

4-20-2013

## Letting the Apes Run the Zoo: Using Tort Law to Provide Animals with a Legal Voice

Tania Rice

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Animal Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Tania Rice *Letting the Apes Run the Zoo: Using Tort Law to Provide Animals with a Legal Voice*, 40 Pepp. L. Rev. Iss. 4 (2013)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol40/iss4/6>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Letting the Apes Run the Zoo: Using Tort Law to Provide Animals with a Legal Voice

- I. INTRODUCTION
- II. IF ANIMALS COULD TALK (OR IF HUMANS COULD LISTEN)
  - A. *The Great Apes*
  - B. *Cetaceans and Elephants*
  - C. *Other Species*
  - D. *New Standards in Scientific Use of Chimpanzees*
- III. ESCAPING THROUGH THE ZOO BARS: CURRENT ANIMAL LAWS
  - A. *Animal Welfare Legislation*
    - 1. Federal Regulation of Animal Practices
    - 2. State Animal Abuse Statutes
    - 3. The Ineffectiveness of the Federal and State Legislation
  - B. *Seeking Judicial Protection*
- IV. A NEW BREED OF IDEAS
- V. CAN WE SPARE THE ZOO KEY?
  - A. *The Rights Approach*
  - B. *The Welfare Approach*
- VI. USING TORT LAW TO BALANCE HUMAN AND NONHUMAN INTERESTS
  - A. *Using a Tort Approach*
  - B. *A Modified Tort: The Wrongful Abuse of an Animal*
  - C. *A Brief Note on Standing*
- VII. CONCLUSION

*"The greatness of a nation and its moral progress can be judged by the way its animals are treated."*

-Mahatma Gandhi

## I. INTRODUCTION

Loulis, still an infant, was found imprisoned in an institution that kept him in a small concrete cell, with no sense of the weather or the time of day outside.<sup>1</sup> The temperature in the cells would drop below fifty degrees Fahrenheit.<sup>2</sup> Loulis's mother had been intentionally infected with the HIV virus, leaving her huddled in the corner, fading away, with metal bolts jutting from her head.<sup>3</sup> It was likely that she could no longer recognize Loulis as her son.<sup>4</sup> Loulis, intelligent enough to feel the pain of loneliness and the unnatural environment, stared through the bars of his cell.<sup>5</sup> Unfortunately for Loulis, he is a chimpanzee, so he had no legal remedy to address his suffering.<sup>6</sup>

This Comment explores the ramifications of giving animals like Loulis rights, or a cause of action, so that they can assert their interests. Due to their advanced cognitive functioning, at least some animals equitably deserve strong protection from unnecessary suffering. Current state and federal law is inadequate in providing that protection. Animal law scholars have suggested that animals should be granted affirmative rights to be able to assert their fundamental interests. Unfortunately, this solution is unlikely to be currently feasible because the American economy relies too heavily on the use of animals, and there would be no way to harness the immense ramifications of animal rights. However, an effective compromise can be reached through the use of a tort cause of action, allowing animals to sue for wrongful abuse.

---

1. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 2 (2001) [hereinafter WISE, RATTLING THE CAGE].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* The institution that held Loulis and his mother, along with other chimpanzees used for research, was the Yerkes Regional Primate Research Center in Atlanta, Georgia. *Id.* Luckily, Loulis was discovered by Roger Fouts, a primatologist. *Id.* Fouts took Loulis to an adoptive mother, Washoe, another chimpanzee who knew sign language and had recently lost a child. *Id.* "Loulis did not want to sleep in Washoe's arms that first night and curled up instead on a metal bench. At four o'clock in the morning, Washoe suddenly awakened and loudly signed 'Come, baby.' The sound jerked Loulis awake, and he jumped into Washoe's arms." *Id.*

But, after years of learning sign language and living with his adoptive family, Loulis faced another challenge that came from lacking legal rights:

As years passed, Fouts realized that Yerkes could call in its loan and put Loulis to the knife, as his mother had been. When Loulis was seventeen years old, Fouts sought to buy him outright. Yerkes agreed to sell for \$10,000, which Fouts didn't have. After strenuous efforts, he raised that amount. But at the last second, a hitch developed. Ten thousand dollars was Loulis's purchase price. As if Yerkes were selling Fouts a desk or chair, Fouts was charged another 7.5 percent in Georgia sales tax.

*Id.* at 3.

Part II of this Comment provides an overview of our current scientific knowledge about the intellectual and emotional capacities of animals.<sup>7</sup> Part III gives an overview of current state and federal laws regarding the common uses of animals and introduces animal rights as an emerging type of law.<sup>8</sup> Part IV describes the two main approaches to animal protection under the law—the welfare approach, which represents the status quo, and the rights approach, which represents a substantial divergence from legal precedent.<sup>9</sup> Part V analyzes the ramifications of each of these approaches.<sup>10</sup> Part VI advocates a modified new tort cause of action as a balance between the welfare- and rights-based approaches.<sup>11</sup> Part VII concludes.<sup>12</sup>

## II. IF ANIMALS COULD TALK (OR IF HUMANS COULD LISTEN)

A lot remains unknown about the minds of nonhuman animals.<sup>13</sup> Attempts to judge intelligence are clouded by the fact that each species “lives in a different world of its own sensory inputs and decoding mechanisms of those inputs.”<sup>14</sup> Different species are intelligent in varied ways, so it would be unfair to compare them only with a human method of intelligence.<sup>15</sup> However, as scientists begin learning to interpret the worlds of other species, scientific developments have shown that animals are a lot more intelligent, and their minds much more like ours, than was previously thought.

These recent insights have fostered a wave of scholarly advocacy asking that society look at animals differently.<sup>16</sup> Like other shifts in societal views, these ideas would become embodied as changes in the legal system.<sup>17</sup> To illustrate the basis for these calls for change, this Section explores the mental capacities of the great apes, cetaceans, elephants, and other species such as farm animals and bees.

---

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

10. *See infra* Part V.

11. *See infra* Part VI.

12. *See infra* Part VII.

13. Although humans are also animals, this Comment uses the terms “nonhuman” and “animal” interchangeably for simplicity.

14. STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* 46 (2003) [hereinafter WISE, *DRAWING THE LINE*].

15. *See id.* at 45–47.

16. *See infra* Part IV.

17. *See infra* Part IV.

### A. The Great Apes

Members of the great ape family, which includes gorillas, orangutans, bonobos, and chimpanzees, are humans' closest relatives.<sup>18</sup> They share between 97% and 98.6% of our genetic code<sup>19</sup> and are similar to us in many ways, possessing "skills, reasoning powers and emotions that were once thought to be uniquely human."<sup>20</sup> They teach, deceive, remember, self-medicate, empathize, use insight to solve problems, use tools, and transmit culture.<sup>21</sup> They also show a wide range of emotion, including grief at the death of loved ones.<sup>22</sup>

Apes' mental aptitude has been well-demonstrated by their learning and communicative achievements in controlled environments. For instance, chimpanzees and orangutans have shown knowledge of conservation of quantities, a logical and mathematical skill equivalent to that gained by human children when they are six or seven years old.<sup>23</sup> Additionally, chimpanzees have the ability to perform simplistic counting, addition with small integers, and even addition of fractions.<sup>24</sup> Further, as an exemplification of apes' language capacity, a bonobo has been able to learn

---

18. Jane Goodall, *Great Apes*, ANIMAL PLANET, <http://animal.discovery.com/fansites/jane-goodall/interactives/greatape/greatape.html> (last visited Oct. 29, 2012).

19. *Id.* Many scientists now think that humans and chimpanzees share 99.5% of working DNA. WISE, DRAWING THE LINE, *supra* note 14, at 182 (citing Morris Goodman et al., *Primate Phylogeny and Classification Elucidated at the Molecular Level*, in EVOLUTIONARY THEORY AND PRACTICE: MODERN PERSPECTIVES 193, 207 (S. P. Wasser ed., 1999)).

20. Paul Eccleston, *Ape Genius Reveals Depth of Animal Intelligence*, THE TELEGRAPH, May 2, 2008, <http://www.telegraph.co.uk/earth/earthnews/3341339/Ape-Genius-reveals-depth-of-animal-intelligence.html> (describing the scientific discoveries depicted in the film *Ape Genius*). "Chimpanzees share biological, physiological, behavioral, and social characteristics with humans . . . ." NATIONAL ACADEMY OF SCIENCES, CHIMPANZEES IN BIOMEDICAL AND BEHAVIORAL RESEARCH: ASSESSING THE NECESSITY 14 (Bruce M. Altevogt et al. eds., 2011).

21. WISE, DRAWING THE LINE, *supra* note 14, at 4.

22. "[C]himpanzees display grief and signs of depression that are reminiscent of human responses to similar situations." NATIONAL ACADEMY OF SCIENCES, *supra* note 20, at 27.

23. WISE, DRAWING THE LINE, *supra* note 14, at 186. The conservation of liquid quantities refers to the concept that the amount of liquid in a container does not change when it is poured into a different-sized container. *Id.* In one test, researchers Josep Call and Philippe Rochat sought to compare this ability in orangutans and human children. *Id.* at 187. The orangutans and children were given a choice of two containers, one of which contained a larger volume. *Id.* The liquid from each container was then poured into two smaller containers of different shapes, making it less clear which one now held the larger volume. *Id.* All four orangutans consistently pointed to the smaller container with the larger volume—they may have done this by remembering and keeping track of the liquid from the original container that held the largest volume or watching the amount poured, or by a keen estimate of volume regardless of the container's shape. *Id.* at 187–88. Most of the children, ranging in age from six years and six months to eight years and eight months, failed the test. *Id.* The researchers believed that this demonstrates superior creative problem-solving abilities in the orangutans. *Id.* at 188.

24. WISE, RATTLING THE CAGE, *supra* note 1, at 188–90.

and understand up to 3000 English words.<sup>25</sup> “[A]pes not only perceive and understand things in the immediate here and now but they also recall things they have perceived in the past and anticipate or imagine things that might happen in the future.”<sup>26</sup>

There is evidence that the great apes have attained self-awareness and theory of mind, which are two major milestones in advanced cognitive functioning.<sup>27</sup> Self-awareness refers to a level of consciousness such that animals are aware of themselves as distinct individuals and can understand that things are happening to them as distinguished from others.<sup>28</sup> No human child under the age of fifteen months has shown self-awareness.<sup>29</sup> Apes also possess theory of mind, which refers to the ability to attribute mental states and perceptions to others.<sup>30</sup> In one seminal experiment, chimpanzees demonstrated their ability to know what others see when they were placed

25. Eccleston, *supra* note 20.

26. Michael Tomasello & Esther Herrmann, *Ape and Human Cognition: What's the Difference?*, 19 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3, 3–4 (2010).

27. Self-awareness and theory of mind are concepts that enable many advanced cognitive and social skills. Self-awareness may underlie “the social complexity and altruistic tendencies shared among” humans, dolphins, elephants, and the great apes. John Roach, *Elephants Recognize Selves in Mirror, Study Says*, NATIONAL GEOGRAPHIC NEWS, Oct. 30, 2006, [http://news.nationalgeographic.com/news/2006/10/061030-asian-elephants\\_2.html](http://news.nationalgeographic.com/news/2006/10/061030-asian-elephants_2.html).

28. WISE, RATTLING THE CAGE, *supra* note 1, at 128, 198. Self-awareness is typically determined using the mirror self-recognition (MSR) test, developed by psychologist Gordon Gallup, Jr. in the 1970s. WISE, DRAWING THE LINE, *supra* note 14, at 36. The MSR test involves placing marks on the animal being tested in a place where the marks could only be seen by looking in a mirror. *Id.* The animal is then brought in front of a mirror, and if he touches and examines the marks while peering in the mirror, the animal is self-aware—he realizes he is looking at an image of himself. *Id.* Although there is some disagreement over what successes and failures in the MSR test mean in particular, it is the most widely used and widely accepted test to determine self-awareness. *Id.* The great apes have passed the MSR test. *Id.* at 188–89, 223; WISE, RATTLING THE CAGE, *supra* note 1, at 198–99. In fact, some have gone far beyond this minimum requirement—such as Chantek, the orangutan who imitated a caregiver by using a mirror to curl his eyelashes with an eyelash curler. WISE, DRAWING THE LINE, *supra* note 14, at 188–89.

29. WISE, RATTLING THE CAGE, *supra* note 1, at 199. This is based on children’s ability to pass the MSR test. *Id.*; see *supra* note 27.

30. NATIONAL ACADEMY OF SCIENCES, *supra* note 20, at 27; see also WISE, RATTLING THE CAGE, *supra* note 1, at 146–48, 194–95; Brian Hare, *From Hominoid to Hominid Mind: What Changed and Why?*, 40 ANN. REV. ANTHROPOLOGY 293, 294–300 (2011) [hereinafter Hare, *From Hominoid to Hominid Mind*]. See generally Janet Wilde Astington & Margaret J. Edward, *The Development of Theory of Mind in Early Childhood*, in ENCYCLOPEDIA ON EARLY CHILDHOOD DEVELOPMENT (2010), available at <http://www.child-encyclopedia.com/documents/Astington-EdwardANGxp.pdf> (describing the development of theory of mind in children under five) (“We use theory of mind to explain our own behaviour to others, by telling them what we think and want, and we interpret other people’s talk and behaviour by considering their thoughts and wants.”).

with a second chimpanzee and two pieces of food.<sup>31</sup> One piece of food was visible to both chimpanzees, while the other piece was visible to the test subject but hidden from the second chimp.<sup>32</sup> When the test subject was dominant over the other chimpanzee, he would first target the piece of food that was visible to both competitors, to try to monopolize both pieces.<sup>33</sup> However, when the test subject was the subordinate, he would target the hidden piece of food to obtain it.<sup>34</sup> Thus, the chimpanzees were able to make strategic decisions based on what the second chimpanzee could see.<sup>35</sup> Some scientists have read the great apes' demonstration of these key attributes as proof that the cognitive gap between humans and apes is slight.<sup>36</sup>

---

31. Hare, *From Hominoid to Hominid Mind*, *supra* note 30, at 297; *see also* Brian Hare, Josep Call, Bryan Agnetta & Michael Tomasello, *Chimpanzees Know What Conspecifics Do and Do Not See*, 59 ANIMAL BEHAV. 771 (2000) (creators of the experiment publishing their findings).

32. Hare, *From Hominoid to Hominid Mind*, *supra* note 30, at 297.

33. *Id.*

34. *Id.*

35. *Id.* Further scientific observations support the conclusion that great apes possess theory of mind. For instance, the ability to deceive shows an awareness of others' mental states. One observation involved a chimpanzee who was about to be fed bananas contained in a box. WISE, RATTLING THE CAGE, *supra* note 1, at 207. When a second chimpanzee appeared, the first chimp quickly closed the box and "nonchalantly walked about ten feet away." *Id.* The second chimp then feigned that he was walking away, but, once out of sight, spied on the first chimp from behind a tree. *Id.* Once the first chimp returned to the box for the bananas, the second chimp sprang forward to take them. *Id.*

Mandara, a gorilla, provides another example. WISE, DRAWING THE LINE, *supra* note 14, at 226. She disliked one of the researchers at her zoo, barking threateningly when he was present. *Id.* One day she devised a scheme, changing her behavior by reaching "through her bars in a friendly flat palm-up beckoning manner." *Id.* at 226–27. The researcher was pleased, and came toward her. *Id.* at 227. However, he had not noticed that her other hand was behind her back, concealing a piece of sharp bamboo. *Id.* When the researcher came close, she tried to stab him. *Id.* The researcher narrowly escaped injury after being alerted by another scientist. *Id.*

36. Theory of mind is thought to be a foundation that allows for humans' unique culture and advanced social development. Hare, *From Hominoid to Hominid Mind*, *supra* note 30, at 294; *see also* Astington & Edward, *supra* note 30, at 1 (describing theory of mind as the "most important development in early childhood social cognition"). Scientists previously thought that self-awareness and theory of mind were uniquely human traits that allowed us to reach a much more advanced level of functioning than nonhuman animals. *See* Hare, *From Hominoid to Hominid Mind*, *supra* note 30, at 296.

It was not until the turn of the twenty-first century that seminal experiments such as the one by Hare, Call, Agnetta, and Tomasello began to prove what researchers had conjectured—that apes and humans share theory of mind as well. Hare, *From Hominoid to Hominid Mind*, *supra* note 30, at 297; Hare, Call, Agnetta & Tomasello, *supra* note 31, at 771 (observations that chimpanzees followed the directions of gazes or engaged in deceit foretold the successful results of these experiments). This evidence has changed the scientific community's hypotheses of how humans have evolved since separating with our last common ancestor with the great apes. Hare, *From Hominoid to Hominid Mind*, *supra* note 30, at 295, 300; *see, e.g.*, Tomasello & Herrmann, *supra* note 26, at 3 (humans separated from our last common ancestor with chimpanzees and bonobos about six million years ago, and with our last common ancestor with orangutans and gorillas about fifteen million years ago). Formerly, scientists believed that humans gained the capacity for theory of mind after separating from that common ancestor, meaning that humans gained a significant

The lack of only a few mental skills prevents the great apes from having cultures that match ours in complexity.<sup>37</sup> Like humans, apes can learn by imitation, pass on skills, and share rudimentary traditions.<sup>38</sup> For example, chimpanzees in Senegal have learned and passed on the skill of using tools to hunt by sharpening spears with their teeth.<sup>39</sup> Additionally, chimpanzees' social sophistication is highlighted by observations that they politically strategize.<sup>40</sup> In four wild chimpanzee societies, the chimps were observed forming "coalitions to subdue the despotic power of an alpha male."<sup>41</sup> Apes may also have a sense of morality—there is evidence that apes will act altruistically to help others, even without the expectation of benefit.<sup>42</sup> However, studies point to a social-cognitive ability in cooperative environments as the key difference between humans and apes.<sup>43</sup> Humans collaborate with others in a more complex way than apes, which is

---

cognitive ability that apes never obtained. Hare, *From Hominoid to Hominid Mind*, *supra* note 30, at 296–97. Currently, scientists think that humans and apes gained theory of mind before that split, meaning that they share these principal cognitive abilities and that the difference between humans and apes is one only of degree. *Id.* at 300.

37. Eccleston, *supra* note 20.

38. Eccleston, *supra* note 20. "The generation of ideas and sharing a skill is a scientific definition of culture." *Id.*

39. *Id.*

40. WISE, DRAWING THE LINE, *supra* note 14, at 5.

41. *Id.*

42. Felix Warneken, Brian Hare, Alicia P. Melis, Daniel Hanus & Michael Tomasello, *Spontaneous Altruism by Chimpanzees and Young Children*, 5 PLOS BIOLOGY 184 (2007) (publishing the results of their study). In an experiment, chimpanzees spontaneously helped unfamiliar researchers obtain an object that was out of their reach, or helped by opening a door for a fellow chimpanzee, regardless of whether they would receive a reward. *Id.* at 1414–18. Therefore, altruism is not unique to humans. *Id.* at 1418.

43. Tomasello & Herrmann, *supra* note 26, at 5. Herrmann, Call, Hernández-Lloreda, Hare, and Tomasello conducted a comprehensive study comparing chimpanzees and orangutans with two-year-old human children in a variety of skills. *Id.* In their ability to understand the physical world—such as concepts of space, quantities, and causality—the children and apes performed very similarly. *Id.* However, the human children were more advanced socially, particularly in cooperative situations. *Id.*

In another study, chimpanzees and human children were set to a task in which they were collaborating with an adult human:

When the adult stopped participating, the chimpanzees simply tried to solve the task alone. The human children, in contrast, employed various forms of communication to try to reengage the adult into the task. The children seemed to understand that the two of them had committed themselves to doing this together and it simply would not do if the adult was shirking her duty. The collaboration was structured by joint goals and joint commitments to one another. It is not difficult to see in these simple activities the roots of the kind of collaborative commitments and activities that structure human social institutions, from governments to religions.

*Id.* (internal citations omitted).



manifested in skills such as advanced language using symbols.<sup>44</sup> Although apes are able to transmit culture, they do not have the same fundamental motivation to constantly cooperate, communicate, teach, and build upon society's accomplishments.<sup>45</sup> Therefore, although the great apes are intelligent and emotional creatures, it may be this mere difference in social skillsets that has prevented humans and apes from evolving more similarly.

The story of Loulis, the young chimpanzee who was rescued from Yerkes, provides a final example of ape intelligence.<sup>46</sup> He was taken to live with an adoptive chimp mother, Washoe, who knew sign language.<sup>47</sup> Within eight days with Washoe, Loulis had learned his first sign.<sup>48</sup> Within five months, Loulis, now an accepted family member to the other chimpanzees, was using combinations of signs to communicate with the other chimpanzees and with humans.<sup>49</sup> "At the end of five years, he was regularly using fifty-one signs; he had initiated thousands of chimpanzee conversations and had participated in thousands more. He had learned everything he knew from the other chimpanzees, for no human ever signed to him."<sup>50</sup>

### *B. Cetaceans and Elephants*

Cetaceans and elephants are often grouped along with great apes as animals that are highly intelligent and emotional. Dolphins and elephants

---

44. *Id.* at 5–6. Further, while apes have the ability to communicate, nonhuman communication is focused on getting others to do what the communicator wants. *Id.* at 5. In contrast, humans communicate freely to exchange information. *Id.* Similarly, teaching is fundamental in human culture, and children are born equipped to listen and learn from adults, whereas intentional teaching is not as central in apes' culture. *Id.* at 6.

45. Although apes and two-year-old human children have similar mental abilities in understanding physical concepts, it is largely the cooperative drive of humans that allows them to learn new skills rapidly and effectively build on the accomplishments of others. *Id.* at 5–7.

46. See *supra* notes 1–6 and accompanying text.

47. WISE, RATTLING THE CAGE, *supra* note 1, at 3. Washoe's introduction to Loulis is also a testament to the deep emotion and comprehension of these animals. Washoe was depressed and refused to eat after losing a child to illness, continuously signing that she wanted her baby. ROGER FOUTS & STEPHEN TUKEL MILLS, NEXT OF KIN: MY CONVERSATIONS WITH CHIMPANZEES 233–40 (1997), available at [http://www.friendsofwashoe.org/learn/chci\\_history/loulis\\_joins\\_washoe.html](http://www.friendsofwashoe.org/learn/chci_history/loulis_joins_washoe.html). Her owner, primatologist Roger Fouts, worried that Washoe would die of heartbreak, something he had seen happen before with other chimpanzees. *Id.* He brought Loulis to cheer her up. *Id.* Before the introduction, Fouts signed to Washoe, "I HAVE BABY FOR YOU." *Id.* Washoe snapped out of her depressed trance, shouting for joy, hair standing up, and excitedly exclaimed in sign language, "BABY, MY BABY, BABY, BABY!" *Id.* However, when she saw Loulis, her excitement ceased. *Id.* She signed "BABY" with mild interest. *Id.* Fouts realized he forgot to specify that this was not *her* baby. *Id.* Luckily, Washoe's maternal instincts rekindled, and she cared for Loulis as her own. *Id.*

48. WISE, RATTLING THE CAGE, *supra* note 1, at 3.

49. *Id.*

50. *Id.*

have been found to possess a cognitive level of self-awareness.<sup>51</sup> It is possible that they possess theory of mind as well.<sup>52</sup> Cetaceans and elephants are highly social creatures that live within complex societies, forming strong bonds with their groups.<sup>53</sup> Cetaceans, like humans, form structured cooperative alliances.<sup>54</sup> Cetaceans and elephants may also transmit culture across generations.<sup>55</sup> Based on these intellectual attributes, it is reasonable to hypothesize that cetaceans and elephants possess the social-cognitive abilities of self-awareness and theory of mind.<sup>56</sup>

Cetacean intelligence is well-demonstrated by their aptitude for language. Dolphins have learned to understand a human-made language composed of signs or sounds of different tones.<sup>57</sup> They have shown an ability to understand new sentences of up to five words, and pay attention to

51. See *supra* note 28 and accompanying text; WISE, DRAWING THE LINE, *supra* note 14, at 152–53, 169; Hart et al., *Large Brains and Cognition: Where Do Elephants Fit In?*, 32 NEUROSCI. AND BIOBEHAV. REVS. 86, 90 (2008); Betsy Querna, *Dolphins Recognize, Admire Themselves in Mirrors, Study Finds*, NATIONAL GEOGRAPHIC TODAY, May 2, 2001, [http://news.nationalgeographic.com/news/2001/05/0502\\_dolphinvanity.html](http://news.nationalgeographic.com/news/2001/05/0502_dolphinvanity.html); Roach, *supra* note 21.

52. See *supra* note 30 and accompanying text; Hart et al., *supra* note 51, at 90–91 (arguing that elephants may possess theory of mind because they are empathetic in assisting injured elephants and because they inspect and ceremoniously handle the remains of deceased elephants); Adam A. Pack & Louis M. Herman, *The Dolphin's (Tursiops truncatus) Understanding of Human Gazing and Pointing: Knowing What and Where*, 121 J. COMP. PSYCHOL. 34 (2007) (reporting, based on experimentation, that dolphins follow trainers' gazing and pointing gestures, indicating that they understand others' mental states with respect to where the trainers' attention is focused). But see Derek C. Penn & Daniel J. Povinelli, *On the Lack of Evidence that Non-Human Animals Possess Anything Remotely Resembling a "Theory of Mind,"* 362 PHIL. TRANSACTIONS ROYAL SOC. 731, 731–35 (2007) (contending that since there may be other reasons for successful experimental results, the results are inconclusive in determining that animals possess theory of mind).

53. Lori Marino, *Convergence of Complex Cognitive Abilities in Cetaceans and Primates*, 59 BRAIN, BEHAV. & EVOLUTION 21, 27 (2002).

A herd of elephants in Kenya provides an apt example of the strength of these bonds. Marc Bekoff, *Are You Feeling What I'm Feeling?*, 194 NEW SCIENTIST 42 (2007). Babyl, a member of the herd, had been crippled for years and could not keep up with the walking pace of the other elephants. *Id.* However, instead of leaving her behind, her herd would continuously look back to see how she was doing, and would wait for her if she was struggling. *Id.* "The elephants had nothing to gain by helping her as she could do little for them. . . . [Yet] out of friendship and empathy they adjusted their behaviour to allow Babyl to remain with the group." *Id.*

54. Marino, *supra* note 53, at 27–28. For example, bottlenose dolphins form coalitions for a type of "warfare" against other groups, and sperm whales take turns babysitting the group's young while others forage for food. *Id.* at 27–28.

55. *Id.* at 28. Cetaceans exhibit cultural traditions through dialects, tool use, and methods of capturing prey. *Id.* Elephants may similarly possess cultural traditions. *Id.*

56. See generally WISE, DRAWING THE LINE, *supra* note 14, at 152–54, 169–71 (discussing the possibility of elephant and dolphin self-awareness).

57. *Id.* at 137–38.

the grammatical order of the words.<sup>58</sup> The dolphins in one study also knew how to generalize symbols—a hoop was a hoop, whether square, round, large, or small.<sup>59</sup>

Elephant intelligence is aptly demonstrated by their problem-solving abilities. For example, elephants in the wild have been observed throwing heavy rocks or logs onto electric fences in order to disable them.<sup>60</sup> Another group of elephants was observed digging holes in the ground looking for water.<sup>61</sup> When a researcher came upon the holes, he “pulled out a long, wide piece of bark that an elephant had chewed into a ball, then used to plug the hole.”<sup>62</sup> Underneath that section of ground was water, and not too far away was a tree from which the elephant stripped the bark.<sup>63</sup> In captivity, another elephant learned to successfully distinguish four dots painted onto cardboard cards from three, no matter the configuration.<sup>64</sup>

Cetaceans and elephants also experience deep, human-like emotions. The best illustration may be the accounts of cetaceans and elephants, along with great apes, mourning death. “When an elephant dies, its family members engage in intense mourning and burial rituals, conducting weeklong vigils over the body, carefully covering it with earth and brush, [and] revisiting the bones for years afterward . . .”<sup>65</sup> They caress the bones, touching a skull’s lower jaw with their trunks “the way living elephants do in greeting.”<sup>66</sup> In the case of cetaceans, research teams have witnessed mothers pushing their dead calves to the surface, appearing to be grieving and unable to accept the death.<sup>67</sup> Providing support for these observations, scientists have discovered that whales have spindle neurons similar to those

---

58. *Id.* at 140–44. Sentences might consist of words such as “water right ball fetch,” which told the dolphin to go to the ball on her right and take it to the water streaming out of a hose. *Id.* at 143–44. When the sentences were reversed or the order of the words was otherwise switched, the dolphins immediately understood that this changed the meaning. *Id.* So when the dolphin was told to “right water ball fetch,” she went to any ball and took it to the stream of water to her right. *Id.* at 144.

59. *Id.* at 146.

60. *Id.* at 171–72.

61. *Id.* at 173.

62. *Id.*

63. *Id.*

64. *Id.* at 172.

65. Charles Siebert, *An Elephant Crackup?*, N.Y. TIMES MAGAZINE, Oct. 8, 2006, available at <http://www.nytimes.com/2006/10/08/magazine/08elephant.html?pagewanted=print>.

66. *Id.*

67. Rowan Hooper, *Do Dolphins Have a Concept of Death?*, 211 NEW SCIENTIST 10, 10 (2011). One dolphin was witnessed frantically pushing her dead calf to the surface for two days. *Id.* Bruising on the calf indicated that the death was probably sudden. *Id.* Comparatively, when a dolphin became sick and had trouble swimming, its pod tried to help it stay afloat, but swam away after it died. *Id.* The research team’s hypothesis is that the pod did not grieve in the same way as the mother with her calf because they expected the death and were prepared for it. *Id.* Therefore, dolphins may understand the concept of death. *Id.*

that exist in humans, which are associated with grief and the processing of emotions.<sup>68</sup> ““This is consistent with a growing body of evidence for parallels between cetaceans and primates in cognitive abilities, behaviour and social ecology.””<sup>69</sup>

### C. Other Species

As the scientific community conducts studies on other animals that have generally not been associated with high intellectual capacities, the results are impressive. For instance, farm animals such as cattle and sheep form deep emotional bonds.<sup>70</sup> One study showed that sheep experienced stress (measured by increases in heart rate, stress hormones, and bleating) when separated from their flock.<sup>71</sup> However, showing them pictures of familiar sheep faces reduced their stress.<sup>72</sup> Pictures of goat faces and triangles did not have the same effect.<sup>73</sup> According to Donald Broom, professor of animal welfare at the University of Cambridge, cows can also recognize familiar faces and form long-lasting bonds.<sup>74</sup> They are also intellectual beings. A

68. *Id.*; Andy Coghlan, *Whales Get Emotional*, 192 NEW SCIENTIST 6 (2006). These cells “occur in the parts of the human brain linked with social organisation, empathy, speech, intuition about the feelings of others and rapid ‘gut’ reactions.” Coghlan, *supra*.

69. *Id.* (quoting Lori Marino). The cells were previously thought to exist only in humans and great apes, leading to unique emotional and cognitive abilities. *Id.* However, whales are now estimated to have three times more of the neurons than humans do. *Id.*

70. See, e.g., Global Action Network, *Cows: About Cows*, <http://www.gan.ca/animals/cows.en.html> (last updated 2005) (“Under natural circumstances, cattle live in herds with social hierarchies and form lifelong bonds with each other.”).

71. Laura Spinney, *More Than Meats the Eye*, THE GUARDIAN, Mar. 16, 2005, <http://www.guardian.co.uk/science/2005/mar/17/1>. This study was conducted by Ana da Costa and her colleagues at the Babraham Institute in Cambridge. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* Another study found that cows with names—who were treated on a more personal level by farmers—produced more milk than cows without names. Caroline Gammell, *Cows With Names Produce More Milk, Scientists Say*, THE TELEGRAPH, Jan. 12, 2012, <http://www.telegraph.co.uk/earth/agriculture/farming/4358115/Cows-with-names-produce-more-milk-scientists-say.html>.

This scientific development provides foundational support for stories such as that of mother cows mourning and waiting outside for their calves, even in harsh conditions, after their calves have been taken to be slaughtered for veal, or stories of cows escaping and walking days to be reunited with their herd. See, e.g., Fiona Carmody, *Animal Intelligence: What They Know and You Don’t*, THE COLLEGIAN, Sept. 9, 2010, available at <http://thecollegianur.com/2010/09/09/animal-intelligence-what-they-know-and-you-don%E2%80%99t/13120/>; Global Action Network, *supra* note 70.

study has shown that cattle enjoy solving intellectual challenges.<sup>75</sup> In the study, cows were given a task of pressing a panel in order to gain access to food.<sup>76</sup> After a cow learned the task successfully, she experienced a leap in heart rate and was more likely to gallop—an expression of joy, or a “eureka” moment, at meeting the challenge.<sup>77</sup> Other farm animals have also demonstrated the ability to learn.<sup>78</sup> For example, another study showed that pigs, given the choice of two feeding stalls, will avoid the one that they had been shut into after eating on a previous date.<sup>79</sup> Similarly, hens will self-medicate by choosing food that has been laced with painkillers over food that has not.<sup>80</sup> This suggests that farm animals, routinely tortured and slaughtered by humans for food, “are, at the very least, aware of what has happened in the past and of acting on it in future.”<sup>81</sup>

Finally, nonhuman sophistication has surprised scientists through its embodiment in even seemingly insignificant creatures, proving that we may still have a lot to learn when it comes to the nonhuman world. Take the surprising intelligence of mound-building mice, which construct elaborate mounds covering meter-deep burrows so that their young can survive the winter.<sup>82</sup> Although the adult mice do not survive the winter season, they couple up and form stable bonds to work together to care for their young.<sup>83</sup> They live in their warm mounds as families, and can recognize who they are related to so as to avoid inbreeding.<sup>84</sup>

Honeybees provide a final example of animal intelligence. They have the capacity to remember, learn, and recognize “sameness” and “difference,” as was demonstrated by bees that learned to look at a choice of visual signs to successfully navigate a maze.<sup>85</sup> Bees also have a good memory, which allows them to efficiently navigate complex routes when they are foraging

---

75. Spinney, *supra* note 71. The study was conducted by Donald Broom and Kristin Hagen. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Michael Marshall, *Zoologger: Architect Mouse Builds a Food Mansion*, NEW SCIENTIST, Sept. 1, 2011, <http://www.newscientist.com/article/dn20855-zoologger-architect-mouse-builds-a-food-mansion.html>.

83. *Id.*

84. *Id.*

85. WISE, DRAWING THE LINE, *supra* note 14, at 75. For this study, bees were trained in a Y-shaped maze. *Id.* When the bees entered the maze, they were shown a sign, which might be a vertical or horizontal line, or a sign colored blue or yellow. *Id.* Upon reaching a “decision chamber” at the intersection of the arms of the Y, the bee would encounter one arm showing the same sign as was at the maze entrance, and the other arm showing a different sign. *Id.* Choosing the identical sign led to a reward of a sip of sucrose. *Id.* The bees learned to select the correct sign. *Id.*

for nectar.<sup>86</sup> After just three encounters, a memory, such as an odor or landmark, will be in the honeybee's long-term memory for the bee's lifetime.<sup>87</sup> Further, honeybees have a remarkably sophisticated communication system, which is thought to be second only to that of humans in complexity.<sup>88</sup> They communicate in a dance-like form, using at least seventeen "signals" (deliberate acts of communication) and at least thirty "cues" (non-deliberate communicative behaviors), to communicate the particular distance, direction, and quality of food, to recruit others to transport discovered nectar, and to communicate the location of materials or of new cavities for hives.<sup>89</sup> These findings caution us against underestimating nonhuman capacities.

#### *D. New Standards in Scientific Use of Chimpanzees*

The scientific community has begun to adapt its practices based on its current knowledge of nonhuman minds. The National Academy of Sciences acknowledged the sophistication of ape intelligence and emotion in a recent study to determine whether it is necessary to use chimpanzees as laboratory

86. *Id.* at 76–77. It is likely that bees have a "cognitive map" in their minds, complete with symbols, which allows them to navigate so well. *Id.* at 77. "Otherwise they would have to store an enormous number of images in their little bee brains to navigate as well as they do." *Id.*

87. *Id.* at 76. A honeybee's lifetime is a matter of weeks or at the most a few months. *Id.* A memory will be part of a bee's short-term memory after just one exposure. *Id.*

88. *Id.* at 77.

89. *Id.* at 78–80. The bees look to this communication to coordinate their work. For example, in one type of signal, a bee can communicate that he has found a good nectar source, but that the hive already has more nectar coming in than it can handle. *Id.* at 79. Other bees will respond by switching to the task of processing nectar, or, if outside the hive, will cease recruiting bees to their nectar source since a better one was found. *Id.* at 79–80. Bees also communicate about new locations for building hives when their current hive becomes overcrowded. *Id.* at 80. Those searching for new sites will return and communicate the location and desirability of those sites. *Id.* What happens next is somewhat like a vote. The bees advocating for one location may visit another site and change positions if they realize the other site is better, indicating toward the new location in their communicative dance. *Id.* at 80–81. This shows that bees can likely think and change their minds as a result of exchanging information through communication. *Id.* at 81. When a site is finally agreed upon, which could take several days, the swarm of bees would fly to the new location within an hour. *Id.* at 80. This communicative strength is impressive, especially considering the bees' short life span. *See id.* at 78.

As a further testament to honeybees' capacity for thought, they appear to be skeptics. *Id.* at 77. Princeton biologist James Gould conducted an experiment by allowing bees to come find nectar in his boat, and then took the boat to the middle of a lake. *Id.* The bees were then allowed to return to their hive, where they communicated the location of the food. *Id.* However, unlike the normal reaction, the other bees did not head for the boat—they did not believe the message that the nectar could be in the middle of the water. *Id.* With these facts, it is hard to deny these small creatures at least some sense of awareness and consciousness.

research subjects.<sup>90</sup> The report noted that “[c]himpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use).”<sup>91</sup> The committee that undertook the study was not asked to weigh the ethical concerns implicated in using chimpanzees for laboratory experimentation; however, the committee found that consideration of the ethical issues was inseparable from any analysis regarding the animals’ use.<sup>92</sup> The committee stated that because of chimpanzees’ advanced cognitive functions and “genetic proximity to humans,” scientists should be required to produce a greater justification before using chimpanzees in experiments.<sup>93</sup>

Recognizing that there were no existing criteria in place for deciding when it is appropriate to use chimpanzees in research, the committee met this need by designing a set of considerations.<sup>94</sup> Although the specific criteria vary depending on the type of research, the report concluded that the determination of whether chimpanzees should be used in a given experiment should be guided by three principles:

1. The knowledge gained must be necessary to advance the public’s health;
2. There must be no other research model by which the knowledge could be obtained, and the research cannot be ethically performed on human subjects; and
3. The animals used in the proposed research must be maintained either in ethologically appropriate physical and social environments or in natural habitats.<sup>95</sup>

Using these principles, the committee made the determination that “most current use of chimpanzees for biomedical research is unnecessary . . . .”<sup>96</sup> Technology has provided alternatives to the use of chimpanzees in

---

90. NATIONAL ACADEMY OF SCIENCES, *supra* note 20. The National Academies are highly respected as “the nation’s premier source of independent, expert advice on scientific, engineering, and medical issues.” See *Our Reputation*, THE NATIONAL ACADEMIES, <http://www.nationalacademies.org/about/reputation/index.html> (last visited Oct. 30, 2012).

91. NATIONAL ACADEMY OF SCIENCES, *supra* note 20, at 27.

92. *Id.* at 2. The committee also agreed that cost should not factor in to the ethical considerations of using chimps in research. *Id.*

93. *Id.*

94. *Id.* at 4.

95. *Id.*

96. *Id.* The two possible exceptions listed are narrow. *Id.* First, although the development of monoclonal antibody therapies will not require the use of chimpanzees in the future, “there may be a limited number of monoclonal antibodies already in the developmental pipeline that may require the

biomedical experiments, and, given the moral reservations over using chimpanzees for such research, these alternatives should be used instead.<sup>97</sup> Further, the committee stated that even in the limited circumstances where the use of chimpanzees is necessary, practices should be conducted so as to minimize harm.<sup>98</sup>

Therefore, the scientific community is recognizing the significance of animals' advanced cognitive functioning and holding that this should have a strong impact on our uses and treatment of them.<sup>99</sup> The legal community should do the same.

### III. ESCAPING THROUGH THE ZOO BARS: CURRENT ANIMAL LAWS

#### A. Animal Welfare Legislation

Animal welfare legislation has been incorporated at both the state and federal levels, but it has been criticized as lagging behind our modern knowledge of the type of protections animals deserve.<sup>100</sup>

---

continued use of chimpanzees." *Id.* Second, the committee was evenly split over whether chimpanzees were needed for a preclinical challenge study relating to the development of a prophylactic hepatitis C virus vaccine. *Id.* at 5.

97. *See id.* Due to these technologies, the necessity of using chimpanzees will likely be even further reduced in the future. *Id.*

98. "It is generally accepted that all species, including our own, experience a chronic stress response . . . when deprived of usual habitats . . ." *Id.* at 27. Thus, it is important to make an effort to minimize the animals' suffering by keeping them in conditions that are as natural as possible. *See id.*

99. In light of the study, the National Institutes of Health, which fund much of the chimpanzee laboratory research in the United States, is ceasing the issuance of new funding for chimp research, at least temporarily until the processes for implementing the new criteria are in place. Nell Greenfieldboyce, *Biomedical Research Using Chimps Curtailed*, NPR NEWS, Dec. 15, 2011, <http://m.npr.org/news/Science/143764694>.

100. Appealing to human emotion and interests, many recent legal developments have focused on protecting household pets. *See* Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 387 (2003) [hereinafter Sunstein, *Rights*]. The Uniform Trust Law and Uniform Probate Law have been amended to specifically allow wills and trusts to provide for the care of an animal. David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 351 (2005). Pet owners are also beginning to attempt to win damages above the market value of their pets in lawsuits over their pets' deaths, and prosecutors have increased prosecution for violations of animal cruelty statutes. *See id.* However, though research shows that there are many other animals possessing equal or greater intelligence and emotional capacity than our beloved pets, such animals are largely unprotected. *See infra* Part III.A.3.



## 1. Federal Regulation of Animal Practices

Federal legislation regulates animal practices that affect interstate commerce, which include those used in scientific experimentation, entertainment, sale in the market, and in the food industry. The Animal Welfare Act<sup>101</sup> and the Humane Methods of Slaughter Act<sup>102</sup> are designed to regulate these major areas of animal use.<sup>103</sup> The Animal Welfare Act (AWA), which was first passed in 1966 and modified through subsequent amendments, was designed to “protect certain animals from inhumane treatment and neglect,”<sup>104</sup> regulating the use of animals in research, and applying to animals used in exhibitions or being held for sale.<sup>105</sup> However, scholars and advocates have criticized it for its ineffectiveness.<sup>106</sup> The AWA only addresses the treatment of certain animals. For non-research uses, it excludes horses and farm animals.<sup>107</sup> For purposes of research, it notably excludes from statutory protection mice, rats, and birds—which comprise about ninety percent of the animals used in experimentation.<sup>108</sup> Further, the AWA expressly denies any authority to actually interfere with laboratory experimentation.<sup>109</sup>

---

101. 7 U.S.C. §§ 2131–2159 (2006).

102. 7 U.S.C. §§ 1901–1907 (2006).

103. Other federal acts aimed at the protection of animals include the Endangered Species Act and the Marine Mammals Protection Act. 16 U.S.C. §§ 1531–1544 (2006); 16 U.S.C. §§ 1361–1407 (2006).

104. Animal and Plant Health Inspection Service, *Animal Welfare*, UNITED STATES DEPARTMENT OF AGRICULTURE, [http://www.aphis.usda.gov/animal\\_welfare/awa\\_info.shtml](http://www.aphis.usda.gov/animal_welfare/awa_info.shtml) (last visited Jan. 21, 2013).

105. 7 U.S.C. § 2131. It is left to the Secretary of Agriculture to set standards for the regulated facilities and conduct inspections. *See id.* §§ 2131–2159.

106. *See* GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247, 249–50 (2007–2008); Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW & CONTEMP. PROBS. 9 (2007); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1334, 1342 (2000) [hereinafter Sunstein, *Standing*]; Shigehiko Ito, Comment, *Beyond Standing: A Search for a New Solution in Animal Welfare*, 46 SANTA CLARA L. REV. 377 (2006); Katharine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937 (2002).

107. 7 U.S.C. § 2132(g). Thus, it does not impose regulations on slaughterhouses.

108. *Id.*; Bryant, *supra* note 106, at 249–50; Swanson, *supra* note 106, at 950–51. When animal advocates pushed for the inclusion of mice, rats, and birds in the AWA, Congress amended it to explicitly exclude them. Bryant, *supra* note 106, at 250.

109. *See* Swanson, *supra* note 106, at 941–43. The AWA states that “nothing in this chapter shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to design, outlines, guidelines, or performance of actual research or experimentation.” 7 U.S.C. § 2143(a)(6)(A); *see also* Swanson, *supra* note 106, at 940–43. Additionally, painful procedures are still allowed in laboratory experiments on nonhuman animals without the administration of an anesthetic as long as such procedures are necessary to the experiment and the experimenter has “considered” alternatives. 7 U.S.C. § 2143(a)(7)(A)–(B); *see also* Swanson, *supra* note 106, at 942–

The Humane Methods of Slaughter Act (HMSA) regulates the process of killing used in slaughterhouses.<sup>110</sup> However, despite the requirement that the killing of livestock be “humane,” which the statute defines as rendering the animal “insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut,”<sup>111</sup> a slaughterhouse is still “an unspeakably horrible place.”<sup>112</sup> Further, the humane slaughter laws have been interpreted to apply to only five percent of the ten billion animals killed in the United States each year, because they exclude poultry.<sup>113</sup>

## 2. State Animal Abuse Statutes

State animal welfare regulation mainly takes the form of animal abuse provisions in criminal statutes, which are aimed at punishing humans who abuse animals through intentional acts or neglect.<sup>114</sup> Therefore, the laws can only be enforced through government prosecution.<sup>115</sup> What constitutes criminal animal cruelty varies between states, but generally includes acts such as the unnecessary killing, injuring, or torturing of animals, as well as the failure to provide food, water, or necessary shelter to an animal within one’s custody.<sup>116</sup> However, many state statutes exempt certain classes of

---

43.

110. See 7 U.S.C. §§ 1901–1907 (2006).

111. *Id.* § 1902.

112. See Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21st Century: The Abolition of the Property Status of Nonhumans*, in *ANIMAL LAW AND THE COURTS: A READER* 14 (Taimie L. Bryant et al. eds., 2008); see also Peter Singer, *Animal Liberation*, N.Y. REV. BOOKS, May 15, 2003, available at <http://www.nybooks.com/articles/archives/2003/may/15/animal-liberation-at-30/?pagination=false> (praising the improvements in animal welfare but noting that “[t]hese modest gains are dwarfed, however, by the huge increase in animals kept confined, some so tightly that they are unable to stretch their limbs or walk even a step or two, on America’s factory farms”). The law does not regulate the practices that cause tremendous suffering to nonhuman animals as they are being raised for food production. Bryant, *supra* note 106, at 252. For instance, “veal calves are deliberately kept anemic, deprived of straw for bedding, and confined in individual crates so narrow that they cannot even turn around.” Singer, *supra*.

113. JORDAN CURNUTT, *ANIMALS AND THE LAW: A SOURCEBOOK* 169 (2001); Bryant, *supra* note 106, at 251. While some states have enacted legislation addressing the humane slaughter of poultry, there is no such federal regulation. See Jeff Welty, *Humane Slaughter Laws*, 70 *LAW & CONTEMP. PROBS.* 175, 190–91, 201 (2007). Federal regulation of poultry slaughter has been proposed but thus far rejected by Congress. *Id.* at 201.

114. See Rebecca F. Wisch, *Overview of State Cruelty Laws*, <http://www.animallaw.info/topics/tabbed%20topic%20page/spuscruelty.htm> (last updated 2010).

115. Sunstein, *Rights*, *supra* note 100, at 390.

116. *Id.* at 389–90; see, e.g., ARIZ. REV. STAT. ANN. § 13-2910 (2012) (declaring that it is animal cruelty to intentionally, knowingly, or recklessly subject “any animal under the person’s custody or

animals, such as farm animals, laboratory animals, and wildlife, leaving those animals unprotected under state anti-cruelty statutes.<sup>117</sup>

Several states have also enacted other legislation, such as their own humane slaughter laws.<sup>118</sup> However, in some circumstances, state law is preempted by federal legislation,<sup>119</sup> leaving the states without power to enact stricter regulations. The Federal Meat Inspection Act (FMIA), a federal statutory scheme that regulates the inspection of slaughterhouse facilities,<sup>120</sup> contains an express preemption clause preventing states from enacting differing regulations pertaining to slaughterhouses.<sup>121</sup> Accordingly, in

---

control to cruel neglect or abandonment” or inflict “unnecessary physical injury to any animal”). State anti-cruelty laws have gradually been strengthened, reflecting an increased societal concern for animal wellbeing. See Laurie Serafino, *No Walk in the Dog Park: Drafting Animal Cruelty Statutes to Resolve Double Jeopardy Concerns and Eliminate Unfettered Prosecutorial Discretion*, 78 TENN. L. REV. 1119, 1120 (2011). The laws have broadened to address more forms of abuse, such as cockfighting, reflecting a shift in purpose from historically protecting only humans’ economic interest in their animal property to modernly viewing the animals as the victims. *Id.* at 1123–25. Additionally, forty-seven states have now made certain animal abuse violations felonies. Animal Legal Defense Fund, *U.S. Jurisdictions With and Without Felony Animal Cruelty Provisions*, <http://www.aldf.org/article.php?id=261> (last updated 2012); see, e.g., N.Y. AGRIC. & MKTS. LAW § 353-a (McKinney 1999) (“Aggravated cruelty to animals is a felony.”).

117. Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 75–79 (1999); Serafino, *supra* note 116, at 1133 (socially accepted practices such as research, slaughtering, and hunting are regularly exempted); Sunstein, *Rights*, *supra* note 100, at 391; see, e.g., N.M. STAT. ANN. § 30-18-1 (1978) (fishing, hunting, trapping, veterinary practices, rodent or pest control, farming, rodeo practices, and research are exempted from the cruelty statute). Special interest groups such as agricultural lobbies and hunting associations push for these exemptions, and animal law has yielded to that political process. See Frasch, *supra*, at 74.

118. Welty, *supra* note 113, at 189 n.100. State humane slaughter laws often mirror the HMSA. *Id.*

119. The Supremacy Clause establishes that the Constitution and federal law are the supreme law of the land, and state law must yield to valid federal law whenever a conflict arises. U.S. CONST. art. VI, cl. 2. Federal law can preempt state law through express preemption, field preemption, and conflict preemption. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000). Express preemption occurs when “a federal statute includes a preemption clause explicitly withdrawing specified powers from the states.” *Id.* Field preemption occurs when federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also Nelson, *supra*, at 227. Conflict preemption occurs when it is physically impossible to comply with both the federal and state law or when “state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Nelson, *supra*, at 228 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

120. 21 U.S.C. §§ 601–695 (2006). In addition to setting guidelines for federal inspection of slaughterhouse facilities, the FMIA mandates the facilities to follow the federal standards for slaughter practices set forth in the Humane Methods of Slaughter Act. *Id.* § 610(b); see *supra* notes 109–12 and accompanying text. Thus, it incorporates the HMSA without changing its standards for “humane” slaughter.

121. 21 U.S.C. § 678. Other federal acts, such as the AWA, do not contain express preemption clauses, leaving the states with some power to regulate animal industries outside of slaughterhouses. 7 U.S.C. §§ 2131–2159 (2006). Further, a finding that state law was preempted by a statute like the AWA through field or conflict preemption would be unlikely. See *supra* note 118. An argument for field preemption would fail because animal welfare is an issue largely left to the states, and

*National Meat Association v. Harris*, the Supreme Court held that a California law prohibiting the use of non-ambulatory animals for slaughter was invalid because it was preempted by the FMIA.<sup>122</sup> Following the Court's decision, states may be left with very little power to improve conditions for slaughterhouse animals.<sup>123</sup> Therefore, state law is inadequate in addressing the gaps in the federal legislation, due to both lackluster legislation and the inability to impose more rigorous laws.

### 3. The Ineffectiveness of the Federal and State Legislation

Overall, both state and federal animal legislation share two main weaknesses.<sup>124</sup> First, the laws are under-enforced. At the state level,

---

"Congress anticipated that states would remain active in this area of traditional state interest." *Kerr v. Kimmell*, 740 F. Supp. 1525, 1530 (D. Kan. 1990); *see DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) (citing *Nicchia v. New York*, 254 U.S. 228, 230–31 (1920)) ("The regulation of animals has long been recognized as part of the historic police power of the States."). A finding of conflict preemption would be unlikely because state and federal statutes would generally "work in concert for their mutual purpose of protecting animals." *Zimmerman v. Wolff*, 622 F. Supp. 2d 240, 248 (E.D. Pa. 2008) (holding that federal licensing of dog breeders under the AWA did not preempt state dog breeder licensing and regulations); *see generally Am. Canine Found. v. Sun*, 2007 WL 4208358, at \*4–\*5 (N.D. Cal. Nov. 27, 2007) (holding that the AWA did not preempt state law requiring licensing for dogs that are not spayed or neutered).

122. 132 S. Ct. 965 (2012). The California law prohibited the use of non-ambulatory animals, requiring instead that they be humanely euthanized. *Id.* at 970. Conversely, the federal scheme allows non-ambulatory animals that are categorized as "suspect" to be monitored and then slaughtered as long as the animal is not reclassified as "condemned." *Id.* at 969. The Court held that the FSIA expressly preempted the California law. *Id.* at 970. In doing so, it stated that "[t]he FMIA's preemption clause sweeps widely . . . prevent[ing] a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." *Id.*

123. Following *National Meat Association*, it seems apparent that state versions of humane slaughter laws could be open to challenge based on preemption. Therefore, states could be prevented from imposing more humane regulations on slaughterhouses. For example, the Court's opinion suggests that a state attempt to require more humane slaughter techniques would likewise be preempted, because the federal scheme regulates these techniques.

State expansion of the animals that are covered by humane slaughter laws, such as the inclusion of poultry, may also be jeopardized. *See supra* note 119 and accompanying text. There may be an argument that this is distinguishable since the HMSA does not regulate the slaughter of animals such as poultry. *See id.* However, since the HMSA defines what animals are to be included within slaughterhouse regulations, a court could alternatively find that Congress has addressed this issue and that any state laws are accordingly preempted. *See* 7 U.S.C. § 1902 (2006).

124. *See* Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 175–76 (2001) (describing inadequacies in the substantive provisions and non-enforcement as weaknesses of the AWA); Cynthia Hodges, *Detailed Discussion of the Humane Methods of Slaughter Act*, ANIMAL LEGAL & HISTORICAL CENTER (2010), available at <http://www.animallaw.info/articles/ddushmsa.htm> (naming exemptions to the provisions and lack of enforcement as weaknesses of the HMSA).

prosecutors must choose to press criminal charges to enforce the laws.<sup>125</sup> They may be less likely to prosecute animal crimes due to limited resources, inexperience, or pressure to focus on other crimes.<sup>126</sup> At the federal level, the AWA and HMSA do not have citizen suit provisions, leaving enforcement solely to the United States Department of Agriculture (USDA), which has not made inspections and enforcement a priority.<sup>127</sup> To reduce the cost of enforcement of slaughterhouse regulations, Congress has delegated the inspection of slaughterhouse practices to existing inspectors within the USDA's Food Safety and Inspection Service, whose primary purpose is to ensure the safety of meat to consumers.<sup>128</sup> As a result, inspectors are overburdened and not specifically trained in the enforcement of humane slaughter regulations.<sup>129</sup> Further, critics have scorned the USDA for being tolerant of animal law violations because it is allied with the meat industry.<sup>130</sup>

Second, the laws are too narrow in practice. Laboratories and

---

125. See *supra* note 115 and accompanying text.

126. Frasch, *supra* note 117, at 69–70.

127. See 7 U.S.C. §§ 1901–1907, 2131–2159 (2006); Bryant, *supra* note 106, at 250; see, e.g., *Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 940 (4th Cir. 1986) (finding that the AWA does not create a private cause of action). This is in contrast to environmental statutes that generally have citizen suit provisions, such as the Clean Water Act and Clean Air Act. 33 U.S.C. § 1365 (2006); 42 U.S.C. § 7604 (2006).

In 2002, in response to news accounts of the lack of enforcement of the HMSA, Congress added language into the Farm Security and Rural Investment Act of 2002 expressing the sentiment that the USDA should fully enforce the HMSA (even though it was already supposed to be doing so). Welty, *supra* note 113, at 187. However, stories of weak enforcement still abound.

Violations of the HMSA received national attention in 2008 after an undercover investigation by the Humane Society of the United States revealed illegal practices in a randomly selected slaughterhouse, showing footage of workers in the slaughterhouse using “electric shock on various parts of cows’ bodies and . . . high pressure water hoses to force water into the nostrils and mouths in attempts to force non-ambulatory cows to move.” Bryant, *supra* note 106, at 251–52; see also Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse*, WASH. POST, Jan. 30, 2008, at A4; Julie Schmit, *USDA Will Step Up Inspections at Slaughterhouses*, USA TODAY, Feb. 18, 2008, [http://www.usatoday.com/money/industries/food/2008-02-18-meat-recall\\_N.htm](http://www.usatoday.com/money/industries/food/2008-02-18-meat-recall_N.htm). The Humane Society also caught footage of the slaughterhouse forcing downed cows to slaughter with the use of electric prods and a forklift, despite the fact that a USDA inspector was in charge of inspecting the plant. Schmit, *supra*. The slaughterhouse failed to report any violations, and the inspector showed up predictably at the same times each day, allowing the violations to remain hidden. *Id.*

128. Welty, *supra* note 113, at 194–95.

129. *Id.*

130. GAIL A. EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY* 24 (1997); Kolber, *supra* note 124, at 176 (quoting GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 211 (1995)) (prior to its responsibility in enforcing the AWA and HMSA, the USDA “‘dealt primarily with the production, treatment, and slaughter of food animals’”); Donna Mo, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313, 1315 (2005). The USDA initially opposed the HMSA, but is now responsible for policing it. EISNITZ, *supra*, at 24.

slaughterhouses may find themselves exempt from regulation at the state level.<sup>131</sup> Many animals are further excluded from regulatory protection within the federal statutes.<sup>132</sup> At a conceptual level, animal welfare regulation tends to protect against only “unnecessary” animal suffering.<sup>133</sup> This approach may seem an ideal way to balance the protection of animals with human interests—for example, an experiment that has the potential to save millions of human lives could be a “necessary” use of an animal, while the statutes should minimize animal suffering whenever possible. However, in practice, this mindset has resulted in animal protection yielding to the political process and to the industries that use animals, which are categorically accepted as necessary.<sup>134</sup> The industries are often allowed to set their own standards for the treatment of the animals. Research facilities are able to make their own determinations of what is scientifically “necessary.”<sup>135</sup> Slaughterhouses have minimal regulations with regard to procedures and the size of cages, but these are generally rules that the food industry itself has agreed to—preventing animals from getting too sick improves the taste of the food, boosting sales.<sup>136</sup> Therefore, current animal legislation does not allow for a true weighing of human and nonhuman interests.

### *B. Seeking Judicial Protection*

Animal advocates have begun an attempt to address these legislative weaknesses through the use of the courts, with an equity argument that animals deserve to have rights of their own.<sup>137</sup> In October 2011, People for the Ethical Treatment of Animals (PETA) filed a lawsuit against SeaWorld,

---

131. See *supra* notes 117–23 and accompanying text.

132. See *supra* notes 101–13 and accompanying text.

133. See Francione & Charlton, *supra* note 112, at 7.

134. State anti-cruelty statutes generally prohibit only “unnecessary” harm to animals, leaving traditional animal uses like food and hunting intact, or provide justification defenses for those uses. See *supra* note 117 and accompanying text. Likewise, the federal legislation only attempts to prohibit “inhumane” procedures for accomplishing the industries’ uses of animals. See *supra* notes 111–12 and accompanying text. However, to be “humane” the procedures only need to meet minimal standards, without questioning the necessity of industry practices. See *supra* notes 109, 111–12 and accompanying text.

135. See *supra* note 109 and accompanying text.

136. Francione & Charlton, *supra* note 112, at 12–14.

137. Dubbed the animal rights movement, this theory, as an effort to ensure that animals’ most basic interests are protected, has been pervading animal law discussion. See generally GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983); SINGER, *ANIMAL LIBERATION* (1975); WISE, *RATTLING THE CAGE*, *supra* note 1.

naming five captive orcas as the plaintiffs.<sup>138</sup> PETA sought constitutional rights for the plaintiffs based on a Thirteenth Amendment claim, arguing that the Thirteenth Amendment “prohibits the conditions of slavery and involuntary servitude without regard to the identity of the victim and without reference to ‘persons.’”<sup>139</sup> The plaintiffs alleged both slavery and involuntary servitude, pleading that the plaintiffs were plucked from their families to be kept in small tanks and forced to perform unnatural tricks for SeaWorld customers.<sup>140</sup> The complaint pled facts demonstrating the sophisticated intelligence, emotions, social dependency, and cultural traits of orcas.<sup>141</sup> Yet, it alleged, being captured from their families in the wild and confined in small tanks with unnatural socialization has caused the whales to suffer psychological distress.<sup>142</sup> For instance, Tilikum, one of the plaintiffs, has suffered cuts from rubbing against the sides of a small metal tank.<sup>143</sup> Boredom and incompatible social groupings have caused him to gnaw on his metal enclosure, resulting in broken teeth, “leaving the pulp exposed and producing chronic pain.”<sup>144</sup> The plaintiffs sought declaratory judgment and an injunction, which would allow them to be moved to suitable conditions.<sup>145</sup> The Southern District of California dismissed the suit for lack of subject matter jurisdiction, interpreting the Thirteenth Amendment to apply only to

---

138. Complaint, *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. SeaWorld Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (No. 11CV2476JM(WMC)), 2011 WL 5077854; *see also* David Crary & Julie Watson, *PETA Lawsuit Seeks to Expand Animal Rights*, YAHOO! NEWS, Oct. 25, 2011, <http://news.yahoo.com/peta-lawsuit-seeks-expand-animal-rights-222219887.html>; James McWilliams, *How PETA’s Lawsuit Against Sea World Could End Factory Farming*, THE ATLANTIC, Nov. 11, 2011, <http://www.theatlantic.com/life/archive/2011/11/how-petas-lawsuit-against-sea-world-could-end-factory-farming/248127/>.

139. Complaint ¶ 104, *Tilikum*, 842 F. Supp. 2d 1259 (No. 11CV2476JM(WMC)). Section 1 of the Thirteenth Amendment states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

140. Complaint ¶¶ 101–11, *Tilikum*, 842 F. Supp. 2d 1259 (No. 11CV2476JM(WMC)).

141. *Id.* ¶¶ 10–18.

142. *Id.* ¶¶ 19, 21, 23. This stress is evidenced by behavior such as abnormal and repetitive movements, “unresponsiveness . . . , self-inflicted physical trauma and mutilation, stress-induced vomiting, compromised immunology, and excessive aggressiveness towards other orcas and humans.” *Id.* ¶ 23. The complaint asserts that this stress is what has led to the accounts of attacks on human handlers. *Id.* ¶ 24. In fact, named plaintiff Tilikum is the orca responsible for killing SeaWorld trainer Dawn Brancheau in 2010. *See, e.g., Tilikum, orca that killed SeaWorld Orlando trainer, will remain at the park despite calls to free him*, L.A. TIMES, Feb. 25, 2010, <http://latimesblogs.latimes.com/unleashed/2010/02/tilikum-orca-killer-whale-sea-world-orlando.html>. There is not a single account of an attack on a human by an orca in the wild, despite the fact that researchers have come very close to orcas for observation. *Tilikum*, 842 F. Supp. 2d at 24.

143. Complaint ¶ 33, *Tilikum*, 842 F. Supp. 2d 1259 (No. 11CV2476JM(WMC)).

144. *Id.* ¶ 43. “Tilikum no longer has teeth on his bottom jaw.” *Id.*

145. *Id.* ¶ 2.



humans.<sup>146</sup> However, there will undoubtedly be future attempts to secure greater protection for animals through the courts.<sup>147</sup>

#### IV. A NEW BREED OF IDEAS

Animal law scholars and activists are gaining momentum in their push to bring animal concerns to the forefront of our current legal debate.<sup>148</sup> Advocates can be divided into two basic camps: those seeking to reduce the suffering of nonhuman animals through welfare laws and those arguing that nonhuman animals should be granted rights.<sup>149</sup>

First, there are several groups that have taken a “welfare” approach and focused their efforts on reforming the animal welfare laws.<sup>150</sup> This approach attempts to incrementally improve the conditions to which we subject nonhuman animals.<sup>151</sup> It would involve adjusting state anti-cruelty laws as well as federal legislation such as the AWA and HMSA to include stricter standards and protection for more animals.<sup>152</sup> To address the problem of non-enforcement, welfare-based solutions could include pushing for better inspections and greater publicity of violations,<sup>153</sup> and reforming the AWA

146. *Tilikum*, 842 F. Supp. 2d at 1263–64. The court held that, within its historical context, the Thirteenth Amendment was intended only to apply to humans. *Id.* It further stated that, unlike other constitutional amendments, the Thirteenth Amendment targets the single issue of slavery, and thus cannot be expanded to fit the “changing conditions and evolving norms of our society,” because “‘slavery’ and ‘involuntary servitude’ are uniquely human activities.” *Id.* at 1264. This could leave the door open for similar claims to be brought under other constitutional provisions.

147. Steven M. Wise and his team have also been preparing to bring a lawsuit arguing for rights for certain animals, such as those in the cetacean community, by arguing that they should be considered “persons.” Interview by ZoeNature.org of Steven M. Wise, Professor, Harvard Law School (Oct. 26, 2010), *The Case for Basic Dolphin Rights*, available at <http://www.zoenature.org/2010/10/dolphins-legal-rights/>. Of these efforts, Wise stated: “Our purpose is to either win those cases or to lose them in a way in which we can understand how to win the next one. And if we lose that one, then we’ll understand how to win the next one, and then the next one.” *Id.*

148. When Katharine T. Bartlett, former Dean of Duke University School of Law, was posed with the question of what issue, in twenty years, people will pick out as a single important issue that should have been given more attention, she pointed to animal law. David J. Wolfson, *Confronting Barriers to the Courtroom for Animal Advocates*, 13 ANIMAL L. 123, 127 (2006).

149. BRUCE A. WAGMAN & MATTHEW LIEBMAN, A WORLDVIEW OF ANIMAL LAW 19–20 (2011) (summarizing the difference between the welfare approach and the rights approach to animal protection); Francione & Charlton, *supra* note 112, at 11–12.

150. These include organizations such as The Humane Society of the United States and People for the Ethical Treatment of Animals (PETA). See Francione & Charlton, *supra* note 112, at 11.

151. See *id.*; WAGMAN & LIEBMAN, *supra* note 149, at 19–20.

152. See *supra* notes 124–36 and accompanying text.

153. Sunstein, *Rights*, *supra* note 100, at 393 (suggesting, as a “minimal reform step,” a system



and HMSA to include private causes of action, allowing citizens to bring suits for suspected violations.<sup>154</sup>

On the other hand, following the trend of trying to bypass weak legislation by appealing to the judicial system for greater animal protections, several animal law scholars have begun to argue for a “rights” approach.<sup>155</sup> Rights-based theories contend that nonhuman animals deserve certain basic rights, such as the right against bodily harm.<sup>156</sup> Once an animal has a positive right, that right could be asserted as against humans.<sup>157</sup> This would override laws such as the AWA, HMSA, and anti-cruelty statutes, allowing animals to stand on their own feet under the law.

Within a rights paradigm, rights theorists vary in their opinions of which animals should receive rights and which rights to grant those animals. First, there are several places where rights-bearers and non-rights-bearers could be divided. Currently, humans possess rights and nonhumans do not.<sup>158</sup> However, this is an arbitrary division that can be shifted. Many animal rights advocates assert that all sentient beings deserve rights.<sup>159</sup> To be sentient one must have conscious awareness, which means the ability to think and feel.<sup>160</sup> This is generally equated to granting rights to animals that have a capacity to suffer—a division that these advocates contend is the most fair.<sup>161</sup> Other commentators advocate a middle ground, giving rights to certain animals that have heightened cognitive abilities that make them similar to humans, thus making it irrational to exclude them from sharing in any basic rights.<sup>162</sup> This could include animals that are self-aware, that possess theory of mind, or that have any other category of attributes.<sup>163</sup>

---

that mandates companies to disclose their animal treatment practices).

154. Ito, *supra* note 106, at 378.

155. See *supra* note 138–39.

156. See, e.g., Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 3 (2010) [hereinafter Wise, *Legal Personhood*]. The rights approach diverges from a welfare approach in that the focus is on the animal as the bearer of a right, whereas the welfare approach centers on humans and their social responsibility toward animals. Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 31 (2009) [hereinafter Cupp, *Moving Beyond*].

157. See Wise, *Legal Personhood*, *supra* note 156, at 3.

158. Animals currently have certain protections under the law, which punish humans for the unlawful treatment of animals. See *supra* notes 101–23 and accompanying text. However, this is distinguished from an affirmative right, which an animal could assert as a plaintiff in court. Wise, *Legal Personhood*, *supra* note 156, at 3.

159. See SINGER, *supra* note 137; Francione & Charlton, *supra* note 112, at 19–20.

160. Francione & Charlton, *supra* note 112, at 7. Most animals are included within this definition. See *id.*

161. Philosopher Jeremy Bentham first said that “the question is not, Can they reason? Nor, Can they talk? But, Can they suffer?” JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 310–11 n.1 (Prometheus 1988).

162. See WISE, DRAWING THE LINE, *supra* note 14; WISE, RATTLING THE CAGE, *supra* note 1.

163. See *supra* notes 27–30 and accompanying text. Due to their heightened intelligence, the

Next, there is a range of rights that could be granted. Animal rights activists do not propose that all animals have the full extent of rights as do normal, adult humans. Like human children, a great ape will not be placing a vote in the next presidential election. Animals could be given rights such as bodily integrity or bodily liberty, which would prevent humans from physically hurting animals or confining them,<sup>164</sup> or a right to life or to be free from torture. Alternatively, rights could be granted on a sliding scale, with the animals possessing the highest cognitive capacity holding greater rights and animals with a lesser capacity holding fewer rights.<sup>165</sup>

Notwithstanding the common goal of improved conditions for animals, there is heated debate between welfarists and rights theorists over whether animals should have rights.<sup>166</sup> Arguments on both sides range from philosophical to legal.<sup>167</sup> Rights proponents argue that if rights are given to infants and incompetent adults, or those in comas, then they should also be granted to animals functioning at a higher level than those individuals.<sup>168</sup> This demonstrates the arbitrariness and potential unfairness of a sharp line drawn between human and nonhuman. Further, rights are assigned to even non-living things such as corporations, showing legal precedent for nonhuman rights.<sup>169</sup> Opponents of animal rights respond that rights for things like corporations are legal fictions designed to protect the rights of the human efforts behind them, and are distinguishable from granting rights to animals on their own accord.<sup>170</sup> Opponents also assert that this comparison

---

great apes, cetaceans, and elephants would likely be included as rights-holders. *See supra* notes 18–69 and accompanying text. *See generally* WISE, DRAWING THE LINE, *supra* note 14. These types of rights would seriously limit human use of the rights-bearing animals, which some scholars argue is an appropriate goal. *See* Francione & Charlton, *supra* note 112, at 19.

Steven Wise argues for basic rights for all animals with “practical autonomy.” WISE, DRAWING THE LINE, *supra* note 14, at 32. He defines practical autonomy as the ability to (1) desire, (2) intentionally try to fulfill that desire, and (3) possess a sense of self-sufficiency that allows the animal (human or nonhuman) to understand “that it is she who wants something and it is she who is trying to get it.” *Id.*

164. Wise, *Legal Personhood*, *supra* note 156, at 3.

165. WISE, DRAWING THE LINE, *supra* note 14, at 286.

166. *See* Sunstein, *Rights*, *supra* note 100, at 388. “Some advocates of animal rights think that their adversaries are selfish, unthinking, cruel, even morally blind. Some of those who oppose animal rights think that the advocates are fanatical and even bizarre, willing to trample on important human interests for the sake of rats and mice and salmon.” *Id.*

167. This Section serves to provide only a superficial overview of a complex debate.

168. WISE, RATTLING THE CAGE, *supra* note 1, at 185.

169. Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 435 (1996).

170. Richard L. Cupp, Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood As Stepping Stones Toward Abolishing Animals’ Property Status*, 60 SMU L. REV. 3,

is dangerous because it could serve only to lessen protections for those humans considered to be at a “lower” level than animals.<sup>171</sup>

Proponents of animal rights cite to modern scientific knowledge as completely rebutting the historical beliefs that justified granting rights only to humans.<sup>172</sup> Our Western precedent is rooted in the ancient beliefs that “lower” beings exist for the sake of humans, and that animals do not have the capacity to think or feel.<sup>173</sup> Since we now know that the differences between humans and at least some nonhumans are “quantitative and not qualitative,” there is no good reason why animals should not be included as rights-bearers.<sup>174</sup> The term “speciesism” has been coined to connote the belief that arbitrary discrimination underlies our mistreatment of animals.<sup>175</sup> Conversely, opponents of animal rights look to the social contract theory as a reason for drawing a sharp line between human and nonhuman.<sup>176</sup> In this view, the foundation for our civilization is based upon a pairing of rights and responsibilities—in order to gain the rights and protections that come with being a member of society, we also undertake responsibilities and give up some freedoms.<sup>177</sup> Since animals do not have the moral capacity to

---

18 (2007) [hereinafter Cupp, *A Dubious Grail*].

171. Cupp, *Moving Beyond*, *supra* note 156, at 76–77.

172. See, e.g., WISE, *DRAWING THE LINE*, *supra* note 14.

173. Early Western philosophers imagined a world designed solely for humans. WISE, *RATTLING THE CAGE*, *supra* note 1, at 11. Socrates believed that animals and nature existed for humans, and Aristotle conceptualized nature as being designed like a ladder. *Id.* These beliefs led to the concept of a “Great Chain of Being,” where humans put themselves ahead of other beings in a hierarchical stepladder, with the lower beings designed to serve the higher ones. *Id.* Later philosophers such as Immanuel Kant continued to deny animals the capacity for any sort of rational thought. Sunstein, *Rights*, *supra* note 100, at 387. The conception of animals as lower rungs on a chain persisted in Western thought until almost a century ago. WISE, *RATTLING THE CAGE*, *supra* note 1, at 11. However, these types of historic beliefs are rebutted by our current scientific knowledge of animals’ cognitive abilities. See *supra* notes 18–88 and accompanying text.

174. Francione & Charlton, *supra* note 112, at 19; see *supra* notes 13–89 and accompanying text. Giving animals rights in the United States would not be unprecedented. “In 2002, Germany became the first European nation to vote to guarantee animal rights in its constitution, adding the words ‘and the animals’ to a clause that obliges the state to respect and protect the dignity of human beings.” Sunstein, *Rights*, *supra* note 100, at 388. The Indian Constitution states that “[i]t shall be the fundamental duty of every citizen of India . . . to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.” WAGMAN & LIEBMAN, *supra* note 149, at 34 (quoting CONST. OF INDIA art. 51–A(g)).

175. See *The Ethics of Speciesism*, BBC, <http://www.bbc.co.uk/ethics/animals/rights/speciesism.shtml> (last visited Oct. 29, 2012). This term reflects the idea that discrimination and mistreatment of animals is not unlike other forms of bias, such as that based on gender or race. It is the natural reaction that those in charge of making a division of rights assign themselves to the group at the top, pushing others down below. WISE, *RATTLING THE CAGE*, *supra* note 1, at 13 (“No one ever, ever, assigns a group to which he or she belongs to any place in a hierarchy of rights other than the top.”). This type of discrimination may be especially hard for animals to overcome, because they do not have a voice of their own, relying instead on humans to advocate for them. See *id.* at 13–14.

176. See Cupp, *A Dubious Grail*, *supra* note 170, at 28–30.

177. *Id.* at 28.

undertake such responsibilities, opponents argue, they do not deserve to be given rights.<sup>178</sup> The social contract argument, however, may be refuted, as some scientists declare that there is growing evidence to show that other species have a sense of morality, and that their social groups, like human societies, are governed by moral codes.<sup>179</sup> Under a social contract theory, to the extent that animals consciously exhibit morals in their interactions with humans, it could be argued that humans should have a duty to reciprocate. For instance, if scientists can say that predator animals refrain from killing unless it is necessary, then the human practice of hunting for pleasure may breach a moral code.

There may be no clear answer to the debate. However, the real reason for denying rights is probably more practical than theoretical: the corresponding ramifications make broad rights for animals a currently unattainable goal.

## V. CAN WE SPARE THE ZOO KEY?

### A. The Rights Approach

Granting animals rights would have immense ramifications, depending on the scope of the rights that are given and the breadth of animals that are included as rights-holders. This is because “rights exist in competition with other rights”—granting new rights to animals would impair the ways in which we currently use animals as property.<sup>180</sup> It would not currently be feasible to extend a wide spectrum of rights to all sentient animals, mainly for economic reasons.<sup>181</sup> In 2010, the beef industry alone was valued at \$74

---

178. *Id.*

179. Richard Gray, *Animals Can Tell Right From Wrong*, THE TELEGRAPH, May 23, 2009, <http://www.telegraph.co.uk/earth/wildlife/5373379/Animals-can-tell-right-from-wrong.html>. In his controversial book *Wild Justice*, Marc Bekoff, an ecologist at the University of Colorado, Boulder, contends that animal behavior research indicates that animals, from mice to primates, have moral codes that allow even competitive animals to live together in groups. MARC BEKOFF & JESSICA PIERCE, *WILD JUSTICE: THE MORAL CODE OF ANIMALS* 18–19 (2009). Bekoff says the research shows that animals “have an innate sense of fairness, display empathy and help other animals that are in distress.” Gray, *supra*. They may even be able to empathize with the suffering of other species. *Id.* This helps explain anecdotes such as that of dolphins helping humans escape from sharks. *Id.*

180. Cupp, *A Dubious Grail*, *supra* note 170, at 26–27.

181. Steven Wise, advocating for rights for certain animals, admits that granting rights to all animals would be impractical. WISE, *DRAWING THE LINE*, *supra* note 14, at 34 (“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.”).

billion, with the U.S. consuming 26.4 billion pounds of beef.<sup>182</sup> The use of animal products is so widespread that most other consumer products would also be eradicated.<sup>183</sup> Gradually, many of these materials could be replaced, but it would be best left to the political and legislative processes to implement those policy trends.<sup>184</sup> Courthouses would struggle, at best, to

---

Perhaps economic concerns should not serve as a barrier to morally correct action. See NATIONAL ACADEMY OF SCIENCES, *supra* note 20, at 2 (deciding that costs should not be a consideration when determining whether chimpanzees are necessary in research). However, from a practical standpoint, economic considerations and feasibility tend to matter a great deal. “[T]he law represents what is politically and financially feasible at a moment in time.” David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 350 (2005).

In this sense, animal rights advocates have compared the current struggle toward rights for animals with the civil rights movement. WISE, DRAWING THE LINE, *supra* note 14, at 10–19; Sunstein, *Rights*, *supra* note 100, at 389 (asserting that in one hundred years, current uses of animals may well be seen as “a form of unconscionable barbarity,” making an analogy to slavery appropriate). African-Americans were considered by law to be property that could possess no legal right, much as animals are now. WISE, DRAWING THE LINE, *supra* note 14, at 16. In the infamous opinion of *Dred Scott v. Sandford*, the Supreme Court found that blacks were “beings of an inferior order,” and could be “treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.” 60 U.S. 393, 407 (1856). This case is now cited as one of the worst Supreme Court decisions in our history. See Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13 (2011). As societal values changed, so did the law regarding slaves. However, this took far longer than it should have, because abruptly shutting down the slave trade, which was a very profitable business, would have economic ramifications. WISE, DRAWING THE LINE, *supra* note 14, at 14. It is now evident that the slavery of humans was not justified, even though it may have profited the groups of people who placed themselves above those who were enslaved. Similarly, in theory, the mistreatment of animals should not be justified only by the fact that it provides an economic benefit. See *id.* at 16.

182. United States Department of Agriculture, *U.S. Beef and Cattle Industry: Background Statistics and Information*, ECONOMIC RESEARCH SERVICE, <http://www.ers.usda.gov/news/BSECoverage.htm>. Apart from weighing the economic concerns, the meat industry should not be a barrier to animal protections, because eating meat is not necessary. An expert panel for the United Nations declared the world’s current meat and dairy diet unsustainable, encouraging a shift to vegan diets as “vital to save the world from hunger, fuel poverty and the worst impacts of climate change.” Felicity Carus, *UN Urges Global Move to Meat and Dairy-Free Diet*, THE GUARDIAN, June 2, 2010, <http://www.guardian.co.uk/environment/2010/jun/02/un-report-meat-free-diet>.

183. See WISE, DRAWING THE LINE, *supra* note 14, at 10.

[T]oday the use of nonhuman animal products is so diverse and widespread that it is impossible to live in modern society and not support the nonhuman animal industry directly. For example, the blood of a slaughtered cow is used to manufacture plywood adhesives, fertilizer, fire extinguisher foam, and dyes. Her fat helps make plastic, tires, crayons, cosmetics, lubricants, soaps, detergents, cough syrup, contraceptive jellies and creams, ink, shaving cream, fabric softeners, synthetic rubber, jet engine lubricants, textiles, corrosion inhibitors, and metal-machining lubricants. Her collagen is found in pie crusts, yogurts, matches, bank notes, paper, and cardboard glue; her intestines are used in strings for musical instruments and racquets; her bones in charcoal ash for refining sugar, in ceramics, and cleaning and polishing compounds.

*Id.* at 10–11.

184. See, e.g., John Vidal, *The Future of Food*, THE GUARDIAN, Jan. 21, 2012, <http://www.guardian.co.uk/global-development/2012/jan/22/future-of-food-john-vidal?INTCMP=ILCNETTXT3487>.

handle the burden of litigation surrounding mistreated animals.<sup>185</sup> Finally, if courts granted rights to animals, manufacturers would simply move to other jurisdictions or countries for their operations, hurting the American economy while achieving little for animal protection.<sup>186</sup>

By reducing the spectrum of rights that are granted and the animals that qualify as rights-holders, the burden on society would become much more reasonable. For example, granting rights to only the great apes, cetaceans, and elephants would be feasible, because society is not dependent on their use.<sup>187</sup> However, it is warranted for courts to remain wary of the unintended consequences of even this limited scope of rights. Granting an animal an affirmative right could result in difficult decisions later if that animal's rights conflict with important human interests. For example, if great apes are granted a right such as freedom from bodily harm, and there becomes a subsequent scientific need for the use of an ape in an invasive experiment that is likely to save millions of human lives, many people would assert that the human interest should outweigh the ape's interest.<sup>188</sup> However, since the

185. See Cupp, *A Dubious Grail*, *supra* note 170, at 42–43. An estimated twenty-five to twenty-eight billion animals are killed each year for human use in the United States, and another twenty million are used in research. *Id.* “[T]he potential number of . . . plaintiffs in the United States would instantly grow from our current 300 million human citizens (in addition to our corporations, foreign plaintiffs, etc.) to well over 25 billion.” *Id.* at 43.

However, it may be unfair to give animals and humans equal weight in the burden they would place on the legal system. First, animals would have a very limited number of causes of action at their disposal, unlike human plaintiffs. Second, litigation would only be flowing in one direction, up to human defendants. Animals would not be bringing causes of action against one another, as humans do. Third, the main targets in the litigation would be the handful of corporations and laboratories that inflict most of the harm. Thus, it would only take a few class action lawsuits, naming an entire species as a class, to set precedents and regulate the behavior of these industries. Fourth, the floodgates of litigation could be controlled, such as by limiting who could be designated as the representative to bring the suit on behalf of the animals.

186. WAGMAN & LIEBMAN, *supra* note 149, at 11. Therefore, change would need to occur on a worldwide scale, such as through international treaties, or accompanied by strict regulations on imports. See *id.* This would require action by the Executive and Legislative Branches, which are unlikely to disregard the animal industries' political influences.

187. The great apes, formerly used as an ideal model in experimentation, are no longer necessary for most research. See *supra* notes 96–98 and accompanying text. Cetaceans and elephants are mainly used in exhibition, which is an unnecessary human luxury.

188. In its report on the necessity of using chimpanzees in experimentation, the National Academy of Sciences left open the possibility that in rare cases chimpanzees could be necessary in future research. NATIONAL ACADEMY OF SCIENCES, *supra* note 20, at 65. Due to their genetic proximity to humans, chimpanzees have a unique value as research subjects. *Id.* at 2. In most cases, particularly with the use of new and developing technology, alternative models are sufficient for experiments; however, a new health epidemic could present an exception. *Id.* at 5.

The European Union, which banned the use of great apes in research, includes a safeguard clause in its directive, stating that the use of great apes is permitted when research is “aimed at the

ape would have an affirmative right to be free from that harm, scientists would be barred from using the ape. Therefore, it is necessary to find a feasible method that could balance animal protection with the concern of avoiding onerous ramifications.<sup>189</sup>

### *B. The Welfare Approach*

Reformation of state anti-cruelty laws and federal legislation has gradually improved conditions for animals, and continuing this path of development could serve to protect animals without an upheaval of societal practices.<sup>190</sup> However, some scholars argue that by remaining within these current legal parameters, with animals lacking rights of their own, no real change is possible.<sup>191</sup> Thus, our treatment of animals will never catch up to our moral and scientific knowledge.<sup>192</sup>

The problem is that improvements in animal laws may be driven more by human self-interest than a legitimate concern for animal welfare. A major development in state anti-cruelty laws has been heightened penalties, with states beginning to turn the most heinous animal abuses into felonies.<sup>193</sup> However, a main goal for these reforms may have been to target violence against humans: the changes were correlated with a series of studies that found animal abusers more likely to commit violent crimes against humans.<sup>194</sup>

The same is true in the food industry. The enactment of the HMSA was really justified by the fact that it increased worker safety and reduced carcass damage, saving the industry money.<sup>195</sup> McDonalds was praised for setting new standards for slaughterhouses, with mild improvements in their treatment of the animals, but the drive behind this decision was the fact that

---

preservation of those species or where action in relation to a potentially life-threatening, debilitating condition endangering human beings is warranted, and no other species or alternative method would suffice in order to achieve the aims of the procedure.” *Id.* at 16–17.

189. See Sunstein, *Rights*, *supra* note 100, at 394 (advocating a balancing of human and animal interests, based on values and scientific facts, before deciding to implement regulations on animal use).

190. See Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 *ANIMAL L.* 131, 131–42 (2005) (discussing improvements in state anti-cruelty laws, such as the addition of felony-level crimes and sentencing guidelines); Swanson, *supra* note 106, at 939–43 (describing the evolution of the AWA).

191. Francione & Charlton, *supra* note 112, at 12.

192. See *supra* Part II; see, e.g., Thomas I. White, *Ethical Implications of Dolphin Intelligence: Dolphins as Nonhuman Persons (Abstract)*, AAAS 2010 ANNUAL MEETING, <http://aaas.confex.com/aaas/2010/webprogram/Paper1489.html> (claiming that dolphins should “qualify for moral standing as individuals” based on their similarities with humans).

193. Frasch, *supra* note 117, at 70; see *supra* note 116 and accompanying text.

194. Frasch, *supra* note 117, at 70.

195. Francione & Charlton, *supra* note 112, at 12–13.



McDonalds discovered that it would help economically.<sup>196</sup> Even slight improvements in the treatment of slaughterhouse animals lead to improved meat quality.<sup>197</sup> There is also a developing niche market for items like “free-range” and “organic” products, which are advertised as healthier and more humane.<sup>198</sup> These products sell because some consumers are willing to pay more for them; however, industry-wide change is unlikely because producers and many consumers would fight against increased costs.<sup>199</sup>

Overall, a welfare approach will cause animal protections to remain subject to political influences rather than current scientific and moral standards. Therefore, a balancing method between the potentially drastic ramifications of a broad rights approach and the ineffectiveness of the welfare approach is necessary.

## VI. USING TORT LAW TO BALANCE HUMAN AND NONHUMAN INTERESTS

### A. Using a Tort Approach

David Favre, professor at Michigan State University College of Law, has suggested the use of a new tort cause of action as a middle ground between the rights and welfare approaches to animal law.<sup>200</sup> This would provide a controlled scheme for balancing competing human and nonhuman

---

196. *Id.*

197. *See id.* at 14. About reforms in the livestock industry, the *Los Angeles Times* commented, “In part, the reforms are driven by self-interest. When an animal is bruised, its flesh turns mushy and must be discarded. Even stress, especially right before slaughter, can affect the quality of meat.” *Id.* at 13–14 (citing Stephanie Simon, *Killing Them Softly: Voluntary Reforms in the Livestock Industry Have Changed the Way Animals Are Slaughtered*, L.A. TIMES, Apr. 29, 2003, at A10).

198. Francione & Charlton, *supra* note 112, at 12, 16. An advertisement like “free-range” does not always mean improved conditions for the animals. *How Free is “Free-Range”?*, COMPASSION OVER KILLING, <http://www.cok.net/lit/freerange.php> (last visited Jan. 23, 2013). There is no federal regulation restricting which eggs can be labeled free-range, so hens are typically still crowded into a shed, with a narrow exit to a little outdoor enclosure, only big enough to fit some of the birds. *Id.* Since the male chicks cannot lay eggs, they are killed, often by being ground alive or thrown into trash bags to suffocate. *Id.* The only restriction the U.S. Department of Agriculture places on birds raised for free-range meat is that there must be an access to the outdoors—often this ends up being a tiny area off of the shed that can fit only a few of the birds. *Id.* The birds also suffer serious health problems from the methods designed to quicken their growth. *Id.* Finally, they are still thrown into trucks to be taken to the same slaughterhouses as the non-free-range birds, where they are all “hung upside down, have their throats slit, and bleed to death, often while still fully conscious.” *Id.* There are similarly loose regulations for other “free-range” animals. *Id.*

199. Francione & Charlton, *supra* note 112, at 12.

200. Favre, *supra* note 100.



interests.<sup>201</sup> Favre asserts that it is also a logical step from our current law, allowing “animal interests to compete more fully with human interests, sometimes winning and sometimes losing.”<sup>202</sup> A tort cause of action would allow animal interests to be asserted, accomplishing many of the goals of the rights approach, while controlling the ramifications through the limitations of the tort’s elements. It would match the duty that already exists under criminal law statutes not to inflict unnecessary pain and suffering on animals, simply imposing a civil duty as well.<sup>203</sup> It would also serve to increase the enforcement of animal laws by allowing individuals to bring suit rather than relying on a prosecutor or the government.<sup>204</sup>

North Carolina has sought to achieve the goal of increased enforcement through a civil cause of action by enacting a statute that allows any person or organization to bring suit for injunction of violations of the state’s criminal anti-cruelty statute.<sup>205</sup> This grant of standing to individuals to bring civil lawsuits to protect animal welfare is similar to the concept of a common law tort cause of action, and shows that the implementation of a civil cause of action is feasible.<sup>206</sup> Unfortunately, the North Carolina legislature yielded to political pressure and included several exemptions from the statute, mirroring the types of exemptions for traditional animal uses that are found in state criminal anti-cruelty statutes and limiting its power to address many common types of animal cruelty, such as excessive and unnecessary cruelty in slaughterhouses or hunting practices.<sup>207</sup>

A tort cause of action could fill this gap by preserving traditional “necessary” uses of animals (which could be at risk under a rights approach)<sup>208</sup> while more effectively addressing conduct that surpasses

---

201. See *id.* at 334.

202. *Id.* at 336. A tort cause of action would not be an unprecedented way to solve this issue. “New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression in which the court has struck out boldly to create a new cause of action where none had been recognized before.” *Id.* at 334 n.2. Examples of these types of new torts include the intentional infliction of mental suffering, the infliction of prenatal injuries, and the invasion of the right to privacy. *Id.*

203. *Id.* at 355.

204. *Id.* at 356.

205. N.C. GEN. STAT. §§ 19A-1 to 19A-4 (2003); see William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, 40 (2005).

206. Both the North Carolina statute and a tort cause of action would allow for plaintiffs to bring claims for animal cruelty with a preponderance of the evidence burden of proof. See Reppy, *supra* note 205, at 44.

207. N.C. GEN. STAT. § 19A-1.1; Reppy, *supra* note 205, at 54–60. The statute includes exemptions for the lawful taking of animals under the Wildlife Resources Commission; lawful research or training; production of livestock, poultry, or fish, lawful activities for the purpose of producing food; lawful veterinary practices; lawful destruction of an animal for the purpose of protecting the public; and lawful activities for sport. N.C. GEN. STAT. § 19A-1.1.

208. See *supra* Part V.A.

acceptable practices within those uses (which the welfare approach inadequately addresses),<sup>209</sup> through a balancing of interests conducted by the trier of fact. For instance, existing state and federal laws generally yield to current practices in laboratory research, accepting the industry standard for treatment of animals.<sup>210</sup> A tort action could seek to enjoin a laboratory for excessive cruelty, such as failing to anesthetize animals for painful procedures where anesthetization would not interfere with the experiment.<sup>211</sup> However, the tort claim would fail in preventing experimentation altogether if the human interests in a necessary experiment were strong enough to override the animal's claim.<sup>212</sup> In this way, a court's case-by-case determination would be much more adept at addressing animal cruelty than statutes with broad, generalized exceptions.

Favre has named his new tort the "intentional interference with a fundamental interest of an animal."<sup>213</sup> Its elements are:

1. That an interest 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 the defendant;
3. That the weight and nature of the interests of the animal plaintiff substantially outweighs the weight and nature of the interests of the human defendant.<sup>214</sup>

What constitutes a "fundamental interest" would be a question for the trier of fact, based on the scientific knowledge that could be produced.<sup>215</sup>

---

209. See *supra* Part V.B.

210. State anti-cruelty statutes typically exclude research practices, and the AWA defers to laboratories' experimental designs. See *supra* notes 109, 117 and accompanying text.

211. Favre, *supra* note 100, at 346–47.

212. *Id.*

213. *Id.* at 334.

214. *Id.* at 353.

215. *Id.* at 357. It would be the plaintiff's burden to show facts proving a fundamental interest. *Id.* For the second element, the interference must be intentional, "whether or not the specific consequence was intended." *Id.* at 359. "As a matter of public policy, if an individual has possession of an animal, it should be presumed that he or she understands the animal's and the species's fundamental interests, and is willing and able to accommodate them." *Id.* For the third element, the plaintiff must show that his interests substantially outweigh those of the defendant. *Id.* at 360. Viable alternatives for advancing the human interest may also be considered in the analysis. *Id.* at 360–61.

Favre used the “substantially outweighs” test to reflect that it would currently be too radical to give the interests of animals and humans equal weight.<sup>216</sup> The remedies of the tort include money damages, injunctive relief, and title transfer.<sup>217</sup>

Favre’s tort has been critiqued as impractical to implement.<sup>218</sup> First, it could pose a threat to even necessary animal uses, such as life-saving medical research, because of frivolous lawsuits.<sup>219</sup> Since monetary damages are offered as a remedy, and due to the costs of defending lawsuits, research facilities (which often operate through grants from the government) may run out of resources and shut down.<sup>220</sup> The meat and dairy industries could also be targeted regardless of the companies’ actual treatment of animals, because some activist groups may abuse the cause of action by bringing lawsuits for the sole purpose of hurting the industries.<sup>221</sup> The costs associated with the litigation would simply be shifted to consumers through raised prices for the products.<sup>222</sup> Further, there may be many and varied lawsuits claiming something to be a “fundamental interest” of an animal.<sup>223</sup> For example, one could try to challenge the spaying and neutering of pets, claiming that reproduction is a fundamental interest.<sup>224</sup> Even if these types of suits proved unsuccessful, they would place a burden on the court system.<sup>225</sup> Second, Favre’s tort calls for a determination of whether an animal’s interests “substantially outweigh” human interests.<sup>226</sup> This determination of the strength and value of the competing interests would be hard to quantify, especially when trying to assign a value to the strength of the animal’s interest in human terms. The test of whether an interest “substantially outweighs” another interest also provides little guidance, as courts could interpret this differently.<sup>227</sup> This would result in extensive

---

216. *Id.* at 359.

217. *Id.* at 366. Favre includes monetary damages as a typically expected tort remedy. *Id.* In this case, if the plaintiff experienced pain and suffering, then compensation “sufficient to assure the conditions do not reoccur” would be appropriate. *Id.* The money would be put into a trust for the animal. *Id.*

218. Cupp, *A Dubious Grail*, *supra* note 170.

219. *Id.* at 44–45. Cupp notes that there are many animal activists that oppose all types of laboratory research, regardless of the significance of the research. *Id.* at 44.

220. *Id.* at 46.

221. *Id.*

222. *Id.*

223. *Id.* at 47. It would be difficult to determine what constitutes a “fundamental” interest of an animal, resulting in speculation in many cases. *Id.*

224. *Id.*

225. *Id.* at 48.

226. *See supra* text accompanying note 207.

227. Cupp, *A Dubious Grail*, *supra* note 169, at 50. Courts disfavor superlatives like “substantially outweighs” in tort law because they signal a lack of clarity in the test. *Id.*

litigation over every claim.<sup>228</sup> The test would not uniformly solve the problems that exist with the current welfare and rights approaches<sup>229</sup> because courts would have room to assign a much higher value to human interests (including economic interests), rendering the test toothless; alternatively, other courts might decide that it is not ethical for economic interests to factor in to the equation, resulting in immense ramifications commensurate to those of the rights approach.<sup>230</sup>

### *B. A Modified Tort: The Wrongful Abuse of an Animal*

This Comment proposes a narrower tort that would address the concerns arising from Favre's original conception of a tort cause of action for animals. The elements of the modified tort, which I term the "wrongful abuse of an animal,"<sup>231</sup> should be as follows: (1) the defendant has caused the wrongful abuse of an animal; (2) the abuse was unnecessary; and (3) there is clear and convincing evidence that the abuse resulted in continuing physical or mental injury to the victim. The only remedy available would be injunctive relief from the cruelty.

What constitutes wrongful abuse would mirror anti-cruelty statutes, which include actions such as physical harm, torture, or neglect.<sup>232</sup> In this respect, the tort would be similar to the North Carolina cause of action—a model that has already proven feasible<sup>233</sup>—in that it would provide greater enforcement for a standard that society already demands of individuals.<sup>234</sup>

Next, a continuing injury could take the form of continuous and repeated physical or mental abuse, or abuse so great that it results in a lasting injury.<sup>235</sup> There are three main reasons for requiring a continuing injury.

228. *Id.* Notably, the tort does not address whether the killing of animals would provide a successful cause of action, instead leaving this question to be determined on a case-by-case basis. *Id.*; see Favre, *supra* note 100, at 364–65. This is a difficult yet important ethical question, the answer to which is key to the animal rights debate and could have a drastic societal impact.

229. See *supra* Part V.

230. See *supra* Part V.A.

231. The term "wrongful" is used to connote that defendants are liable for only unjustified abuses.

232. See *supra* note 116 and accompanying text.

233. See *supra* notes 200–01 and accompanying text.

234. One difference is that the tort would not synthetically exclude particular animals. See *supra* Part III.A.

235. Examples of mental abuse could include being locked in a tiny cage, being unnaturally separated from family, or torture resulting in great mental injury. A plaintiff would most likely try to prove continuing abuse through a showing of heightened intelligence and emotional capacity coupled with behavioral changes as a result of the abuse.

First, it narrows the scope of animal plaintiffs to match evolving scientific knowledge, because the animal must be capable of suffering continuing injury.<sup>236</sup> In the case of unjustified continuing physical abuse, sentient animals that are capable of suffering may qualify. However, in the case of mental abuse, the animal would require the mental capacity to be impacted by psychological abuse and to suffer for a longer period of time than the immediate harm. At a minimum, this would require the ability to remember the abuse and the emotional sensitivity to be impacted by it (possibly requiring self-awareness).<sup>237</sup> Second, because this tort seeks injunction, it would be an action in equity. In weighing the equitable interests, animal protection would only be furthered by removing an animal if the cruelty was likely to continue in the future.<sup>238</sup> Without the threat of continuing injury, there would be no reason to remove an animal from her owner.<sup>239</sup> Third, the requirement of a continuing injury makes the tort more practical, namely by allowing society to continue using animals for food and other large industries.

A plaintiff must show the existence of a continuing injury by clear and convincing evidence. The wrongful abuse of an animal tort shares similarities with a proceeding for the termination of parental rights for abuse, which may be brought in addition to criminal charges for child abuse in order to remove a child from abusive parents to protect the child's welfare.<sup>240</sup> Thus, both actions provide the victims of abuse with supplemental protections outside of criminal statutes, and seek to place the animal or child in the best situation for his or her wellbeing.<sup>241</sup> In proceedings for termination of parental rights, clear and convincing evidence is required in order for severance of parental rights to satisfy the Due Process Clause of the Fourteenth Amendment.<sup>242</sup> The clear and convincing evidence standard is similarly appropriate in the wrongful abuse of an animal context because some actions may result in enjoining a person's ownership of an animal. A legal analogy between protections for animals

---

236. This would incorporate the scientific focus of the rights approach, while allowing for a more flexible standard—instead of drawing a line to confer rights on a specific category of beings, such as those that are sentient or self-aware, this standard is more closely tied to the actual injury and could be subject to change on a case-by-case basis. It turns the focus toward requiring plaintiffs to prove an injury, albeit using scientific knowledge, rather than proving only a certain cognitive standard.

237. See *supra* note 28 and accompanying text. Thus, an animal that is confined to an undersized cage for a short period of time, and then does not have the capacity to remember or be affected by the abuse for long afterward, would not meet this standard.

238. See Reppy, *supra* note 205, at 44 (“A judge asked to enjoin cruelty under the civil remedies law is unlikely to do so without credible evidence that cruelty will continue in the future.”).

239. 42 AM. JUR. 2D *Injunctions* § 91 (2012).

240. See generally 43 C.J.S. *Infants* § 57 (2004).

241. See *id.*

242. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

and children is becoming increasingly appropriate, as the law progressively recognizes the animals as the victims rather than their human owners.<sup>243</sup> Animals have also been treated similarly to children in other areas of the law, such as in custody cases involving pets or in the ability to provide for an animal in a will or a trust.<sup>244</sup>

The tort's inclusion of the element of necessity is appropriate because authorities addressing animal protection consistently represent that only "unnecessary" actions toward animals should be prevented.<sup>245</sup> The tort would thus adhere to current standards, acting similarly to the North Carolina statute and other state and federal laws in general, except through a more effective outlet.<sup>246</sup> It would provide an appropriate balance between preserving traditional animal uses, which are not currently feasible to eliminate, and protecting against animal abuse that exceeds what is necessary to achieve those uses.<sup>247</sup> For instance, this rule allows society to use animals for food, but would require industries to treat animals more humanely before they are killed.<sup>248</sup> Important in the consideration of necessity is the feasibility of alternatives.<sup>249</sup> If there is a feasible way to accomplish a necessary purpose while reducing animal suffering, it should be employed.<sup>250</sup> Additionally, a consideration of alternatives would be consistent with the purpose of focusing on the animal's wellbeing.<sup>251</sup> Depending on the alternatives, removing an animal from her current situation may do more harm than good. For example, in the case of an

---

243. State anti-cruelty statutes have developed to shift the focus from economic damages for animal owners to protecting the animals from harm, even when no human interests are at stake. Serafino, *supra* note 116, at 1120–25. Federal statutes have similarly been enacted to improve conditions for animals, even though this may conflict with economically-ideal practices in the use of animals. *See supra* notes 101–13 and accompanying text.

244. *See supra* note 100.

245. State and federal law, as well as the National Academy of Sciences, have indicated that necessity is an important determination when addressing animal use. *See supra* notes 90–98, 133 and accompanying text.

246. *See supra* notes 101–18, 205–06 and accompanying text.

247. *See supra* notes 206–10 and accompanying text.

248. *See, e.g., supra* note 198.

249. The National Academy of Sciences found that the necessity in using chimpanzees in medical research was dependent on the existence of alternatives. *See supra* notes 95–98 and accompanying text. Although the Academy's report does not provide legal precedent, it is persuasive in that it was published by experts in current scientific knowledge about animals and a body that is involved in the field of animal use. Thus, the Academy is close to the issue and may be in the best position to determine how to solve it.

250. *See supra* notes 92–93 and accompanying text.

251. *See supra* notes 228–29 and accompanying text.

animal hoarder who is not taking proper care of her animals, the animals may be even worse off if they are sent to a shelter where they will be euthanized within a few days.<sup>252</sup> Since this is an action in equity, it will be important for courts to consider the alternatives and determine the best solution for the parties involved.<sup>253</sup> It is the plaintiff's burden to show that the defendant's actions are unnecessary and that there are feasible alternatives.<sup>254</sup>

Limiting the remedy to injunctive relief and requiring the plaintiff to pay attorneys' fees and costs if the judge finds that the suit is frivolous would serve to prevent the groundless lawsuits and excessive damage to industries of which critics warn.<sup>255</sup> Alternatively, courts could assuage critics' worries by issuing sanctions for frivolous claims.

The orcas that brought suit against SeaWorld for their captivity<sup>256</sup> serve to provide an example of the application of this tort. First, the plaintiffs could likely show that SeaWorld's actions constitute wrongful abuse, because the orcas have suffered physical harm due to inadequate living conditions.<sup>257</sup> Second, this would likely constitute unnecessary abuse, because there are feasible alternatives. SeaWorld could increase the size of its tanks and remove the orcas from unsuitable social pairings. Third, there is clear and convincing evidence of continuing injury, because the orcas have exhibited behaviors proving extreme distress and lasting physical injury.<sup>258</sup> Scientific knowledge about the cognitive abilities of whales further shows that the orcas would suffer continuous psychological injuries.<sup>259</sup> Therefore, a court may make the equitable determination to

---

252. The guardian bringing the case on behalf of the animal plaintiff would need to demonstrate that she has found a more suitable option, such as a foster home or no-kill shelter.

253. See *e.g.*, 43 C.J.S. *Infants* § 57 (2004) ("[T]he facts supporting the permanent deprivation must clearly show that the welfare of the children will be substantially subserved by such an action.").

254. This is consistent with state anti-cruelty statutes. Reppy, *supra* note 205, at 55 ("The concept that the cruelty must be unjustifiable in order to warrant criminal punishment is found in most animal cruelty statutes, and courts usually hold that the prosecution has the burden of proof to show lack of justification.").

255. The requirement of paying the other side's fees is not unprecedented. For example, if a litigant rejects a settlement offer but the court's final decision is significantly less favorable to the litigant than the settlement offer, that litigant must pay the other side's litigation costs, including attorneys' fees. FED. R. CIV. P. 68(d). As another example, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2006), provides that "the court in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in certain actions.

Likewise, a prevailing plaintiff could be awarded attorneys' fees and costs to enable parties to bring suits. However, this may be unnecessary: much of the litigation would likely be brought by animal activist groups eager to seek injunctions of abusive practices.

256. See *supra* note 138 and accompanying text.

257. See *supra* notes 140–45 and accompanying text.

258. See *supra* notes 142–44 and accompanying text.

259. See *supra* notes 51–56, 68–69 and accompanying text.

enjoin SeaWorld from continuing to engage in its current treatment of the orcas, or to equitably remove the orcas to a better environment.<sup>260</sup>

### C. A Brief Note on Standing

There is some controversy over whether animals can achieve standing to assert a claim as a plaintiff.<sup>261</sup> There have been courts that have held that an animal does not have standing to bring a claim.<sup>262</sup> However, there have also been a number of cases that have included animals as named plaintiffs.<sup>263</sup> Nothing in the Constitution limits standing to only humans.<sup>264</sup> This is demonstrated by the fact that entities such as corporations possess standing.<sup>265</sup> Animals lack standing under federal statutes simply because Congress has not granted them standing under those provisions.<sup>266</sup> Therefore, this Comment contends that animals may bring claims as plaintiffs under a common law tort cause of action.<sup>267</sup>

## VII. CONCLUSION

Current animal legislation is largely ineffective at protecting the interests of animals, while advancements in our knowledge of animal intelligence induce the conclusion that animals deserve better treatment.<sup>268</sup>

---

260. A court may decide to grant injunction from the abusive practices in an initial suit, and remove the animal from the owner's custody in the case of subsequent violations.

261. See Wise, *Legal Personhood*, *supra* note 156, at 1, 2–5 (contending that in order to achieve standing, a plaintiff must achieve the legal status of “personhood”).

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

This is not intended as a full discussion of this complex issue, but serves only to note the debate.

263. Sunstein, *Standing*, *supra* note 106, at 1359; see *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988) (the palila bird “wings its way into federal court as a plaintiff in its own right” under the Endangered Species Act). Additionally, under the Uniform Trust Act, a representative interested human can be appointed to sue on behalf of an animal. Favre, *supra* note 100, at 363.

264. See Sunstein, *Standing*, *supra* note 106, at 1360.

265. See *id.*

266. *Id.* at 1359.

267. Like in cases involving children or incompetent persons, claims would be brought by a type of appointed guardian. Favre, *supra* note 100, at 363–64 (“Our legal system has a number of mechanisms such as guardianships, next friends, legal representatives and social workers to deal with this issue.”).

268. See *supra* Parts II, III.



In fact, some have argued that animals deserve rights of their own.<sup>269</sup> This theory, however, could have drastic ramifications.<sup>270</sup> In order to effectively balance the interests of animals with those of humans, a new solution is necessary, at least as a stepping stone to rights. A tort cause of action to address unnecessary suffering, while it may seem duplicative of state and federal laws, is necessary to ensure that animal interests are protected and enforced.<sup>271</sup>

Under this new tort cause of action, Loulis, the chimpanzee who was found awaiting his experimental fate in a death row of cells,<sup>272</sup> would have a legal voice. Since the continuously abusive conditions were unnecessary to any human interest,<sup>273</sup> a court would be able to exercise its power under the tort to equitably change Loulis's fate.

Tania Rice \*

---

269. See *supra* Part IV.

270. See *supra* Part V.

271. See *supra* Part VI.

272. See *supra* notes 1–6 and accompanying text.

273. Although the experimentation was designed to help cure a human disease, it was not a necessary part of the experiment to keep the animals in such poor conditions. Moreover, scientists now know that using chimpanzees in laboratory research is ethically troubling and largely unnecessary, given the availability of other alternatives. See *supra* Part II.D. Therefore, the result of the use of this tort would be one that the scientific community would appear to support. *Id.*

\* J.D. Candidate, 2013, Pepperdine University School of Law; B.S. in Business Administration, Pepperdine University. I would like to thank all of the members of *Pepperdine Law Review* for their dedication and help in the development of this article. I would also like to thank Jeff, a human, and Duncan, a canine, for in their own ways showing their patience and support during the writing process.