

JUDICIAL RECOGNITION OF THE INTERESTS OF ANIMALS—A NEW TORT

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INTRODUCTION

This article seeks to explore a simple but profound question: how should our legal system deal with the claims of animals for protection against harms inflicted by humans? Rather than a focus on pain and suffering or the cognitive abilities of animals,¹ this article will use the non-comparative approach based upon an interest analysis. The short answer is that our legal system can and should do what it always has done: balance the interests of competing individuals in a public policy context, always seeking to strike an ethically appropriate balance. The legislative branch of our government presently promotes the consideration of animal interests on this basis. This article examines how the legal system presently balances such interests and how common law judges could expand, in a forthright manner, the consideration of animals' interests. Finally, this article will suggest a more expansive consideration of animals' interests through the adoption of a new tort: intentional interference with a fundamental interest of an animal.²

I. THE CURRENT ANIMAL RIGHTS DEBATE

Early advocates of animal rights focused on the point that animals feel pain and can suffer.³ If the starting point of the discussion is "animals should

1. See generally Gary L. Francione, *Animals—Property or Persons*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 115-20 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (discussing unnecessary suffering); Lesley J. Rogers & Gisela Kaplan, *All Animals are Not Equal: The Interface Between Scientific Knowledge and Legislation for Animal Rights*, in *id.* at 175, 175-96 (discussing intelligence).

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 3-4 (5th ed. 1984) [hereinafter PROSSER].

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression in which the court has struck out boldly to create a new cause of action where none had been recognized before. The intentional infliction of mental suffering, the obstruction of the right to go where the plaintiff likes, the invasion of the right of privacy, the denial of the right to vote, the conveyance of land to defeat a title, the infliction of prenatal injuries, the alienation of the affections of a parent, and injury to a person's reputation by entering the person in a rigged television contest, to name only a few instances, could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to be torts.

3. The roots of the moral debate are centuries old, with Jeremy Bentham perhaps being one of the key figures in the debate. See Jeremy Bentham, *A Utilitarian View*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 129-30 (Tom Regan & Peter Singer eds., 2d ed. 1989) (basing consideration for animals not on their linguistic or rational capacities but on their capacity for suffering). This perspective was recently re-articulated in Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003). See also Martha C. Nussbaum, *Animal*

not feel pain” then the nature of the debate cannot extend to animals that do not have the capacity to feel pain, as we understand it. Additionally, if the debate is limited to pain, there may be any number of interferences by humans, such as suffering, early death, and limiting mental development, which would not be considered within the legal arena. Likewise, if the starting point is self-awareness, consciousness, or language skills, then those not meeting the standard cannot be within the legal arena.⁴ There is no reason to limit the debate about how to accommodate the needs of animals within our legal system by constraining the initial parameters. Instead, the playing field should be as broad as possible, offering every animal the opportunity to make their case.

The threshold for access to the arena should be whether an entity has “interests.” This notion has at least two connotations. First, in both humans and dogs, for example, a being may “desire” an object or outcome, that is, have an interest in a car or a bone. Secondly, in humans and dogs, a being has an “interest” in living life in a supportive and protected environment, e.g., interests in not being beaten and in having access to potable water. This interest may never be specifically or consciously articulated in the brain of an individual, but through life experiences and the information provided by science it is understood to be present nevertheless. As used in this article, both aspects may apply, but the latter is the primary focus. However, only a limited number of these interests will ultimately be recognized and protected by the legal system.

In the past decade there have been a number of books and articles that have urged significant change in how the legal system deals with animals.⁵

Rights: The Need for a Theoretical Basis, 114 HARV. L. REV. 1506 (2001) (reviewing STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000) [hereinafter *RATTLING THE CAGE*] and overviewing the various basics for claims for animals).

An interesting summary of views during the 1800's can be found in the first chapter of the first formal book advocating legal rights for animals. HENRY S. SALT, *ANIMALS' RIGHTS: CONSIDERED IN RELATION TO SOCIAL PROGRESS* (MacMillan & Co. 1894). The perspective of suffering and human mercy has been most recently considered in a book by MATTHEW SCULLY, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* (2002).

4. For a detailed consideration of animal awareness, from a key animal rights philosopher, see TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 34-81 (1983). For an update on the science of animal awareness and consciousness, see *RATTLING THE CAGE*, *supra* note 3, at 119-62 and STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* (2002) [hereinafter *DRAWING THE LINE*]. See also MARC BEKOFF, *MINDING ANIMALS: AWARENESS, EMOTIONS, AND HEART* (2002); *THE COGNITIVE ANIMAL: EMPIRICAL AND THEORETICAL PERSPECTIVES ON ANIMAL COGNITION* (Marc Bekoff et al. eds., 2002).

5. Professor Gary Francione has written extensively as an advocate for animal rights in the legal community. See, e.g., GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW*

Steven Wise has made a strong case for the allocation of legal rights for some animals on the basis of dignity rights such as liberty and equality. His “rights” jurisprudence is developed extensively in two books.⁶ The core of his approach suggests that common law judges have the inherent authority to extend some legal rights to animals. As at least some animals experience the world in ways that are similar to the way humans experience the world, any differences between them and us is one of degree and not of nature. Thus it follows that at least some fundamental legal rights familiar to us ought to extend to them as well.⁷ Mr. Wise’s writings do not suggest how to think about balancing human and animal rights when they are in conflict. His focus is on the triumphing capacity of the nonhuman’s right to be free from enslavement of the person and the need to have bodily integrity.

A significant limitation on this approach is that human characteristics become the measuring stick by which to judge the legal “oughts” for animals. Another problem is that it seems unlikely that the next movement in the legal system will be to grant any absolute rights to a group or species of animals. Instead, it is more likely that the next step will be to allow animal interests to compete more fully with human interests, sometimes winning and sometimes losing.

Some writers, those promoting legal rights for animals, argue that a chasm exists between humans and animals which can be bridged only with the greatest effort, with a beach assault on the legal status quo.⁸ On the one side

(1995). Another lawyer, Steven M. Wise, has also been an active scholar. *See, e.g.*, Steven M. Wise, *Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998) (analyzing the development of “rights” in the common law context and the justification of animals rights under a traditional “rights” framework). In the world of philosophy, Peter Singer and Tom Regan have long been visible advocates. *See* PETER SINGER, ANIMAL LIBERATION (1975); ANIMAL RIGHTS AND HUMAN OBLIGATIONS, *supra* note 3.

6. DRAWING THE LINE, *supra* note 4; RATTLING THE CAGE, *supra* note 3.

7. As noted by Steven Wise:

“Practical autonomy” is not just what most humans have but what most judges think is sufficient for basic liberty rights, and it boils down to this: a being has practical autonomy and is entitled to personhood and basic liberty rights if she:

1. can desire;
2. can intentionally try to fulfill her desires; and
3. possesses a sense of self sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it.

DRAWING THE LINE, *supra* note 4, at 32.

8. Professor Gary Francione has long rallied against the property status of animals and has stated that the treatment of animals will not significantly change until the property status of animals is eliminated. Part of the confusion that plagues the modern animal protection movement is connected to the failure to realize that rights theory, at its core, is the rejection of the property status of animals. Gary L. Francione, *Animal Rights Theory and Utilitarianism*:

of the river is the humanity and on the other side is the community of things, that community including animals. The river, the barrier between, is the property status of animals. These writers suggest that so long as animals are property, they will be excluded from our legal community.⁹ Additionally, the reform they suggest indicates that the legal community they envision is not the one of today, but a different one, one in which all people are vegans, and commercial use of animals is prohibited.¹⁰

To provide a way for animals to both cross the river of property status and to create this vision of a new human community simultaneously is not possible. It asks for revolution in a legal system that prefers evolution. To move from where we are today to this future legal community would indeed be bridging a wide chasm. But perhaps these animal advocates are looking in the wrong place to promote the interests of animals. Perhaps it is not as difficult as they believe;¹¹ perhaps a shallower place to cross the river can be

Relative Normative Guidance, 3 ANIMAL L. 75, 100-01 (1997). Other than suggesting that the property status should be eliminated, Professor Francione does not suggest exactly how, in a post property status world, the legal system would treat animals. In particular, he has not suggested how to balance the competing interests of humans and animals.

9. Steven M. Wise, *Animal Thing to Animal Person – Thought on Time, Place, and Theories*, 5 ANIMAL L. 61, 61 (1999)

(For centuries, a Great Legal Wall has divided humans from every other species of animal in the West. On one side, every human is a person with legal rights; on the other, every non-human is a thing with no legal rights. Every animal rights lawyer knows that this barrier must be breached.)

On the other hand Professor Laurence Tribe has suggested that perhaps this wall is not so great. Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 2 (2001) (“[I]t is a myth . . . that our legal and constitutional framework has never accorded rights to entities other than human beings and, therefore that a high wall must be breached or vaulted if rights are now to be accorded to non-human animals.”)

10.

If we are serious about animal rights, we have a responsibility to stop bringing them into existence for our purposes. We would stop bringing all domestic animals into existence for human purposes We recognize that the most important step that any of us can take toward abolition [of the property status of animals] is to adopt the vegan lifestyle and to educate others about veganism.

Interview by Lee Hall with Gary L. Francione, Professor of Law, Rutgers School of Law (Summer, 2002), at <http://www.friendsofanimals.org/programs/animal-rights/interview-with-gary-francione.html>.

11.

The first lesson that our Constitution teaches is that rights are not such a scary thing to recognize or to confer, since rights are almost never absolute. Arguing for constitutional rights on behalf of non-human beings . . . shouldn't be confused with giving certain non-human interests absolute priority over conflicting human claims. Tribe, *supra* note 9, at 2. From a legal point of view, there is nothing at all new or unfamiliar

found, not into some future legal community, but into the community of today.¹²

What if we took a step back from the demands of sweeping legal change? What if we could make progress for animals without eliminating their property status? What if we could make the legal argument on behalf of animals without demanding a showing that they are on equal footing with humans? Is there a place where the property concept is not a barrier to being a participant in the legal community of today? As will be shown, many animals have already found a series of stepping stones into our legal community; they are already quietly among us.

II. AN INTEREST BASIS FOR LEGAL ANALYSIS

As a starting point we need a conceptual lens with which to view our present legal community. An “interests” lens provides the sharpest and most useful vision. One of the most luminous deans of Harvard Law School, Roscoe Pound, set out a comprehensive analysis of this “lens” some fifty years ago. In his four volume set, *Jurisprudence*, Dean Pound used an interests analysis to explain the existence and operation of our legal system.¹³

He suggested a legal system is a necessary and natural outgrowth of social organization, arising out of the reality that individual humans within any society have conflicting interests with other individuals and society in general.¹⁴ Further, “the law does not create these interests. It finds them pressing for recognition and security.”¹⁵ Basic to the existence of a society is the existence of systematic methods for dealing with conflicts. A mark of a civilized society is the rejection of violence, or “might makes right,” as a basis

about the idea of animal rights; on the contrary, it is entirely clear that animals have legal rights—at least a certain kind. Cass R. Sunstein, *Standing For Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1335 (2000).

12. Some progress on behalf of animals can be made by modifying the concept of property ownership. By dividing title into legal and equitable components and then awarding equitable title to the animal, some degree of self-ownership can be allowed without destroying the acknowledged relationship with a human. See David Favre, *Equitable Self-Ownership For Animals*, 50 DUKE L.J. 473 (2000).

13. See generally, 3 ROSCOE POUND, JURISPRUDENCE (1959).

14.

Conflicts or competition between interests arise because of the competition of individuals with each other, the competition of groups or associations or societies of men with each other, and the competition of individuals with such groups or associations or societies in the endeavor to satisfy human claims and wants and desires.

Id. at 17.

15. *Id.* at 21.

of social organization. Other mechanisms for dispute resolution, such as those that exist within religious communities, likewise have inherent limitations, and as such, are nevertheless held to the standards of the broader legal community.¹⁶

Within our legal context, what are these interests? Pound suggests that interests “may be defined as a demand or desire or expectation which human beings, either individually or in groups . . . seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behavior through the force of a politically organized society requires society must take account.”¹⁷ These interests can be both positive and negative. For example, humans have interests both in being free from the sensation of pain and in a desire to form families. Both of these interests are recognized and promoted within our legal system.

If humans move through life with interests attached to them, then the job of the legal system is to act as referee between the conflicting interests. But, two considerations serve to limit the law’s willingness to engage in a dispute. First, the legal system has limited resources and cannot address all disputes between individuals. Second, notwithstanding the assertions of any particular individual, some conflicts should not be resolved by the state. For example, Mr. Jones of Dominoes, Iowa may have an interest in marrying a wealthy, attractive woman who lives in his town. This interest is one best left to the individual, even if government resources existed to help Mr. Jones pursue this interest. In short, the legal system must sort out which interests deserve protection. Then, the legal system must develop the rules by which conflicts between qualifying, quarreling interests will be resolved.

In the following sections, the role of the present-day legal system in sorting out and balancing conflicting interests will be considered.¹⁸ This article first considers conflicts between humans, then conflicts with other species, and finally how our present system deals with some human, animal conflicts. This analysis will support the proposition that presently the interests of some animals are sometimes acknowledged as within the legal system. Building upon the premise that it is ethically appropriate to address animal interests

16. For example, the Catholic Church has been trying to deal with the issue of sexual abuse by priests within the community. Many are dissatisfied by how the Church has sought to balance the competing interests of the institution, the priest and the parishioners. See Justin Pope, *New Revelations Could Topple Boston Cardinal*, LANSING ST. J., Dec. 8, 2002, at 7A. Regardless of how the dispute is settled within the church, the individuals involved can demand accountability under the civil and criminal laws of the state.

17. 3 POUND, *supra* note 13, at 16. The word “interests” is also a key phrase in the discussion of torts in the Restatement of Torts. The Restatement defines interests as “to denote the object of any human desire.” RESTATEMENT (SECOND) OF TORTS § 1 (1965).

18. See 3 POUND, *supra* note 13, at 30-33.

within the legal system, an additional approach, made available through the creation of a new tort, will be advocated.¹⁹

A. Human Interests in the Legal System

Human beings have interests. Sometimes, many times, these interests are in conflict with the interests of other human beings. To help understand some of the complexities, consider Mr. Alpha Jones as an example. Mr. Jones has an interest in apple pies; he would love to have apple pie every day. There is nothing inherently wrong with this interest, and presumably he is free to fulfill this interest within the limitations of his culinary skill and personal resources. However, if he seeks to satisfy this interest by taking, without paying, an apple pie made by Sally Top, then his interest will be in conflict with Ms. Top's interest in either eating the pie herself or in receiving compensation for her labor and cost.²⁰

Now the question becomes, is this conflict of interest of such a nature that the State, through its legal system, should intervene in the conflict? Human history suggests that protecting work product or invention is a critical component in keeping a peaceful society, and therefore, the law has adopted a series of rules/laws to deal with this conflict. The law says that Ms. Top's pie may not be taken physically from her unless she has made a gift or sale of it to another. If Mr. Jones violates this norm, then Ms. Top may either sue him for the return of the pie or its value and/or the State may press criminal charges for the theft.

Mr. Jones may also have an interest in having a social date with Ms. Top. And again, Ms. Top's interest may be in conflict with Mr. Jones's interest. She may have an interest in being free from the attention of Mr. Jones. Should the law intervene in this conflict of interest? Assuming that this is a verbal exchange, then society has decided that there is no role for the legal system, that Mr. Jones and Ms. Top will normally resolve this conflict; indeed, thousands of times daily this conflict arises and is resolved without the intervention of the law.²¹ If, however, Mr. Jones decides to further his interest

19. "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 (1965).

20. The author recognizes that this fact pattern promotes long held sexual stereotypes, and that the pie maker could as well be a male, but he cannot escape the reality that his wife's apple pies are simply superior to all others.

21.

It does not lie within the power of any judicial system to remedy all human wrongs. The obvious limitations upon the time of the courts, the difficulty in many cases of ascertaining the real facts or of providing any effective remedy, have meant that there

by inappropriately touching or grabbing Ms. Top, or perhaps by calling her and following her for days on end, he has exceeded the norms of social conduct. He has interfered with her liberty rights. In such a case, the legal system provides recourse for Ms. Top, so her interests are protected. The recourse would be in the form of criminal charges for battery or stalking or a civil action seeking an injunction against further intrusion of her privacy.²²

What if, as Mr. Jones left the home of Ms. Top, he stepped on her dog Floppy,²³ breaking the dog's back? Now Mr. Jones has engaged in conduct that runs counter to the interests of two beings, Ms. Top and Floppy. Ms. Top has an emotional attachment to Floppy, such that to harm Floppy would inflict harm upon Ms. Top. Floppy has the interest of being free from the infliction of pain and suffering by others. In this case, the response of the legal system is less than straightforward.

Floppy's interest to be free from pain has been long recognized in the United States. Protection from interference with this interest, although significantly qualified, exists in every state's criminal anti-cruelty provisions.²⁴ This would appear to give Floppy a legal right enforceable by the state.²⁵ But the decision to proceed against Mr. Jones is up to the local prosecutor; Floppy has no direct legal remedy, as of yet. On the other hand, Ms. Top's interest in not having her pet, with whom she has considerable attachment, harmed is only partly protected. Most states would limit any recovery in a civil suit to the market or replacement value of the dog, unless she is within the scope of a tort known as the "intentional infliction of emotional distress."²⁶ Thus, the legal

must be some selection of those more serious injuries which have the prior claim to redress and are dealt with most easily. Trivialities must be left to other means of settlement, and many wrongs which in themselves are flagrant—ingratitude, avarice, broken faith, brutal words, and heartless disregard of the feelings of others—are beyond any effective legal remedy, and any practical administration of the law.

PROSSER, *supra* note 2, at 23.

22. For example, in June of 2003, the actress Sandra Bullock obtained an injunction against a Michigan man which prohibited any contact of her by him. He had sought to contact her for eighteen months by voice mail, fax and phone calls. *Newsmakers*, LANSING ST. J., June 8, 2003, at 2A.

23. Yes, another example of stereotyping by the author. Ms. Top might have a German Shepard who is called Bruno.

24. See *infra* notes 38-45 and accompanying text.

25. Some might argue that it is not a legal right unless it is enforceable by the individual. However, if a right can represent a restraint on the actions of others, then whether it is enforced by the government or private action should not make a definitional difference, even though there may well be significant practical differences. See Sunstein, *supra* note 11, at 1342-59.

26. See also <http://www.animallaw.info/topics/spuspetdamages.htm>; see generally, Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological*

system has a rich assortment of responses for interference with a diversity of human interests, but much less when the harm is to the interests of an animal.

B. Animal Interests—Endangered Species

The legal system of the United States has shown the flexibility to allow for the protection of interests beyond or in addition to human interests. A prime example of this arose in the early 1970s as part of the environmental movement. It was recognized at the time that human activities were placing groups of living entities, clustered under the term “species,” at risk of extinction.²⁷ The federal Endangered Species Act (“ESA”) was adopted to address these concerns.²⁸ This law acknowledges this group interest in continued biological (and ecological) existence and seeks to protect that interest from human intrusion through conservation of the species.²⁹

As a corporation is a conceptual tool or framework for the representation of a group of humans, a “species” is a conceptual way to address the interests

Argument for Special Valuation, 8 ANIMAL L. 199 (2002); Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L.J. 31 (2001); Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47 (2002); William C. Root, “Man’s Best Friend”: *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423 (2002).

27. See, e.g., 16 U.S.C. § 1531-1544 (2000).

Congressional findings and declaration of purposes and policy

(a) Findings. The Congress finds and declares that—

- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people

§ 1531(a).

28. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified in scattered sections of 16 U.S.C. §§ 1531-1544).

29. “It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” § 1531(c). “The terms ‘conserve,’ ‘conserving,’ and ‘conservation’ mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” § 1532(3). Concern for animals also arises with other federal laws. See Sunstein, *supra* note 11, at 1339-40.

of a group of individual animals. A species's interests, like a corporation's interests, are derivative of the members of which it is composed. A species has no moral claim upon us; rather it is the interests of individual animals that assert their claim upon us.³⁰ But knowing and tracking individual wild animals is difficult at best and it is simply easier to deal with a group without seeking to identify specific individuals. Thus, humans may not be particularly compelled by the claim of any one animal for its continued life, but become compelled when an entire group of individuals face extinction. As the number of individuals decrease, and risk of extinction increases, then we adjust the balance of interests, giving trumping power to the continuation and recovery of the species over a number of human interests. This re-balancing of the interests was captured in the ESA.

The majority of U.S. environmental laws adopted in the same time period seek to balance the interests of humans to be free from the harmful effects of pollution and the need for allowing economic and other human activity.³¹ But when it comes to species preservation, there is no balancing of this interest with human economic needs. Species are listed on the endangered or threatened list on the basis of scientific criteria, not a risk-benefit or public health analysis.³² Once a species is listed, government and private actions that harm the species are limited. Under the ESA, the conservation of a listed species supercedes almost all human interests, including economic, religious, sport hunting and food gathering.³³ Clearly the law gives the executive branch

30. In an abstract sense species represent information—genetic, biological and ecological—which humans might find useful. But moral claims can attach only to individual living entities. Likewise, a corporation, however useful to organizing human activities, has no claim in the moral arena. For a general discussion of nature of corporations, see HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 144-52 (West 1983). But the corporation is not a natural entity. It is an artifactual entity recognized and protected by the state. The state endows it with many of the same rights that individuals have, but does so for instrumental ends. RICHARD A. POSNER, *OVERCOMING LAW* 285 (Harvard Univ. Press 1995).

31. Like FIFRA [Federal Insecticide, Fungicide and Rodenticide Act], TSCA [Toxic Substance Control Act] is known as a balancing law, invoking the noncommittal language of “unreasonable risk” no less than thirty-eight times in a statute of sixty-four pages. WILLIAM H. RODGERS, *ENVIRONMENTAL LAW* 489 (1994). The Clean Air Act uses human health as the starting point for standards, but ultimately the administrator must define some level of risk as acceptable. *Id.* at 156-64.

32. *See generally* 16 U.S.C. § 1533 (2005).

33. The Endangered Species Committee, 16 U.S.C. § 1536(e)-(h) (2000) (known as the “God” Committee), has the authority to grant exemptions from the requirements of § 1536(a)(2)—protecting critical habitat, and prohibiting actions “likely to jeopardize” a species. This committee is allowed to balance the benefits of a proposed activity against the harm or risk of harm the project represents. One of the concessions that the environmental organizations were able to obtain during the drafting process in Congress was a requirement that the

the power to assert these species' interests against human activities when the law is violated. Perhaps even more importantly, private individuals, under citizen suit provisions, have been allowed to assert the specie's interests both against the government itself and other private individuals.³⁴

In the early development of environmental law, it was suggested that the ecological grouping of living and non-living entities might be combined together to support standing in the courts for environmental issues. Justice Douglas, in *Sierra Club v. Morton*,³⁵ suggested that perhaps ecological entities such as rivers and forests could be ecological "plaintiffs" whose interest might come before the Court in its consideration of human actions impacting the natural environment.³⁶ While this idea was proposed in some detail in an article by Professor Christopher Stone,³⁷ and in turn utilized by Justice Douglas, the Supreme Court has not pursued this path in subsequent opinions.

Committee be composed of high profile individuals who could not delegate their responsibility to agency employees. See § 1536(e)(3) (listing the composition of the Committee).

Until 1991, only two applications for exemptions had been filed, both denied by the Committee. In 1991, the Administration found itself in the hot seat with the spotted owl controversy. Perhaps realizing that amending the act was not a realistic option in the short term, the government sought the blessing of the "God" Committee to continue to cut down the public's old growth forest for the benefit of the timber industry. Notice of Exemption Application, 56 Fed. Reg. 48,548 (Sept. 25, 1991). See Jared des Rosiers, Note, *The Exemption Process under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

34.

Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—(A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . .

16 U.S.C. § 1540(g)(1)(A) (2000). For an example of a private party suing another private party for the protection of the interests of a species, see *Coho Salmon v. Pacific Lumber Company*, 61 F. Supp. 2d 1001 (N.D. Cal. 1999). Defendant's timber operations were polluting the streams used by the endangered salmon. *Id.* at 1005. The court held that the plaintiffs had standing under the ESA to assert the protection of the law for the salmon. *Id.* at 1015.

35. 405 U.S. 727 (1972).

36. *Sierra Club v. Morton*, 405 U.S. 727, 741-52 (1972).

37. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* 45 CAL. L. REV. 450 (1972) (subsequently incorporated into the book CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* (1996)).

C. Individual Animals

Finally, and most importantly, the following are examples of situations in which our legal system acknowledges animal interests for some purposes, for some animals, notwithstanding their status as property. These examples are from three diverse areas of law: criminal law, civil law and administrative law.

1. *Anti-Cruelty Laws*

The first beachhead for all animals, on the shores of our legally relevant community of beings, was in the area of criminal law. From early in the 19th Century into the 1870s there was a clear transition in the laws dealing with animals from mere protection of the property interests of owners, to concern about the animals themselves.³⁸ A 1867 New York law, promoted by Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals, represents the conceptual breakthrough.³⁹ Thereafter, many states adopted new laws based on the New York model.⁴⁰ The existence of these laws clearly reflects the legislature's acceptance of the proposition that an

38. *See generally* David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. C.L. REV. 1. An example of a statute that reflects the strict property concept of animals, which existed at the beginning of the nineteenth century, is found in Vermont law, stating in part:

Every person who shall wilfully and maliciously kill, wound, maim or disfigure any horse, or horses, or horse kind, cattle, sheep or swine, of another person, or shall wilfully or maliciously administer poison to any such animal . . . shall be punished by imprisonment [of] . . . not more than five years, or fined not exceeding five hundred dollars

1846 Vt. Acts & Resolves 34.2. In this language there is no provision prohibiting the cruel treatment of animals. The list of animals protected was limited to commercially valuable animals, not pets or wild animals. The purpose of this law was to protect commercially valuable property from the interference of others, not to protect animals from pain and suffering. Finally, since the penalty was for up to five years of jail time, a violation of this law was a felony.

39. *See generally* Favre & Tsang, *supra* note 38, at 14-18.

40. Within a few years, Massachusetts (An Act for the More Effectual Prevention of Cruelty to Animals, MASS. GEN. LAWS ch. 344 (1869)), Pennsylvania (XXIV PA. STAT. §§ 7770-7783 (1920)), Illinois (Prevention of Cruelty to Animals Act, 1869 Ill. Laws § 3), New Hampshire (1878 N.H. LAWS 281), and New Jersey (N.J. REV. STAT. §§ 64-82 (1873)) had adopted the same pattern of legislation as that in New York, with both new criminal laws and the chartered creations of state Societies for the Prevention of Cruelty to Animals ("S.P.C.A."). As of 1890, thirty-one states had some level of organized Society for the Prevention of Cruelty to Animals. AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, 1890 ANNUAL REPORT 36. *See generally*, RICHARD D. RYDER, ANIMAL REVOLUTION: CHANGING ATTITUDES TOWARD SPECIESISM 171-75 (1989).

animal's interest to be free from unnecessary pain and suffering should be recognized in the legal system.

This new proposition was also recognized by the courts of the time. In *Stephens v. State*,⁴¹ the court found that, "[t]his statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners."⁴² This point was also made in an Arkansas case where the court acknowledged this new concern when it noted that the new laws

are not made for the protection of the absolute or relative rights of persons, or the rights of men to the acquisition and enjoyment of property, or the peace of society. They seem to recognize and attempt to protect some abstract rights in all that animate creation . . . from the largest and noblest to the smallest and most insignificant.⁴³

These laws clearly reflect society's acknowledgment that animals have interests in being free from pain and suffering.

It must also be recognized that the early laws also sought to balance these newly acknowledged animal interests with human interests. The laws recognized that sometimes human interests will supercede those of the animals', and pain and suffering might occur. Within the original New York law, this balancing existed. The critical prohibitions on beating and killing animals are modified by "unnecessarily" and "needlessly."⁴⁴ Thus, if a horse has to be hit to make him start pulling the wagon, or if an animal has to be killed to be eaten, such actions do not violate the law. Another clear balancing of interests occurs in the context of scientific experimentation. Section 10 of the 1867 New York law provided that properly conducted scientific experiments do not violate the law, thus allowing intentional infliction of pain and suffering for the advancement of scientific knowledge.⁴⁵ A key limitation

41. 3 So. 458 (Miss. 1888).

42. *Stephens v. State*, 3 So. 458 (Miss. 1888).

43. *Grise v. State*, 37 Ark. 456, 458 (1881).

44. 1867 N.Y. ANTI-CRUELTY LAW ch. 375 § 1 (1867) (current version at N.Y. AGRIC. & MKTS. LAW § 353 (Consol. 2004)) (penalty for overdriving, cruelly treating animals, etc.).

If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill. or cause or procure to be overdrive, overloaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated, or killed as aforesaid any living creature, every such offender shall, for every such offence, be guilty of a misdemeanor.

Id.

45. § 10.

Nothing in this act contained shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall

of criminal cruelty laws is the extensive, broad list of exemptions built into the law. As will be developed later in this article, this balancing of interests will be a part of crafting into the proposed new tort for animals, though without the historical exemptions.

2. Federal Animal Welfare Act

The federal government's concern over animal welfare issues did not arise until almost one hundred years after the adoption of the New York laws. The federal Animal Welfare Act ("AWA")⁴⁶ was adopted in 1967. A key difference of the federal law, when compared with the prior state laws, is that the AWA was intended primarily as a regulatory scheme, rather than a criminal law one. Initially the language of the law was limited to creating a license system and assuring that some mammals were housed and cared for in an appropriate manner.⁴⁷

Acknowledgment of animal interests expanded with the 1985 Amendments to the AWA.⁴⁸ Within these provisions, for the first time in United States law, the mental well-being, rather than just the physical well-being of a primate, was recognized and guarded. The law now requires all holders of primates under the jurisdiction of the AWA to have "a physical environment adequate to promote the psychological well-being of primates."⁴⁹ There is no balancing this interest with human interests; it is an unmodified, unlimited requirement for the housing of primates. This provision is as close to a trump card as any group of animals has received in our legal system. However, it must be noted that the implementation of this requirement has been a slow process that has not yet been fully realized.⁵⁰

be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of New York.

Id.

46. 7 U.S.C. §§ 2131-2159 (2000). Available with full legal history at www.animallaw.info/statutes/stusawa.htm.

47. H.R. 13881, 89th Cong. (1966) (enacted) (No criminal law provisions are included, but animal "dealers" need to have a license to sell animals to research facilities.).

48. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985) (codified at 7 U.S.C. §§ 2151-59); *see also* Sunstein, *supra* note 11, at 1340-42.

49. 7 U.S.C. § 2143(a)(2)(B).

50. The USDA has developed regulations to deal with this issue. *See* 9 C.F.R. § 3.75 (2004). A number of books, for example, HOUSING, CARE AND PSYCHOLOGICAL WELL BEING OF CAPTIVE AND LABORATORY PRIMATES (Evalyn F. Segal ed., 1989), a number of law suits, for example, *Animal Legal Defense Fund v. Glickman*, 204 F.3d 229 (D.C. Cir. 2000), and many conferences have been held over the past decade to more fully develop how this legal obligation should be carried out.

Another aspect of the 1985 amendments focused specifically on the scientific experiments themselves changing the balance of interests struck in the 1867 New York law and the 1967 version of the AWA. Now there is a federally imposed duty both to minimize the pain during the experiment and to provide pain management after the experiment.⁵¹ The AWA represents a clear example of our legislative process adopting a law seeking to strike a balance between the interests of humans and animals.

3. *Chimpanzee Protection Act*

Another example at the federal level deals specifically with our genetic cousins, the chimpanzee. In 2000, Congress passed the Chimpanzee Health Improvement, Maintenance, and Protection Act.⁵² The issue before Congress was what should be done for or with the more than one thousand long-living chimpanzees that had been part of the U.S. federal research system for many years, but were no longer needed for research. A special committee of the National Research Council looked into the issue and found that continued lab housing for chimpanzees would have been expensive, particularly when the animal was no longer actively part of research.⁵³ The cheapest alternative would have been to euthanize the unneeded animals, though this option was rejected by the Committee, and ultimately by Congress as well. The option suggested by the Research Committee and adopted by Congress was the creation of retirement sanctuaries that would be operated and partly supported by Congress and non-profit private organizations.⁵⁴

51. Congress directed the USDA that the adopted regulations should provide:
(A) for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia;
(B) that the principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal.
7 U.S.C. § 2143(a)(3).

52. 42 U.S.C. § 287a-3a (2000).

53. At the time of the adoption of the law, CNN reported that existing laboratory housing for chimpanzees was \$20-\$30 dollars per day, while it was expected that a sanctuary would cost \$8 to \$15 per day. *Senate Approves Chimpanzee Sanctuary*, ASSOC. PRESS, Dec. 7, 2000, at <http://www.archives.cnn.com/2000/NATURE/12/07/laboratory.animals.ap>. “We can estimate that the direct cost for chimpanzee support now being paid from multiple government budgets is \$7,300,000 per year.” COMM. ON LONG-TERM CARE OF CHIMPANZEES, INST. FOR LAB. ANIMAL RESEARCH COMM’N ON LIFE SCIENCES, CHIMPANZEES IN RESEARCH: STRATEGIES FOR THEIR ETHICAL CARE, MANAGEMENT, AND USE 53-54 (1997) [hereinafter NRC REPORT], available at <http://bob.nap.edu/html/chimp/>

54.

The committee believes that funds for long-term care of chimpanzees, especially the

While money was one motivation for Congress's action, underlying the passage of the Chimpanzee Protection Act was also the recognition that chimpanzees used in research are morally relevant beings, toward whom our society, having used them for human benefit, has obligations. However, the political/Congressional record does not have any clear statement about moral philosophy. The record dances around the issue of why the chimpanzees are the focus of such concern. While some Congressmen objected to the law, saying that Congress should be addressing more important human issues, such as human health care, no one on the record even hinted at killing chimpanzee as an alternative.⁵⁵ On the other hand, no congressperson took the opportunity to make the case for animal rights. The clearest statement was given by Senator Smith of New Hampshire who said, "[i]n other words, because chimpanzees and humans are so similar, those who work directly in chimpanzee research would find it untenable to continue using these animals if they were to be killed at the conclusion of the research."⁵⁶ Thus, it is not his moral position, but the moral concerns of others that support the legislation. Congressman Brown of Ohio stated in the floor debate, "[t]here is a moral responsibility for the long-term care of chimpanzees that are used for our benefit in scientific research and today that responsibility is ours."⁵⁷

phase when they are no longer needed for research or breeding, should not come from biomedical research budgets, and it urges that creative approaches to develop and support sanctuaries be sought. Societal obligations to chimpanzees no longer needed for research or breeding require cooperative support from federal agencies, Congress, commercial companies, and nongovernment organizations.

NRC REPORT, *supra* note 53, at 59-60.

55. For example, Congressman Brown of Ohio stated:

While I am pleased that we are passing legislation that illustrates a sensitivity to and responsibility for chimpanzees after they are no longer needed for research, I cannot understand why we are unable to demonstrate this level of responsiveness to Medicare beneficiaries or consumers of managed care plans who have asked us to address their concerns about health care.

146 CONG. REC. H10,554 (daily ed. Oct. 24, 2000) (statement of Rep. Brown).

56. 146 CONG. REC. S11,654, 11,655 (daily ed. Dec. 6, 2000) (statement of Sen. Smith).

57. 146 CONG. REC. H10,554 (daily ed. Oct. 24, 2000) (statement of Rep. Brown).

It is the author's observation that for elected members of Congress, this proposal presented issues difficult for them to address openly. It would not be good politics to say in public you want to kill the chimpanzee, for that would most likely not resonate well with the average voter who, through the efforts of Jane Goodall and others, holds the chimpanzee as a special species. On the other hand, members of Congress cannot publicly say that they think chimpanzees are morally relevant beings for fear of being cast by political opponents as animal rights supporters, as animal rights are not yet supported by the mainstream American voter.

Another tension unstated in the public discussion was that the politicians did not want to criticize the medical research industry, which has strong political support generally. Yet, it was understood that moving the chimpanzee out of laboratory cages and into a sanctuary would

Under the Chimpanzee Protection Act, Congress required that regulations adopted by the Secretary of Health and Human Services have a provision requiring that “none of the chimpanzees may be subjected to euthanasia, except as in the best interest of the chimpanzee involved.”⁵⁸ Congress weighed the fundamental interests of the chimpanzees in having continued life against the cost to the taxpayers in supporting their continued life, and decided the chimpanzees’ interests are greater.⁵⁹

This action by Congress is representative of incremental legal change on behalf of animals.⁶⁰ Note that nobody suggested a retirement home for all of the rats that have been used in scientific studies and are no longer needed. Rather, the law represents what is politically and financially feasible at a moment in time. If this works, then perhaps this model can be expanded to other species in the future.

4. *Trusts & Estates*

An example of increased recognition of animal interests in the civil law arena is the Uniform Trust Act of 2000,⁶¹ which has been adopted in over a

significantly enhance the quality of their lives. To talk about this as a justification for the new law would raise issues about why the medical research industry finds it necessary to keep chimpanzees in such repressive conditions to begin with.

Thus the recorded debate is rather silent on the underlying motivations for the Act. Additionally, the Act itself does not have any preliminary language suggesting the motivations for the law. However, if it was not the case that there was moral concern for the plight of the chimpanzees, then it is difficult to see how the bill would have made it through the congressional labyrinth. *See generally* S. REP. NO. 106-494 (2000); 146 CONG. REC. S11,654-55 (daily ed. Dec. 6, 2000); 146 CONG. REC. H10,550-54 (daily ed. Oct. 24, 2000); *Biomedical Research: Protecting Surplus Chimpanzee: Hearing Before the House Subcommittee on Health and Environment*, 106th Cong. 109 (May 18, 2000).

58. 42 U.S.C. § 287a-3a(d)(2)(I) (2000). It should be noted that regulations have yet to be adopted.

59. This position did have its dissenters:

The minority view is that euthanasia is also an appropriate strategy for maximizing the quality of life of the remaining population while facilitating the continued production of chimpanzees to fulfill critical needs in biomedical and behavioral research when faced with limited financial resources and lack of adequate alternative facilities.

NRC REPORT, *supra* note 53, at 88.

60. The United States is not alone in advancing the legal status of chimpanzees. In 1999, New Zealand amended its Animal Welfare Act to ban the use of non-human hominids in medical research unless it was for the benefit of the animal. *See* Rowan Taylor, *A Step at a Time: New Zealand's Progress Toward Hominid Rights*, 7 ANIMAL L. 35 (2001).

61. UNIF. TRUST CODE (2003), available at <http://www.law.upenn.edu/bll/ulc/uta/2001final.pdf>.

dozen states.⁶² With this adoption, another long-standing legal barrier has been lowered for animals. The river has been forded. The traditional view in the United States prevented animals from being the lawful subject of a provision in a will or trust.⁶³ This inability of individuals to make provisions for their pets after their deaths was addressed by the drafters of the Uniform Trust Law with the drafting of section 408. Under this section, a trust for the care of an animal is specifically allowed and courts are likewise authorized to appoint someone to enforce the trust.⁶⁴ Similar language has also been made part of the Uniform Probate Law.⁶⁵ Thus, animals become legally relevant beings, with income and assets that must be protected and accounted for within the legal system.

This change of legal status has occurred in that most traditional of legal areas—trust and estates. Moreover, this change is of a different quality than the prior examples. In this case, government action is not required for the interests of an animal to be asserted in the legal system. The civil courts have authority to act on behalf of animals. While the primary motivation may well have been

62. See ALASKA STAT. § 13.12.907 (Michie 2004); ARIZ. REV. STAT. § 14-2907 (2004); CAL. PROB. CODE § 15212 (West 2005); COLO. REV. STAT. § 15-11-901 (1995); FLA. STAT. ch. § 737.116 (2002); IOWA CODE § 633.2109 (1999); MICH. COMP. LAWS § 700.2722 (2000); 1995 MONT. CODE ANN. § 72-2-1017 (2005); 2001 NEV. REV. STAT. 163-0075 (2001); N.J. STAT. ANN. § 3B:11-38 (West 2001); N.M. STAT. ANN. § 45-2-907 (1995); N.Y. EST. POWERS & TRUSTS LAW § 7.8.1 (2004); N.C. GEN. STAT. § 36A-147 (1995); OR. REV. STAT. § 128.308 (2001); TENN. CODE ANN. § 35-15-408 (2004); UTAH CODE ANN. § 75-2-1001 (1998); WASH. REV. CODE § 11.1118 (2004).

63. See generally, Gerry W. Beyer *Pet Animals: What Happens When Their Humans Die?* 40 SANTA CLARA L. REV. 617 (2000); Siobhan Morrissey, *Wills Go to the Dogs*, ABA J., May 2003, at 24.

64. Trust for Care of Animal:

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

UNIF. TRUST CODE § 408.

65. UNIF. PROBATE CODE § 2-907 (1993).

A trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

ARIZ. REV. STAT. § 14-2907(B) (1994).

to take care of human concerns, legislatures adopting the Uniform Law and associated state statutes apparently did not have any conceptual difficulty with the accommodation of animals into the existing legal community.

III. INTEREST RECOGNITION: A NEW TORT FOR ANIMALS

The prior four examples support the position that animal interests are already acknowledged by our legal system, and therefore that animals are within our legal community. In particular, it should be noted that these points of legal recognition have occurred while animals have retained their property status. Property status is not a barrier to the recognition and protection of interests within our legal system.⁶⁶ As the above examples suggest, our legislatures have exercised their authority to expand the presence of animal interests within our legal system; now it is time to consider the potential role of our common law courts.

Because of the limited scope of the AWA and Chimpanzee Protection Act, as well as the exceptions and limitations of criminal cruelty laws, more needs to be done on behalf of animals.⁶⁷ While the legislative route is always available, state courts represent an untapped resource that might be used on behalf of animals. These traditional courts have the capacity to expand the legal recognition of animal interests in the civil law arena.⁶⁸ In order to give form and substance to the judicial approach, the adoption of a new tort—the intentional interference with the primary interests of an animal—is hereby

66. For an approach which transforms the nature of the property relationship without eliminating it, see Favre, *supra* note 12. This balancing of interests is rejected by Professor Francione as a wrong road to take in pursuing animal rights.

Any version of animal welfare requires that we balance human and animal interests As I have argued throughout this book, this balancing process is at the root of the problem: it explains why animals are so ruthlessly exploited despite social norms that reject inhumane treatment, for as long as animals are regarded as property under the law, virtually any attempt to balance interests will entail an unavoidable devaluation of animal interests simply because they are property.

FRANCIONE, *supra* note 5, at 257.

67. *See generally*, SCULLY *supra* note 3. Just as one example, he discusses the horrors faced by animals in the agriculture segment of our society.

68. The flexible power of the common law state courts is developed extensively in RATTLING THE CAGE, *supra* note 3, at 89-118. While his discussion is in the context of developing rights, it applies also to the concepts of interests recognition. *See* PROSSER *supra* note 2, at 17-20.

urged.⁶⁹ This tort would allow for the resolution of conflicts between human and a limited number of animal interests.⁷⁰

Under this cause of action, the plaintiff must show the following elements:

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

Before discussing the elements of the tort in more detail, three examples will be provided, allowing the reader to have a context in which to understand what the tort seeks to accomplish. All three will deal with a hypothetical chimpanzee - JoJo.

#1- JoJo lives in the Potsville Zoo. He is one of a group of ten chimpanzees on a three-acre track that was part of a \$6 million project the zoo built three years ago. Zoo visitors can see the chimpanzees from five viewing positions, though chimpanzees have the ability to retreat out of view if they wish. There is a trained caregiver on duty ten hours a day. The caregiver has the obligation to observe the chimpanzees for medical needs, to provide them with creative food gathering challenges, to assure that their individual interactions do not cause harm, to control humans, and to generally assure their well being. George Hall, an attorney, files a lawsuit on behalf of client JoJo, claiming that regardless of the size of the cage, JoJo is still not able to move about in as large an area as he would in nature, and that the confinement interferes with his fundamental interest in personal freedom. Under the elements of the new tort, the court would not rule for JoJo with these facts. While assuming that personal freedom may be a fundamental interest, the zoo has provided an environment which allows significant exercise of the interest of freedom of movement. Therefore, the plaintiff will not be able to show a substantial interference with a fundamental interest.

69. The tort proposed in this article could be legislatively adopted. Over the next decade it is more likely that legislatures will proceed on a more modest point by point basis. Perhaps the AWA could be amended to outlaw the use of primates in invasive research. For an example of how the balance of competing human-animal interests could be re-balanced, see David Favre, *Laboratory Animal Act: A Legislative Proposal*, 3 PACE ENVTL L. REV. 123 (1986).

70.

The first thing that our Constitution teaches is that rights are not such a scary thing to recognize or to confer, since rights are almost never absolute. Arguing for constitutional rights on behalf of non-human being[s] . . . shouldn't be confused with giving certain non-human interests absolute priority over conflicting human claims. Tribe, *supra* note 9, at 2.

#2-JoJo lives in the basement of the home of Big Jones in a commercial 5 X 5 X 7 cage. Big Jones collects exotic animals and shows off JoJo to all his beer-drinking friends by banging on the cage to get a reaction out of JoJo. After several months in residence, JoJo no longer reacts to cage rattling and has cut back on eating the table scraps that Big Jones feeds him. This comes to the attention of attorney George Hall, who brings an action for JoJo under this tort seeking a guardianship for JoJo and an injunction requiring the transfer of JoJo to better facilities. The first two elements of the tort are easily satisfied. The fundamental interests of JoJo are clearly at risk; no socialization, no physical exercise, no enrichment of the environment, lack of appropriate food and clear psychological abuse. He is basically a live trophy for Big Jones. Therefore, the court will move to the third element: whether the interests of JoJo substantially outweigh the interests of Big Jones. The interests of Big Jones are personal; he has a modest financial investment in the animal and he feels important as the center of attention within his community of friends. It makes him feel special, providing part of his self-identity and self-esteem. The interests of Big Jones can be fulfilled other ways and do not justify this degree of interference with JoJo's fundamental interests. Jones's property interest in JoJo is not a defense. The court should be willing to enjoin the continued possession of JoJo by Big Jones. Because of the harm caused by Jones, the court could award damages or require the title transfer of JoJo to a third party without compensation.

#3- As a final example, consider JoJo, having lived for twenty years in an institutional lab at Big University, in a cage that meets the requirements of the AWA in physical dimensions.⁷¹ However, he never sees the natural light of the sun, or feels the touch of any other chimpanzee, human or other, unless handlers have sought to do a procedure with him. There is nothing for him to do in the cage. He has been part of three different scientific protocols over the past fifteen years. If attorney George Hall brings an action for violation of the tort and seeks removal of JoJo from this environment, it should not be too difficult to show intentional interference with his fundamental interests as discussed above. The legal focus would quickly turn to element three and the court would have to determine whether JoJo's interests clearly outweigh the interests of the owner, Big University, in utilizing this animal in the name of science. This is not an abstract argument about the use of animals in science; instead, the dispute will be about this particular chimpanzee being used by this particular university. Whereas, in the past, researchers have only had to justify the use of chimpanzees to themselves, and did not have to give any weight to

71. See 9 C.F.R. § 3.75 (2004).

the interests of the animal. Under the proposed tort, Big University would have to make its case to a court.

A. A Legal Duty Generally

Fundamental to the concept of a tort is the creation/existence of a duty obligating one being to take into consideration the interests of another.⁷² It is the role of the common law courts to determine whether a particular asserted interest will be accepted, resulting in the imposition of a legal duty upon others to accommodate the newly asserted interest. As moral perspectives change and society evolves, courts find that duties exist where none existed before.⁷³ In this case, the claimed duty is that of humans to not interfere with the fundamental interests of an animal unless they are asserting a more important, human-focused interest.⁷⁴ While this may seem novel and unsupportable to some, it is a duty that has long been in existence, though it has been owed to the government rather than the animal. As discussed previously,⁷⁵ for over one hundred years our criminal law, adopted in every state of the union, has imposed on humans a duty to not inflict pain and suffering on animals without justification, as well as an affirmative duty of care for animals within someone's possession and control.⁷⁶ The proposed tort simply allows recognition of a comparable duty within the civil legal system.⁷⁷

72. See PROSSER, *supra* note 2, at 4. "[I]t has been said that torts consist of the breach of duties fixed and imposed by upon the parties by the law itself, without regard to their consent" *Id.*

73. See *supra* note 2.

74. "So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others." PROSSER *supra* note 2, at 6.

Much of the footnoted materials use terms such as "others" or "persons." Most often the author does not specifically contemplate animals being included under the umbrella of such terms. For a discussion of how to stretch these terms to include animals, see Mary Midge, *Persons and Non Persons*, in *IN DEFENSE OF ANIMALS* 53 (Peter Singer ed., 1985).

75. See sources cited *supra* notes 38-45 and accompanying text.

76. For a survey of the state laws see, Pamela D. Frasch, et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 *ANIMAL L.* 69 (1999).

77.

A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing, by eliminating the offender from society.

....

The civil action for a tort, on the other hand, is commenced and maintained by

This is but a logical next step. It is the well-being of the animal that is the focus of concern in the first place, so why not tie the duty directly to the being that deserves the protection and consideration? This will make the implementation of the duty more efficient. As might be presumed, any number of reasons arise which make it difficult for the government, through the offices of local prosecuting attorneys, to enforce this acknowledged duty. The presence of a civil action will allow other resources, neither politically nor economically limited, to support animals in asserting their interests. The duty exists presently; it is a matter of how the legal system will impose obligations in light of this duty. While building on the existence of this duty, this proposal rejects the legislative exemptions created in the criminal law, seeking a re-balancing of animal and human interests under the structure of the proposed tort.⁷⁸

B. Presence of a Fundamental Interest

The proposed tort first requires the presence of a fundamental interest. All living beings have interests: biological, physiological, social and nutritional needs, of which an individual may or may not be self-aware. While

the injured person, and its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer. If successful, the plaintiff receives a judgment for a sum of money, enforceable against the defendant. The state never can sue in tort in its political or governmental capacity.

PROSSER, *supra* note 2, at 7.

78. Most state anti-cruelty statutes exempt a number of general activities from the scope of the law. If any particular act can be shown to have been carried out under the umbrella of a specified general activity, then it is exempted regardless of the intention of the actor or degree of cruelty involved. For example, the Michigan law MICH. COMP. LAWS § 750.50 provides in relevant part:

8) This section does not prohibit the lawful killing or other use of an animal, including, but not limited to, the following:

(a) Fishing.

(b) Hunting, trapping, or wildlife control regulated pursuant to the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106.

(c) Horse racing.

(d) The operation of a zoological park or aquarium.

(e) Pest or rodent control.

(f) Farming or a generally accepted animal husbandry or farming practice involving livestock.

(g) Activities authorized pursuant to rules promulgated under section 9 of the executive organization act of 1965, 1965 PA 380, MCL 16.109.

(h) Scientific research pursuant to 1969 PA 224, MCL 287.381 to 287.395.

(i) Scientific research pursuant to sections 2226, 2671, 2676, and 7333 of the public health code, 1978 PA 368, MCL 333.2226, 333.2671, 333.2676, and 333.7333.

the interest in eating an apple pie may be trivial, others are more fundamental, such as a freedom from pain and suffering and personal freedom of movement.⁷⁹ We are dependant upon the advances of scientific study to bring before the court the information necessary to decide what interests a particular animal may have. While most of the information can be provided on a species basis, some information may be unique to the individual animal. Obviously the test cannot be whether humans know everything about a species, as we do not yet even know everything about ourselves. Sufficiency of knowledge should be judged in the context of the specific interests at issue before a court. Satisfying the court as to the base of information is the plaintiff's burden. An issue, such as the appropriate home for the placement of a pet, may be highly dependent on the character of the individual animal and only modestly dependent on information about the species generally. On the other hand, the basic housing square footage need for a tiger in a zoo is most likely satisfied by species information, rather than individual animal information.

The extent of expert information needed by a court relates to the degree to which the issue reflects new ideas, or ideas not commonly understood. Some issues, such as the general need for clean water and nutritional food, can be presumed to be generally understood, but if the specific food for the feeding of a snake is at issue, then some expert will be required to present information to the court.⁸⁰

Only interests of fundamental importance to the animal should be before the court, as opposed to the trivial or obscure interests of the animal. This is required by both the reality of limited judicial resources and the political support that will be necessary to sustain the new tort. For the most part, these interests should also be capable of ready scientific support. This is not a bright line test and obviously will force the court to make a judgment call. The term "fundamental" should be considered in light of our knowledge of what is important to an animal as a species and as an individual. Fundamental interests reflect those needs or characteristics of an individual animal which are required for the physical and mental well being of the animal, and will

79. *Id.* Roscoe Pound lists five categories of fundamental human interests:

1. The physical person
2. Freedom of will
3. Honor and reputation
4. Privacy and sensibilities
5. Belief and opinion

3 POUND, *supra* note 13, at 33. Pound discusses these categories at length. *See id.* at 33-105.

80. For many issues this will only need to be done once. As courts make factual determinations, subsequent courts will be able to rely upon that information without full litigation with experts. For example, the proposition that primates are social creatures that need or prefer group living arrangements could be so established.

normally be reflected in providing those environmental conditions which are necessary to allow the animal to exercise and experience those characteristics or activities that are species defining. For example, to be housed in social groupings is fundamental to primates, but most likely not to snakes; to be able to reproduce is fundamental to all living beings; to be able to sustain life with water and food is fundamental; to be able to use one's body in modes for which it is built is fundamental to all life. Birds need perches and the space in which to fly, while rabbits do not. Cheetahs need space to run, frogs need ponds in which to lay eggs. Some lizards need walls to climb and places to hide. Boa constrictors need branches to lie out upon, and drop down from. Hogs need space to root and wallow. Sheep need space to sit in social groups and chew their cud. Each species has developed characteristics by which they survive and reproduce. Humans have removed many of them from the environment in which they would normally exist. One of the moral duties that arises out of this taking of possession and control of an animal is the obligation to provide the animal those conditions that are fundamental to the animal's nature.

This does not have to be a search without landmarks. The criminal anti-cruelty laws and the AWA, discussed earlier, can act as a rich set of markers, already adopted by the legislature and administrative agencies as reflecting concern for fundamental interests. However, the adopted regulations do not necessarily protect an animal's fundamental interest. Surely we know enough about chimpanzees to be comfortable in stating that keeping a chimpanzee in a 5 X 5 X 7 cage is an interference with its fundamental interest.⁸¹

If we cannot say what is fundamental to an animal, then the doors of the courtroom will remain closed until such information is available. While this may seem unfair, there is no other way to proceed, given the limited resources of the legal system. A court cannot be asked to do the science; it can only be asked to weigh the information science provides. For many of the species around us on a daily basis, this portion of the test will not be the difficult one, while in other instances, the balancing of interests will provide a unique challenge.

81. See generally JANE GOODALL, CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR (1986) (documenting chimpanzee behavior); Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163 (2001) (providing information on mental abilities of great apes). Admittedly these issues are complex, see HOUSING, CARE AND PSYCHOLOGICAL WELL BEING OF CAPTIVE LABORATORY PRIMATES, *supra* note 50, but the cage sizes contained in the existing regulations, 9 C.F.R. 3.75 (2004), are more reflective of prior laboratory capital investment than of a determination of fundamental interest of chimpanzees.

C. Intention of the Defendant

It is axiomatic that the plaintiff must show that the defendant is the source of actions causing interference with the plaintiff's interest. This is fundamental to common law tort actions, and the usual concepts and theories would apply in this circumstance as well.⁸² An important issue when focusing on the actions of the defendant is the issue of intentionality. Most interest interferences within the scope of this tort will not be one time events like battery or publication of libel, but are ongoing conditions imposed by the owner/possessor upon an animal. The level of intention necessary for a violation of the tort is that the act (or failure to act) must be shown to have been intended by the defendant, whether or not the specific consequence was intended. As a matter of public policy, if an individual has possession of an animal, it should be presumed that he or she understands the animal's and the species's fundamental interests, and is willing and able to accommodate them. In the prior example, Big Joe has single caged and mis-fed JoJo. His acts are intentional; the court may conclusively presume that he understood the consequences of his actions upon JoJo. Likewise, Big University, by intentionally placing JoJo in a cage, would be presumed to understand that such conditions interfered with a fundamental interest.

D. The Test of Substantially Outweighs

While in the realm of philosophy it may be possible to argue that the interests of animals are equal to that of humans, in the realm of law it is not currently possible. New law is built on compromise and incremental change. The shifting of individuals' expectations causes society to evolve. Admittedly, this new tort will bring new, conflicting public policy questions before the courts, and the courts should act only when the moral balance is clearly in favor of the animal. To do otherwise would undermine the public's confidence in the right of courts to address these novel issues. It will also allow for a shift of perspective and expectation to occur in the minds of the general public. The policy discussion of the courts will become increasingly vital, complex and compelling as information is provided and public policy is developed.⁸³

82. See RESTATEMENT (SECOND) OF TORTS §§ 2, 3 (1965) (defining "Acts" and "Actor"); PROSSER *supra* note 2, at § 26.

83.

The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammelled freedom in the furtherance of defendant's desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scales

The burden is on the plaintiff to show that his interests “substantially outweigh” those of the defendant. Presumably, the plaintiff will initially be required to show a prima facie case of substantially outweighing, whereupon the defendant would have the option of making an affirmative showing of his or her interests.⁸⁴ In the second of the JoJo examples, JoJo’s counsel would need to show, through the use of expert witnesses, that the physical living conditions, nutrition and psychological abuse were interfering with JoJo’s fundamental interests. The plaintiff would then argue that the defendant’s interests do not substantially outweigh his or her own. The defendant would have the opportunity both to show the court, as an affirmative defense, the scope and depth of his or her need to engage in the complained of conduct, as well as to contest the characterization of the conduct itself. In the context of the second example, a court should be willing to find a violation of the proposed tort.

The third example with JoJo is more difficult because broader social interests are involved. In this example, the issue will be whether the possible advancement of science through specific experimentation will be substantially outweighed by the degree of interference with the plaintiff. Presumably, the defendant would assert that a broader public good was being served by the use of the animal in the proposed experiment. If the institution has no planned use for the specific animal and is simply housing it, the interference would likely be without justification.

In both of the examples, a court might also consider what alternatives exist for advancing the human interests raised by the defendant as justifying the proposed action. Alternatives fulfilling at least a portion of the human

and allowed to swing the balance for or against the plaintiff, the result is a form of “social engineering.” A decision maker might deliberately seek to use the law as an instrument to promote the “greatest happiness of the greatest number,” or instead might give greater emphasis to protecting certain types of interests of individuals as fundamental entitlements central to an integrity of person that the law upholds above all else. This process of weighing the interests is by no means peculiar to the law of torts, but it has been carried to its greatest lengths and has received its most general conscious recognition in this field.

PROSSER, *supra* note 2, at 16-17. The reality of the need to balance the interests of animals with those of humans was noted by one of the first animal rights advocates, Henry Salt. “Once more then, animals have rights, and these rights consist in the ‘restricted freedom’ to live a natural life—a life, that is, which permits of the individual development—subject to the limitations imposed by the permanent needs and interests of the community.” SALT, *supra* note 3, at 22.

84. As in the situation of a bailment where a plaintiff bailor has the duty to show negligence on the part of the defendant bailee, since the defendant has the best information about what happened to the bailed item, the plaintiff’s showing is prima facie, and the expectation is that the defendant will affirmatively defend with more information than the plaintiff might have possessed. See *Gebert v. Yank*, 218 Cal. Rptr. 585 (Cal. Ct. App. 1985).

interest, without imposing a substantial interference with the plaintiff's interests, could be weighed in the court's balancing. In the case of Mr. Jones, there are many different courses of conduct which may allow him to realize notoriety and ego gratification. However, depending on what information is sought by the science experiment in the third example, the number of alternatives may be restricted. If the plaintiff can convince the court that viable alternatives exist, then the court can consider this in the balancing of interests.

Alternatively, the court might find that what is sought in a particular experiment by a particular person is neither of sufficient public concern nor justified, or that while a chimpanzee may be necessary for the experiment, the best possible outcome would be of such trivial value to science and the public that any interference with a fundamental interest may negate the justification for the experiment. Thus, when a public good is involved, there are two types of questions that may be addressed. First, is the plaintiff in question necessary to the desired outcome? Second, is the desired outcome important from a social, cultural or scientific perspective? What if Mr. Jones sought to advance science by dissecting JoJo in order to determine how the arteries supply blood to a chimpanzee's heart? Clearly a chimpanzee is necessary to this outcome. But even though Mr. Jones may think this information necessary, others may have already obtained it, or it may be obtained without any cutting of tissue through the use of advanced imaging technology. Even though Mr. Jones does not have access to the technology, the courts could well judge that whatever social or scientific interests may exist in the information can be obtained by others without interference with a fundamental right, thus allowing the court to deny Mr. Jones his interests. So again, the plaintiff may counter the claims of the "weight" of the defendant's action—when a public good is asserted—by showing that society at large neither needs nor values the outcome asserted.

All of this calls upon a judge to weigh disparate interests. Undoubtedly, issues of morality, money, fairness and social policy will be intermixed. This difficulty is precisely why it is important to engage the courts in the debate about the use of animals. At the moment, the owner of the animal usually makes this decision. There can often be a significant conflict of interests, as some owners give no weight to any interests of any animal in their charge. Optimum fairness to animals will be obtained when someone other than the owner is fully authorized to weigh the benefits, costs and risks of a particular act.⁸⁵ In so doing, the "property rights" of the owner are being modified. This is the transition in which we are currently engaged. Animals are not just

85. That animals deserve fair treatment is a moral premise that brings animals within our legal community to begin with. If society does not accept this premise, that animals deserve fair treatment when they are within human control, then society will not accept the appropriateness of this proposed tort.

property, but a hybrid and owners of animals must adjust their expectations to this new reality. Property relationships will continue to be useful for issues of clarity about care of an animal, and as the mechanism to transfer value that is represented by some animals.⁸⁶ However, the paradigm will shift nonetheless.

E. Loose Strings—Additional Points Before Proceeding

1. *Extent of the Tort—Wild Animals*

There is a set of animals which may need to be set-aside for the moment. Individual animals may be divided into two rough categories, those within the possession and control of humans (domestic animals) and those that are not (wildlife). This article has focused upon those animals that are among us; animals for which humans have responsibilities. Indeed, the tort suggested by this article arises out of the fact of possession and control. While a tiger in a zoo is comparable to a tiger in the wilds of India, the context is not the same. Wildlife exist in a different matrix than domestic animals, that of ecology. They are a substantial component of the ecological systems of which the earth is composed and in which humans exist. They are our ecological brothers and sisters, our genetic cousins still living under the rules of evolution. This ought to give rise to a more complex ethical consideration.

While undoubtedly human actions can have significant impact on wildlife, it is not clear that the analysis of this article is adequate for the task. Wild animals are capable of full existence without the aid of humans. They are not the property of humans.⁸⁷ The analysis for wildlife is more complex than the proposed tort. Perhaps for wildlife, the tort would be framed more along the lines of placing the burden on the human to show a substantial human need before allowing interference with such wild animals. But this is another article.

86. *Bueckner v. Hamel*, 886 S.W.2d 368, 377 (Tex. Ct. App. 1994) (Andell, J., concurring) (“Because of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of ‘property’ that neither statutory law nor case law has yet recognized.”).

87. As property laws are a human construct and not an inherent characteristic of physical objects, there is always conceptual space for innovation. One of the premises for our new property paradigm is that living objects have “self-ownership.” That is, unless a human has affirmatively asserted lawful dominion and control so as to obtain title to a living object, then a living entity will be considered to have self-ownership. *Favre*, *supra* note 12, at 479-80.

2. Who Will Represent the Animals?

It is not expected that any animal has the capacity to call a lawyer and initiate a lawsuit; this inability is not a bar to the creation of the tort. On a regular basis, courts adjudicate issues concerning beings that are incapacitated: children, mentally incompetent, the insane, and the aged. It is beyond the scope of this article to address who is best able to represent the interests of animals before courts. It should be noted that the Uniform Trust Act specifically allows for the appointment of a representative.⁸⁸ In the notes to the Uniform Act, the issue of standing is specifically discussed and it is allowed that an interested human has standing to enforce the provisions of the Act.⁸⁹

The courts are capable of discerning when a particular human is the appropriate party to pursue the interests of an animal. In an indirect manner, two federal courts have allowed humans to pursue cases that furthered the interests of animals covered by federal law.⁹⁰ In at least one case in Florida, a court appointed a guardian ad litem for a Chimpanzee Trust.⁹¹ The development of guidelines for the courts in resolving this issue will undoubtedly be the subject of future law review articles. Our legal system has a number of mechanisms such as guardianships, next friends, legal

88. UNIF. TRUST CODE § 408(b) (2003).

89. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, section 110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consent. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. *See, e.g.*, UNIF. PROBATE CODE §§ 5-210(b), 5-414(a) (amended 1993); UNIF. TRUST CODE § 408.

90. *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (finding that one named individual who made a number of visits to a particular chimpanzee in a zoo and sought a number of times to pursue administrative remedies on behalf of the chimpanzee had standing under the Animal Welfare Act to question the regulations adopted by the government agency); *Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003) (finding the plaintiff had standing arising out of his concern for the well-being of an elephant which he had seen abused while in the employment of the defendant and therefore could bring an action under the Endangered Species Act to determine if the actions of the defendant had "harmed" the elephant in violation of the law).

91. *In re Fla. Chimpanzee Care Trust*, No. CP-02-1333- IY (Prob. Div. Palm Beach County Cir. Ct., Apr. 1, 2002).

representatives and social workers to deal with this issue.⁹² This is a procedural issue and while in need of scholarly consideration, is not a bar to the adoption of the substantive tort.

3. *Death for the Benefit of Humans*

One of the most fundamental conflicts that the courts will have to face under this tort analysis is the balance of animals' interest in continued life as weighed against the interests of humans in the use of the body or body parts after the death of the animal. Given the number of animals that are part of commercial food industry, it is fair to say that most domestic animals exist only because their bodies are a desired commercial product. Obviously all animals will die at some point. After death, the interest of the individual animal is gone, and the interest of the human owner becomes paramount. The human may bury the body, cremate it, eat the meat, or use the fur.

One of the most difficult ethical issues this society faces is whether it is appropriate to bring animals into existence under the assumption of their premature death, so that humans may consume the animal's body. If the answer to the question is no, then the entire animal food industry must be shut down. If the answer is yes, then surely there must be considerable focus upon the quality of life and the process of death for such animals. Additionally, there should be analysis about which human interests justify early death. This is separate from issues that relate to quality of life or how death is inflicted.

The fundamental question the courts will address is whether human interests can ever justify taking an animal's life. Do an individual animal's interests to continued life trump any human interests that could be put forth? Under one scenario, an animal may have a high quality life, live for years and face a painless and unseen death. Clearly there are many individuals who have a personal ethical position that suggest early death is never justified by human interests. Others see no difficulty in the early death of animals for human consumption.⁹³

If the present proponents of animal rights can convince broader society that animals should not die for the benefit of humans, then that outlook can

92. See generally Kolber, *supra* note 81 (arguing that great apes should be allowed standing under the AWA).

93. The issue of how to balance the animal's interest and that of a consuming human is considered in a New York Times Magazine article. Michael Pollan, *An Animal's Place*, N.Y. TIMES MAG., Nov. 10, 2002, at 58. "What's wrong with animal agriculture—with eating animals—is the practice, not the principle. What this suggests to me is that people who care should be working not for animal rights but animal welfare—to ensure that farm animals don't suffer and that their deaths are swift and painless." *Id.* at 110.

easily be implemented in the application of the test proposed by this article. Until that time, it will be understood as a premise of this cause of action that human interests can be of sufficient weight to justify the death of an animal. But it seems appropriate to say that where the life and premature death of an animal is for the benefit of humans, then the quality of life and nature of death deserve enhanced consideration and protection by the courts.

4. Profit Motive as a Justification

Another topic adding to the complexity of balancing conflicting interests is how to deal with the human desire to make money. Given all the alternatives available in this world for making money, that human interest, standing alone, should not justify a substantial interference with a fundamental interest. For example, if Big Jones bought JoJo with the intention of displaying him in his hardware store to increase customer visits, and then to use him in human-chimp wrestling matches on the weekend, the primary motivation for ownership is profit. Assuming the living conditions violate JoJo's fundamental interest, then the third prong of the test will be satisfied and JoJo will win, as Big Jones's desire for profit is of insufficient weight to justify the impact on JoJo's fundamental interest.

Another aspect to profit is seeking to increase or enhance profitability in a way that increases the harm to an animal. In deciding whether consumption of pig products is an acceptable use of pigs, the fact that, under our capitalist system, someone will profit in providing the product, should not weigh in the balance. Assume that the judgment is to allow pig products. Then the question turns to the issue of how pigs are raised. When pig producers' desire to enhance profits or gain a competitive advantage in raising pigs results in an interference with a fundamental right, such actions should not be allowed. It is possible to raise pigs in a manner that does not violate their fundamental interest. Unfortunately, in the capitalist system, the motivation to enhance profits by decreasing cost is a powerful force. However, it is an objectionable force when the conditions in which animals are raised substantially interfere with a fundamental right.

As one narrow hypothetical, consider a producer of hogs who has 1,000 hogs in one building. The accountant figures out that if they lower the temperature in the building during winter by five degrees, they will lose fifty hogs to exposure, as well as some loss of poundage in hogs because of constant shivering. However, these financial losses are offset by the money saved from a reduction in fuel cost. This action should not be allowed, as enhancing profit is not such an interest as will justify the interference with fundamental rights.

5. Remedies

Three remedies shall be available for violation of this tort: money damages, injunctive relief and title transfer. The expected remedy for violation of an ordinary tort is money damages of a sufficient amount to “make the plaintiff whole.” Damages should also be available under this tort; that level of money necessary to eliminate the interference with a fundamental right. If pain and suffering has been a part of the experience of the plaintiff then, as with humans, some compensation is appropriate, perhaps within the context of money sufficient to assure the conditions do not reoccur. As for money damages awarded, the money would need to be put into a trust arranged by a court appointed trustee who would be under the obligation to expend the money for the benefit and well being of the animal in question.

The remedy that will be most useful in many circumstances is injunctive relief. While an injunction is somewhat unusual for torts, it is available when an ongoing tort exists.⁹⁴ Like the factory that continues to bleach out toxic gases and hot cinders onto a neighbor, money damages would be appropriate for harm to date, but an injunction to shut down the ongoing source of pollution would also be available to the plaintiff.

Most unusual for an action in tort is a remedy allowing the court to force the transfer of title of the property to another. In those circumstances, when a violation of the tort has been shown, and the defendant is an owner of the plaintiff, then the court is empowered to force the transfer of the title from the defendant to a new owner. In the prior examples, it is unlikely Mr. Jones has the financial capacity to provide for JoJo and therefore transfer of title might be an appropriate remedy. Big University could well have adequate resources to meet the fundamental interests of JoJo, and all that would be required is an injunction with direction to modify the environmental conditions of the animal. The key point is that if a violation of the tort is found by the court, the animal should not be forced to remain in such conditions. And if the defendant is unable to provide the resources necessary, the plaintiff should be transferred to someone who can provide the appropriate resources.

CONCLUSION

This article has established that animals presently have some of their interests represented within our legal system. Building upon this premise, a new approach has been suggested by which civil tort laws could be expanded

94. See PROSSER, *supra* note 2, at 640-43 (discussing injunctive relief being available for a continuing nuisance).

to include a new tort which would directly balance the fundamental interests of animals with those of humans. This would bring to the forefront a process that has long existed, allowing public policy to be more forthrightly considered and decided. It will, in fact, provide a legal mechanism to realize our moral obligations to the domestic animals that are among us.