for and to others,” as well as “play” or “being able to laugh, to play, and to enjoy recreational activities.” Martha Nussbaum, Capabilities and Human Rights, 66 FORDHAM L. REV. 273, 287–88 (1997).

25. We can already buy Internet friends! See, Eric Steuer, How to Buy Friends and Influence People on Facebook, WIRED (Apr. 5, 2013), http://www.wired.com/2013/04/buy-friends-on-facebook/.
One problem here is that friend-forcing contains echoes of a nefarious kind of “specific performance.” Generally, the law is much more wary of coercing action (here friend-making) versus inaction (indolence, doing nothing). Coercive action may remind readers of our odious history of slavery or indentured servitude. Or there might be a decidedly amoral, but visceral reaction—coercive friendship is positively weird and impossible to implement. Perhaps true. However, there is at least one relevant analogue: sexual surrogacy for persons with physical disabilities. There has been an increasingly robust conversation for surrogates to be state-provided (or subsidized, or legalized) for persons with disabilities that make “voluntary” sexual encounters more difficult to realize. In the Netherlands, the national health system is thought to provide public funds to such individuals to pay for sexual services. Again, Maslow’s taxonomy places sex (as a reproductive act) at the stage one of physiological requirements for human survival, and sex (as intimacy) on stage three Love/Belonging, along with friendship. It is obvious that these debates surrounding friend or sex surrogates are controversial, divisive, and understandably offensive to the sensibilities of many individuals. But this essay does not offer any normative posture about the rightness of coercive friendship; it is only a vehicle to think about a more profound tension—is there a coherent jurisprudence for a taxonomy of human rights?

Professor Christopher McCrudden is an illustrative voice on the continued dependence on dignity as a source for human rights law. This word was deliberately chosen for its capacious, cohesive feel—many countries might sign on to an international covenant that uses this familiar language as a basis for rights jurisprudence. Also, many countries—and individuals within the same country—might attach diverse meanings to the penumbral constellation of this word. “Dignity” possesses a broad, ample architecture ideal for building a novel area of doctrine. However, Shultziner points to a divergence in human rights law founded in conflicting interpretations of dignity, a signal that its utility as a jurisprudential fulcrum may be eroding.

29. Id. at 675–78.
30. Doron Shultziner, Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-
There is also a critique that comes from dignity’s self-definitional content as exclusively human. This lexicon of humanity, dignity, and rights serves to limit the moral community of the law; specifically, (even evolved) animals are excluded. The December 2014 case People ex rel. Nonhuman Rights Project, Inc. v. Lavery reflects how a contested jurisprudence can determine practical legal outcomes for animals like great apes. The New York state appellate court denied Tommy the chimpanzee’s habeas corpus petition to be removed from a private residence to an animal sanctuary. There is a rich tradition of both deontological and utilitarian rights theorists who argue for legal personhood for high-functioning animals like Tommy. However, the court in Nonhuman Rights Project wholly elides that literature and instead cites only to Professor Richard Cupp, who yokes personhood and rights to the necessary corollary of being “responsible.” The United Nations assumes a universal human dignity and natural right to covenant protections, no matter idiosyncratic moral, psychical, or physical attributes. Why then must kin primates endure the stricter test of whether they are sufficiently individually responsible to earn protections of habeas corpus or a pre-conditional “right to life”?

Oh right, don’t many animals already fulfill these required social duties? Pets are after all our “service animals,” our “companion animals.” Our state-designated friends.

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