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A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals' Property Status

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A DUBIOUS GRAIL: SEEKING TORT LAW EXPANSION AND LIMITED PERSONHOOD AS STEPPING STONES TOWARD ABOLISHING ANIMALS' PROPERTY STATUS

*Richard L. Cupp Jr.**

SOME grails are sought one piece at a time. The holy grail for many animal rights activists is abolishing animals' property status. This is an ambition befitting mythical grail status in its level of difficulty given current societal mores and values. It is too inconsistent with our strongly rooted societal paradigm to afford any hope of realization in the near future. Thus, rather than expecting to capture the grail in the short term, many animal rights legal advocates are seeking more manageable steps that may someday lead to the elimination or modification of property status. This Article critiques such efforts, specifically focusing on two potential stepping stones that may be perceived as particularly desirable for animal rights activists: seeking limited personhood for intelligent species of animals, such as chimpanzees; and the possible expansion of tort law to provide animals standing as plaintiffs whose interests are represented by court-appointed humans.

I. INTRODUCTION

Animal rights law is growing explosively. The animal rights movement started gaining attention in the 1970s and 80s, but in those decades it was primarily a philosophical and moral movement rather than a law-based movement. Philosopher Peter Singer's 1975 book entitled *Animal Liber-*

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I dedicate this Article to Shasta, the Husky/Shepherd mix who has been my faithful friend and buddy for the past thirteen years. We are in happy agreement that unique and precious property is the appropriate paradigm in human/animal relationships, though we gently differ as to which is the owner and which is the owned.

ation[1] was a significant influence, but Singer is a philosopher, not a lawyer, and his book reflected that.

In the past decade, an enormous change has begun. The animal rights movement has evolved from a moral/philosophical basis to a pragmatic, increasingly sophisticated legal action basis, and it has done so with startling rapidity on a large scale. Ten years ago, for example, there were only perhaps one or two animal law courses being taught at United States law schools. Now there are approximately seventy, with most of the nation's elite law schools represented.[2] Several prominent law schools have taken a step further. Bob Barker, host of the television show *The Price Is Right*, has provided million-dollar gifts to nine highly respected law schools to establish animal rights centers.[3] Included among these law schools with new animal rights centers are Harvard, Stanford, Columbia, Georgetown, Northwestern, Duke, and UCLA.[4]

At least three scholarly legal journals dedicated exclusively to animal law have been established over the past ten years, two of them in 2006.[5] Animal rights legal organizations have proliferated, and older organizations, such as the Animal Legal Defense Fund ("ALDF"), have experienced dramatic growth.[6] A small organization only a decade ago, the ALDF now claims to have over 100,000 members.[7]

Thirteen years ago, the Student Animal Legal Defense Fund had just one law school chapter.[8] It now has chapters at 87 out of a total of 181 American Bar Association ("ABA")-approved law schools, with many more on the way.[9] Many state bar associations have in recent years created animal law sections.[10] Even the ABA, the nation's largest and perhaps most mainstream legal organization, recently created an animal law section.[11]

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1. PETER SINGER, ANIMAL LIBERATION (1975).

2. *See* NABR Animal Law Section, Animal Law Courses, http://www.nabr.org/animallaw/LawSchools/AnimalLawCourses.htm (last visited Nov. 12, 2006). *See also* Animal Legal Defense Fund, http://www.aldf.org/ (last visited June 30, 2006) [hereinafter ALDF].

3. *See* William Hageman, *Early Steps Taken on Road to Animal Law*, CHI. TRIB., June 5, 2005, at 3A.

4. *See id.*

5. Lewis & Clark Law School, ANIMAL LAW REVIEW, http://www.lclark.edu/org/animalaw/ (established in 1995, last visited Nov. 12, 2006); University of Pennsylvania Law School, JOURNAL OF ANIMAL LAW AND ETHICS, http://www.law.upenn.edu/groups/jale/ (last visited Nov. 12, 2006); Michigan State University, JOURNAL OF ANIMAL LAW, http://www.animallaw.info/ (last visited Nov. 12, 2006).

6. *See* ALDF, *supra* note 2, at http://www.aldf.org/about.asp?sect=about.

7. *See id.*

8. National Center for Animal Law, http://www.lclark.edu/org/ncal/lewisandclark.html (last visited June 30, 2006).

9. *See* ALDF, *supra* note 2.

10. *See, e.g.*, Pennsylvania Bar Animal Law Committee, http://www.pabar.org/public/committees/animal/ (last visited Nov. 12, 2006); Texas Bar Animal Law Section, http://www.animallawsection.org (last visited Nov. 12, 2006); Washington Bar Animal Law Section, http://wsba.org/lawyers/groups/animallaw/default1.htm (last visited Nov. 12, 2006).

11. The American Bar Association, Animal Law Committee, http://www.abanet.org/tips/animal/ (last visited Nov. 12, 2006).

Several nationally prominent constitutional law scholars with generally expansive views of rights, including Alan Dershowitz,[12] Martha Nussbaum,[13] Cass Sunstein,[14] and Laurence Tribe,[15] have in the past decade written articles supporting legal rights for animals. Animal rights-related state and federal legislative efforts by legal action groups have rapidly increased. For example, in the past decade, legislation has been proposed in at least ten states seeking to allow expanded tort damages for harm to animals, and the effort has already been successful in a few states.[16] For a particularly powerful example, as recently as 1994, animal cruelty was a felony in only fifteen states—but it is now a felony in forty-one states and in the District of Columbia.[17]

Steven Wise's book *Rattling the Cage*,[18] published in 2000, and his related 2002 book, *Drawing the Line*,[19] are perhaps the most prominent intellectual products of the burgeoning animal rights movement. In the books, Wise argues that property status should first be eliminated for especially intelligent animals, such as chimpanzees and bonobos, based on

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12. *See generally* ALAN M. DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS (2005); ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002).

13. *See generally* MARTHA CRAVEN NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006); MARTHA C. NUSSBAUM, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (2004); Martha C. Nussbaum, *Steven M. Wise's Rattling the Cage: Toward Legal Rights for Animals*, 114 HARV. L. REV. 1506 (2001) (book review).

14. *See generally* CASS R. SUNSTEIN, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (2004); Cass R. Sunstein, *Cost-Benefit Analysis and the Environment*, 115 ETHICS 351 (2005); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003); Cass R. Sunstein, *Enforcing Existing Rights*, 8 ANIMAL L. i (2002); Cass R. Sunstein, *Standing for Animals*, 47 UCLA L. REV. 1333 (2000).

15. *See* Laurence Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001).

16. *See* CONN. GEN. STAT. § 22-351a (2006) (allowing for punitive damages up to $3,500); 510 ILL. COMP. STAT. 70/1 to 70/16.4 (2005) (providing for punitive damages of not less than $500 and not more than $25,000 for each act of abuse or neglect); TENN. CODE ANN. § 44-17-403 (2005) (allowing for up to $5,000 in noneconomic damages in the death of a pet caused by the negligent act of another). *See also* H.R. 03-1260, 64th Gen. Assem., 1st Reg. Sess. (Colo. 2003), *available at* http://www.nabr.org/animallaw/VetMalpractice/COHB1260072904.pdf; H.R. 648, 23d Leg., Reg. Sess. (Haw. 2005); H.R. 941, 2005 Gen. Assem., 2005 Sess. (Md. 2005); S.B 932, 2003 (Mass. 2003); H.R. 1379 2002 S., Reg. Sess. (Mich. 2007); H.R. 5433, 2005 Gen. Assem., Jan. Sess. (R.I. 2005); H.R. 2411, 211th Leg., 2004 Sess. (N.J. 2004); H.R. 3585, 2005 Gen. Assem., Reg. Sess. (N.Y. 2005). *See generally* National Association for Biomedical Research, Animal Law Section, http://www.nabr.org/animallaw/Damages/index.htm (last visited Nov. 12, 2006) (listing enacted, proposed, and failed state legislation providing for noneconomic damages in animal tort cases).

17. ANIMAL LEGAL DEFENSE FUND, FELONY STATUS LIST (2006), http://www.aldf.org/uploads/Felony_Status_List%204-06.pdf (last visited Nov. 12, 2006). *See also*, Inhumane.com, Animal Cruelty Laws by States, http://www.inhumane.org/data/crueltylaws.html (last visited July 3, 2006); American Humane Association, http://www.americanhumane.org (last visited Nov. 12, 2006) (under "Take Action" drop down menu follow "State Issues" hyperlink; then follow "Animal cruelty state summary" hyperlink).

18. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

19. STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS (2002).

increasing evidence of their capacity for "practical autonomy."[20] According to Wise, such animals are functionally analogous to children and incompetent adults, and should similarly be granted fundamental autonomy rights as persons.[21]

Wise recognizes, however, that courts are not likely to accept personhood for intelligent animals anytime soon.[22] Thus, he advocates a stepping stone approach toward that goal, and he also seems sympathetic toward the related (and even more ambitious) goal of eliminating all animals' property status as it currently exists.[23] The stepping stone approach is to pursue evolution in a number of legal arenas that will not directly lead to rights, but which will pave the way for eventual abolition of property status for some or all animals through incremental heightening of their legal status.

Tort law is one of the most significant areas of focus in the stepping stone approach toward eventual abolition of animals' property status.[24] Professor David Favre has perhaps pushed the tort envelope the furthest in a recent law review article, titled *Judicial Recognition of the Rights of Animals—A New Tort*, which argues that even without abolition of property status, animals should be permitted status as plaintiffs (represented by court-appointed humans) in an expansive new tort action.[25]

This Article will analyze Steven Wise's work in *Rattling the Cage* and *Drawing the Line*, advocating limited personhood for some animal species, and David Favre's proposals in *A New Tort*, as illustrative of efforts at incremental movement toward animal rights and the abolition or modification of property status for animals. Part II addresses the elimination of property status as the grail for many in the animal rights movement, with special emphasis on *Rattling the Cage* and *Drawing the Line* as influential grail roadmaps. It analyzes the "practical autonomy" scale proposed in the books as an approach to determining when basic rights should be recognized. Part II also critiques *Drawing the Line*'s proposed

20. WISE, *supra* note 18, at 179, 243-48, 251-57, 270; WISE, *supra* note 19, at 7, 32-33, 47, 157-58, 205-06, 235-38.

21. WISE, *supra* note 18, at 12, 57, 86-7, 144-54 (outlining the "Rings of Consciousness," developed through the extensive study of human children and analogizing it to chimpanzee development); *id.* at 163-72 (describing and comparing the effects of socialization on both human children and chimpanzees); *id.* at 244 (quoting *Care and Protection of Beth*, 587 N.E.2d 1377, 1382 (Mass. 1928) "'[c]ognitive ability is not a prerequisite for enjoying basic liberties'"); WISE, *supra* note 19, at 236 ("[A] normal human child possesses the practical autonomy sufficient for dignity-rights by age eight months . . . . Any nonhuman animal with practical autonomy is similar to this child in ways highly relevant to the possession of basic legal rights. As a matter of equality, [a chimpanzee] is certainly entitled to them.").

22. *See* WISE, *supra* note 18, at 4-5.

23. *Id.*; WISE, *supra* note 19, at 9 (stating that "[a]n advocate for the legal rights for nonhuman animals must proceed one step at a time . . ."); *id.* at 234-35 (comparing his position for the animal rights movement to Lincoln's strategy for gaining rights for black slaves).

24. *See infra* notes 185-97 and accompanying text.

25. *See generally* David S. Favre, *Judicial Recognition of the Rights of Animals–A New Tort*, 2005 MICH. ST. L. REV. 333.

use of a "precautionary principle" to support its rights argument, and both books' efforts to analogize to standing granted to nonliving entities such as corporations to buttress their assertions. Finally, Part II discusses the books' efforts to compare the animal rights movement to the development of civil rights for slaves, women, and children. Part III seeks to identify implications of Wise's proposals to extend rights to animals. Identifying legal standing as a likely battlefield for assertions of animal personhood, Part III raises concerns about the competitive nature of rights and the implications for moral responsibility and the societal compact if personhood for animals were allowed in a standing dispute or other type of dispute. Part III concludes that courts will not accept any form of personhood in the reasonably near future, and that doing so would cause harmful societal consequences.

Part IV addresses the stepping stone approach to gradually eroding animals' property status, of which proposed limited rights for intelligent species is a prominent example. Part IV also discusses arguments proffered for an incremental approach to animal rights and addresses several of the other legal stepping stones (in addition to efforts to attain limited personhood for intelligent species) currently being pursued. Part V analyzes in some depth the possibility of expanding tort law to grant animals status as plaintiffs (represented by humans appointed by the courts) as a stepping stone toward eliminating property status. Part V concludes that, as with other proposed stepping stones seeking to treat animals similarly to humans, the proposed new tort is untenable and contrary to public policy.

II. THE GRAIL OF ELIMINATING PROPERTY STATUS AND ANIMAL PERSONHOOD

Rattling the Cage's model of eventual personhood for particularly intelligent animals serves as a particularly influential roadmap for the animal rights movement in its efforts to eventually achieve the grail of eliminating animals' property status. Wise is probably the most prominent legal activist in the United States promoting the concept of animal rights. Describing himself as an "animal protection lawyer," he has practiced "animal law" for more than twenty-five years and has taught animal law courses at Harvard Law School, Vermont Law School, and John Marshall Law School.[26]

Wise was an early leading figure in the Animal Legal Defense Fund, and, beginning in 2000, he received a great deal of attention both in the media[27] and in the legal academic community with the publication of *Rat-*

26. *See* WISE, *supra* note 19, at xi.

27. Wise has made numerous other national and local television and radio appearances, and he is quoted frequently in print media about animal rights issues. *See, e.g.*, Claudia Dreifus, *A Conversation With—Steven Wise: A Courtroom Champion for 4-Legged Creatures*, N. Y. TIMES, Oct. 1, 2002, at 2; Anita Hamilton, *Woof, Woof, Your Honor*, TIME, Dec. 13, 2004, *available at* http://www.time.com/time/archive (enter "woof, woof" into the search pane); Staff Writer, *Beastly Behavior?*, WASH. POST, June 5, 2002, at C01; Stephanie

tling the Cage.[28] Famed anthropologist Jane Goodall wrote a foreword for the book, which was favorably reviewed by prominent constitutional law scholar Cass Sunstein in the *New York Times Book Review*.[29] Federal judge and former University of Chicago law professor Richard Posner, another of the nation's most prominent legal thinkers, also found the book interesting and published a review.[30] Since then, Wise's theories have received support from other well-known scholars with expansive views of rights, such as Harvard Law School professors Alan Dershowitz and Laurence Tribe.[31]

In 2002, Wise followed up on *Rattling the Cage* with *Drawing the Line*.[32] Both *Rattling the Cage* and *Drawing the Line* focus on arguments for extending some basic level of liberty and equality rights to relatively intelligent animals, such as great apes.[33] *Rattling the Cage* sets forth Wise's fundamental premise and provides arguments supporting his premise.[34] The book's basic argument is that throughout history, notions about the nature and existence of rights have evolved in keeping with shifting societal mores and values and new scientific discoveries, and that with the scientific discoveries made in recent years regarding the intelligence and abilities of some animals, such as great apes, we have evolved to a point where courts should extend some degree of basic rights to these animals.[35]

Rattling the Cage does not argue that great apes should be awarded all of the rights held by humans. For example, it does not argue that great apes should be given the right to vote or to receive educational opportunities equal to those given to humans.[36] Rather, it argues loosely for what might be described as dignity rights, such as the right not to be en-

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Zimmerman, *Scholars Debate How Far Animal Rights Should Go*, CHI. SUN-TIMES, Apr. 15 2001, *available at* http://www.findarticles.com/p/articles/mi_qn4155/is_20010415/ai_n13903819/pg_2.

28. WISE, *supra* note 18.

29. Cass R. Sunstein, *The Chimps' Day in Court*, THE N.Y. TIMES BOOK REV., Feb. 20, 2000 *available at* http://www.nytimes.com/pages/books/ (enter "The Chimps' Day in Court" into the search pane).

30. *See generally* Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527 (2002).

31. *See supra* notes 12, 15 and accompanying text.

32. *See* WISE, *supra* note 19.

33. *See generally* WISE, *supra* note 18; WISE, *supra* note 19.

34. *See generally* WISE, *supra* note 18.

35. *Id.* at 179-237 (outlining the scientific discoveries made about the inner workings of the chimpanzee mind); *id.* at 237 ("Whatever legal rights these apes may be entitled to spring from the complexities of their minds."); *id.* at 261 ("Determining the dignity-rights of chimpanzees and bonobos in accordance with the fundamental principles of Western law—equality, liberty, and reasoned judicial decisionmaking—reemphasizes and reinvigorates these principles . . ."). *See generally id.* at 131-34 (describing the similarity between the genetic makeup and brains of humans and chimpanzees).

36. *See id.* at 243-48 (admitting that he "[is] not argu[ing] that any chimpanzee or bonobo has full autonomy. . ." and therefore concedes the limited nature of the rights he desires for highly intelligent species of nonhuman animals). For an illustration of other animal rights thinkers adopting this "limited rights" approach, see Adam J. Fumarola, *With Best Friends Like Us Who Needs Enemies: The Phenomenon of the Puppy Mill, the Failure of Legal Remedies to Manage It, and the Positive Aspects of Animal Rights*, 6 BUFF. ENVTL. L.J. 253, 286-88 (1999).

slaved (for example, in a zoo or in a research lab,) and the right not to have one's body used in medical experiments.[37] *Rattling the Cage* and *Drawing the Line* are written for a general educated audience rather than for lawyers, and they do not flesh out detailed theories on how specific constitutional provisions should or should not apply to great apes and other intelligent animal species. Instead, their analyses center more broadly on the general nature of fundamental rights. The books undertake to erode resistance to the basic principle of denying all rights to all animals, and they leave many specifics of arguments on particular rights to others (or perhaps to future books).

The generality of Wise's approach does not reflect a lack of ambition for his cause. Rather, he doubtlessly recognizes that the most important initial battle is over the question of whether rights should ever be extended to animals in any form. If any notion of rights for animals, however general, is accepted by courts, the consequences will be enormous, and the subsequent battles over which specific rights should apply and to which animals they should apply will entail much smaller legal and intellectual leaps.

Following an introductory story about the suffering of a chimpanzee named Jerome who was intentionally infected with the HIV virus in a research laboratory (perhaps intended to touch readers' emotions and make them more receptive to changes in the law that could prevent such suffering), *Rattling the Cage* begins with an analysis of the history of animals' legal and moral status in human society.[38] Although the book does not spare the ancient Greek philosophers, it assigns much of the blame for animals' subjugation to Jewish and Christian religious teachings.[39] Both Greek philosophy and Judeo-Christian teachings ascribe to the "Great Chain of Being," a concept frequently referenced throughout both books.[40]

According to the Great Chain of Being presupposition, all life forms may be placed on a conceptual ladder of importance or value.[41] Animals occupy the lowest rungs of the ladder, humans are higher up, and spiritual and divine beings, such as angels or gods, are at the top of the ladder.[42] Beings lower on the ladder were created to serve the beings higher

37. *See* WISE, *supra* note 18, at 7 ("I hope you will conclude, as I do . . . that justice entitles chimpanzees and bonobos to legal personhood and to the fundamental legal rights of bodily integrity and bodily liberty . . . . "); *id.* at 49 (defining bodily integrity and bodily liberty); *id.* at 79 ("Dignity-rights rather than human rights . . . more accurately describes these fundamental rights."); *id.* at 100 (identifying the "two most important [areas] with respect to dignity-rights, [as] liberty and equality."); *id.* at 267 (summarizing his argument, "we must replace the legal *thinghood* of chimpanzees and bonobos with a legal *personhood* that immunizes them from serious infringements upon their bodily integrity and bodily liberty").

38. *Id.* at 9-48.

39. *See id.*

40. *See id.* at 11 (the first of multiple references to the influence of the "Great Chain of Being" throughout the book).

41. *Id.*

42. *Id.*

on the ladder.[43] Jews and Christians channeled this thinking into the idea that humans have immortal souls but animals do not, and that this distinction calls for treating humans with infinite dignity and treating animals as lesser beings placed on earth for the benefit and use of humans.[44] Under Jewish and Christian thought, humans were created to serve God, and animals were created to serve humans.[45]

After introducing the history of human subjugation of animals, *Rattling the Cage* explores the nature and history of rights. It emphasizes the ideals of liberty and equality as the basis for rights, and asserts (correctly) that ideas about how broadly rights should be extended have slowly evolved over time.[46] The gradual evolution of mores, values, and legal principles is an important theme for Wise. He describes change in these areas as often taking place "funeral by funeral," arguing that core ideas are so deeply imbedded in our psyches that we find it difficult to change our views even when they are objectively untenable.[47] However, our children may be slightly more open to a new idea that challenges existing thought, and their children may be more open yet to the new idea, and so on, until gradually, funeral by funeral, the new idea gains general acceptance.[48]

Recent scientific discoveries about the intelligence, communicative abilities, and emotional capacities of great apes are the lynchpin of *Rattling the Cage*'s hope for gradual acceptance of the idea that great apes should be afforded rights.[49] It rejects as irrational Judeo-Christian religious tenets affirming the ascendancy of humans, and it argues that philosophical and scientific writers' historical efforts to justify subjugating all animals because they do not have consciousness, cannot communicate, cannot use tools, are not self-aware, cannot feel emotions, etc., have been destroyed by recent findings that great apes (and, with some of these traits, other animals) have and can do all of these things that were previously thought limited only to humans.[50]

In *Drawing the Line*, Wise undertakes to be more specific, not in analyzing particular rights in detail, but in creating a framework for deciding which animals should be entitled to basic dignity rights. *Drawing the Line* makes clear that Wise has been criticized by some other animal rights activists for his focus in *Rattling the Cage* on animals that typically have high intelligence, such as great apes. He responds that "[i]f I were Chief Justice of the Universe, I might make the simpler capacity to suffer, rather than practical autonomy, sufficient for personhood and dignity

43. *Id.*
44. *Id.*
45. *Id.*
46. *See id.* at 49-87.
47. *Id.* at 72 (quoting economist Paul Samuelson).
48. *Id.*
49. *Id.* at 179-81.
50. *See id.* at 119-237.

rights."[51] However, he is a pragmatist, and does not believe judges are likely to assign rights based on the ability of animals to suffer because of the overwhelming practical consequences for human society of such a development.[52] His notion of rights based on "practical autonomy," he argues, would have a much more limited impact on human society and is thus much more likely to be accepted at some point by judges.[53]

A. A Scale of Practical Autonomy

The primary purposes of Wise's follow-up book, *Drawing the Line*, seem to be the following:

1) Proposing a formula for when animals may be found to exercise or to have practical autonomy and thus be entitled to personhood and basic dignity rights;[54] and

2) Applying that formula to scientific knowledge about a number of individual members of animal species (chimpanzees, bonobos, orangutans, gorillas, honeybees, African grey parrots, dogs, dolphins, and elephants) to determine what degree of practical autonomy (and thus, what rights, if any) should be assigned to them.[55]

Drawing the Line borrows its scale of practical autonomy from the work of Dr. Donald Griffin, whom Wise describes as the father of cognitive ethology.[56] Griffin acknowledges that how much particular animals feel, want, act intentionally, know, and are self-aware is not scientifically knowable at this time.[57] Thus, he has created a scale ranging from 0.0 to 1.0, with the point value being closer to 1.0 the more likely the answer is "yes," to the above questions.[58] Griffin and Wise believe that all animals

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51. Wise, *supra* note 19, at 34.

52. The practical impact of granting rights based on the ability to suffer would be enormous. Such a finding would immediately impact the use of animals for food, and clothing, scientific research on almost any animals, and other economic uses, such as the ability of humans to kill or otherwise control animals that might interfere with human endeavors (as one of thousands of potential examples, killing rodents who are destroying crops). The enormous practical "cost" of granting such rights is the basis of Wise's determination that rights based on "practical autonomy" are a much easier sell than rights based on the ability to suffer. *See infra* note 164 and accompanying text.

53. Wise, *supra* note 19, at 32

> ([A] being has practical autonomy and is entitled to personhood and basic liberty rights if she: 1. can desire; 2. can intentionally try to fulfill her desires; and 3. possesses a sense of self sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it.);

id. at 34.

> ([T]he capacity to suffer appears irrelevant to common-law judges in their consideration of who is entitled to basic rights. What is at least *sufficient* is practical autonomy. . . . I may not like it much myself. But philosophers argue moral rights; judges decide legal rights. And so I present a legal, and not a philosophical, argument for the dignity-rights of nonhuman animals.).

54. *Id.* at 35-47.

55. *Id.* at 49-230.

56. *Id.* at 35.

57. *Id.*

58. And, of course, with the point value being closer to 0.0, the likelier the answer is "no" to any of these questions. *See id. See also* Donald R. Griffin, Animal Minds: Beyond Cognition to Consciousness 11 (2001).

may be divided into four categories on this scale of probability of consciousness and sophisticated mental abilities: Category One: almost 1.0; Category Two: above 0.50; Category 3: exactly 0.50; and Category Four: below 0.50.[59] *Drawing the Line* argues that all animals falling into Category One "clearly possess sufficient practical autonomy to qualify them for basic liberty rights."[60] It describes consciousness as the "bedrock" of practical autonomy,[61] and in both *Drawing the Line* and *Rattling the Cage*, Wise seeks to link intelligence, communicative ability, and self-recognition to the notion of consciousness.[62]

Drawing the Line concludes that chimpanzees, bonobos, orangutans, gorillas, and dolphins are Category One animals possessing practical autonomy, and that clearly they should be granted dignity rights.[63] It places honeybees toward the bottom of Category Two,[64] dogs near the middle of Category Two,[65] and African elephants and African grey parrots near the top of Category Two.[66] *Drawing the Line* argues that animals near the top of Category Two, such as African grey parrots that have been the subject of experiments related to consciousness, should be entitled to dignity rights.[67]

Along with other problems,[68] the approach taken by *Rattling the Cage* and *Drawing the Line* is vexed by a lack of scientific or societal consensus on the parameters of consciousness.[69] The books' approach to finding consciousness seems general and loose; they seem to throw out a number of arguments for finding consciousness in some animals with the hope that one or more of them will stick. A basic premise in the books seems to be that most humans are conscious, and thus the more animals are like us, the stronger the argument that they are also conscious.[70] The books point out numerous similarities between great apes (and other intelligent animals) and humans in terms of emotional capacity, intelligence, ability

59. WISE, *supra* note 19, at 35.

60. *Id.* at 36. Wise argues that animal should be included in Category One if the certainty that they are self-aware and highly intelligent is .90 or higher. *See id.*

61. *Id.* at 37.

62. WISE, *supra* note 18, at 119-62, 186-222 (discussing many of the chimpanzees' abilities ranging from counting to nonlanguage symbolic communication). WISE, *supra* note 19, at 35-38.

63. WISE, *supra* note 19, at 231.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 112.

68. *See, e.g.*, *infra* notes 80-180 and accompanying text.

69. *Compare* TOM REGAN, THE CASE FOR ANIMAL RIGHTS 33 (2d ed. 2004) ("Common sense and ordinary language favor the attribution of consciousness and a mental life to many animals . . . animal behavior is consistent with viewing them as conscious . . ."), *and* GRIFFIN, *supra* note 58, at 1) (clearly stating his view in the title of the first chapter, "In Favor of Animal Consciousness"), *with* MICHAEL LEAHY, AGAINST LIBERATION: PUTTING ANIMALS IN PERSPECTIVE 140 (1994) (examining commonly held beliefs about animal rights and consciousness), *and* Bob Bermond, *The Myth of Animal Suffering*, *in* THE ANIMAL ETHICS READER 79 (2003) (claiming that the lack of a developed prefrontal cortex and the capacity for reflection prohibits nonhuman suffering).

70. *See* WISE, *supra* note 18, at 120-22.

to communicate, self-awareness, etc.[71] However, Wise acknowledges that many scientists reject assigning consciousness to animals[72] and several writers addressing the subject contend that if we cannot be certain what animals are thinking, we also cannot make conclusions that they think like we do.[73]

Further, *Rattling the Cage* acknowledges that philosophers and scientists are hopelessly divided on how the concept of consciousness should even be defined.[74] It summarizes the "top ten" theories of consciousness, subtitling the section "Nobody Has a Clue."[75] It quotes the *International Dictionary of Psychology*'s description of consciousness as "a fascinating but elusive phenomenon: it is impossible to specify what it is, what it does, or why it has evolved."[76]

Because consciousness is, as Wise says, the "bedrock" of his theory of practical autonomy, and scientists, philosophers, and psychologists have no agreement on whether animals may be conscious or even how to define consciousness among animals, the practical autonomy theory is not likely to seriously challenge judicial precedents disallowing rights for animals anytime soon. *Drawing the Line*'s elaborate "Scale of Practical Autonomy," with its four major categories and many gradations within those four categories, seeks to establish a sense of clarity where clarity is not possible to attain—at least given our present understanding of animals. For example, despite relying on scientific findings susceptible to multiple interpretations, the book extends its autonomy scale to two places to the right of a decimal point, assigning an autonomy value on its 0-1 scale of 0.59 to honeybees,[77] 0.68 to a dog that was studied,[78] 0.78 to an African grey parrot that was studied,[79] and so forth.

This effort to identify precise gradations of consciousness and practical autonomy in the face of such uncertainty and lack of consensus is not likely to impress most courts. Indeed, the intricate and strained model developed may in fact provide ammunition for arguments against personhood for animals. It serves to highlight the probability that courts will, at least for many years, reject finding new rights that would create significant social upheaval given the present lack of certainty or consen-

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71. *Id.*

72. *See id.* at 127 (quoting Donald Griffin's concerns about intense "antagonism of many scientists to suggestions that animals may have conscious experiences").

73. *See id.* at 124, 127. Other sources Wise cites as arguing that animals are not conscious include STEPHEN BUDIANSKY, IF A LION COULD TALK: ANIMAL INTELLIGENCE AND THE EVOLUTION OF CONSCIOUSNESS (1998); PETER CARRUTHERS, THE ANIMALS ISSUE 184-93 (1992); Daniel C. Dennett, *Animal Consciousness: What Matters and Why*, 62 SOC. RES. 691 (1995).

74. WISE, *supra* note 18, at 129-30.

75. *Id.* at 129.

76. *Id.* at 128; THE INTERNATIONAL DICTIONARY OF PSYCHOLOGY (N.S. Sutherland ed., 1989).

77. WISE, *supra* note 19, at 86.

78. *Id.* at 129. In fact, Wise enthusiastically asserts that "it won't take much to push [dogs] to 0.70." *Id.*

79. *Id.* at 112.

sus about animal consciousness and autonomy. Fetuses aside, defining a human "person" is at present probably viewed as a fairly straightforward undertaking for courts; the more uncertainty and complexity would be required to expand the definition to some nonhumans, the less likely courts will be to undertake the leap.

B. THE "PRECAUTIONARY PRINCIPLE"

Drawing the Line seeks to buttress its "Scale of Practical Autonomy" by arguing that courts should follow what it calls "the precautionary principle."[80] The book borrows the precautionary principle from environmental policymakers. In that context, the precautionary principle represents an approach urging that if we are uncertain whether something will cause harm to the environment, we should make decisions with the assumption that it will harm the environment.[81] *Drawing the Line* asserts that "the precautionary principle rejects science 'as the absolute guide for the environmental policy maker,'" instead encouraging regulators to "'act in anticipation of possible environmental harm to ensure that this harm does not occur.'"[82] The book asserts that the precautionary principle is finding a home in America, German, British, Australian, and European law.[83]

The attraction to animal rights activists of applying the precautionary principle to the question of whether animals have practical autonomy is obvious. It might allow an extension of rights to relatively intelligent animals even though we are uncertain of the extent to which they share characteristics with humans that arguably form the basis for rights. Even though we cannot know for certain how similarly to humans relatively intelligent animals possess practical autonomy, *Drawing the Line* would like to use the precautionary principle to afford them dignity rights because we cannot be certain of the degree to which they possess practical autonomy.[84]

Drawing the Line provides an example of how it would like courts to use the precautionary principle in its discussion of African grey parrots.[85]

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80. *Id.* at 38.

81. *Id.* at 39. A number of environmental scientists have analyzed and advocated the use of the precautionary principle in policymaking. *See, e.g.*, David Appell, *The New Uncertainty Principle*, SCI. AM., Jan. 2001, *available at* http://www.sciamdigital.com (follow "archive" hyperlink to the "January 2001" issue hyperlink); Tim Lauck et al., *Implementing the Precautionary Principle in Fisheries Management Through Marine Reserves*, 8 ECOLOGICAL APPLICATIONS S72 (Supp. 1998), *available at* http://links.jstor.org/sici?sici=1051-0761%28199802%298%3A1%3CS72%3AITPPIF%3E.

82. WISE, *supra* note 19, at 39.

83. *Id.* at 40. In fact, the precautionary principle appears to have influenced the creation of some national and international environmental policies and legislation. *See, e.g.*, Marine Mammals Protection Act, 16 U.S.C. § 1374 (1972) (prohibits any taking of marine mammals that could be disadvantageous to the species); World Charter for Nature, U.N. Doc. A/Res/37/7 art. 11/b (Oct. 28, 1982) (an activity that may impact nature is prohibited if its "potential adverse effects are not fully understood").

84. WISE, *supra* note 19, at 35-47.

85. *See supra* note 66 and accompanying text.

As noted above, the book assigns an "autonomy value" of 0.78 to an African grey parrot on its scale of practical autonomy.[86] It then argues that "this entitles [the African grey parrot being discussed] to dignity rights under a moderate reading of the precautionary principle."[87] In other words, we cannot be certain whether particular African grey parrots are self-aware and conscious, but significant evidence of this possibility exists so let us consider giving them the benefit of the doubt.

Courts are, appropriately, unlikely to adopt this approach anytime soon. Rather than being a guiding principle of our legal system, the precautionary principle is directly contrary to the manner in which courts generally address novel arguments such as the thesis that dignity rights should be extended to animals. *Drawing the Line* asserts that "[b]ecause it appears likely that many, perhaps most, mammals and birds have emotions, are conscious, and have selves, the burden of proving at trial that an individual mammal or bird lacks practical autonomy should be shouldered by the one who wants to harm them."[88] However, courts generally operate in precisely the opposite direction. Rather than presuming that arguments are correct unless disproven, courts typically apply the burden of persuasion to those seeking to establish facts or to change the status quo.[89] The more novel and disruptive to the status quo the assertion, the stronger the burden of persuasion will likely be on those seeking the change.[90] Courts tend to presume that existing paradigms that have stood the test of time make sense and should continue to be applied unless a party challenging the paradigm offers convincing proof that change is needed.[91] Presuming that a paradigm should be changed whenever challenged if the existing paradigm might cause harm to some interest would invite chaos, to say the least.

Courts do not require parties to establish absolute certainty of harm when initiating litigation in order to obtain a ruling in their favor, but they typically at least require harm to be shown more likely than not to exist. In some contexts they require liability to be shown by "clear and convincing" evidence or even, in criminal cases, guilt must be established by proof beyond a reasonable doubt.[92] Given the dramatic, society-shak-

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86. *Id.*

87. WISE, *supra* note 19, at 112.

88. *Id.* at 43. Wise argues that the precautionary principle should be applied to presume that any animal "with an autonomy value higher than 0.70" possesses practical autonomy for basic liberty rights. *Id.*

89. For example, both federal and state courts tend to assign the burden of proof to the party trying to prove something new. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 60 (1991) ("[H]istory creates a strong presumption of continued validity . . . ."); Wilson v. State, No. 09-05-232 CR, 2006 Tex. App. LEXIS 2495, at *7 (Tex. App.—Beaumont Mar. 29, 2006, no pet.) (citing Tong v. State, 25 S.W.3d 707, 710 (Tex. Crim. App. 2000) ("While an appellant may make a novel or unique argument for which there is no authority directly on point, he must ground his contention in analogous case law or provide the reviewing court with the relevant jurisprudential framework for evaluating his claim.").

90. *See supra* note 89.

91. *Id.*

92. Under California law, punitive damages may be awarded to a plaintiff who provides "clear and convincing evidence" that the defendant acted with "oppression, fraud or

ing implications of assigning personhood and rights to some animals,, courts would likely in practice make the burden of persuasion high indeed.

Further, establishing harm to the interests of the party seeking a change is only part of the equation. As addressed below, rights are not absolute, and do not exist in a vacuum.[93] Assigning rights to one party creates obligations for other parties. Courts would need to consider the societal costs and policy implications that an assignment of new rights would create in deciding whether to grant the rights. As one of many potential examples, courts would need to consider the loss of life-saving and other medical advances benefiting both humans and animals that are attained through the use of animals in research laboratories along with the interests of the research animals in obtaining a new right.[94] In light of the considerations addressed above, most courts will not apply a precautionary principle to the question of whether some animals are conscious.

C. PERSONHOOD AND RIGHTS FOR CHILDREN, INCOMPETENT ADULTS, AND THINGS SUCH AS CORPORATIONS AND SHIPS

Both *Rattling the Cage* and *Drawing the Line* emphasize that despite all of the attention devoted by animal rights' detractors to the primacy of humans over animals, precedent exists for granting legal capacity to sue[95] and legal rights to humans who are not legally competent and to other entities that are not even sentient.[96] Human children, even as infants or fetuses, are granted rights under the Constitution.[97] The same is true for

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malice," each of which indicate that, in performing the harmful act, the defendant acted consciously or intentionally. CAL. CIV. CODE § 3294(a), (c)(1)-(3) (West 1987). *See, e.g.*, Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 69 (Cal. 2005) (plaintiff awarded punitive damages based on clear and convincing evidence that defendant financial institution acted fraudulently in a real estate transaction between the parties).

93. *See infra* notes 159-65 and accompanying text.

94. *See generally* FOUNDATION FOR BIOMEDICAL RESEARCH, THE PROUD ACHIEVEMENTS OF ANIMAL RESEARCH, http://www.fbresearch.org/Education/pdf/ProudAchieve.pdf (last visited Nov. 12, 2006) (listing medical arenas in which animal research has been vital); New Jersey Association for Biomedical Research, Medical Milestones, http://www.njabr.org/programs/medical_milestones (last visited Nov. 12, 2006) (timeline of medical advancements completed with the use of animal research).

95. Capacity to sue, a crucial prerequisite to any effort to assert rights, is the ability of a party to bring a dispute before a court. Although some courts have allowed animals to be named as parties in lawsuits where such standing was not challenged, courts have rejected allowing animals to be named as direct parties in legal actions where challenged by the opposing party. *See* WISE, *supra* note 18, at 83; WISE, *supra* note 19, at 217.

96. *See* WISE, *supra* note 18, at 83; WISE, *supra* note 19, at 217.

97. 43 C.J.S. *Infants* § 23 (2006) ("A child is entitled to all of the protection that the law affords every human being . . . ."). *See, e.g.*, State v. Henry, 434 P.2d 692, 693 (N.M. 1967) (*citing In re* Gault, 387 U.S. 1 (1967)) (twenty-two-day delay in bringing juvenile armed robbery defendant before judge insufficient to overturn his conviction, since the delay did not prevent him from receiving a fair trial and "the same constitutional standards apply to juveniles as to adults."); *In re* James Rich, 86 N.Y.S.2d 308, 310 (N.Y. Fam. Ct. 1949) (citing People v. Lewis, 260 N.Y. 171, 183 (N.Y. App. Div. 1932)) (domestic relations court judge refused to charge the 15-year-old defendant as an adult because defendant's doubtfully truthful story of having acted in self-defense was insufficient to prove defendant's guilt of premeditated homicide or manslaughter beyond a reasonable doubt).

adults who are mentally ill or mentally retarded.[98] *Rattling the Cage* correctly points out that many great apes function at a much higher level of intelligence and communication than infant children or many mentally incompetent adults.[99] Thus, the book argues, if rights are assigned to infants and incompetent adults, they should also be assigned to great apes functioning at a higher level.[100]

This argument has a powerful intuitive appeal. The position that we must draw a sharp line between legal personhood for humans and animals seems less compelling when we are reminded that humans with less intellectual, emotive, and communicative ability than many animals receive these rights. The wind is taken from the sails of the sharp line argument even more effectively when considering that even ships and corporations are granted personhood in civil litigation.[101] If these nonthinking, nonfeeling, lifeless things are granted legal personhood for some purposes, one might wonder just how sacred legal personhood can be. There is surface attractiveness to the argument that a living, thinking, communicating, feeling animal should have an even better case for personhood than does a permanently unconscious human being or, even more so, a lifeless thing.

Rattling the Cage uses the rights status of children and incompetent adults to illustrate that rights exist on a scale, and that personhood may be granted without granting all forms of rights.[102] For example, children and incompetent adults do not have the right to vote or to hold political office.[103] *Rattling the Cage* states that "as their autonomies *approach* the

98. *See, e.g.*, Mich. Prot. & Advocacy Serv. v. Kirkendall, 841 F. Supp. 796 (D. Mich. 1993) (discussing the constitutional right to bear children of a mentally disabled woman); People v. Reliford, 382 N.E.2d 72, 76 (Ill. App. Ct. 1978) ("[M]entally retarded individuals possess the same rights as other individuals."). *See also* WISE, *supra* note 18, at 244-57; WISE, *supra* note 19, at 44, 237-38. For a brief discussion of standing, see *infra* Part III.A. Wise notes that the Louisiana legislature has even granted personhood and rights to a fertilized *in vitro* ovum before it is implanted in a womb. WISE, *supra* note 18, at 237.

99. *See* WISE, *supra* note 18, at 185 ("[C]himpanzees were shown a Lilliputian can of soda hidden in a scale model of a real room with which they were familiar. Unlike most three-year old children, the chimpanzees were able to go straight to the real can of soda hidden in the real room."); *id.* at 186 ("Sarah [the chimpanzee] could sort small bells and cars as well as children" between three and one-half and five and one-half years old.); WISE, *supra* note 19, at 236 (arguing that Koko, one of the world's only two signing gorillas, "scores between 70 and 95 on standard human child intelligence tests").

100. *See* WISE, *supra* note 18, at 185.

101. *See, e.g.*, Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 409 (1886) (establishing that corporations are to be considered persons within the meaning of the Fourteenth Amendment).

102. *See* WISE, *supra* note 18, at 256.

103. *See* U.S. CONST. amend. XXVI ("The right of citizens . . . *who are eighteen years of age or older*, to vote shall not be denied or abridged . . . on account of age.") (emphasis added). *See, e.g.*, Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1357 (N.D. Ga. 2005) ("the Georgia Constitution lists only two grounds for denying a Georgia citizen who is registered to vote the right to vote . . . (2) having a judicial determination of being mentally incompetent to vote"). *See generally* Wikipedia, Election, http://en.wikipedia.org/wiki/Election (last visited Nov. 12, 2006) ("The electorate does not generally include the entire population; for example, many countries prohibit those judged mentally incompetent from voting, and all jurisdictions require a minimum age for voting.").

minimum, the *scope* of their fundamental rights may be varied *proportionately*."[104] Wise would like for courts to take the same approach to animals, allowing them basic dignity rights if they have practical autonomy, but not necessarily allowing them "full" rights such as the right to vote, hold office, marry, engage in political speech, and so forth.[105]

Despite the intuitive appeal of pointing out that some rights are afforded to children, incompetent adults, corporations, and ships, important distinctions exist. Regarding corporations and ships, personhood was created as a legal fiction because courts found doing so to be efficacious in conducting and regulating business transactions and practices.[106] No great societal upheavals or challenges accompanied courts' pretense that these entities could be thought as legal persons for some purposes. Corporations are legal concentrations of the energies and efforts of humans (shareholders and employees), and assigning them personhood is a device to indirectly facilitate and control the combined efforts of humans.[107]

Similarly, ships are owned by humans for profit or pleasure, and the legal fiction of assigning them personhood is a proxy for the human or humans who control them.[108] Ships and corporations do not assert the dignity rights that *Rattling the Cage* and *Drawing the Line* would assign to animals, such as the right to be free from slavery or a right of bodily integrity, and pretending that ships and corporations are "persons" does not create the enormous societal implications that would a finding that some animals may not be "enslaved" or have their bodies used without their consent.

Regarding children and incompetent adults, one may argue that the potential for full autonomy they represent as humans distinguishes them from all animals, even if some animals may surpass their intellectual,

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104. WISE, *supra* note 18, at 256.

105. *Id.* ("To the extent that any of the Language Research Center apes . . . lack the autonomy necessary to entitle them to liberty rights in full, they should be given *fewer* rights than one whose autonomy is sufficient, *if* humans who lack minimum autonomy are given these rights.").

106. *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) ("[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."); DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 688 (4th Cir. 1976); 18 AM. JUR. 2D *Corporations* § 46 (2006) ("The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice.").

107. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945); Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

108. *See* Na Iwi O Na Kapuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1407 (D. Haw. 1995) (noting that "inanimate entities such as ships and corporations are accorded standing in their own right, but these forms of standing are legal fictions created for the benefit of living members of society"); Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 77 (2001) (discussing the history of "the United States Supreme Court endors[ing] the judicially-created in rem personification fiction of the 'guilty object'"). *See also* The Palmyra, 25 U.S. 1, 15 (1827) (seminal case affording personhood to a ship).

emotive, and communicative ability. As *Rattling the Cage* and *Drawing the Line* acknowledge, religious and societal values and assumptions play a large role in this response's appeal.[109] Most Americans probably believe that humans are uniquely sacred. An infant, while perhaps not possessing consciousness at one stage of its life, may grow up to become the next Einstein or Ghandi or may develop a cure for cancer. Even a person in a permanent vegetative state, with no hope of recovery, is tied to other humans more closely by their emotions and by societal and religious values than is an intelligent animal. Courts assign dignity rights to this unfortunate human because she is a human, and most other humans feel a bond of sameness with her stronger than any bond of sameness they might feel with the most intelligent of animals.[110]

A related criticism that may be made regarding the books' focus on consciousness as the primary basis for personhood is that, based on that standard, even computers demonstrating artificial intelligence may one day need to be granted personhood status and constitutional rights. Wise is clearly skeptical that computers might be able to attain consciousness anytime soon. Prominent legal scholar and judge Richard Posner takes Wise to task for his unwillingness to seriously address the problem of having to eventually grant personhood to computers on an analogous basis.[111]

Rattling the Cage criticizes MIT professor Marvin Minsky, the "founding father of artificial intelligence," as grossly overstating the possibility that computers may attain consciousness in the foreseeable future.[112] Having to add computers into the mix when arguing for expansion of rights complicates matters for those supporting animal rights. Assigning rights and personhood to exceptionally powerful computers that are programmed to attain a high level of artificial intelligence would likely strike most Americans as untenable,[113] and recognizing that the arguments for granting rights to computers are similar to the arguments for

109. WISE, *supra* note 18, at 262 (recognizing that "[a] judge's deepest cultural and religious beliefs may disable even a Principle Judge from deciding according to principle."); *id.* at 263-64; WISE, *supra* note 19, at 17-19, 22-23.

110. *See generally* Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 ANIMAL L. 143 (2002) (arguing that the dissolution of long-standing human pathologies and beliefs about nonhuman animals is the road to animal rights, not continual litigation or the establishment of a statutory scheme); Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 539 (1998) (claiming that "[m]any people who love and admire dogs" do so because they represent benevolent human characteristics "including loyalty, trust, courage, playfulness, and love"); David R. Schmahmann & Lori J. Palacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 752 (1995) ("[O]nce one dismisses innate human characteristics, the ability to express reason, to recognize moral principles, to make subtle distinctions, and to intellectualize—there is no way to support the view that humans possess rights but animals do not.").

111. *See* Posner, *supra* note 30, at 531.

112. WISE, *supra* note 18, at 158.

113. The possibility of computers attaining consciousness has even been addressed more than once in recent years by Hollywood, for example in the movies I, ROBOT (Fox 2004) and AI (Dreamworks 2001).

granting rights to animals may weaken the appeal of assigning personhood to animals.

D. The Evolution of Rights and Personhood for Slaves, Women, and Children

Rattling the Cage focuses on three cases to illustrate the history of equality and liberty rights. Two of the three cases involve slaves. This in itself is not controversial, as the question of human slavery has given United States courts their most significant opportunities to reflect upon the nature of personhood and rights.[114] However, *Rattling the Cage* goes far beyond looking to cases involving slavery merely for lessons on the nature of rights. Rather, the book (and other writings by animal rights activists) makes close and pronounced parallels between societal and legal evolution away from slavery and the proposed evolution of rights for some animals. In addition to helping to understand the sense of righteous zeal possessed by many animal rights activists (that is, unless they are engaged in lawless violence, we would not consider someone who is passionate about the evils of human slavery as an extremist), this provides one of the central questions in the debate over animal rights: are the parallels between intelligent animals and slaves close enough to use the legal evolution of rights for slaves as the blueprint for evolving rights for some animals?

The two cases involving slavery that Wise describes as setting the stage for his theory of animal personhood[115] are *Somerset v. Stewart*[116] and *Dred Scott v. Sandford.*[117] Somerset is a well-known English case from 1772. It involved James Somerset, a slave captured in Africa and sold in Virginia in 1749.[118] In 1769, Somerset's owner traveled to England, bringing Somerset with him.[119] Somerset escaped in England but was captured and imprisoned until he could be sailed back to Jamaica and sold.[120] However, English abolitionists petitioned the King's Bench for a writ of habeas corpus seeking to have slavery declared illegal and Somerset freed.[121] To the delight of present animal rights activists—but also identifying a foundation for a negative response to pleas for animal

114. *See, e.g.*, Scott v. Sanford, 60 U.S. 393, 394 (1857) (federal court did not have jurisdiction over a case in which plaintiff slave sued his owner for assault; since slaves were not considered to be U.S. citizens, they lacked the right to bring suit in a U.S. court); Prigg v. Pennsylvania, 41 U.S. 539, 540 (1842) (any state law that classified slaves as property could not be nullified by a contradictory law in another state); Groves v. Slaughter, 40 U.S. 449, 450 (1841) (Mississippi law forbidding import of slaves for sale into the state after a certain date could not be used to nullify a contract, entered into in Louisiana and legal under Louisiana law, for the sale of slaves).

115. Wise, *supra* note 18, at 49.

116. 98 Eng. Rep. 499 (K.B. 1772).

117. 60 U.S. 393 (1857).

118. William M. Wiecek, Somerset: *Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. Chi. L. Rev. 86, 101 (1974).

119. *Id.* at 102.

120. *Id.*

121. *See id.*

rights—Somerset's lawyer used an analogy to property ownership of animals in his argument that Somerset should have personhood and rights. At a preliminary hearing, he questioned "upon what principle is it—can a man become a dog for another man?"[122]

The King's Bench used this case to prohibit slavery in England (although it was of course still allowed in the colonies).[123] The court's decision was influenced strongly by notions of natural law—the idea that moral absolutes exist and at a basic level are apparent to humans and that the role of the courts is to correctly identify and follow natural law rather than contradicting the natural moral order.[124]

In a passage quoted in *Rattling the Cage*, the *Somerset* court relied on basic moral imperatives to reject the arguments of Somerset's owner and to ban slavery:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only by positive law . . . it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[125]

For Wise, a key aspect of this reasoning is that a sufficiently strong moral imperative outweighs practical concerns (the ruling being made despite "whatever inconveniences . . . may follow").[126] The economic upheaval societal leaders knew would be caused by banning human slavery was, without doubt, the strongest reason that it lasted as long as it did in the United States.[127] Of course, one of the strongest practical arguments against rights for animals is that assigning them rights would cause enor-

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122. *See id.* at 90. (quoting the transcript of oral argument in *Somerset*).

123. *See* Somerset v. Stewart, 98 Eng. Rep. 499, 510 (K.B. 1772).

124. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980) ("There is (i) a set of basic practical principles . . . and (ii) a set of basic methodological requirements of practical reasonableness . . . [which] provide the criteria for distinguishing between acts that . . . are reasonable-all-things-considered . . . and acts that are unreasonable-all-things-considered, . . . thus enabling one to formulate (iii) a set of general moral standards."). *See generally* CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT (1999). Natural law is contrasted with positive law, which represents the relativist notion that laws are whatever humans declare them to be. *See* Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 1, 2 (1996) (defining legal positivism as "the proposition that human law was what human beings had posited, that immoral laws counted as 'law,' and that there was no 'necessary connection' between law and morals"). *See generally* ANTHONY J. SEBOK ET AL., LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998) (outlining the origins and history of legal positivism and discussing the effects of various courts on the theory). As a simple illustration, adherents of natural law would say that murder must be illegal because murder is, by its nature, evil. Legal positivists would say murder is illegal because human society has decided it is useful to hold murder to be illegal.

125. *Somerset*, 98 Eng. Rep. at 510.

126. WISE, *supra* note 18, at 50.

127. *See generally* DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD (2006).

mous economic and societal disruption.[128] By focusing on a natural law moral imperative, *Rattling the Cage* seeks to argue that assigning rights for some animals is necessary and that our history with slavery illustrates this.

The *Dred Scott* case, known better than *Somerset* to Americans, involved a slave named Dred Scott, whose master, Dr. John Emerson, was an Army surgeon.[129] Because of his Army career, Dr. Emerson moved to different posts in the 1830s several times, taking Mr. Scott with him.[130] Their residences included forts in the Illinois territory and the Missouri territory.[131] The Scotts filed petitions in federal court arguing that they should be released from slavery since they had resided in the Illinois territory, which prohibited slavery.[132]

The United States Supreme Court's decision in the *Dred Scott* case, made at a time of enormous national tension shortly before the outbreak of the Civil War, is a model of racist ignominy, and it remains a source of shame in our history. Like *Somerset*, the *Dred Scott* Court seemed attracted to the concept of natural law, but with a much different interpretation of natural justice. Chief Justice Roger Taney declared blacks to have been found to be "beings of an inferior order, and altogether unfit to associate with the white race."[133] Because of this natural order, blacks could be "treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."[134] On this basis, the Court rejected Mr. Scott's legal personhood, and held that as property he had no standing to bring a legal action.[135]

Rattling the Cage uses *Somerset* to illustrate its vision of an enlightened use of legal process to create (or, more accurately from Wise's perspective, to properly acknowledge) rights, and uses *Dred Scott* to illustrate the backward legal thinking Wise believes is presently holding courts back from granting rights to intelligent animals. The final of the three primary cases Wise uses to illustrate his concept of rights is *Citizens to End Animal Suffering and Exploitation v. New England Aquarium.*[136] This is a case Wise litigated himself in the 1990s in which a dolphin named Kama was named as a plaintiff in a lawsuit alleging violations of federal law in the sale of the dolphin to the Navy. Wise finds a direct connection between the shameful reasoning of the court in *Dred Scott* and the decision of a federal court in 1993 that Kama the dolphin was not a person and

128. *See* Schmahmann & Palacheck, *supra* note 110, at 759-61 (discussing potential problems with the expansion of animal rights in the section titled "The Challenge to Human Freedoms Posed by Animal Rights").

129. Scott v. Sandford, 60 U.S. 393, 397 (1857).

130. *Id.* at 431.

131. *Id.*

132. *Id.* at 452-54.

133. *Id.* at 407.

134. *Id.*

135. *Id.* at 454.

136. Citizens to End Animal Suffering & Exploitation v. New Eng. Aquarium, 836 F. Supp. 45 (D. Mass. 1993).

thus could not file a legal action: "One hundred and forty years later [after *Dred Scott*], another federal judge said that Kama had no legal capacity either."[137]

Other animal rights activists have also sought to use the evolution of rights for women and for children as roadmaps for the evolution of rights for animals.[138] In Anglo-American legal history, both women and children were, until relatively recent times, viewed as property of husbands and fathers in some contexts.[139] Feminist literature and thought, in particular, have been increasingly referenced in analyzing oppression and denial of rights for animals.[140] The message repeated with all three comparisons (slaves, women, and children) is that our concept of rights evolves with time and shifting societal mores and values, and that over time we will view our repression of animal rights to be shameful just as our earlier repression of rights for oppressed humans was shameful.

III. ANIMAL PERSONHOOD, RIGHTS, AND SOCIETAL INTERESTS

As noted above, no clear standard exists for determining when an entity may be considered a person for purposes of asserting rights.[141] This is likely in large part because the answer has historically seemed too apparent for serious discussion—a person is a human person. Even *Somerset v. Stewart*, the well-known English case discussed above disallowing slavery, relied on simple natural law notions of liberty and equality for humans rather than a precisely articulated legal standard.[142] Although some creations of humans, such as corporations, have been granted the capacity to sue or be sued, they may be viewed as symbolic representations of the

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137. WISE, *supra* note 18, at 61.

138. *See, e.g.*, Drucilla Cornell, *Are Women Persons?*, 3 ANIMAL L. 7 (1997) (using the arguments of a colleague concerning animal rights to defend her position on women's rights); Susan Finsen, *Obstacles to Legal Rights for Animals: Can We Get There from Here?*, 3 ANIMAL L. i, iii (1997); Helena Silverstein, *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 15 (2002)

> ([W]hat has happened over the years is that there have been a lot of strategic and savvy people who have been able to use various notions like rights . . . to move things forward and to have progress . . . . [W]e saw it with women's rights. We saw it with children's rights and we're seeing it with animal rights . . . .).

139. *See generally* Katrina M. Albright, *The Extension of Legal Rights to Animals Under a Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage*, 42 NAT. RESOURCES J. 915 (2002).

140. *See, e.g.*, *id*; Derek W. St. Pierre, *The Transition from Property to People: The Road to Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255 (1998). In the fall of 2005 the author taught a course called *Animal Law Seminar*, and on the first day of class I asked all of my students to share what interested them in enrolling in the course. Two of my twenty-three students indicated that they were inspired to support rights for animals by undergraduate courses they had taken comparing the historic oppression of women and animals.

141. *See supra* notes 68-79 and accompanying text.

142. *See* Somerset v. Stewart, 98 Eng. Rep. 499, 505 (K.B. 1772); *see supra* notes 123-28 and accompanying text.

interests of humans, and thus as extensions of humans.[143]

Animals are, of course, not extensions of humans. Thus, efforts to extend personhood to animals have centered on highlighting as many attributes as possible that they share with humans. If some animals are smarter than some humans, more capable of feeling emotions than some humans, better communicators than some humans, and more conscious than some humans, the argument goes, it is unjust to assign personhood to all humans but not to intelligent animals.[144] Assuming that courts were some day to accept this argument, a specific legal mechanism where it might initially be manifest is the doctrine of standing.

A. PERSONHOOD AND LEGAL STANDING

Courts must find standing before considering substantive rights arguments on the merits. Because of this, the first, and perhaps most decisive, struggle in the direct battle[145] for animal rights may be fought over capacity to sue. At present, if a person representing that she is acting on behalf of a research lab chimpanzee were to file a lawsuit in the chimp's name claiming, for example, that the chimp was being subjected to slavery in violation of the Thirteenth Amendment, the court would likely reject the claim on the basis of lack of standing to sue for the chimp rather than needing to address the substantive constitutional claim.[146]

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143. *See supra* notes 95-107 and accompanying text.

144. *See* DERSHOWITZ, *supra* note 12, at 82-87 ("Do (Should) Animals Have Rights?"). *See also* WISE, *supra* note 18, at 251-57; Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 66 (2002) ("[A]nimals do not have many of the abilities that the average human possesses. The fact that most people do not view humans without these abilities as somehow lacking inherent value is the beginning of the analysis that can extend [personhood] status to animals."); Megan A. Senatori, *The Second Revolution: The Diverging Paths of Animal Activism and Environmental Law* 8 WIS. ENVTL. L.J. 31, 37 (2002)

> (We deny the personhood of animals because we claim that animals have certain 'defects,' such as the inability to use language or a supposedly inferior intelligence, that permit us to treat them instrumentally, as means to our ends. But there is simply no such 'defect' that is possessed by animals that is not also possessed by some group of human beings.);

Sunstein, *Standing for Animals, supra* note 14, at 1363 ("The capacity to suffer is . . . a sufficient basis for legal rights for animals."); Tribe, *supra* note 15, at 7 ("[I]t is obscene and evil to treat [animals] as things that anyone can really own."); Jens David Ohlin, Note, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 220 (2005) ("Several theorists have suggested that some animals meet most criteria for personhood and are therefore deserving of basic human rights.").

145. As contrasted with the stepping stone battles, such as eroding animals' property status in tort claims, addressed above.

146. Standing for animals and standing for humans seeking to assert claims on behalf of animals has been a favorite topic of animal rights scholarship. *See, e.g.*, Joshua E. Gardner, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 GEO. WASH. L. REV. 330, 359-60 (2000) (arguing for extension of standing under the Animal Welfare Act); Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 817-20 (1997) (analyzing, among other things, potential standing for "pet consumers"); Fiona M. St. John-Parsons, *"Four Legs Good, Two Legs Bad": The Issue of Standing in* Animal Legal Defense Fund, Inc. v. Glickman *and Its Implications for the Animal Rights Movement*, 65 BROOK. L. REV. 895,

Provided that a case or controversy is found to exist, Congress may legislatively grant standing in the federal courts to any entity it wishes.[147] It may be that a court would find the Constitution's case or controversy requirement to prevent standing for an animal in any context.[148] However, it seems likelier that the courts would allow Congress to permit standing for direct enforcement of legislation such as the Animal Welfare Act if Congress chose to do so.[149]

Standing to assert constitutional rights, as opposed to enforcement of legislation, is another matter. Although many of the cases he addresses involve federal constitutional rights questions. Wise ultimately argues for rights under the common law.[150] However, other animal rights supporters have not shied away from seeking direct rights under the federal constitution. For example, the *Seton Hall Law Constitutional Law Journal* published a sample legal brief in 2000 that provides insights into the types of constitutional claims that may be raised when lawsuits make direct constitutional challenges rather than focusing on "stepping stone" issues. This sample legal brief is entitle *The Case of Evelyn Hart.*[151] Evelyn Hart is the name of a fictitious chimpanzee bringing a constitutional claim in her own name through a guardian ad litem. In addition to arguing for personhood, the sample brief argues that using the chimp for scientific experiments violates the chimp's constitutional rights under the equal protection and due process clauses of the Fifth and Fourteenth amendments, the Eighth amendment's prohibition of cruel and unusual punishment, and the Thirteenth amendment's prohibition of slavery. The key to an animal's standing to make constitutional slavery, due process, or equal protection claims is, as the *Evelyn Hart* brief recognizes, the question of personhood. Thus, the personhood debate at the center of the struggle for animal rights may find a prominent battlefield in the legal context of adjudicating constitutional standing.[152]

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933 (1999) (arguing that the *Glickman* decision may lead to direct standing for animals); William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: the North Carolina Experience*, 11 ANIMAL L. 39, 61 (2005) (arguing that North Carolina law allowing standing for humans to litigate anti-cruelty statutes despite not owning or possessing the animals involved should be a model for other states); Varu Chilakamarri, Comment, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 ANIMAL L. 251, 264-70 (2004) (arguing for expanded use of taxpayer standing for humans to defend animals' interests); Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 192-97 (2001) (arguing that animals should be permitted direct standing under the Animal Welfare Act); Jonathan Krieger, *Emotions and Standing for Animal Advocates After* ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 22 LAW & INEQ. 385, 402-05 (2004) (arguing that humans should have standing to sue for animal welfare based on emotional injury to humans).

147. *See* Sunstein, *Standing for Animals, supra* note 14, at 1359.

148. *See id.* at 1360.

149. *See id.*

150. *See Wise, supra* note 18, at 257-61.

151. Lee Hall & Anthony Jon Waters, *The Case of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1 (2000).

152. For a recent denunciation of animal rights activists' efforts to attain standing for animals, see Matthew Armstrong, Note, Cetacean Community v. Bush: *The False Hope of Animal Rights Lingers On*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 185 (2006).

The seminal case of *Roe v. Wade*[153] provides an interesting discussion of personhood that will doubtlessly receive attention in any constitutional litigation over rights for animals. The Court in that case held that the government cannot interfere with a woman's privacy right of autonomy over her body absent a compelling government interest.[154] The government had argued that a fetus is a "person" entitled to rights under the Fourteenth Amendment, and that protecting the life of this person is a compelling interest.[155] Noting that "[t]he Constitution does not define 'person' in so many words," the Court analyzed each use of the word "person" in the Constitution and found that in almost every instance "the use of the word is such that it has application only postnatally."[156] Thus, the court concluded that the word person in the Constitution does not include the unborn.[157] Although, of course, animals for whom constitutional rights are sought are born rather than unborn, *Roe*'s analysis and restrictive interpretation of the word "person" likely will be useful to those opposing the extension of rights to animals both in disputes over legal standing and on other battlegrounds of what will doubtlessly be a protracted war over animals' property status.

B. RIGHTS IN COMPETITION

Recognizing personhood and rights for animals in standing claims or in any other legal context would generate deep and lasting moral and societal challenges. An intellectual foundation for opposing the assignment of personhood and thus rights to animals is based on recognizing that all rights exist in competition with other rights.[158] Rights are not free; assigning new rights may entail significant societal costs and may significantly impair existing rights.[159] Were this not so, rights would be an

153. 410 U.S. 113 (1973).
154. *Id.* at 155.
155. *Id.* at 156.
156. *Id.* at 157.
157. *Id.* at 158.
158. *See* MARY ANN GLENDON, RIGHTS TALK: The Impoverishment of Political Discourse 15 (1991) (noting that discussions of rights should "keep competing rights and responsibilities in view, helping to assure that none would achieve undue prominence and that none would be unduly obscured"); Harold W. Hannah, *Animals as Property Changing Concepts*, 25 S. ILL. U. L.J. 571, 576 (2001) (noting that if they were granted, "[a]nimal rights would not be co-existent with human RIGHTS, THEY WOULD BE IN COMPETITION with each other"); Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1006 (1994) (discussing, among other things, "the relation a given right should have to other rights and interests . . . and what effects a given right can be expected to have on the setting of conditions for the durable protection of freedom and human dignity").
159. *See* Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe – And for the United States* 32 TULSA L.J. 1, 2 (1996)

> (Legal RIGHTS ARE NOT FREE goods, unless society is willing to let them remain purely aspirational, paper rights. The enforcement of legal rights consumes real resources, including . . . indirect costs to the extent that rights are enforceable against socially productive activities, or impose socially burdensome duties, or protect socially harmful activities.);

Tara J. Goldsmith, Note, *What's Wrong with This Picture? When the Lanham Act Clashes with Artistic Expression* 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 821, 880 (1997)

unmitigated good, and should be assigned as freely and as broadly as possible.[160]

As a simple and pertinent illustration, recognizing a constitutional right in a chimpanzee to be free of slavery under the Thirteenth Amendment would destroy currently recognized property rights (for example, an HIV research laboratory's "property" interest in its chimpanzee). It would also restrict the First Amendment expression rights of scientists to engage in important animal research.[161] Beyond the costs to other constitutional rights, it would incur significant—perhaps disastrous—costs to society in the loss of potential medical advances that will relieve suffering and death for both humans and animals. The abortion debate provides another vivid illustration. In that context, claims for fetus' right to life are in competition with women's claims to autonomy rights over their bodies.[162]

Thus, any debate over animal rights of necessity must include consideration of what specific rights are being sought and at what cost to competing rights and to society in general. *Rattling the Cage*'s approach of limiting claims to particularly intelligent animals and seeking only limited rights for those intelligent animals reflects a recognition of this problem.[163] The more limited the rights *Rattling the Cage* seeks, the less the societal cost accepting its arguments would entail. However, even providing limited rights to a limited range of animals challenges the sanctity and primacy of human rights.

Taking away the uniqueness and sanctity of humanity even through the establishment of limited "human" rights for some animals is a threat to humanity. The philosopher A. M. MacIver asserts that, rather than improving the lot of animals, recognition of animal rights would reflect a fundamental shift in how we value human life and human rights, making both less precious: "The ultimate sufferers are likely to be our fellow men, because the final conclusion is likely to be, not that we ought to treat the brutes like human beings, but that there is no good reason why we should not treat human beings like brutes."[164]

("Intellectual property RIGHTS ARE NOT FREE; they are imposed at the expense of future creators and the public at large.").

160. *See* GLENDON, *supra* note 158, at 9 (referencing Plato's model of a completely free society as a failed society); Posner, *supra* note 159, at 2 ("Some goods really are free, such as air (if you're not too particular about its quality), and there is no need to worry about trading them off against other goods. Legal rights are not free goods . . . .").

161. Scientific research may be considered expressive activity protected under the First Amendment. *See, e.g.*, Barry P. McDonald, *Government Regulation or Other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 980 (2005); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 249 (2004).

162. *See supra* notes 153-57 and accompanying text.

163. *See* WISE, *supra* note 18, at 251, 267.

164. A.M. MACIVER, *Ethics and the Beetle*, *in* ETHICS 527, 528 (Judith J. Thompson & Gerald Dworkin eds., 1968), *quoted in* Schmahmann & Polacheck, *supra* note 110, at 752-53.

C. Divorcing Rights from Responsibilities—Rejecting the Social Compact

The argument that humans must have primacy is supported not only by concern that human suffering will ultimately increase if we begin viewing ourselves on the same level as animals, but also by humans' ability to exercise moral responsibility. Rights may be viewed as inextricably intertwined with moral responsibilities.[165] When chimpanzees viciously attacked and mutilated a human visitor in a highly publicized incident in California in 2005, no one blamed the chimps.[166] They do not have rights but, correspondingly, they do not have responsibilities in human society.[167] The search for responsibility appropriately centered on those with the power to exercise rights with moral responsibility: the chimps' keepers and even the assault victims.[168]

Political scientists often describe human civilization and government as grounded upon a "social compact" between citizens and government.[169] In exchange for being assured of valued rights[170] and protection, humans in effect agree to sacrifice some freedoms and to take on responsibilities to others in their community and to their government. A powerful argument may be made that assigning rights to animals that do not possess moral responsibility represents a rejection of the foundation of human civilization.

In this regard, the argument for animal rights may be even less persuasive than arguments for "computer rights." The capacity to make smarter and smarter computers remains dynamic, allowing at least the argument that they could some day develop consciousness and moral responsibility. Even under the most hopeful scenario, absent millions of years of evolution or DNA manipulation, chimpanzees will never develop the moral

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165. *See* Glendon, *supra* note 158; Robert E. Rodes, Jr., *Propter Honoris Respectum: Forming an Agenda – Ethics and Legal Ethics*, 77 Notre Dame L. Rev. 977, 998 (2002) (regarding the interrelation of a lawyer's duty to discuss both a client's legal rights and moral responsibilities).

166. For a description of this incident, see Amanda Covarrubias & Hector Becerra, *No Charges Filed in Chimps' Attack*, L.A. Times, April 21, 2005, at B1.

167. Humorist P.J. O'Rourke oversimplified this argument against animal rights but provided an interesting perspective in writing: "Screw the rights of nature. Nature will have rights as soon as it has duties. The minute we see birds, trees, bugs and squirrels picking up litter, giving money to charity, and keeping an eye on our kids at the park, we'll let them vote." P.J. O'Rourke, *Save the Planet? We're All Going to Die Anyway*, Providence Phoenix, Sept. 8, 1994, at 6.

168. *See* Covarrubias & Becerra, *supra* note 166.

169. *See generally* Robert B. Reich, *What Happened to the American Social Compact?*, 50 Me. L. Rev. 1 (1998); Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 San Diego L. Rev. 681 (1997).

170. In this context, the concept of rights applies even in governments perceived as failing to appropriately respect human rights. The most repressive of governments will fail if its citizens conclude that the government cannot or will not provide them some level of benefit or protection. Following the mass extinction of millions of Russians in World War II, many citizens of the former Soviet Union were content to sacrifice the rights to free speech and democratic elections because they most strongly valued the "right" to security provided by their government—the social compact between government and the governed applied even in a repressive regime that denied many basic human rights.

responsibility that should be a prerequisite for establishing new rights in a civilized society.[171]

One might argue that animals' interests may actually be best served by emphasizing the centrality of human moral responsibility rather than animal rights in debates over how animals are treated.[172] The higher one places humans on a rights pedestal, the higher human recognition or acceptance of responsibility for moral choices must be. This relates to A. M. MacIver's argument that assigning rights to animals would diminish the sanctity and dignity of human life.[173] The cost to humans of receiving rights is the heavy burden of responsibility, including responsibility for preventing inappropriate treatment of socially powerless animals.[174]

The status of children and incompetent adults must be raised again when analyzing the relationship between rights and responsibilities. Human society gives some rights to children and incompetent adults even though in some instances they are incapable of exercising any moral responsibility at all (for example, an infant or an adult in a coma). As addressed above, children and incompetent adults are different from animals in the potential for full consciousness and human autonomy that they represent.[175] Even brain-dead humans who have no hope of recovering consciousness are connected to other humans by the nonimpaired humans' emotions and by societal and (for most Americans) religious values much more closely than are intelligent animals.[176]

Abandoning blanket recognition of at least some rights for all humans that are superior to what society recognizes for animals would entail im-

171. *See* M. TOKESHI, SPECIES COEXISTENCE: ECOLOGICAL AND EVOLUTIONARY PERSPECTIVES 22 (1999) ("[I]t was observed that the rate of DNA evolution was apparently slow in primates and fast in rodents compared with other mammals.").

172. For an argument that animals' interests are best served by the property paradigm rather than by a rights model, see Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 ANIMAL L. 77 (2002). The contrasting "mainstream" animal rights position that property status should be eliminated is illustrated by Thomas G. Kelch, *supra* note 110.

173. *See supra* note 164 and accompanying text.

174. *See* DANIEL BRENNAN ET AL., CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 69 (2005) (considering corporate rights: "Simply put: with rights come responsibilities—a familiar but all too often ignored point."); Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM. L. & POL'Y 237, 244 (2004) ("[B]ecause society grants rights, society may also expect something in return. Therefore, with those socially granted RIGHTS COME RESPONSIBILITIES or obligations to the larger community . . . ."); Bernard W. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 251 (1999) (reviewing DANIEL TROY, RETROACTIVE LEGISLATION (1998)) ("The principle that an actor should pay for the harms caused by his activity can also be considered a moral principle. With rights come responsibilities—one should not be able to claim the benefits without also bearing corresponding burdens.").

175. *See supra* notes 109-10 and accompanying text.

176. *See* Daniel Sperling, *Maternal Brain Death*, 30 AM. J.L. & MED. 453, 480-83 (2004) ("[T]he view that a brain-dead patient is deprived of rights or interests, and exists solely as a corpse, referred to by Finnerty et al. as 'the cadaveric model,' is distressing. Such an approach goes against most of our societal norms . . . ."). Sperling also cited certain principles, including "moral intuitions," "psychological inclinations," and "religious convictions," as contributing to the reluctance of people to view brain-dead individuals as not possessing basic rights. *Id.*

plications that society in its present state would not be willing to accept. To expand upon a quote from *Rattling the Cage* noted above,[177] Wise argues:

> Human infants, young children, and the severely mentally retarded or autistic who lack the autonomy necessary to entitle them to full liberty rights are not totally denied them. Judges give them dignity-rights, and even the right to choose, by using the legal fiction that "all humans are autonomous." However, as their autonomies *approach* the minimum, the *scope* of their fundamental rights may be varied *proportionally*. If so, equality demands that the rights of animals who possess the same degree of autonomy as these humans possess vary proportionally, too.[178]

If this argument were to prevail, we would have to be willing to accept that some animals are entitled to rights superior to the rights of some humans. A normal adult chimpanzee has a stronger argument for practical autonomy as defined by Wise than does a human infant or a comatose or severely retarded human adult.[179] Chimps have better demonstrated reasoning ability, greater ability to communicate, and, at least in comparison to an unconscious human, greater emotive capability.[180] Society is simply not prepared to value chimpanzees more highly than it values infants or severely impaired adults, and noting this reality helps to highlight the difficulties in the comparisons *Rattling the Cage* seeks to make.

IV. THE STEPPING STONE APPROACH

Mr. Wise's approach of seeking rights and personhood for intelligent animals is not the only stepping stone being sought. Professor David Favre, an animal law activist,[181] has expressed concerns that Wise's personhood approach is not sufficiently practical in the short term. He notes that "Mr. Wise's writings do not suggest how to think about balancing human and animal rights when they are in conflict."[182] A "significant limitation" he sees with Wise's practical autonomy approach is that "human characteristics become the measuring stick by which to judge the

177. *See supra* note 104 and accompanying text.

178. WISE, *supra* note 18, at 256.

179. *See* W.C. MCGREW, THE CULTURED CHIMPANZEE: REFLECTIONS ON CULTURAL PRIMATOLOGY 71, 72 (2004) ("All four species—bonobo, gorilla, orangutan, and chimpanzee—show similar problem-solving abilities and facility at acquiring human systems of communication . . . [and] similar ability at mirror-image recognition, a cognitive capacity that correlates with tool use."); HERBERT S. TERRACE, NIM 18 (1979) ("Whatever the nature of the . . . gap that separates human and ape intelligence, its magnitude has been reduced considerably by demonstrations that chimpanzees can learn extensive vocabularies of arbitrary words."). *See generally* GEORGE PAGE, INSIDE THE ANIMAL MIND: A GROUNDBREAKING EXPLORATION OF ANIMAL INTELLIGENCE (2001) (discussing the intelligence of chimpanzees, as well as other animals).

180. *See* MCGREW, *supra* note 179.

181. Favre, a Professor at Michigan State University College of Law, has published extensively on animal law issues, and he edits the Michigan State University College of Law Animal Legal and Historical Web Center, http://www.animallaw.info/.

182. Favre, *supra* note 25, at 336.

legal 'oughts' for animals."[183] Further, Favre correctly believes it is "unlikely that the next movement in the legal system will be to grant any absolute rights to a group or species of animals."[184] Instead, Favre thinks that courts are likelier to begin taking animals' interests more seriously in what he perceives to be a gradual approach—taking steps that represent something less than a grant of personhood status, but something more than the current legal paradigm.

Although Wise ultimately hopes for rights for some animals (and, if he were "Chief Justice of the Universe," he might recognize rights for all animals capable of suffering),[185] he also understands that this is not going to come quickly. As addressed above, his books focus extensively on the gradual evolution of the common law and "funeral by funeral" changes as older judges die and younger judges with greater receptivity to emerging ideas take their place.[186] Because of this, animal rights activists are fighting numerous legal battles that do not directly go to the question of personhood and rights for animals, but rather would serve as important stepping stones toward eventually achieving that ultimate objective.

The most intense of these related stepping stone battles at present is over noneconomic damages in tort lawsuits brought by humans whose companion animals were wrongfully killed. Courts in most jurisdictions allow damage awards for the emotional distress suffered by a parent, child or spouse when a loved one is negligently killed (for example, a death caused by negligent operation of an automobile or medical malpractice).[187] However, courts typically do not allow such damages when a companion animal is negligently killed.[188] Animals are viewed as property under the law, and the law typically does not allow emotional distress damages for property loss.[189] Rather, the measure of damages is the animal's property value. Thus, the recovery available for the negligent death of a much-beloved mutt whom the owner loves like a child is almost nothing.[190]

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183. *Id.*

184. *Id.*

185. As noted above, Wise declares "If I were Chief Justice of the Universe, I might make the simpler capacity to suffer, rather than practical autonomy, sufficient for personhood and dignity rights." WISE, *supra* note 19, at 34 and accompanying text. *See also supra* note 51 and accompanying text.

186. *See supra* notes 47-48 and accompanying text.

187. *See, e.g.*, Grandstaff v. City of Borger, 767 F.2d 161, 172 (5th Cir. 1985) (holding that a parent may recover for the mental anguish caused by the death of a child); Smith v. United States, 608 F. Supp. 1270, 1271-72 (D. Mass. 1985) (concluding that a parent was entitled to recover for mental anguish and emotional pain and suffering); Adams v. Hunter, 343 F. Supp. 1284, 1290-91 (D.S.C. 1972), *aff'd*, 471 F.2d 648 (4th Cir. 1973) (upholding an award for the parents' mental shock and suffering).

188. *See* Council Draft, RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 46 cmt. j (2006) ("While pet animals are often quite different from chattels in terms of emotional attachment, damages for emotional harm arising from negligence causing injury to a pet are also not permitted.").

189. *See id.*

190. *See, e.g.*, Huss, *supra* note 144, at 89-103; Richard L. Cupp, Jr., *Barking Up the Wrong Tree*, L.A. TIMES, June 22, 1998, at 5.

Animal rights activists have recognized that if courts or legislatures reject the market value paradigm in these cases and instead treat pets in the same way human children are treated—again, emotional distress damages are allowed to parents when their children are negligently killed—a significant legal step will have been taken toward ultimately eradicating animals' property status. Further, they recognize that they have in this issue a potential opportunity to garner support from mainstream society. No loving pet owner thinks of her or his pet as mere property like a chair or a bicycle, and the idea that the wrongful death of a much-beloved but nonpedigreed family dog could be "compensated" for less than $100 seems coldhearted and perhaps even offensive.[191]

It is telling that Wise himself, although seeming to have a primary focus on animal rights rather than specifically on tort law, is a prominent supporter of these cases seeking expansion of emotional distress damages. He is not shy about providing a reason for his strong interest in this area. In a June 5, 2005 article in the *Chicago Tribune*, Wise was quoted as saying that often the monetary damages are not the most important aspect of animal-related cases.[192] And to quote part of a March 6, 2005 article in the *Boston Globe* discussing the views of Wise and other animal rights activists, "Animal rights activists say they are laying the legal foundation establishing that pets have intrinsic worth. Ultimately, says Steven Wise . . . this foundation will support a ruling that animals are not property but have rights of their own and thus legal standing."[193]

Although not yet accepted by appellate courts, some lower courts have begun awarding emotional distress damages for negligent killing of a pet. Further, three states[194] have enacted statutes allowing damages beyond market value in at least some circumstances, and legislation has been proposed in at least seven other states.[195] The American Veterinary Medical Association views the issue as having serious ramifications, and recently drafted an official policy position opposing efforts to expand such damages.[196] The American Law Institute is recognizing the emergence of this

191. *See* Cupp, *supra* note 190.

192. William Hageman, *Is Your Pet Entitled to His Day in Court? The Answer: Maybe.*, CHI. TRIB., June 5, 2005, at Q1.

193. Douglas Belkin, *Animal Rights Gains Foothold as Law Career*, BOSTON GLOBE, March 6, 2005, at 6.

194. Tennessee, Maryland, and Illinois have enacted statutes allowing damages beyond market value in at least some circumstances. *See* NAT'L ASS'N FOR BIOMEDICAL RESEARCH ANIMAL LAW SECTION, NON-ECONOMIC DAMAGES, *available at* http://www.nabr.org/AnimalLaw/Damages/index.htm (last visited Nov. 12, 2006) (follow "Non-Economic Damages" link on right).

195. *Id.* These states include California, Colorado, Connecticut, Massachusetts, New Jersey, New York, Oregon, and Rhode Island. *Id.*

196. In 2005, the author served as an advisor to the AVMA Task Force that formulated the animal compensatory value policy position adopted by the AVMA, which reads as follows:

> The American Veterinary Medical Association recognizes and supports the legal concept of animals as property. However, the AVMA recognizes that some animals have value to their owners that may exceed the animal's market value. In determining the real monetary value of the animal, the AVMA

issue; a recent tentative draft of a section of the *Restatement (Third) of Torts: General Principles* directly addresses the problem and correctly concludes that recovery is not appropriate.[197]

In addition to focusing on the concern over helping to lay the groundwork for assigning rights to animals, opponents of potential expansion focus on numerous other concerns, including that allowing this expansion would place human-animal relationships over most human-human relationships (under wrongful death statutes very close nonfamily relationships, such as best friends or even fiancés, are not allowed emotional distress recovery),[198] and that allowing this expansion would make veterinary services more expensive and less available to the poor, actually causing harm rather than benefit to animals needing medical care.[199]

Two other stepping stone battlefields that are receiving increasing attention from animal rights activists are the movement to replace the concept of pet ownership with pet "guardianship," and the movement to treat pets more similarly to how human children are treated in marital dissolution cases. Applying the concept of guardianship rather than ownership would, of course, be a step in the direction of eliminating property status.[200] Human parents are legal guardians, not owners, of human children.[201] At least thirteen cities and the state of Rhode Island have enacted ordinances and statutes changing ownership language to

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> believes the purchase price, age and health of the animal, breeding status, pedigree, special training, veterinary expenses for the care of the animal's injury or sickness, related to the incident in question, and any particular economic utility the animal has to the owner should be considered. Any extension of available remedies beyond economic damages would be inappropriate and ultimately harm animals. Therefore, the AVMA opposes the potential recovery of non-economic damages.

American Veterinary Medical Association, *Compensatory Values for Animals Beyond Their Property Value* (Nov. 2005), http://www.avma.org/issues/policy/compensatory_values.asp (last visited Nov. 12, 2006).

197. Council Draft, RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 46 cmt. j (2006).

198. *See, e.g.*, Lindsey v. Visitec, Inc., 804 F. Supp. 1340, 1344 (E.D. Wash. 1992) (holding that the victim's girlfriend could not recover for negligent infliction of emotional distress for the death of a non-relative under Washington's Wrongful Death Statute); Kately v. Wilkinson, 148 Cal. App. 3d 576, 585 (Cal. Ct. App. 1983) (affirming dismissal of a claim based on mental distress brought by victim's best friend because the best friend was not related to the victim by blood or marriage).

199. *See* Cupp, *supra* note 190; *see also* Richard L. Cupp, Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?*, THE BRIEF, Spring 2002, at 48.

200. For an argument that a guardianship model would enhance animal protection more effectively than eliminating the property paradigm, see David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87, 91 (2004). *See also* Tim Eigo, *Laws for Paws: A New Breed of Law Section*, 42 ARIZ. ATT'Y 14, 18 (2005); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 486-88 (2003); Joyce S. Tischler, Comment, *Rights for Nonhuman Animals: A Guardianship Model for Cats and Dogs*, 14 SAN DIEGO L. REV. 484, 500-06 (1977).

201. *See* Roy T. Stuckey, *Guardians* Ad Litem *as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1785 (1996) (explaining a parent's ability to act as a guardian *ad litem* for their children because parents are the natural guardians of children).

guardianship.[202]

In marital dissolution cases, pets are currently treated by most courts as property.[203] If a divorcing couple cannot reach agreement on who should have custody of a jointly owned pet, courts will sometimes threaten to have the pet sold and the proceeds of the "property" sale divided between the spouses.[204] Animal rights activists are pushing to have courts change the standard from property to a "best interest of the pet" approach, analogous to the "best interest of the child" approach used in deciding custody for human children in divorce cases.[205] Appreciating how this approach, if adopted, would serve as another stepping stone toward animal personhood, is not difficult.

V. SEEKING ANOTHER STEP: ANIMALS AS TORT PLAINTIFFS

A. ANIMALS AS "INDIVIDUALS" IN TORT LAW INTEREST BALANCING

A New Tort,[206] Professor David Favre's recent law review article, continues the search for stepping stones with an interesting proposal. In the

202. *See* National Association for Biomedical Research Animal Law Section, *Ownership vs. Guardianship*, http://www.nabr.org/AnimalLaw/Guardianship/index.htm (last visited Nov. 12, 2006).

There are fifteen cities, towns, and counties that have adopted an ordinance changing the term "owner" to "guardian" in relation to pets, including Santa Clara, California; Bloomington, Indiana; Saint Louis, Missouri; Albany, California; Wanaque, New Jersey; Woodstock, New York; Marin County, California; Sebastopol, California; San Francisco, California; Amherst, Massachusetts; Menomonee Falls, Wisconsin; Sherwood, Arkansas; West Hollywood, California; Berkeley, California; and Boulder, Colorado. *Id.* The state of Rhode Island also has incorporated this language into its constitution. *Id.*

203. *See* Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 195-97 (2003) (discussing the property status of domesticated animals and pets); Eithne Mills & Keith Akers, *"Who Gets the Cats . . . You or Me?" Analyzing Contact and Residence Issues Regarding Pets upon Divorce or Separation*, 36 FAM. L.Q. 283, 286-87 (2002) (addressing the fact that courts consider pets personal property).

204. *See* Sally Kalson, *Pets Take Center Stage in Many Divorce Cases*, FT. WAYNE J. GAZETTE, July 9, 2006, at 3D ("A circuit judge threatens to sell the animal and split the proceeds between them if the two can't agree on visitation."). Usually this threat seems to be effective in convincing the spouses to come to an agreement of some kind.

205. *See* Huss, *supra* note 203, at 226; *id.* at 307 (referencing the "best interests of the animal" approach taken by a court in roommates' dispute over their cat); Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97, 114-16 (2001) (examining animal abuse within the context of domestic violence and suggesting a "best interest of the animal" test for resolving animal custody disputes). *See also* Brooke A. Masters, *In Courtroom Tug of War Over Custody, Roommate Wins the Kitty*, WASH. POST, Sept. 13, 1997, at B1. In one case in which a trial court decided to allow a "best interest of the pet" standard, a wealthy divorcing couple spent approximately $150,000 in legal fees and expenses fighting over whether their dog Gigi would be better off with the husband or the wife. *See* Quentin Letts, *Fur Better or Worse*, LONDON SUN. TELEGRAPH, Feb. 16, 2003, at 21. One of the spouses hired a film crew to make a "Day in the Life of Gigi" video to demonstrate how happy Gigi was staying at the home of that spouse. *See id.* The other spouse hired an animal behaviorist to analyze the dog in support of her contention that the dog was happier living with her. *See id.* For obvious reasons, many animal rights activists would prefer not to highlight cases such as these.

206. Favre, *supra* note 25.

article, Favre takes a step beyond efforts to allow noneconomic damages for owners of tortiously-killed animals. He suggests that a new tort cause of action should be recognized in which animals themselves, represented by humans appointed by the courts, are the plaintiffs. This section will analyze *A New Tort*'s proposal as illustrative of efforts to bend current law to provide stepping stones for the erosion or elimination of animals' property status.[207]

1. The Historical Basis for Torts Claims

Tort law is intensely human. It is the civil legal repository for the countless conflicts between humans that are inevitable in civilized society. As noted by Dean William Prosser, tort law addresses "the allocation of losses arising out of human activities."[208] Its purpose may be described as providing a societal balancing of interests between humans or human institutions in conflict. Quoting Prosser again, "in short, to strike some reasonable balance between the plaintiff's claim to protection against damage and the defendant's claim to freedom of action for the defendant's own ends, and those of society, occupies a very large part of the tort opinions."[209]

The essential humanity of tort law is so strongly imbedded in its nature that commentators typically do not even bother to address the possibility of applying it to entities unrelated to humans.[210] Of course tort law may involve corporations[211] or government entities[212] as parties, but these institutions are human creations and merely represent aggregations of human interests.[213] Thus, considering their interests against those of an

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207. Professor Favre is not alone in favoring expansion of tort law to advance the cause of animal rights. *See, e.g.*, Lauren Magnotti, Note, *Pawing Open the Courthouse Doors: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN'S L. REV. 455, 482-83 (2006) (supporting expansion of emotional distress damages for death of pets in argument that standing should be granted to animals).

208. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 6 (5th ed. 1984).

209. *Id.*

210. Favre seems to acknowledge this in his article. When discussing the purpose of tort law, he notes that "[m]uch of the footnoted materials use terms such as 'others' or 'persons.' Most often the author does not specifically contemplate animals being included under the umbrella of such terms." Favre, *supra* note 25, at 355 n.74.

211. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that corporations are granted legal personhood); Johnson v. Goodyear Mining Co., 59 P. 304, 305 (Cal. 1899) (holding that the word "person" in the Fourteenth Amendment applies to a corporation).

212. *See, e.g.*, United States v. Cooper Corp., 312 U.S. 600, 604 (1941) (holding that the United States is a juristic person with the capacity to sue on contracts made with it); Hoyt v. Bd. of Civil Serv. Comm'rs of L.A., 132 P.2d 804, 806 (Cal. 1942) (holding that municipal corporations are given power to sue and be sued by charter or statute).

213. Corporations are considered to be "singular entities" in terms of tort liability, even though they are created by formally aggregating separate interests. *See generally* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329 (2005). A corporation is, therefore, a human creation with a distinct existence that "can be held responsible, both legally and morally, for [its] intentions, actions, and character." Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 805-06 (2000). Many jurisdictions have codified similar tort liability for government agencies, not allowing them to claim sovereign

opposing human (or even of an opposing corporation or government entity) is very much an exercise in balancing human concerns.

Although tort scholars typically assume rather than explicitly emphasize the exclusively human nature of tort law balancing, they often ascribe purposes for the balancing that are uniquely human. For example, theorists have emphasized preservation of moral freedom—a concept that entails free will and moral responsibility—as a primary focus of tort law. Professor Richard Wright, promoting the Kantian-Aristotelian concept of justice as a basis of tort law, argues that tort law's goal is the

> promotion of the equal (positive and negative) freedom of each individual in the community. Embodied in this concept of the good is the idea of the absolute moral worth of each human being as a free and equal member of the community, with an equal entitlement to the share of social resources and the security of currently held resources needed to realize his or her humanity.[214]

Professor David Owen provides another illustration, writing that "[i]n an imperfect and dynamic world, accidental harm is inevitably entailed in human freedom, such that conduct resulting in accidental harm may be considered faulty only if it results from a choice to violate another person's vested rights or the community's interests in utility."[215]

The Kantian-Aristotelian focus on justice as a basis for tort law is often described as a corrective justice model.[216] In the past few decades, law and economics scholars have articulated a deterrence model to compete with the corrective justice model.[217] Advocates of the deterrence model, which does not have deep historical roots in tort law scholarship,[218] argue that societal economic efficiency should be tort law's objective.[219] However, even the upstart deterrence model (derided too harshly by one scholar as a fad whose "novelty" has faded),[220] although perceived as cold and uncaring by some, is ultimately human. The utilitarian balancing

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immunity from tort actions brought against them if a private actor would face liability in the same situation. *See, e.g.*, FLA. STAT. § 768.28(1) (1997); TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997); WASH. REV. CODE § 4.92.090 (2002).

214. Richard W. Wright, *Right, Justice & Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 181-82 (David G. Owen ed., 1995).

215. David G. Owen, *Philosophical Foundations of Fault*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 228 (David G. Owen ed., 1995).

216. *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802-03 (1997).

217. *See id. See generally* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

218. Schwartz, *supra* note 216, at 1804. When law and economics advocates began propounding their theories in the context of tort law, "[d]eterrence had not played a significant role in traditional tort scholarship." *Id.*

219. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691 (1990); Gordon Tullock, *Negligence Again*, 1 INT'L REV. L. & ECON. 51 (1981).

220. ALAN CALNAN, JUSTICE AND TORT LAW 5 (1997), *quoted by* Schwartz, *supra* note 216, at 1807.

of interests in a human society are of necessity human interests. Analyses of interest balancing by deterrence-minded scholars focuses on human needs and human desires in a world of scarce resources.[221] Although the interests of corporations and governments may be included in the balancing, they are, as noted above, human creations and represent collective human interests.[222] Both from a corrective justice and from an economic efficiency perspective, consideration of animals' interests in tort law must inevitably be made from a human perspective in a society created, organized, and controlled by humans.

Dean Roscoe Pound listed five categories of fundamental human interests that provide the basis for law.[223] They include the physical person, freedom of will, honor and reputation, privacy and sensibilities, and belief and opinion.[224] The latter four of these five interests are uniquely human. Few serious persons would ascribe free will, for example, with its companion moral responsibility, to any animals. As noted above,[225] when chimpanzees viciously attacked and mutilated a human visitor in a highly publicized incident in California in 2005, no one blamed the chimps.[226] Animals do not have rights but, correspondingly, they do not have responsibilities in human society.[227] *The Restatement (Second) of Torts* applied an interest analysis specifically to tort law, which it also described in uniquely human terms. It defined interests as denoting "the object of any human desire."[228]

2. *The Proposed New Basis for Tort Claims Involving Animals as Plaintiffs*

A New Tort's proposed new tort claim would require finding a basis for tort law radically different from its uniquely human foundation. The article's first paragraph infers that animals are "individuals" and that, under *A New Tort*'s proposal, tort law would "do what it always has done" by balancing the interests of individuals.[229] Accepting this premise, of course, makes all the difference in the world regarding whether animals should be allowed to bring tort lawsuits.

As noted above, tort law is uniquely human and has always been di-

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221. *See* John C. P. Goldberg, *Symposium: Twentieth-Century Tort Theory*, 91 GEO. L. J. 513, 544-45 (2003) (explaining that economic deterrence theorists see the purpose of tort law as supporting social welfare by deterring undesirable conduct).

222. *See supra* notes 95-107 and accompanying text.

223. 3 ROSCOE POUND, JURISPRUDENCE 33 (1959). Professor Favre relies heavily on Dean Pound's emphasis on balancing interests in his proposal for a new tort. *See* Favre, *supra* note 25, at 338-42.

224. POUND, *supra* note 223, at 33. Professor Favre cites these five interests. *See* Favre, *supra* note 25, at 357 n.79.

225. *See supra* note 166 and accompanying text.

226. *See* Covarrubias & Becerra, *supra* note 166, at B1.

227. *See supra* notes 165-174 and accompanying text.

228. RESTATEMENT (SECOND) OF TORTS § 1 cmt. e (1965). Professor Favre also cites this language. *See* Favre, *supra* note 25, at 359 n.17.

229. *See* Favre, *supra* note 25, at 334.

rected at human conflicts.[230] Animals are certainly individuals in a sense; each animal has different characteristics, and few would challenge an assertion that intelligent species of animals even have individual personalities. However, the concept of an "individual" in legal analysis has always applied to human individuals and their proxies (for example, corporations and government entities). Only humans possess the moral responsibility and undisputed consciousness[231]—in other words, personhood—required by the tort system for status as a party to a lawsuit.

Indeed, allowing animals plaintiff status in tort lawsuits may be more of a front door approach toward personhood than *A New Tort* concedes. The article's thesis is that direct attempts at eliminating property status are too bold given the current societal climate, and that allowing animals to serve as tort plaintiffs would serve as a stepping stone toward change while, at least for now, maintaining their property status.[232] However, given the intensely human nature of tort law, recognizing animals as plaintiffs would in some respects be equivalent to making them persons. The historically dominant view of tort law as moral balancing to maintain human freedom by definition requires persons or their proxies to serve as parties.[233] Viewing the ascension of animals to plaintiff status as merely a small stepping stone may underestimate the dramatic repudiation of the basis of tort law that such a development would require. Rather than making animals a bit more like persons, as far as tort law is concerned, they would be given the moral status of persons.

A New Tort points to the creation of several types of laws protecting animals as previous stepping stones making the transition to animals as plaintiffs feasible. For example, the article argues that because anti-cruelty laws protect animals from mistreatment, they already appear to have legal rights enforceable by the state.[234] Currently, this "right" is only enforceable by the state, but *A New Tort* argues that the "logical next step" is to evolve the government-enforced right into a personal right held by animals.[235] The government may have difficulty enforcing this right, and allowing animals to enforce it themselves would "make the implementation of the duty more efficient."[236] This would "allow other resources, neither politically nor economically limited, to support animals in asserting their interests."[237]

This analysis neglects some fundamental problems in comparing protection of animals under criminal animal welfare statutes to animals protecting their own welfare as tort plaintiffs with human representatives.

230. *See supra* Part notes 208-222 and accompanying text.
231. *See supra* notes 165-174 and accompanying text. For a discussion of the issues surrounding consciousness in infants and incompetent adults, *see supra* notes 109-10 and accompanying text.
232. *See* Favre, *supra* note 25, at 352-53.
233. *See supra* notes 208-222 and accompanying text.
234. *See* Favre, *supra* note 25, at 341.
235. *Id.* at 355.
236. *Id.* at 356.
237. *Id.*

Criminal law's purpose is different from tort law's purpose. Criminal law is not directed at creating rights for victims of crime; rather, it is directed at the societal (rather than individual) interests of punishing wrongdoers and deterring future potential wrongdoing.[238] One of the more dramatic illustrations of this point is found in cases of domestic violence where the victim, after reporting the crime, makes amends with her or his partner and seeks to withdraw charges. Prosecutors often press forward with the charges despite the victim's desire to drop the matter because it is not the victim's direct interests that the prosecutor is pursuing.[239] Rather, it is society's interest in punishing the wrongdoer and in discouraging future wrongdoing by the criminal or by others in society.[240]

This focus on societal interests rather than the interests of individual persons makes protection of animals much less problematic in criminal law than it would be if they were granted plaintiff status in tort law. Unlike criminal law, tort law focuses on the interests (and, as addressed above, the human freedom) of the individual persons or proxies for persons involved in the litigation.[241] In tort law, of course, a plaintiff is allowed to discontinue a lawsuit if she wishes to do so, because the lawsuit is first and foremost a pursuit of her individual interests rather than broad societal interests.

Further, numerous legislatures have made it clear that societal concern for the welfare of humans is the deeper issue in criminal animal cruelty statutes. The first state to enact an animal cruelty statute was Maine.[242] The statute was promoted as a measure to protect human society, because cruelty to animals corrupts human morality and desensitizes humans to acts of inflicting pain on other humans.[243] This concern for human welfare has also served as a primary motivator for the enhancement of animal cruelty laws to felony status in many states since the

238. *See* JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL LAW 1 (2006) ("A crime causes 'social harm,' in that the injury suffered involves 'a breach and violation of the public rights and duties, due to the whole community.'"); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 5 (3d ed. 2000) ("[C]riminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct.").

239. *See* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?* 63 FORDHAM L. REV. 853, 873 (1994) (discussing the conflict between prosecutorial discretion and a victim's desire to withdraw charges in domestic violence cases); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 660-61 (2002) ("[I]n the past two decades some jurisdictions via controversial 'no-drop' legislation have imposed mandatory prosecution of DOMESTIC VIOLENCE cases, regardless of the desires of the VICTIM.").

240. *See* Krug, *supra* note 239, at 660-61.

241. *See* KEETON ET AL., *supra* note 208, at 5-6 (stating that tort law "is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally . . . .").

242. *See* Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 541 n.461 (noting that the first anti-cruelty statute was passed in Maine, "Me. Laws ch IV, § 7," and that it was enacted directly "against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or who have knowledge of these acts").

243. *Id.*

1990s. Stories of Jeffery Dahmer's mutilation of animals as a precursor to the atrocities he committed on humans are well-known.[244] Such stories, buttressed by empirical evidence and psychological profiling indicating that humans who abuse animals are much more likely to eventually abuse humans as well, were frequently cited as the basis for enhancing the penalty's for animal cruelty to felony status.[245]

This emphasis on human welfare even in statutes addressing cruelty to animals is not surprising, given that our legal system and indeed our society are inextricably intertwined with humanity and human concerns. Abusing or failing to care for animals is corrosive to human nature, and thus barring such behavior is in humanity's interests. Our laws protect animals, but they do so from a human perspective, and with the human moral consequences of mistreatment of animals heavily in mind. This perspective fits well with criminal laws addressing the societal implications of animal cruelty; it is not a good fit with the idea of effectively elevating animals to personhood status by making them plaintiffs in tort lawsuits.

Other statutes *A New Tort* seeks to identify as stepping stones to animal tort lawsuits also serve to emphasize law's uniquely human perspective. For instance, the article raises the example of the Chimpanzee Health Improvement, Maintenance, and Protection Act, enacted by Congress in 2000, as "representative of incremental legal change on behalf of animals."[246] The Act addressed what to do with chimpanzees that had been used in federally funded research but were no longer needed.[247]

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244. *See, e.g.*, David Kelly, *Mutilation of Cats Mystifies Denver Police*, L.A. TIMES, July 3, 2003, at A18 ("Authorities are concerned because they know that serial killers often desensitize themselves by killing cats and dogs before turning to people. Well-known murderers like Ted Bundy and Jeffrey Dahmer tortured animals."); *Nation in Brief*, WASH. POST, Aug. 30, 1998, at A.05 ("A bill that would require people convicted of animal abuse to obtain psychiatric counseling as a condition of probation is awaiting action by Gov. Pete Wilson (R). Before Jeffrey L. Dahmer became a serial killer, he cut off the heads of neighborhood pets.").

245. *See* Joseph Lubinski, *The Cow Says Moo, the Duck Says Quack, the Dog Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. COLO. L. REV. 1109, 1140 (2003) (noting that "supporters of stronger anti-cruelty laws [in Arkansas] pointed to studies that suggest animal abuse is often a prelude to violence against humans"); Jacqueline Tresl, *The Broken Window: Laying Down the Law for Animals*, 26 S. ILL. U. L.J. 277, 292-93 (2002) ("Animal abuse is considered an indicator crime that escalates toward violence against humans. Also, there is a "direct correlation" between people who abuse animals and those who abuse children .... Indeed, increasing the violation from a misdemeanor to a felony is one with which many politicians would agree, but few talk about."). *See generally* N.Y. AGRIC. & MKTS. LAW § 353-a (McKinney 1999) (listing "aggravated cruelty to animals" as a felony).

246. Favre, *supra* note 25, at 350.

247. *See* 42 U.S.C. § 287 a-3a(a) (2000). The statute outlines the Secretary's responsibilities regarding the lifetime care of research chimpanzees as follows:

> The Secretary shall provide for the establishment and operation in accordance with this section of a system to provide for the lifetime care of chimpanzees that have been used, or were bred or purchased for use, in research conducted or supported by the National Institutes of Health, the Food and Drug Administration, or other agencies of the Federal Government, and with respect to which it has been determined by the Secretary that the chimpanzees are not needed for such research.

One option would have been to euthanize the animals, but instead, Congress voted to create and fund retirement sanctuaries for them.[248]

Humans should treat animals humanely, for humans' sake as well as for animals' sake. Conscious mistreatment of animals is morally corrosive for humans, and it both reflects and deepens serious character flaws.[249] Thus, every step toward greater protection or concern for animals is not necessarily a step toward animal rights and personhood. Although *A New Tort* seeks to utilize the Chimpanzee Health Improvement statute as a stepping stone in its arguments for animals as tort plaintiffs, Favre concedes that in debating the legislation "no congressperson took the opportunity to make the case for animal rights."[250]

Indeed, the language *A New Tort* cites as the "clearest statement" by a congressperson regarding the reason for enacting the law focuses explicitly on human concerns. Senator Bob Smith of New Hampshire stated "In other words, because chimpanzees and humans are so similar, those who work directly in chimpanzee research would find it untenable to continue using these animals if they were to be killed at the conclusion of the research."[251] Humans should feel concern over killing chimpanzees when reasonable options are available, regardless of whether they feel that such animals should have rights. The strong emphasis on human concerns rather than animal interests in Senator Smith's explanation detracts from, rather than supports, an argument that the statute provides a progression toward animal rights. *A New Tort* argues that the law represents "what is politically and financially feasible at a moment in time. If this works, then perhaps this model can be expanded to other species in the future."[252] However, there is no evidence that this admirable legislation had anything to do with the advancement of animal rights. Were this necessarily the case, every new law that in some way benefits animals would be a step toward animal rights. To the contrary, law is distinctively human, and creating laws promoting responsible and humane treatment of animals is an important responsibility for humans that we ignore at our peril.

A New Tort claims the Uniform Trusts Act of 2000 as another stepping stone toward animals as tort plaintiffs, but in reality the Act provides another illustration of the primacy of human concerns in animal-related legislation. The Act allows animals to be included in trusts, and for a

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Id.

248. *Id.* § 287 a-3a(d)(2)(I) ("A prohibition that none of the chimpanzees may be subjected to euthanasia, except as in the best interests of the chimpanzee involved, as determined by the system and an attending veterinarian.").

249. *See supra* notes 243-45 and accompanying text.

250. Favre, *supra* note 25, at 349.

251. 146 CONG. REC. S11,654, 11,655 (daily ed. Dec. 6, 2000) (statement of Sen. Smith), *available at* http://www.congress.gov/cgi-bin/query/z?r106:S06DE0-0029.

252. Favre, *supra* note 25, at 350.

person to be appointed to enforce the trust.[253] *A New Tort* notes that "legislatures adopting the Uniform Law and associated state statutes apparently did not have any conceptual difficulty with the accommodation of animals into the existing legal community."[254] However, the Act was designed to benefit humans rather than animals. The goal of laws addressing the distribution of an individual's assets after the individual's death is to fulfill the individual's wishes as closely as possible within the limitations of public policy.[255] This law is consistent with the law's desire to honor human wishes, rather than a step toward animal rights.

As moral beings, humans have a responsibility toward the animals they own, and this law empowers humans to exercise that responsibility for the care of their animals after their deaths. Favre acknowledges that "the primary motivation may well have been to take care of human concerns."[256] Once again, the focus is on humans. Shifting the focus of human law to animal interests through allowing animals to sit as plaintiffs in human courts would not be a small step beyond statutes such as the Chimpanzee Health Improvement Act and the Uniform Trusts Act of 2000—it would be an enormous and ill-advised leap into an entirely different realm.

B. Adding Billions of Potential New Plaintiffs and Billions of Dollars in Litigation Costs to the United States Tort System

In considering the specifics of Professor Favre's proposed new tort, the potential for gargantuan expansion of the tort system stands out among numerous serious concerns. People for the Ethical Treatment of Animals ("PETA") and other animal rights organizations estimate that 25 to 28 billion animals per year are killed for human use in the United States.[257] Another estimated 360 million animals are kept as pets in the United

253. Unif. Trust Code § 408 (2003), *available at* http://www.nabr.org/animallaw/Trusts/UTC_408.pdf (stating that "(a) A trust may be created to provide for the care of an animal" and "(b) A trust authorized by this section may be enforced by a person").

254. Favre, *supra* note 25, at 352.

255. David S. Favre, Animal Pet Trusts and Other Estate Issues (2003), *available at* http://www.animallaw.info/articles/ovuswillstrusts.htm (stating that "the primary motivation [of the Uniform Trust Act of 2000] may well have been taking care of the concerns of human owner of pets").

256. Favre, *supra* note 25, at 351-52.

257. *CNN American Morning with Paula Zahn: Interview with PETA Communications Director* (CNN television broadcast Feb. 28, 2003), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0302/28/ltm.10.html ("Today, 28 billion animals in the United States alone are . . . shoved in warehouses, tens of thousands of birds, for example, in warehouses where they suffocate to death. . . ."); TaxMeat.com, The Humane Argument, http://www.taxmeat.com/humane.asp (last visited Nov. 15, 2006) ("More than 26 billion animals are slaughtered every year for food in the United States alone."); GoVeg.com, 30 Reasons to Go Vegetarian, http://www.goveg.com/feat/chewonthis/ (last visited Nov. 15, 2006) ("Every year, more than 27 billion animals (including fish) are killed for food in the United States alone.").

States, according to a pet industry group.[258] According to animal rights organizations, another 20 million animals are being used for scientific research.[259]

A New Tort makes clear that each of these billions of animals would be eligible for status as plaintiffs if its proposed new tort were accepted.[260] Thus, if the cause of action were adopted, the potential number of tort plaintiffs in the United States would instantly grow from our current 300 million human citizens[261] (in addition to our corporations, foreign plaintiffs, etc.) to well over 25 billion.[262] The significance of this explosion in potential plaintiffs is difficult to understate.

One of the more common sound reasons for courts to reject proposed new tort causes of action or expansions of existing causes of action are concerns for opening up the floodgates of litigation. As a particularly relevant example, in 2001 a New Jersey appellate court articulated this concern in rejecting noneconomic damages for pet owners based on the wrongful death of a pet. In *Harabes v. Barkery, Inc.*, the court noted, "We are particularly concerned that were such a claim to go forward, the law would proceed along a course that had no just stopping point."[263] In 2003, an Ohio appellate court agreed with *Harabes* in *Oberschlake v. Veterinary Associates Animal Hospital*.[264] In *Oberschlake*, the owners of a miniature poodle named "Poopi" sought to name the dog as a plaintiff in a lawsuit based on a veterinary hospital's alleged negligence, and also sought to bring a claim in their own names for the emotional distress they suffered from harm to Poopi.[265] The court first declined to allow Poopi standing as a plaintiff because, although dogs can suffer emotional distress, "the evidentiary problems with such issues are obvious."[266] The court then went on to dismiss Poopi's owners' emotional distress claims, stating among other reasons that *Harabes* was correct to be concerned about potentially opening a floodgate of litigation were such claims to be

258. *See* Ann Hoevel, *U.S. Is a Nation of 360 Million—Pets: Evolving Relationships Result in Complicated, Pampered Pets*, Mar. 17, 2006, http://www.cnn.com/2006/US/03/10/modern.pets/index.html (American Pet Products Manufacturers' Association estimates 360 million pets in the United States, outnumbering humans by 60 million).

259. *See, e.g.*, American Association for Laboratory Animal Science, *Use of Animals in Biomedical Research: Understanding the Issues*, http://www.aalas.org/pdf/08-00007.pdf#search=%2220%20million%20animals%20used%20in%20medical%20research%22 (last visited Nov 12, 2006).

260. Favre discusses potential claims associated with research animals, *see, e.g.*, Favre, *supra* note 25, at 354-55, 360-61; pets, *see, e.g.*, *id.* at 354, 360; and animals used for food or other economic benefit, *see, e.g.*, *id.* at 364-65.

261. *See* CIA, THE WORLD FACTBOOK, https://www.cia.gov/cia/publications/factbook/geos/us.html (Central Intelligence Agency factsheet estimating 298,444,216 United States citizens in July 2006).

262. *See supra* note 257 and accompanying text.

263. Harabes v. Barkery, Inc., 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001) (cited by Victor G. Schwartz & Emily E. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 239 (2006)).

264. Oberschlake v. Veterinary Assocs. Animal Hosp., 785 N.E.2d 811, 815 (Ohio Ct. App. 2003).

265. *Id.*

266. *Id.*

allowed.[267]

Given the huge numbers involved, the enormous expansion of potential tort plaintiffs would be exceptionally troubling even if animals were not particularly litigious. But there is every reason to believe that they would be quite litigious—or rather, that those seeking to represent their "interests" would be quite litigious.

A New Tort argues that courts should appoint human representatives to decide when to sue on behalf of an animal and to represent the animal's interests in the lawsuit.[268] It declines to address the issue in detail, dismissing it as "a procedural matter" that should be the subject of further scholarly consideration but that should not be a bar to creating the proposed tort.[269] However, predicting who will be first in line seeking to initiate lawsuits on behalf of these billions of animals is not difficult. Large numbers of the volunteers will be animal rights activists passionately committed to utilizing the legal system in any manner possible to build stepping stones toward animal personhood and the elimination or erosion of property status. As noted above, interest in using the courts and legislatures to further an animal rights agenda has experienced dramatic growth in recent years. Many of the lawyers and law students participating in the rapid expansion of animal law,[270] as well as many nonlawyer animal rights activists, will without doubt view representing an animal or class of animals in a lawsuit as perhaps the most powerful vehicle yet devised for ultimately achieving the animal rights agenda.

A New Tort in effect emphasizes this by promoting the appropriateness of applying its tort action to some of the most important uses of animals in society, which are also among the favorite targets of animal rights activists. Many animal rights legal activists vehemently oppose most or all scientific research on laboratory animals.[271] In addition to legal efforts to limit or eliminate scientific research on laboratory animals, a radical fringe's terrorist attacks against animal researchers and research laboratories have highlighted the passion such research efforts generate.[272]

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267. *Id.*

268. *See* Favre, *supra* note 25, at 363-64

269. *Id.* at 364.

270. *See supra* notes 1-16 and accompanying text.

271. *See, e.g.*, Laura Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 772 (1995) (explaining the animal rights movement's ultimate goal is to end human use of animals, especially research on laboratory animals); Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 596-98 (2002) (discussing the animal rights movement and its belief that all animal experimentation should be disallowed).

272. *See, e.g.*, Charles Burress, *Activists Denounce Research on Animals / Cops Stop Shovel Protest Above UC's Underground Labs*, S.F. CHRON., Apr. 20, 2004, at B5 (detailing protest by animal rights activists who thrust shovels into the courtyard above an underground animal-research laboratory on UC Berkeley's campus); *Seattle Man Among 6 Animal Rights Activists Convicted by Federal Jury*, SEATTLE TIMES, Mar. 3, 2006, at A4, *available at* http://seattletimes.nwsource.com/html/nationworld/2002840714_animal03.html (detailing the conviction of members of Stop Huntingdon Animal Cruelty who waged a campaign against Huntingdon Life Sciences, a British company engaged in animal testing).

A New Tort chooses to utilize a chimpanzee in a scientific research laboratory as the context for one of its three primary hypotheticals demonstrating how its proposal would operate.[273] The chimpanzee in the article's hypothetical is kept in a manner meeting the requirements of the Animal Welfare Act but is not given all of the environmental amenities that some activists believe are appropriate.[274] If a legal representative for the chimpanzee (again, the burgeoning legal animal rights community would supply a surfeit of volunteers for this role) were to sue to attain a better environment in the research laboratory, *A New Tort* states that "under the proposed tort, [the research laboratory] would have to make its case to a court."[275]

Such a consequence could be disastrous for HIV research and other areas of medical research that rely on the use of animals. As addressed below, Favre proposes that his tort include money damages awards,[276] and such awards would of course have a chilling effect on research. However, even if researchers were usually found by jurors to have acted appropriately in caring for the chimpanzee, and thus money damages awards were few, the litigation would likely be devastating to medical animal research.

In tort lawsuits, litigation costs—primarily attorney's fees and expert witness fees—often exceed the money damages awarded.[277] Even when no damages are awarded, litigation costs for each lawsuit can cost hundreds of thousands or sometimes even millions of dollars. For example, in asbestos litigation, in which most cases settle rather than lingering through a full trial, a study found that out of the $70 billion spent on asbestos litigation between the 1960s and 2002, $40 billion was spent on legal fees rather than on judgments.[278]

The tendency for lawsuits to settle, as illustrated in asbestos litigation, keeps litigation costs from being even higher, as would be the case if most lawsuits proceeded all the way through trial. According to one study, ninety-eight percent of lawsuits settle before trial.[279] Unfortunately, there are strong reasons for concern that animal tort lawsuits would settle significantly less frequently than do typical tort lawsuits, making animal tort lawsuits even more expensive to litigate. Tort lawsuits typically settle because both parties believe that settling is in their best financial interest.

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273. *See* Favre, *supra* note 25, at 354-55.

274. *Id.*

275. *Id.* at 355.

276. *See infra* notes 312-21 and accompanying text.

277. *See* COUNCIL OF ECONOMIC ADVISORS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM 9 (2002), *available at* http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf (stating that fifty-eight percent of tort costs go toward administration, claimants' attorney fees, and defense costs).

278. *See* STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 88 (2005) (explaining that of the $70 billion spent on asbestos litigation, defense transaction costs comprised $21 billion while claimant's transaction costs accounted for $19 billion).

279. Susan Pang Gochros, *Settlement Conferences: The Good, The Bad, and the Ugly*, HAW. B.J., Nov. 2003, at 10.

However, as noted above, activist Steven Wise probably spoke for most attorneys interested in animal law when he stated that money damages are often not the most important matter in animal-related tort lawsuits.[280] Creating stepping stones toward abolishing or eroding the property status of animals is likely much more appealing to animal rights activists than is making as much money as possible from lawsuits.[281] Although settlements would doubtlessly sometimes be reached, much of the motivation for compromise from the plaintiff's perspective in traditional tort litigation would be absent. Further, it is expected that animal rights activists would be cognizant that numerous lengthy legal battles might drain research laboratories' resources and limit their ability to continue undertaking such research. Even if very few of the lawsuits result in judgments, opening up tort litigation in this context might well signal the end of scientific research that presently provides enormous public health benefits.

Opening up tort lawsuits by animals against the meat and dairy industries would perhaps cause even more societal upheaval, at least from an economic perspective. *A New Tort* proposes to somehow bar lawsuits based on the permissibility of killing animals for food from its animal tort cause of action, yet allow lawsuits based on the quality of life afforded to animals used for food.[282] In practice, the article's proposed distinction might make little difference, as those passionately opposed to eating animals or to the use of other animal products would have countless opportunities to initiate costly lawsuits even without reaching the question of whether animals may in any circumstances be killed. As noted above, animal rights activists estimate that 25 to 28 billion animals are killed for food or other human use in the United States every year.[283] Almost any approach to treatment of livestock or other animals kept for economic uses could be at least argued to be inappropriate. As with scientific research on animals, animal rights activists would not even need to be successful in winning judgments to create enormous havoc. Given the scale of animal use for food or other economic benefit in our society, simply bringing lawsuits addressing even a small percentage of the billions of potential animal plaintiffs could lead to overwhelmed courts and nationwide economic blight.

C. Elements of the Proposed New Tort

Professor Favre suggests that an animal plaintiff should prevail in his proposed new tort if the animal's representative can establish the following elements:

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280. *See supra* notes 192-93 and accompanying text.

281. *See, e.g.*, Susan Gilmore, *Lawyer Breaking New Legal Ground on Animal Issues*, Seattle Times, Feb. 7, 2006, at B1 (quoting the only attorney in the state whose practice is limited to cases involving animals as stating that "[i]t's more a way of life than a philosophy," and noting a client's assertion that "[w]hat [the lawyer] does is a labor of love").

282. *See* Favre, *supra* note 25, at 364-65.

283. *See supra* note 257 and accompanying text.

1) That an interest exists that is of fundamental importance to the plaintiff animal;
2) That the fundamental interest has been interfered with or harmed by the actions or inactions of defendant; and
3) That the weight and nature of the interests of the animal plaintiff substantially outweigh the weight and nature of the interests of the human defendant.[284]

1. An Interest of Fundamental Importance to the Animal

A New Tort's proposed requirement that the interest at issue must be of fundamental importance to the animal seems designed to ensure that no trivial matters, but rather only matters of true significance, are successfully litigated. The word "successfully" in the previous sentence is key, as animal rights activists would be able to claim that any number of interests are fundamental to a particular animal and would have an opportunity to impose costly litigation on animal owners to address such issues in the courts. As noted in the discussion of a potential flood of lawsuits against research laboratories and the animal food industry, the ultimate success of such lawsuits may not be necessary to make such uses of animals much more expensive and difficult.

A New Tort asserts that there "is not a bright line test" regarding animals' fundamental interests, and that this "obviously will force the court to make a judgment call."[285] This constitutes an invitation to wide-scale litigation on the issue. In some areas, whether something is fundamental to animals is obvious, such as freedom from intentional torture. In these areas, existing laws, such as animal cruelty laws and the Animal Welfare Act, already provide protection (whether such statutes should be strengthened or broadened are important but separate questions beyond the scope of this article). Further, for a much larger class of issues, whether something is fundamental to an animal would have to be fought out in costly litigation. As one of countless potential examples, *A New Tort* contends that being able to reproduce "is fundamental to all living beings."[286] Presumably this means that every time pet owners decide to have their pets spayed or neutered, they may have to fight lawsuits over whether this infringement on their animal's fundamental interest is justified. They might also be subject to lawsuits when they prevent their pets from going over the fence to mate with a neighboring pet. Even if such lawsuits are not ultimately successful, allowing them into the courts is societally costly and bad public policy to say the least.

This raises another problem: beyond the obvious, how are humans to decide what are fundamental interests to other species? One might argue that the very endeavor is presumptuous. Further, one might suspect that the vague standard proposed by *A New Tort* would allow activists to pro-

284. Favre, *supra* note 25, at 353.
285. *Id.* at 357.
286. *Id.* at 358.

ject onto animals the activists' own ideas on what is best for the animals. Steven Wise's lawsuit addressed above in which he sought to name Kama, a Navy research dolphin, as a plaintiff may be illustrative.[287] Wise argued that Kama, the named plaintiff, was harmed by the Navy's activities with it.[288] However, the Navy retorted that Kama mingled freely with wild dolphins on a regular basis, that Kama could easily swim away from his work with the Navy but chose not to do so, and that Kama was indeed happy with his work for the Navy.[289] Humans are not capable of knowing Kama's mind and heart sufficiently to ascertain whether freedom from his labors with the Navy was fundamental to him. Favre argues that "if we cannot say what is fundamental to an animal, then the doors of the courtroom will remain closed until such information is available."[290] However, he does not indicate how we would be able to close those doors, and doing so seems unlikely. Activists may find the doors to actually winning judgments in such cases closed, but the doors to causing enormous aggregate litigation expenses and burden on the courts in battles over whether we can know whether an interest is fundamental would be wide open.

2. Causation (and Intent)

The proposed element that the animal must establish that the fundamental interest has been interfered with or harmed by the actions or inactions of the defendant appears intended as a general causation element. Confusingly, however, *A New Tort* labels its discussion of this proposed element as "Intention of the Defendant"[291] rather than in referring in any way to causation. The article briefly acknowledges that establishing causation is "axiomatic" in tort lawsuits but then quickly shifts its discussion to the question of intent.

The level of requisite intent is an issue in all tort lawsuits but it is not addressed in *A New Tort*'s list of proposed elements. In its section addressing the causation element, the article reveals Favre's view that tort's intent standard should not consider whether the human defendant intended the specific consequence of her acts. Rather, the standard should be met if the defendant intended the act at issue, regardless of intent regarding consequences.[292]

Analyzing the intent element of an intentional tort in this manner is supported by precedent.[293] However, *A New Tort* seeks to modify the intent element further in a manner that would be exceptionally prejudi-

287. *See supra* notes 136-37 and accompanying text.
288. Citizens to End Animal Suffering and Exploitation, Inc. v. New Eng. Aquarium, 836 F. Supp. 45, 47 (D. Mass. 1993) ("The Navy has invested over $ 700,000 and over 3,500 man hours training Kama. The Navy contends that Kama is able to associate with wild dolphins on a daily basis, and could swim away if he so desired.")
289. *Id.*
290. Favre, *supra* note 25, at 358.
291. *See id.* at 359.
292. *See id.*
293. *See* DAN B. DOBBS, THE LAW OF TORTS 52-53 (2000)

cial to defendants. It proposes, in effect, that the burden of proof be shifted to the animal's owner to presume that the owner understood the fundamental interests of the animal's species.[294] How the owner can fairly be presumed to know an animals' fundamental interests when determining such interests, as *A New Tort* acknowledges, "is not a bright line test" and will often require courts to make a "judgment call" is not addressed[295] Indeed, such an onerous presumption in the face of such a vague and ambiguous standard seems spectacularly unfair. Further, it seems contrary to *A New Tort*'s own assertion in the article's section addressing the fundamental interest element that "[o]bviously the test cannot be whether humans know everything about a species, as we do not yet even know everything about ourselves."[296]

3. Animal Interests Substantially Outweigh Human Interests

A New Tort's final formally identified element[297] is that the animal's representative must establish that the weight and nature of the interests of the animal plaintiff substantially outweigh the weight and nature of the interests of the human defendant. The proposition that a tort action should only be permitted if the plaintiff can first prove that her interest substantially outweighs the other party's interest is, at least, unusual in tort law. Nuisance torts come to mind as claims requiring substantial and unreasonable interference with the plaintiff's interests,[298] but these elements are much different from *A New Tort*'s "substantially outweighs" standard. In nuisance law, "substantial" means only a significant harm.[299] The "unreasonable" requirement in nuisance law does entail balancing, but it is a simple weighing of interests rather than a requirement that one party's interests be "substantially" stronger than the other party's interests.[300] *A New Tort* indicates, however, that its odd standard is necessary because without it there is no hope that society as it currently exists would accept the tort.[301]

The odd nature of this element highlights the tort's general vagueness and ambiguity and the significant stretching of accepted tort principles it would represent. Courts tend to disfavor superlatives in tort elements because superlatives tend to signal doctrinal fuzziness and lack of clarity regarding when tort elements are established. For example, the concept

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(The defendant is subject to liability for a simple battery when he intentionally causes bodily contact to the plaintiff in a way not justified by the plaintiff's apparent wishes. . . . An intent to cause actual harm is a sufficient intent but not a necessary one. It is enough that the defendant intends the bodily contact that is 'offensive'. . . .).

294. *See* Favre, *supra* note 25, at 359.

295. *Id.* at 357.

296. *Id.*

297. In reality, the proposal seeks to incorporate additional elements not included in its list of the proposed elements. *See infra* notes 304-21 and accompanying text.

298. *See* KEETON ET AL., *supra* note 208, at 626-30.

299. *Id.* at 626.

300. *Id.* at 626, 629-30.

301. *See* Favre, *supra* note 25, at 359.

of "gross negligence" has largely wilted on the common law vine. Most courts have rejected the standard, reasoning that negligence is negligence, and that seeking to make distinctions between gross and "regular" negligence is confusing and unproductive.[302]

Even with the proposed limitation that the animal's interest must substantially outweigh the owner's interest, this element will, like the "fundamental interest" element, invite excessive litigation, lack of certainty regarding the law, and inconsistent decisions by courts. When are an animal's interests "substantially" stronger than the owner's interests rather than simply stronger, clearly stronger, or stronger by a little bit? Although some cases would be obvious, such as when an owner wishes to torture his animal to satisfy the owner's sadism, in most situations the balancing would not be so apparent, and costly case-by-case litigation would be needed to make findings. Different courts would doubtlessly weigh the interests differently, inviting inconsistent and confusing case law.

Animal rights activists' potential attraction to the legal messiness this tort would create, which would in turn further magnify the messiness, bears repeating. To the extent that animal lawyers perceive themselves as working toward vitally important public policy concerns, the profit factor that heavily influences most litigation is diminished on the plaintiff's side. Animal rights activists' passion likely makes them willing to accept no compensation or less compensation than they could otherwise earn if they believe they are potentially making a difference for their cause.[303] If the very existence of expansive litigation, regardless of whether most of it ultimately does not result in a plaintiff's judgment, hurts those performing scientific research on animals, those raising animals for food, and so forth, many animal rights activists would feel that they are furthering their cause by initiating as many of these tort actions as possible.

D. Damages, Other Remedies, and Other Elements to the Proposed Tort

Although *A New Tort* lists only three vague and ambiguous elements for its proposed cause of action, the article's full proposal makes clear that the tort would in actuality be even more complicated. Details provided in *A New Tort* suggest that several other conditions, which are in effect additional tort elements, would need to be met. The article de-

302. *See* KEETON ET AL., *supra* note 208, at 210-11 ("The prevailing rule in most situations is that there are no 'degrees' of care or negligence, as a matter of law; there are only different amounts of care, as a matter of fact."); PROSSER, HANDBOOK OF THE LAW OF TORTS 182 (4th ed. 1971) ("Although 'degrees of negligence' has not been without its advocates, it has been condemned by most writers, and, except in bailment cases, rejected at common law by nearly all courts . . . ."). For examples of courts rejecting the gross negligence standard, see, City of Canton v. Harris, 489 U.S. 378, 388-89 (1989); Biscoe v. Arlington County, 738 F.2d 1352, 1363-64 (D.C. Cir. 1984); Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir. 1983); Wells v. State, 642 A.2d 879, 884 (Md. Ct. Spec. App. 1994); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976).

303. *See supra* notes 192-93 and accompanying text.

scribes most of these additional elements in a section toward the end of its proposal in a section aptly entitled "Loose Strings."[304] One of these is the intent element, which is not among *A New Tort*'s three stated elements but which, as discussed above, the article addresses in its discussion of causation.[305] Another element not listed among the article's three formal elements is that the plaintiffs must be owned animals, rather than wild animals—at least for now. Noting that "the analysis for wildlife is more complex than the proposed tort" because wild animals are not property and because they are capable of existence without the aid of humans, *A New Tort* indicates that more thought must be given regarding wild animals' potential status as tort plaintiffs.[306]

Of course, this open question adds yet another layer of complexity and uncertainty to the proposed tort, yet the article goes further to suggest a possible approach to wild animals that would make the tort even more onerous. The article suggests that perhaps the burden of proof should shift to human defendants in cases involving wild animals, such that defendants would have the burden of proving "a substantial human need before allowing interference with such animals"[307]—presumably even if the human is engaged in activity not violating any statutes or regulations. Thus, a homeowner wishing to rid her lawn of gophers or to rid her flowerbeds of snails might be subject to lawsuits in which she will be found liable unless she can establish—potentially at great litigation expense of course—that she has a "substantial human need" to interfere with these animals.

Another element *A New Tort* adds but does not list as a formal element is that the plaintiff must be making a claim for something other than the simple fact of being killed for food or for other economic benefit.[308] Rather, as addressed above, claims involving animals used for food or other economic use would only be allowed to focus on how the animals are treated while alive.[309] Apparently, *A New Tort* included this additional element because society has not yet been persuaded that animals should not be killed for human use. Of course, this additional element or caveat adds yet another layer of complexity to the proposed tort.

A final element or restriction *A New Tort* adds to its proposal but does not list among the formal tort elements is that owners' interests must be something more than mere profit motivation.[310] The article includes this element because there are many other alternatives in the world for making money, so a profit motive alone should not, according to the article,

304. The section's full title is "Loose Strings—Additional Points Before Proceeding." Favre, *supra* note 25, at 362.

305. *See supra* notes 291-96 and accompanying text.

306. Favre, *supra* note 25, at 362.

307. *Id.*

308. *Id.* at 364.

309. *Id.*

310. *Id.* at 365.

justify imposing on an animal's fundamental interests.[311] Thus, if a free range chicken rancher provided one-tenth of an acre per chicken on which his chickens could roam, and an activist suing on behalf of the chickens argued that it is in the chickens' interest to have even more space—perhaps one-fourth of an acre per chicken—in which to roam, presumably the chicken rancher would not be able to rely on his additional profit from restricting the chickens to one-tenth of an acre each as his interest in not giving them yet more space. Instead, he would be restricted to arguing that providing one-tenth of an acre each is not cruel, but what if one-forth of an acre each would provide an even more pleasant environment for the chickens? The rancher does not have an "interest" in the fact that one-tenth of an acre per chicken is enough; probably his only interest in keeping his chickens' range down to that size would be making more profit, and he would presumably be unable to rely upon that important interest as his defense even if his chickens' living conditions are relatively good.

As noted above, one of the most societally destructive aspects of *A New Tort*'s proposed action is its open invitation to an enormous expansion of litigation, regardless of whether much of the litigation would ultimately prove successful.[312] Given the billions of potential new plaintiffs and the passion of animal rights attorneys willing to damper lawyers' usual profit motive because of their idealism, litigation costs to animal owners and burden on the courts alone could be overwhelming.[313] However, *A New Tort* further compounds this problem by asserting that when the lawsuits are successful, the animals should be awarded money damages in addition to other remedies. Further, it suggests a compensatory damages standard inconsistent with courts' accepted approach to such damages.

A New Tort includes pain and suffering damages in its list of appropriate categories of damages animals should be able to recover.[314] The article suggests that the money could be placed into trusts for the animals' benefit created by the courts.[315] Obviously this could generate a huge amount of money overall if even only a small percentage of all of the lawsuits that might be brought for billions of animals were successful.

The enormous draining of society's financial resources would not be the only cost of allowing animal plaintiffs to win pain and suffering damages awards. There is also a problem regarding the limits of humans' capacity to understand animals and thus make appropriate awards for their pain and suffering. Awarding money to compensate pain and suffer-

311. *Id.*

312. *See supra* notes 257-67 and accompanying text.

313. *See* notes 268-72 and accompanying text.

314. *See* Favre, *supra* note 25, at 366. In addition to money damages, Professor Favre suggests injunctions and "title transfer" (in which title might involuntarily be transferred from the defendant to another party that might provide better care for the animal) as remedies for his proposed cause of action. *Id.*

315. *Id.*

ing requires creative and abstract thinking on the parts of jurors and courts even in cases involving humans, and such awards have recently been a point of significant focus in tort law scholarship—much of it critical of the notion that dollars can compensate pain.[316] As difficult as it is for jurors and courts to determine how much money would be needed to compensate the pain and suffering involved in a particular case involving humans, trying to determine a dollar amount appropriate to compensate pain and suffering for another species borders on absurdity—particularly when money is meaningless to all nonhuman species.

A New Tort seeks to address this challenge by suggesting that compensatory damages in these lawsuits should perhaps be set at the amount of money "sufficient to assure the conditions do not reoccur."[317] A fly in the ointment in this proposed approach to compensatory damages is that it has nothing to do with compensatory damages. Compensatory damages narrowly focus on the plaintiff—specifically, making the plaintiff whole from the harm suffered in the case before the court.[318] Compensating the plaintiff may have a deterrent effect, but compensatory damages are not structured toward that end. They do not take into account the wealth of the defendant, how likely the defendant is to commit the wrong again, etc. They only focus on remedying the plaintiff's loss.[319]

Punitive damages, rather than compensatory damages, allow a focus on defendants and on deterring future misconduct. They are not designed to compensate plaintiffs, but rather to deter defendants and potential future defendants from committing further bad acts, and to provide punishment.[320] Many people would be dubious about further expanding already controversial punitive damages by opening them up to billions of poten-

316. *See, e.g.*, Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 781-83 (1995) (discussing the problem of translating an intangible, nonmonetary injury into a monetary award for pain and suffering and remarking that jury awards often are arbitrary because they are given only ambiguous guidelines in how to determine the award amount); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 171-76 (2004) (arguing that money damages for pain and suffering do not negate the victim's pain and explaining the difficulty for juries in placing a monetary value on pain and suffering); Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 374 (2006) (remarking on the unpredictability of pain and suffering awards due to the lack of a fixed standard for determining these awards).

317. Favre, *supra* note 25, at 366.

318. *See, e.g.*, Daniel W. Shuman, *The Psychology of Compensation Law*, 43 U. KAN. L. REV. 39, 45 (1994) ("The commonly understood goal of tort compensation is to restore the injured to their preaccident condition, to make them whole."); Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 769 (1987) (stating the "cardinal principle" of compensation as "injured plaintiffs should receive an amount necessary to make them 'whole,' that is, to restore them to the position they would have occupied but for the defendant's tortious conduct").

319. *See supra* note 318.

320. *See, e.g.*, DOBBS, *supra* note 293, at 1063 (discussing that the purpose of punitive damages is to deter and make repetition of the undesirable conduct unlikely); Robert A. Klinck, *Reforming Punitive Damages: The Punitive Damage Debate*, 38 HARV. J. ON LEGIS. 469, 470 (2001) (stating that a major rationale for punitive damages is deterrence); Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?* 50

tial new plaintiffs, and it is important to identify when they are in effect being expanded.

Although protecting animals and caring for their welfare is necessary in a moral society, awarding money to animals simply seems odd. Perhaps, to some, an attraction of awarding such damages is that they could provide income to animal rights' lawyers suing on behalf of animals. Most tort lawsuits are filed on a contingency fee basis, with the plaintiff's lawyer receiving a percentage of the recovery.[321] If the dominant contingency fee approach were applied to animal tort lawsuits, activist lawyers who might not receive any compensation for winning an injunction could perhaps earn their living—with billions of potential plaintiffs, possibly even a very comfortable living—through winning damages awards for their animal clients. This financial incentive of course would attract yet more activist lawyers (and, if the money is good enough, even nonactivist lawyers) toward filing animal plaintiff lawsuits. Because the cause is important to many lawyers interested in animal rights, even modest judgments in lawsuits involving animal plaintiffs might fuel rapid expansion of such cases. Due to the potential quantity of lawsuits and huge potential litigation costs associated with animal-plaintiff lawsuits, allowing such lawsuits could be societally disastrous even if damages were not permitted as a remedy. Adding damages as a remedy makes the potential harm yet worse.

VI. CONCLUSION

Seeking to further the humane treatment of helpless and too-often mistreated animals is important, even heroic. However, taking the path of incrementally humanizing animals in our courts, whether through creating personhood for intelligent animals, through granting animals standing as plaintiffs in tort lawsuits, or through any of the other potential stepping stones toward abolishing animals' property status, is misguided and dangerous for both humans and animals. Our legal system is intrinsically human, and the protection and humane treatment of animals is a basic human responsibility, not a basic animal right.

HASTINGS L.J. 1001, 1002 (1999) (explaining that the purpose of punitive damages is to discourage the defendant and others from committing bad acts).

321. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS: CASES & MATERIALS 544 n.9 (11th ed. 2005) ("Lawyers who represent plaintiffs in personal injury litigation usually are paid on the basis of a contingency fee contract.").