

# **Judicial Recognition of the Interests of Animals - A New Tort Professor David Favre<sup>1</sup> © 2004**

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## **Introduction**

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

## **I. The Present Point of the Animal Rights Debate:**

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<sup>2</sup>New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The intentional infliction of mental suffering, the obstruction of the right to go where the plaintiff likes, the invasion of the right of privacy, the denial of the right to vote, the conveyance of land to defeat a title, the infliction of prenatal injuries, the alienation of the affections of a parent, and injury to a person's reputation by entering the person in a rigged television contest, to name only a few instances, could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to be torts.

W. PAGE KEETON, PROSSER AND KEETON ON TORTS 3-4 (West 1984) (hereinafter "Prosser").

Some of the early advocates of animal rights focused on the point that animals could feel pain, and suffer.<sup>3</sup> If the start point of the discussion is ‘animals should not feel pain’ then the nature of the debate cannot extend to animals that do not have the capacity to feel pain, as we understand it. Additionally, if the debate is limited to pain, there may be any number of interferences by humans, such as suffering, early death, and limiting mental development, which would not be considered within the legal arena. Likewise, if the starting point is beings that possess self-awareness, consciousness, or language skills, then those not meeting the standard can not be within the legal arena.<sup>4</sup> There is no reason to limit the debate about how to accommodate the needs of animals within our legal system by constraining the initial parameters. Instead, the playing field should be as broad as possible and everyone should have an opportunity for making their case.

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

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<sup>3</sup> The roots of the moral debate are centuries old, with Jeremy Bentham perhaps being one of the key figures in the debate. *See* Jeremy Bentham, *A Utilitarian View*, in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS*, Tom Regan & Peter Singer eds., 129-30 (basing consideration for animals not on their linguistic or rational capacities but on their capacity for suffering). This perspective was recently re-articulated by Professor Cass Sunstein, *The Rights of Animals*, 70 *CHI. L. REV.* 387 (2003) (hereinafter Sunstein). Also see, Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 *HARVARD L. REV.* 1506 (2001) (this is a long book review of *RATTLING THE CAGE* by Steven M. Wise and contains a good overview of the various basics for claims for animals).

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

<sup>4</sup> For a detailed consideration of animal awareness, from a key animal rights philosopher, *see* TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 34-81 (1983 Univ. of Ca. Press). An update on the science of animal awareness and consciousness can be found in Steven M. Wise, *RATTLING THE CAGE* 119- 62 (Perseus Books, 1999) (hereinafter “Rattling the Cage”) & STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* (Perseus Books, Cambridge Massachusetts, 2002)(hereinafter “Drawing the Line”). *Also see*, MARC BEKOFF, *MINDING ANIMALS* (2002); MARC BEKOFF, COLIN ALLEN AND GORDON M. BURHGARDT EDITORS, *THE COGNITIVE ANIMAL: EMPIRICAL AND THEORETICAL PERSPECTIVES ON ANIMAL COGNITION* (2002 The MIT Press).

In the past decade there have been a number of books and articles that urge for significant change in how the legal system deals with animals.<sup>5</sup> Steven Wise has made a strong case for the allocation of legal rights for some animals on the basis of dignity rights such as liberty and equality. His “rights” jurisprudence is developed extensively in his two books.<sup>6</sup> The core of his approach is to suggest that common law judges have the inherent authority to extend some legal rights to some animals. As at least some animals experience the world in ways that are similar to the way that humans experience the world, any differences between them and us is one of degree and not of nature. Thus it follows that at least some fundamental legal rights familiar to us ought to extend to them as well.<sup>7</sup> Mr. Wise’s writings, so far, do not suggest how to think about the balancing of human and non-human rights when they are in conflict. His focus is on the triumphing capacity of the nonhuman’s right to be free from enslavement of the person and the need to have bodily integrity.

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

Some writers, promoting legal rights for animals, argue that a huge chasm exist between humans and all non-human animals which will be bridgeable only with the greatest effort, with a beach assault on the legal status quo.<sup>8</sup> On the south side of the river is the realm of humans

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<sup>5</sup> Professor Gary Francione has extensive writings as an advocate for animal rights in the legal community, *ANIMALS PROPERTY AND THE LAW* (1995, Temple University Press). Another lawyer Steven M. Wise has also been an active scholar. See, *Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998) (analyzing the development of “rights” in the common law context and how animals rights can be justified under a traditional “rights” framework). In the world of philosophy Peter Singer and Tom Regan have long been visible advocates. See, PETER SINGER, *ANIMAL LIBERATION* (1975 Avon) and Regan, *supra* note .

<sup>6</sup> DRAWING THE LINE *supra* note . RATTLING THE CAGE, *supra* note .

<sup>7</sup>“Practical autonomy” is not just what most humans have but what most judges think is sufficient for basic liberty rights, and it boils down to this: a being has practical autonomy and is entitled to personhood and basic liberty rights if she:

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

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

<sup>8</sup> Professor Gary Fransione has long railed against the property status of animals and has stated that the treatment of animals will not significantly change until the property status of animals is eliminated.

within a legal community and on the north side of river is the community of things, property, which includes animals. And the river, the barrier between, is the property status of animals. These writers suggest that so long as animals are property, they will be excluded from our legal community.<sup>9</sup> Additionally, the legal community they see on the south side is not the one of today but a different one, one in which all people are vegans, and commercial use of animals is prohibited.<sup>10</sup>

To provide a way for animals to both crosses the river barrier of the property status and to create this vision of new human community simultaneously is not possible. It asks for revolution in a legal system that prefers evolution. To move from where we are today to this future legal community would indeed be bridging a wide chasm. But perhaps these advocates for animals are looking in the wrong place to promote the interests of animals. Perhaps it is not as difficult as they believe;<sup>11</sup> perhaps a shallower place to cross the river can be found, not into some future legal community, but into the community of today.<sup>12</sup>

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Part of the confusion that plagues the modern animal protection movement is connected to the failure to realize that rights theory has at its core the rejection of the property status of animals. Gary Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 ANIMAL LAW 75, 100-01 (1997).

Other than suggesting that the property status should be eliminated, Professor Fransione does not suggest exactly how, in a post property status world, the legal system would treat animals. In particular, he has not suggested how to balance the competing interests of humans and non-human animals.

<sup>9</sup>For centuries, a Great Legal Wall has divided humans from every other species of animal in the West. On one side, every human is a person with legal rights: on the other, every non-human is a thing with no legal rights. Every animal rights lawyer knows that this barrier must be breached.

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

On the other hand Professor Lawrence Tribe has suggested that perhaps this wall is not so great. It is a myth that our legal and constitutional framework has never accorded rights to entities other than human beings and therefore that a high wall must be breeched or vaulted if rights are now to be accorded to non-human animals.

Laurence Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL LAW 1, 2 (2001)(hereinafter Tribe).

<sup>10</sup>If we are serious about animal rights, we have a responsibility to stop bringing them into existence for our purposes. We would stop bringing all domestic animals into existence for human purposes....We recognize that the most important step that any of us can take toward abolition [of the property status of animals] is to adopt the vegan lifestyle and to educate others about veganism.

*An Interview with Professor Gary L. Francione on the State of the U.S. Animal Rights Movement*, ACTION LINE, publication of Friends of Animals (Summer 2002).

<sup>11</sup>The first thing that our Constitution teaches is that rights are not such a scary thing to recognize or to confer, since rights are almost never absolute.... Arguing for constitutional rights

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

## II. An Interest Basis for Legal Analysis

As a starting point we need a conceptual lens with which to view our present legal community. An “interests” lens obtains the sharpest and most useful vision. This is not something this author has created or needs to describe in great detail in this article. One of the most luminous deans of Harvard Law School, Rosco Pound set out a comprehensive analysis some fifty years ago. In his four volume set, *JURISPRUDENCE*, Dean Pound uses an interests analysis to explain the existence and operation of our legal system.<sup>13</sup>

He suggests a legal system is a necessary and natural outgrowth of social organization, arising out of the reality that individual humans within any society have conflicting interests with other individuals and society in general.<sup>14</sup> Further, “the law does not create these interests. It finds them pressing for recognition and security.”<sup>15</sup> Basic to the presumption of the existence of

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on behalf of non-human being, ... shouldn't be confused with giving certain non-human interests absolute priority over conflicting human claims.

Tribe, *supra* note at .

From the legal point of view, there is nothing at all new or unfamiliar about the idea of animal rights; on the contrary, it is entirely clear that animals have legal rights, as least a certain kind. Cass Sunstein, *Standing For Animals (With Notes on Animal Rights)* 47 U.C.L.A. L. REV. 1333, 1335 (2000)(hereinafter “Standing for Animals”).

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

<sup>13</sup> *See generally*, ROSCOE POUND, *JURISPRUDENCE*, Vol. III (West, 1959) (hereinafter, “Pound”).

<sup>14</sup>Conflicts or competition between interests arise because of the competition of individuals with each other, the competition of groups or associations or societies of men with each other, and the competition of individuals with such groups or associations or societies in the endeavor to satisfy human claims and wants and desires.  
Pound, *id.* at 17.

<sup>15</sup> Pound, *id.* at 21.

a society is that the society develops systematic methods for dealing with conflicts. A mark of a civilized society is the rejection of violence or “might makes right” as a basis of social organization. Other mechanisms for dispute resolution such as those that exist within religious communities have inherent limitations.<sup>16</sup>

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

If humans move through life with interests attached to them, then the job of the legal system is to act as referee between the conflicting, clashing interests. But, there are two points to ponder before having the law jump into a dispute. First, the legal system has limited resources and cannot address all disputes between individuals. Second, notwithstanding the assertions of any particular individual, some conflicts should not be resolved by the state. For example, Mr. Jones of Dominoes, Iowa may have an interest in marrying a wealthy, attractive woman who lives in his town. This interest is one best left to the individual, even if, government resources existed to help Mr. Jones pursue his interests. The legal system must sort out which interests deserve protection. Then, the legal system must develop the rules by which conflicts between qualifying, quarreling interests will be resolved. For example, George may have a desire to shoot his neighbor, as he has just shot George’s dog. But the neighbor may have another story to tell about why he shot the dog. For example, the dog had entered his property and had killed three of his chickens. Those competing interests are accepted as ones the legal system ought to deal with and there are criminal and civil law mechanisms available to help resolve such disputes.

In the following sections, the role of the present-day legal system in sorting out and balancing conflicting interests will be considered.<sup>18</sup> This article first considers conflicts between humans, then conflicts with other species, and finally how our present system deals with some human, non-human conflicts. This analysis will support the proposition that presently the interests of some animals are sometimes acknowledged as within the legal system. Building

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<sup>16</sup> For example, the Catholic Church has been trying to deal with the issue of sexual abuse by priest within its community. Many are dissatisfied by how the Church has sought to balance the competing interests of the institution, the priest and the parishioners. See, Justin Pope, *New Revelations could topple Boston cardinal* Lansing State Journal 7a (AP story, Sun. Dec. 8, 2002). Regardless of how the dispute is settled within the church the individuals involved have the civil and criminal laws of the state also to deal with and demand accountability under.

<sup>17</sup> Pound, *supra* note at 16. The word ‘interests’ is also a key phrase in the discussion of torts in the Restatement of Torts. The Restatement defines interests as “to denote anything which is the object of human desire.” Restatement of the Law Second, Torts 2d §1(1965).

<sup>18</sup> See generally, Pound, *supra* note at 30-33.

upon the premise that it is ethically appropriate to address animal interests within the legal system, then an additional approach, through the creation of a new tort, will be advocated.<sup>19</sup>

#### **A. Human Interests in the Legal system**

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

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

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

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<sup>19</sup>The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests that previously were not protected at all. Torts 2d §1 p.3.

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

<sup>21</sup>It does not lie within the power of any judicial system to remedy all human wrongs. The obvious limitations upon the time of the courts, the difficulty in many cases of ascertaining the real facts or of providing any effective remedy, have meant that there must be some selection of those more serious injuries which have the prior claim to redress and are dealt with most easily. Trivialities must be left to other means of settlement, and many wrongs which in themselves are flagrant—ingratitude, avarice, broken faith, brutal words, and heartless disregard of the feelings of others—are beyond any effective legal remedy, and any practical administration of the law. Prosser, *supra* note at 23.

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

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

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

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<sup>22</sup> For example, in June of 2003 the movie star Sandra Bullock received an injunction against a Michigan man which prohibited any contact of her by him. He had sought to contact her for 18 months by voice mail, fax and phone calls. "Newsmakers," Lansing State Journal, Sun. June 8, 2003 at 2A.

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

<sup>24</sup> See discussion and notes *infra*, note 33-38

<sup>25</sup> Some would say that it is not a legal right unless it is enforceable by the individual, but if a right can represent a restraint on the actions of others, then whether it is enforced by the government or private action should not make a definitional difference, even though it there may well be significant practical differences. *See*, Sunstein, *supra* note at Sec. II.

<sup>26</sup> *See generally*, [www.animallaw.info/topics/spuspetdamages.htm](http://www.animallaw.info/topics/spuspetdamages.htm); Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. Jour. 199 (2002); Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L. J. 31 (2001); Rebecca Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47 (2002); William C. Root, "Man's Best Friend:" *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423 (2002).

## B. Non-Human Interests - Endangered Species

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

As a corporation is a conceptual tool or framework for the representation of a group of humans, a "species" is a conceptual way to address the interests of a group of individual non-human animals. A specie's interests, like a corporation's interests, are derivative of the members of which it is composed. A species has no moral claim upon us; rather it is the interests of individual animals that assert their claim upon us.<sup>29</sup> But knowing and tracking individual wild animals is difficult at best and it is simply easier to deal with a group without seeking to identify specific individuals. Thus, humans may not be particularly compelled by the claim of any one

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<sup>27</sup> § 1531. Congressional findings and declaration of purposes and policy

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

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

U.S. Endangered Species Act, 16 U.S.C. §§ 1531.

<sup>28</sup> c) Policy.

- (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

*Id.* at § 1531(c).

- (3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.

*Id.* at § 1532(3).

Concern for animals also arises with other federal laws, *see, Standing for Animals, supra* note at 1339-40.

<sup>29</sup> In an abstract sense species represent information - genetic, biological and ecological - which humans might find useful. But moral claims can attach only to individual living entities. Likewise, a corporation, however useful to organizing human activities, has no claim in the moral arena. *See, Pound supra* note at .

animal for its continued life, but are compelled when an entire group of individuals face extinction. As the number of individuals decrease, and risk of extinction increases, then we humans adjust the balance of interests, giving trumping power to the continuation and recovery of the species over a number of human interests. This re-balancing of the interests was captured in the U.S. Endangered Species Act.

The majority of the US environmental laws that were adopted in the same time period seek to balance the interests of humans to be free from harmful effects of pollution and the need for allowing economic and other human activity.<sup>30</sup> But when it comes to species preservation, there is no balancing of species preservation with human economic needs. Species are to be listed on the Endangered or Threatened list on the basis of science based criteria, not a risk-benefit analysis or human public health analysis. Once a species is listed then there is a limitation on both government and private actions that harm the species. Under the ESA, the conservation of a listed species will supercede almost all human interests, including economic, religious, sport hunting or food gathering.<sup>31</sup> Clearly the law gives the executive branch the power to assert these species interests against human activities when the law is violated. Perhaps even more importantly, private individuals, under the citizen suit section have been allowed to assert the interests of the species both against the government itself and other private individuals.<sup>32</sup>

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<sup>30</sup> Like FIFRA, TSCA [Toxic Substance Control Act] is known as a balancing law, invoking the noncommittal language of “unreasonable risk” no less than thirty-eight times in a statute of sixty-four pages.

WILLIAM ROGERS, ENVIRONMENTAL LAW 2ED (1994) 489. The Clean Air Act uses human health as the start point for standards, but ultimately the administrator must define some level of risk as acceptable. *Id.* at 156-64.

<sup>31</sup> The Endangered Species Committee, ESA § 7(e)-(h) (known as the "God" Committee), has the authority to grant exemptions from the requirements of § 7(a)(2) - protecting critical habitat, and prohibiting actions "likely to jeopardize" a species. This committee is allowed to balance the benefits of a proposed activity against the harm or risk of harm the project represents. One of the concessions that the environmental organizations were able to obtain during the drafting process in Congress was a requirement that the Committee be composed of high profile individuals who could not delegate their responsibility to agency employees. *See* list at § 7(e)(3).

Until 1991 only two applications for exemptions had been filed, both denied by the Committee. In 1991 the Administration found itself in the hot seat with the spotted owl controversy. Perhaps realizing that amending the act was not a realistic option in the short term, the government sought the blessing of the "God" Committee to continue to cut down the public's old growth forest for the benefit of the timber industry. Notice of application - 56 Fed. Reg. 48548, Sept 25, 1991. *See, The Exemption Process under the Endangered Species Act: How the 'God Squad' Works and Why*, 66 NOTRE DAME. L. REV. 825 (1991).

<sup>32</sup> (g) Citizen suits.

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--

In the early development of environmental law it was suggested that an ecological grouping of living and non-living entities might be combined together to support standing in the courts for environmental issues. Justice Douglas, in *Sierra Club v. Morton*,<sup>33</sup> suggested that perhaps ecological entities such as rivers and forests could be ecological plaintiffs whose interest might come before the court when considering human actions impacting the natural environment. While this idea was proposed in some detail in a law review article by Professor Stone,<sup>34</sup> and in turn utilized by Justice Douglas, the Supreme Court in subsequent opinions did not pursue this path.

### C. Individual Animals

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

#### 1. Anti-Cruelty Laws

The first beachhead for all animals, on the shores of our legally relevant community of relevant beings, was in the area of criminal law. From early in the 19<sup>th</sup> Century into the 1870's there was a clear transition in the laws dealing with animals from mere protection of the property interests of owners, to concern about the animals themselves.<sup>35</sup> The 1867 New York law,

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(A) to enjoin any person, including the United States and any other governmental instrumentality or agency..., who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or  
ESA at §1540(g). For an example of a private party suing another private party for the protection of the interests of a species, *see*, *Coho Salmon v. Pacific Lumber Company*, 61 F.Supp. 2d 1001 (N. D. Ca 1999) (Defendant's timber operations were polluting the streams used by the endangered salmon. The Court held that the plaintiffs had standing under the ESA to assert the protection of the law for the salmon.)

<sup>33</sup> 405 U.S. 727, 92 S.Ct. 1361 (1972)

<sup>34</sup> Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* 45 CAL. L. REV. 450 (1972) . It was subsequently published as a book, *SHOULD TREES HAVE STANDING* (Oceana Publications 1996).

<sup>35</sup> See generally, David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. COL. OF L. REV. 1 (1993). An example of a statute that reflects the strict property concept of animals, which existed at the beginning of the nineteenth century, is found in Vermont law. Section 2 states in part:

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

promoted by Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals, represents the conceptual breakthrough. Thereafter new laws were adopted by many states on the New York model.<sup>36</sup> The existence of these laws clearly reflects the legislature's acceptance of the proposition that an animal's interest to be free from unnecessary pain and suffering should be recognized in the legal system.

This new proposition was also recognized by the courts of the time. In the case of *Stephens v. State* the court found that, "This statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners."<sup>37</sup> This point was also made in an Arkansas case where the court acknowledged this new concern when it noted that the new laws "are not made for the protection of the absolute or relative rights of persons, or the rights of men to the acquisition and enjoyment of property, or the peace of society. They seem to recognize and attempt to protect some abstract rights in all that animate creation, ..., from the largest and noblest to the smallest and most insignificant."<sup>38</sup> These new laws clearly reflect society's acknowledgment that animals have interests to be free from pain and suffering.

However, it must also be recognized that the early laws also sought to balance these newly acknowledged interests of animals with human interests. The laws recognize that sometimes the human interests will supercede that of the animal's, and pain and suffering might occur. Within the original New York law itself the balancing existed. The critical prohibitions on beating and killing animals are modified with "unnecessarily" and "needlessly".<sup>39</sup> Thus if a

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1846 Vt. Laws 34.2.

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

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

<sup>37</sup> 3 So. 458 (Miss. 1888).

<sup>38</sup> *Grise v. State*, 37 Ark. 456 (1881).

<sup>39</sup> The 1867 New York Anti-Cruelty Law:  
Section 1. Penalty for Overdriving, Cruelly Treating Animals, Etc.  
If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill. or cause or procure to be

horse has to be hit to make him start pulling the wagon, or if an animal has to be killed to be eaten, such actions do not violate the law. Another clear balancing of interests occurs in the context of scientific experimentation. Section 10 of the 1867 New York law provided that properly conducted scientific experiments do not violate the law, thus allowing the intentional infliction of pain and suffering for the advancement of scientific knowledge.<sup>40</sup> A key limitation of the criminal cruelty laws is the extensive, broad list of exemptions built into the law. As will be developed later in this article, this balancing of interests will be a part of crafting the proposed new tort for animals, one without the historical exemptions.

## 2. Federal Animal Welfare Act

The concern of the federal government over animal welfare issues did not arise until almost 100 years after the adoption of the New York laws. The federal Animal Welfare Act (AWA)<sup>41</sup> was adopted in 1967. A key difference of the federal law with the prior state laws is that the AWA was primarily to be a regulatory scheme with inspectors and permits, rather than criminal law enforcement. Initially the language of the law was limited to assuring that some mammals were housed and cared for in an appropriate manner.

An expanding acknowledgment of animal interests occurred in the 1985 Amendments to the AWA.<sup>42</sup> Within these provisions, for the first time in United States law, the mental well being, rather than just the physical well being of a primate, was recognized and supported. The law now requires that all holders of primates under the jurisdiction of the AWA, have "a physical environment adequate to promote the psychological well-being of primates."<sup>43</sup> There is no balancing of this interest with human interests; it is an unmodified, unlimited requirement for the housing of primates. This requirement is as close to a trump card as any grouping of animals has

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overdrive, overloaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated, or killed as aforesaid any living creature, every such offender shall, for every such offence, be guilty of a misdemeanor. N.Y. REV. STAT. §§ 375.2-.9 (1867).

<sup>40</sup> Section 10. Proviso.

Nothing in this act contained shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of New York.

Section 10 N.Y. REV. STAT. §§ 375.2-.9 (1867).

<sup>41</sup> 7 U.S.C. §§ 2131 - 59; available with full legal history at [www.animallaw.info/statutes/stusawa.htm](http://www.animallaw.info/statutes/stusawa.htm) .

<sup>42</sup> Public Law 99-198. Also see, Sunstein, *Standing for Animals*, supra note at p.1340-42.

<sup>43</sup> §2143(a)(2)(B).

received in our legal system. However, it must be noted that the implementation of this requirement has been a slow and painful road that has not yet been fully realized.<sup>44</sup>

Another aspect of the 1985 amendments focused specifically on the scientific experiments themselves changing the balance of interests struck in the 1867 New York law and the 1967 version of the AWA. Now, there is a federally imposed duty both to minimize the pain during the experiment and to provide pain management after the experiment.<sup>45</sup> The AWA represents a clear example of our legislative process adopting a law seeking to strike a balance between the interests of humans and non-human animals.

### 3. Chimpanzee Protection Act

Another example at the federal level deals specifically with our genetic cousins, the chimpanzee. In 2000 Congress passed the Chimpanzee Health Improvement, Maintenance, and Protection Act.<sup>46</sup> The issue before Congress was what should be done for or with the thousand plus long living chimpanzees that have been part of the U.S. federal research system for many years but are no longer needed for research. A special committee of the National Research Council looked into the issue and found that continued lab housing for chimpanzees to be expensive, particularly when the animal was no longer actively part of research.<sup>47</sup> The financially

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<sup>44</sup> The USDA has developed regulations to deal with this issue (9 C.F.R. 3.75 - Subpart D-- Specifications for the Humane Handling, Care, Treatment, and Transportation of Nonhuman Primates). A number of books (Evalyn Segal ed., HOUSING, CARE AND PSYCHOLOGICAL WELLBEING OF CAPTIVE AND LABORATORY PRIMATES (Noyes 1989)), a number of law suits (*see*, Animal Legal Defense Fund v. Glickman, 204 F.3d 229, 340 U.S.App.D.C. 191 (2000)) and many conferences have been held over the past decade to develop more fully how this legal obligation should be carried out.

<sup>45</sup> Congress directed the USDA that the adopted regulations should provide:  
(A) for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia;  
(B) that the principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal;  
(a)(3)(A)

<sup>46</sup> 42 U.S.C. 287a -3a.

<sup>47</sup> At the time of the adoption of the law CNN reported that existing laboratory housing for chimpanzee was \$20-\$30 dollars a day while it was expected that at a sanctuary it would cost \$8 to \$15 per day. *Id.* (Dec. 7, 2000) <http://www.cnn.com/2000/NATURE/12/07/laboratory.animals.ap>. Last visited 12/6/2002.

“We can estimate that the direct cost for chimpanzee support now being paid from multiple government budgets is \$7,300,000 per year.” Chimpanzees in Research: Strategies for Their Ethical Care, Management, and Use” by the Committee on Long-Term Care of Chimpanzees Institute for Laboratory Animal Research Commission on Life Sciences, at Sec 4, National Research Council, National Academy Press, Washington, D.C., 1997 (hereinafter, NRC Report)(available at <http://bob.nap.edu/html/chimp/>).

cheapest alternative would be to euthanize the unneeded animals, however, this option was rejected by the Committee and ultimately by Congress as well. The option suggested by the Research Committee and adopted by Congress was the creation of retirement sanctuaries that would be operated, and partly supported by, Congress and non-profit private organizations.<sup>48</sup>

While money was one motivation for the action of Congress, underlying the passage of the Chimpanzee Protection Act was also recognition that chimpanzees used in research are morally relevant beings, toward whom our society, having used them for human benefit, has obligations. However, the political/Congressional record does not have any clear statement about moral philosophy. The record as it exists dances around the issue of why the chimpanzee are the focus of such concern. While some Congressmen objected to the law, saying that Congress should be addressing more important human issues, such a human health care, no one on the record even hinted at the killing of the chimpanzee as an alternative.<sup>49</sup> On the other hand, no Congressperson took the opportunity to make the case for animal rights. The clearest statement was given by Senator Smith of New Hampshire who said, "In other words, because chimpanzees and humans are so similar, those who work directly in chimpanzee research would find it untenable to continue using these animals if they were to be killed at the conclusion of the research."<sup>50</sup> Thus it is not his moral position, but the moral concerns of others that support the legislation. Congressman Brown of Ohio did state in the floor debate, "There is a moral responsibility for the long-term care of chimpanzees that are used for our benefit in scientific research and today that responsibility is ours."<sup>51</sup>

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<sup>48</sup>The committee believes that funds for long-term care of chimpanzees, especially the phase when they are no longer needed for research or breeding, should not come from biomedical research budgets, and it urges that creative approaches to develop and support sanctuaries be sought. Societal obligations to chimpanzees no longer needed for research or breeding require cooperative support from federal agencies, Congress, commercial companies, and nongovernment organizations.

*Id.* at Sec. 4, Cost, Sanctuary Construction.

<sup>49</sup> Congressman Brown of Ohio:

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

Congressional Record (House of Representatives) - Oct. 24, 2000, at p. H10554.

<sup>50</sup> Congressional Record (Senate - December 6, 2000) at p. S11655.

<sup>51</sup> Congressional Record (House of Representatives - Oct. 24, 2000, at p. H10554.

It is the observation of the author that for elected members of Congress this proposal presented issues difficult for them to address openly. It would not be good politics to say in public you want to kill the chimpanzee, for that would most likely not resonate well with the average voter who, through the

Under the Chimpanzee Protection Act, Congress requires that the regulations that are to be adopted by Secretary of Health and Human Services have a provision which says, “none of the chimpanzees may be subjected to euthanasia, except as in the best interest of the chimpanzee involved.”<sup>52</sup> Congress has weighed the fundamental interests of the chimpanzees in having continued life against the cost to the taxpayers in supporting their continued life and decided the chimpanzees’ interests are greater.<sup>53</sup>

This action by Congress is representative of incremental legal change on behalf of animals.<sup>54</sup> Note that no one suggested a retirement home for all of the rats who have been used in scientific studies and are no longer needed. Rather, the law represents what is politically and

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efforts of Jane Goodall and others, holds the chimpanzee as a special species. On the other hand they can not publicly say that they think chimpanzees are morally relevant beings, for fear of being cast by political opponents as an animal rights supporter. And, animal rights is not yet supported by the main stream American voter.

Another tension unstated in the public discussion was that the politicians did not want to criticize the medical research industry, which has strong political support generally. Yet, it was understood that moving the chimpanzee out of the laboratory cages and into a sanctuary would significantly enhance the quality of their lives. To talk about this as a justification for the new law would raise issues about why the medical research industry finds it necessary to keep chimpanzee in such repressive conditions to begin with.

Thus the recorded debate is rather silent on the underlying motivations for the Act. Additionally, the Act itself does not have any preliminary language suggesting the motivations for the law. However, if it was not the case that there was moral concern for the plight of the chimpanzees then it is difficult to see how the bill would have made it through the labyrinth of Congress to passage. See generally, Senate Report 106-494, Oct. 10 2000; Congressional Record (Senate - December 6, 2000) at p. S11654-55; Congressional Record (House of Representatives - Oct. 24, 2000) at p. H10550-54; House Hearing, “Biomedical Research: Protecting Surplus Chimpanzee,” Serial No. 106-109, May 18, 2000.

<sup>52</sup> 42 U.S.C. 287a-3(d)(2)(I). It should be noted that regulations have yet to be adopted.

<sup>53</sup> This position did have its dissenters:

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

Minority Report of NRC Report, *supra* note .

<sup>54</sup> The United States is not alone in advancing the legal status of chimpanzees. In 1999 New Zealand amended its Animal Welfare Act to ban the use of non-human hominids in medical research unless it was for the benefit of the animal. See, Rowan Taylor, *A Step at a Time: New Zealand’s Progress Toward Hominid Rights*, 7 ANIMAL LAW 35 (2001)

financially feasible at a moment in time. If this works, then perhaps this model can be expanded to other species in the future.

#### 4. Trusts & Estates

An example of increased recognition of animal interests in the civil law arena is the Uniform Trust Act of 2000,<sup>55</sup> which has been adopted in over a dozen states.<sup>56</sup> With this adoption another long-standing legal barrier has been lowered for animals. The river has been forded. The traditional view in the United States disallowed animals to be the lawful subject of a provision in a will or trust.<sup>57</sup> This inability of individuals to make provisions for their pets after their deaths was addressed by the drafters of the Uniform Trust Law with the drafting of Section 408 of the Act. Under this section a trust for the care of an animal is specifically allowed along with the authorization for courts to appoint someone to enforce the trust.<sup>58</sup> Parallel language has also been made part of the Uniform Probate Law.<sup>59</sup> Thus a pet becomes a legally relevant being,

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<sup>55</sup> Uniform Trust Code, Last Revised or Amended in 2001, Drafted by the National Conference of Commissioners on Uniform State Laws.(available at: <http://www.law.upenn.edu/library/ulc/uta/2001final.htm> ).

<sup>56</sup> Alaska (Sec 13.12.907); Arizona (Sec 14-2907);California (Sec 15212); Colorado (Sec 15-11-901);Florida (Sec 737.116); Iowa (Sec 633.2105); Kansas (UTC 408; Sec 29); Michigan (Sec 700.2722); Missouri (Sec 456.055); Montana (Sec 72-2-1017);Nevada (Sec 163.0075);New Jersey (Sec 3B:11-38); New Mexico (Sec 45-2-907); New York (Sec 7-6.1); North Carolina (Sec 36A-147); Oregon (Sec 128.308); Tennessee (Sec 35-50-118);Utah (Sec 75-2-1001);Washington (RCW 11.118)

<sup>57</sup> See generally, Gerry W. Beyer *Pet Animals: What Happens When Their Humans Die?* 40 SANTA CLARA L. REV. 617(2000); Siobhan Morrissey, *Wills Go To the Dogs*, 89 ABA JOUR. 24 (May 2003).

<sup>58</sup> Trust for Care of Animal:

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

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

Uniform Trust Code § 408, supra note .

<sup>59</sup> Uniform Probate Code § 2-907(1993). Adopted by Arizona:  
Honorary trusts; trusts for pets; conditions

one who has income and assets which must be protected and accounted for with in the legal system.

This change of legal status has occurred in that most traditional of legal areas - trust and estates. This change is of a different quality than the prior examples. In this case government action is not required for the interests of an animal to be asserted in the legal system. The civil courts have authority to act on behalf of the animals. While the primary motivation may well have been taking care of the concerns of human owner of pets, the lawyers and legislatures adopting the Uniform Law and associated state statutes, apparently did not have any conceptual difficulty in accommodating animals into our existing legal community.

### III. Interest Recognition - a New Tort for Animals

The prior four examples support the position that animal interests are already acknowledged by our legal system, and therefore that animals are within our legal community. In particular it should be noted that these points of legal recognition have occurred while the animals have had the status of property. Property status is not a barrier to the recognition and protection of interests within the legal system.<sup>60</sup> As the above examples suggest, our legislatures have exercised the authority to expand the presence of animal interests within our legal system; now it is time to consider the potential role of our common law courts.

Because of the limited scope of the AWA and Chimpanzee Protection Act, as well as the exceptions and limitations of the criminal cruelty laws, more needs to be done on behalf of animals.<sup>61</sup> While the legislative route is always available, the state courts represent an untapped

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

Az. Rev. Statute §14-2907.

<sup>60</sup> For an approach which transforms the nature of the property relationship without eliminating it, see *Equitable Self-Ownership*, *supra* note .

This balancing of interests is rejected by Professor Francione as a wrong road to take in pursuing animal rights.

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

Animal Property, *supra* note at 256.

<sup>61</sup> See generally, Scully *supra* note . Just as one example, he discusses the horrors faced by animals in the agriculture segment of our society.

resource that might be used on behalf of animals. These traditional courts have the capacity for the expansion of legal recognition of animal interests in the civil law area.<sup>62</sup> In order to give form and substance to the judicial approach the adoption of a new tort - the intentional interference with the primary interests of an animal - is hereby urged.<sup>63</sup> This tort would allow for the resolving of conflicts between the competing interests of humans and a limited number of animal interests.<sup>64</sup>

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

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

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

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<sup>62</sup> The flexible power of the common law state courts is developed extensively by Steven M. Wise in *Rattling the Cage*, *supra* note at 89 - 118. While his discussion is in the context of developing rights, it applies also to the concepts of interests recognition. *Also see*, Prosser *supra* note at 17- 20, "Lawmaking by Courts".

<sup>63</sup> The tort proposed in this article could be legislatively adopted. Over the next decade it is more likely that legislatures will proceed on a more modist point by point basis. Perhaps the AWA could be amended to outlaw the use of primates in invasive research. For an example of how the balance of competing human animal interest could be re-balanced, *see*, David Favre, *Laboratory Animal Act: A Proposal*, 3 PACE ENVT'L L. REV. 123 (1986).

<sup>64</sup>The first thing that our Constitution teaches is that rights are not such a scary thing to recognize or to confer, since rights are almost never absolute.... Arguing for constitutional rights on behalf of non-human being, ... shouldn't be confused with giving certain non-human interests absolute priority over conflicting human claims.

Tribe, *supra* note at 2.

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

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

#3- As a final example, consider JoJo, having lived for twenty years in an institutional lab at Big University, in a cage that meets the requirements of the AWA in physical dimensions.<sup>65</sup> However, he never sees the natural light of the sun, or the touch of any other chimpanzee, human or other, unless handlers have sought to do a procedure with him. There is nothing for him to do in the cage. He has been part of three different scientific protocols over the past fifteen years. If

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<sup>65</sup> 9 CFR 3.75, Subpart D, available at <http://www.animallaw.info/administrative/adusawaregd.htm> .

attorney George Hall brings an action for violation of the tort and seeks removal of JoJo from this environment, it should not be too difficult to show intentional interference with his fundamental interests as discussed above. The legal focus would quickly turn to element three and the court would have to determine whether JoJo's interest clearly outweighs the interests of the owner, Big University, in utilizing this animal in the name of science. This is not an abstract argument about the use of animals in science; instead, the dispute will be about this particular chimpanzee being used by this particular University. Whereas in the past researchers have only had to justify the use of chimpanzees to themselves, and did not have to give any weight to the interests of the JoJo, under the proposed tort, Big University would have to make its case to the judge.

#### **A. A Legal Duty Generally:**

Fundamental to the concept of a tort is the creation /existence of a duty obligating one being to take into account the interests of another.<sup>66</sup> It is the role of the common law courts to determine whether a particular moral claim or interest that is asserted will be accepted by a court, resulting in the imposition of a legal duty upon others to accommodate the newly asserted interest. As moral perspectives change and society evolves, then the courts can find that a duty exist where none existed before.<sup>67</sup> In this case the claimed duty is that of humans to not interfere with the fundamental interests of an animal unless they are asserting a more important, human-focused interest.<sup>68</sup> While this may seem novel and unsupportable to some, it is a duty that has long been in existence, but the duty has been owed to the government rather than the animal. As discussed previously<sup>69</sup> for over a hundred years our criminal law, adopted in every state of the union, has imposed on humans a duty to not inflict pain and suffering on animals without justification, as well as an affirmative duty of care for animals within someone's possession and

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<sup>66</sup> “[I]t has been said that torts consist of the breach of duties fixed and imposed by upon the parties by the law itself, without regard to their consent...” Prosser, *supra* note at 4.

<sup>67</sup> *See supra* note 2.

<sup>68</sup> So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others.

Prosser *supra* note at 6.

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

<sup>69</sup> *See* text and materials at notes 34-39, *supra*.

control.<sup>70</sup> This proposed tort simply allows recognition of a comparable duty within the civil side of the legal system.<sup>71</sup>

This is but a logical next step. It is the well-being of the animal that is the focus of concern in the first place, so why not tie the duty directly to the being that deserves the protection and consideration. This will make the implementation of the duty more efficient. As might be conjectured, any number of reasons arise which make it difficult for the government, through the offices of local prosecuting attorneys, to enforce this acknowledged duty. Thus the presence of a civil action will allow other resources, not politically or economically limited, to support the animals in asserting their interests. The duty exists presently; it is a matter of how the legal system will impose the obligations of the duty. While building on the existence of this duty the tort rejects the legislative exemptions created in the criminal law and seeks a re-balancing of animal human interests under the structure of the proposed tort.<sup>72</sup>

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<sup>70</sup> For a survey of the state laws *see*, Pamela D. Frasci, Stephan K. Otto, Kristen M. Olsen & Paul Ernest, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL LAW 69 (1999).

<sup>71</sup> A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing, by eliminating the offender from society.

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

Prosser, *supra* note at 7.

<sup>72</sup> Most state anti-cruelty statutes exempt a number of general activities from the scope of the law. If any particular act can be shown to have been carried out under the umbrella of a specified general activity, then it is exempted regardless of the intention of the actor or degree of cruelty involved. As an example the Michigan law MCLA §750.50 provides:

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

- (a) Fishing.
- (b) Hunting, trapping, or wildlife control regulated pursuant to the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106.
- (c) Horse racing.
- (d) The operation of a zoological park or aquarium.
- (e) Pest or rodent control.

## B. Presence of a Fundamental Interest

The proposed tort will first require the presence of a fundamental interest. All living beings have interests: biological, physiological, social and nutritional needs, of which an individual may or may not be self-aware. While the interest in eating an apple pie may be trivial, even Mr. Jones has fundamental interests, such as a freedom from pain and suffering and personal freedom of movement.<sup>73</sup> We are dependant upon the advances of scientific study to bring before the court the information necessary to decide what interests a particular animal may have. While most of the information can be provided on a species basis, some information may be unique to the individual plaintiff. Obviously the test cannot be whether humans know everything about a species, as we do not yet even know everything about ourselves. Sufficiency of the knowledge should be judged in the context of the specific interests that is at issue before the court. Satisfying the court as to the base of information is the burden of the plaintiff. An issue such as the appropriate home for the placement of a pet may be highly dependent on the character of the individual animal and only modestly with information about the species/breed generally. On the other hand, the basic housing square footage need for a tiger in a zoo is most likely satisfied by species information, rather than individual animal information.

The extent of expert information needed by the court will relate to the degree to which the issue reflects new ideas, or ideas not commonly understood. Some issues, such as the general need for clean water and nutritious food, can be presumed to be generally understood, but if the

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

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

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

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

<sup>73</sup> Roscoe Pound list five categories of fundamental human interests:

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

Pound, *supra* note at 33. These categories are discussed at length by Pound, *id.* at 33 - 105.

specific food for the feeding of a snake is at issue then some expert will be required to present information to the court.<sup>74</sup>

Only interests of fundamental importance to the animal should be before the court, not the trivial, or obscure interests of the animal. This requirement is about both the reality of limited judicial resources and the political support that will be necessary to sustain the new tort. For the most part, these interests should also be the ones about which the most scientific information exists. This is not a bright line test and obviously will require the court to make a judgment call. The term “fundamental” should be considered in light of our knowledge about what is important to an animal as a species and as an individual. Fundamental interests reflect those needs or characteristics of an individual animal which are required for the physical and mental well being of the animal, and will normally be reflected in providing those environmental conditions which are necessary to allow the animal to exercise /experience those characteristics or activities that are species defining. For example, to be housed in social groupings is fundamental to primates, but most likely not to snakes; to be able to reproduce, produce prodigy, is fundamental to all living beings; to be able to sustain life with water and food is fundamental, to be able to use their body in modes for which it is built is fundamental. Birds need perches and the space in which to fly, while rabbits do not. Cheetahs need space to run, frogs need ponds in which to lay eggs. Some lizards need walls to climb and places to hide. Boa constrictors need branches to lie out upon, and drop down from. Hogs need space to root and wallow. Sheep need space to sit in social groups and chew their cud. Each species has developed characteristics by which they survive and reproduce. Humans have removed many of them from the environment in which they would normally exist. One of the moral duties that arise out of this taking of possession and control of a non-human animal is the obligation to provide the animal those conditions that are fundamental to the animal’s nature.

This does not have to be a search without landmarks. The criminal anti-cruelty laws as well as the AWA discussed above can act as a rich set of markers already adopted by the legislature and administrative agencies as reflecting concern for fundamental interests. The examples above with JoJo suggest a credible context. Surely we know enough about chimpanzees to be comfortable in stating that the keeping of a chimpanzee in a 5X5X7 cage is an interference with a fundamental interest.<sup>75</sup>

If we cannot say what is fundamental to an animal then the doors of the courtroom will remain closed until such information is available. While this may seem unfair, there is no other way to proceed with limited resources of the legal system. A court cannot be asked to do the

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<sup>74</sup> For many issues this will need to be done only once. As courts make factual determinations then subsequent courts will be able to rely upon that information without full litigation with experts. For example: the proposition that primates are social creatures that need /prefer group living arrangements.

<sup>75</sup> See generally, Jane Goodall, *Chimpanzees of Gambia*,(1990); Adam Kolber, *Standing Upright: the Moral and Legal Standing of Humans and Other Apes*, 54 *Stan. L. Rev.* 163 (2001)(author provides information on mental abilities of great apes). Admittedly these issue are complex, see, Segal *supra* note , but the cage sizes contained in the existing regulations, *supra* note , are more reflective of prior laboratory capital investment than of a determination of fundamental interest of chimpanzees.

science, it can be asked to weigh the information science provides. For many of the species around us on a daily basis, this portion of the test will not be the difficult one, instead it will be the balancing of the interests.

### **C. Intention of the Defendant**

It is axiomatic that the plaintiff must show that the defendant is the source of actions causing the interference with the plaintiff's interest. This is fundamental to common law tort actions, and the usual concepts and theories would apply in this circumstance as well.<sup>76</sup> An important issue when focusing on the actions of the defendant is the issue of intentionality. Most interests interferences within the scope of this tort will not be one time events like battery or publication of liable, but are on going conditions imposed by the owner/keeper upon an animal. The level of intention necessary for the violation of the tort by an owner/keeper is that the act (or non-act) must be shown to be intended by the defendant whether or not the specific consequence was intended. As a matter of public policy, if an individual has possession of an animal it should be presumed that he or she understands the animals and species fundamental interest and is willing and able to accommodate them. In the prior example Big Joe has single caged and mis-fed JoJo. His acts are intentional; the court may conclusively presume that he understood the consequences of his actions upon JoJo. Likewise, Big University, by placing JoJo intentionally in a cage would be presumed to understand that such conditions interfered with a fundamental interest.

### **D. The Test of Substantially Outweighs**

While in the realm of philosophy it may be possible to argue that the interests of animals are equal to that of humans, in the realm of law it is not now possible, but perhaps at some future point in time it will be. New law is built on compromise and incremental change. It is the shifting of expectation of individuals as society evolves. Admittedly, this new tort will bring new conflict and public policy questions before the court, and the court should act only when the moral balance is clearly in favor of the animal. To do otherwise will result in the undermining of the public's confidence in the right of courts to address these novel issues. It will also allow for a shift of perspective and expectation to occur in the minds of the general public. The policy discussion of the courts will become increasingly vital, complex and compelling as information is provided and public policy is developed.<sup>77</sup>

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<sup>76</sup> See, Restatement *supra* note at § 2 "Acts" and § 3 "Actor"; Prosser *supra* note at § 26 "Motive and Chapter 4 "Defences to Intentional Interference with Personal Property."

<sup>77</sup>The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammelled freedom in the furtherance of defendant's desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scales and allowed to swing the balance for or against the plaintiff, the result is a form of "social engineering." A decision maker might

The burden is on the plaintiff to show that his interests ‘substantially outweigh’ those of the defendant. Presumably the plaintiff will be required to show initially a prima facie case of ‘substantially outweigh’ and then the defendant would have the option of making an affirmative showing of their interests.<sup>78</sup> In the second of the JoJo examples, JoJo’s counsel would need to come forward and show that the physical living conditions, nutrition and psychological abuse were interfering with the fundamental interest of JoJo, through the use of expert witnesses. Then the plaintiff would suggest their view of why the defendant was engaging in this conduct and argue that the defendant’s interests do not substantially outweigh the plaintiff’s. The defendant would have the opportunity to show the court as an affirmative defense the scope and depth of the defendant’s need to engage in the complained of conduct, as well as, contest the characterization of the conduct itself. In the context of example #2 a court should be willing to find a violation of the proposed tort.

The third example with JoJo is more difficult because issues broader than the interests of an individual human are involved. In this example, the issue will be whether the possible advancement of science through a specific proposed experiment will be substantially outweighed by the degree of interference with the plaintiff. The defendant would be either an individual or an institution and in either case would undoubtedly and correctly assert that a broader public good was being sought by the use of the animal in the proposed experiment. If the institution has no planned use for the specific animal and is simply housing them, the interference would be without justification.

In both of the examples a counter point that may be made by the plaintiff and considered by the court is what alternatives might exist for advancing the human interests raised by the defendant as justifying the proposed action. Alternatives that would fulfill at least a portion of

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

Prosser, *supra* note at 16-17.

The reality of the need to balance the interests of animals with that of human society was noted by one of the first animal rights advocates, Henry Salt.

Once more then, animals have rights, and these rights consist in the “restricted freedom” to live a natural life—a life, that is, which permits of the individual development—subject to the limitations imposed by the permanent needs and interests of the community.

Animal Rights, *supra* note at 22.

<sup>78</sup> As in the situation of a bailment where a bailor has the duty to show negligence on the part of the defendant bailee, since the defendant has the best information about what happened to the bailed item, the plaintiff’s showing is prima facie and the expectation is that the defendant will affirmatively defend with more information than the plaintiff might have possessed. *See, Gebert v. Yank*, 172 Cal. App.3d 544, 218 Cal. Rptr. 585 (1985).

the human interest without imposing the substantial interference with the interests of the plaintiff could be weight in the balancing of the court. In the case of Mr. Jones there are many different courses of conduct, like taking up snow boarding, which may allow him to realize notoriety and ego gratification. However, depending on what information is sought by the science experiment, then the number of alternatives may be restricted. If the plaintiff can convince the court that viable alternatives exist, then the court can find that the weight and nature of the defendant's interest does not exceed that of the plaintiffs.

Alternatively, the court might find that what is sought in a particular experiment by a particular person, no one else thinks is important, or that while a chimpanzee may be necessary for the experiment, the best possible outcome would be of such trivial value to science and the public that any interference with a fundamental interest may negate the justification for the experiment. Thus when a public good is involved, there are two types of questions that may be addressed. First, is the plaintiff in question necessary to the human desired outcome? And secondly, is the human desired outcome important from a social, cultural or scientific perspective? What if Mr. Jones sought to advance science by dissecting JoJo in order to determine how the arteries supply blood to a chimpanzee's heart? Clearly a chimpanzee is necessary to this outcome. But, even though Mr. Jones may think this information is necessary, others may have already obtained it, or it may be obtained without any cutting of tissue through the use of advanced imaging technology. Even though Mr. Jones does not have access to the technology, the courts could well judge that whatever social/scientific interests may exist in the information, it can be obtained by others without interference with a fundamental right. Thus allowing the court to deny Mr. Jones his interests. So again the plaintiff may counter the claims of the weight of defendant's action - when a public good is asserted - by showing that society at large does not need or value the outcome asserted or that alternatives exist for obtaining the information, or other alleged benefit.

All of this calls upon a judge to weigh disparate interests. Undoubtedly issues of morality, money, fairness and social policy will become intermixed. This difficulty is precisely why it is important to engage the courts in the debate about the use of animals. At the moment the owner of the animal usually makes this decision. There can often be a significant conflict of interests, as some owners give no weight to any interests of any animal in their charge. Optimum fairness to nonhuman animals will be obtained when someone other than the owner is fully authorized to weigh the benefits, cost and risk of a particular act.<sup>79</sup> In so doing it is acknowledged that the "property rights" of the owner are being modified. This is the transition in which we are currently engaged. Animals are not just property, but a hybrid and owners of animals must adjust their expectations to the new reality. Property relationships will continue to

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<sup>79</sup> That animals deserve fair treatment is a moral premise that brings animals within our legal community to begin with. If society does not accept this premise, that animals deserve fair treatment when they are within human control, then society will not accept the appropriateness of this proposed tort.

be useful for issues of clarity about care of an animal, and as the mechanism to transfer value that is represented by such animals as racehorses.<sup>80</sup>

## **E. Loose Strings -Additional Points before Proceeding**

### **1. Extent of the Tort - Wild Animals**

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

While undoubtedly human actions can have significant impact on wildlife, it is not clear that the analysis of this article is adequate for the task. Wild animals are capable of full existence without the aid of humans. They are not the property of humans.<sup>81</sup> The analysis for wildlife is more complex than the proposed tort. Perhaps for wildlife the tort would be framed more along the lines of placing the burden on the human to show a substantial human need, before allowing interference with wild animals.

### **2. Who will Represent the Animals?**

It is not expected that any animal has the capacity to call a lawyer and ask to initiate a law suit, but this is not a bar to the creation of the tort. On a regular basis, courts adjudicate issues concerning beings that are incapacitated: for example children, mentally incompetent, the insane, and the aged. It is beyond the scope of this article to address who is best able to represent

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<sup>80</sup>Because of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of "property" that neither statutory law nor case law has yet recognized.

Bueckner v. Hamel, 886 S.W.2d 368 (1994).

<sup>81</sup>As property laws are a human construct and not an inherent characteristic of physical objects, there is always conceptual space for innovation. One of the premises for our new property paradigm is that living objects have "self-ownership." That is, unless a human has affirmatively asserted lawful dominion and control so as to obtain title to a living object, then a living entity will be considered to have self-ownership.

Equitable Self-Ownership, supra note at 479-80.

the interests of animals before courts. It should be noted that the Uniform Trust Act provisions for the creation of a pet trust specifically allows for the appointment a representative.<sup>82</sup> In the notes to the Uniform Act the issue of standing is specific discussed and it is allowed that an interested human will have standing to enforce the provisions of the act.<sup>83</sup>

The courts are capable of discerning when a particular human is the appropriate party to pursue the interests of an animal. In an indirect manner two federal cases allowed humans to pursue cases that furthered the interests of animals covered by federal law.<sup>84</sup> In at least one case in Florida a court has appointed a guardian ad Litem for a Chimpanzee Trust.<sup>85</sup> The development of guidelines for the court in helping sort out this issue will undoubtedly be the subject of future law review articles. Our legal system has a number of mechanisms such as guardianships, next friends, legal representatives and social workers to deal with this issue.<sup>86</sup> This is a procedural

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<sup>82</sup> § 408(b), *supra* note .

<sup>83</sup>The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. *See, e.g.*, Uniform Probate Code Sections 5-210(b), 5-414(a).

Uniform Trust Act § 408 Comment.

<sup>84</sup> *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 332 U.S.App.D.C. 104 (1998)(the court found that one named individual who had made a number of visits to a particular chimpanzee in a zoo and had sought a number of times to pursue administrative remedies on behalf of the chimpanzee, had standing under the Animal Welfare Act to question the regulations adopted by the government agency). *American Society For Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334 (C.A.D.C., 2003)(the court found the plaintiff had standing arising out of his concern for the well-being of an elephant which he had seen abused while in the employment of the defendant and therefore could bring an action under the Endangered Species Act to determine if the actions of the defendant had “harmed” the elephant in violation of the law).

<sup>85</sup> *In re The Florida Chimpanzee Care Trust*, File # CP-02-1333- IY, Probate Division of Palm Beach County Circuit Court, Florida, April 1, 2002.

<sup>86</sup> *See generally*, Kolber *supra* note (author argues that great apes should be allowed standing under the AWA).

issue and while in need of scholarly consideration is not a bar to the adoption of the substantive law, a tort law.

### 3. Death for the Benefit of Humans

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

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

The fundamental question the court will address is whether human interests can ever justify the taking of an animal's life. Do the interests of an individual animal to continued life trump any human interests that could be put forth? Under one scenario, an animal may have a high quality life, live for years and face a painless and unseen death. Clearly there are many individuals who have a personal ethical position that suggest early death is never justified by human interests. Others see no difficulty in the early death of animals for human consumption.<sup>87</sup>

If the present proponents of animal rights can convince broader society that animals should not die for the benefit of humans, then that outlook can easily be implemented in the application of the test proposed by this article. Until that time, it will be understood as a premise of this cause of action that human interests can be of sufficient weight to justify the death of an animal. But it seems appropriate to say that where the life and premature death of an animal is

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<sup>87</sup> The issue of how to balance the animal's interest and that of a consuming human is considered in a New York Times Magazine article. Michael Polland, *An Animal's Place*, NEW YORK TIMES MAG. Nov. 10, 2002, p. 58

What's wrong with animal agriculture— with eating animals – is the practice, not the principle. What this suggest to me is that people who care should be working not for animal rights but animal welfare – to ensure that farm animals don't suffer and that their deaths are swift and painless.

*Id.* at p. 110.

for the benefit of humans then the quality of life and nature of death take on enhanced protection and consideration by the courts.

#### **4. Profit Motive as a Justification**

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

Another aspect to profit is the seeking to increase or enhance profitability in a way that increases the harm to an animal. In the deciding of whether the eating of pig products is an acceptable use of pigs, the fact that under the capitalist system some one will make a profit in providing the product should not weigh in the balance. Assume that the judgment is to allow pig products. Now the question will turn to the issue of how the pigs are raised. When the pig producers seek to enhance profits or gain a competitive advantage in the raising of pigs results in an interference with a fundamental right, it should not be allowed. It is possible to raise pigs in a manner that does not violate their fundamental interest. Unfortunately in the capitalist system the motivation to enhance profits by decreasing cost is a powerful force. It is an objectionable force when the changes in the condition of raising the animals may substantially interfere with a fundamental right.

As one narrow hypothetical, consider the producer of hogs who has 1,000 hogs in one building. The accountant figures out that if they lower the temperature in the building during winter by five degrees, they will lose 50 hogs to health effect of exposure and some loss of pounds in hogs because of constant shivering, but that those financial loses would be less than the money saved from the reduction in fuel cost. This action should not be allowed, as enhancing profit is not such an interest as will justify the interference with fundamental rights.

#### **5. Remedies**

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

The remedy that will be most useful in many circumstances is that of injunctive relief. While an injunction is somewhat unusual for torts, it is available when an ongoing tort exists.<sup>88</sup> Keeping an animal in an inappropriate housing is like the factory that continues to bleach out toxic gases and hot cinders onto a neighbor. Money damages would be allowed for harm to date, but an injunction to shut down the on going source of pollution would also be available to the plaintiff.

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

## Conclusion

This article has sought to establish the premise that non-human animals presently have some of their interests represented within our legal system. Building upon this presence, a new approach has been suggested by which the civil tort laws could be expanded to include a new tort which would directly balance the fundamental interests of animals with those of humans. This would bring to the forefront a process that has long existed and allow public policy to be more forthrightly considered and decided. This will provide a legal mechanism to realize our moral obligations to the domestic animals that are among us.

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<sup>88</sup> See discussion of injunctive relief being available for a continuing nuisance in Prosser, *supra* note at 640- 43.