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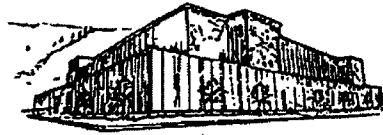
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Welfare Interests and Legal Rights for Non-Human Animals

by

Jonathan M. Morgan

B.A. University of Wisconsin-Stevens Point, 1999

presented in partial fulfillment of the requirements

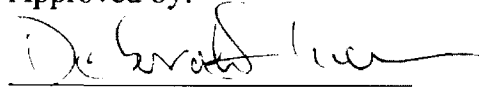
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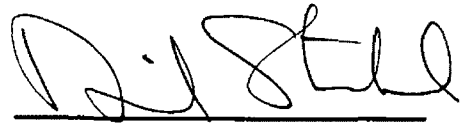
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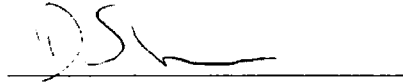
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Welfare Interests and Legal Rights for Non-Human Animals

Chairperson: Deborah Slicer



There is a concept of environmental interests that, while at work in discussions among environmentalists, does not enjoy the same force and articulation in the legal system as anthropocentric environmental interests. This is the idea that the environment itself or specific members of the environment have interests that demand our attention and respect. Such an attitude of respect would then entail that these nonhuman entities ought to enjoy some measure of legal protection. But, notions such as giving nonhuman animals legal standing have not yet proven wildly successful.

The main focus of this paper is to begin to parse out what it means for an individual to have an interest, specifically, to have a welfare interest. Once we begin to understand what it means for an individual to have an interest that is necessary for its welfare, we can begin the process of deciding how such interests can and will be protected. This is, I think, a different approach to legal rights for non-human animals than more commonly argued positions advocating consistent rights for individuals with similar or compatible capabilities. Rather than focus on what individuals can and cannot do, how individuals measure up against the capabilities of the typical human, we can look to the welfare interests of individuals. When we recognize that human and nonhuman animals both have welfare interests that can be equally intruded upon we recognize that all such individuals can make the same claims for protection.

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I need to thank my parents, who helped me keep my immediate worries, stresses, and doubts in perspective. They were both always there to remind me of all the good things in my life now and down the road. I am fortunate to have parents who have been so supportive of me.

I also want to thank Mark Phares. Mark was always willing to give of his free time to help steer my own research in a useful direction. Mark let me make use of the thesis he wrote for his LLM in Environmental Law. This was a wonderful starting point that introduced me to environmental law and pointed me to some great cases. I would probably still be writing this thesis right now if it was not for his help and guidance.

Finally, I want to thank my thesis committee for their interest and input during this process. Professor Deborah Slicer was a tremendous help in focusing my research and writing. Beyond this thesis, she also helped me gain confidence in the classroom through her encouragement. Professor Tom Huff was always willing to take time out and help me work through the legal issues I dealt with in this paper. Professor Alan McQuillan really helped me develop my ideas by offering perspectives that I had not even considered. This was invaluable in helping me clarify my own thoughts.

There are many more people who have helped me along the way, more people than there is space in this acknowledgment. I wanted to take this opportunity to say thank you to everyone who has helped and supported me. Although their names do not, unfortunately, show up on the diploma at the end, I am thinking of all of them and am grateful for all they have given me.

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Introduction

The notion of environmental interest means different things to different people. All of us have interests in the environment that are related to our own well-being. I have an interest in the cleanliness of the air I breathe and the water I drink. It is these environmental interests that have found their way into our legal system. Local, state, and federal regulations prohibit certain acts against the environment because of the damaging effects such acts can have on the people who live in and are affected by the environment. Environmental and animal law also goes to the point of protecting the property interests and rights we have in these objects. We can call these interests anthropocentric interests because they have human concerns as their foundation.

There is still another concept of environmental interests that, while at work in discussions among environmentalists, does not enjoy the same force and articulation in the legal system as anthropocentric environmental interests. This is the idea that the environment itself or specific members of the environment have interests that demand our attention and respect. Such an attitude of respect¹ would then entail that these nonhuman entities ought to enjoy some

¹ Paul W. Taylor, *Respect for Nature* (Princeton: Princeton University Press, 1986), pp. 81-85. Briefly, to have a respect for nature implies that one have the dispositions to regard all living things as having inherent worth, preserve an entity's existence as a part of nature, refrain from actions because they are harmful to entities, and feel pleased about any occurrence that is expected to maintain in existence the Earth's wild communities of life. We show genuine respect when we act or decline to act out of consideration and concern for the good of wild living things.

measure of legal protection. But, such notions as giving nonhuman animals legal standing have not yet proven wildly successful.² It seems that some animals, at least, deserve their own protection, much like our own protection of basic human rights. I do not think, however, we can make a blanket statement of absolute legal rights for all nonhuman animals. In other words, there will be cases, such as species preservation, where individuals will be sacrificed for the sake of the survival of a species. The survival of endangered tropical birds, for example, might necessitate the removal (by killing if necessary) of wild goat and sheep populations that threaten the birds' habitat.³ There are also cases where such a sacrifice will be inappropriate. The most readily available examples of this might be found where animals are used to satisfy a human desire for fashion (such as wearing furs) or when habitat is destroyed to make room for unnecessary human development.

Chapter One of my thesis outlines what it means for nonhuman living entities to have an interest and why they are deserving of our moral consideration. In Chapter Two I will discuss the extent to which environmental and animal law and policy have ignored these interests. Chapter Three will highlight the tension that will need to be addressed between protecting the interests of the individual and our desire to protect endangered species and threatened ecosystems. In Chapter Four I will propose that our legal system, which has mainly been used to ensure the protection of human interests as its

² See Christopher D. Stone, *Should Trees Have Standing?* (Los Altos, William Kaufmann, Inc., 1974).

³ *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985 (1979), *Palila v. Hawaii Dept. of Land and Natural Resources*, 649 F. Supp. 1070 (D. Hawaii 1986), *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir., 1988).

primary target, does contain principles that can be extended to protect all individuals with interests. Finally I will propose a method by which we can begin to redraw the line between rights holders and non-rights holders in hopes of including some nonhuman animals and their interests into the group of rights holders.

Chapter One

The Concept of Interests in the Environment

What does it mean for something to have an interest? To ask a simpler question, what does it mean for someone, some person, to have an interest? One way to answer this question is to look at what the person is consciously interested in. What does she like to do, what does she not like to do? What someone is interested in will be reflected by the subjective values she expresses. For example, Steve may be interested in spending his free time in front of the television, while Sally shows a great interest in reading about contemporary art forms. We may say, in other words, that Steve likes to watch television and Sally likes to read about art.

We can also look at the term “interest” in another sense. Instead of asking what Steve and Sally are interested in, we ask what is in Sally and Steve’s best interest. Arguably, some of the things we are interested in (things we like) are not the same as those things that are in our best interest. We say that some activities or circumstances are objectively better for us than others. A general guide for this type of judgment may follow along the lines of whatever tends to enhance or secure our well-being, our flourishing, may be thought of as good for us, i.e. in our interest. Conversely, whatever tends to hurt or endanger our well-being can be said to be harmful for us, i.e. not in our interest.⁴ We are now able to judge our likes and dislikes as objectively better or worse, as well as the

⁴ Tom Regan, *The Case For Animal Rights* (Berkeley: University of California Press, 1983), pp. 87-88. Regan makes the distinction between welfare-interests and preference-interests; a difference between what is conducive to our well-being and what we prefer.

circumstance and environment in which we live. It makes sense to say that some living conditions and lifestyles are better for us than others.

The discussion of what constitutes the good life is not the focus of this paper. One might argue that passing judgment on what is in a person's best interest is a dangerous, if not inappropriate, task. We run the risk of not looking to what is really in that individual's best interest; rather, we simply impose what we think is best for us onto others. In attempting to secure another's well being, we do not leave it to the individual to define what constitutes his or her good for him or herself. Despite these objections we can look to certain conditions as better for us than others because they provide us the opportunity to freely search out and express whatever we may find to be a good, worthwhile life. A circumstance where we are unwillingly under constant threat of injury or death can be thought of as not in our interest, whatever we may consider to be the good life. We would not, in such circumstances, be free to seek out and live a life of our own free choosing.⁵ Great care would need to be taken in such an exercise that we maintain a certain level of modesty. Modesty will allow us to focus on what, as best as we can tell, what might be in *another's* best interest, and not merely impose our own values and desires—values and desires we think are correct, in part, because we happen to have them—on other individuals.

⁵ Taylor, *Respect For Nature*, pp. 107-108. Taylor finds such limitations to be the result of internal and external constraints placed upon us. He classifies four types of constraints: (i) external positive – being physically harmed, locked in a cage; (ii) internal positive – compulsions, uncontrollable cravings and desires; (iii) external negative - lack of money, food, shelter; (iv) internal negative – lack of knowledge, lack of health, physical and mental disabilities. Any or all of these constraints result in a loss of freedom, a loss of the ability to live one's life freely.

We are now, I think, in a position to approach the idea of the interests of the nonhuman environment. It would be inappropriate, outside of a few specific cases perhaps, to say that nonhuman individuals are interested in certain things.

They do not have interests because they are not interested in, do not care about, what happens to them. They can experience neither satisfaction nor dissatisfaction, neither fulfillment nor frustration. Such entities are all those living things that lack consciousness or, if conscious, lack the ability to make choices among alternatives confronting them.⁶

Despite a creature's lack of *interest in* something, we can still say that there are certain things and conditions that are in its best interest. What is in our (or any living organism's) objective interest can be independent of our (or any living organism's) subjective interests.⁷

How might one, as an example, come to determine what is in a chimpanzee's best interest? It seems that we can begin to approximate what might be in another's best interest. While we may never develop a full understanding of some of the quality of life issues for another individual, we can, if we take a modest approach, begin to form an understanding of what might be in another's best interest. We can observe the animal and determine that there are certain nutrition requirements and environmental conditions that favor its well-being.⁸ We also see there are conditions that hamper, if not end, the growth and

⁶ *Id.*, p.63.

⁷ Only the well-being, or interests, of living things will concern us. Non-living things, like sand dunes, mountain ranges, or even my car, cannot have a well-being of their own. It is good to change the oil in my car only because the car will serve my own purposes better if it is well maintained. The same can be said for natural non-living things. It may be good not to pollute mountain ranges or rivers, but not in the sense that mountain ranges and rivers have a good of their own that can be furthered or hampered. The plants and animals that live in those environments can be benefited or harmed, so we look to their interests when we say that air, land, and water pollution are bad for the environment. See Taylor, p. 61.

⁸ Determining the nutritional and environmental needs might be the simplest task regarding welfare interests. Determining things that would lead to a fulfilling life would be much more difficult. Is a bear as happy in a zoo as in the wilderness? My guess is probably not. These quality of life issues will never be easily determined, but I think we can begin to make informed guesses. Here again, we would need to make

flourishing of the animal.⁹ So even though the chimpanzee, or bear, or fish, or tree may not, or cannot, consciously care what happens to themselves, we recognize conditions that are objectively better for their flourishing.¹⁰ We can “without a trace of anthropomorphism, make a factually informed and objective judgment regarding what is desirable or undesirable (from a nonhuman living thing’s) standpoint.”¹¹

In this chapter I have begun to address what it means for living things to have an interest. We see that there are two different types of interests an individual may have. Welfare interests are those things that are objectively better or worse for us. A clean (not polluted) and safe environment would fall into this category. Preference interests such as my like of one sports team and dislike of another, represents the second type of interests. While most humans have both welfare and preference interests, the same cannot be said for other living individuals. Some animals may not have the ability to exercise choice over what they do and do not prefer.¹² The same can be said for the plant kingdom. But we also notice that an individual’s inability to have preference interests does not diminish the welfare interests it has. In the next chapter I will focus on how the law, animal law specifically, has dealt with and continues to deal with the welfare interests of nonhuman animals.

sure we do not simply transplant our own desires onto another individual. We would need to make sure we are focusing what is in the other’s best interest.

⁹ In the case of the chimpanzee and other higher mammals we can see fairly easily that these individuals suffer, suffer as any human would, when placed in conditions at odds to their well-being.

¹⁰ These individuals might, in fact, have a conscious sense of what benefits them or not. But even if they do not have such a sense, we can still recognize conditions that contribute to their own flourishing.

¹¹ Taylor., p. 67.

¹² Although it may be the case that many animals can exercise choice if given the opportunity, although they may not reason through the choice in the same way a human might.

Chapter Two

Animal Law as it Stands

Perhaps the primary source for articulating the interests or well-being of the environment itself is Christopher Stone's essay *Should Trees Have Standing*. Stone submits that concerned and qualified individuals or groups of individuals ought to be appointed as guardians to voice the concerns and interests of the environment itself before the court. These interests can be found in the "needs" and "wants" of the natural environment.¹³

I am sure I can judge . . . when my lawn wants (needs) water . . . The lawn tells me that it wants water by a certain dryness of the blades and soil—immediately obvious to the touch—the appearance of bald spots, yellowing, and a lack of springiness after being walked on . . . For similar reasons, the guardian attorney for a smog-endangered stand of pines could venture with more confidence that his client wants the smog stopped.¹⁴

Stone finds the greatest obstacle to environmental protection for the sake of the environment itself to be nonhuman objects' failure to fulfill several requirements as a traditional bearer of legal rights. First, an object cannot be the holder of legal rights until some authoritative body is willing to confer those rights upon it. Second, to be a holder of rights, the thing in question must be able to institute legal actions at its behest. Third, the court must take the thing's injury into account when granting legal relief. Finally, the relief must be able to be applied to the thing itself.¹⁵

In the face of these requirements we see how and to what end environmental law is applied. When a stream is polluted, any repayment for

¹³ See pp. 4-6 *Supra*

¹⁴ Stone, pp. 18-19.

damages is given to those people whose interests are affected. The damages to living creatures in the stream is not at issue before the court, rather the damages to "a lower riparian—another human being—able to show an invasion of *his* rights."¹⁶ A further consequence of balancing the right to use clean water and the responsibility of polluters is that no legal action may ever be levied.

Consider, for example, that while the polluter might be injuring 100 downstream riparians \$10,000 a year *in the aggregate*, each riparian separately might be suffering injury only to the extent of \$100—possibly not enough for any one of them to want to press suit by himself, or even to go to the trouble and cost of securing co-plaintiffs to make it worth everyone's while.¹⁷

Even if the polluter is forced into a situation where he or she is forced to pay some amount of damages, there may also be a cost of introducing new technology to clean up and stop pollution. If this remediating cost is more than the polluter would face in fines and damages, the polluter "might prefer to pay off the damages (i.e. the legally cognizable damages) and continue to pollute the stream."¹⁸ This can be viewed as the classic algebraic formula to identify cost effective protections from harm, articulated by Judge Learned Hand. The formula, spelled out $B < PL$, says that when the probability of harm (P) multiplied by the gravity of the potential harm (L) outweighs the burden of employing protections (B), those protections ought to be employed. When the burden of protection outweighs the probability of harm multiplied by the gravity of harm, we are justified in not taking the burden of precaution. Judge Hand did note, however, that this calculation was not the only way we determine what precautions to take. It was but one of many factors that are taken into account.

¹⁵ Ibid., pp. 11-12.

¹⁶ Ibid., p. 12.

¹⁷ Ibid., p. 13.

In the case of animal suffering, Gary Francione points out that the vast majority of anticruelty statutes forbid “unnecessary” and “cruel” punishment. But the terms “unnecessary” and “cruel” are not defined by some moral sense, but by the legitimacy of the use to which the animals are put.¹⁹ Therefore, the slaughter of animals for food, an act that seems to be a cruel procedure (especially to anyone who has first hand witness to factory farms and slaughterhouses), or the use of animals in painful experimentation are not deemed “cruel” or “unnecessary” under anticruelty statutes. These acts, as oblivious as they may be to the animals’ interests, do not count as wasting of animal property, and thus do not count as an infringement of anti-cruelty statutes.²⁰ Current animal law, which views animals primarily as property, was developed to ensure that animals, as an economic resource, would not be wasted. There is a sense in the law to protect animals from suffering, but only that which is unnecessary. Animals seem to play this dual role as individuals that ought not be treated cruelly, yet still be treated as property. Furthermore, it is the individual, not the state, who will ultimately determine how much she values her property.²¹ Only the most gratuitous cases of animal abuse will find their way before a court.

McDonald’s has recently taken steps to ensure more humane treatment for its egg supplying chickens, thus avoiding any “cruel” or “unnecessary” suffering that might be encountered on chicken farms. Chicken farmers must now comply with a new list of guidelines concerning the humane treatment of

¹⁸ *Ibid.*, p. 15.

¹⁹ Gary L. Francione, *Animals, Property, and the Law* (Philadelphia, PA: Temple University Press, 1995), p. 29.

²⁰ *Id.*, pp. 119-133.

their animals if they want to sell eggs to McDonald's. Among new additions to the menu: a reduction of crowding of hens in the 20" x 19" cages from eight birds per cage to four or five, snipping only the tip of the bird's beak rather than cutting off the entire beak, and an end to the practice of forced molting, of starving the hens and then reintroducing food so as to hotwire the birds to lay an abnormally high number of eggs.²² It should be noted that the law required none of these improvements for the chickens' welfare. Had McDonald's continued to purchase eggs from suppliers that practiced forced molting, beak removal, and overcrowding of cages, the fast food company would not have broken any laws.

A more common occurrence of animal cruelty finding its way into the courts is when one person takes the property of another. I am legally protected when I willfully harm my own dog in the hopes of housebreaking it.²³ I cannot do the same thing to my neighbor's dog without consent. I am protected, however, when I harm or kill an animal in an attempt to protect my own property.²⁴ In such a case where the willful harming or killing of another's animal cannot be justified through the protection of people or property, the owner can recover only the actual economic value of the animal. Any other reparations made to the owner might come through the tort of negligent infliction of emotional distress, the tort of intentional infliction of emotional distress, or by addressing emotional distress as

²¹ *Id.*, pp. 40,45

²² *All Things Considered*, National Public Radio News, April 15, 2002.

²³ *State v Fowler*, 205 S.E.2d 740 (N.C. Ct. App. 1974), See also Francione p.136.

²⁴ *State v Jones*, 625 F.2d 503. See also Francione, p.126.

part of a punitive damage award.²⁵ In any case, any legal remedy that might be required goes to the owner of the animal property, not the animal itself.

I do not raise this point to say that this issue of how to adequately repay damages does not occur when humans are harmed or killed through another's negligence or willful intent of harm. Rather, I want to highlight the fact that the root of most anticruelty law is the satisfaction of property interests humans have in the nonhuman animals that they own. Many anticruelty statutes contain broad exemptions that allow for actions of which society has traditionally approved. Thus we see the practice of hunting, fishing, and biomedical research involving animals as outside the realm of anti-cruelty statutes. These statutes also allow for instances of cruelty that are deemed necessary for the full use of the property, as in the case of violently housebreaking or training pets. Finally, the relatively minor penalties imposed on those who are found guilty of breaching anti-cruelty statutes do not carry the same force as the penalties that would be handed out for similar actions taken on another human.²⁶ Oftentimes the maximum fine imposed for violating anticruelty statutes is \$1,000 and a prison term no longer than one year. Rarely are prison terms handed out and the monetary fine is often well below the maximum amount possible.²⁷ A promising sign is found in those states that have sought to impose higher penalties on those who are found guilty of breaking anticruelty statutes. Breaking anticruelty statutes in California can mean a \$20,000 fine, a felony conviction, and one year in prison.²⁸

²⁵ Francione pp. 57-60.

²⁶ *Id.*, p. 134.

²⁷ *Id.*, p. 156.

²⁸ CA Penal Code § 597, cited in Francione p.156, n.130.

Wisconsin is not far behind with a possible \$10,000 fine and two years in prison.²⁹

The above analysis offers evidence that the environment itself is always in danger of being harmed if its well-being resides solely in the changing wants, needs, desires, and interests of people. This problem is intensified when humans who wish to engage in the cruel or negligent treatment of animals, for example, face no legislatively or judicially imposed duty or sanction to not take part in such acts.

Stone specifically takes issue with an entity's voicelessness as a sufficient reason to deny it legal standing.

It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can States, estates, infants, incompetents, municipalities or universities. Lawyers speak for them as they customarily do for the ordinary citizen with legal problems.³⁰

Stone points out that voiceless legal entities still have interests that are given legal force when advocates, such as lawyers, are allowed to speak up for them. A good deal of Stone's argument for the legal standing of the environment and its interests centers on examples of persons who are not normally functional or of artificial persons and the current standing that they have before the court. Those who, because of sickness, age, injury, or a combination of these factors, have been left in a vegetative state, for example, still retain legal rights even though we may no longer consider them to be "persons" in the fullest sense of the word. We appoint guardians for these individuals whose job will be to ensure that their

²⁹ WI Stat. Ann. § 951.18, cited in Francione p.156, n.131.

³⁰ Francione., p. 17.

wishes be followed. These interests range from orders regarding the use of life support to the execution of their will after death. Some legal entities are nonpersons in the sense that they never have been, nor ever will be, a person. Corporations and businesses are the most ready example of this type of rights holder. A company, for example, may hold certain property or patent rights.

Stone finds the guardianship of corporations and other not fully functional persons to be good evidence that we can similarly act as a legal advocate for those voiceless members of the environment who have welfare interests that require legal protection. If we afford certain legal rights to vegetative humans and persons stricken with mental illness, we ought to be able to extend some rights, but maybe not all of the responsibilities, to the rest of the nonhuman natural world. Acknowledging the welfare interest found in nonhuman animals is similar to acknowledging welfare interests in voiceless humans.

I think we can go beyond the corporate standing analogy to make an argument for limits on human use of the environment, specifically, the use of nonhuman animals primarily as a means of furthering some human end. The corporate standing analogy alone, it seems to me, is open to the objection that such entities ultimately have the interests (and therefore rights) of persons as their foundation (for corporations we look to the rights of its shareholders, the individual in the vegetative state made requests regarding life support when he/she was a fully competent person). Stone's corporate standing analogy seems as if it is plagued by the same shortcomings he finds in current

environmental law, namely that environmental law is written primarily to protect human interests.

It would be a difficult argument to make that legal entities such as corporations are anything more than legal constructs. Any legal rights a corporation may have are rights ultimately founded upon some individual human interest. The company itself has no well-being of its own that must be respected. "No law prohibits the death or dismemberment of corporations on the basis of their intrinsic 'right to life.' No jurisprudence rationalizes the validity of corporate law in terms of 'just' propitiation of the endogenous needs or wants of corporate entities."³¹

Legislators, lawyers, and even courts can act as a guardian of the environment itself as Stone has suggested. But we see that they are not guardians in the same sense that a corporate lawyer, as an example, may be. Instead of representing nonpersons, such as a corporation or business, with the ultimate intent of furthering some human desire, such as the desire of shareholders to make money on their investment, they would directly address issues of harm to the environment itself.

Stone does raise an important point regarding how and to whom (or what) we will confer legal protection. Public opinion may run strong against protections offered to nonhuman individuals or species that serve relatively little use to us or even to the surrounding environment. Such opposition can be especially strong when peoples' livelihoods are about to be placed on the negotiating table. So it

³¹ Laurence Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 *Yale Law Journal* 1342-1343 (1974).

might make sense to start the process of recognizing environmental interests by appealing first to individuals or species that we can easily and readily empathize with. Easily recognizable images of popular animals have helped move environmental protection legislation through Congress. "The Endangered Species Act was sold on the passionate images of large and breathtaking wildlife."³² This might be just the first step towards expanding legal protection to take into account the interests nonhuman animals have in themselves. And, like most first steps, it must be small. Of course such a strategy would require that, for the meantime at least, some individuals with interests of their own would go unrecognized in the course of legal protections. This would pose, perhaps, the greatest problem for those arguing that we must protect the interests of the individual rather than what is best for the community. For example, what do we do when faced with the interest of one elk to survive versus ensuring a healthy herd, even if it requires that some weak or sick individuals be sacrificed? If one holds that all individuals who have welfare interests that can be furthered or hampered are equal in the eyes of the law, one presumably would be unwilling to trade one of these individuals we do not readily empathize with for another individual with whom we can.³³

One might be led to ask why the task of ensuring protection for the environment itself is so difficult; why is there an unwillingness to grant the environment itself legal standing? Why might Stone's strategy of first protecting

³² Shannon Peterson *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*. 29 *Environmental Law* Northwestern School of Law of Lewis & Clark College 463 (Summer 1999).

more popular and grand nonhuman animals be the safest bet, strategically speaking, when we want to protect the environment itself? What ideology lies behind “[t]he widely held view that law exists for the purpose of ordering human societies, and for that purpose alone . . . ?”³⁴

The answer to this question, I think, is found in the longstanding tradition of viewing the nonhuman natural world primarily in terms of human self-interest. This is the ideology that buttresses the view of untapped natural resources (downed trees, undammed rivers, increasing big game populations) as resources left to waste. One strong theme in Locke’s philosophy concerning ownership of property is that land ought not to be left idle. We see the impetus for labor as a command from God. “God gave the world to men in common; but since He gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed He meant that it should always remain common and uncultivated.”³⁵ God gave us the land for our use, so we ought to use it. Early Americans viewed lands inhabited by native tribes as land going to waste. Even Henry David Thoreau was not convinced that native tribes could make the best use of the land, remarking in his essay “Walking,” “I think that the farmer displaces the Indian even because he redeems the meadow, and so makes himself stronger and in some respects more natural.”³⁶ European settlers were not stealing land from its original inhabitants. Rather, the removal of native

³³ Stephen M. Wise, *Thunder Without Rain: A Review of Gary L. Francione’s Rain Without Thunder: The Ideology of the Animal Rights Movement*, 3 *Animal Law* 52-53 (1997).

³⁴ Tribe, *Ways Not To Think About Plastic Trees* . . . at 1329.

³⁵ John Locke, “The Creation of Property.” *The Environmental Ethics & Policy Book Second Edition*, edited by Donald VanDeVeer and Christine Pierce (Belmont, CA: Wadsworth Publishing Company, 1998) p. 364.

peoples made way for the American fulfillment of God's plan for His creation.

Native Tribes stood in the way of American progress.

Such an outlook will distort our view of the natural world and any sense of obligation we may feel towards it. As a matter of political and legal reality, one might couch feelings of obligation toward the natural world in terms of self-interest.³⁷ Instead of preserving wetlands habitat for its own sake, one might face a greater chance of success as a proponent of wetlands preservation advocating the benefits (clean water, pretty views) the environment can provide to humans.

Affording legal rights to endangered species and threatened wilderness areas might thus be regarded as a convenient technique for concentrating congeries of otherwise diffuse aesthetic and ecological concerns ultimately reducible to human interest—in other words, as a useful but quite transparent legal fiction.³⁸

The long-term effect of such a strategy is that environmental values will be forgotten in favor of anthropocentric values.³⁹ The value of the wetland, and the anthropocentric interests it satisfies, will ultimately need to be compared to other interests that might be satisfied by the use of that land, such as the interest of more land open to commercial development. To help in such a weighing of values, both interests would need to be reduced to some common unit of measurement, such as dollar value.⁴⁰ Thus environmental protection is reduced to the amount of preference satisfaction it may provide us. Such an approach would lead us to the conclusion that

³⁶ Henry David Thoreau, "Walking," *The Portable Thoreau*, edited by Carl Bode (New York, NY: Penguin Books, 1977) p. 614.

³⁷ Tribe, *Ways Not To Think About Plastic Trees* . . . at 1331.

³⁸ *Id.*, p. 1343.

³⁹ *Id.*, p. 1331.

. . . [a]nything that is valued instrumentally and in comparison to the instrumental value derived from other things can in principle be handled by economics, be it acts of friendship or love or wilderness recreation, aesthetics, levels of species preservation, or bequests of natural resources to future generation.⁴¹

Even though society has not yet witnessed a shift away from popular use-orientated attitudes toward the rest of the natural world, those who press for the legal protection of environmental interests still have hope of success. There may be room in legal institutions for a shifting social conscience to help shape the legal institutions themselves. During capital cases, for example, the Supreme Court has insisted that juries “be composed in such a way as to reflect (more immediately than legislatures ever could) shifting public attitudes toward the penalty of death.”⁴² The Court held that “a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of death.”⁴³ The decision, the use of capital punishment in this case, is too important to ignore shifting public attitudes. Our legal framework can and has adapted to social change. Evolving social standards have been reflected in the legal system through liberation movements, pressing the rights of African Americans, women, and children in the court of law.⁴⁴ Most recently the “evolving social standard” has led the Supreme Court to rule the execution of mentally retarded individuals to be cruel and unusual, and therefore

⁴⁰ *Id.*, pp. 1331-1332.

⁴¹ Steven F. Edwards, “In Defense of Environmental Economics” *Environmental Ethics, Divergence and Convergence*, edited by Susan J. Armstrong and Richard G. Botzler (New York: McGraw Hill, Inc., 1993) pp. 233-234.

⁴² Laurence Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature’s Future*. 84 *Yale Law Journal* 545, 553 (1975).

⁴³ *Witherspoon v. Illinois* 391 U.S. 510, 519 (1968).

unconstitutional.⁴⁵ This is not to say that judges must only look to current public sentiment when deciding cases. Rather, the moral pulse of the community can serve as one of the factors that inform how legal principles are determined.

In this chapter I have shown that animal law has traditionally not gone to the point of protecting the welfare interests of nonhuman animals as its primary purpose. Rather animal law is more concerned with the interests humans have in nonhuman animals as property. Often times this will mean preference interests of humans will trump the welfare interests of nonhuman animals. Such a misdirection of animal law can be traced to nonhuman animals' voicelessness in our legal system as well as traditional western views of the natural world as primarily (or only) a cache of resources for our use. Such an outlook towards nonhuman animals leads to our most dedicated protections of those species which we prefer to see untouched. We prefer to see (and hear) majestic wolves. We care very little for their smaller cousins, the coyote. If we are to break away from saving only charismatic megafauna there needs to be a legal recognition of the welfare interests of all nonhuman animals.

In the next chapter I will address how the welfare interests of nonhuman animals weigh in against what is good for the entire species or ecosystem.

⁴⁴ Tribe, *Ways Not To Think About Plastic Trees* . . . at 1345.

⁴⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

Chapter Three

Ecosystem v. Individual Interests

The purpose of this paper is not to give a full account of the debate between those who propose an environmental ethic focused on species or ecosystems and those who favor an ethic that looks to the interests of individuals. But, if we are to look at how environmental interests, and more specifically nonhuman animal interests, might be articulated in the legal system, we must first make a distinction (as general as it may be) between what, or whose, interests we seek to protect. Where one comes down on the debate between an ethic of environmental stability verses an ethic of respect for individuals can, I think, affect how one would conceive of legal consideration for the environment itself.

We have two options to choose from when we are called on to determine where the interests of the environment rest. The first of the options is to say that the interests of the environment rest, ultimately, in the environmental community itself. We ought to use some sort of utilitarian calculus when speaking and acting on behalf of the environment. We may look, for example, to what is in the best interest (what is objectively good for) the grizzly bear species. We may even take a more focused view and look to what is in the interest of the grizzly bear population in the United States, or even specifically in Montana. We can also look past the parameters of individual species and look to what is good for the entire ecosystem. We can ask ourselves what is good for ecosystems in Glacier National Park. Or, we might take a more grand view and ask what is good for the biosphere, for the planet as a whole.

The importance and value of species and ecosystems is, I think, readily apparent in policy decisions concerning the environment. Looking to the good of the species and the ecosystem as a whole is where the strongest piece of environmental protection legislation, the Endangered Species Act (ESA), takes aim. The ESA looks for survival of species and biodiversity for present and future humankind as its mission statement. In *TVA v. Hill*, the Supreme Court upheld limitations imposed on resource use by the ESA in an attempt to “halt and reverse the trend toward species extinction – whatever the cost.”⁴⁶ The Court highlighted the fact that during the development of the ESA, “Senators and Congressmen uniformly deplored the irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear.”⁴⁷ The Court justified halting the completion of a multi-million dollar dam by looking back to the intent of Congress in passing the ESA.

One might dispute the applicability of [preserving grizzly bear populations in Yellowstone Park] to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered Species Act nor Article III of the Constitution provides federal courts with the authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endanger species as “incalculable.”⁴⁸

Most people, I think, want to see natural habitats flourish. Part of the allure of wild places is their relatively untouched and pristine ecosystems. A more basic concern for the well-being of ecosystems is that our own well-being depends on the status of the environment around us. The driving force behind

⁴⁶ *TVA v. Hill*, 437 U.S. 153, 154 (1978).

⁴⁷ *Id.*, 437 U.S. at 177.

⁴⁸ *Id.*, 437 U.S. at 187.

many of our clean air, clean water, and soil conservation decisions is that healthy humans depend upon a clean environment.⁴⁹ Our own health depends on the survival and interactions between species in an ecosystem. This is one of the foundations of Aldo Leopold's concept of community and his land ethic which "enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."⁵⁰

The interactions that Leopold observed on his sand farm in Wisconsin illustrates the open energy circuit that flows through soils, plants, and animals.⁵¹ The plants that Leopold observed in south-central Wisconsin, and those we find here in western Montana, affect and are affected by the environment in which they live. All members of the land community can be benefited or harmed by the health⁵² (or lack of health) of the surrounding ecosystem. Our first responsibility, then, is to the health and well-being of species and the ecosystems in which they live.

Holmes Rolston III echoes the importance of species survival. Nature must be allowed to take its "ecosystemic course."⁵³ Such an outlook requires that, in terms of the natural world around us, we place the highest priority on the well-being of species. "Life on earth cannot exist without its individuals, but a lost

⁴⁹ Holmes Rolston III "Why Species Matter" *The Environmental Ethics & Policy Book Second Edition*, edited by Donald VanDeVeer and Christine Pierce (Belmont, CA: Wadsworth Publishing Company, 1998) p. 507.

⁵⁰ Aldo Leopold, *A Sand County Almanac* (New York: Ballantine Books, 1970), p. 239.

⁵¹ *Id.*, pp. 251-258. Leopold finds three basic ideas connected to the concept of the land as an energy circuit. One, the land is not merely the soil. Two, the native plants and animals will keep this energy circuit open. Other species may or may not. Finally, human-made changes will affect the land differently than evolutionary changes. Once more, the affects of human-made changes are not always fully apparent until much later. See p. 255.

individual is always reproducible; a lost species is never reproducible.”⁵⁴ To guarantee survival at the level of the individual we must first ensure survival at the level of the species. The individual is a single representation of the species to which it belongs. The telos, or life plan, of the grizzly bear, for example, is an individual representation of the telos found in the species *Ursus arctos horribilis*. Furthermore, the individual grizzly bear is shaped by the biotic community in which it lives.⁵⁵

If we allow the natural processes within species and biotic communities to flourish we will find the end result to be a biologically sound, living system.⁵⁶ It is here that we find a move from a fact of the world to a prescription for action. Rolston embraces the idea of natural systems guiding our ethical conduct. “Yet ecological description generates this valuing of nature, endorsing the systemic rightness. The transition from *is* to *good* and thence to *ought* occurs here; we leave science to enter the domain of evaluation, from which an ethics follows.”⁵⁷ Thus, when we see nature function to preserve a species⁵⁸ we discover the way the world ought to be.⁵⁹ Our own action (or inaction) ought to then follow suit. We find that our own subjective attachments to specific individuals may run counter to

⁵² Health, for Leopold, can be summed up in the ‘key-log’ of his land ethic, “A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.” Ibid., p.262

⁵³ Rolston p. 507.

⁵⁴ *Id.*, pp. 505-506.

⁵⁵ *Id.*, p.508.

⁵⁶ *Id.*, p.505.

⁵⁷ *Id.*, p.511.

⁵⁸ This is the familiar statement of letting nature take its course. We must allow sacrifice in nature, such as letting newborn cubs die in order to maintain an appropriate and healthy number in the population, or allowing the weakest gazelle to become prey for the lion, thereby ensuring both a stronger herd of gazelle and pride of lions.

⁵⁹ Rolston., p.511.

what is in the best interest of the species and the wider ecosystem. The healthy functioning of the ecosystem is what allows for the health of the individual.

The second option we have before us is to look towards the good of individuals themselves. While we can ask and discuss what benefits the grizzly bear population or the ecosystem in Glacier National Park, our concern rests ultimately on the individuals themselves that make up the species or ecosystem. "Thus whenever the good of an entire species-population is referred to, we must always keep in mind that it is individual organisms that alone comprise the actual entities that have a good definable independently of the good of any other entities."⁶⁰

Why might we look to the individual, rather than the species or ecosystem, as the focus of our concern for nature? The answer, it seems to me, is that if we recognize that individuals have some type of value beyond their use to the species or ecosystem, we have the responsibility of taking those individual considerations seriously. In other words, short of our own welfare and/or self-defense, there is little or no reason to needlessly harm or destroy another living thing. This argument rests on several premises.

First is the idea that living things have value above and beyond their use to others; living things have inherent worth.⁶¹ Inherent worth is worth or value that something has in itself, regardless of the value anyone else might place on it.

⁶⁰ Taylor, p. 69.

⁶¹ Paul Taylor refers to this as "inherent worth" (Taylor, p. 75) and Tom Regan introduces this as "inherent value" (Regan, p. 235). Because Taylor and Regan develop virtually the same concept, I will use only the term "inherent worth" as a matter of convenience. It should be noted, however, that Taylor does draw a distinction between his own understanding of inherent value and inherent worth. For Taylor inherent value is something we place on an object because of its beauty, historical importance, or cultural significance.

The value of the object, therefore, is never reducible to the instrumental value others may place upon it.

Second, inherent worth is not dependent on any of the merits the individual may or may not possess. We ought not, for example, gauge the inherent worth of persons in terms of what talents they have or what luck has provided them. The inherent worth of persons is not doled out in degrees dependant upon what skills, features, or natural abilities that person has. Part of the concept of inherent worth is that it is found equally among its possessors. To view inherent worth as something that is dependent on the features or merits of the individual is to empty the concept "inherent worth" of meaning.⁶²

The third premise of this argument is that nonhuman living beings are included with human persons and not fully functional human persons (such as the severely mentally retarded and those in vegetative states) as having inherent worth.⁶³ One might be tempted here to say that nonhuman living beings do have inherent worth, but do so in a lesser degree than the inherent worth found in persons. But we must guard against recognizing inherent worth in terms of an individual possessing certain favored virtues, experiences, utility to others, or the interests others may place in them. Rather, if one has inherent worth, one has it equal to all others who have inherent worth. There are no degrees of inherent worth. Either one has it or one does not.⁶⁴ So, if we hold that nonhuman life such

Inherent value is still dependent upon an outside valuer. Inherent worth, in contrast, is the good or worth an entity has on its own, regardless of the value others place on it. See Taylor, pp. 73-75.

⁶² Regan, pp. 234-235.

⁶³ Here Taylor would argue that all living being have inherent worth. Regan goes only so far as to say that all subjects-of-a-life, a condition fulfilled only by animals, have inherent worth.

⁶⁴ Regan, pp. 240-241.

as plants and nonhuman animals have inherent worth, they hold it in equal amount to all others who have inherent worth.

Taylor brings nonhuman living individuals into the inherent worth community through the adoption of a biocentric outlook. Briefly, this outlook is composed of four beliefs: 1.) humans are members of the Earth's community of Life, 2.) all species are members of the Earth's community of Life, 3.) all organisms are unique teleological (goal-orientated) centers of life, and 4.) humans are not inherently superior to other forms of life.⁶⁵

If we are to adopt the above biocentric outlook, the only coherent way to treat all other living creatures is with respect for their own inherent worth.⁶⁶ This recognition of the inherent worth found in nonhuman organisms is analogous to our accepting persons as having inherent worth because "only this way of regarding persons is coherent with the conception of every person as a rational, valuing being—an autonomous center of conscious life."⁶⁷ If we are to accept that nonhuman organisms are unique centers of life and are inherently equal to all others forms of life, our proper relationship to them would be one of respect.

It is important to note that Taylor's biocentric outlook would include all living creatures as beings possessing inherent worth. Thus the smallest and seemingly insignificant creatures are of equal inherent worth to every other living

⁶⁵ Taylor, pp. 99-100.

⁶⁶ *Id.*, p.80.

⁶⁷ *Id.*, p. 79.

creature. Short of self-defense, providing for my own and others' survival, and the inevitable impact of living in the world, it is wrong to destroy another life.⁶⁸

Tom Regan approaches the concept of inherent worth (inherent value) through the subject-of-a-life criterion:

To be the subject-of-a-life is to be an individual whose life is characterized by . . . beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else's interests.⁶⁹

Regan offers three arguments supporting the subject-of-a-life criterion as a principled way of determining who possesses inherent worth. First, the subject-of-a-life criterion brings to light a similarity or characteristic that is shared by all moral agents and moral subjects who are thought of having inherent worth. "*All moral agents and all those moral patients [subjects] with whom we are concerned are subjects of a life that is better or worse for them . . . logically independently of their being the object of interests of others.*"⁷⁰ Second, just as the concept of inherent value is an all-or-nothing concept (it does not come in degrees) so is the subject-of-a-life criterion.⁷¹ It does not make sense to say that something is only partially a subject-of-a-life. Third, and finally, not every living creature fulfills this subject-of-a-life criterion.⁷² Thus, not all creatures make the

⁶⁸ Taylor holds that we can remedy these impacts on the world by following principles of imposing only a minimum wrong and ensuring restitutive justice for those who have been wronged. See Taylor, pp. 264-307.

⁶⁹ Regan, p. 243.

⁷⁰ *Id.*, p. 244.

⁷¹ *Id.*, pp. 244-245.

⁷² Regan does, however, state that while the subject-of-a-life criterion is sufficient to recognize an individual's inherent worth, it is not a necessary condition. Regan does not spell out how such an ethic which does not employ the subject-of-a-life criterion might look, but concedes that while such an ethic is

same moral claim on us. Regan's moral universe is much more restricted than Taylor's is. This would explain why one might say, for example, we do not have any direct duty to preserve the trees in a forest. We would, however, recognize that part of our duties to the animals of the forest (those who satisfy the subject-of-a-life criterion) would be to preserve the habitat they need to survive. We have a direct duty to the animals to preserve their habitat. We do not, however, have a duty to the trees themselves.

We now seem to be faced with two options regarding the source of environmental interests. On the one hand we can make legal decisions and adopt protections at the species or ecosystem level. Environmental laws and regulations would be written and enforced in terms of a species or ecosystem. This would allow, presumably, for activities such as sport hunting and other herd management practices, provided that such practices are carried out for the ultimate end of species or ecosystem well-being.

On the other hand one could look to the individual as the focus of legal rights. Instead of targeting ecosystem interests, animal law would play a key role in providing protection for individuals' interests. Sport hunting and game management would no longer be acceptable as a means of regulating a healthy herd because the health of the herd would no longer be our primary focus. Outside of securing our own and others well-being and safety, other living organisms ought to be left alone. The legal protection of nonhuman organisms' interests would require human impact on the environment be kept at a minimum.

not an intelligible option, "those who aspire to do it certainly have their work cut out for them." See Regan, pp. 245-246.

To choose between species level interests and individual interests is a daunting task. Even after making this choice we still may be faced with the task of choosing which individuals might qualify for legal personhood. Both the preservation of species and the protection of individuals seem to be worthy efforts. Leopold's land ethic captures the importance of biodiversity and a healthy ecosystem. Yet for some, there is still a nagging feeling of regret, if not remorse, when humans destroy other living creatures in an effort to promote and protect ecosystem well-being.

I must admit that I am sympathetic for both sides of this issue. The legal protections for ecosystems, species, and individuals are all important. It is hard to argue against the basic premises of ecology that find the world to be an interconnected whole with each member of the community at once affected and affecting the surrounding ecosystem. The healthy functioning of the system will eventually require that some of its individuals become part of the food chain, part of Leopold's "energy circuit." But my focus is not the predator/prey relationship or the process of natural selection that, often times painfully, dispenses with less fit individuals or species. Rather I am concerned when humans step outside of what might be considered the natural functioning process of the ecosystem and begin to press preference interests at the expense of welfare interests of other individuals.

I think there is a difference between, as an example, allowing orphaned wild animals to succumb to death by starvation or predation, and allowing pet owners to neglect and abuse the animals in their charge out of convenience or

pleasure. In both cases the animals suffer and have their own welfare interests violated, but the former is within the context of natural process that serve to maintain a healthy ecosystem. These types of conflicts between welfare interests, as painful as they may be for us to watch, let alone the pain and fear experienced by the victim, are unavoidable, are necessary, if any individual, let alone species, is to survive. The latter case of the negligent pet owner serves only to satisfy a preference interest at the expense of the victim's welfare interests. These types of actions are morally wrong not just because they are a waste of a resource that could be put to better use, but because the abused and neglected individuals do not deserve such treatment. The point is that no individual with welfare interests deserves to have those interests violated for the sole purpose of satisfying another's subordinate preference interests. In order to give legal protection to nonhuman animals with welfare interests I am going to focus on the legal approach that seeks to protect individuals with interests.

Currently it seems that any legal rights or protection given to nonhumans is at the group level. The rights or interests of the group are weighed against the rights or interests of humans, and human interests are always given more weight. Robert Nozick refers to this as "Kantianism for people, utilitarianism for animals" in which "human beings may not be used or sacrificed for the benefit of others; animals may be used or sacrificed for the benefit of other people or animals *only if* those benefits are greater than the loss inflicted."⁷³ The balancing of interests involved in a utilitarian calculus will mean that some individuals will be sacrificed.

⁷³ Gary L. Francione, *Animals, Property, and the Law* (Philadelphia, PA: Temple University Press, 1995), p. 105.

The fallout of such an approach in which nonhumans are viewed only as a means to human ends is that nonhuman interests will virtually never trump any human interests. This is not too far off from the current state of environmental and animal law. Animal and other environmental interests are weighed against human interests of economic efficiency, recreation, and curiosity. Often times it is these human interests that take precedence over environmental and animal interests. If we are to take seriously that other entities have welfare interests of their own, granting them legal rights that take them into account as individuals is the only sensible move.

If we grant other individuals rights we must also determine which individuals qualify for these rights and what rights they would have. A workable legal solution to this conflict will have to display several features. First it would need to take seriously the fact that humans, like all creatures, modify their context, thus harming and even destroying other forms of life. I think it would be unreasonable to propose environmental protections that disallowed any human impact upon the landscape. Second we must bring biocentric principles into our current legal system that primarily serves to protect humans. We must, for example, bring the discussions of environmental interests and legal protections for ownership and use of property into a coherent picture. We would need to determine how the addition of legal protections to non-human animals would limit property rights. Third and finally, we would need to make sure we maintain the idea of interests of nonhuman individuals themselves. The goal is to move away from defining nonhuman animals' value solely in terms of what they can provide

for us, and in the direction of granting legal protection for the well-being of nonhuman individuals.

In this chapter I have highlighted the seemingly inevitable conflict that will arise between animal law as utilitarian (secure the greatest good for the greatest number, allowing for the sacrifice of individuals in doing so) and animal law as deontological (we have a legal duty to preserve the well-being of the individual, the good of the group is not our primary concern). This conflict for human rights in our legal system has been settled (in theory at least) in favor of the individual. The Bill of Rights, for example, outlines all the ways in which the protection of the individual trumps what is most socially efficient. If we want to take seriously each human as an autonomous individual with interests, protecting the individual is the only coherent way to do it. So too, it would seem for nonhuman animals with interests. We ought not to sacrifice these individuals so we might secure our preference interests.

Short of tearing down and rebuilding our existing legal framework, we need to make animal law fit with established legal principles. This will be the task in the next chapter. I will argue that there are current widely embraced legal principles that can allow for legal protections of nonhuman animals.

Chapter Four

Making the Case for the Legal Protection of Animals

Why, one might ask, do humans have a secured set of fundamental rights? At first this sounds like a silly question. I doubt most of us ever give it much thought. The answer even seems pretty obvious at first. Why do we have human rights? Often times the answer comes in the form, “we have rights because we are humans, of course.” But what is it about being human that ensures we carry with us a fundamental set of rights, rights we have as yet to extend beyond the human sphere to other living beings? Is there anything wrapped up in the concept of “human rights” that might be extended to other nonhuman beings? Are there certain types of interests that are so strong that they merit legal protection?

Human rights do not simply spring from thin air or from our intuitions.⁷⁴ There must be some foundation on which the notion of “human rights” or “fundamental rights” ultimately rests. Several U.S. and State Supreme Court cases can shed light on the foundations of our fundamental rights. In *Cruzan v. Director, Missouri Health Department* the Court looked at the interests of the individual weighed against the State’s interest in preserving and protecting life. At issue was the “State’s artificial provision of nutrition and hydration” and the degree of intrusion and restraint required for those in a vegetative or comatose

⁷⁴ Steven M. Wise, *Rattling the Cage* (Cambridge, MA: Perseus Publishing, 2000), p. 243.

state.⁷⁵ Some methods of artificial nutrition and hydration require the introduction of a “nasogastric tube . . . through the patient’s nose, throat, and esophagus and into the stomach.” This procedure often requires that the “patients . . . be restrained forcibly and their hands put into large mittens to prevent them from removing the tube.” Nancy Cruzan required a gastrostomy tube that was “surgically implanted into the stomach or small intestine.”⁷⁶ In light of the severity of such intrusions, Justice O’Connor opined that

[r]equiring a competent adult to endure such procedures against her will burdens the patients liberty, *dignity*, and *freedom to determine* the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual’s deeply personal decision to reject medical treatment, including the artificial delivery of food and water.⁷⁷

In this case we see that the decision to submit to invasive procedures is based on a competent adult’s “liberty, dignity, and freedom to determine” their own life plan. There is a value placed on an individual’s autonomy to make their own choices.

In *Planned Parenthood of Southern Pennsylvania v. Casey*, Justice O’Connor, Justice Kennedy, and Justice Souter found that issues relating to “marriage, procreation, contraception, family relationships, child rearing, and education . . . involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal *dignity* and *autonomy*, are central to the liberty protected by the Fourteenth Amendment.”⁷⁸ The Justices went on to further write that “the heart of liberty is the right to define one’s own concept of

⁷⁵ *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 288 (1990).

⁷⁶ *Id.*, 497 U.S. at 289.

⁷⁷ *Id.*, 497 U.S. at 289, emphasis added. See also Wise, *Rattling the Cage*, p. 244, n.21.

existence, of meaning of the universe, and of the mystery of human life.”⁷⁹ While *Planned Parenthood* does not specifically take on invasive intrusions of the body, as does *Cruzan*, the same issues of the integrity of the autonomous life and its importance are brought to the fore. Here again we see as the central issues the dignity and autonomy of the individual. If we accept an individual's autonomy and the dignity that comes with having a unique life plan, we must also respect that individual as free to live out their life without others imposing their will on how or how not to live out their life.

We also see a protection of fundamental rights of those who, for all practical purposes, do not share the same autonomy as those dealing with issues of marriage, contraception, and family relationships as in *Planned Parenthood*, or Nancy Cruzan's decision to forgo lifesaving measures before her tragic accident that led to her vegetative state. In *Youngberg v Romeo*, the issue was whether mentally retarded individuals have substantive rights under the Due Process Clause to “(i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or ‘habilitation.’”⁸⁰ In this case the respondent, Nicholas Romeo, age 33, was mentally retarded, had the mental capacity of an 18-month-old child, had an I.Q. of about 10, lacked the ability to talk or provide himself with basic self care, and was prone to episodes of uncontrollable violence.⁸¹ Nicholas' mother, Mrs. Romeo, unable to care for her son, gave her son over to the Pennhurst State School and Hospital. Upon learning that her son

⁷⁸ *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). Emphasis added. See also Wise, *Rattling the Cage*, p. 244, n.21.

⁷⁹ *Planned Parenthood*, 505 U.S. at 851.

⁸⁰ *Youngberg v Romeo*, 457 U.S. 307, 309 (1982).

had suffered from injuries on at least 63 different occasions, Mrs. Romeo filed complaint that her son had failed to receive appropriate care. The case was eventually appealed to the Supreme Court. Justice Powell, writing the opinion of the Court, found that “[i]n the past, this Court has noted that the right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause. And that right is not extinguished by lawful confinement”⁸² Justice Powell continues that “liberty from bodily restraints always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”⁸³ Even in cases where the individual displays none of the features found in what we normally consider to be an autonomous person, the Supreme Court still acknowledges fundamental liberties guaranteed to all humans.

In *Care and Protection of Beth*, the Supreme Judicial Court of Massachusetts found that an individual’s consent to a Do Not Resuscitate order outweighed the State’s or legal guardian’s interest in preserving life.⁸⁴ This case differs from *Cruzan* in the fact that Beth had never expressed any intention either way regarding extraordinary life saving procedures. Shortly after her birth, Beth was involved in a car accident that left her in a persistent vegetative coma and required that machines assist her nutrition and breathing. Eventually both the mother and the Department of Social Services (who was responsible for both the care and protection of the mother, a minor herself, and baby Beth) moved that

⁸¹ *Id.*, 457 U.S at 309.

⁸² *Id.*, 457 U.S at 315.

⁸³ *Id.*, 457 U.S at 316. See also Wise, *Rattling the Cage*, p. 244, n.25.

⁸⁴ *Care and Protection of Beth*, 587 N.E. 2d 1377, 1383 (Mass. 1982).

the District Court decide what further medical treatment Beth would receive. The court, in rendering their substituted judgment for Beth,

don[ne]d 'the mental mantle of the incompetent' and substitut[ed] itself as nearly as possible for the individual in the decision-making process. . . . [T]he court does not decide what is necessarily the best decision but rather what decision would be made by the incompetent person if he or she were competent.⁸⁵

In this case the court felt that Beth would deny the further use of lifesaving measures. Beth's guardian ad litem, however, felt that even if the court's substituted judgment determination were correct, "the child has no dignity interest in being free of bodily invasions" because she "has no cognitive ability and therefore will suffer no 'indignity' that the medical care might be supposed to produce in a conscious person."⁸⁶ In such a case, the guardian felt, the "State's interest in the preservation of life outweigh[ed] the child's desire to have a 'no code' [a do not resuscitate order] entered on her medical charts."⁸⁷ In response the Court held that " '[c]ognitive ability' is not a prerequisite for enjoying basic liberties. In the law of this jurisdiction, incompetent people are entitled to the same respect, dignity, and freedom of choice as competent people."⁸⁸ In this case, dignity and the option of being free from State sanctioned invasive procedures was extended to an individual with no cognitive abilities.⁸⁹

The above cases illustrate the importance of autonomy and dignity to the protection of fundamental rights. The concepts of autonomy and dignity, vital to

⁸⁵ *Id.*, 587 N.E. 2d at 1381.

⁸⁶ *Id.*, 587 N.E. 2d at 1382.

⁸⁷ *Id.*, 587 N.E. 2d at 1380.

⁸⁸ *Id.*, 587 N.E. 2d at 1382. See also Wise, *Rattling the Cage*, p. 245.

⁸⁹ Witness accounts of Beth's condition held that "the child's lower brain, and not her upper brain functions. The upper brain controls thinking and awareness. The lower brain controls only vegetative functions." *Care and Protection of Beth* 587 N.E. 2d 1377, 1379.

our concept of a person, have even been extended to those with little or no autonomy. The Due Process Clause goes directly toward the protection of the dignity of autonomous individuals, even if the dignity is created by legal fiction. So it may be that membership in the human species is a sufficient condition for legal protection, but not a necessary condition. Can autonomy and dignity, and the interests that come with autonomy and dignity, also act as both necessary and sufficient conditions for the extension of legal protection to nonhuman individuals?

One might object here that not only was the autonomy and dignity of the individual at issue, but also the ability to make a choice as to what kind of life to lead. In *Planned Parenthood* the Court stressed an individual's freedom to make choices regarding child rearing and family life. In *Cruzan* the Court was asked to determine what it was that Nancy Cruzan had chosen to do, while she was a fully functioning person, if she were ever placed on life support. In *Care and Protection of Beth* the Court imagined itself as Beth, were she a fully competent person, in order to determine what Beth would have decided regarding her own treatment. We respect the autonomy of these individuals because of the choice (or potential choice) they have made in how to live their lives.⁹⁰ The State cannot force extraordinary life saving measures on those who have chosen to deny that type of treatment. Competent adults have the choice of how and when to raise a family, and the State then has a duty to not interfere with that choice. An individual having legal rights depends on his or her ability to choose one course

⁹⁰ Francione, pp. 95-104, Wise, p. 57.

of treatment over another. This standard for the ability to choose is, I think, restricted to the capabilities of most rational adults.

Such an approach would probably exclude some nonhuman animals from the realm of legal rights.⁹¹ It would also exclude any humans incapable of making a choice regarding their own treatment. Even though the courts can try to imagine what not fully functional individuals might choose these individuals are still incapable of making any choice at all.

In order to avoid giving only some humans fundamental rights, some have argued that humans are of a kind that deserves the protection of fundamental rights. Humans, in general, have the ability to make conscious choices of how to live their lives. The ability to choose one option over another

is not a test to be administered to human beings one by one. . . . The issue is one of kind. Humans are of such a kind that they may be the subject of experiments only with their voluntary consent. . . . Animals are of such a kind that it is impossible for them, in principle, to give or withhold voluntary consent or to make a moral choice.⁹²

Thus individual rights are conferred or denied by the ability of the group, in general, to willfully choose one set of circumstances over another. Beth's and Nicholas's autonomy and dignity are protected by virtue of the general ability to choose found in the human species. Cattle kept on factory farms have no autonomy or dignity to protect because cattle cannot, in general, assert their desire in a way familiar to humans to live in such conditions.

⁹¹ Presented with a choice many nonhuman animals would choose one option over another although they may not reason through the choice in the same way humans usually do. Fish in a pond, for example, if presented with the option of clean water over polluted water, might very well choose to live in clean water. Although they may not use the depth of reasoning that a human might in making such a decision, they would, nevertheless, make a decision.

There is another way to approach legal rights that does not require us to (1) forego legal rights for most (possibly all) nonhuman animals and a good number of humans, or (2) rely on speciesism to recognize rights in all humans of every cognitive level and disregard all nonhumans of every cognitive level. Instead of looking at an individual's ability to choose one option over another as the basis of legal protection, we can look at the individual as a holder of legally recognized welfare interests, an individual who can stand to be benefited or harmed by another's actions. This would allow the legal protection of not fully functional humans on the basis of their possessing legally recognized interests, rather than on their inclusion in the group of legally protected humans capable of making choices for treatment. Recognizing interests as a beginning point for legal protection will also move us away from the double standard employed when not fully functional human individuals can have their legal rights pressed in court while intelligent nonhuman animals, who are aware of the environment in which they are placed and the suffering they are forced to endure, go without any protection of their own interests.

Our legal system does include principles that safeguard the interests of the individual. These safeguards are not based on an individual's ability to choose one option over another. Rather the inherent worth of an individual is dependent on interests. An individual's ability to reason through a decision in favor of his/her own welfare interests does not impact the duty of the State to not interfere with those interests.

⁹² Carl Cohen, "The Case for the Use of Animals in Biomedical Research," 315 *New England Journal of Medicine*, 866 (1986). Cited in Francione, p. 99 n.33.

In my final chapter I will begin to address where the line of legal protections for nonhuman animals be drawn. This is perhaps the most difficult point because it will set new legal limits on how (and how much) we take from nonhuman animals.

Chapter Five

Drawing the Lines for Legal Protection

We are now left with the task of how and why we can redraw the line for human and nonhuman animal legal protection. If we leave the argument at interests, every living thing will have an absolute legal right to autonomy and freedom. Possessing interests does not seem to be a satisfactory point for ending the discussion of who possesses legal rights. One would, I think, be hard pressed to argue that the legal rights of a deadly virus or bacteria not to be eradicated share any similarities to a human's right not to be the unwilling subject of medical experiments. Right now we do enjoy a fairly bright line when it comes to legal protections. All humans are on the side of those who possess legal protections, and every other living thing falls on the side of those who do not, in their own right, possess legal rights and protections. The edges of this line begin to blur, however, when we look for the justification behind denying all nonhuman animals legal protection of their welfare interests. There are several options available to us when we begin to address this problem.

The first is to leave everything the way it is. Humans are the only ones who qualify for legal protections. All other creatures have, at best, the protection that comes with the status of property. This view is becoming more difficult to justify. An evolving moral consciousness has made the wearing of furs a more socially unacceptable act. Vegetarianism is becoming more popular both among

adults and young people. The plight of fur seals, mammals used in animal experimentation, and the animals of disappearing rainforests strike a resounding chord in more and more people.⁹³ Some animals are no longer viewed merely as property. Colorado is seeking to pass legislation that will extend special legal protections to companion animals.⁹⁴ It is true that such legislation would only afford these legal protections to a very narrow class of nonhuman animals (mostly pets and livestock) but we do see an expanding sphere of moral consideration beginning to influence the realm of legal consideration.

A second related option would be to rely on current environmental and animal law to do the work of protecting nonhuman animals. The Endangered Species Act is probably the best tool by which nonhuman animals can have their interests heard in court.⁹⁵ In *Palila v. Hawaii Dept. of Land and Natural Resources*, the court found that “as an endangered species, the bird [Palila], a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right.”⁹⁶ This same issue was

⁹³ Admittedly it is easier to get a favorable reaction from people when the animals in question are cute, furry, and display very “human-like” behavior. It is easy to empathize with something you can see yourself having as a pet.

⁹⁴ “The general assembly hereby finds and declares that the protection of companion animals and livestock is a matter of statewide concern; and that it is the policy of this state that persons responsible for the care or custody of such animals be persons fit to adequately provide for the health and well-being of such animals.” C.R.S. § 35-42-104, (2002).

“No animal shall be mistreated or neglected to such degree or abandoned in any circumstance so that the animal's life or health is endangered.” C.R.S. 35-42-109 Sec. (1), (2002).

⁹⁵ There have been series of cases brought to court regarding ESA violations in which the endangered species was listed as a plaintiff. See *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (1982), *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal., 1995), *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir., 1996), *MT Graham Red Squirrel v. Yeuter*, 930 F.2d 703 (9th Cir. 1991), *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash., 1988), *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash., 1991), *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985 (1979), *Palila v. Hawaii Dept. of Land and Natural Resources*, 649 F. Supp. 1070 (D. Hawaii 1986), *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir., 1988).

⁹⁶ *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir., 1988).

revisited almost seven years later in *Marbled Murrelet v. Pacific Lumber Co.* when the court opined that “as a protected species under the ESA, [the] marbled murrelet has standing to sue in its own right in action challenging timber harvest plan which would allegedly result in ‘take’ of marbled murrelet in violation of ESA.”⁹⁷ The court went on to point out the issue of interests regarding the marbled murrelet. “As Pacific Lumber’s expert witness Steven Speich . . . asserted, ‘the whole reason for being a marbled murrelet is to reproduce successfully.’”⁹⁸ Here the strictures of the ESA and recognition of the marbled murrelets’ interests of self-preservation and reproduction were sufficient to enjoin the Pacific Lumber Company from executing its proposed timber harvest.

The above cases rely on the private suit provision of the ESA, which provides that “any *person* may commence a civil suit on his own behalf.”⁹⁹ A “person” as defined by the ESA is “an individual, corporation, partnership, trust, association, or any other private *entity*, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or any foreign government.”¹⁰⁰ Unfortunately the liberal usage of the terms “entity” and “person” as applied to nonhuman animals has not always proven a successful strategy. In *Hawaiian Crow (‘Alala) v. Lujan*, the court found that the “bird protected by the [ESA] was not a ‘person’ within the meaning of [the] ESA’s citizen suit provision,” and the “bird protected by . . . [the] ESA was not authorized to bring suit as [a] named plaintiff under rule of civil

⁹⁷ *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995).

⁹⁸ *Id.*, 880 F. Supp. at 1348.

⁹⁹ Endangered Species Act of 1973, § 11(g)(1), emphasis added.

¹⁰⁰ *Id.*, § 3(8), emphasis added.

procedure addressing [the] capacity of infants or incompetent persons to bring suit.”¹⁰¹ The court also found that *Palila* could not be used to reinforce ‘Alala’s case because the issue of standing was never disputed in *Palila* as it was in ‘Alala.

This issue of nonhumans’ standing to sue was brought to light again, this time the focus was Kama the dolphin and standing to sue under the Marine Mammal Protection Act (MMPA).¹⁰² The definition of a “person in the MMPA is similar to that found in the ESA.¹⁰³ The *Citizens* court followed the same line of reasoning of the ‘Alala court.

“The MMPA does not authorize suits brought by animals. . . . [A]s with regard to the ESA in ‘Alala, the MMPA expressly authorizes suits brought by persons, not animals. This court will not impute to Congress or the President the intention to provide standing to a marine mammal without a clear statement in the statute. If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.¹⁰⁴

Thus the future of nonhuman animal standing to sue is far from certain. *Citizens* and ‘Alala show there is reluctance to grant nonhuman animals standing to sue when the issue of standing is the focus of the case and the statute in question shows no clear intent of extending the terms “persons” and “entity” beyond the human realm.

A third option would be to rely on a consistency and capabilities argument to give nonhuman animals some basic legal protections. If we allow basic legal protections to infants, those in vegetative states, and other not fully functional

¹⁰¹ *Alala v. Lujan*, 906 F. Supp. 549 (D. Hawaii 1991).

¹⁰² *Citizens to End Animal Suffering and Exploitation v. The New England Aquarium*, 836 F. Supp. 45 (D. Mass., 1993).

¹⁰³ “The term ‘person’ includes (A) any private person or entity, and (B) any officer, employee, agent, department, or instrumentality of the Federal Government, or any State or political subdivision thereof, or any foreign government.” Marine Mammal Protection Act of 1972, § 3[10].

persons, why not extend the basic protections of dignity and autonomy to those nonhuman animals that possess the same, or even greater, levels of consciousness and self-awareness? If we take a view of the law that searches for the underlying principles of the law, we could argue that laws which currently safeguard the interests of only humans are ultimately aimed at protecting all of those who can be aware of their interests being violated.

The most remarkable chimpanzee (or wolf, or whale, or dolphin) will probably never be able to perform the mental gymnastics of an average adult (or adolescent or child) human. This does not take away from the fact that chimpanzees (and possibly other nonhuman animals) possess at least some level of self-consciousness, anticipation of suffering, and other “human-like” abilities (use of language, grieving for the death of a mate or child).

This is where the consistency argument might be rounded out with the addition of a focus on capabilities. An individual’s psychological capabilities (consciousness, self-consciousness) seem to be a meaningful criterion when assigning legal consideration. Psychological capabilities seem to act as the lynchpin for many legal considerations. A person’s maturity comes into issue when granting or denying rights to drive, vote, sign contracts as an adult, and drink alcohol or smoke cigarettes. An individual may not be held responsible for crimes committed while that individual suffers some type of psychological dysfunction. The power of attorney can be assigned to others to ensure that the best interests of those who can no longer make such judgements be looked out for.

¹⁰⁴ *Citizens to End Animal Suffering and Exploitation v. The New England Aquarium*, 836 F. Supp. at 49.

Of course when speaking of nonhuman animal legal rights based on psychological capabilities I do not refer to their rights to vote, sign contracts, or obtain a driver's license. The focus is instead on more basic legal rights to have basic interests (being able to live as a free, autonomous individual) recognized and protected in the legal system. We find these legal considerations for basic interests to be granted to all humans, despite the differences in capabilities for self-awareness and autonomy among the entire population of humans. Beth and Nicholas do not share the same levels of self-consciousness and autonomy, and they differ from the attorneys and judges who determined the outcome of their cases. Regardless of these differences it can be argued that all of these individuals were granted, by law, the legal protections needed to live out an autonomous life. Even though Beth had no way of enjoying this autonomy (Nicholas may have enjoyed autonomy, possibly in ways that the majority of fully functional humans can not, or will not ever, understand), we see that the autonomy of the individual was respected anyway. As Carl Cohen noted, psychological capabilities and the legal privileges that come with having such capabilities are viewed in terms of what the kind, not the individual, is like.¹⁰⁵ Cohen seems to draw the line for the ability to make choices between humans and all other animals. What such an outlook fails to recognize is the potential for differences in psychological capabilities (such as the ability to make choices) that might exist in the nonhuman animal kingdom.

If we assume all members of a group have rights, it is then up to those who wish to override those rights to prove that there is good enough reason that

¹⁰⁵ *Supra* at 40.

some individuals be forced to give up their rights. If we accept, for example, that chimpanzees and bonobos are of a kind that are conscious and self-aware, good evidence would need to be present before any of those individuals could be sacrificed. If any group approaches the level of consciousness and self-awareness found in humans (chimpanzees, bonobos, wolves, whales, may fall into this category) then perhaps no amount of evidence would be able to compel us to overturn their rights to self preservation in order to provide a greatest good for the entire group. As we move to lower levels of consciousness and self-awareness, trumping legal considerations of the individual becomes an easier task. Culling wild sheep and goat populations for endangered species preservation and ecosystem management (as was done in *Palila*) can be viewed as a legally acceptable task. In this case preserving endangered species and their habitat are viewed as goals that override the interests of the individual sheep and goats. All of this assumes that those individuals about to be sacrificed have a sentience level that allows, in this case, the preservation of other species and habitat at their expense. If it were proven that the wild sheep and goats of *Palila* did enjoy sentience approaching that of humans, then their sacrifice might no longer be justified.

The above capability-focused approach becomes problematic when we run into extremely capable individuals in groups that we think are at an inferior level. Does this individual now get more consideration than the rest of the group, or do we give the entire group a higher level of consideration? We would also need to determine what is the threshold for the capabilities that will guarantee

legal protection of welfare interests. Anyway, if the point is to protect the welfare interests of the individual, what do capabilities matter anyway? Basing legal considerations on capabilities is what we are doing now. Only those capable of voicing their choice, or those capable of making choices in a way familiar to humans, have legally protected interests. Rather, I think we should protect the interests of individuals regardless of what psychological, physical, or emotional capabilities they might have. The fact that Beth had virtually no emotional or psychological capabilities, and it appeared that she never would develop those abilities, did not hinder the court from protecting what was in Beth's interest.

Perhaps a fourth option, using ecology and a land ethic, will allow us to avoid resorting to the use of capabilities when determining the limits of what the law will protect. Eventually individuals with welfare interests will conflict. In order to deal with such a large legal universe (all human and non-human animals with welfare interests would qualify for legal protection) we would need to have some way of determining whose welfare interests would take priority. Here the law would need to work with the science of ecology to determine the appropriate response to questions that arise between conflicting individuals and between the interests of the individual and the welfare of a larger group. We could tailor animal law to follow the natural cycles and relationships we find in the world around us. This will allow one individual's interests to trump another's in cases where we are protecting welfare interests. My own welfare interests of having food and shelter would allow my use of the environment to secure these goods. Plant life could be used for food and shelter. The use of animals for food and

clothing, however, might no longer be legally acceptable if we have alternative methods of securing a vegetarian diet through agriculture. Recognizing the legally protected interests of other individuals does not mean that we avoid any contact with any other living being in order to avoid displacing, harming, or even killing any organism with a legally recognized interest.

I think it is important here to remember that no legal rights are absolute. I face limits on my freedoms to speech, religion, and assembly. We even find that a right to life does face its legal limits as State and Federal government allows for the use of force in self-defense (admittedly the amount of force must be appropriate for the situation) and the death penalty. In terms of expanding animal law, recognizing the legally protected interests of others also means we need to allow for individuals to function and flourish in their environments. Looking at how nature works, as emphasized by Leopold and Rolston, can inform us where individual legal rights might give way.

Approaching animal law in terms of recognizing other individuals' welfare interests does not mean that these same interests will no longer be overridden. Predators will still hunt for prey. Individuals will still compete for space to live. All I propose is that humans have a prima facie legal obligation to respect the welfare interests of human and nonhuman animals. Such an approach will demand that the welfare interests of others (human and nonhuman alike) will take priority over the preference interests we might have.

Conclusion

Hopefully I have shown that extension of legal protections to nonhuman animals is possible within our legal framework. Such a move, however, will not be without its own challenges. One of the first challenges we will face, I think, is moving past a Cartesian world view that holds the human species as wholly separated from the nonhuman animals that occupy the planet with us. Too often the call for legal and moral consideration of nonhuman animals is met with the response, "Well they are, after all, only animals." There are, of course, many differences between humans and other animal species. No other animal, as far as we can tell, has mastered language and reason to a degree even close to that found in humans. But we also see significant similarities in other species that warrants our examination of their inclusion with those who have a legally enforceable right to live out autonomous lives.

A second major challenge, which I have touched on, will be the tension that arises between ensuring the health of ecosystems (which may require the sacrifice of some individuals) and the preservation of individual rights. By taking an ecological or biocentric approach to finding the limits for legal protections, we can begin to determine where the limits of legal protections reside.

A final challenge remains to be answered. In this paper, I have begun to make a distinction between welfare and preference interests. This was not the main topic of this paper, so I did not deal with all of the questions and problems that inevitably arise. Questions such as, when I swat at a fly, am I not intruding

on its welfare interests to save myself the simple aggravation of a mosquito bite, will need to be answered.

If we are to reform animal law to the point of looking to the animals themselves as the focus of legal protection, we need to abandon the practice of granting legal rights on the basis of how “human-like” the individual may be. We do not currently apply the same standard for capabilities to fellow humans that we extend to the rest of the animal kingdom. Humans who have very few, or a complete absence, of what we typically think of as human capabilities (ability to reason, make conscious choices) are granted legal protection while nonhuman animals who do display these features go without any protection.

Rather than focus on what individuals can and cannot do, how individuals measure up against the capabilities of the typical human, we can look to the welfare interests of individuals. When we recognize that human and nonhuman animals both have welfare interests that can be equally intruded upon we recognize that all such individuals can make the same claims for protection.

While it may be inappropriate to make any interaction in the world where one individual intrudes upon the interests of another (wolves who hunt down and kill deer are not breaking any laws, swatting at mosquitoes is not an illegal act), we can use the welfare interests of other individuals to set limits on the impact humans make on the world around them. Killing animals to provide for the welfare interests of food and clothing is legally acceptable, but sport hunting to provide for the preference interest of hunting trophy animals is unacceptable. The above situations do not ask us to determine the psychological and emotional

capabilities of animals. Rather we are called upon to judge whether we are attempting to further a welfare or preference interests at the expense of forfeiting another individual's welfare interests.

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