

3-1-1977

Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats

Joyce S. Tischler

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law Commons](#)

Recommended Citation

Joyce S. Tischler, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats*, 14 SAN DIEGO L. REV. 484 (1977).

Available at: <https://digital.sandiego.edu/sdlr/vol14/iss2/8>

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

RIGHTS FOR NONHUMAN ANIMALS: A GUARDIANSHIP MODEL FOR DOGS AND CATS

Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless "things" to be a decree of Nature, not a legal convention acting in support of some status quo.¹

INTRODUCTION

The idea that nonhuman animals should have rights is amusing to many people.² Those humans who support the extension of rights to nonhumans are frequently branded "sentimental,"³ a label which has significantly impeded serious discussion⁴ of our attitudes toward nonhumans.

Nevertheless, those in the growing movement for animal liberation⁵ are quite serious. They see the oppression and suffering of millions of nonhumans,⁶ readily visible to us all, and are demanding

1. C. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* 6 (1974). This book appeared in its entirety in 45 S. CAL. L. REV. 450, 453 (1972).

2. C. STONE, *supra* note 1, at 8.

3. A. SCHWEITZER, *REVERENCE FOR LIFE* 5 (1965); P. SINGER, *ANIMAL LIBERATION* ix (1975) [hereinafter cited as SINGER]; Brophy, *In Pursuit of a Fantasy*, in *ANIMALS, MEN AND MORALS* 130 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972) [hereinafter cited as Brophy]; Regan, *The Moral Basis of Vegetarianism*, 5 *CAN. J. PHILO.* 181, 182 (1975).

4. SINGER, *supra* note 3, at ix.

5. The leading text in the Animal Rights Movement is P. SINGER, *ANIMAL LIBERATION* (1975). See *ANIMALS, MEN AND MORALS* (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972); Fallows, *Lo, The Poor Animals! What Did Noah Save Them For?*, *THE ATLANTIC MONTHLY*, Sept. 1976, at 58; Note, *Toward Legal Rights for Animals*, 4 *ENV'TL AFF.* 205 (1975) [hereinafter cited as *Legal Rights for Animals*].

6. Almost every facet of human activity has some adverse effect on nonhumans. For example, the cosmetics worn by humans are exhaustively tested on nonhumans. Rabbits are widely used to test cosmetics for possible eye damage. The rabbits are placed in boxes with only their heads protruding; their eyes are held open with metal clips, and concentrated solutions of the experimental substance are dripped into their eyes. In some tests, applications are repeated over several days to measure the damage done. Damage may include severe pain, injury to the eye, or total blindness. See SINGER, *supra* note 3, at 50-51.

The eating habits of most humans directly conflict with nonhumans' in-

that humans begin to reevaluate their treatment of other species.⁷

The idea that many species of nonhumans⁸ should have legal rights has rarely been posited.⁹ Under our laws domesticated animals, in particular, have traditionally been viewed as property.¹⁰

terest in both the existence and the enjoyment of life. A little known fact about the meat industry is the manner in which nonhumans exist before their deaths. Peter Singer writes extensively about factory farming, the big business of mass-producing animals and raising them in close and often highly oppressive confinement in order to get the highest yield for the least amount of output. SINGER, *supra* note 3, at 96-170. See also Fallows, *Lo, The Poor Animals! What Did Noah Save Them For?*, THE ATLANTIC MONTHLY, Sept. 1976, at 61-62.

Many humans aspire to own fur coats. To make such a coat, trappers use a device called a steel-jaw trap. When a nonhuman steps on this trap, the metal teeth snap shut, shattering bones, and causing hours and sometimes days of agony. Because trappers do not check their traps daily, the nonhumans either starve, bleed, or freeze to death. Nonhumans have been known to chew off their own arms or legs in order to escape. The Fund For Animals, in New York City, distributes leaflets with graphic examples of nonhumans caught in the device.

Humans indulge in the erroneous belief that most research performed on nonhumans is for some essential medical purpose. In fact, the overwhelming majority of experiments does *not* contribute to important medical research. SINGER, *supra* note 3, at 33. Because nonhumans are easily obtained, Ph.D. candidates and high school biology students often perform repetitious and painful experiments. In 1973, the United States Government paid experimenters to run dogs on a treadmill until their temperature reached 113 and they died. The purpose was to show that heatstroke victims should be cooled. This experiment was performed even though the same experiment has produced the same result many times before. As early as 1881, experimenters electric-shocked dogs to a temperature of 113 and death to show that overheated bodies should be cooled. Fallows, *Lo, The Poor Animals! What Did Noah Save Them For?*, THE ATLANTIC MONTHLY, Sept. 1976, at 63. This example is not exceptional. Experiments are routinely performed on nonhumans, inflicting severe pain, and death, with no practical benefit being derived. See generally SINGER, *supra* note 3, at 28-91.

7. See ANIMALS, MEN AND MORALS (R. GODLOVITCH, S. GODLOVITCH & J. HARRIS eds. 1972); SINGER, *supra* note 3; *Legal Rights for Animals*, *supra* note 5.

8. In a literal sense, the term *nonhuman* encompasses all species except humans. It is not suggested, however, that *all* nonhumans must enjoy legal rights. The practical problems inherent in according rights to insects, for example, would probably be too overwhelming for our legal system to resolve. A means must be found to identify the species which should enjoy legal rights. Although this Comment is not designed to enumerate precisely which species should enjoy legal rights and which should not, factors useful in locating the boundaries of legal rights are considered below.

9. The proposition was recently stated in *Legal Rights for Animals*, *supra* note 5, at 205.

10. See, e.g., CAL. PENAL CODE § 597 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 272, § 77 (West Supp. 1976).

They are typically considered only in terms of their usefulness to humans,¹¹ rather than for their intrinsic worth as independent, sentient beings.¹² Although nonhumans contribute to human well-being in countless ways, their property status affords them insufficient protection and no legal rights.¹³

This Comment describes the existing legal status of nonhumans in general. Through an examination of the traditional cut-off points for legal rights, it will be shown that nonhumans should have rights that transcend their utility to humans.¹⁴ Finally, the Comment presents a guardianship model as a possible way in which the substantive rights of two species, dogs and cats, can be implemented.¹⁵

THE EXISTING STATUS OF NONHUMANS

History demonstrates that as humans find new ways to use non-

11. S. Godlovitch, *Utilities*, in *ANIMALS, MEN AND MORALS* 177-78 (R. Godlovitch, S. Godlovitch & J. Harris eds. 1972).

12. Courts have held that a dog's value "may be the market value or some special or peculiar value to its owner to be ascertained by reference to its usefulness or other qualities." *Roos v. Loeser*, 41 Cal. App. 782, 785, 183 P. 204, 205 (1919). See *Sabin v. Smith*, 26 Cal. App. 676, 147 P. 1180 (1915); *In re Ackerman*, 6 Cal. App. 5, 91 P. 429 (1907); *Jenkins v. Ballantyne*, 8 Utah 245, 30 P. 760 (1892).

13. See *Legal Rights for Animals*, *supra* note 5, at 228.

14. See SINGER, *supra* note 3, at viii; S. Godlovitch, *Utilities*, in *ANIMALS, MEN AND MORALS* 177-78 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972); Salt, *The Rights of Animals*, 10 INT'L J. ETHICS 206, 210 (1900); *Legal Rights for Animals*, *supra* note 5, at 228. The assumption that nonhumans should be given more adequate consideration is also implied by R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 35 (1974); C. STONE, *SHOULD TREES HAVE STANDING?* 50 (1974), also printed in 45 S. CAL. L. REV. 450, 474 (1972). Stone's essay calls for a recognition of rights for environmental objects in nature.

15. Cats and dogs were chosen for practical reasons. They have a close association with humans and are familiar to most readers. Implementing legal rights for every species would be a monumental task. Each species is distinct, with different needs and lifestyles, and the law would have to reflect these differences. In addition, adopting a guardianship model for all species would call for massive changes in the present societal order. For example, if nonhumans were given the right to life, industries dependent on nonhumans or nonhuman products would be affected in ways which would reflect the scope of that right.

In 1972, total market sales for all livestock and their products was \$34,-317,000,000. U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 597 (1973). The meat industry is the largest sector of the food industry. N. ALTMAN, *EATING FOR LIFE* 63 (1973). Thus, recognizing legal rights for all sentient beings would require radical alteration of the present national economy, diet, and lifestyle. As a practical matter, fashioning a model limited to dogs and cats is more feasible. Nonetheless, it is hoped that the principles discussed here will eventually be used to grant rights to all nonhumans.

humans, the relationship between the two grows closer.¹⁶ The legal treatment of dogs and cats will serve to represent the treatment of nonhumans as a whole. The domestication of dogs and cats is illustrative. Dogs were probably first domesticated in Europe during the Mesolithic period.¹⁷ Although no written record exists, researchers believe that humans and semi-wild dogs developed a hunting partnership in which the dog would pursue the animal and the human would kill it.¹⁸ This arrangement was advantageous to both species, for the percentage of kills effected was much higher than that for either species working alone.¹⁹ Those dogs who displayed better hunting skills probably got more food and a place closer to the fire.²⁰ A dependence on humans followed as the human settlements became a primary food source for the dogs.²¹

Similarly, cats are believed to have been domesticated as a result of their pursuit of rodents inhabiting the graneries of early agriculturalists.²² In order to protect their food supply, farmers encouraged the cats to stay.²³

In the eighteenth century, Blackstone set the common law standard by characterizing cats and dogs as creatures "only kept for pleasure, curiosity, or whim."²⁴ Their value was not intrinsic; rather, it depended "on the caprice of the owner."²⁵ Unlike the cow

16. See *Roos v. Loeser*, 41 Cal. App. 782, 784, 183 P. 204, 205 (1919). See also Downs, *Domestication: An Examination of the Changing Social Relationships Between Man and Animals*, 22 KROEBER ANTHRO. SOC'Y PAPERS 18, 45 (1960).

17. The Mesolithic Age lasted from approximately 8,300 to 2,500 B.C. Mesolithic or Middle Stone Age denotes the period between the Paleolithic Age, when the great ice sheets began to recede, and the Neolithic Age. During the Mesolithic period, humans were still primarily food gatherers, rather than food producers. J. CLARK, *THE MESOLITHIC SETTLEMENT OF NORTHERN EUROPE, A STUDY OF THE FOOD-GATHERING PEOPLES OF NORTHERN EUROPE DURING THE EARLY POST-GLACIAL PERIOD* xiv (1953). Commentators pinpoint this period as the beginning of the domestication of dogs. See Downs, *Domestication: An Examination of the Changing Social Relationships Between Man and Animals*, 22 KROEBER ANTHRO. SOC'Y PAPERS 18, 45 (1960). See also S. COLE, *THE NEOLITHIC REVOLUTION* 21 (1967).

18. Downs, *Domestication: An Examination of the Changing Social Relationships Between Man and Animals*, 22 KROEBER ANTHRO. SOC'Y PAPERS 18, 46 (1960).

19. *Id.*

20. *Id.*

21. *Id.* at 58.

22. *Id.*

23. *Id.*

24. II W. BLACKSTONE, *COMMENTARIES* 1241 (W.C. Jones ed. 1916).

25. *Id.* at 1241.

or goat, the cat and dog did not serve as food or perform many practical functions beyond those already described. Thus, property in dogs was of an "imperfect or qualified nature,"²⁶ and accordingly they received less legal protection than did the more useful nonhumans.²⁷

The common law, shaped by the attitude that dogs and cats serve only limited functions in society, correspondingly limited their legal status and protections.²⁸ Dogs and cats were subjected to various regulations not imposed on other domestic animals.²⁹ The state could, and still does, compel owners to obtain a yearly license for dogs,³⁰ regulate the number of animals in a single residence,³¹ and impound strays either to be destroyed or surrendered to institutions for research.³² However, dogs and cats could not be the subject of larceny, for at common law the punishment for larceny was death, and it was considered unreasonable that a human should die for stealing a dog or cat.³³

26. *Nicchia v. New York*, 254 U.S. 228, 230 (1920); *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 701 (1897); *Sabin v. Smith*, 26 Cal. App. 676, 679, 147 P. 1180, 1181 (1915).

27. *Nicchia v. New York*, 254 U.S. 228, 230 (1920); *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 701 (1897); *Sabin v. Smith*, 26 Cal. App. 676, 679, 147 P. 1180, 1181 (1915).

28. II W. BLACKSTONE, COMMENTARIES 1241 (W. Jones ed. 1916).

29. *Nicchia v. New York*, 254 U.S. 228, 230 (1920); *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 702 (1897).

30. *Nicchia v. New York*, 254 U.S. 228 (1920); *Romero v. Santa Clara*, 3 Cal. App. 3d 700, 83 Cal. Rptr. 758 (1970); *Thiele v. Denver*, 135 Colo. 442, 312 P.2d 786 (1957); *Shadoan v. Barnett*, 217 Ky. 205, 289 S.W. 204 (1926). See generally CAL. FOOD & AGRIC. CODE § 30501 (West 1968); MASS. GEN. LAWS ANN. ch. 140, § 137 (West 1974); MICH. COMP. LAWS ANN. § 287.266 (Supp. 1976); N.Y. AGRIC. & MKTS. LAW § 109 (McKinney Supp. 1976).

31. *E.g.*, a city statute may declare it unlawful to keep more than three dogs in a home. See *Miller v. Arcadia*, 121 Cal. App. 660, 661, 9 P.2d 587, 587 (1932).

32. *Simpson v. Los Angeles*, 40 Cal. 2d 271, 279, 253 P.2d 464, 469, appeal dismissed, 346 U.S. 802 (1953). See also *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1897); *Shadoan v. Barnett*, 217 Ky. 205, 289 S.W. 204 (1926); *Massachusetts SPCA v. Commissioner of Pub. Health*, 339 Mass. 216, 158 N.E.2d 487 (1959); *Central Westchester Humane Soc'y v. Hill-eboc*, 202 Misc. 881, 116 N.Y.S.2d 403 (1952); *Jenkins v. Ballantyne*, 8 Utah 245, 30 P. 760 (1892); *University of Wis. v. Dane County Humane Soc'y*, 260 Wis. 486, 51 N.W.2d 56 (1952). See generally CAL. FOOD & AGRIC. CODE § 31106 (West 1968); MASS. GEN. LAWS ANN. ch. 140, § 151A (West Supp. 1976); N.Y. AGRIC. & MKTS. LAW § 114 (McKinney Supp. 1976).

33. Suits for civil remedies were considered adequate. *Sabin v. Smith*, 26 Cal. App. 676, 679, 147 P. 1180, 1181 (1915). Today, this treatment of dogs and cats is not consistent throughout the United States. In defining larceny, the Massachusetts legislature stated that the term *property* includes "any domesticated animal, other than a dog, or a beast or bird which is ordinarily kept in confinement and is not the subject of larceny at common law." MASS. GEN. LAWS ANN. ch. 266, § 30(2) (West 1976). In Michigan,

Today, society's dependence on cats and dogs has increased enormously. Pets serve humans in a variety of ways, including child substitute, companion,³⁴ playmate, and protector of the home.³⁵ Dogs have been used by psychiatrists as a means of establishing a link with severely withdrawn children in order to bring them within the therapist's reach.³⁶ Each year throughout the United States large numbers of dogs and cats are used in scientific and commercial experimentation.³⁷ They offer revenue to the growing pet food and grooming industries built around them³⁸ and serve as a prime source of entertainment in pet shows, dog races, zoos, circuses, television, and films.³⁹ Dogfighting, though illegal,⁴⁰ is a thriving business.⁴¹

stealing a licensed dog is a misdemeanor, MICH. COMP. LAWS ANN. § 287.286 (b) (1976); but theft of livestock (horses, cows, sheep, etc.) is labeled *larceny* and is a felony, MICH. COMP. LAWS ANN. § 750.357 (a) (1976). However, in New York, the unauthorized possession of a dog for more than ten days is larceny. N.Y. AGRIC. & MKTS. LAW § 363 (McKinney 1972).

34. Levinson, *Psychology of Pet Ownership*, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE ECOLOGY OF THE SURPLUS DOG AND CAT PROBLEM 18 (1974).

35. *Roos v. Loeser*, 41 Cal. App. 782, 784, 183 P. 204, 205 (1919).

36. M. FOX, BEHAVIOUR OF WOLVES, DOGS, AND RELATED CANIDS 206 (1971); Levinson, *Psychology of Pet Ownership*, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE ECOLOGY OF THE SURPLUS DOG AND CAT PROBLEM 18 (1974).

37. Singer states that no one really knows the accuracy of the estimates, for no full-scale survey has been done. SINGER, *supra* note 3, at 32. In 1966, the Animal Breeders Association estimated that between 500,000 and 1,000,000 dogs and cats had been used in research during the preceding year. *Id.* In 1971, the Rutgers University College of Agriculture and Environmental Sciences estimated that each year United States laboratories use 500,000 dogs and 200,000 cats. Dogs and cats comprise only a small proportion of the estimated 63 million nonhumans used for research each year. *Id.* at 32-33.

38. The Pet Food Institute, a national trade association of dog and cat food manufacturers, sponsors a consumer education program throughout the country. Pope, *Public Education*, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE SURPLUS DOG AND CAT PROBLEM 103 (1974).

39. For an interview with the feline star of *Harry and Tonto*, see ALL-CATS MAGAZINE, July 1975, at 14.

40. See, e.g., CAL. PENAL CODE § 597.5 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 272, §§ 94-95 (West Supp. 1976); MICH. COMP. LAWS ANN. § 750.49 (1976); N.Y. AGRIC. & MKTS. LAW §§ 351-352 (McKinney 1975).

41. An example was provided by Deputy Andrew Garcia, vice squad, Sheriff's Department in Los Angeles, California. During 1975, Deputy Garcia was involved in a five-month undercover investigation of a dog-fighting ring. In spring 1975, the investigation resulted in the arrest of 25 people and the confiscation of 101 dogs. Of the 23 people convicted, none went to prison, and the maximum fine imposed was \$250. Several of the dogs had to be destroyed; 12 were returned to their owners. The vice squad has

The qualified property status advocated by Blackstone afforded owners of these versatile animals inadequate protection.⁴² Therefore the courts have since declared cats and dogs to be property, of which an owner may not be deprived without due process of law.⁴³

Theoretically, protection is provided for dogs, cats, and other non-humans by humane statutes and anti-cruelty laws.⁴⁴ Advocates of rights for nonhumans have argued that, in truth, the statutes are "to preserve the moral standards of human beings rather than to prevent the abuse of other living creatures."⁴⁵

That these laws were ever meant to protect the interests of non-humans is highly questionable.⁴⁶ For example, under California law, cruelly killing or injuring a nonhuman animal is a felony if the animal belongs to another person.⁴⁷ However, the same act constitutes a mere misdemeanor when the killer is the animal's owner.⁴⁸ The explanation for the disparity in penalties is that nonhumans are valued not as independent entities, but rather as objects to serve human desires.⁴⁹ The law is concerned with deprivation of property, not with the harm done to the nonhuman.⁵⁰ Thus, when a nonhuman is stolen or killed by a third party, her owner has a civil action for the value of the nonhuman.⁵¹ How-

information that these people have resumed dog-fighting events, which can earn the owner from \$300 to \$500 each fight. Telephone interview with Deputy Andrew Garcia, Sheriff's Dep't, Los Angeles, Ca. (April 1976).

42. *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1897); *Sabin v. Smith*, 26 Cal. App. 676, 147 P. 1180 (1915). These cases are illustrative of the inadequacy of the qualified property status.

43. *Fucelli v. ASPCA*, 23 N.Y.S.2d 983, 984 (N.Y. City Ct. 1940). See also *Jenkins v. Ballantyne*, 8 Utah 245, 30 P. 760 (1892).

"Dogs are personal property, and their value is ascertained in the same manner as other property." CAL. PENAL CODE § 491 (West 1976).

44. E.g., CAL. PENAL CODE § 597-597.2 (West Supp. 1976) defines forms of cruelty and the penalties and duties imposed on owners and humane officers. See *Legal Rights for Animals*, supra note 5, at 220-25.

45. COMMITTEE FOR HUMANE LEGISLATION, INC., MODEL STATE ANIMAL PROTECTION STATUTES (undated). The Committee, based in Washington, D.C., is composed of private citizens, lawyers, and lobbyists working to obtain more realistic protection for nonhumans. One of their proposals is establishing a State Department of Animal Protection. See Nelson, *Duties to Animals*, in ANIMALS, MEN AND MORALS 149 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972); *Legal Rights for Animals*, supra note 5, at 228.

46. See Nelson supra note 45, at 149; *Legal Rights for Animals*, supra note 5, at 228.

47. CAL. PENAL CODE § 597(a) (West Supp. 1976).

48. Id. § 597(b).

49. S. Godlovitch, *Utilities*, in ANIMALS, MEN AND MORALS 177 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

50. See, e.g., *Roos v. Loeser*, 41 Cal. App. 782, 183 P. 204 (1919). See generally MASS. GEN. LAWS ANN. ch. 272, § 85A (West 1970); MICH. COMP. LAWS ANN. § 287.287 (1967).

51. See, e.g., *Sabin v. Smith*, 26 Cal. App. 676, 679, 147 P. 1180, 1181

ever, claims that nonhumans should possess rights of their own are ridiculed through sarcasm or attempts at humor.⁵²

Neither the case law nor the present humane statutes and anti-cruelty laws operate to assure nonhumans the rights they need and deserve. As one commentator notes: "Real protection in our legal system . . . involves more than protection as mere property. It involves the right to be heard, the right to be treated as having a unique worth."⁵³

WHY NONHUMANS SHOULD HAVE LEGAL RIGHTS

Probably the chief obstacle to recognizing legal rights for nonhumans has been the difficulty of delineating logical boundaries. This difficulty consists of two components: that of identifying which species should enjoy legal rights and that of identifying what those rights should be.

Identifying the Species: The Inadequacies of Present Criteria for Holders of Rights

Presently, humans are the only species possessing comprehensive legal rights. This sharp dichotomy between humans and nonhumans is based on justifications that are arbitrary and unsound.⁵⁴ That nonhumans should qualify as holders of rights does not imply that they should possess every right applicable to humans.⁵⁵ However, under contemporary standards nonhumans are denied practically all rights.⁵⁶ The following discussion examines the validity

(1915); II, W. BLACKSTONE, COMMENTARIES 1241 (W.C. Jones ed. 1916).

52. One judge noted: "It may be that 'every dog has his day'; but if so, it is only a 'dog day' and does not entitle him to claim the rights of persons." *People v. Fimbres*, 107 Cal. App. 778, 781, 288 P. 19, 20 (1930). Another judge, casually dismissing a claim that dogs have rights, said: "In these observations, though rather *dog-matically* asserted, we think no one of ordinary experience in the common, all-around affairs of this mundane sphere will hesitate to *con-cur*." *In re Ackerman*, 6 Cal. App. 5, 13, 91 P. 429, 433 (1907) (emphasis by court).

53. *Legal Rights for Animals*, *supra* note 5, at 228.

54. One author declared that because humans possess the right to life, nonhumans should have the same right, for in both cases the right rests on the same facts—"namely being alive" and sentient. Brophy, *In Pursuit of a Fantasy*, in *ANIMALS, MEN AND MORALS* 126 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

55. Stone makes this point about the logical limit of rights to be given the natural environment. C. STONE, *supra* note 1, at 10.

56. SINGER, *supra* note 3, at ix.

of various arguments which have been advanced to justify the denial of rights to nonhumans.

One argument often made is that the inferior intelligence of nonhumans justifies depriving them of all legal rights.⁵⁷ There are several defects in this theory. First, the legal rights of a species should not be determined exclusively by its *average* intelligence.⁵⁸ Although the average human intelligence exceeds that of the average nonhuman, there are humans who function on levels lower than that of some cats or dogs.⁵⁹ Certainly cats and dogs "have a higher degree of self-awareness and a greater capacity for meaningful relations with others than a severely retarded infant or someone in a state of advanced senility."⁶⁰

Second, the *type* of intelligence possessed by many species is quite similar to that present in humans.⁶¹ The early belief that animals do not reason⁶² is now widely rejected.⁶³ Dr. Wesley Mills expressed what has become the prevailing view: "[E]vidence of reasoning power is overwhelming for the upper ranks of animals, and yearly the downward limits are being extended the more the inferior tribes are studied."⁶⁴ The difference in intelligence between humans and nonhumans is one of degree rather than of kind,⁶⁵ a fact clearly supported by modern scientific knowledge.⁶⁶

57. "We have to ask whether we would consent to be used as mere means by another being far superior to us in strength and intelligence." Nelson, *Duties to Animals*, in *ANIMALS, MEN AND MORALS* 152 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

58. SINGER, *supra* note 3, at 4-5.

59. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 311 (1907).

60. SINGER, *supra* note 3, at 22.

61. C. DARWIN, *DESCENT OF MAN* 193 (1871); Salt, *The Rights of Animals*, 10 *INT'L J. ETHICS* 206, 207 (1900).

62. Descartes considered that nonhumans are machines, having no ability to reason and therefore no capacity to feel pain. R. DESCARTES, *DISCOURSE ON METHOD* 46-48 (P. Olscamp trans. 1965).

63. "Formerly, the line was drawn at reason. It was said that the brutes cannot reason. Only persons who do not themselves reason about the subject, with the facts before them, can any longer occupy such a position." Salt, *The Rights of Animals*, 10 *INT'L J. ETHICS* 206, 209 (1900), quoting Dr. Wesley Mills. Salt noted that the word *brute*, which connotes *irrational*, is a misnomer when applied to the more intelligent species. See R. LEWIN-SOHN, *ANIMALS, MEN AND MYTHS* 193 (1954); L. ROSENFELD, *FROM BEAST-MACHINE TO MAN-MACHINE* 8 (1941); SINGER, *supra* note 3, at 218-20; Regan, *The Moral Basis of Vegetarianism*, 5 *CAN. J. PHILO.* 180, 184 (1975); *Legal Rights for Animals*, *supra* note 5, at 207.

64. Salt, *The Rights of Animals*, 10 *INT'L J. ETHICS* 206, 209 (1900).

65. *Id.* at 207; L. ROSENFELD, *FROM BEAST-MACHINE TO MAN-MACHINE* 132 (1941).

66. E. THORNDIKE, *ANIMAL INTELLIGENCE, EXPERIMENTAL STUDIES* 284-85 (1911).

Even if all humans were more intelligent than all nonhumans, and even if the differences were ones of kind rather than of degree, a more fundamental problem with the intelligence theory exists: Intelligence should not be determinative of legal rights.⁶⁷ The American system of law and government has always implicitly recognized that legal rights should not depend on inherent inequalities among people. There is a great variety of human characteristics. Certain humans are more intelligent than others; certain lives are more fulfilling than others; certain lives are more valuable to society than others. Nevertheless, the American legal system has always recognized that the law must treat people equally.⁶⁸

Robert Nozick, in *Anarchy, State, And Utopia*, offers an analogy in which earth is visited by extraterrestrial beings who have developed fourteen stages past the present development of earth's humans.⁶⁹ Consistency with the present treatment of nonhumans would compel the conclusion that humans could be sacrificed for the benefit and comfort of these beings.⁷⁰ If, however, it is unjustifiable for beings to exploit other beings because of differences in intelligence, our legal and moral treatment of nonhumans must be reappraised.

Equality is a moral idea, not an assertion of fact. There is no logically compelling reason for assuming that a factual difference in ability between two people justifies any difference in the amount of consideration we give to their needs and interests. *The principle of the equality of human beings is not a description of an alleged actual equality among humans: it is a prescription of how we should treat humans.*⁷¹

A second argument often raised to defend the rightlessness of nonhumans is that they do not possess the human form.⁷² One author⁷³ has imagined the development of a chemical which, if injected into the brain of a kitten, would cause its mind to develop similarly to that of a human. If, at maturity, this being has the

67. Brophy, *In Pursuit of a Fantasy*, in ANIMALS, MEN AND MORALS 129 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972). See THE DECLARATION OF INDEPENDENCE (1776).

68. "We hold these truths to be self-evident, that all men are created equal . . ." THE DECLARATION OF INDEPENDENCE (1776).

69. R. NOZICK, ANARCHY, STATE, AND UTOPIA 46 (1974).

70. *Id.* at 46; Nelson, *Duties To Animals*, in ANIMALS, MEN AND MORALS 152 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

71. SINGER, *supra* note 3, at 5.

72. *Id.* at 21.

73. Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37 (1972).

physical form of a cat and the intellectual capacity of a human, would treating her as mere property be morally or legally justifiable?⁷⁴ Could it be said that she has no right to life?

That physical form should not determine the existence of rights can be illustrated in another way. If a human has some gross deformity, would killing her be permissible because of her dissimilarity to the human form? Obviously, the answer is in the negative, and thus the physical form argument collapses.

Another justification for denying rights to nonhumans is rooted in the concept of spirituality. A widely held belief is that nonhumans do not possess souls and that this difference justifies disparate treatment.⁷⁵ Because the concept of soul is so nebulous, this argument is difficult to address. While Western religious theorists have stated that only humans have souls, certain religions, notably Jainism and Hinduism, ascribe souls to all beings and objects.⁷⁶ The question arises about which belief, if either, is correct. Further, in order to understand whether soul is present in humans but not in nonhumans, it is necessary to define precisely what soul is.⁷⁷ Lastly, even if all these questions were answerable, a problem similar to that engendered by the intelligence theory would arise: Why is the presence or absence of soul a basis for determining legal rights?⁷⁸

A final justification for ignoring the rights of nonhumans has been a belief that nonhumans are unable to communicate. This attitude has not been directed solely at nonhumans. One writer noted that "[t]he common practice of disregarding the interests of barbarians has been justified on the very grounds that communication with them was impossible."⁷⁹

The fact that nonhumans do communicate is more significant

74. *Id.* at 60.

75. SINGER, *supra* note 3, at 21 n.*.

76. M. STEINBERG, *BASIC JUDAISM* 160-61 (1947). "The human soul first came about at the critical point of evolution when a primate became able to reflect on himself—and hence became human, a man, free and immortal" A. WILHELM, *CHRIST AMONG US* 24 (1973). The belief that all matter possesses souls was emphasized by the Jains and has had considerable influence on Indian thinking in general. A. EMBREE, *THE HINDU TRADITION* 71 (1966).

77. SINGER, *supra* note 3, at 21 n.*. See also R. COPLESTON *BUDDHISM* (1892); M. FAKHRY, *A HISTORY OF ISLAMIC PHILOSOPHY* (1970); B. RAY, *AFRICAN RELIGIONS* (1976). Each of these authors discusses soul, but none defines it.

78. SINGER, *supra* note 3, at 21 n.*.

79. Peters, *Nature and Culture*, in *ANIMALS, MEN AND MORALS* 219 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

than the form such communication takes.⁸⁰ Communication is effected through a whole complex of visual, auditory, tactile, and olfactory signals.⁸¹ For example, in dogs, wolves, and other canids, the tail is used as a visual signal. An erect tail indicates arousal; a lowered tail may be a sign of submission; a wagging tail is a sign of happiness and greeting.⁸² Dogs also use urination and defecation to communicate certain facts to others. The scent itself indicates which dog had been nearby, and freshness indicates how often and when that dog had been in the area.⁸³ Barking may signify a need for attention or the presence of a territorial rival; barking, growling, whining, and yelping are all vocalizations used to express distress.⁸⁴

Jane Goodall, in her studies of chimpanzees, found that three sounds in particular are functional in coordinating the mother-infant relationship: "the 'hoo' whimper, the scream, and the 'soft bark.'"⁸⁵ These sounds are combined with various facial and postural signals. Thus, an infant separated from her mother and seeking to reestablish physical contact would make a "pout-face" in conjunction with a "hoo" whimper.⁸⁶

As a third example, scientists have begun to study the sounds made by whales. Sounds of baleen whales are generally low frequency; the highest sound is that of the humpback whale.⁸⁷ Humpbacks are one of the few whale species whose sounds have been recorded.⁸⁸ While there is no authenticated case of vocal communication among whales, or between humans and whales,⁸⁹ scientists

80. T. SEBEOK & A. RAMSAY, *APPROACHES TO ANIMAL COMMUNICATION* 73 (1969).

81. S. ALTMANN, *SOCIAL COMMUNICATION AMONG PRIMATES* 330 (1967). Altmann notes that humans, like nonhumans, frequently rely on "nonlinguistic cues." *Id.* at 328. See also T. SEBEOK & A. RAMSAY, *APPROACHES TO ANIMAL COMMUNICATION* 181 (1969).

82. M. FOX, *BEHAVIOUR OF WOLVES, DOGS AND RELATED CANIDS* 194 (1971).

83. *Id.* at 189.

84. *Id.* at 185. See H. FINK, *MIND AND PERFORMANCE* 35 (1954).

85. van Lawick-Goodall, *Mother-Offspring Relationships in Free-ranging Chimpanzees*, in *PRIMATE ETHOLOGY* 331 (D. Morris ed. 1967).

86. *Id.* at 332.

87. Interview with Dr. William Cummings, Naval Undersea Center, in San Diego, Ca. (Nov. 1976).

88. Hill, *Vanishing Giants*, 77 *AUDUBON* 56, 76 (1975).

89. Dr. Cummings stressed that studies done to date do not present conclusive evidence of communication, but because of whales' large variety of sounds and their propensity for sound, we can judge that communication is occurring. Interview with Dr. Cummings, *supra* note 87.

continue to study whales, believing that such communication occurs.⁹⁰ For instance, scientists have succeeded in using sounds of the killer whale, a fierce predator, to intimidate other whales.⁹¹ In playing the sounds of the killer to migrating California gray whales, researchers find that the gray whales head in the opposite direction to avoid the source of the sound. Similar experiments have shown that when the sound of killer whales is played to other whales, avoidance tactics occur.⁹² Some species make signals which members of other species are able to understand.⁹³ The ways in which nonhumans convey fear or other emotions to humans are similar to the ways in which humans convey such emotions to one another.⁹⁴ This fact is a reminder that nonhumans do experience emotions and that these emotions are often expressed in ways not so different from our own.

Descriptions of nonhuman communicatory systems are endless: It is hoped the preceding examples will suffice to show the subtle and complex patterns employed to communicate both verbal and non-verbal messages. As humans study and learn to understand nonhuman communicatory forms, this justification for rightlessness makes progressively less sense.

The failure of three of the above justifications—intelligence, physical form, and language—was noted by Jeremy Bentham, who wrote:

The day *may* come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose they were otherwise, what would it avail? The question is not, Can they *reason?* nor Can they *talk?* but, Can they *suffer?*⁹⁵

90. See note 87 *supra*. See also Hill, *supra* note 88.

91. See note 87 *supra*.

92. *Id.* Dr. Cummings has noted this behavior in all experiments.

93. Peters, *Nature and Culture*, in *ANIMALS, MEN AND MORALS* 219 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

94. *Id.* at 220.

95. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 311 (1907).

Identifying the Species: The Formation of More Rational Standards

If the criteria of intelligence, physical form, spirituality, and ability to communicate are logically irrelevant to the determination of whether an organism should have legal rights, the question arises of what the criteria should be. Several noted philosophers have advanced ideas applicable in this context.

Jeremy Bentham offered a rational and compassionate criterion—the ability to feel pain.⁹⁶ No reason exists to think that humans are more sensitive to physical pain than are higher forms of non-human life.⁹⁷ The nervous systems of all vertebrates are similar.⁹⁸ In the higher vertebrates, the center for all sensory input is the thalamus, a portion of the diencephalon lying in the forebrain. Scientists rely on this similarity for the many experiments they perform on nonhumans in order to benefit humans.⁹⁹

Furthermore, while nonhumans cannot verbalize their pain, they can show it in a fashion quite similar to that of humans—facial contortions, body movements, screams and moaning noises, and “attempts to avoid the source of the pain [and] the appearance of fear at the prospect of its repetition.”¹⁰⁰

Some may argue that a human suffers more because of a better memory of pain and the ability to anticipate.¹⁰¹ However, the opposite can occur. If a human was placed in a cage, she could amuse herself by reading a book and could understand the reason for her confinement. But a lioness, wild from birth, would be unable to comprehend the reason for her imprisonment or the intentions of her captors. Thus, her terror and anguish would be greater.¹⁰²

96. *Id.*

97. SINGER, *supra* note 3, at 17; Harris, *Killing for Food*, in ANIMALS, MEN AND MORALS 103 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972); Salt, *The Rights of Animals*, 10 INT'L J. ETHICS 206, 230 (1900).

98. C. PROSSER, *COMPARATIVE ANIMAL PHYSIOLOGY* 666 (1973). See A. ROMER, *THE VERTEBRATE BODY* 502 (1970); J. WILSON, *PRINCIPLES OF ANIMAL PHYSIOLOGY* 427 (1972).

99. Although the human brain is more developed than that of other species, the major difference is in the cerebral cortex, which controls the thinking process. Feelings and impulses are controlled by the diencephalon, which is also well developed in other mammals and birds. M. GORDON, *ANIMAL FUNCTION: PRINCIPLES AND ADAPTATIONS* 467 (1968).

100. SINGER, *supra* note 3, at 12. See Regan, *The Moral Basis of Vegetarianism*, 5 CAN. J. PHIL. 181, 186 (1975).

101. SINGER, *supra* note 3, at 18.

102. *Id.*; Brophy, *In Pursuit of a Fantasy*, in ANIMALS, MEN AND MORALS 129 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

Because many nonhumans are capable of suffering¹⁰³ and because they reason,¹⁰⁴ these nonhumans have interests:¹⁰⁵ It is in their interest to avoid pain and suffering.¹⁰⁶

The ability to desire or to have interests is the criterion for rights set forth by Michael Tooley in his discussion, *Abortion and Infanticide*.¹⁰⁷ Tooley begins by defining a person "as a purely moral concept, free of all descriptive content."¹⁰⁸ To have a serious right to life, an organism, whether human or nonhuman, must be a "person." Tooley examines whether either a fetus or a very young infant could satisfy his definition of person.¹⁰⁹ He argues that in order to have a right to something, the individual must be able to desire the thing:

[If] A is the sort of thing that is a subject of experiences and other mental states, A is capable of desiring X, and if A does desire X, then others are under a prima facie obligation to refrain from actions that would deprive him of it.¹¹⁰

Tooley calls his cut-off point the achievement of "self-consciousness."¹¹¹ An organism is a "person," possessing a serious right to life, when it is able to conceptualize about its own "self as a continuing subject of experiences and other mental states"¹¹² and has the capability of desiring to continue as such an entity. Present human morality recognizes a right not to be tortured, but not a right to life for nonhumans. Under Tooley's definition, most higher forms would have a serious claim to the right of life.¹¹³

Darwin, in his revolutionary theory on the close relationship between humans and nonhumans, said:

We have seen that the senses and intuitions, the various emotions and faculties, such as love, memory, attention, and curiosity, imitation, reason, etc., of which man boasts, may well be found in an incipient, or even sometimes in a well-developed condition, in the lower animals.¹¹⁴

Although Darwin did not propose that these properties be used as a basis for conferring legal rights, his statement does suggest an-

103. Brophy, *In Pursuit of a Fantasy*, in *ANIMALS, MEN AND MORALS* 129 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

104. See note 61 *supra*.

105. SINGER, *supra* note 3.

106. *Id.*

107. Tooley, *Abortion and Infanticide*, 2 *PHILO. & PUB. AFF.* 37 (1972).

108. *Id.* at 40.

109. *Id.* at 50-51.

110. *Id.* at 45.

111. *Id.* at 50.

112. *Id.* at 44.

113. *Id.* at 37.

114. C. DARWIN, *DESCENT OF MAN* 193 (1871).

other approach. The weighing of all the characteristics Darwin cites could arguably serve as a way of determining which species should have rights. Again, the higher forms of nonhuman life readily fit within the meaning of the above-quoted passage. Any one of the above criteria—Bentham's pain theory, Tooley's desire theory, or the collective approach following from Darwin—compels the conclusion that nonhuman animals should be accorded legal rights.

Identifying the Rights

Once it is concluded that certain nonhuman animals should have legal rights, the question arises about which rights they should have. It is impossible to catalog with specificity the precise rights which each species should enjoy. Presumably these rights will be developed by the legislatures and judiciary in much the same manner in which definitions of human rights have evolved.¹¹⁵ The general principles which define these rights can be demonstrated by analogizing to human legal rights. For example, because humans are alive and sentient, the Declaration of Independence announced a right to be alive and to follow the pleasure-pain principle.¹¹⁶ "Life, Liberty and the pursuit of Happiness"¹¹⁷ were found to be rights possessed by humans. That nonhumans are alive and sentient should logically imply that they too have a basic right to life and freedom from unwarranted pain and suffering.¹¹⁸

Rights should reflect the interests of the holder.¹¹⁹ Differences between humans and nonhumans would generate different rights for each. Concern for the well-being of a child may require that the child be educated. Concern for the well-being of a pig would require merely that the pig be left with other pigs in a place with adequate food and space to roam freely.¹²⁰

115. Burr discusses the feasibility of several specific rights for nonhumans. He considers giving nonhumans access to the courts through legal guardians so that nonhumans could sue for their own injuries. *Legal Rights for Animals*, *supra* note 5, at 228. Also, nonhumans could be given the right to enforce the present anti-cruelty statutes through equitable actions. *Id.* at 229-30. Burr also advocates creating a new tort at common law, the tort of inflicting pain on an animal. *Id.* at 230-31.

116. Brophy, *In Pursuit of a Fantasy*, in *ANIMALS, MEN AND MORALS* 126 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

117. *Id.* at 127.

118. SINGER, *supra* note 3, at 21-24; Brophy, *In Pursuit of a Fantasy*, in *ANIMALS, MEN AND MORALS* 128 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972).

119. SINGER, *supra* note 3, at 2-7.

120. *Id.* at 6.

But the basic element—the taking into account of the interests of the being, whatever those interests may be—must, according to the principle of equality, be extended to all beings, black or white, masculine or feminine, human or nonhuman.¹²¹

Nothing contained in this Comment should be construed as a suggestion that the legal rights of nonhumans must be absolute. Just as some of the most basic human rights may be limited,¹²² so too would the rights of nonhumans have certain boundaries. Subject to reasonable restrictions, the rights of nonhumans should reflect their interest in life and their corollary interests in food, care, and maintenance. The crucial point, regardless of the specific right involved, is that nonhumans are entitled to equal consideration based on their individual characteristics;¹²³ they should be recognized as holders of legal rights.¹²⁴

A GUARDIANSHIP MODEL FOR DOGS AND CATS

If nonhumans are to have certain rights, and if each species is to have rights consistent with its interests, a system must be devised which implements the rights of each species. Domesticated dogs and cats are two species which meet the criteria for holders of legal rights.¹²⁵ They are a higher form of life, having the ability to feel and express their pain and pleasure, and the ability to reason and to desire. In recognition of these abilities, the law should afford them legal rights.

The existing statutes¹²⁶ fail in this regard, for they are based on the assumption that inflicting suffering on nonhumans tends to corrupt humans. Their focus on human morality diverts the statutes from what should be their true purpose—effective protection of the nonhuman.

121. *Id.*

122. *E.g.*, the right to life may be taken away upon the conviction of certain crimes. *Gregg v. Georgia*, 96 S. Ct. 2971 (1976). The state may, for compelling reasons, limit an individual's freedom of expression. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Cohen v. California*, 403 U.S. 15 (1971).

123. See SINGER, *supra* note 3, at 6.

124. *Legal Rights for Animals*, *supra* note 5, at 227-29. Also, Stone lists three criteria for a holder of legal rights which can be applied to nonhumans as well as to the environment. "First, that the thing can institute legal actions at its behest; second, that in determining the granting of legal relief, the court must take *injury to it* into account; and, third, that relief must run to the *benefit of it*." C. STONE, *supra* note 1, at 11-12.

125. See note 15 *supra*.

126. See, *e.g.*, CAL. PENAL CODE §§ 597-99 (West 1970 & West Supp. 1976); MASS. GEN. LAWS ANN. ch. 272, §§ 77-95 (West 1970 & West Supp. 1976); MICH. COMP. LAWS ANN. § 750.49-.70 (Supp. 1976); N.Y. AGRIC. & MKTS. LAW §§ 353-376 (McKinney 1972).

This preoccupation with human interests is reinforced by the fact that dogs and cats are considered property. When a nonhuman is injured, recovery goes not to the nonhuman, but to her "owner."¹²⁷ Moreover, in many jurisdictions, if a nonhuman is injured or killed by her owner, the punishment of that owner is significantly less stringent than it would have been had a third party committed the same act.¹²⁸ Thus, it is the nonhuman's worth to a human, not her individual worth, which determines the sanction. Lastly, because they are considered property, nonhumans may be used by the state for medical research.¹²⁹ These nonhumans are outside the general application of the anti-cruelty statutes.¹³⁰ Therefore, any sort of atrocity may be and is performed on laboratory animals.¹³¹ Although the guardianship model would not preclude research for important medical needs, it would at least assure that those needs be balanced against the dog's or cat's interest in life.

A further shortcoming of the anti-cruelty statutes is that they are designed neither to anticipate nor to prevent cruelty.¹³² They are activated only after the fact, when the dog or cat has already suffered the damage.¹³³ This situation emphasizes that their focus is on punishing the human rather than protecting the nonhuman.¹³⁴

As an alternative, this Comment proposes a legislative change of status for dogs and cats, removing them from the property category, and a guardianship model to implement their rights. Because anti-

127. See note 51 *supra*.

128. See, e.g., CAL. PENAL CODE § 597 (West Supp. 1976). The Michigan and Massachusetts statutes make no such distinction. The New York statute does not differentiate on the basis of ownership, but rather on the basis of usefulness of a domestic animal. While cruelty to animals is generally a *misdemeanor* (e.g., N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1972)), injury to or destruction of a domestic animal used for racing, breeding, or competitive exhibition is a *felony*. E.g., N.Y. AGRIC. & MKTS. LAW § 361 (McKinney Supp. 1976).

129. CAL. HEALTH & SAFETY CODE §§ 1650-73 (West 1970); MASS. GEN. LAWS ANN. ch. 49A, §§ 1-10 (West 1976); MICH. COMP. LAWS ANN. § 287.381-.394 (1976); N.Y. PUB. HEALTH LAW §§ 504-5 (McKinney 1971).

130. In New York, laboratory animals are specifically exempted by statute. N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1972). In California, unclaimed, impounded dogs and cats may, under city ordinances, be sent to both public and private laboratories. There is no meaningful regulation of the researchers to ensure humane treatment. *Simpson v. Los Angeles*, 40 Cal. 2d 271, 253 P.2d 464, *appeal dismissed*, 346 U.S. 802 (1953).

131. SINGER, *supra* note 3, at 28-95.

132. *Legal Rights for Animals*, *supra* note 5, at 226.

133. See note 124 *supra*.

134. *Legal Rights for Animals*, *supra* note 5, at 226.

cruelty statutes remain the "real heart of animal protection in this country,"¹³⁵ they should be retained to supplement the recent proposals made by advocates of rights for nonhumans.¹³⁶ Each of these proposals views the nonhuman as an independent holder of rights.

The essence of guardianship is "care and compassion"¹³⁷ and an acceptance of responsibility for both the physical and mental well-being of the ward.¹³⁸ The guardian is the protector of the ward, who by reason of "weakness, incompetence, youthfulness, or other legally recognized disability,"¹³⁹ needs an intermediary to put her on more equal footing with the rest of society.

The primary advantage of the guardianship model is that the basic principles are already well defined and have long been used throughout the country as a means of protecting those who are incapable of asserting their rights. Additionally, the change of status from personal property to ward recognizes dogs and cats as holders of legal rights and should prompt legislators to enact laws with more stringent penalties for crimes committed against nonhumans. Most important is the psychological impact on humans of recognizing the individual worth of other sentient beings.

At present, any natural person or nonprofit corporation may act as a guardian.¹⁴⁰ Under existing law, there are two types of wards, minors and mental incompetents.¹⁴¹ Considering dogs and cats another type of ward is not difficult. The problem lies in defining who the guardian should be and how the guardianship procedure should operate.

In the case of minors, the parent is defined as the natural guard-

135. *Id.*

136. *Id.* at 205; COMMITTEE FOR HUMANE LEGISLATION, INC., MODEL STATE ANIMAL PROTECTION STATUTES (undated). "On Jan. 22, [1977] delegates of animal protection associations from many countries will meet in Paris to prepare the presentation of the charter entitled Universal Declaration of the Rights of Animals to UNESCO." The Charter stresses that "vivisection must neither mutilate nor cause pain" and bans "bull-fighting, safaris, hunting, pigeon-shooting, and cockfighting," condemning these activities as biocide. The Minneapolis Star, Dec. 25, 1976, § A, at 4, cols. 1-3.

137. J. JEFFREY, THE GUARDIANS HANDBOOK (INCOMPETENT) 37 (1971).

138. *Id.*

139. R. MACKAY, GUARDIANSHIP AND THE PROTECTION OF INFANTS 7 (1957). See also R. ALLEN, E. FERSTER, & J. RUBIN, READINGS IN LAW AND PSYCHIATRY 439 (1975).

140. *E.g.*, CAL. PROB. CODE § 1400 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 201, § 6 (West Supp. 1976); MICH. COMP. LAWS ANN. § 330.1628 (1975); N.Y. Surr. Ct. Proc. Act § 1703 (McKinney 1967), § 1754 (McKinney Supp. 1976).

141. *E.g.*, CAL. PROB. CODE § 1400 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 201, § 1 (West Supp. 1976); MICH. COMP. LAWS ANN. §§ 330.1602 & 703.1 (1976); N.Y. Surr. Ct. Proc. Act § 1701 (McKinney 1967), § 1750 (McKinney Supp. 1976).

ian of the child.¹⁴² A parent who is unable to carry out his or her duties may be replaced through the appointment of a general guardian for the minor.¹⁴³ Similarly, courts have power to appoint a guardian over someone who is found to be mentally incompetent.¹⁴⁴

One approach to extending the guardianship model to dogs and cats is to broaden the definition of natural guardian to include the human who has elected to take responsibility for the care and well-being of a nonhuman. This guardianship would commence when the human manifested some intent to protect the nonhuman, either through "adoption" from a pound or animal shelter or through transfer from another human. Neither a formal adoption procedure nor a court appointed guardian seems feasible, for most humans would probably decline to go through the expense and effort involved in those procedures in order to have a cat or dog live with them.

Although the parent-offspring relationship does not exist, the human guardian could be viewed as a "natural guardian" of the nonhuman in the sense that the human has evolved into the "natural" companion and protector of cats and dogs in modern society.¹⁴⁵ Alternatively, the relationship between humans and nonhumans could be considered a "quasi-guardianship."¹⁴⁶ A quasi-guardian would stand in much the same position as a court appointed guardian, representing the ward in legal actions and caring for the basic necessities of the ward.¹⁴⁷

142. This idea is a product of case law. *Stinson v. Meegan*, 319 Mass. 682, 67 N.E.2d 465 (1946); *Paton v. Paton*, 363 Mich. 192, 108 N.W.2d 876 (1961). See R. MACKEY, *GUARDIANSHIP AND THE PROTECTION OF INFANTS* 14 (1957).

143. *E.g.*, CAL. PROB. CODE § 1440 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 201, § 2 (West Supp. 1976); MICH. COMP. LAWS ANN. § 703.2-3 (1976); N.Y. CIV. PRAC. LAW § 1210 (McKinney Supp. 1976).

144. *E.g.*, CAL. PROB. CODE § 1460 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 201, § 1 (West Supp. 1976); MICH. COMP. LAWS ANN. § 330.1604 (1975); N.Y. SURR. Ct. Proc. Act § 1750 (McKinney Supp. 1976).

145. Some objection may be made to this expansion of the concept. Such a change would probably have to be effected by statute, for courts have condemned as careless any extension of the term *guardian*. H. TAYLOR, *LAW OF GUARDIAN AND WARD* 32 (1935).

146. *Id.* In an early Missouri case, the court refused to recognize a natural guardianship in anyone other than the father or mother of a child. The court employed the term *quasi-guardian* to describe the grandmother who had cared for the minor and who had exercised control over the minor's estate. *Stetina v. Bergstein*, 204 Mo. App. 366, 370, 221 S.W. 420, 421 (1920).

147. H. TAYLOR, *LAW OF GUARDIAN AND WARD* 69 (1935).

The guardian's general duties would apply to a guardian of the dog or cat. These duties would include the obligation to provide care and custody¹⁴⁸ and the right to sue on behalf of the ward,¹⁴⁹ with recovery going to the ward. Such a scheme would result in the creation of property rights for dogs and cats. The court granting recovery to the ward would be required to give the general guardian or some other person or entity the responsibility of prudent management of the funds for the ward's benefit.¹⁵⁰

The safeguards provided for minors and mental incompetents in the guardianship system could be adapted to dogs and cats. In the event that a guardian abused her ward or a third person injured the ward and the guardian failed to act, a responsible animal protection organization could be designated guardian *ad litem* by the court.¹⁵¹

148. *E.g.*, CAL. PROB. CODE § 1500 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 201, § 5 (West Supp. 1976); MICH. COMP. LAWS ANN. § 703.7 (1976), § 703.8 (Supp. 1976); N.Y. DOM. REL. LAW § 82 (McKinney 1964); N.Y. Surr. Ct. Proc. Act § 1751 (McKinney Supp. 1976).

149. *See* CAL. PROB. CODE § 1501 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 201, § 37 (West Supp. 1976); MICH. COMP. LAWS ANN. § 703.18 (1968).

150. For examples of state statutes governing the duty of the guardian to care for the property of the ward, see CAL. PROB. CODE § 1502 (West 1956); MASS. GEN. LAWS ANN. ch. 201, § 12 (West Supp. 1976); MICH. COMP. LAWS ANN. § 703.17 (1968); N.Y. Surr. Ct. Proc. Act § 1723 (McKinney Supp. 1976).

At present, some states allow a wrongful death action. *E.g.*, MASS. GEN. LAWS ANN. ch. 272, § 85A (West 1970), under which, if the dog is killed, maimed, or enticed or carried away, the owner has a tort action against the wrongdoer for three times the value of the dog. *See also* MICH. COMP. LAWS ANN. § 287.287 (1967). Standing should be extended to interested animal rights organizations to sue for the wrongful death of individuals or large groups of animals.

A problem will occur when, during the lifetime of the ward, the guardian sues on behalf of the ward and recovers. Because the ward is the legal holder of the property, the ward's death will require disposition of the property. Cases will arise in which the guardian has given lifelong care and support to the ward and thus will justly deserve this "inheritance." Nevertheless, giving the guardian an expectancy in the ward's property may encourage many untimely deaths of dogs and cats. Additionally, claims may come from guardians of cats and dogs who are related to the decedent. The problem of how to dispose of the property of the decedent is difficult. The best solution may be to provide for reversion to nonprofit organizations who represent animals' rights.

151. California provides for guardians *ad litem* in CAL. CIV. CODE § 42 (West 1954); CAL. CIV. PROC. CODE § 372 (West 1973); CAL. PROB. CODE § 1607 (West 1957). *Compare* CAL. PROB. CODE § 1401 (West 1976); MASS. GEN. LAWS ANN. ch. 201, § 34 (West 1958); MICH. COMP. LAWS ANN. § 703.12 (1968), § 330.1616 (1975); N.Y. CIV. PRAC. R. 1202 (McKinney 1963); N.Y. Surr. Ct. Proc. Act § 403 (McKinney Supp. 1976). Various organizations exist that could represent the interests of nonhumans, including the United Action for Animals, Fund for Animals, and Friends of Animals.

This organization would sue on behalf of the injured dog or cat.¹⁵²

The guardian could be removed by the court for failure to properly care for the ward. Absent such failure, the guardianship would terminate either when the ward dies or when the guardian is incapable or unwilling to continue in that capacity.¹⁵³ The guardian would be permitted to transfer the guardianship to some other human.

The guardianship model is analogous to the ideas of Justice Douglas as expressed in his dissenting opinion in *Sierra Club v. Morton*.¹⁵⁴ In that case the Sierra Club, an organization devoted to protecting the environment, sought to challenge federal approval of a massive development project in Mineral King Valley, a scenic area of California. The majority held that the organization itself, without alleging injury to its members, lacked standing to sue. In a creative dissent, Justice Douglas argued that environmental objects should themselves be accorded legal rights.¹⁵⁵ Recognized environmental organizations could then sue on behalf of the natural object.

To support his position, Justice Douglas analogized to other areas of the law in which inanimate objects are recognized as parties in litigation.¹⁵⁶ This legal fiction has been widely applied to ships and to corporations in order to protect their interests.¹⁵⁷ It should apply as well to valleys, rivers, and mountains endangered by modern technology. In the same way, animal rights groups should be allowed to represent the interests of dogs and cats when the need arises, so that these beings will have the chance to be heard.

The guardianship system offers a viable method of extending legal rights to dogs and cats. It gives more effective protection than the present anti-cruelty statutes. Although no law can succeed completely in preventing the abuse which it makes illegal, the

152. Animal protection organizations could also represent classes of animals—e.g., those on farms, those in zoos, and members of endangered species.

153. See generally CAL. PROB. CODE § 1590 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 201 §§ 13 & 33 (West Supp. 1976); MICH. COMP. LAWS ANN. § 330.1636 (1975); N.Y. SURR. CT. PROC. ACT § 1752 (McKinney Supp. 1976).

154. 405 U.S. 727, 741 (1972) (dissenting opinion).

155. *Id.* at 752.

156. *Id.* at 742.

157. *Id.* at 742-43.

guardianship model would accomplish at least two things. First, it would supply an additional deterrent to the abuse of dogs and cats, for through their guardians, dogs and cats would be able to sue for their own injuries. Thus a potential wrongdoer would be faced not only with stiffer criminal penalties but also with civil liability, including medical expenses and damages for pain and suffering. Second, the guardianship model would have the psychological effect of making humans understand that dogs and cats are members of society who deserve and will receive real protection under the law.

CONCLUSION

Although the claim that nonhumans should have rights will seem unlikely to some and absurd to others, philosophers, moralists, scientists, and lawyers have begun to understand that the claim is valid. By engaging in "speciesism,"¹⁵⁸—a belief that all other forms of life are secondary to their own—humans often fail to see how the majority of nonhumans actually live—and die.

The guardianship model for dogs and cats serves as one alternative to the present system. Its purpose is twofold: to emphasize the rights that nonhumans possess independently of human interests and to provide a means by which these rights can be protected.

Nonhuman animals should not be excluded from the equality of treatment and consideration which our society provides for its other members. Thus, it is time for some questions to be asked concerning the rights of nonhuman animals. It is time for a drastic reevaluation of their present status in our legal system.

JOYCE S. TISCHLER

158. SINGER, *supra* note 3, at 7.