CAN NONHUMAN ANIMALS FIND TORT PROTECTION IN A HUMAN-CENTERED COMMON LAW?

By
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The question of "rights allocation" typically hinges on society's distinction between legal and moral entitlement. Although many rights find support in both categories, not all rights grounded in societal morality are likewise accorded legal status. The animal rights movement, particularly in the last three decades, has advanced the recognition of nonhuman animals' moral entitlements, but corresponding legal rights have been slow to follow. This Comment explores this gap in nonhuman animals' rights allocation with an eye toward establishing a basis for a private right of intentional tort action. Through appeal to predominant tort jurisprudential theories, in conjunction with an examination of our scientifically and experientially grounded understanding of nonhuman animals, the Comment concludes that there is room in our current legal system for direct recognition of, and compensation for, intentional injurious behavior aimed at nonhuman animals.

I. INTRODUCTION

The common law is an invaluable resource for protecting individuals by virtue of its inherent malleability. There exist several theories as to the propositions driving the common law adjudicatory process.[1] Most, if not all, admit to at least one form of extra-legal consideration which influences the judicial decision-maker in his or her adherence to, or modification of, established doctrinal rules.[2] Thus, as Melvin Eisenberg speculates,

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1 *See, e.g.*, Lief H. Carter, REASON IN LAW (4th ed. 1994); MELVIN EISENBERG, THE NATURE OF THE COMMON LAW (1988).

2 The noninstrumentalist theory focuses on the litigants immediately before the court, and how their past interaction is to be construed in terms of moral norms. *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, *in* Perspectives on Tort Law 256 (Robert L. Rabin ed., 4th ed. 1995). The instrumentalist theory, on the other hand, considers dispute resolution in terms of what will promote policies for the future betterment of society generally. *See, e.g.*, Oliver Wendell Holmes, *The Common Law*, *in* PERSPECTIVES ON TORT LAW 2 (Robert L. Rabin ed., 4th ed. 1995). Eisenberg's theory, *supra* note 1, at 38, looks to both moral norms and policy, as well as experiential, with the latter mediating between the former and the established doctrine.

the common law is not what we find in the Restatements of Law or the Reporters, but "[r]ather, it consists of the rules that would be generated at the present moment by application of the institutional principles that govern common law adjudication."[3]

Because tort law focuses on injuries between non-contracting parties, the common law legal regime presents an especially compelling forum for considering how society's attitudes and functioning may have changed, and how tort doctrine, in turn, must change.[4] Whether justified by moral, political, or experiential changes (or a combination of the three), a previously sanctioned act may evolve into a violation of a legally protectable interest.[5]

This Comment seeks to determine whether nonhuman animals, or a subgroup thereof, may acquire such a legally protectable interest in the context of tort law.[6] Section II explores the development of human thought regarding our relationship with nonhuman animals. Section II (A) considers the influence on judges of the philosophies popular in ancient Greece, the religious teachings of the biblical text, and general societal perspectives, from ancient times to the mid-nineteenth century. Section II (B) recounts how Charles Darwin's research and observations sparked a revolution in humankind's understanding of our species. This subsection continues with considerations of behavioral science and sociobiology and their influence on twentieth century understanding of the animal kingdom, and it concludes with an exploration of the potential for cognitive ethology to shed new light on the societal position of nonhuman animals. Section II (C) departs from the philosophical and empirical inquiries of the prior two subsections and examines specific examples of how humankind interacts with nonhuman animals.[7]

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[3] EISENBERG, *supra* note 1, at 3. The institutional principles to which Eisenberg refers include the foundations governing the way a court establishes and changes law, *id.* at 8-13; the modes of legal reasoning employed by courts, *id.* at 50-103; and the modes of partial or complete overturning of established doctrine, *id.* at 104-145.

[4] The driving force of tort law is characterized by the American Bar Association as "an epicenter of jurisprudence, not simply as a set of guides and standards for the decision of many thousands of private lawsuits, but as a reflection of how American society feels about justice at dozens of focal points of social tension." ABA Special Comm. on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantial Justice in American Tort Law* 2-2 (1984) [hereinafter ABA Report].

[5] This form of extension is recognized in the Restatement (Second) of Torts: "The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." RESTATEMENT (SECOND) OF TORTS § 1 cmt. e (1979) (noting that a wife's interest in her husband's consortium is such an extension).

[6] Admittedly, the term "interest," as defined in the Restatement (Second) of Torts, is "the object of any *human* desire." *Id.* § 1 (emphasis added). Thus, if the argument of this paper holds sway, not only must there occur an extension of an interest, but, by necessity, the very definition of "interest" must similarly be extended.

[7] This subsection includes discussion of general relationship (e.g., humans and their companion animals, or pets); as well as specific instances of human-nonhuman animal interaction (e.g., the blessing of the animals), and what these interactions imply about our views of nonhuman animals.

Section III compares human and nonhuman animals' claims to legal rights. Specifically, it discusses why the law applies to whom it does, and what it is about the holders of tort rights that differentiates them from the unprotected members of the animal kingdom, thereby entitling the former to tort protection. Through hypothetical narrative, inconsistencies in the current allocation of cognizable tort interests are revealed.

Section IV explores the theories underlying the current application of tort law. Through appeal to tort theorists of instrumentalist and noninstrumentalist disciplines, this Comment concludes that the current justifications for tort protection support the extension, albeit in a severely limited fashion, of tort rights to some nonhuman animals.

Section V considers the methods a court might use to extend a private right of action for intentional torts to nonhuman plaintiffs. The analysis focuses on section 870 of the Restatement (Second) of Torts, which allows a court to impose liability for intentional injury to another even though "the actor's conduct does not come within a traditional category of tort liability."[8] In assessing whether this "innominate tort" may be available to nonhuman animals, the balancing test suggested in the comments to section 870 is employed.[9]

The capability of administratively extending limited tort protection for nonhuman animals is discussed in Section VI. This section includes considerations of who would file the suit, who would pay for legal and other related expenses, how damages might be assessed, and how the award might be administered.

Despite the difficulties of administering the extension of intentional tort protection to nonhuman animals, Section VII concludes that the rationales underlying tort law, in conjunction with the biological and societal status of some nonhuman animals, mandates the extension of limited tort protection, including certain outright prohibitions of conduct, as well as some causes of action qualified by the superseding interest of the general (human) public welfare.

II. NONHUMAN ANIMALS AS UNDERSTOOD BY HUMANKIND

A. *Man as the Center of the Universe: Conceptions of Nonhuman Animals from Ancient Times to the Mid-Nineteenth Century*

From the time of the ancient philosophers to the mid-nineteenth century, the average human, as well as the foremost philosophers of the times, lived according to a "teleological anthropocentrism;" in other words, pursuant to "the notion that the universe was designed solely to serve human beings."[10] This notion manifested itself in the "Great Chain of Being," a highly ordered hierarchy which strictly compartmentalized all

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[8] RESTATEMENT (SECOND) OF TORTS § 870 (1979). Section 870 "epitomizes the capaciousness of tort law." ABA Report, *supra* note 4, at 14-8 to 14-9.

[9] RESTATEMENT (SECOND) OF TORTS § 870 (1979).

[10] Steven M. Wise, *Legal Rights for Nonhuman Animals: The Case for Chimpanzees and Bonobos*, 2 Animal L. 179, 180 (1996).

life forms on a linear scale, from the least worthy of regard (plant life), to the most revered (the purely spiritual being, i.e., angels).[11]

History is replete with examples of how this perspective influenced society's attitude towards nonhuman animals. For example, the Stoics of ancient Greece took the position that everything "exists only for the sake of what is endowed with reason, individual beings endowed with reason exist for the sake of each other . . . [t]owards animals we never stand in a position to exercise justice . . . [j]ustice can only be exercised towards other men and towards God."[12] Thus, in the minds of the Stoics, it was the ability to reason which afforded humankind its rights.

With the onset of the Judeo-Christian tradition came further application of the Great Chain's linear hierarchy. Within this theory, the superior status of humans was explicitly derived from God's grant to humankind of dominion over all other living creatures.[13]

The Great Chain's human-centered focus persisted through the centuries, as evidenced in the writings of, among others, St. Augustine and St. Thomas Aquinas.[14] Rene Descartes was particularly vigorous in distinguishing between humankind and nonhuman animals and conceived of the latter as automata, or machines, with absolutely no capability of reason, emotion, or feelings of pain.[15] In the thousands of years elapsing between the time of the ancient philosophers and the relatively recent past, the place of nonhuman animals in the moral and/or legal order was firmly entrenched—no rights could be accorded to them.[16]

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[11] *Id.* at 181.

[12] Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 Animal L. 15, 30 (1995) (citing EDUARD ZELLER, THE STOICS, EPICUREANS AND SCEPTICS, 313 (Oscar J. Reichel trans., 1962)).

[13] *Id.* at 30 (citing Genesis 1:28). Although the creation story of Genesis is routinely used to justify humankind's various uses of nonhuman animals, one commentator poses an interesting argument to counter the limitless-grant-from-God theory. Andrew Linzey, in an examination of how Old Testament animal sacrifice could be viewed, proposes that: (1) humans of the time believed that "all life was a gift from God and therefore belonged to him;" (2) the sacrificial act was understood to be the "offering of life;" and (3) therefore, the sacrificial act "assumed that the life of the individual animal continued beyond mortal death." Andrew Linzey, *Christianity Supports Animal Rights*, *in* Animal Rights: Opposing Viewpoints 30 (Janelle Rohr ed., 1989).

[14] Wise, *supra* note 12, at 33.

[15] Rene Descartes, *Discourse on Method in Philosophical Works of Descartes*, *in* Animals Rights and Human Obligations 60, 60-63 (Tom Regan & Peter Singer eds. 1976).

[16] This is not to say that there existed no voices advocating for a greater recognition of protection for nonhuman animals. One particularly forceful argument for the natural rights of animals was put forth by Jean Jacques Rousseau, as follows: "[I]t is clear that, being destitute of intelligence and liberty, they cannot recognize that law; as they partake, however, in some measure of our nature, in consequence of the sensibility wherewith they are endowed, they ought to partake of natural right; so that mankind is subjected to a kind of obligation even toward the brutes. It appears, in fact, that if I am bound to do no injury to my fellow-creatures, this is less because they are rational than because they are sentient beings; and this quality, being common to man and beasts, ought to entitle the latter at least to the privilege of not being wantonly ill-treated by the former." Mary Midgely, Animals and Why They Matter 62 (1984) (citing JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 172 (Everyman ed. 1994)).

B. Modern Thought: A Behaviorist Return to the "Machinery" of Descartes, or A Cognitive Recognition of Nonhuman Animals' Status

The teleological anthropocentrism of the Great Chain of Being met its nemesis in the mid-nineteenth century when Charles Darwin published *The Origin of Species*.[17] Darwin, through his research and observation of nonhuman animals, fought back the static, human-centered approach of the Great Chain, explaining that species evolve through gradual adaptation to change, a process unaffected by godly intentions or other deeper designs.[18] Of particular interest, Darwin theorized that the process of natural selection may not be limited to purely biological traits, but may also be implicated in the development of psychological traits.[19]

By the turn of the twentieth century, however, Darwin's theory of evolution had been so corrupted, that "in the minds of many people natural selection [became] synonymous with open, unrestricted competition."[20] With the concurrent rise of both positivism and behaviorism,[21] the stage was further set for a complete rejection of any theory proposing distinct, nonhuman animal consciousness, particularly in the areas of altruism and morality. As Frans de Waal writes, "We are not dealing with a mere biological theory, but with a convergence between religious, psychoanalytical, and evolutionary thought, according to which human life is fundamentally dualistic."[22] Behavioral psychologists and sociobiologists were unable to explain how human moral judgment might logically follow from a strict, self-serving stimulus-response conception of reality. Because they could not make this link, these scientists therefore placed the concept of morality outside of the biologically determined, elevating it to a special gift possessed only by humankind.[23]

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[17] CHARLES DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (Encyclopedia Britannica 1952) (1859).

[18] Wise, *supra* note 12, at 38-39 n.148 (citing James Rachels, Created From Animals 116 (1990)).

[19] CHARLES DARWIN, THE DESCENT OF MAN 304 (Encyclopedia Britannica 1952) (1871). In contrast to the arguments that any characterization of animal feelings or thoughts is anthropomorphic, Darwin stated the following: "[T]he difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind. We have seen that the senses and intuitions, the various emotions and faculties, such as love, memory, attention, curiousity, imitation, reason, etc., of which man boasts, may be found in an incipient, or even sometimes in a well-developed condition, in the lower animals. They are also capable of some inherited improvement, as we see in the domestic dog compared with the wolf or jackal." *Id.* at 319.

[20] FRANS DE WAAL, GOOD NATURED: THE ORIGINS OR RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 11 (1996) (discussing how the Darwinian revolution, in conjunction with the earlier writings of Thomas Malthus, regarding intra-species (human) competition, prompted turn of the century society to make such comparisons as that of Wall Street to a Darwinian jungle).

[21] BERNARD E. ROLLIN, THE UNHEEDED CRY: ANIMAL CONSCIOUSNESS, ANIMAL PAIN AND SCIENCE 88 (1989).

[22] DE WAAL, *supra* note 20, at 17. De Waal specifically references both John Calvin and Sigmund Freud as key contributors to the man-versus-inner-beast duality.

[23] *Id.* at 16 ("these scientists have [thus] absolved themselves from trying to fit [morality] into their evolutionary perspective."). De Waal also remarks, "what a brilliant way of estab-

Just as the fate of animal consciousness appeared to be once again in the hands of Descartes, the field of cognitive psychology emerged, liberalizing the areas of consciousness and intent, into which a scientist could legitimately scrutinize.[24] This liberalization extended to the study of animal psychology,[25] creating the field of cognitive ethology, which "looks at animals as knowing, wanting, and calculating beings."[26] As a self-proclaimed cognitive ethologist, de Waal answers criticisms of anthropomorphism by explaining that the discipline "seek[s] to reconstruct mental processes in much the way the nuclear physicist 'looks inside' the atom by testing predictions based on a model of its structure."[27]

Almost one-hundred-fifty years after Darwin's initial studies, we seem to stand before the same two doors as those which confronted mid-nineteenth century scientists.We can either refuse to open the door, afraid of what might appear, or we can take the course of many present-day scientists who ask questions such as whether "some of the building blocks of morality are recognizable in other animals,"[28] and what purpose is served by recreational play in the nonhuman animal kingdom.[29] In words reminiscent of Darwin's triumph over the Great Chain of Being,[30] de Waal explains how we are now moving through new doors, stating that, "[w]estern science seems to be moving away from a tidy, mechanistic world view. Aware that the universe is not necessarily organized along logically consistent lines, scientists are—ever so reluctantly—beginning to allow contradictions."[31]

C. Experiential Evidence of the Character of Nonhuman Animals

In addition to what we have learned from the fields of biology, ethology, and psychology, human beings also lay claim to knowledge about the moral and reasoning abilities of nonhuman animals based on interactions with them. According to Bernard Rollin, such a "common sense" approach not only is valid, but actually informs the progress of scientific discovery and understanding:

> I am arguing that one's notions of science and knowledge rest upon philosophical assumptions which are intertwined with valuational assumptions, both epistemic and moral, concerning what is worth knowing, what counts as

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lishing morality as the hallmark of human nature—by adopting our species name for charitable tendencies." *Id.* at Prologue 1.

[24] ROLLIN, *supra* note 21, at 245-46.

[25] *Id.*

[26] DE WAAL, *supra* note 20, at Prologue 3.

[27] *Id.* at 66. "It is this use of anthropomorphism as a *means* to get at the truth rather than as an end in itself, that sets its use in science apart from use by the layperson." *Id.* at 64 (emphasis in original).

[28] *Id.* at Prologue 3.

[29] Shannon Brownlee, *The Case for Frivolity*, U.S. News & World Rep., Feb. 3, 1997, at 45, 45 (noting that "[i]n the past decade, the study of play has gained a badge of respect as biologists have found increasing evidence that to a variety of species it is nearly as important as food and sleep").

[30] *See supra* notes 17 and 18, and accompanying text.

[31] DE WAAL, *supra* note 20, at Prologue 4.

knowledge, how it ought to be known, what ought and ought not to be done to acquire knowledge, and so on.[32]

From this perspective, it is equally legitimate, in determining the capabilities of nonhuman animals, to look to humankind's experiences with them.[33]

As a starting point, the average person's understanding of animal consciousness is quite different from that of the behavioral scientists referenced earlier. "In the world-view of ordinary common sense, animal consciousness is a fact, and the sort of fact which we experience directly and daily, just as we do human mentation."[34] The relationship between humans and their companion animals (*i.e.*, owners and pets) provides ample evidence for the foregoing statement.[35] The gifts we buy for our companion animals for the holidays, and our attribution of a spiritual presence[36] to nonhuman animals, are but two of the many examples of how humankind treats nonhuman animals as something more than mere property. As Mary Midgely explained, we do not treat nonhuman animals as machines, but rather we recognize their individuality, showing "a direct capacity in man for attending to, and to some extent understanding, the moods and reactions of other species."[37]

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[32] ROLLIN, *supra* note 21, at 62. Rollin also argues that "scientific positions, like philosophical positions, will change on the basis of value changes. These value changes may be moral or epistemic, or may result from changes in cultural values." *Id.* at 63. *See also id.* at 5 ("[s]o in becoming educated as scientists, we often abandon common sense and the categories which govern our interpretation of ordinary experience."). Interestingly, Rollin's view of science is quite analogous to Eisenberg's theory of the common law. *See* Eisenberg, *supra* note 1.

[33] *But cf.* de Waal, *supra* note 20, at Prologue 3. Although he is fond of telling stories about the nonhuman animals he observes, de Waal cautions that "vignettes do not constitute scientific proof. They tease the imagination and sometimes hint at striking capacities, yet cannot demonstrate them. Only repeated observations and solid data allow us to compare hypotheses and arrive at firm conclusions." *Id.*

[34] ROLLIN, *supra* note 21, at 65.

[35] Sally Deering, *Ape Really Comes Through for One of Its Descendants*, The Star-Ledger (Newark, NJ), *available at* 1996 WL 11873784 ("[a]nyone who's a dog or a cat owner will cite countless examples of their pet's sensitivity. Most dogs happily show tail-wagging love for their owners. Some even risk their lives when they sense their owners are in danger."). For a wealth of examples regarding the particulars of the human-companion animal relationship, *see* Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059 (1995). One example, which seems particularly telling of the way in which people value their companion animals concerns a study determining the ways in which individuals in war-torn Beirut continued their relationships with their pets: "71% shared their own meager food supplies with their animals; and 27% were actually more deprived of food than their animals." *Id.* at 1066 (citing ODEAN CUSACK, PETS AND MENTAL HEALTH 69-70 (1988)).

[36] Two examples of humankind's acceptance of nonhuman animals in the former's spiritual universe are, first, the blessing of the animals (during the Feast of St. Francis) each October, *see* The Animal Rights Handbook: Everyday Ways to Save Animal Lives 92 (1990); David Yount, *Let's Take Care of Our Own Aliens Before We Go Looking for Others*, ROCKY MOUNTAIN NEWS, *available at* 1996 WL 12347014; and second, the popularity of pet cemeteries.

[37] Midgely, *supra* note 16, at 113-14.

Additionally, humankind's moral concern for nonhuman animals is clear from the increased popularity of, and demand for, cruelty-free products.[38] There is also a wealth of information available on the World Wide Web concerning nonhuman animal rights and welfare.[39] Even among those who traffic in nonhuman animal exploitation, there is evidence of human recognition of the nonhuman animal's individual existence. In the dairy farming industry, there was an "early realization that gentle, compassionate treatment of cattle leads to significantly better milk yield. Science has recently confirmed what common sense already knew—that the variable correlating most highly with milk production is the personality of the herder and that women generally make the best stock managers."[40]

With regard to nonhuman primates, there is abundant experiential evidence, often backed up by scientific proof, of the capabilities of these species. "Primates have scored 75 to 85 on standard IQ tests, have put signs together in novel ways to express new ideas, have shown the ability to lie, have taught signing systems to others, and so on."[41] Just two years ago, the world was shocked and relieved by the actions of Binti Jua, a gorilla in the Brookfield Zoo, who protected a small child after he inadvertently fell into the zoo's gorilla area.[42] Eyewitnesses described what they perceived as Binti's decision-making process: she initially checked for signs of life, then cradled the boy by her chest, as she did with her own young; she wanted to give the boy to the crowd, but, upon approaching, sensed panic and withdrew; she challenged a much larger female gorilla who approached, keeping the boy safe until she could lay him down by the door leading to her human trainers.[43] Biologists confirmed what the

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[38] On its web site, The People for the Ethical Treatment of Animals ("PETA"), lists over 550 cosmetics companies who are devoted to cruelty-free products, including such industry leaders as Revlon, Estee Lauder, L'Oreal, and Avon. PETA Factsheet: PETA History: Compassion in Action, <http://www.envirolink.org/arrs/peta/facts/mis/fsmis02/htm> (visited April 24, 1997). Additionally, individuals interested in investing in accordance with their conscience can now seek out the Cruelty-Free Value Fund "with an investment portfolio intended to exclude those companies that employ animal testing in their product development, that endanger species of animals, sponsor inhumane animal events, or are subsidiaries of companies involved in these activities." Beacon Global Advisors Cruelty-Free Value Fund, <http://www.crueltyfree.com> (visited April 24, 1997).

[39] The Animal Rights Resource Site, for example, hosts forty-five individual web pages and provides links to numerous other sites concerning nonhuman animals. <http://www.envirolink.org/arrs/> (visited April 24, 1997). Notably, the variety of these sites evidence the fact that concern for animals crosses various professional, cultural, and political lines (e.g. Association of Veterinarians for Animal Rights, Feminists for Animal Rights, Jews for Animal Rights, and Psychologists for the Ethical Treatment of Animals).

[40] BERNARD E. ROLLIN, FARM ANIMAL WELFARE: SOCIAL, BIOETHICAL, AND RESEARCH ISSUES 99 (1995).

[41] Rollin, *supra* note 21, at 247.

[42] Charles Hirshberg, *Primal Compassion: Binti Jua Moved the World—And Changed One Family Forever—When She Moved a Little Boy Out of Harm's Way*, Life Magazine, *available at* 1996 WL 9362970.

[43] *Id.* Although Binti's actions may seem amazing to us at first, they "are not unprecedented: 10 years ago, in a British zoo, a gorilla named Jumbo protected a five-year-old boy in strikingly similar circumstances." *Id.*

crowd perceived.[44] Shortly after the event, Robert Close wrote, "[i]t is my opinion that Binti knew exactly what she was doing. Gorillas are territorial, and no doubt her territorial instincts were aroused by the appearance of a human inside her compound. She had a choice, then: Save the child or do it harm."[45] We humans can be happy that, if gorillas have a "no duty to rescue" rule,[46] Binti chose to rescue anyway.

Through the foregoing exploration of humankind's historical and present-day understanding of nonhuman animals, a foundation for the extension of limited tort rights to some nonhuman species has been laid. The following section builds on the information presented here, concluding that, at least with regards to some species and some injuries, there exists no credible reason for the arbitrary exclusion of all nonhuman animals from tort protection.

III. Comparison of Human and Nonhuman Animals' Claims to Legal Rights

To begin a comparison of human and nonhuman animals' claims to legal rights, consider the following hypothetical:

> *As the sun rose one morning, the inhabitants of America's ten largest cities were astounded to see hovering above them massive space crafts of a clearly alien nature. Before too much hysteria erupted, however, the citizenry were relieved to discover that these extraterrestrial visitors meant no harm.*
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> *Each city's mayor, along with the President of the United States, appeared on the morning network news shows with representatives of the alien race (the X), explaining the unbelievable situation. The appropriate governmental officials had been contacted late the previous night via conference call by the approaching alien fleet. The X explained that they were a peaceful race of explorers who combed the galaxies in search of organized societies with which to commune for a limited time, before moving on to others. Exploration, the X emphasized, was the driving force of their existence. They were, in a sense, like our own anthropologists, wishing to live with another social group to gain direct understanding of that group's social interplay, but with no intention of altering the indigenous community's mores, social structures, or cultures.*
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> *The citizens, though naturally skeptical of the X's motives, were soothed by the aliens' humanoid appearance. Although their facial features led many to make feline comparisons, the X did exhibit the "correct" (i.e., human) number of legs, arms, eyes, ears, etc. Upon hearing the assurances of Department of Defense representatives that these aliens posed no threat to Americans, all but a small group of conspiracy theorists felt not only safe, but privileged to have the X living among them.*
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> *The agreement reached between the X and our political representatives was quite simple and typical of those generally arranged by the X. During their*

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[44] Robert Klose, *Measure of Intelligence*, Bangor Daily News (Bangor, ME), *available at* 1996 WL 10708998.

[45] *Id.*

[46] Restatement (Second) of Torts § 314 (1979).

stay on Earth, the X would be subject to American federal and applicable state and local laws, acquiring all the rights and responsibilities given to and accepted by human beings subject to those jurisdictions. Relevant codes, treatises, and common law decisions were to be transferred to the X, who, in turn, through their superior brain power, would familiarize themselves with the law quickly, before attempting any social interaction with humans. Additionally, the X stressed that, although humans could inquire and learn about the X's history, language, and culture, the X would provide no information regarding their advanced technologies, lest the bargain be construed as compromising individual human interests for the sake of a boon to society in general.

One week after the landmark agreement was signed, the team of X explorers teleported to Earth's surface. The first few days were uneventful to the average citizen, as the X were entertained by high-ranking officials and toured some of American society's achievements. On the fourth day, however, tragedy struck. While waiting to board a New York subway, an X was shot by John Doe, a known member of the Aryan Nation, who confessed that he "intended to eradicate X scum from the face of the Earth." Although badly wounded, the X survived and immediately filed an action against Doe for battery. The X was awarded $200,000 in damages, and garnered a wealth of apologies from the citizenry.

Two days later, a second altercation between an X and a human occurred. In casual conversation, a human, Mary Smith, learned from an X that he had "found a stray" and had taken it home to care for it as a pet. Through further conversation, Smith gleaned that the X's "pet" was in fact a severely retarded woman. After consultation with the authorities, and cooperation by the X, the "pet" was in fact determined to be Sue Jones, a forty-two-year-old woman with the mental capabilities of a three-year-old, who had been reported missing after she had strayed away from her group at the Bronx Zoo. Ms. Jones was returned to her residential care facility, and her guardians subsequently filed an action against the X individual for false imprisonment.

During the trial, it was determined that the X in question had done a less than thorough job of reviewing American law; among the subjects left unexplored was all law pertaining to the mentally disabled. In a limited defense, the X emphasized his complete understanding of American property law, including the legal thinghood status accorded nonhuman animals. In his decision to take in Ms. Jones (the "stray"), he had deduced that intelligence and the ability to reason must be what separates the rights-holders (humans, generally), from those animals without private rights. Critical to his decision was the fact that the Earthlings were so quick to give the X (highly intelligent, nonhuman animals), the rights and responsibilities of their legal system.

The trial never reached a conclusion. The parties, along with several governmental authorities, brokered an agreement that the injured Ms. Jones would pursue her tort action no further, so long as the X left Earth's solar system immediately and refrained from making contact for at least another fifty years.

Although the above hypothetical may seem a bit fanciful, it points out the inconsistencies inherent in our current legal system's allocation of le-

gally protectable interests.[47] The primary question which should spring to mind from reading this narrative is: what differentiates those with rights from those without?[48]

The characters of import in the above hypothetical can be grouped categorically: the average human, the severely mentally retarded human, the average nonhuman (Earth) animal, and the intellectually superior alien. The third category comprising nonhuman animals is overly broad. When a spider, a fish, a pig, and a chimpanzee all fall within the same category, the question arises, what does this category represent? It cannot represent all animal life, because humans are excluded. It cannot represent all "non-intelligent" life, because higher life forms such as chimpanzees are included, and plants are excluded. Rather, the ultimate commonality within the category of nonhuman animals, as constructed by humans, is that they do not possess legal rights.

This realization, in conjunction with the recognition that legal rights are a social construction, begs the question of why legal rights are only available to humans. Judge Richard Posner proposed an answer, stating that:

> the main "reason" why the "philosophical" idea that . . . talking apes might have more rights than newborn or profoundly retarded children seems outlandish or repulsive may simply be that *our genes force us to distinguish between our ownand other species* and that in this instance disembodied rational reflection will not overcome feelings rooted in our biology.[49]

Although this might be a common justification for the differential treatment of humans and nonhumans, Judge Posner has introduced an irony which needs resolution: the highlighted language in the above passage implies that, when it comes to rights allocation, our species is bound by instinct rather than rational decision-making. Therefore, following this

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[47] Others have appealed to the extraterrestrial analogy to identify what might be unfair or inconsistent in humankind's treatment of nonhuman animals. *See, e.g.*, Midgely, *supra* note 16, at 102, 106-07 (discussing the reality and naturalness, albeit discriminatory nature, of species bonds, Midgely imagines an advanced alien race which values humankind at only a fraction of itself, and questions whether, in such a case of valuation difference, "the species barrier . . . give[s] some ground for such a preference or not"); Desmond Stewart, *The Limits of Trooghaft*, *in* ANIMALS RIGHTS AND HUMAN OBLIGATIONS 238 (Tom Regan & Peter Singer eds. 1976) (describing a futuristic Earth, where aliens have conquered humankind, segregating it into several castes, including those for food, those to assist in hunting, and those for pets). One commentator twisted the focus of the analogy, stating, "[o]ur universal fascination with aliens ignores the fact that we already have strangers living among us" (the strangers being nonhuman animals). Yount, *supra* note 36.

[48] Or, to put it another way, "[m]any of us experience an instant sensation of clarification when we ask ourselves: Would it be right to do this to another *human*? If not, what morally relevant difference would permit us to do this to a *nonhuman*?" Evelyn B. Pluhar, Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals 224 (1995) (emphasis in original) (internal quotations omitted).

[49] Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471, 545 (1996) (emphasis added) (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 347-48 (1990)).

line of reasoning, humans, based on their irrationality, should be relegated to the same legal status limbo as irrational nonhuman animals.

When legal rights allocation for the mentally retarded human and for the nonhuman alien are examined, questions of morality and intelligence surface for discussion. The grant of legal rights to the alien species could be attributed to the X's superior intellectual abilities, and their seemingly similar morality (to that of the average human). But if this is the basis for granting legal rights, it does not follow that the mentally retarded woman should get rights. She has negligible intelligence, and no conception of "right and wrong." Additionally, some nonhuman animal species have greater intelligence and morality-based capabilities than she, but they do not receive legal rights. Perhaps then, she is the recipient of the benefits of an irrational species-based bias.

Mary Midgely suggests the following:

> [d]uties to babies, defectives and the senile, and to people too humble, confused or indecisive to be capable of judging whether they are wronged, are not canceled by that incapacity. They are strengthened by it. Those who owe these duties become responsible for passing judgments on their own conduct which the incapable person cannot pass for himself.[50]

In this way, Midgely disposes of the "capability-but-for" argument,[51] emphasizing that our duties to these individuals are direct and are to them "as they are now,"[52] despite their inability to judge us for our actions or to reciprocate in the rights-responsibilities mix.

It can thus be inferred that there are several independent criteria for rights allocation. For the purposes of this Comment, we can assume the following as a non-exclusive list of those criteria: (1) intelligence (some level of rational, decision-making ability); (2) evidence of moral capacity; (3) being capable of experiencing pain and suffering (this could also be referred to as a charitable instinct on the part of the rights-giver); (4) the ability to reciprocate, *i.e.*, to take on responsibilities towards others in exchange for the allocation of rights; and (5) "likeness," or species-based bias. Additionally, each criterion may be sufficient, but by no means necessary for the allocation of a right in the human legal arena.[53]

Based on the information presented in Sections II (B) and II (C), along with some comparative questions specifically highlighting the five criteria listed above, it is posited that humans must take seriously the allocation of some legal rights to some species of nonhuman animals.

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[50] MIDGELY, *supra* note 16, at 60.

[51] *Id.* at 60-61.

[52] *Id.*

[53] Among the rights-holders in the alien visitor hypothetical, for example, only the average human possesses all five of these criteria. The alien possesses all but the fifth, and the severely mentally retarded woman possesses only limited evidence of both the first and second, does not possess the fourth, but possesses fully the third and fifth.

1. *Intelligence*

There is little doubt remaining as to the intelligence and decision-making abilities of some nonhuman species.[54] Various nonhuman primate species, for example, have learned to communicate through sign language,[55] and large marine mammals, *e.g.*, dolphins and whales, have proven similarly impressive abilities.[56] A dog, as Justice Holmes once said, can distinguish between a purposeful kick and being tripped over.[57]

A detailed account of the specific cognitive abilities of the various nonhuman animal species is clearly beyond the scope of this Comment, but suffice it to say that there is scientifically documented evidence that some nonhuman animals do not operate by instinct alone, but rather possess rational decision-making abilities.[58]

2. *Moral Capacity*

With regard to the second criterion, moral capacity, the science of cognitive ethology has propelled us by leaps and bounds in our understanding of nonhuman animal abilities.[59] Frans de Waal explains that, although they were "[o]nce thought of as purely spiritual matters, honesty, guilt, and the weighing of ethical dilemmas are traceable to specific areas of the brain. It should not surprise us, therefore, to find animal parallels."[60] Thus, contrary to Keith Tester's assertion that "[o]nly society invests animals and the natural world with moral meaning, because only

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[54] ROLLIN, *supra* note 21, at 247.

[55] *Id.*

[56] DE WAAL, *supra* note 20, at 40-43.

[57] Holmes, *supra* note 2, at 3.

[58] *See generally* de Waal, *supra* note 20; ROLLIN, *supra* note 21.

[59] *See generally* de Waal, *supra* note 20. De Waal sets forth a list of moral capacities and tendencies found in both human and some nonhuman species. The list is as follows:

Sympathy-Related Traits
- Attachment, succorance, and emotional contagion.
- Learned adjustment to and special treatment of the disabled and injured.
- Ability to trade place mentally with others: cognitive empathy.*

Norm-Related Characteristics
- Prescriptive social rules.
- Internalization of rules and anticipation of punishment.*

Reciprocity
- A concept of giving, trading, and revenge.
- Moralistic aggression against violators of reciprocity rules.

Getting Along
- Peacemaking and avoidance of conflict.
- Community concern and maintenance of good relationships.*
- Accommodation of conflicting interests through negotiation.

* It is particularly in these areas—empathy, internalization of rules and sense of justice, and community concern—that humans seem to have gone considerably further than most other animals.

DE WAAL, *supra* note 20, at 211. *See also* Tabitha M. Powledge, *The Evolution of Morality*, BIOSCIENCE, June 1996, at 395.

[60] *Id.* at 217-18.

society is sufficiently free to be able to carry out that investment,"[61] it appears, in fact, that we humans owe a debt to our nonhuman forebearers for our more highly evolved moral capacities.[62]

3. *Pain and Suffering*

Just as the existence in nonhuman animals of the first criterion has been firmly established, the conclusion that nonhuman animals can and do feel pain is now quite supportable. Rollin, for example, states that "[m]uch of the behavioural evidence which licenses us to attribute experienced pain to other humans is present in animals. Animals cry out when injured, are tender at the point of injury, cringe before blows, avoid electrical shock and heat, and so on."[63]

Rollin astutely chastises those who refuse to attribute pain and suffering capacities to nonhuman animals:

> It is not the people who impute pain to animals who are anthropomorphic; they have good evolutionary, physiological, and behavioural reasons to do so. It is, rather, those who deny pain to animals on the grounds that their behaviour is unlike ours who are anthropomorphic. . . Animals do show unique pain behaviour. It just doesn't happen to be human pain behaviour.[64]

4. *Reciprocity*

The fourth criteria, the concept of reciprocity, at first seems to be a much more difficult one to establish among nonhuman animals. Although there exists evidence that certain nonhuman animal species exhibit reciprocal behavior within their own species,[65] it is less clear how we can know that these same species, or any others, would be capable of understanding and accepting a legal responsibility toward humans.

Aside from one account of a group of chimpanzees enforcing human-made rules among their own group,[66] no scientific evidence was found of any such nonhuman recognition of a human rule and its attendant responsibilities. Despite the lack of scientific evidence, however, there exists ample experiential evidence to support a finding that some nonhuman animals are capable of attending to human-made rules. Ask the owner of

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[61] KEITH TESTER, ANIMALS AND SOCIETY: THE HUMANITY OF ANIMAL RIGHTS 197 (1991).

[62] DE WAAL, *supra* note 20, at 217-18. *See also* MIDGELY, *supra* note 16, at 59 (also looking at how we can make sense of evolution, he observes that "[t]o suppose that speech could have originated among creatures which had no understanding, no concepts, no emotions, no beliefs and no desires is wild").

[63] ROLLIN, *supra* note 21, at 149. *See also* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 So. CAL. L. REV. 450, 479 n.93 (1972) ("[i]t is not easy to dismiss the idea of 'lower' life having consciousness and feeling pain, especially since it is so difficult to know what these terms mean even as applied to humans").

[64] ROLLIN, *supra* note 21, at 146.

[65] *See, e.g.*, DE WAAL, *supra* note 20, at 211. *See also* Powledge, *supra* note 58, at 395 (comparing the principle of reciprocity understood by some nonhuman primates to that which "forms the basis for contract law" in human society).

[66] Powledge, *supra* note 59, at 395.

any domesticated animal, for example, if his or her companion animal understands its rights and responsibilities and a likely answer may take the following form:

> Rover understands that his right to run free in the field is limited by his responsibility to return home when I call him. Rover understands that his right to receive scraps from the table is limited by his responsibility to sit on the floor and not jump up on the table. When Rover has broken one of the rules (e.g., urinated on the floor, jumped up to the kitchen counter to eat all the cookies), I know as soon as I see him, because he approaches with an already-shamed appearance: head held low, tail between his legs, and generally skittish.

No doubt such a description would meet with cries of anthropomorphism. How can we "know" what Rover understands? But as Rollin notes, "if we are positivistic enough to claim that we cannot know anything which we do not experience directly, then we can make no claims about anyone's mental states but our own."[67]

As additional support for the idea that Rover understands his rights and responsibilities in his human-nonhuman companion relationship, Midgely speaks of "the mixed community,"[68] claiming that certain nonhuman animals are able to be trained "not only because the people taming them [are] social beings, but because they themselves [are] so as well."[69]

As a final note on the issue of human-nonhuman reciprocity, we must recognize that we already demand certain behaviors of nonhuman animals, without according them any corresponding rights. And our punishment for their failure to conform to those behaviors is severe indeed.[70] Consider, for example, the following all-too-believable hypothetical:

> *Johnny, a ten-year-old boy, lives with his parents in a duplex, the other side of which is occupied by a single young man and his twelve-week-old pit bull. The young man works all day, as do both of Johnny's parents, and, this being the summer, Johnny is left at home alone all day with the pit bull chained in the back yard.*
>
> *Through the summer months, Johnny spends his evenings conceiving of different ways to torture the dog, and spends his days bringing those plans to fruition. Johnny applies cigarette burns, places thumbtacks under the dog's blanket, and engages in several more heinous assaults on the pit bull.*
>
> *By the end of August, the dog has grown much bigger and harbors a natural animosity toward Johnny. An opportunity arises where the pit bull has the upper hand. He pins Johnny, his jaws closing tightly around Johnny's neck. The boy survives, but the dog is condemned to death.*

The dog is thus bound by an unspoken human rule: thou shalt not do harm to humans. But he receives no reciprocal right in return.

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67 ROLLIN, *supra* note 21, at 147-48.

68 MIDGELY, *supra* note 16, at 112.

69 *Id.*

70 *See, e.g.*, Jill Schachner Chanen, *Carving Out Your Own Niche*, A.B.A. J., May 1997, 48, 50 ("[u]nder Massachusetts law, for example, a dog can be banished and killed if its disposition makes it a nuisance").

5. "Likeness"

No matter how much scientists can confirm the nonhuman animal capacities for the first through fourth criteria, no one but a human may lay claim to the fifth criterion—the species-based bias. In fact, it is this fifth basis for legal rights allocation, which is the only way to explain the rights accorded to many subgroups of humans, in light of statements such as the following:

> It is we—humans—who are having the debate, not animals; and it is a unique feature of humankind to recognize ethical subtleties. This ability to recognize gradations and competing interests is what defines the rules that we live by and the system of rights and responsibilities that comprise our legal system. Animals cannot possess rights because animals are in no way a part of any of these processes.[71]

Infants, small children, and the severely mentally retarded are not participating in the debate, yet they receive legal rights. A human sociopath is unable to "recognize gradations and competing interests,"[72] (*i.e.*, he or she fails to fulfill his or her responsibilities), yet he or she receives legal rights.

This comparison is not intended to question the legitimacy of these human subgroups' rights. As Midgely admits, there is a naturalness to species bonds,[73] and as de Waal emphasizes, "who can deny our species the right to construct its moral universe from a human perspective?"[74]

It is simply suggested that, where the species bond is *not* present, we look for evidence of the other criteria discussed in assessing the possibility of an extension of legal rights to a nonhuman animal species. Just as we say, "this is a two-month-old infant, therefore lacking in criteria numbers one, two, and four, but she *is* human (number five), and she can feel pain" (number three), we should similarly be able to say, this is a chimpanzee, therefore lacking in criteria number five, but he does exhibit capacities for all other evaluative criteria.

As Stephen J. Gould argues:

> We should be skeptical as we scrutinize the complex and socially embedded reasons behind the original formulations of our favored categories. Dualisms based on dominance may represent, most of all, the imposition of a preferred human order upon nature, and not a lecture directed to us by the birds and bees.[75]

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[71] David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. Envtl. Aff. L. Rev. 747, 754-55 (1995).

[72] *Id.*

[73] MIDGELY, *supra* note 16, at 102

[74] DE WAAL, *supra* note 20, at 215.

[75] Wise, *supra* note 49, at 472 (quoting Stephen J. Gould, *Reversing Established Orders*, 104 Nat. Hist. 12, 12 (Sept. 1995)).

IV. How the Rationales Underlying Tort Law Support an Extension of Private Rights to Nonhuman Animals

This section outlines how society's current understanding of nonhuman animals could fill the inconsistent gaps explored in Section III. Many theories are generally advanced to explain the underpinnings of tort law protection, including normative, positivist, instrumentalist, and noninstrumentalist. These theories must be closely analyzed. By focusing on the immorality, or "wrongness," of the injurious act, and on the advantages to society in general of imposing liability for such an act, this section concludes that different theoretical bases of tort protection support a limited extension of intentional tort rights to nonhuman animals.[76]

A. What's Right Morally Between the Parties?

Probably the best known proponent of morality-focused tort theory is George P. Fletcher.[77] His emphasis on the events occurring between the parties, with no attention paid to the future good of society, places Fletcher firmly in the noninstrumentalist camp.

Fletcher has even constructed a "paradigm of reciprocity,"[78] which evaluates the wrongness of conduct in terms of the parties and their relationship, as opposed to the currently approved "paradigm of reasonableness,"[79] which focuses on society and makes rules in terms of its future needs.[80] Thus, under Fletcher's view, where one actor imposes on another a nonreciprocal risk, and injures the second party by virtue of the risk, the first party may be liable for damages, notwithstanding how good for society this disproportionate distribution of risk may be.[81]

Given that "[a]n intentional assault or battery represents a rapid acceleration of risk, directed at a specific victim,"[82] Fletcher's paradigm of reciprocity would be of great value to nonhuman animals in the pursuit of intentional tort claims. In general, nonhuman animals are at a natural and disproportionately higher risk of injury than are their human aggressors because of several factors: nonhuman animals do not possess an equivalent level of intelligence; most species with which humans have contact are markedly weaker physically than the average human; and

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76 Given the present state of the law and society's current reliance on nonhuman animals for such things as food, clothing, and medical advances, an extension of anything more than intentional tort rights seems implausible. Under a negligence theory, for example, there would always be a balancing of nonhuman versus human interests. Since the balancers would always be human, there is little doubt who would win in most, if not all, cases. Under intentional tort theory, however, the balancing process has already been done and is inherent in the cause of action. Now we simply must ask if there exists a valid excuse or justification.

77 *See, e.g.*, Fletcher, *supra* note 2.

78 *Id.* at 269.

79 *Id.*

80 *Id.*

81 *Id.* at 262. Fletcher notes that the paradigms of reciprocity and reasonableness diverge where "a socially useful activity imposes nonreciprocal risks on those around it." *Id.* at 269.

82 *Id.* at 261.

most nonhuman animal species are caged, chained, or physically restrained in such a way that their opportunities for escape from an intentional aggressor are severely limited.

Although Fletcher's theory is therefore supportive of a nonhuman animal's claim, there remains one anomaly which requires resolution—how the nonhuman animal would get into court in the first place. Because the noninstrumentalist paradigm of reciprocity has no concern for the pursuit of societal change through litigation,[83] it would seem that a nonhuman plaintiff could never break through tradition to be heard by a court under noninstrumentalist influence. Arguably, however, such a court could, in a particularly vicious case of alleged cruelty, as evidenced by the initial complaint, recognize the disproportionate allocation of risk and the utter "wrongness" of the defendant's actions toward the nonhuman plaintiff, and allow the case to proceed. In this way, the allowance of the case would not be for the purpose of bettering society, but rather for doing justice between the two parties to the action. Precedent would nonetheless be established for similar allowances in the future, as between other human and nonhuman animal litigants.

Although Fletcher's noninstrumentalist approach could thus be manipulated to provide for the presence of nonhuman animal plaintiffs pursuing intentional tort claims, the absence of societal considerations makes the case more difficult. An instrumentalist theory, with a focus on considerations of morality, would appear more advantageous to the nonhuman animal plaintiff.

Such a theory has been set forth by David Owen.[84] Owen expresses his emphasis on right and wrong, both in terms of the immediate parties and society generally:

> Both [retribution and corrective justice] postulate that if a victim's injuries are caused by a breach in the standard of propriety—if, that is, the injurer's choices were "wrongful" according to the standard—the injurer may fairly be required to recompense the victim for his loss. This serves the purposes of providing psychological "satisfaction" to the victim—who receives pleasure from causing the injurer himself now to suffer—and of restoring to society a proper balance in the social order.[85]

According to Owen, therefore, not only do the parties to the action get their just desserts, as Fletcher would require,[86] but society also benefits by virtue of the reaffirming and strengthening of the proper standard of morality. Specifically, the court must consider whether the "proper balance in the social order"[87] will be restored by the court's adjudicative decision. For example, does society find it morally acceptable to punish "one

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[83] Compare the paradigm of reasonableness. *Id.* at 270.

[84] David G. Owen, *Deterrence and Desert in Tort: A Comment, Symposium: Alternative Compensation Schemes and Tort Theory*, 73 Cal. L. Rev. 665, 665 (1985) ("[t]he doctrine for [intentional] torts has become so wooden over time . . . that even the most objectionable, deliberately inflicted harm sometimes slips through the cracks and escapes the system").

[85] *Id.* at 668 (citations omitted).

[86] Fletcher, *supra* note 2.

[87] Owen, *supra* note 84, at 668.

set of persons (injurers) . . . for the purpose of benefiting a possibly unrelated set of persons (potential victims)"?[88]

Such proposed considerations of society's morality and how decisions will affect society from a future-oriented perspective are particularly important in the context of human-nonhuman animal litigation. However, although some nonhuman animals exhibit moral capacities,[89] we are unable to verify scientifically whether they can comprehend a concept such as retribution. Where Owen notes that one purpose of compensating the victim for his or her loss is to "provid[e] psychological 'satisfaction' to the victim,"[90] we must admit that we are unsure whether this purpose is actually served where a nonhuman animal is victimized.

By using Mary Midgely's analogy to human groups who similarly cannot be proven to judge or to reap psychological benefits from punishing their aggressors,[91] in conjunction with society's considerations of morality, we might solve this dilemma. The court would therefore be required to consider how society would prefer its future morality to be perceived. Following Midgely's analogy, societal consistency would be best served by allowing for society to judge for those who cannot.[92] Therefore, by taking into account *society's* psychological satisfaction at punishing the wrongdoer for his or her wrongful act, an already existing wrong, as well as possible future wrongs, will not endanger disrupting the proper social order.

B. What Policy Serves Society Best? A Positive Economic Justification for Intentional Tort Protection

A direct appeal to concepts of morality would at first seem necessary to ground any extension of legal rights to nonhuman animals. Because society is so dependent on many forms of animal exploitation, it might be thought that claims of serious "wrongness" would be required for a successful nonhuman animal action. In fact, through examination of William Landes' and Richard Posner's positive economic analysis of the law,[93] one may conclude that policies which further present and future economic efficiency, to the exclusion of moral considerations, also support some limited intentional tort rights for nonhuman animals.

According to Landes' and Posner's definition, there is actually an injection of moral judgment in the basis of "intentional tort:" the action is defined as "[d]eliberately inflicting an injury that the injurer knows is wrongful."[94] Further evidence of their recognition of the underlying morality-based question is found in the following: "[r]arely is an individual justi-

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88 *Id.* at 669.

89 DE WAAL, *supra* note 20, at 211.

90 Owen, *supra* note 84, at 668.

91 MIDGELY, *supra* note 16, at 60-61.

92 *Id.*

93 WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

94 *Id.* at 150. By defining "intentional tort" in this way, Landes and Posner "establish[ ] a clear-cut economic basis for condemning a distinct form of misconduct." *Id.* at 153.

fied in deliberately injuring another, so as a matter of economy in pleading and proof it is sensible to place the burden of justification on the defendant."[95]

Although the economic approach to tort law does little to advance the legal rights of nonhuman animals intentionally harmed in what we term socially beneficial activities,[96] Landes' and Posner's conception of intentional tort should provide for a civil action by a nonhuman animal in the classic case of cruelty to a companion animal.

C. Morality, Policy, and Social Experience: Eisenberg's Instrumentalist Theory

The two preceding sections show that both morality-based and policy-based theories of tort protection can provide some extension of legal rights to nonhuman animals. By looking at *both* morality *and* policy, and adding considerations of social experience, Melvin Eisenberg argues that the common law adjudicative process is even better informed and well-rounded in its determination of whether or not to continue applying doctrinal rules.[97] In the following section, each of Eisenberg's considerations (*i.e.*, morality, policy, and experience), as applicable to a nonhuman animal's intentional tort claim, will be addressed in turn.

As a jumping-off point concerning the question of moral consideration, Eisenberg asserts that:

> In large part, the task of the common law is not to determine what constitutes an injury or a right, but to explore, on an ongoing basis, the extent to which actions that are perceived by the community as inflicting wrongful injuries should give rise to remedies at law.[98]

This sets forth the idea that everything which is morally wrongful does not necessarily lead to a legal remedy, but everything which does lead to a legal remedy is necessarily morally wrongful.[99] In other words,

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[95] *Id.* at 167.

[96] Intentionally harmful activities such as factory farming and scientific experimentation on nonhuman animal subjects would likely be analogous to Landes' and Posner's cases of public necessity. *See id.* at 180-81. In such cases, "[b]ecause the defendant does not reap the full benefits of his act, neither should he have to pay the full costs. Otherwise there will be too little of his activity." *Id.* Despite this general disallowance of tort actions against a defendant acting for the public's necessity, Landes and Posner do provide for a civil action where the defendant *acted carelessly* in sacrificing something of worth for the benefit of something else of worth. *Id.*

[97] EISENBERG, *supra* note 1, at 38. Eisenberg's approach has support among the courts as well. *See, e.g., Weirum v. RKO General, Inc.*, 539 P.2d 36, 39 (Cal. 1975) (listing factors to evaluate when considering whether a duty exists, "our continually refined concepts of morals and justice . . . the guidance of history, the convenience of the rule, and social judgment as to where the loss should fall").

[98] EISENBERG, *supra* note 1, at 15.

[99] According to the Restatement, the word "injury" "denote[s] the invasion of any legally protected interest of another," and "harm" "denote[s] the existence of loss or detriment in fact of any kind to a person resulting from any cause." Restatement (Second) of Torts § 7 (1979). Comment d goes on to explain that, in order to be actionable, a "harm" must also be an "injury:" "[H]arm, which is merely personal loss or detriment, gives rise to a cause of

considerations other than those of "right and wrong" (*e.g.*, policy and experience), must be factored into the remedy-recognition process.

Before analyzing Eisenberg's other considerations, however, it is important to determine what moral norms the court should apply. Eisenberg states that the "moral standards that claim to be rooted in aspirations for the community as a whole,"[100] and which can be verified by "appropriate methodology" (*e.g.*, both official and unofficial sources),[101] are those which the court should employ in its decision-making. In the context of nonhuman animals, it is clear from much of the evidence presented in Section II(C) that our community values the inherent worth of creatures other than ourselves, and that, as a society, we condemn as wrongful those intentionally inflicted harms against nonhuman animals which are not deemed necessary.[102] In addition to these unofficial sources, the court can look to official, law-related sources and find similar concern for providing justice for nonhuman animals.[103] Specifically, there have been several judicial opinions in recent years that may serve as precedent to show changing social mores.[104]

Importantly, the court is not required to provide statistical proof that the majority of Americans abide by such morality.[105] Additionally, under Eisenberg's theory, a court is authorized to "lead by overturning legal rules that have lost their social support, and establish[ ] in their place rules based on existing social standards."[106] Given this discretion, a court may

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action only when it results from the invasion of a legally protected interest, which is to say, an injury." RESTATEMENT (SECOND) OF TORTS § 7 cmt. d (1979).

100 EISENBERG, *supra* note 1, at 15.

101 *Id.* at 15-17.

102 *See supra* notes 32-46 and accompanying text.

103 According to the Animal Legal Defense Fund ("ALDF"), there are currently six established chapters of nonhuman animal rights-related law student groups; and nonhuman animal law sections of various bar associations (including one national, one in New York, NY, one in the state of Michigan, and one in the state of Texas). <http://www.aldf.org/link.htm> (visited April 24, 1997). Additionally, the ALDF provides links from its web site to other nonhuman animal law-related sites on the World Wide Web (*e.g.*, the Animal Law Resource Center at Rutgers University, the Law Student Animal Rights Alliance, Progressive Law Student Web Page, Not Only Attorneys and Students Animal Rights Committee, and the Animal Law Section of the State Bar of Michigan). *Id.*

104 *See, e.g.*, *Bueckner v. Hamel*, 886 S.W.2d 368, 377-78 (Tex. Ct. App. 1994) (Andell, J., concurring) ("simple property concepts cannot reflect the complex reality of the relationship between humans and their pets . . . Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, mere property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live."); *State v. Karstendiek*, 22 So. 845, 847 (La. 1897) (finding that "animals have rights, which, like those of human beings, are to be protected. And that a horse, under its master's hands, stands in a relation to the master analogous to that of a child to a parent").

105 EISENBERG, *supra* note 1, at 18. Eisenberg specifically notes that such proof is an impossible task, and that the court must infer the requisite social support from appropriate methodology.

106 *Id.* at 19. *See also* Squires-Lee, *supra* note 35, at 1083 n.172 (1995) ("in addition to reflecting societal values, tort law can help to change those values; . . . [f]or example, the law affects the way society values the environment when it requires recycling; the law both reflects selected insights and shapes social values regarding women, privacy, and equality

thus recognize a waxing societal moral standard which, for whatever reason, has not yet been authorized by any other lawmaking body. The Court may then grant justice to the immediate parties, where precedent is out of touch with present reality. Justice Holmes authorized the same approach over half a century ago, when he stated the following:

> [i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[107]

Holmes' statement could just as easily be applied to the current laws (or lack thereof) regarding nonhuman animals, with a simple substitution of "Genesis," or "Descartes," in place of "Henry IV."[108]

The second of Eisenberg's categorical considerations is that of policy, or what is good or bad for society.[109] In addition to the more rule-specific policies which must be considered in light of any proposed alteration, extension, or abolishment of a rule, Eisenberg identifies two general policies which should be considered by the court in every case—social gravity and private autonomy.[110]

The policy of social gravity essentially echoes the harm-vs.-injury distinction made earlier; in other words, a court must take care not to deem something an injury which, although wrong, would involve overly burdensome enforcement costs.[111] To apply the policy of social gravity to cases which could possibly arise in the context of human-nonhuman animal litigation, a comparison might be as follows: whereas a person's relentless taunting of a pet dog with steak (with no intention of ever handing it over) would be analogous to a person cutting in line (both actions being morally wrong, but neither calling for judicial intervention), the same person's act of setting the pet dog on fire would be something morally reprehensible enough to warrant the burdens and costs of official enforcement.

Eisenberg's second general policy, that of private autonomy, is that "morally wrongful conduct should not be made the basis of liability if doing so would unduly inject officials into intimate spheres of social conduct."[112] An analogy to parental disciplining techniques of children may be appropriate here. Although society may generally view corporeal punishment to be morally wrong, we are willing to leave a minimal amount of discretion in the parent's hands, with the hope and expectation that par-

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when it decriminalizes abortion; and when the Supreme Court requires integration in public school, it reflects, alters, and shapes society's valuation of integration").

107 Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* Collected Legal Papers 167, 187 (1920).

108 De Waal's (and others') studies provide further support for a reconsideration of the legal remedies available to nonhuman animals. "We need to reevaluate traditional attitudes developed over a long history without realistic alternatives, and without awareness of the sensibilities and cognitive abilities of animals." DE WAAL, *supra* note 20, at 214.

109 EISENBERG, *supra* note 1, at 26.

110 *Id.* at 29.

111 *Id.*

112 *Id.*

ents use such punishment wisely and sparsely, and with the belief that the state cannot encroach too far into the parental-child relationship. Similarly, although society may consider it cruel and wrong to see an individual slap his or her companion animal, we are not willing to call this "cruelty," for we do not know the underlying motivation, and the cost of determining it is too great.[113]

The court's inquiry regarding rule-specific policies, the initial criteria of which a policy must satisfy in order to be considered by the court, is analogous to those required of moral norms.[114] Eisenberg notes, however, that, given their more temporal nature, such policies must satisfy additional criteria for judicial consideration.[115] For example, the policy must be capable of effective implementation by the court through remedies "such as the imposition of damages or the grant of injunctive relief."[116] As set forth in detail in Section VI, a nonhuman animal's claims could be satisfied by the already-existing tort damages structure.

The third and final of the court's considerations, according to Eisenberg, is that of experience, or simply by looking at how the world works.[117] Experiential propositions comprise a variety of different considerations, including customary business usage,[118] "the laws of the physical and biological sciences,"[119] and psychological and sociological propositions.[120] These last propositions, Eisenberg emphasizes, are the most important among all experiential propositions.[121] He goes on to state that "[i]t is almost impossible to overstate the importance in adjudicative reasoning of these types of experiential propositions, whose major function is to mediate between policies (and to a lesser extent moral norms), on the one hand, and legal rules, on the other."[122]

It is these experiential propositions which most drastically segregate one class of nonhuman animal's intentional tort claims from another's. Whereas moral norms, policy, and experience would support a companion animal's claim against a cruel aggressor, a nonhuman animal used for scientific research or as a food source would have a much more difficult time overcoming what is our current reality. Our society is heavily dependent on various forms of animal exploitation, and a court would not be quick to

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113 In both the case of the parent-child and the human-nonhuman relationship, we intuitively recognize that some actions warrant a consistent, immediate, and severe response. *See, e.g.*, Henry L. Roediger III et al., Psychology 216 (1984). For example, where a small child or a companion animal leaps toward a busy street, a responsible party may be justified in giving either a quick swat on the behind, along with verbal reinforcement of the danger inherent in the situation.

114 EISENBERG, *supra* note 1, at 29. *See also supra* notes 99-105, and accompanying text.

115 EISENBERG, *supra* note 1, at 31.

116 *Id.*

117 *Id.* at 36.

118 *Id.* at 37-38.

119 *Id.* at 38.

120 *Id.*

121 *Id.*

122 *Id.*

ignore this reality, even in the face of conflicting moral and policy considerations.[123]

D. All Law Is Politics: A Critical Approach to Extending Intentional Tort Protection to Nonhuman Animals

Although each of the foregoing three theories of tort protection provides some measure of support for a nonhuman animal's tort claim, it is, in fact, the fourth theory, that of the Critical Legal Studies (CLS) movement, which tends to bolster the nonhuman animal's claim the most.

At the heart of CLS thought is the proposition that all of society's governing structures are in fact reified, or, in other words, conceived by society as being mandated by some overarching truth, when, in fact, they may have no basis in, *e.g.*, "history, human nature, [or] economic law."[124] Upon realizing our human-made assumptions, CLS theorist Robert Gordon argues that we must "unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying."[125]

CLS theory fits so well with the idea of extending some legal rights to nonhuman animals because of the theory's congruity with society's experiential knowledge of some nonhuman animal species. Just as Bernard Rollin argues that most scientists tend to shed their "science is value-free"[126] ideology upon arriving home to the excitement of their companion animals,[127] society implicitly authorizes the same type of duality, by at once recognizing, *e.g.*, the sentience and decision-making ability of nonhuman animals, and abiding a body of law that mandates the all-or-nothing property status of nonhuman animals.

Outside the CLS school itself, there exists other commentary tending toward the same idea that there is a political element to our reified structures. As an ABA Report suggests, "[w]e further see an increasingly significant role for tort law as an agent of response to the socially undesirable use of power by parties in a position to affect the lives and destinies of

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123 *See, e.g.*, MD. Ann. Code art. 27, § 59(c) (1957) (stating that it is the "intention of the General Assembly that all animals . . . shall be protected from intentional cruelty, but that no person shall be liable for criminal prosecution for normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable").

124 Robert W. Gordon, *New Developments in Legal Theory*, in The Politics of Law: A Progressive Critique 413, 420 (David Kairys rev. ed., 1990). Gordon cautions that even the concept of "economic law" is reified: "[f]or if social reality consists of reified structures, 'law' and 'the economy' are *both* belief systems that people have externalized and allowed to rule their lives." *Id.* at 421.

125 *Id.* at 420. *See also* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, *in* Jurisprudence: Contemporary Readings 233, 236 (Robert L. Hayman, Jr. & Nancy Levit eds., 1995) ("I view legal and moral questions as matters to be answered by experience, emotions, introspection, and conversation, rather than by logical proof").

126 ROLLIN, *supra* note 21, at 5.

127 *Id.*

others who are relatively helpless to resist the imposition of that power."[128]

By authorizing such reifications as the "legal thinghood of nonhuman animals,"[129] society has put itself in the politically advantageous position referenced above in the ABA Report.[130] We have allowed lawmakers to construct governing, abstract relationship models for humans and nonhumans, which are antithetical to what we perceive as being real. An objectivist might ask how we can prove that any nonhuman animals are deserving of any legal rights. An appropriate response from the CLS school, and one that is highly applicable in the nonhuman animal context, is the following argument made by Joseph Singer:

> [w]e need to get over the feeling that a view is either one that all persons should accept because it is grounded in reality or it is 'just your opinion.' The proper question is not 'how can we be certain that we are right?' but 'how should we live?'[131]

V. TORT PROTECTION FOR NONHUMAN ANIMALS VIA THE "INNOMINATE TORT"

The harms intentionally inflicted on nonhuman animals, as discussed in this paper, can be said to fall primarily in the category of the well-estab-

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[128] ABA Report, *supra* note 4, at 14-7. A further acknowledgment of reified structures in the law may be inferred from the following: "[A]n emphasis on control also may have strong ethical content. Courts which speak of relations of 'dependence and submission' are not simply construing economic bargains. They appear to be saying that when one person attributes an injury to another's misuse of power to dictate vital circumstances of the first person's life, or occasionally when one ascribes his harm to a failure to use such power, there are limits to judicial willingness to enforce marketplace mores." *Id.* at 14-119. Social scientists and philosophers concerned with nonhuman animal issues also speak in phraseology reminiscent of the CLS school. *See, e.g.*, Robert Garner, Animals, Politics and Morality 1 (1993) ("[this book] seeks to examine moral theories which endeavour to tell us how we ought to treat animals as well as how individuals and the law actually do treat them. That there is a political dimension here is precisely because increasing numbers of people feel there is a gap between what morality prescribes and the law allows").

[129] Wise, *supra* note 49.

[130] ABA Report, *supra* note 4, at 14-7.

[131] Singer, *supra* note 125, at 236. The absence of any reference in this section to Richard Abel is no doubt glaring, given his recognition as a preeminent CLS theorist in the area of torts. *See* Richard L. Abel, *A Critique of Torts*, *in* Perspectives on Tort Law 322 (Robert L. Rabin ed., 4th ed. 1995). Whereas this paper is focused on getting the nonhuman animal into the courtroom, to be the beneficiary of the current damages system, Abel focuses on the injustice of the current tort compensation scheme. *See id.* This paper does not seek to engage in a reevaluation of tort damages generally. However, in the event nonhuman animals do gain access to the courts, some of Abel's criticisms would be equally applicable to them. Specifically, Abel claims that "the legal proclamation of formal equality [in the courts] obscures the persistence of real inequality." *Id.* at 326. Among the reasons for this inequality, Abel offers the following, all of which would present themselves as issues for consideration in the human-nonhuman litigation context: "some people are more likely than others to be victimised by tortfeasors who cannot or will not pay compensation; . . . the process of making a claim is institutionalized to varying degrees in different settings . . . there may be no witnesses . . . and there is no obvious defendant; [and] . . . the measure of damages is unequal . . . it seems likely that jurors are more solicitous of those who have lost privilege than those who never enjoyed it." *Id.* at 326-27.

lished tort of battery.[132] Although it is appealing, therefore, to analyze a nonhuman animal's claim simply in terms of the prima facie case of battery and its established privileges, to do so ignores the restriction inherent in the cause of action. Battery (like all other torts presently) restricts its class of plaintiffs to "persons."[133] Because of this limitation, a more appropriate method of establishing a specific intentional tort to which nonhuman animals may appeal is to consider the "innominate tort," as set forth in section 870 of the Restatement (Second) of Torts.[134]

Entitled *Liability for Intended Consequences—General Principle*,[135] section 870 states the following:

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132 There are two battery causes of action: harmful contact battery, *see, e.g.*, Restatement (Second) of Torts § 13 (1979); and offensive contact battery, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 18 (1979). Of the two branches, harmful contact battery appears the more legitimately applicable to nonhuman animals, as our ability to discern what is "offensive" to a nonhuman animal is limited at best, and anthropomorphic at worst (compare, for example, the Restatement's definition of what constitutes bodily harm, RESTATEMENT (SECOND) OF TORTS § 15 (1979) ("any physical impairment of the condition of another's body, or physical pain or illness"); with the definition of offensive contact, RESTATEMENT (SECOND) OF TORTS § 19 (1979) (contact which "offends a reasonable sense of personal dignity"). Although other injuries to nonhuman animals may be equally analogous to established intentional torts (*e.g.*, intentional infliction of emotional distress, false imprisonment), these, like the offensive contact branch of battery, suffer from human limitations in understanding the nature of the injury at issue. Thus, although some nonhuman animals may meet the knowledge and emotional requirements of the aforementioned torts (given our current understanding of the nonhuman animal mind. *See supra* notes 17-31, and accompanying text), the current legal system would not be as willing to acknowledge such subjective injuries as it would be able to ascertain the objective manifestations of a harmful contact. Therefore, the present innominate tort analysis is limited to similarities to harmful contact battery.

133 *Supra* notes 6 and 20.

134 RESTATEMENT (SECOND) OF TORTS § 870 (1979). Given the existence of state anti-cruelty legislation, one might also consider appealing to Section 874A of the Restatement, which provides for the implication of a civil action from the presence of a legislative provision. The full text of Section 874A is as follows: "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action." RESTATEMENT (SECOND) OF TORTS § 874A (1979). Although this language is, at first glance, promising for the nonhuman animal plaintiff, the comments to Section 874A provide otherwise. Comment d, in particular, explains that a court is to engage in a standard determination of legislative intent. In other words, if the court determines that the enacting legislature intended, either explicitly or implicitly, that a civil action would or would not lie for the wrong, then the matter is settled, and the court must adhere to the legislature's intent. *Id.* § 874A cmt. d. This would be the case for most, if not all, anti-cruelty legislation; a court would be hard-pressed to find other than that a legislature intended no private right of action for a nonhuman animal plaintiff. Even if a court did determine that the legislature evidenced no specific intent as to the issue, a court would risk vehement claims of judicial activism if it were to infer, through traditional methods of statutory interpretation (*e.g.*, imaginative reconstruction, policy/purpose evaluation), a nonhuman animal's private right of action from an anti-cruelty statute. Therefore, this analysis refrains from considering any hope of using Section 874A of the Restatement.

135 RESTATEMENT (SECOND) OF TORTS § 870 (1979).

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.[136]

The comments to section 870 go on to explain what is implicit in the above-referenced text, that there may be a basis for liability for intentionally inflicted injuries, notwithstanding the failure of such an injury to fall neatly within a traditional cause of action.[137] The comments also explain that the established intentional torts and their privileges "amount to crystallizations of the general principle stated in this Section."[138]

With this guiding principle in mind, comment c of section 870 explains, in instrumentalist language, that all tort law is based on "a balancing of the conflicting interests of the litigants in light of the social and economic interests of society in general."[139] In the realm of intentional torts, however, that balancing is already completed prior to a claim's reaching the legal factfinder.[140] Thus, in comments e-i, the Restatement spells out the factors to be evaluated in considering an innominate tort.[141] These are the same factors which are deeply ingrained in already-existing intentional torts.

The four factors for analysis, as listed in comment e to section 870, are as follows: "(1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive."[142] Keeping in mind that the basis for liability "cannot be neatly divided into several separate, mutually exclusive determinations,"[143] each of the four factors are addressed in turn, as they apply to intentionally harmful contact against nonhuman animals. This section concludes by synthesizing what becomes generally apparent from the four factors at issue, that there is a place in the law for an "intentional harmful contact to nonhuman animals" tort.

A. The Nature and Seriousness of the Harm

Comment (f) to section 870 outlines the considerations for evaluating the "nature and seriousness of the harm to the injured party."[144] Essentially reiterating the distinction between "harm" and "injury," as discussed in section 7 of the Restatement,[145] comment (f) explains that individuals

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136 *Id.*

137 *Id.* § 870 cmt. a.

138 *Id.* § 870 cmt. d.

139 *Id.* § 870 cmt. c.

140 *Id.*

141 *Id.* § 870 cmts. e-i.

142 *Id.* § 870 cmt. e.

143 *Id.*

144 *Id.* § 870 cmt. f.

145 *See supra* note 98, and accompanying text.

cannot be compensated for all the harms they suffer.[146] Only if a legally protected interest is violated may the injured party seek legal redress.[147]

Although nonhuman animals presently have no such protectable interests in the eyes of the law, the evidence presented in Sections II and III indicates that some do have such interests, and it is just that the interests simply have not been recognized by the law.[148] Society's experiential understanding of nonhuman animals, the knowledge gained from the various sciences, and the perceived requirement that the allocation of legally protectable interests be consistent in its application, all mandate that some nonhuman animals be accorded a legally protectable interest in their bodily integrity.[149] Even if one considers the nonhuman animal's interest to be subordinate to the human's, the guidance provided by comment (f) suggests that a particularly serious intentional injury to a nonhuman animal could still lead to a finding of liability. Comment (f) states that, "the severity of the harm is an important consideration, and a serious harm to an interest less deserving of protection may be a more important factor in finding liability than a slighter harm to a more significant interest."[150]

B. Interests Promoted by the Actor's Conduct

The second factor in the innominate tort analysis considers the interests, both individual and societal, that the actor's injurious conduct promotes.[151] This significant factor is "the basis for established privileges"[152] in intentional tort jurisprudence, and likely would prove severely limiting on nonhuman animals' rights of recovery.

Self-defense, defense of others, and necessity are three privileges which immediately spring to mind as easily applicable in the arena of human-nonhuman tort litigation.[153] For example, if a dog were to attack a neighbor, or the neighbor's small child, the neighbor would be justified in repelling the dog, just as he or she would be as against an attacking human.[154] Similarly, where a person drives his or her car onto a narrow street and discovers that the car's brakes have failed, and his or her only

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146 RESTATEMENT (SECOND) OF TORTS § 870 cmt. f (1979). For example, an individual who is snubbed on the street by someone he or she knows, does not have a cause of action against the "snubber."

147 *Id.* § 870 cmts. e-f. *See supra* note 6 and accompanying text.

148 *See supra* notes 17-46 and accompanying text.

149 Id.

150 RESTATEMENT (SECOND) OF TORTS § 870 cmt. f (1979).

151 *Id.* § 870 cmt. g.

152 *Id.*

153 Although such analogous privileges seems obvious, one should heed the guidelines of § 870: "[r]ecognized privileges for the established torts that are most analogous to the newly-created tort will usually be held applicable to the new tort, *but a deliberate decision must be made as to this issue.*" Restatement (Second) of Torts § 870 cmt. j (1979) (emphasis added).

154 The justification would depend, of course, on the actor's conduct and belief meeting the requirements of the applicable privilege. *See, e.g.*, Restatement (Second) of Torts § 65 (1979) (entitled "Self-Defense by Force Threatening Death or Serious Bodily Harm").

options are to drive over either a child or a dog, it is almost inconceivable that the driver would choose to hit the child.[155]

In addition to such analogous privileges, however, there are sure to be several others specific to human-nonhuman litigation, given the well-entrenched societal approval of certain human injurious uses of nonhuman animals. A medical researcher conducting experiments on nonhuman animals, for the ultimate benefit of humans, would undoubtedly be subject to such a privilege.[156] Additionally, those individuals in the business of raising nonhuman animals for human food consumption would be privileged in their killings.[157] Although the methods used in both scientific experimentation and factory farming may be ethically questionable, and there very well may be less cruel alternatives,[158] the general society's cur-

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155 One person who very well might hit the child is Ingrid Newkirk, Founder of PETA. Newkirk has been cited as saying that "even if animal research resulted in a cure for AIDS, PETA would 'be against it.'" Schmahmann & Polacheck, *supra* note 71, at 754 (quoting Fred Barnes, *No Longer Dismissed as Weirdos, Animal-Rights Groups are Now Threatening Medical Research*, Vogue, Sept. 1989, at 542, 542).

156 A medical research privilege seems obvious from a number of facts. First, many state anti-cruelty statutes exempt from coverage all scientific experiments conducted on nonhuman animals. *See, e.g.*, Mich. Comp. Laws Ann. § 750.50(8)(h)-(i) (West 1996); UTAH CODE ANN. § 76-9-301(5)(b) (1996). Second, the Animal Welfare Act, a federal statute aimed at regulating the manner in which researchers maintain nonhuman animals, explicitly denies any cause of action based on the content of an experiment. 7 U.S.C. § 2143(a)(6)(A)(i) ("nothing in this chapter . . . shall be construed as authorizing the Secretary [of Agriculture] to promulgate rules, regulations, or orders with regard to design, outlines, guidelines, or performance of actual research or experimentation by a research facility as determined by such research facility"; *see also* H.R. REP. 91-1651, at 4 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104 ("[u]nder this bill the research scientist still holds the key to the laboratory door"); International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934, 939 (4th Cir. 1984) ("[b]oth the language of the statute and the means chosen by Congress to enforce it preserve the hope that responsible primate research holds for the treatment and care of humankind's most terrible afflictions. The statutory design is, in turn, inconsistent with the private right of action that plaintiffs assert"). Third, the sheer numbers of people helped by medical advances due, at least in part, to nonhuman animal experimentation, is multitudinous. *See, e.g.*, Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, *in* ANIMAL RIGHTS: OPPOSING VIEWPOINTS 23, 28 (Janelle Rohr ed., 1989) ("[e]very disease eliminated, every vaccine developed, every method of pain relief devised, every surgical procedure invented, every prosthetic device implanted—indeed, virtually every modern medical therapy is due, in part or in whole, to experimentation using animals."); Ron Karpati, *A Scientist: I Am the Enemy*, *in* ANIMAL RIGHTS AND WELFARE 83, 83 (Jeanne Williams ed., 1991). So long as there are devastating human diseases such as AIDS and cancer, killing our loved ones daily, it remains doubtful that a significant percentage of our population would be willing to abandon experimentation on nonhuman animals (so long as it is conducted without malice and for the benefit of humankind).

157 Again, many state anti-cruelty statutes exempt this activity from coverage. *See, e.g.*, Ky. Rev. Stat. Ann. § 525.130(2)(b) (Michie 1996); MICH. COMP. LAWS ANN. § 750.50(8)(f) (West 1996). The few states which do impose some regulatory restrictions may be fertile ground for tort actions as discussed in this paper. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5511(e) (West 1996).

158 *See, e.g.*, <http://www.envirolink.org/arrs/peta> (visited April 24, 1997) (explaining the benefits of specific nonhuman animal testing procedures); <http://www.navs.org/educate.htm> (visited April 24, 1997) (discussing alternatives to animal dissection); and <http://infonet.welch.jhu.edu/caat/News_fall96/PandG.html> (visited April 24, 1997) (letter from

rent acceptance of such practices militates against a successful tort action against these actors.

C. *The Character of the Means Used by the Actor*

When referring to the character of the means used by the actor, the Restatement explains that the third factor concentrates on the actor's conduct.[159] "The reference is to the moral and legal character of that conduct. If the means is illegal or unfair or immoral according to the common understanding of society, this constitutes a factor favoring liability."[160]

Because the most likely nonhuman tort action to be brought would be one also punishable under a state's criminal anti-cruelty statute,[161] this factor strongly favors an imposition of liability.[162] Not only are such acts illegal, but, notably, several of the criminal statutes punishing human cruelty toward nonhuman animals are found in chapters or subparts entitled with words invoking a sense of moral propriety,[163] as opposed to simple policy motivations. Thus, such conduct has already been deemed legislatively to be "improper or wrongful . . . blameworthy, not in accord with community standards of right conduct."[164]

D. *The Actor's Motive in Causing the Injury*

The final factor for analysis, the actor's motive, confirms much of what has already been considered in the previous three factors. According to comment i of section 870, "[i]f the only motive of the actor is a desire to harm the plaintiff, this fact becomes a very important factor."[165] In the hypothetical typical case, therefore, where a companion animal has been cruelly mistreated by an owner or other individual, this factor likely will favor the imposition of liability.[166]

Gordon S. Hassing of Proctor and Gamble to the Johns Hopkins Center for Alternatives to Animal Testing).

159 RESTATEMENT (SECOND) OF TORTS § 870 cmt. h (1979).

160 *Id.*

161 A tort action based on the same type of conduct as is punishable criminally is most typical for a number of reasons. First, it is only logical that the civil law would be willing to allow a victim direct compensation from his or her assailant, if the conduct at issue has already been criminalized as immoral and against the public welfare. Second, conduct which is specifically exempt from criminal prosecution yields a strong presumption of its legality and thus makes implication of a civil tort action difficult.

162 RESTATEMENT (SECOND) OF TORTS § 870 cmt. h (1979) ("[o]f course, acts that are in violation of civil or criminal statutes . . . may be strongly indicative of liability").

163 *See, e.g.*, Kan. Stat. Ann. § 21-4310 (1996) ("Crimes Against the Public Morals"); LA. REV. STAT. ANN. § 14:102 (West 1996) ("Offenses Affecting the Public Sensibility"); MONT. CODE ANN. § 45-8-211 (1996) ("Offensive, Indecent, and Inhumane Conduct"); VT. STAT. ANN. tit. 13 § 353 (1996) ("Humane and Proper Treatment of Animals"); W. VA. CODE § 61-8-19 (1996) ("Crimes Against Chastity, Morality and Decency").

164 RESTATEMENT (SECOND) OF TORTS § 870 cmt. e (1979).

165 *Id.* § 870 cmt. i.

166 *Id.*

If, on the other hand, the actor is promoting some interest other than "venting his ill will,"[167] he or she may be privileged in their conduct, depending on how society views the interest being promoted. As in the analysis of the second factor (concerning privileges), the scientific researcher and the farmer likely emerge unscathed by liability; although each has some intention of "harming" the nonhuman animal (as a necessary means of reaching the desired end), neither presumably is guilty of the "disinterested malevolence" condemned by the Restatement.[168]

E. Synthesis of the Innominate Tort Analysis

From the above four considerations emerges an intentional tort cause of action, available to nonhuman animals who are injured not as a direct result of some human conduct which is intended to benefit the general human welfare (or which is subject to an analogous privilege to battery). This may limit successful nonhuman tort actions to an extremely small class of all nonhuman animals hurt or killed. Given society's balancing of interests, however, this small class of nonhuman animal plaintiffs is likely the most the law currently would be willing to entertain.

Admittedly, this proposed allocation of tort rights and privileges is anthropocentric. In other words, it provides greater rights to those nonhuman animals which humans see as ends in themselves (*e.g.*, cats, dogs, companion animals generally), rather than focusing on the particular species' capacity for learning, emotion, language, etc. Under this scenario, the family cat who is burned by the neighborhood sociopath would be entitled to sue. In contrast, the gorilla subjected to various painful experiments precisely because he or she is so much like a human, would not have a cause of action because of the scientist's privilege.

This is a troubling result of this Comment's proposal, but this proposal is also the only one which might hold sway in a current common law court. Getting "a paw in the door," so to speak, may be the best that nonhuman animals can do at this point. Society is gradually changing its balancing of priorities, with more individuals willing to pay more for cruelty-free hygiene products, free-range chickens, and anti-vivisection alternatives. Humans are evolving from creatures solely interested in the well-being of their "pets," to individuals who see the necessity of extending their compassion for nonhuman animals beyond their backyards. The change is coming, but, for a more radical change in tort law to occur, there must be further change in society.

VI. Considerations of Procedures Necessary for the Litigation of a Nonhuman Animal's Tort Claim

Having previously presented arguments for why, substantively, intentional tort rights should be extended in some respects to nonhuman animals, this section addresses procedural implementation. The first

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167 *Id.*

168 *Id.*

consideration, from the overall perspective of rights-vindication (generally), is that a nonhuman animal must "count jurally,"[169] as Christopher Stone put it twenty-six years ago. Stone outlined four criteria which must be satisfied in order for an entity to possess a truly vindicable legal right:

> *some public authoritative body* [must be] prepared to give *some amount of review* to actions that are colorably inconsistent with that 'right'[;] . . . [the entity] can institute legal actions *at its behest*; . . . in determining the granting of legal relief, the court must take *injury to it* into account; and . . . relief must run to the *benefit of it*.[170]

At the heart of Stone's proposal lies the distinction between a court's recognition of human damages as a result of injury to the entity and the recognition of the entity's injury in and of itself, with any damages flowing directly to the entity.[171] Similarly to Stone's natural objects, nonhuman animals are suffering injuries which must be redressed. Substituting a cause of action in the name of an interested human for a cause of action in the name of the most directly injured party (the nonhuman animal) is not only inequitable, but also denies the independent worth of the nonhuman animal.[172]

Crucial to the success of this extension of intentional tort rights is an affordable method of vindicating these rights through recourse to the judicial system. Although at first glance, the costs of an animal bringing suit might seem prohibitive (*e.g.*, attorney fees, court costs, money expended for expert witness services), if the court were to impose a "loser pays" rule, as to all related costs, this may substantially increase the likelihood that suits will be filed.[173] In particular, it would increase the availability of legal recourse to injured nonhuman animals without human companions/owners, who would have to rely on guardians to file the relevant legal action in the nonhuman animal's name (the aspect of necessary human intervention in the litigation process is discussed below). Additionally, a "loser pays" rule likely would discourage the filing of frivolous or questionable actions, and thus would diminish any arguments that the pro-

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169 Stone, *supra* note 63, at 458.

170 *Id.* (emphasis in original).

171 *Id.* at 459. Stone sets forth the comparison as follows: "compare two societies, S_1, in which pre-natal injury to a live-born child gives a right of action against the tortfeasor at the mother's instance, for the mother's benefit, on the basis of the mother's mental anguish, and S_2, which gives the child a suit in its own name (through a guardian *ad litem*) for its own recovery, for damages to it." *Id.*

172 In the case of an injured companion animal, most courts do not even allow a human-instituted claim of intentional infliction of emotional distress. Squires-Lee, *supra* note 35. Thus the only remedy generally available for any party to redress the wrong done to nonhuman animals is one based on destruction of property.

173 David Owen advocates such an approach for intentional torts generally. *See* Owen, *supra* note 84, at 671 n.34 ("[a]n intentional injurer needs to be punished in excess of compensatory damages to take the profit out of injuring and to adjust for the tendency of injurers to discount the likelihood of being caught and punished" (citations omitted)); *see also id.* at 671 ("it seems only fair (and apparently efficient) to require the 'thief' to pay the victim's loss-recovery costs through the payment of the plaintiff's litigation expenses, especially attorneys' fees" (citation omitted)).

posed extension of tort rights would cause a litigation explosion which the court system could not bear.

The second consideration, in terms of the litigation process, addresses the likelihood that nonhuman animals could secure legal representation. Although certainly not a well-populated practice area, animal law is a field in which some practitioners specialize.[174] In fact, there already exist organizations which commit resources to the maintenance of a legal defense fund and practice for animals.[175] Additionally, the legal representation of nonhuman animal plaintiffs would be a logical expansion of a legal practitioner's pro bono work.

As noted earlier, in cases where the nonhuman animal is not the property of a human, or if the owner is the defendant in the tort action, the question of lawsuit initiation arises. Although an owner logically may take the necessary steps to initiate the nonhuman animal's cause of action, in the other cases mentioned, a guardian would need to be appointed.[176] If the proposed tort right were adopted, it is highly likely that the various societies organized to prevent cruelty to nonhuman animals would agree to serve such a guardian function.

Where the plaintiff's action is successful, there arises the obvious problem of damages assessment. In addition to the awarding of legal costs, as referenced above, punitive damages may be in order. Under several general theories of tort jurisprudence, the award of punitive damages in cases of malicious injury has support.[177] In the specific case of injury intentionally inflicted on companion animals, in response to which the owner sues the aggressor under property theory, some courts have also endorsed punitive damages to supplement the low compensatory award.[178]

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174 Chanen, *supra* note 70, at 50 (commenting that "Boston lawyer Steven Wise thinks there will be a day when animals will be able to sue human beings for battery or even wrongful imprisonment. And when they can, Wise will be there to represent them."); *See also* Joe Mooney, *Career Switch Puts Attorney on Front Line of Animal Defense*, Seattle Post-Intelligencer, *available at* 1996 WL 6457727.

175 See, *e.g.*, The Animal Legal Defense Fund's ("ALDF") web site, which sets forth the following organizational biographical information: "Founded in 1981, ALDF is the country's leading animal rights law organization working nationally to defend animals from abuse and exploitation. ALDF's network of over 700 attorneys is dedicated to protecting and promoting animal rights. Over the past 17 years, we've won precedent-setting victories for animals on every front—in research laboratories, on farms, in the wild and for companion animals." <http://www.aldf.org/about.htm>.

176 Stone set forth a similar suggestion. *See* Stone, *supra* note 62, at 464, 480.

177 *See, e.g.*, W. Page Keeton et al., PROSSER & KEETON ON THE LAW OF TORTS 9 (5th ed. 1984) ("[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action 'punitive' or 'exemplary' damages." (footnote omitted)); *See also* Owen, *supra* note 83, at 670-71; LANDES & POSNER, *supra* note 93, at 100.

178 *Wilson v. City of Eagan*, 297 N.W.2d 146, 150 (Minn. 1980) ("citizens and attorneys are not likely to take action to redress the wrongs . . . Punitive damages are, therefore, appropriate for such cases"); *Rimbaud v. Beiermeister*, 154 N.Y.S. 333, 336 (App. Div. 1915) ("Even if the animal had almost no market value, it was evidently a pet, and the jury may have assigned by far the greater portion of the damages allowed to the punitive part of their verdict").

As Owen,[179] and Landes and Posner[180] justify the imposition of punitive damages, the applicability to the nonhuman animal's tort claim becomes clear. Owen likens an intentional tort to "a kind of 'theft' which is plainly wrong, which if possible should be discouraged in advance, and for which a just dessert often will far exceed mere recompense of the stolen goods."[181]

As opposed to Owen's moralistic tone, Landes and Posner justify the imposition of punitive damages on the basis of economic efficiency:

> [t]he average injurer does not bypass the market in these cases because transaction costs are high or prohibitive. On the contrary, those costs typically are low, making market transactions feasible . . . [the actor] bypasses the market to avoid having to compensate [the injured party]. Hence [the actor] has a strong incentive to conceal his identity or engage in other actions that will avoid his being sued. We can therefore expect the probability of identifying and successfully suing [the actor] to be less than 1. If so, optimal damages would be a multiple of the victim's injury; in legal terms, punitive as distinct from merely compensatory damages would be awarded to the victim.[182]

Applying this reasoning to the nonhuman animal context, a person intent on committing an act of cruelty could simply buy a nonhuman animal. Instead, he or she has good reason to avoid the market entirely, since his or her purpose is not only immoral but also punishable criminally.[183] Additionally, the chances of catching such an intentional injurer are even less than in Landes' and Posner's general explanation, given that the victim of the intentional tort is a nonhuman animal, and thus unable to communicate to friends or authorities the identity of his or her attacker.

Finally, regarding punitive damages, such an assessment would at least remedy the impossible task of a human evaluating actual damages to a nonhuman animal plaintiff. However, Stone emphasizes that we already engage in such impossible calculations in the human damages arena "not because we think we can ascertain [the damages] as objective 'facts' about the universe, but because, even in view of all the room for disagreement, we come up with a better society by making rude estimates of them than by ignoring them."[184] In order to avoid blatantly excessive damages assessment, the court could impose procedural safeguards, such as punitive damages "caps, multiples of actual damages, and/or the imposition of a standard of proof."[185]

The next step is to determine how a damages award would be administered to inure to the benefit of the wronged nonhuman animal. Although a nonhuman animal may not be the beneficiary of a trust,[186] the courts will

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179 Owen, *supra* note 84, at 670-72.

180 LANDES & POSNER, *supra* note 93, at 160-61, 184-85.

181 Owen, *supra* note 84, at 671.

182 LANDES & POSNER, *supra* note 93, at 160.

183 *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 5511 (West 1983 & Supp 1997) (concerning criminal offenses involving cruelty to nonhuman animals).

184 Stone, *supra* note 63, at 478.

185 Owen, *supra* note 84, at 671-72.

186 *In re Searight's Estate*, 95 N.E.2d 779, 781 (Ohio Ct. App. 1950).

honor an "honorary trust," which is essentially a gift to a person, with the expectation that the donee will use the funds to honor a specific purpose.[187] Additionally, the donee must be willing to carry out the donor's wishes.[188] If the donee subsequently fails to carry out the purpose, he or she may not retain any remaining funds for himself or herself. Instead, "a resulting trust will arise in favor of the testator's residuary legatee or next of kin."[189]

The honorary trust would be an effective method of ensuring that any damages awarded would directly benefit the injured nonhuman animal. Either an owner or guardian could administer the trust and, in the event of failure or neglect, the traditional rule might be modified to call for a resulting trust in favor of a humane society.

One final point is worth noting. To promote the goal of decreasing cruel treatment of nonhuman animals, it is essential that a right of action lie not only for injury, but also for what essentially amounts to wrongful death. Although the prospect of litigation and the imposition of damages for a nonhuman animal who is already deceased may seem excessive, if such a remedy is not available, the extended law may in fact promote the very behavior it seeks to avoid. In other words, a person who has committed an actionable intentional mistreatment of a nonhuman animal may decide to "finish the job," killing the animal so as to avoid possible civil penalty.

There are problems with the wrongful death cause of action in this context. First, the issue arises as to who would bring the suit. Normally a surviving spouse would initiate such an action, but in the nonhuman animal context, responsibility for bringing the cause of action might fall to an owner or, where the nonhuman animal was not owned, to a humane society. More importantly, there is the problem of damages. According to Landes and Posner, an "inexplicable feature of the wrongful-death statutes—and one that survives in most states to this day—is that punitive damages cannot be awarded in cases of wrongful death."[190]

In this section, an attempt was made to explain how the existing court system might accommodate the extended tort rights advocated here. Although there is undoubtedly a difficulty in administration, there already exist procedural methods by which the claims of injured nonhuman animals may be vindicated. These procedures, which may be applied to nonhuman animals by analogy, in conjunction with an adequate population of persons willing to assist in the litigation process, would provide one solution to the somewhat vexing problem posed by the presence of nonhuman animal litigants.

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187 Id.

188 *Id.* at 782.

189 *Id.*

190 LANDES & POSNER, *supra* note 93, at 187 n.70.

VII. CONCLUSION

The common law of tort may be flexible, but, as with anything bendable, it will break if subjected to a sufficient amount of pressure. The full weight of nonhuman animal rights, as conceived as coextensive with those of humans, would be such an unbearable weight on our current tort system. A categorical extension of tort protection to the entire nonhuman animal kingdom would be not only an amazing burden on the court systems, but, more importantly, would run counter to society's expectations and aspirations.

In the spirit of tort law's flexibility, however, a qualified private right of action for some nonhuman animals has been proposed, attempting a compromise between recognition of society's belief that the use of animals for food and medical experimentation should continue, and society's moral condemnation of intentionally inflicted, unnecessary harm to nonhuman animals.

Undoubtedly, this conclusion will meet with extreme disfavor among members of the animal rights community. It likely will be viewed as speciesist, in its subordination of nonhuman animal rights to the rights of humans (except to the extent that the human actor's exercise of rights was unnecessary, and thus unreasonable). Critics may make comparisons to the nineteenth century slave owners who advocated for slave anti-cruelty legislation,[191] thereby continuing to gain benefit from the exploitation of their "property," but claiming to assist the slave by providing him or her a morsel of legal personhood.[192]

This comparison, although of no surprise, is troublesome. In the search for a justification for extending unlimited private tort rights to nonhuman animals, the well-worn analogies to other victims of past legal discrimination (*e.g.*, minorities, women, the mentally handicapped) have been considered, in hopes of explaining how humankind makes mistakes, and, later recognizing them, attempts to rectify them through the law. The conclusion has been reached that "[t]he analysis that equates animal rights with the rights of women and African-Americans is as inappropriate as the equation is distasteful, and the progression upon which those who make it rely is not inexorable."[193]

The problem with this general analogy concerns the additional inference necessary to make the analogy applicable to nonhuman animals. Whereas we can look back upon those who considered women, African-Americans, and other marginalized groups to be property, and we can *know* that each of the subjects of discrimination was in fact a human being, in the context of nonhuman animals, we are not in a position to *know*

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191 GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 112 (1995) (citing DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 58 (1966)).

192 FRANCIONE, *supra* note 191, at 112 ("[t]he problem is that such rules fail to protect the supposed beneficiaries, who are without rights and legal personhood and whose interests are being balanced against those of a full person, who possesses legal rights, and, as property, the very being whose interests are being balanced against her own").

193 Schmahmann & Polacheck, *supra* note 71, at 780

much more than what has been presented here. This is not to diminish the worth of our knowledge, both scientific and experiential, of the nonhuman animals with whom we coexist; it simply is to stress that our analogies must be as close to perfect as possible, in order to instill believability and support in the listener.

Despite the imperfection of this analogy, it remains clear that we as a society understand and abhor unjust, useless pain and suffering, and assume a protective role over nonhuman animals in this regard (as evidenced by the enactment of anti-cruelty legislation in each state). We also consider it good policy that wrongs be righted by the wrongdoer, to the direct benefit of the injured party.

In light of these propositions, it is concluded that the doctrinal proposition that the benefits of intentional tort law be left solely to humans cannot be maintained. In essence, nonhuman animals should be able to maintain a tort action for intentional harm, but only to the extent that the defendant acted unnecessarily; in other words, that he or she acted in such a way that either (1) was of no benefit to the human public welfare in general; or (2) ignored a less harmful alternative action which could have adequately protected the human public interest.