LIBERATING ANIMAL LAW: BREAKING FREE FROM HUMAN-USE TYPOLOGIES

By
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Animal protection laws have traditionally categorized animals according to the manner in which humans use them. Animals have been categorized as companion animals, animals used in medical testing, animals raised for slaughter, and wildlife, and the protection afforded to animals has been ostensibly commensurate to their use categorization.

This Article focuses on two alternative strategies that provide legal protection for animals without relying on human use as their primary mode of categorization. First, the Article looks at protecting animals as a single category, in particular through the use of constitutional provisions. The Article then looks at a species-based model that seeks to extend some traditional "human rights" to Great Apes.

Ultimately, the Article concludes that the species-based model provides a more effective alternative to the use-based model, since it provides an alternate means of categorization that shifts focus to the needs and capacities of animals. While generalized protection at the constitutional level may be rhetorically effective, it does not offer an alternative form of legal category that would allow for precision in legal rule-making.

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I. INTRODUCTION

The law requires categorization. Rights, duties, benefits, and prohibitions must be defined, as must the individuals to whom they apply, and the circumstances in which they are applicable. Animal law is no exception. Traditionally, categorization in animal protection laws has focused on the particular use to which animals are put by humans.[1] Companion animals, animals raised for slaughter, wildlife, and animals used in medical and product testing have all been accorded protections that are ostensibly commensurate to their circumstances.[2] Animal rights and animal welfare advocates have long worked within these categories to strengthen legal protections for animals.[3]

This Article will examine two emergent strands of advocacy, each of which appears to be premised upon departures from the use-based approach to animal protection. The first of these is the movement to provide constitutional protection for "animals" as a single monolithic category, and the second is the quest for recognition of all great apes as meriting some of the basic rights and protections that humans enjoy.

This Article will examine the practical and theoretical implications of these shifts and will conclude that, although these approaches may exacerbate problems inherent in the use-model—or even create new problems—the introduction of these approaches ultimately constitutes a positive development in the animal rights movement. While neither may in itself be an appropriate basis for meaningful animal protection, both have served to reawaken a stagnating debate on the appropriate relationship between human and nonhuman animals. By abandoning the presumptions of the use-model, these emerging approaches disrupt conventional wisdom and provide valuable fodder for public debate on questions of fundamental importance to animal protection.

Finally, this Article will conclude that, while the inclusion of constitutional protections for "animals" may represent a great symbolic

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[1] *See e.g.* Levi Pulkkinen, Seattle Post-Intelligencer, *Cruelty Laws Apply to Livestock, Lawsuit Says*, http://www.seattlepi.com/local/400950_slaughter21.html (updated Feb. 20, 2009) (accessed Nov. 21, 2010) (discussing how livestock have not been covered under a local animal cruelty law); *see also* Peggy Hall, CattleNetwork, *House Passes Revisions to Ohio's Animal Cruelty Laws*, http://www.cattlenetwork.com/House-Passes-Revisions-To-Ohio-s-Animal-Cruelty-Laws/2010-06-03/Article.aspx?oid=1100429&fid=VN-HOT_TOPICS (June 3, 2010) (accessed Nov. 21, 2010) (discussing differences in penalty provisions in Ohio animal cruelty laws based upon how the animal is being used).

[2] *See* Peter Singer, *Animal Liberation*, 72, 152 (Ecco 2002) (mentioning laws relating to animal experimentation and animal slaughter, and discussing how the laws are influenced by the use to which the respective animals are put).

[3] *See e.g.* Badgerland, *History of Animal Protection Laws*, http://www.badgerland.co.uk/animals/legal/history_of_laws.html (accessed Nov. 21, 2010) (explaining the development of animal protection laws in the United Kingdom, and discussing how certain categories of animals have been included or excluded).

victory for animal advocates, such protections may be too ambiguous to provide meaningful protection. On the other hand, efforts to shift the relevant categorizations in animal law to focus on species distinctions may have significant potential for substantial animal protection reform, both by allowing for precision in legal rule-making (which translates into greater enforceability), and by encouraging a paradigm shift that brings the actual needs and capacities of animals into focus during debates over legislative reform.

II. REVISITING THE HUMAN-USE MODEL OF ANIMAL PROTECTION

Animal rights advocates have long decried the law's treatment of animals as "property."[4] The animals-as-property model animates an animal protection regime that defines standards of treatment in accordance with how human property-owners seek to "use" the animal property in question. It is appropriate that a paradigm that defines the place of animals in our communities according to human use would support regulatory regimes organized around those human uses. As Gary Francione explains, "When we consider our moral obligations to animals without first addressing the status of animals as property, we tend to confine our discussion to ways in which we might exploit animals more 'humanely' rather than to ask whether our exploitation—'however humane'—is morally justifiable."[5]

Francione groups animal welfare legislation into two categories: "general" and "specific."[6] The "specific" provisions under Francione's typology include those laws that "purport to apply the humane treatment principle to a particular animal use," while the "general" provisions, such as anticruelty laws, "prohibit cruelty or the infliction of suffering on animals without distinguishing between various uses of animals."[7] For the purposes of this Article, however, these two categories will be collapsed since, in practical terms, even the "general" provisions to which Francione refers turn out to look more like "specific" provisions in practice. In fact, Francione himself derides the practical value of anticruelty—or general—laws on the basis that the most frequent exceptions to these statutes include scientific experimentation, agricultural practices, and hunting.[8] Effectively, then, these provisions apply only in the human-use sphere of domestic animals, and possibly also to animals used for entertainment.

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[4] *See e.g.* David Hambrick, *A Legal Argument Against Animals as Property*, in *People, Property, or Pets?* 55 (Marc D. Hauser et al. eds., Purdue U. Press 2006) (stating that anyone who cares about animals' interests should want to remove them from the category of "property").

[5] Gary L. Francione, *Animals, Property, and Personhood*, in *People, Property, or Pets?* 77 (Marc D. Hauser et al. eds., Purdue U. Press 2006).

[6] *Id.* at 78.

[7] *Id.*

[8] *Id.* at 80.

Constructing meaningful alternatives to the use-based, property-oriented model of animal protection poses a daunting challenge, and one which the "general" protections cited by Francione may admittedly have failed to meet. The ideological hegemony of the animals-as-property model has created serious obstacles for those seeking to rethink (and convince others to rethink) the underlying logic of our animal protection regimes. The following Parts will examine two such attempts: generalized constitutional protection for animals, and rights for great apes.

III. PROTECTING "ANIMALS": THE CONSTITUTIONAL APPROACH

In recent years, constitutional law has taken on a new role in animal protection. Because of the widely held view that constitutional law represents the highest law of the land, constitutionalizing animal law is seen to lend a seriousness to animal protection that is often lacking in the public and judicial mind.[9] As Dr. Gieri Bolliger explains, "A constitution always reflects the overall values of a nation. The inclusion of animal welfare measures . . . is rather an official and clear acknowledgement, at the highest level of law, that people cannot deal with animals at will and with no limitations set."[10]

It should be emphasized, however, that the move to constitutional inclusion does not in itself demand a departure from a use-based approach, and many constitutional provisions rely on traditional typologies of human use. The proposed European constitution, for example, asserts:

> In formulating and implementing the Union's *agriculture, fisheries, transport, internal market, research and technological development and space policies*, the Union and the Member States shall, since animals are sentient beings, pay full regard to the requirements of animal welfare, while respecting the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and regional heritage."[11]

The Swiss Constitution also makes reference to state responsibilities with respect to animals in several contexts: a "Nature and Cul-

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9 Gieri Bolliger, Lecture, *Animal Welfare in Constitutions* (Conf. on Const. & Legis. Aspects of Animal Welfare in Europe, Brussels, Belgium, Feb. 1, 2007) (available at http://www.tierimrecht.org/de/PDF_Files_gesammelt/Abstract_Bruessel_TIR_Papier.pdf (accessed Nov. 21, 2010)).

10 *Id.*

11 *Treaty Establishing a Constitution for Europe* art. III-121 (Aug. 6, 2004) (available at http://www.animals-constitution.info/pdf/_std/consolidateddraft.pdf?PHPSESSID=7f79adb2919d68dacd6e6ccadc52052b) (accessed Nov. 21, 2010)) (emphases added); *see also* Human Const. Rights, *EU Constitution: The State of Play*, http://www.hrcr.org/hottopics/EuropeanC.html (accessed Nov. 21, 2010) (describing the failure of member states to ratify the treaty).

tural Heritage" provision[12], an "Agriculture" provision,[13] a "Protection of Health" provision,[14] and a "Gene Technology in the Non-Human Field" provision.[15] In addition to these use-specific provisions, the dedicated animal protection provision is also organized around human use:

> Art. 80 Protection of Animals
> 1. The Confederation shall legislate on the protection of animals.
> 2. It shall regulate in particular:
> a. the keeping and care of animals;
> b. experiments and intervention on live animals;
> c. the use of animals;
> d. the importation of animals and animal products;
> e. trade in animals and transportation of animals;
> f. the slaughter of animals.[16]

Finally, the Constitution of India makes the apparently general statement that "[i]t shall be the duty of every citizen of India . . . to have compassion for living creatures."[17] However, this duty is posited in the context of a broader provision concerning "the natural environment" and "wildlife," which makes its application in other contexts unclear.[18]

Constitutional laws, however, are often written in broad brushstrokes, promising protections to "any person"[19] or to "everyone,"[20] inviting an approach to animal law that similarly eschews categorization. Note that none of the constitutional provisions canvassed have posited enforceable "rights" but are instead welfarist in focus (a point which will be discussed further below). The World Animal Net's Constitution Project, which advocates for the inclusion of

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[12] Swiss Fed. Const. art. 78 (available at http://aceproject.org/ero-en/regions/europe/CH/Switzerland Constitution 2002.pdf/at_download/file (accessed Nov. 21, 2010)).

[13] *Id.* at art. 104.

[14] *Id.* at art. 118.

[15] *Id.* at art. 120.

[16] *Id.* at art. 80.

[17] Const. of India art. 51A(g) (available at http://servingcommonman.blogspot.com/2009/03/constitution-of-india-full-and-latest.html (updated Dec. 1, 2007) (accessed Nov. 21, 2010)).

[18] *Id.* Aside from this provision, the rest of the Constitution of India's references to animal protection are in the specific context of animal agriculture or refer to division of powers rather than substantive guarantees: Articles 48 (Agriculture and Husbandry), 48A (Wildlife), and the division of powers provisions in Schedule VII, List III-17 (Prevention of Cruelty to Animals) and Schedule VII, List III-17B (Protection of Birds and Wild Animals).

[19] *See* U.S. Const. amend. V (stating that "any person" shall not be "subject for the same offense to be twice put in jeopardy of life or limb").

[20] *See* Canadian Charter of Rights and Freedoms, pt. I of the Constitution Act, 1982 (U.K.), being Sched. B to the Canada Act 1982 (U.K.), 1982, s. 7 (available at http://www.solon.org/Constitutions/Canada/English/ca_1982.html (accessed Nov. 21, 2010)) (stating that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice").

animal interests in constitutional documents, offers proposals for similarly general constitutional provisions:

> Require the government and the citizens at all times to consider animals with respect, and treat them with compassion.
>
> Require the government to develop laws and enforcement structures so as to afford animals the highest level of protection.
>
> Require the government to develop and support humane education programmes to encourage respect and compassion for people, animals and the environment, and recognition of the interdependence of all living things.[21]

A number of countries have attempted to constitutionalize similarly general protections. Before implementing the use-specific provisions discussed above, the Swiss parliament amended its constitution in 1992 to clarify that animals were to be treated as "beings," not "things."[22] In 2004, the Austrian parliament unanimously voted to include, alongside "human rights," the statement that "[t]he state protects the life and well-being of animals due to the special responsibility humans have for their fellow creatures."[23] The remainder of this Part will focus on Germany's animal protection experience, which culminated in the incorporation of animal protection into its constitution.

A. Germany: A Case Study in Generalized Constitutional Protection for Animals

Erin Evans points out that "[i]n Germany, animal protection has an extensive history, reflected by their first national law in 1871 punishing those who 'publicly or offensively beat[ ] or plainly mishandle[ ] an animal.'"[24] Kate M. Natrass suggests that the reference to the "public" and "offensive" nature of the prohibited conduct reflects that "the first German laws were based firmly on the anthropocentric

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[21] World Animal Net, *Constitution Project: Background Notes*, *Suggested Constitution Provision(s)*, http://www.worldanimal.net/resources/constitution-project-resources/54-constitution-project-background-notes#suggested%20constitution%20provisions (accessed Nov. 21, 2010).

[22] Associated Press, USA Today, *Germany Guarantees Animal Rights in Constitution*, http://www.usatoday.com/news/world/2002/05/18/germany-rights.htm (May 18, 2002) (accessed Nov. 21, 2010).

[23] Verein Gegen Tierfabriken (Assn. Against Animal Factories) *Animal Law: What VGT has Achieved in Austria!*, *Well-Being and Life of Nonhuman Animals Protected By Constitution*, http://www.vgt.at/publikationen/texte/artikel/20071211AustrianLaw/index_en.php#wellbeing (updated Dec. 11, 2007) (accessed Nov. 21, 2010). For a description of the political lobby effort that culminated in this vote, see Abolitionist-Online, *Martin Balluch-The Interview*, http://www.abolitionist-online.com/interview-issue04_bite.back-martin.balluch.shtml (accessed Nov. 21, 2010).

[24] Erin Evans, Presentation, *Political Opportunity Structures and Constitutional Inclusion of Animal Rights in Germany and Switzerland* (annual meeting of the W. Pol. Sci. Assn., Mar. 20, 2008) (available at http://www.allacademic.com//metalp_mla_aoa_research_citation/2/3/7/8/8/pages237881/p237881-1.php (accessed Nov. 21, 2010)).

grounds that animal abuse was imprudent and unseemly."[25] In Natrass' view, the 1933 introduction of an "ethically-based" animal protection code was a significant step forward, reducing animal experimentation, mandating that animals be "stunned" before slaughter, and imposing support for these laws in the form of serious penalties.[26] Natrass describes the increasing reach of animal protection legislation in the following years, explaining that "[t]hrough many changes and amendments, the law has maintained its character as an ethics-based animal welfare act."[27]

In explaining the decision among animal rights activists to begin lobbying for constitutional change in the late 1980s, Erin Evans points to a number of instances in which attempts to enforce animal cruelty provisions were thwarted by constitutional protections. A number of constitutional provisions were relevant here: "The Basic Law, or Grundgesetz, was a constant obstacle in pursuing cruelty cases as it protects freedom of artistic expression (sometimes involving animals), freedom of profession, and freedom of research."[28] She notes in particular a 1994 case in which a researcher sued after being denied a permit to perform a research study on the basis of animal cruelty.[29] Evans describes the proposed research as including "sewing the eyes of newborn monkeys shut for one year, then forcing their eyes open to have a copper electrode implanted; the animal would then be bound to a 'primate chair' for up to six months while coerced to do visual exercises."[30] The court upheld the claim, relying on the Basic Law's constitutional protection of "freedom of research."[31] In addition, Natrass adds that the Basic Law's freedom of profession has meant that "[a]ny stringent standard that challenges common agricultural practice may cause German farmers to lose their ability to compete in the international market, and is thus viewed as a violation of a constitutionally protected freedom."[32] Further, the Basic Law's protection of freedom of expression was accepted as a defense to animal cruelty charges against an artist who bound a live bird in a glue-like substance and left it to "hobble about the exhibit in obvious distress."[33] The animal cruelty provi-

[25] Kate M. Nattrass, *" . . . und die Tiere": Constitutional Protection for Germany's Animals*, 10 Animal L. 283, 286 (2004).

[26] *Id.* at 286, 288. Natrass acknowledges the provisions' problematic Nazi heritage: "In many ways, the Nazi regime used animal protection as a means of promoting its own unethical and highly convoluted social agenda. Despite the tragic effects of such an agenda, the fact that animal protection was a sound platform on which to win popular approval attests to the widespread German acceptance of animal protection as a legitimate issue by the 1930s."

Id. at 286–87 (citations omitted).

[27] *Id.* at 288.

[28] Evans, *supra* n. 24, at 7.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Nattrass, *supra* n. 25, at 293.

[33] *Id.* at 293–94.

sion that formed the basis of the charges offered apparently broad protection, stating that "[i]t is forbidden to use an animal in a film, public show, advertisement, or similar display if pain, suffering, or injury to the animal will result,"[34] but the provision was trumped by the Basic Law.[35] Evans posits that animal rights activists, frustrated with the weakness of the courts as a means of protecting animals in light of the Basic Law, "shifted their focus towards another political opportunity, a constitutional amendment, to resolve the weakness."[36]

After years of lobbying and shifts in the German political context,[37] several amendments to the Basic Law were proposed by Germany's major political parties. Note that, with the exception of the Socialist Party's proposal, "animals" are treated as a monolithic category, without distinction as to species or mode of human use:

> Animals will be protected within the framework of the current laws.
>
> —Free Democratic Party (FDP)
>
> Animals will be held in appropriate containment facilities, protected from destruction of their habitats as well as from preventable pain and suffering. Animal experimentation is only permitted when it is imperative for the development and health of humans.
>
> —Socialist Party (PDS)
>
> Animals will be treated as fellow creatures. They will be protected from inappropriate containment, avoidable suffering, and in their natural habitats.
>
> —SPD/Greens[38]

The eventual incorporation of animal protection into the Basic Law consisted only of the addition of the simple phrase *und die Tiere* ("and the animals") to a 1994 environmental protection amendment. The new constitutional protection thus established that "[t]he state protects, in the interest of future generations, the natural basis of life *and the animals* within the framework of constitutional laws and through the making of laws, and in accordance with ordinances and through judicial decision."[39]

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[34] Tierschutzgesetz [Animal Protection Act] BGB1. I, May 25, 1998 at 1094 art. 3 no. 6 (English translation available at http://www.animallaw.info/nonus/statutes/stdeawa1998.htm (updated Oct. 2010) (accessed Nov. 21, 2010)).

[35] Nattras, *supra* n. 25, at 293–94.

[36] Evans, *supra* n. 24, at 7–8.

[37] *See Id.* at 1–19. Evans provides a detailed overview of this process through the lens of social movement theory. Since the focus of this Article is the theoretical ramifications of different animal protection strategies rather than the practical history of their implementation, this discussion was omitted.

[38] Nattrass, *supra* n. 25, at 296–97.

[39] Nattrass, *supra* n. 25, at 297 (emphasis added) (citing Grundgesetz [GG] [Constitution] art. 20a (F.R.G.)). Prior to this amendment, the Christian Democratic Union Party, along with a number of academics and lawyers, had unsuccessfully argued that animals should have been protected as part of the "natural basis of life." *Id.*

B. Theoretical Implications of Constitutional Welfarism

Animal rights advocates who have fought for these generalized constitutional provisions have emphasized the fact that "[a] constitution always reflects the overall values of a nation."[40] Bolliger argues, moreover, that constitutional animal protection has a significance "[a]bove and beyond this symbolic character," positing that

> To meet the obligation of protecting and looking after the welfare of animals, a national legislature is thus urged to enact restrictive animal welfare regulations and to create suitable structures and means to guarantee the enforcement of these standards. Additionally, already existing animal protection regulations become safeguarded by the constitution. On the strength of their own constitutional status, such regulations can limit the basic rights of those who manage animals.[41]

In reality, the practical force of constitutional protections will vary in accordance with the specifics of domestic legislative and regulatory provisions. Bolliger's use of the term "welfare" here is not accidental. At base, these general provisions do not disrupt the legal relationship between human and nonhuman animals that subsists under a use-model. As Deborah Rook explains, "including 'animal welfare' in the German constitution had, and has, nothing to do with granting animals 'rights.'"[42] Indeed, Bolliger concedes that "[t]he inclusion of animal welfare measures does not indicate a revolution in human/animal relations," emphasizing rather the symbolic importance of protecting animals at the "highest level of law."[43]

The protection of animals is cast as a "responsibility" of humans who themselves bear rights. As Rook explains, "if a case were to come before the court concerning animal experimentation, the court may be required to balance the right to freedom of scientific inquiry against the responsibility to protect animal welfare."[44] The essential framework of categorical human "dominance" is retained, but with a conceptual shift with respect to human "entitlement." As described above, the property model produced welfare regulations that were defined by human use. The generalized protection offered by these constitutions, however, extends to all nonhuman animals, regardless of how they are "used." While it is true that the use-based paradigm persists in the subsidiary legislation of countries that have constitutionally recognized animal protection, the constitutional protection itself does not adhere to this framing.

Notably, these generalized constitutional animal protections treat "animals" as a monolithic category, mirroring the logic of human ex-

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40 Bolliger, *supra* n. 9.

41 *Id.*

42 Deborah Rook, *Should Great Apes Have 'Human Rights'?*, 1 Web J. of Current Leg. Issues (Feb. 27, 2009), http://webjcli.ncl.ac.uk/2009/issue1/rook1.html (accessed Nov. 21, 2010).

43 Bolliger, *supra* n. 9.

44 Rook, *supra* n. 42.

ceptionalism that underlies the property model. By treating "animals" as a monolithic category, individual and species distinctions within that category are obscured. Therefore, the use-based categories that are erased are not effectively replaced. As mentioned above, even laws governing humans rely on categories as a basis for defining rights, obligations, prohibitions, and benefits. Constitutions commonly demarcate entitlements on the basis of categories such as age or citizenship, and constitutional equality laws provide further guidance as to what kinds of categories are appropriate in other legislation. While categorizations of humans are ostensibly intended to reflect the needs and capacities associated with membership in a given group or category, generalized constitutional animal protection does not offer us a comparably sensitive approach to the legal categorizing of animals. In the absence of such an alternative, subsidiary legislation will continue to employ use-based categories, and, in practical terms, the erasure of these categories at "the highest level of law" may do little to shift the rhetorical focus of animal protection discourse.

IV. SPECIES-SPECIFIC PROTECTION

A second shift in animal protection law has departed from the use-based model by focusing on species—in particular "great ape" status—as an alternative basis for categorizing animal protection.[45] Unlike the generalized constitutional animal protections discussed above, the great ape rights movements rely upon "species" as the categorical basis for defining the beneficiaries and the protections it proposes.[46] This form of advocacy has focused on the unique qualities of great apes, in particular their intelligence, their emotional complexity and other "similarities" to humans, who are already included in the community of legal rights-bearers.[47]

A. The Great Ape Project

In 1993, the Great Ape Project was founded to advocate for the creation of a United Nations Declaration of the Rights of Great Apes, and the extension of basic rights to all great apes more generally.[48] The first basic right endorsed by the Great Ape Project was the right to life. Under this provision, great apes "may not be killed, except in very strictly defined circumstances, for example, self-defense."[49] The second

[45] Mark Beckoff, *Resisting Speciesism and Expanding the Community of Equals*, 48 BioScience 638, 638 (Aug. 1998).

[46] *Id.*

[47] Helene Guldberg, Spiked, *The Great Ape Debate: Comparing Primates to Humans Makes Apes of Us All*, http://www.spiked-online.com/articles/000000005549.htm (Mar. 29, 2010) (accessed Nov. 21, 2010).

[48] Apoorva Mandavilli, Discover, *Top 100 Stories of 2008: Spain Gives Great Apes Legal Rights*, http://discovermagazine.com/2009/jan/064 (Dec. 10, 2008) (accessed Nov. 21, 2010).

[49] *A Declaration on Great Apes*, in *The Great Ape Project*: *Equality Beyond Humanity* 4 (Paolo Cavalieri & Peter Singer eds., St. Martin's Press 1993).

right was the protection of individual liberty, which demanded that apes not be "arbitrarily deprived of their liberty; if they should be imprisoned without due legal process, they have the right to immediate release."[50] Finally, the Great Ape Project calls for a prohibition on the torture of great apes, stating categorically that "[t]he deliberate infliction of severe pain . . . either wantonly or for an alleged benefit to others, is regarded as torture, and is wrong."[51] This project and similar species-based advocacy for great apes has resonated with lawmakers around the world, apparently offering a workable alternative to use-based typologies. This Section will review some of the major examples of this phenomenon.

In New Zealand, great ape or "hominid" rights were submitted to Parliament as early as 1980.[52] The hominid rights proposed in New Zealand were similar to those enumerated by the Great Ape Project: the right not to be deprived of life, freedom from torture, and the right not to be subjected to experimentation where it is not in the best interests of the individual hominid.[53] In the end, only the last of these was adopted. Notably, however, the restrictions on experimentation were accompanied by an expansion of the law of standing to allow any individual to advance a claim on behalf of an ape whose rights had been violated under the new provisions.[54]

In 2007, the Parliament of the Balearic Islands, an autonomous region of Spain, approved a resolution granting legal rights to all great apes.[55] In 2008, the Spanish Parliament voted to extend legal rights to great apes through a non-binding declaration.[56] The proposal, introduced by the parliament's environmental committee, was supported by all of Spain's political parties. Spain was an unlikely candidate for the adoption of such an apparently radical form of animal protection. Many animal rights advocates were surprised to see Spain adopt such a position, particularly in light of the government's continued support of bullfighting in the face of vociferous opposition.[57] Others were surprised to see this development in Spain because Spain has no wild

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[50] *Id.* The proposed declaration also provides that apes that lack "the relevant capacity" to participate in their legal defense in such cases should be provided with an advocate.

[51] *Id.*

[52] Rowan Taylor, *A Step at a Time: New Zealand's Progress Toward Hominid Rights*, 7 Animal L. 35, 35 (2001).

[53] *Id.* at 37.

[54] Sigrid De Leo, European Vegetarian, *"Human Rights" for Monkeys in New Zealand*, Issue 1/2000 (available at http://www.euroveg.eu/evu/english/news/news001/greatapes.html (accessed Nov. 21, 2010)).

[55] Eoin O'Carroll, Christian Science Monitor, *Spain to Grant Some Human Rights to Apes*, http://www.csmonitor.com/Environment/Bright-Green/2008/0627/spain-to-grant-some-human-rights-to-apes (June 27, 2008) (accessed Nov. 21, 2010).

[56] *Id.*

[57] Thomas Catan, Times (London), *Apes Get Legal Rights in Spain, to Surprise of Bullfight Critics*, http://www.timesonline.co.uk/tol/news/world/europe/article4220884.ece (June 27, 2008) (accessed Nov. 21, 2010).

apes.[58] The resolution also passed in the heat of domestic political turmoil surrounding mounting fuel prices and economic decline, causing some commentators to question why this issue should have been a priority for parliament at the time.[59] As an editorial in a national newspaper noted, "With the problems that Spanish farmers and fishermen are experiencing, it is surprising that members of Congress should dedicate their efforts to trying to turn the country of bullfighting into the principal defender of the apes."[60]

Nonetheless, the Spanish government, following the Balearic Islands, has declared its support of the Great Ape Project. While the declaration is not in itself legally binding, the Spanish parliament has committed itself to the incorporation of this declaration into a range of existing legislation. Included among the proposed changes is a plan to outlaw the use of great apes in laboratory research.[61] Time magazine explains the implications of the proposal: "It makes the killing of an ape a crime and bans their use in medical experiments, circuses, films and television commercials."[62] The proposed law would also forbid private ownership of apes, and the 200 apes privately registered in Spain would be transferred to sanctuaries.[63] Zoos will be allowed to retain the 300 apes currently in their possession, but approximately 70% of the facilities where they are housed will likely be compelled to improve the apes' living conditions.[64]

Shortly after the decision in the Balearic Islands, judges in Austria heard a claim from a British woman, Paula Sibbe, seeking a declaration of legal "personhood" for a chimpanzee so that she might petition the courts for legal guardianship. The ape, named Hiasl, was housed at an animal sanctuary that was closing, and Sibbe hoped to prevent him from being sold to a zoo.[65] The Austrian courts were very resistant at first, threatening to dismiss the first barrister to argue the case for wasting court time.[66] But the claim has wound its way through the domestic courts, and Sibbe now plans to appeal the Austrian Supreme Court's rejection of her claim before the European

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[58] *Id.*

[59] *Id.*

[60] *Id.* (quoting an editorial in El Mundo, the Madrid daily newspaper).

[61] Martin Roberts, Reuters, *Spanish Parliament to Extend Rights to Apes*, http://www.reuters.com/article/scienceNews/idUSL256586320080625 (June 25, 2008) (accessed Nov. 21, 2010).

[62] Lisa Abend, Time, *In Spain, Human Rights for Apes*, http://www.time.com/time/world/article/0,8599,1824206,00.html?xid=feed-cnn-topics (July 18, 2008) (accessed Nov. 21, 2010).

[63] Thomas Rose, CBC News, *Going Ape over Human Rights*, http://www.cbc.ca/news/viewpoint/vp_rose/20070802.html (Aug. 2, 2007) (accessed Nov. 21, 2010).

[64] Roberts, *supra* n. 61.

[65] Tom Geoghegan, BBC News, *Should Apes Have Human Rights*, http://news.bbc.co.uk/2/hi/uk_news/magazine/6505691.stm (Mar. 29, 2007) (accessed Nov. 21, 2010).

[66] David Hill, Wiener Zeitung, *Brit Lady Saves Celebrity Chimp from the Circus*, http://www.wienerzeitung.at/DesktopDefault.aspx?TabID=4103&Alias=wzo&cob=366134 (Aug. 15, 2008) (accessed Nov. 21, 2010).

Court of Human Rights; the European Court has yet to release a decision on this question.[67]

In 2005, prosecutors from the Brazilian Environmental Department petitioned the courts for a *habeus corpus* order for a chimpanzee named Suica.[68] The petitioners argued that Suica was being caged in inhumane conditions, so severely confined that he was unable to move around, and they sought to have Suica moved to a sanctuary run by the Great Ape Project.[69] Surprised that the case was not dismissed at the outset, the zoo requested two consecutive 72-hour postponements.[70] During the second of these postponements, Suica "mysteriously died," even though the judge reported that he had covertly visited the zoo the previous weekend and found the animal to be in good health.[71] The judge, in dismissing the case on grounds of mootness, was emphatic nonetheless that "Criminal Procedural Law is not static, rather subject to constant changes, and new decisions have to adapt to new times. I believe that even with 'Suica's' death the matter will continue to be discussed, especially in Law school classes, as many colleagues, attorneys, students and entities have voiced their opinions . . . ."[72]

B. Great Ape or "Hominid" Rights: Theoretical Implications and Public Reactions

Unlike the generalized constitutional provisions discussed above, the ape rights paradigm offers us a new, species-based model for animal protection. The fundamental issue in determining the protection accorded to an animal is not, then, how we choose to use that animal, but rather the species classification of that animal. As the following review will show, this shift has attracted substantial commentary from critics and advocates. This Article will argue that the vigor and nature of these debates are themselves evidence that this form of advocacy has been successful—relative to the generalized constitutional advocacy discussed above—at destabilizing the use-based typologies that have long governed animal law.[73]

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[67] John Morris, Austrian Times, *What Do You Get If You Cross a Chimp with a Bodybuilder from Kent?*, http://www.AustrianTimes.at/index.php?id=10393 (June 1, 2009) (accessed Oct. 15, 2010).

[68] *Suica - Habeas Corpus*, 833085-3/2005, at ¶ 1 (9th Salvador Crim. Ct., Salvador, Bahia, Brazil Sept. 28, 2005) (available at http://www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm (accessed Nov. 21, 2010)).

[69] *Id.* at [¶ 2].

[70] *Id.* at [¶ 5].

[71] *Id.* at [¶¶ 5–6].

[72] *Id.* at [¶ 6].

[73] A focus on species as the relevant category in animal law does not, however, necessitate an elevated concern for animals. Controversial "breed-specific legislation" such as pit bull bans make the "type" of animal a categorical focus of laws that protect human interests, often with no regard for the needs or circumstances of the animals in issue. (The extent to which such laws actually protect human interests has itself attracted substantial debate, as discussed in the articles listed at the end of this note). It

One major criticism leveled at ape rights advocacy has come from animal rights and welfare advocates: the ape rights approach retains the "exceptionalist" focus of the traditional animal protection paradigm and merely seeks to extend (insufficiently) the circle of those deserving to be included in the exceptional category of rights-bearers. Much of the advocacy surrounding great ape rights has focused on the specific capacities of great apes. Ian Redmond of the United Nations' Great Ape Survival Project explains that "[a]pes are special because they are so closely related to us . . . . Chimpanzees and bonobos are our joint closest living relatives, differing by only one per cent of DNA—so close we could accept a blood transfusion or a kidney."[74] Steven Wise observes that great apes experience "practical autonomy," including the capacity for desire, to attempt to fulfill those desires, and self-awareness.[75] It is on this basis that Wise argues, "we must replace the legal *thinghood* of chimpanzees and bonobos with a legal *personhood* that immunizes them from serious infringements upon their bodily integrity and bodily liberty."[76]

Thus the Great Ape Project and similar movements retain much of the logic that has supported anthropocentric use-based models. One commentator, William Saletan, observes of appeals based on the intelligence and human-like qualities of apes, that

> These are appeals to discrimination, not universal equality. Most animals don't have a rich cultural life. They can't make tools. They don't teach languages. [Peter] Singer even points out that "chimpanzees, bonobos and gorillas have long-term relationships, not only between mothers and children, but also between unrelated apes." Special rights for animals in committed relationships! It sounds like a Moral Majority for vegans.

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is apparent that the great ape rights movements have done more than simply shift the "category" at issue: They have shifted the moral content of lawmaking to include a concern for animals. In this respect, these great ape rights movements may echo the ambitions of other rights and welfare movements (including the constitutional movements discussed above). The focus of this Article, however, is on the role of legal categorization in shaping paradigms for animal *protection* laws, and the ensuing discussion will focus on the implications of a species-focus from that perspective. For discussions of breed-specific legislation, see Devin Burnstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 Animal L. 313 (2004); Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems*, 27 Nova L. Rev. 415 (2002–2003); Safia Gray Hussain, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, 74 Fordham L. Rev. 2847 (2005–2006); Heather K. Pratt, *Canine Profiling: Does Breed-Specific Legislation Take a Bite out of Canine Crime?*, 108 Penn. St. L. Rev. 879 (2003–2004); Bernard E. Rollin, *Animal Ethics and Breed-Specific Legislation*, 5 J. Animal L. 1 (2009); Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. Rev. 839 (2009–2010).

74 Geoghegan, *supra* n. 65 (quoting Ian Redmond).

75 Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* 7 (Perseus Books 2002).

76 Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 267 (Perseus Books 2000).

> Opening your mind to science-based animal rights doesn't eliminate inequality. It just makes the inequality more scientific.[77]

Distressed at the exceptionalist focus of ape rights discourse, Saletan equates the ape rights movement to the "cruel finale" of George Orwell's Animal Farm: "'All animals are equal. But some animals are more equal than others.' That wasn't how the egalitarian uprising in the book was supposed to turn out. It wasn't how the animal rights movement was supposed to turn out, either."[78]

The Great Ape Project takes this criticism seriously, even including articles in the *Great Ape Project* book that defend this apparently contrary position. Steve Sapontzis, for example, argues that the focus on great apes is "morally objectionable," and that "[o]vercoming speciesism requires going beyond the modest extension of our moral horizons to include intellectually sophisticated, nonhuman animals . . . [i]t also requires recognising that the origin of value does not lie in anything that is human-like. . . ."[79]

Great Ape Standing and Personhood (GRASP), an organization with a mission similar to that of the Great Ape Project, includes on its website an article entitled *Does Nonhuman Ape Personhood Contradict Egalitarian Animal-Rights Principles? The Top Ten Questions*.[80] In this article, Lee Hall explains, "We understand and acknowledge that this incremental path to animal rights is imperfect; every example of the evolution of legal rights so far has been imperfect."[81] GRASP supports efforts for ape personhood since "any class of conscious beings that we can remove from property status should be removed as soon as possible."[82] In Hall's view, such change does not have to come at the expense of other nonhuman animals:

> If most people already accept that other ape communities are similar in many ways to ours, then starting with an ape case makes sense. It does *not* make sense to think that rights rules could be, for once, extended beyond humanity and then become a thicker wall than they are right now. The reverse is true; they'll become more flexible in a way humanity has never in legal history seen or allowed.[83]

Notably, some ape rights advocates are clear that their position is strategic. Some argue explicitly that the distancing of ape rights from "animal rights" more generally will make the position more publicly

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77 William Saletan, Slate, *Animal-Rights Farm: Ape Rights and the Myth of Animal Equality*, http://www.slate.com/id/2194568/ (July 1, 2008) (accessed Nov. 21, 2010).

78 *Id.*

79 Steve F. Sapontzis, *Aping Persons—Pro and Con*, in *The Great Ape Project*: *Equality Beyond Humanity* 269, 271 (Paolo Cavalieri & Peter Singer eds., St. Martin's Press 1993).

80 Lee Hall, Great Ape Standing & Personhood (GRASP), *Does Nonhuman Ape Personhood Contradict Egalitarian Animal-Rights Principles? The Top Ten Questions*, http://personhood.org/hierarchical/ (Jan. 2007) (accessed Nov. 21, 2010).

81 *Id.*

82 *Id.*

83 *Id.*

acceptable. Discussing the New Zealand context, Rowan Taylor argues that "Hominid rights are more likely to win acceptance if they are seen as applying only to beings like us and not as the 'thin end of the wedge' for the entire Animal Kingdom."[84] In Taylor's view, "When legal personhood for hominids is perceived, not as a valid end in itself, but as a Trojan Horse for animal rights in general, the distinctive merits of the hominids' case tend to get lost beneath the considerable baggage of the animal rights debate."[85] Similarly, Hall distinguishes GRASP's position from that of the Great Ape Project on the basis that, for GRASP, the decision to focus on apes is strategic.[86] While Great Ape Project advocates like Peter Singer are outspoken in claiming that intellectual capacity is morally relevant,[87] GRASP posits that its position is strategic, "based not on hierarchy (this is where we diverge from the Great Ape Project, or GAP), but on the reality that people already view other ape communities as clearly self-aware and as members of cultures."[88]

Despite this casting of "ape rights" as a more practical, less ideologically motivated approach, the ape rights movement has come under fire (and ridicule) by those who see its implications as deeply disruptive and threatening. Medical researchers, for example, have expressed concern that other animals will be granted similar rights, making animal experimentation impossible.[89] In an interview with the BBC, geneticist Steve Jones asked, "Where do you stop?"[90] He decries the application of human rights logic to species for which it was not designed, explaining that "[r]ights and responsibilities go together and I've yet to see a chimp imprisoned for stealing a banana because they don't have a moral sense of what's right and wrong. To give them rights is to give them something without asking for anything in return."[91] Still others challenge the factual foundation of the comparison between human and nonhuman apes, questioning the rigor of demonstrations of apes' capacities for language, abstract concepts, symbolic thought, or "self-awareness."[92] Beyond some domestic industry objections, constitutional animal protection has sparked little public debate. The intensity of the opposition to ape rights, however, suggests that opponents of animal protection take this incursion into the animals-as-property framework to be a more serious threat to the status quo.

Indeed, the shift from welfarism to "rights" that this project represents is significant in many accounts of this movement, both in those

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84 Taylor, *supra* n. 52, at 39.

85 *Id.* at 41.

86 Hall, *supra* n. 80.

87 *See* Saletan, *supra* n. 77 (stating that "Peter Singer . . . puts it this way: 'There is no sound moral reason why possession of basic rights should be limited to members of a particular species.'").

88 Hall, *supra* n. 80.

89 De Leo, *supra* n. 54.

90 Geoghegan, *supra* n. 65 (quoting Steve Jones).

91 *Id.*

92 Kenan Malik, *Man, Beast and Zombie: What Science Can and Cannot Tell Us about Human Nature* 214–17 (Weidenfeld & Nicolson 2000).

that support the project and in those that oppose it. It is arguable, however, that the "rights" framework does not flow necessarily from species-based distinctions. Just as the generalized constitutional provisions might have—but have not—deployed a rights framework rather than a welfarist framework, species-specific protections do not necessarily depend upon a rights approach, but might also be deployed in the service of a welfarist agenda. More likely, however, a species-based approach makes "rights" possible in a way that generalized protections do not. Discussing what the law can and should do to protect a particular species invites inquiry into what that animal is like, what it needs, and even what it should be guaranteed, in a way that general protections for all animals do not.

V. CONCLUSION

This Article has examined animal protection movements and measures that have, in different ways, challenged the animals-as-property paradigm and the human-use-based animal protection laws that have emerged from it. The focus of this discussion has been the theoretical ramifications of these frameworks, and how shifts in categorization might serve to change the lens through which humans understand their responsibilities toward other animals. The constitutional protections studied here have treated "animals" as a monolithic category, offering protection without regard to human use; in doing so, however, they have not offered an alternative model, and the underlying human-use model has continued to dominate animal protection even in the wake of these constitutional changes.

While the constitutional amendments described above received some public attention, the discussion was unmatched by the vigorous and emotional debate that arose in response to extension of rights to great apes. The great apes rights movement has offered an alternative paradigm, implicitly encouraging recognition of "species" distinction (rather than human-use) as the relevant category in animal protection law. Although criticized for retaining aspects of the hierarchical framing of the human-use typologies model, great ape rights have clearly been understood by a broader audience as challenging (or threatening) this traditional paradigm.

The international conversation in response to constitutional animal protection provisions has, with few exceptions, been limited to law reviews and to sociological study of the movements involved.[93] As the foregoing discussion has shown, however, the movement for ape rights has spurred debate within the animal rights community and among the broader public. The discussion above has included references to articles and commentary from the BBC, the CBC, Time, Slate,

[93] *See e.g.* Evans, *supra* n. 24 (describing the social movements leading to constitutional animal protection provisions in Germany and Switzerland); *see also* Nattrass, *supra* n. 25 (tracing the social movements culminating in Germany's 2002 constitutional amendment, which provides protections to animals).

and other major media outlets. The New York Times notes that even Stephen Colbert has weighed in: "The comedian Stephen Colbert—flashing a photo of a performing chimpanzee—insisted that the new law had better not give apes 'the right to not wear a tuxedo and roller skates.'"[94]

In both cases, the immediate impact of these provisions depends upon the strength of the underlying legislative regimes governing the implementation of these theoretical shifts. Where apes have been granted rights, however, the rhetorical shift has caused remarkable response, with much of the response focused on the underlying theories represented by different positions on the issue. Critics of ape rights are correct to note that these models retain the hierarchy of human-centered paradigms. I argue, however, that even as they retain these structures, apes' rights models spark a debate that throws them into question. Discussions around the extension of rights compel humans to question why and where we draw these lines. This discussion has been able to capture the public imagination and spark judicial and legislative change in a way that generalized constitutional provisions have not. Perhaps more importantly, it is the very discussion that is required in order to liberate animal law from the practical constraints and ideological limitations of use-based typologies.

[94] Adam Cohen, *What's Next in the Law? The Unalienable Rights of Chimps*, N.Y. Times A16 (July 14, 2008) (available at http://www.nytimes.com/2008/07/14/opinion/14mon4.html (accessed Nov. 21, 2010)).