IN DEFENSE OF HUMANITY: WHY ANIMALS CANNOT POSSESS HUMAN RIGHTS

INTRODUCTION

Humans are unique. We possess traits that animals do not, just as animals possess traits that humans do not. One of those traits is language. You are human; therefore, you are able to speak, write, and even read this Note.\(^1\) Being human means you are part of a unique group that enjoys unique rights and bears unique responsibilities. Until the recent past, this was obvious, self-evident, and noncontroversial. This notion of being unique, or human exceptionalism, has increasingly come under attack.\(^2\)

In today's new age, which has arguably blossomed in the light of World War II and the Civil Rights Movement,\(^3\) it seems almost every conversation and headline centers on one's rights. Mary Ann Glendon calls this allure of rights the “romance of rights” and contends that this new rights discourse focuses on influencing the courts rather than influencing society as a whole.\(^4\) However, in this era of expanding rights,

\(^1\) As Wesley Smith so cleverly put it, “[i]f you are reading these words, you are a human being.” Wesley J. Smith, Four Legs Good, Two Legs Bad: The Anti-human Values of “Animal Rights,” HUM. LIFE REV., Winter 2007, at 7, 7 (hereinafter Smith, Four Legs Good). Throughout this Note the traditional terms “animal” and “human” will be used with their obvious connotations. The discourse of animal rights activism has sought to redefine the terminology of the debate by using the term “nonhuman animal” when referring to what is commonly called an animal. See Paul Waldau, Will the Heavens Fall? De-Radicalizing the Precedent-Breaking Decision, 7 ANIMAL L. 75, 94 (2001). In an effort to entreat people to begin to think of the difference between humans and animals only as a matter of degree, animal rights proponents attempt to subordinate human standing and subliminally undermine the authentic meaning of humanness through word games. See Geordie Duckler, Two Major Flaws of the Animal Rights Movement, 14 ANIMAL L. 179, 194 (2008).

\(^2\) See Steven Best, Minding the Animals: Ethology and the Obsolescence of Left Humanism, INT'L J. INCLUSIVE DEMOCRACY, Spring 2009, at 1, 1–2 (“The massive, tangled knot of ideologies involved in the social construction of our species identity need to be critically unraveled, so that we can develop new identities and societies and forge sane, ethical, ecological, and sustainable life ways.”).


\(^4\) Id. at 5; see also Richard L. Cupp, Jr., Moving Beyond Animal Rights: A Legal/Contractualist Critique, 46 SAN DIEGO L. REV. 27, 28 (2009) [hereinafter Cupp, Moving Beyond Animal Rights] (footnote omitted) (“Since important legal victories against racial discrimination and other forms of discrimination in the 1950s and 1960s, many legal scholars and lawyers have been increasingly attracted to the ‘romance of rights.’ For these scholars and lawyers, analogies to the civil rights movement seem especially appealing as vehicles for achieving societal change in new fields.”).
“rights are not what they used to be.”

Glendon observes that the law talk permeating society today is far removed from traditional dialogue by its “simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness . . . , and its silence with respect to personal, civic, and collective responsibilities.” This dialogue of rights “has become the principal language that we use in public settings to discuss weighty questions of right and wrong.”

One of the most rapidly expanding fields in this new era of rights is so-called animal rights. This expansion is evidenced by, among other things, the relatively recent growth in the number of law schools offering courses on animal law and establishing animal rights centers, the number of journals focusing on animal law, the number of established Animal Legal Defense Fund chapters, and, perhaps most telling of all, the amount of money spent each year in animal rights activism.

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5 Cupp, Moving Beyond Animal Rights, supra note 4.
6 Glendon, supra note 3, at x.
7 Id. at x–xi (noting also that “[t]his unique brand of rights talk often operates at cross-purposes with our venerable rights tradition”).
8 Cupp, Moving Beyond Animal Rights, supra note 4, at 29.
9 Compare Richard L. Cupp, Jr., A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status, 60 SMU L. Rev. 3, 4 (2007) [hereinafter Cupp, Dubious Grail] (stating that in 1997 “there were only perhaps one or two animal law courses being taught at United States law schools”), with Animal Law Courses, Animal Law Section, NAT’L ASS’N FOR BIOMEDICAL RESEARCH, http://www.nabranimallaw.org/Law_Schools/Overview/ (last visited Mar. 31, 2014) (“There are now at least 119 law schools in the United States that offer or have offered credit for an animal law course”).
Indeed, the animal rights discussion “has moved from the periphery and toward the center of political and legal debate.”\textsuperscript{14} Consistent with society’s increasing focus on rights, the core of this move is concentrated on gaining intrinsically human rights for animals.\textsuperscript{15} Suits are being filed regularly as activists try to utilize the courts to confer rights upon animals.\textsuperscript{16}

Animal welfare advocacy starts with laudable premises—“that humans should be alert and even sympathetic to the needs of animals, who are the creatures of God.”\textsuperscript{17} Very few people would attempt to argue that humans have unlimited license to make animals’ lives miserable, to do whatever we want to them, or to destroy their habitat at will without any thought of the consequences.\textsuperscript{18} “Not to care, to one degree or another, about animals is not to care, period.”\textsuperscript{19} As Immanuel Kant wrote, “he who is cruel to animals becomes hard also in his dealings with men.”\textsuperscript{20}

Most animal rights activists today, however, do not want mere protection for animals.\textsuperscript{21} They want moral and legal equivalence, and


\textsuperscript{15} Cupp, Moving Beyond Animal Rights, supra note 4, at 31.


\textsuperscript{18} See, e.g., Gary L. Francione, Animal Rights and Animal Welfare, 48 RUTGERS L. REV. 397, 398 (1996) (“Almost everyone—including those who use animals in painful experiments or who slaughter them for food—accepts as an abstract proposition that animals ought to be treated humanely’ and not subject to ‘unnecessary’ suffering.”).

\textsuperscript{19} Murchison, supra note 17, at 31.

\textsuperscript{20} IMMANUEL KANT, LECTURES ON ETHICS 240 (Louis Infield trans., 1978).

\textsuperscript{21} SUSAN SPERLING, ANIMAL LIBERATORS: RESEARCH AND MORALITY 2 (1988) (explaining that the animal rights movement questions “assumptions about the human relationship to animals that have been fundamental to Western culture,” and it does not want to merely reform animal use by humans; it wishes to abolish it altogether).
this is where the advocate and the activist diverge.\textsuperscript{22} By showing that certain animals possess attributes or capacities that are akin to humans, today’s activists argue that animals are equal to humans\textsuperscript{23} and should be given similar rights, including legal personhood and standing to sue.\textsuperscript{24} This debate raises important issues about animal welfare and the proper balance between man and beast; however, few animal activists have addressed the implications of the rights they seek for animals.\textsuperscript{25} This Note argues that the answer to these issues correctly lies in human responsibility and stewardship—not animal rights. “Developing an artificial construct of formal rights for animals would be harmful both to humans and, ultimately, to animals.”\textsuperscript{26}

With this growing debate, several experts have emerged on both sides and each have supported his or her belief with particular arguments. The debate has largely been a one-on-one, scholarly point-counterpoint debate that consists of one scholar writing an article or delivering a speech articulating his or her theory, and then another scholar responding by writing a book refuting that particular theory. This Note, therefore, attempts to amalgamate and explain these arguments, while ultimately espousing the theory of human exceptionalism as the proper way of viewing human-animal relationships.

Wesley J. Smith is possibly the foremost expert regarding the theory of human exceptionalism. Among other accomplishments, he is a Senior Fellow at the Discovery Institute’s Center on Human Exceptionalism and a prolific author on the topic of human exceptionalism itself.\textsuperscript{27} Richard L. Cupp, Jr., another proponent of and prolific author on human exceptionalism, is the John W. Wade Professor

\textsuperscript{22} Wesley J. Smith, A Rat Is a Pig Is a Dog Is a Boy: The Human Cost of the Animal Rights Movement 14–15 (2010) [hereinafter Smith, A Rat Is a Pig]. Throughout this Note the term “advocate” will refer to one who seeks animal welfare, while the term “activist” will refer to one who fights for animals to have moral equivalence and human rights. This difference between animal welfare advocates and animal rights activists is further explained in Part I.

\textsuperscript{23} See Peter Singer, Animal Liberation 11 (Updated ed. 2009) [hereinafter Singer, Animal Liberation].


\textsuperscript{26} Cupp, Moving Beyond Animal Rights, supra note 4, at 28.

\textsuperscript{27} Wesley J. Smith, Senior Fellow—Discovery Institute, Discovery Inst., http://www.discovery.org/p/13 (last visited Mar. 31, 2014).
of Law and Associate Dean for Research at Pepperdine University School of Law. Smith’s seminal book, A Rat Is a Pig Is a Dog Is a Boy, articulates human exceptionalism and refutes animal rights in great detail. In the same regard, several of Cupp’s works on animal rights theory provide excellent background on the rights movement and a thorough framework through which to view and rebut animal rights arguments. The works of these two expert authors, therefore, are the main sources on which the arguments and logic of this Note relies in espousing the theory of human exceptionalism.

Part I of this Note explores important differences between animal welfare and animal rights. Part II explains the major animal rights theories and critiques their efficacy as viable arguments for human-animal equality. Part III focuses on the intrinsic humanness of our legal system, explains the importance of this structure, identifies the rights that animal advocates seek, and argues that so-called animal rights do not fit into our innately human system. After defining and defending human exceptionalism, Part IV explains human exceptionalism’s meaning, how it is the foundational belief upon which all human rights are built, and its importance to the human-animal debate. Finally, Part V concludes that human exceptionalism is the appropriate theory in which to view this debate because it requires human responsibility and accountability that values animals but does not supplant humans’ appropriate place as the ultimate stewards of the earth.

I. ANIMAL WELFARE VS. ANIMAL RIGHTS

Animal welfare societies have done much to further the prevention of cruelty to animals, but as Wesley Smith explains, “animal welfare and animal rights represent incompatible moral principles and mutually exclusive goals.” Citing animal law attorney Michael Schau, Smith lauds animal welfare, or animal protection advocacy, as having grown out of admirable “principles of humane care and treatment” for animals. Smith warns that these legitimate animal welfare activities, however, must not be conflated with today’s animal rights movement because the moral principles and goals of each group sharply diverge after their shared general concern “with the way people treat animals.”

28 Cupp, Dubious Grail, supra note 9, at 3 n.4.
29 Smith, A Rat Is A Pig, supra note 22, at 15.
30 See, e.g., Cupp, Moving Beyond Animal Rights, supra note 4, at 32–34.
31 Smith, A Rat Is A Pig, supra note 22, at 15.
32 Id. at 15–16 (citing Michael Schau, Animal Law Research Guide, 2 BARRY L. REV. 147, 148 (2001)).
33 Id. at 15.
Schau explains that animal welfare advocates seek to improve animal husbandry methods, alleviate needless pain and suffering, and ensure that animals receive “essential food, water[,] shelter, [and] health care.”34 Smith adds that welfarists accept human exceptionalism and “believe we have a human duty to prevent unnecessary animal suffering.”35 They do not believe that animals should be given human-type rights, and they “acknowledge that, assuming appropriate practices, we are entitled to benefit from animals in furtherance of human interests.”36 Most importantly, however, is that animal welfare advocates “do not seek to create a moral equivalence between human beings and animals.”37 Animal rights activists, on the other hand, do seek moral equivalence. They fervently “deny that human beings have the right to use animals to further any human purpose,”38 period, and they zealously oppose “the idea that animals can ever properly be considered property.”39 Even Professor Gary L. Francione, a leading animal rights advocate and author, admits that today’s “animal ‘rights’ movement is fundamentally different from . . . the animal welfare movement” because it patently rejects the beliefs that animals are the property of humans and that animals may be used for human benefit.40 Additionally, he states that animal rights activists think that at least some animals should possess rights that absolutely insulate them from harm, just as human rights protect humans from harm.41 Thus, they demand the “abolition of all exploitation of animals, on the grounds that animals have inherent, inviolable rights” that are non-negotiable.42 Moreover, animal rights activists believe that animal welfarism is “per se

35 Smith, Four Legs Good, supra note 1, at 8 (emphasis added). Welfarists do not seek to end all animal suffering. See id.
36 SMITH, A RAT IS A PIG, supra note 22, at 15; see also Schau, supra note 34, at 148 (“Animal welfare] advocates will ardently support animal use practices that are perceived to produce widespread benefits to society, thus justifying required use of animals, but reject support for nonessential use.”).
37 SMITH, A RAT IS A PIG, supra note 22, at 15.
38 Id. at 16.
39 Id.
40 Francione, supra note 18, at 397 n.*, **, 401; see also ROBERT GARNER, ANIMALS, POLITICS AND MORALITY 60 (2d ed. 2004) (“[T]he terms welfare and rights are indicative of the key division within the animal protection movement; between those who consider that animal interests should take a subordinate, albeit important, position and those who recognise a higher moral status for animals.”).
41 Francione, supra note 18, at 401.
insufficient,” “outdated and fundamentally immoral.”

The significance of the differences in the two movements seems more or less clear; however, Smith explains that animal rights activists have muddied the waters by co-opting the welfare approach. He points to early activists who recognized that arguing for human-type rights for animals might be viewed as radical by the “general public that love[s] animals but still consider[s] them less important than people.” Accordingly, Smith reasons, animal rights organizations are able to ride the coattails of support that animal welfare organizations enjoy by concealing their true intentions. Through this tactic, rights organizations are able to pursue their radical ideologies by garnering “substantial financial and moral support from animal lovers who believe they are promoting animal welfare.” Smith points out, however, that in the long run this has had a detrimental effect for animals because organizations pursuing radical ideologies “have drained funds from traditional welfare activities . . . which have really helped animals historically.”

II. THE THEORIES

The animal rights movement has developed many theories to support its pursuit of moral equality for animals. Some activists cite consciousness, some cite sentience, others cite autonomy, and still others base their argument upon an amalgamation of the three. The two major theories, however, are those espoused by Peter Singer and Steven Wise. Accordingly, this Note will address those two theories in turn.

A. A Utilitarian Quality of Life Ethic

The utilitarian philosopher Peter Singer became the instigator and godfather of the animal rights movement when he published Animal

43 Francione, supra note 18, at 400.
44 SMITH, A RAT IS A PIG, supra note 22, at 17.
45 Id.
46 Id.
47 Id. at 18.
48 Id.
49 Id. (quoting Interview by Wesley J. Smith with Frederick K. Goodwin (Oct. 28, 1998)) (internal quotation marks omitted).
52 See discussion infra Part II.B.
Liberation in 1975.\textsuperscript{53} It was in this book that Singer popularized the term “speciesism,” which had been conceived a few years earlier by British psychologist Richard Ryder.\textsuperscript{54} Singer defined speciesism as “a prejudice or attitude of bias in favor of the interests of members of one’s own species and against those of members of other species,”\textsuperscript{55} and he later asserted that “[s]peciesism is logically parallel to racism and sexism.”\textsuperscript{56} Under his utilitarian framework, Wesley Smith points out, Singer was the first to seriously argue “that the ‘interests’ of animals should be accorded ‘equal consideration’ with those of people.”\textsuperscript{57} Ultimately, Smith argues, Singer’s ideology is a masked argument supporting a “new moral hierarchy in which individual capacities are what matter morally.”\textsuperscript{58}

Singer’s argument for equal consideration is based on what he calls the “quality of life” ethic,\textsuperscript{59} which, in other contexts, has been lauded as “a species neutral way of grouping creatures.”\textsuperscript{60} Singer seeks to eradicate speciesism, but according to Smith this does not make Singer a believer in animal rights because Singer not only rejects the intrinsic value of life, but “he rejects the very concept of rights.”\textsuperscript{61} In lieu of inherent worth, Smith explains, Singer posits an equation whereby the cognitive capacities of “person[s],” which he defines as “any being that exhibits . . . ‘rationality and self-consciousness,’”\textsuperscript{62} are measured against each other.\textsuperscript{63}

\textsuperscript{53} See Smith, A Rat Is a Pig, supra note 22, at 23; see also Neale Duckworth, Living and Dying with Peter Singer, PsychoL. Today, Jan.–Feb. 1999, at 56, 57.
\textsuperscript{55} Singer, Animal Liberation, supra note 23, at 6.
\textsuperscript{56} Peter Singer, Ethics Beyond Species and Beyond Instincts, in Animal Rights: Current Debates and New Directions 78, 79 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).
\textsuperscript{57} Smith, A Rat Is a Pig, supra note 22, at 23; see also R. George Wright, Michael Perry, Peter Singer, and Quasimodo: Persons with Disabilities and the Nature of Rights, 14 J.L. & Religion 113, 128 (1999–2000).
\textsuperscript{58} Smith, A Rat Is a Pig, supra note 22, at 231.
\textsuperscript{59} See Peter Singer, Rethinking Life and Death: The Collapse of Our Traditional Ethics 190–91 (1994) [hereinafter Singer, Rethinking Life and Death]; Smith, A Rat Is a Pig, supra note 22, at 27.
\textsuperscript{60} See, e.g., John Harris, The Concept of the Person and the Value of Life, 9 Kennedy Inst. Ethics J. 293, 307 (1999) (discussing how the re-definition of personhood to account for a creature’s “capacity to value existence” allows for the neutral characterization of all species).
\textsuperscript{61} Smith, A Rat Is a Pig, supra note 22, at 31; see Singer, Animal Liberation, supra note 23, at 19.
\textsuperscript{62} Smith, A Rat Is a Pig, supra note 22, at 27 (quoting Peter Singer, Practical Ethics 74 (3d ed. 2011)).
\textsuperscript{63} Id.
In this equation, the “person” with “higher capacities, whether human or animal, [is] deemed to have greater value than [the “person”] with lower capacities,” and thus, when the interests of two “persons” are in conflict, the interests of the being estimated to have the greater value receives priority.\footnote{Id.}

At first glance, one may not notice the inherent atrocities that this theory supports. Smith concedes that Singer’s language of equality can be misleading.\footnote{See id. at 26.} Smith, however, uses Singer’s own words to illuminate the radical departure in human morality that Singer is suggesting:

To avoid speciesism we must allow that beings who are similar in all relevant respects have a similar right to life—and mere membership in our own biological species cannot be a morally relevant criterion for this right, . . . We may legitimately hold that there are some features of certain beings that make their lives more valuable than those of other beings; but there will surely be some nonhuman animals, whose lives, by any standards, are more valuable than the lives of some humans. A chimpanzee, dog, or pig, for instance, will have a higher degree of self-awareness and a greater capacity for meaningful relations with others than a severely retarded infant or someone in a state of [advanced] senility. So, if we base the right to life on these characteristics we must grant these animals a right to life as good as, or better than, such retarded or senile human beings.\footnote{Id. at 27 (first alteration in original, bracketed alteration corrects Smith’s misquotation of Singer) (quoting \textsc{singer}, \textsc{animal liberation}, \textit{supra} note 23, at 19).

Judge Richard A. Posner gives an example that further illustrates the outrageousness of Singer’s philosophy:

Suppose a dog menaced a human infant and the only way to prevent the dog from biting the infant was to inflict severe pain on the dog—more pain, in fact, than the bite would inflict on the infant. Singer would have to say, let the dog bite, for Singer’s position is that if an animal feels pain, the pain matters as much as it does when a human being feels pain, provided the pain is as great; and it matters more if it is greater. But any normal person . . . would say that it would be monstrous to spare the dog, even though to do so would minimize the sum of pain in the world.\footnote{Posner, \textit{supra} note 25, at 64.}

Smith illuminates, therefore, that accepting Singer’s theory—that being human “is irrelevant to moral value” and to protecting human interests—would mean the end of universal human rights.\footnote{\textsc{smith}, \textsc{a rat is a pig}, \textit{supra} note 22, at 26.} Dr. Alasdair Cochrane submits that universal human rights are grounded in the notion that “human beings possess dignity,” and thus we have “direct
moral obligations” to every human.⁶⁹ He highlights that the Universal Declaration of Human Rights recognizes this: “All human beings are born free and equal in dignity and rights.”⁷⁰ The United States Declaration of Independence is grounded in the same notion: “W[e] hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights.”⁷¹

Furthermore, not only would this end human rights, “ironically it would preclude establishing a regime of animal rights, since an individual’s value and the protection of his or her interests and preferences would be subject to change over time with increases or decreases in capabilities.”⁷² Smith concludes that by arguing for a hierarchy based on cognitive capacities, in which beings with higher capacities have greater moral worth than those with lower capacities, Singer would create a rights system that doles out or takes away rights on a case-by-case, moment-by-moment basis.⁷³ Smith deduces, therefore, that by inventing moral equivalency between all living beings, Singer’s theory deprives so-called irrational or unaware humans of legal personhood.⁷⁴ This creates an untenable paradigm that maintains “[s]ince neither a newborn human infant nor a fish is a person, the wrongness of killing such beings is not as great as the wrongness of killing a person.”⁷⁵

B. Practical Autonomy

The second major theory is practical autonomy. Steven Wise, one of today’s most prominent animal rights activists,⁷⁶ claims that no “objective, rational, legitimate, and nonarbitrary quality” exists that every human possesses, but no animal possesses, entitling all humans,

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⁷¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).
⁷² SMITH, A RAT IS A PIG, supra note 22, at 27.
⁷⁴ SMITH, A RAT IS A PIG, supra note 22, at 28.
⁷⁶ SMITH, A RAT IS A PIG, supra note 22, at 61; Cupp, Dubious Grail, supra note 9, at 7; David J. Wolfson, Steven M. Wise: Rattling the Cage—Toward Legal Rights for Animals, 6 ANIMAL L. 259, 260 (2000).
but no animal, to basic dignity rights.\textsuperscript{77} Wise argues, however, he has identified the one quality that is “sufficient to entitle \textit{any} being, of \textit{any} species, to basic liberty rights.”\textsuperscript{78} He calls this quality “practical autonomy.”\textsuperscript{79} According to Wise,

[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 desire; and
3. possesses a sense of self sufficiency to allow her to understand, even dimly, that she is a being who wants something and is trying to get it.\textsuperscript{80}

For Wise, “[c]onsciousness is the bedrock of practical autonomy,” and he links self-recognition, intelligence, and communication to the concept of consciousness.\textsuperscript{81}

Other animal rights activists espouse different theories about what qualities are sufficient to entitle an animal to rights.\textsuperscript{82} Gary L. Francione holds that the ability to suffer, or sentience, is the quality that entitles a species to rights.\textsuperscript{83} Tom Regan’s “subject-of-a-life criterion” grants rights to animals that have desires, emotions, preferences, perceptions, “a sense of the future,” or any of the many other criterion that can be associated with being alive and conscious.\textsuperscript{84} These alternate capacity theories, however, can easily be categorized under Wise’s umbrella quality of practical autonomy.

Wise utilizes the abolition, civil rights, and gender equality movements as a roadmap\textsuperscript{85} to illustrate the “history of extending rights to formerly excluded persons.”\textsuperscript{86} Similarly, other animal rights activists

\textsuperscript{77} Steven M. Wise, Animal Rights, One Step at a Time, in \textit{ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS} 19, 27 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). The basic dignity rights, Wise suggests, are the rights to bodily integrity and bodily liberty. He defines bodily integrity as the right not to have one’s body invaded without consent and bodily liberty as the right not to be enslaved. \textit{Id.} at 30.

\textsuperscript{78} \textit{Id.} at 27 (emphasis added).

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 32. Wise also clarifies that “[c]onsciousness . . . and sentience are implicit in practical autonomy.” \textit{Id.}

\textsuperscript{81} See Wise, Drawing the Line, \textit{supra} note 50, at 35–37.

\textsuperscript{82} See Sunstein, \textit{supra} note 14, at 13–14 (describing the beliefs of other activists such as James Rachels, Lesley Rogers, Gisela Kaplan, Martha Nussbaum, and Amartya Sen).

\textsuperscript{83} Francione, \textit{supra} note 51, at 127.


\textsuperscript{85} Wise, Rattling the Cage, \textit{supra} note 24, at 49 (using Somerset v. Stewart, the famous English slavery case, and Dred Scott v. Sandford to “set the stage” for his arguments); see also Cupp, Moving Beyond Animal Rights, \textit{supra} note 4, at 43.

\textsuperscript{86} Posner, \textit{supra} note 25, at 55.
analogize animal to human suffering by referencing historical events.\textsuperscript{87} Wise draws analogies to these movements to support his assertion that “notions about the nature and existence of rights have evolved in keeping with shifting societal mores and values and new scientific discoveries, and . . . we have evolved to a point where courts should extend some degree of basic rights to these animals.”\textsuperscript{88} Wise further argues liberty and equality require that all persons enjoy liberty and that “likes should be treated alike.”\textsuperscript{89}

In order to decide what animals should be awarded personhood and rights, Wise creates a scale of practical autonomy divided into four categories.\textsuperscript{90} The more any particular animal “feels or wants or acts intentionally or thinks or knows or has a self,” the larger the proportion of rights it should be awarded.\textsuperscript{91} At the top of the scale are “Category One” animals that “clearly [have] practical autonomy and [are] entitled to the basic liberty rights,” and at the bottom are “Category Four” animals that “lack[] practical autonomy and [are] not entitled to liberty rights.”\textsuperscript{92} When scientific uncertainty exists as to an animal’s autonomy level, it falls into Categories Two and Three.\textsuperscript{93} For these unknown animals, Wise argues courts should adopt a “precautionary principle” and award proportional rights to these animals in anticipation of their potential autonomy.\textsuperscript{94} “In other words,” as Richard Cupp says, “giv[e] them the benefit of the doubt.”\textsuperscript{95}

In an article critiquing Wise’s views, Judge Posner states that practical autonomy “is certainly relevant to rights[,] . . . [b]ut most people would not think it either a necessary or a sufficient condition of

\textsuperscript{87} See, e.g., SMITH, A RAT IS A PIG, supra note 22, at 37–40 (describing PETA’s 2003 “Holocaust on Your Plate” campaign, which juxtaposed “a gruesome photograph of the piled bodies of emaciated Jewish Holocaust victims . . . with the picture of a pile of dead pigs” conveying a horrific message that killing pigs is equivalent to killing Jews).

\textsuperscript{88} Cupp, Dubious Grail, supra note 9, at 8, 20.


\textsuperscript{90} See WISE, DRAWING THE LINE, supra note 50, at 35–38 (adopting this probability scale from the work of Dr. Donald Griffin, whom Wise calls the father of “cognitive ethology”).

\textsuperscript{91} Id. at 35.

\textsuperscript{92} Id. at 38.

\textsuperscript{93} See id. at 38, 43.

\textsuperscript{94} See id. at 38–39, 43. Wise takes the precautionary principle from environmental policymakers. In the environmental context, the principle holds that if uncertainty exists regarding whether something will have a negative impact on the environment, policymakers should make decisions and act with the assumption that it will negatively impact the environment. Id. at 39.

\textsuperscript{95} Cupp, Dubious Grail, supra note 9, at 15.
having rights. By comparing the highest functioning animals to the lowest functioning humans, such as infants and mentally incapable adults who may have less autonomy than certain animals but are still afforded rights, Wise creates a "surface appeal" for his argument that some animals should be given rights. Cupp's argument, and many others like it, rely on this comparison to "the rights status of children and incompetent adults to illustrate that rights exist on a scale, and that personhood [and its concurrent rights] may be granted" to animals on the same scale. However, "[d]espite its intuitive appeal... important distinctions exist." A child or incompetent adult may lack certain aspects of autonomy, and therefore, according to the practical autonomy scale, a highly intelligent ape may be considered more autonomous. However, the ape and the infant still "differ in kind." Cupp contends that the infant has "the potential for full autonomy" because he or she is human. The ape, on the other hand, will never possess the consciousness of a human.

The practical autonomy theory also leads to other untenable consequences. Cupp reasons that if the basis for personhood is consciousness, then "even computers demonstrating artificial intelligence may one day need to be granted personhood status." Furthermore, he explains, assignment of rights based on comparisons to mental capacities endangers the weakest members of human society and directly challenges human dignity. Cupp determines that if some animals are awarded rights because "they are sufficiently intelligent," this necessarily "implies that perhaps some humans should lose their dignity rights if they are sufficiently unintelligent." Ultimately, though some of their arguments create a surface appeal for awarding animals rights, both Singer's and Wise's theories are tragically misguided and create outrageous consequences that would mean the end

96 Posner, supra note 25, at 56 (giving the right to vote as an example of a right to which autonomy is relevant).
97 Cupp, Moving Beyond Animal Rights, supra note 4, at 46–48, 50–51.
98 Cupp, Dubious Grail, supra note 9, at 17.
99 Id. at 18.
100 Id. at 17–19.
102 Cupp, Dubious Grail, supra note 9, at 18–19.
103 See Adler, supra note 101, at 86.
104 See Cupp, Moving Beyond Animal Rights, supra note 4, at 76.
105 Cupp, Dubious Grail, supra note 9, at 19.
106 Cupp, Moving Beyond Animal Rights, supra note 4, at 76.
107 Id. at 76–77.
of human rights as we know them.108

III. A LEGAL SYSTEM FOR HUMANS BY HUMANS

Another scholar who argues in support of human exceptionalism, Geordie Duckler, highlights that around the year 534 A.D., Justinian credited the Roman jurist Hermogenian with having written “hominum causa omne ius constitutum sit,” which translates to “all law is established for men’s sake.”109 Duckler goes on, stating that this statement was true then, and “some 1,500 years later, . . . [it] still holds firm: Humans alone possess legal rights, while animals . . . are denied legal rights.”110 The truth of this statement, it seems, may be so self-evident it remains unseen.

A. The Intrinsic Humanness of our Legal System

Our legal system was made for humans by humans;111 therefore, Richard Cupp concludes, it is “intrinsically human.”112 Furthermore, law, government, and rights “properly understood are distinctly and exclusively a human concept that can only apply to human actions.”113 Put another way, “[a]nimals cannot be the bearers of rights because the concept of right is essentially human; it is rooted in the human moral world and has force and applicability only within that world.”114

There are countless reasons for this conclusion. Many scholars have posited explanations,115 but perhaps James Madison said it most succinctly: “If men were angels, no government would be necessary.”116 Law and government were established solely for human social benefit,

110 Duckler, supra note 1, at 180.
111 Id.
112 Cupp, Dubious Grail, supra note 9, at 54.
113 Smith, A Rat Is A Pig, supra note 22, at 233.
115 See 28 THOMAS AQUINAS, SUMMA THEOLOGIE pt. 1–II, Q. 95, art. 1, at 101–03 (Thomas Gilby O.P. trans., Blackfriars, Cambridge 1966) (1495) (“Not all [men], however, are like that; some are bumptious, headlong in vice, not amenable to advice, and these have to be held back from evil by fear and force, so that they at least stop doing mischief and leave others in peace . . . . This schooling through the pressure exerted through the fear of punishment is the discipline of human law. Consequently we see the need for men’s virtue and peace that laws should be established . . . .”).
116 THE FEDERALIST No. 51, at 291 (James Madison) (Glazier & Co., 1826).
survival, and prosperity,\textsuperscript{117} and they are instituted to protect and promote our fundamental human rights.\textsuperscript{118} Indeed, a foundational aspect of our law is that it must protect the most vulnerable humans among us;\textsuperscript{119} the exact same humans animal rights advocates desire to trample over while clambering to elevate animals to human status.\textsuperscript{120}

Though animals may be somewhat social by instinct, Mortimer J. Adler adds that humans are the only beings that develop constitutions, laws, and governments to live by.\textsuperscript{121} Duckler describes how these systems and institutions have been born and developed over thousands of years through man’s unique language ability.\textsuperscript{122} He explains that history demonstrates that humans live “within a communication- and idea-driven social web and express[] themselves most formally and most thoroughly through the rule and operation of law.”\textsuperscript{123} Indeed, Duckler says the foundation of every legal system, and consequently every legal right, is man’s “capacity for language,”\textsuperscript{124} and without our ability to speak, read, and write, the development of the complex legal systems that operate today would be impossible.\textsuperscript{125}

Claire Rasmussen, a political science professor at the University of Delaware, exposes another telling fact: the way in which “legal and philosophical defenses of animal[] rights are typically mounted.”\textsuperscript{126} Quoting Elizabeth Anker, Rasmussen describes how animal rights activists “typically take the status of the human as their starting points, asking whether animals are sufficiently like human beings . . . [And] within this type of framework, animals are entitled to rights only to the degree they resemble the human, reinforcing” the idea that humanness

\textsuperscript{117} See Adler, supra note 101, at 380–81.

\textsuperscript{118} See U.S. Const. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . . .”).


\textsuperscript{120} See Singer, Rethinking Life and Death, supra note 59, at 220.

\textsuperscript{121} Adler, supra note 101, at 85.

\textsuperscript{122} Duckler, supra note 1, at 180–81. Even Jane Goodall, famous for her research on chimpanzees, admits “sophisticated spoken language is unique to humans.” Jane Goodall, Remark, The Evolving Legal Status of Chimpanzees, 9 Animal L. 1, 2–3 (2003).

\textsuperscript{123} Duckler, supra note 1, at 182.

\textsuperscript{124} Id. at 181.

\textsuperscript{125} Id.

\textsuperscript{126} Claire E. Rasmussen, Are Animal Rights Dead Meat?, 41 Sw. L. Rev. 253, 253 n.*., 256 (2012) (internal quotation marks omitted) (quoting Elizabeth Susan Anker, Elizabeth Costello, Embodiment, and the Limits of Rights, 42 New Literary Hist. 169, 170 (2011)).
is the relevant prerequisite in our human legal system.\footnote{127}{Id. (first alteration in original) (internal quotation marks omitted).}

Historically, theoretically, and by its very nature, the structure of our legal system is intrinsically human; therefore, animal welfare and protection must be addressed with “a humancentric approach.”\footnote{128}{Posner, supra note 25, at 66–67.} Duckler explains that this is precisely the reason “legal rules should not be applied to animals as if they were no different than humans.”\footnote{129}{Duckler, supra note 1, at 182.} The animal rights movement, he argues, fails to adequately address this reality,\footnote{130}{Id. at 200.} and it seeks to convince the courts to operate in contravention to and outside of “the parameters within which law operates to define rights and make those rights useful.”\footnote{131}{Id. at 191; see also id. at 192.}

\textbf{B. The Rights Activists Seek: What Are They? Where Do They Originate?}

What are these so-called rights that animal activists seek? Steven Wise advocates for what he calls “dignity-rights,” which are the rights to bodily integrity and bodily liberty.\footnote{132}{Wise, RATTLING THE CAGE, supra note 24, at 49, 267.} Peter Singer proposes all animals be given moral equivalence with humans,\footnote{133}{See Smith, A Rat Is A Pig, supra note 22, at 23, 28 (quoting Singer, RETHINKING LIFE AND DEATH, supra note 59, at 220).} and still others advocate for additional rights.\footnote{134}{See, e.g., Wise, RATTLING THE CAGE, supra note 24, at 7; Cupp, Moving Beyond Animal Rights, supra note 4, at 31.} They all feverishly work, however, to gain rights for animals, often without attempting to describe or justify what rights are or from where they originate.\footnote{135}{See Duckler, supra note 1, at 191.}

Legal thinkers and philosophers have debated the rights question for decades. The Universal Declaration of Human Rights states human rights belong to everyone, everywhere, and that these rights are grounded in “the inherent dignity . . . of all members of the human family.”\footnote{136}{Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl., (Dec. 10, 1948).} Nicholas Wolterstorff, a former Yale philosophy professor and prolific author on rights and ethics,\footnote{137}{Nicholas Wolterstorff, Justice: Rights and Wrongs, at back cover (2008).} defines rights as “a normative social relationship . . . , [that is,] a legitimate claim to the good of being treated a certain way by persons and by those social entities capable of rational action.”\footnote{138}{Id. at 385–86.}
professor, defines rights as “valid claim[s], or potential claim[s], that may be made by a moral agent, under principles that govern both the claimant and the target of the claim.” These claims are all “states of affairs.” Wolterstorff explains, for example, that the rights to have some object or to not be physically harmed are the states of affairs of owning that object or of “persons treating and refraining from treating one in certain ways.” Therefore, he reasons, “rights are inherently social,” and this “sociality is built into the essence of rights.” Wolterstorff adds that a right is always related to someone; consequently, “[r]ights themselves are foundational to human community.”

Human rights are characterized in many different ways and separated into many different categories. Wolterstorff lists and provides examples of, among others, the following categories of rights. Legal or socially conferred rights are those given by the “legislation of some organization or the rules of some social practice.” The right to Social Security, which is bestowed by legislation of Congress, is a socially conferred right. Standing rights are those that ensue by virtue of one’s office or position. For example, a military officer has the intrinsic right and authority to issue commands to his troops and the right to his troops’ obedience. The troops’ obligation to obey and the officer’s right to their obedience “are not generated by the officer’s commands; they were already there” by virtue of the officer’s standing. Then there are benefit or positive rights, which are rights to be treated a certain way, such as the right to the benefit of a formal education, and there are

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139 COHEN & REGAN, supra note 114, at 323.
140 Id. at 17.
141 WOLTERSTORFF, supra note 137, at 137.
142 Id. at 137–38.
143 Id. at 246.
144 Id. at 4.
145 Id.
146 Id. at 5–6.
147 The examples provided are not an exhaustive list and are lacking greatly in detail. For an excellent and detailed exposition of many additional categories of rights and the justification and grounding of those rights, see generally WOLTERSTORFF, supra note 137.
148 Id. at 288.
149 Id. at 291–92.
150 Id. at 269–70.
151 Id.
152 Id.
freedom or negative rights, which are rights to not be treated a certain way, such as the right not to be tortured. Wolterstorff categorizes the final set of rights as natural rights. They are natural, he explains, because they “have not been socially conferred” upon anyone or, phrased a different way, they are rights “that one would possess even if they had not been socially conferred,” regardless of any other factor. These rights are “inherent to those who have them,” and “they have them on account of the worth of beings of their sort.”

Wolterstorff holds that inherent natural rights are the base rights upon which all other rights are founded and evaluated, and “[n]atural law for the right ordering of society is what ultimately grounds justice . . . not the inherent rights of members of society.” To that end, rights are tied to justice; they “are trumps.” In other words, Wolterstorff explains, no other considerations matter, “[t]he face value of the cards makes no difference,” and rights win no matter what.

St. Thomas Aquinas wrote that justice is “rendering to each his right; a man is called just because he safeguards right.” In Justinian’s Digest, the Roman jurist Ulpian defined justice as a “steady and enduring will to render unto everyone his right.” Wolterstorff reasons that according to this formula “[p]rimary justice . . . is present in society insofar as the members of society enjoy the goods to which they have a right.”

Therefore, because justice is grounded in inherent rights, and because inherent rights and all other rights built upon them inhere on account of a human’s worth, the idea of human dignity and worth is central to any discussion of justice or rights. Consequently, all rights flow from “the status of being a human being, a member of the species Homo sapiens,” and the worth that is attached to that status.

Wolterstorff provides the following example: one who has the status of

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154 Wolterstorff, supra note 137, at 315 n.8, 16.
155 Id. at 33.
156 Id.
157 Id. at 10–11.
158 Id. at 386.
159 Id. at 11.
160 Id. at 291.
161 Id. at 23, 305–06.
163 Dig. 1.10 (Ulpian, Libro Primo Regularum 1) (The Digest of Justinian (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985)).
164 Wolterstorff, supra note 137, at 24.
165 See supra notes 136–44 and accompanying text.
166 Wolterstorff, supra note 137, at 313.
being a United States citizen age sixty-five or older has the right to a monthly Social Security payment, and everyone understands this to mean “the government shall send this payment to such persons [having attained the status], period.”\textsuperscript{167} In deciding whether to send the payments, the government is not to consider any utilitarian or capacity-based calculation.\textsuperscript{168} The right to the payment comes along with the status, and that right trumps all others.\textsuperscript{169} He argues, therefore, that just as the right to Social Security inheres in the status of United States citizen age sixty-five or older, so too do all inherent, natural human rights inhere in the status of human being.\textsuperscript{170} No utilitarian or capacity based calculation enters the equation. The whole is greater than the sum of its parts. Wolterstorff argues it is simply because we are human that we enjoy human rights;\textsuperscript{171} therefore, his “trumping principle affirms . . . [n]o human being has a price”\textsuperscript{172} and each is “irreducibly precious.”\textsuperscript{173}

IV. HUMAN EXCEPTIONALISM\textsuperscript{174}

Most Americans still believe humans have “irreplaceable significance” and intrinsic dignity,\textsuperscript{175} and they “care a great deal about human dignity.”\textsuperscript{176} Indeed, our history is replete with examples of battles waged for human dignity—“for treating human beings as they deserve to be treated, solely because of their humanity.”\textsuperscript{177} However, there is a growing movement that believes we share more similarities than differences with animals and that man is not unique.\textsuperscript{178}

Wesley Smith defines human exceptionalism as the belief that humans possess a unique nature that places us at the “pinnacle of moral worth”\textsuperscript{179} and “every human life [has] equal moral value simply and

\textsuperscript{167} Id. at 292.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 292, 313.
\textsuperscript{171} Id. at 313.
\textsuperscript{172} Id. at 308.
\textsuperscript{173} Id. at 361.
\textsuperscript{174} The structure of some arguments in this section is based on Wesley J. Smith's 	extit{A Rat Is a Pig Is a Dog Is a Boy}. See generally SMITH, 	extit{A RAT IS A PIG}, supra note 22, at 231–49.
\textsuperscript{175} Peter Augustine Lawler, 	extit{Commentary on Meilaender and Dennett}, in HUMAN DIGNITY AND BIOETHICS 278, 282 (2008).
\textsuperscript{177} Id.
\textsuperscript{178} See Goodall, supra note 122, at 10.
\textsuperscript{179} SMITH, 	extit{A RAT IS A PIG}, supra note 22, at 3, 235; see also Luis Roberto Barroso, 	extit{Here, There, and Everywhere: Human Dignity in Contemporary Law and in the
merely because it is human.” Smith holds, just as Alasdair Cochrane similarly explains, that this objective, intrinsic value every human possesses is “the bedrock of universal human rights.” Therefore, if one were to accept the argument that humans do not possess inherent worth derived solely from our nature, then the basis of universal human rights and the foundation that all our liberties are built upon are rendered defunct.

Animal rights activists argue that “believing in human exceptionalism shows hubris, a disdainful pride that leads us to believe we are entitled to treat animals as cruelly as we desire.” This could not be farther from the truth. Human exceptionalism maintains that humans are unique and superior. As Smith explains, it does not suggest human beings not recognize the nobility of animals or not believe we owe them kindness and respect, and it does not advocate that humans have unlimited license to make animals’ lives miserable or to destroy their habitats at will without any thought to the consequences. Smith, as well as other proponents of human exceptionalism, believes the absolutist view that animals are purely property is “as wrong from its end of the spectrum as animal rights ideology is from the other extreme.”

A. A Faith-Based Justification

Most people believe humans have unequaled importance and intrinsic dignity; however, some have come to question this “self-evident” truth. Smith points out that a justification for this instinctive belief that human life matters most can be made from faith-based or


181 SMITH, A R AT IS A PIG, supra note 22, at 253; Cochrane, supra note 69, at 236.


183 SMITH, A R AT IS A PIG, supra note 22, at 243.

184 Id. at 235, 248.

185 Id. at 248–49.

186 See Francione, supra note 18, at 398.

187 SMITH, A R AT IS A PIG, supra note 22, at 232; see, e.g., Posner, supra note 25, at 67.

188 Lawler, supra note 175, at 282.

189 SPERLING, supra note 21, at 2 (explaining that “animal rights groups question assumptions about the human relationship to animals that have been fundamental to Western culture”).

190 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
secular grounds. Furthermore, as Nicholas Wolterstorff explains, a faith-based justification is fairly easy to come by, “since virtually all major faith traditions promote the proper care of animals but also assert that humans have greater worth than animals.”

The Christian tradition teaches man was made in the image of God, and therefore God has bestowed intrinsic dignity and worth upon mankind. Wolterstorff asserts that God loves every human equally, and that love confers matchless worth on humans above any other creature. Another illustration of this principle is Jesus telling his disciples they “are worth more than many sparrows.” One theologian points out that St. Francis of Assisi, who founded the Franciscan order of the Roman Catholic Church and is the patron saint of animals and the environment, espoused a “hierarchical view of creation, according to which every living being praises God but is also available for human use and consumption as food.” In fact, Judge Posner highlights that “Aquinas and other traditional Catholic thinkers [espoused the belief] that animals are entitled to no consideration, at least relative to human beings, because animals lack souls.” However, William Murchison, another proponent of human exceptionalism, explains that the dominant Christian belief is that “man [is not] the owner of the world, rather just the tenant, with positive responsibilities for his treatment of the property and its other inhabitants.” Smith expounds that “[e]ven religions that doctrinally require vegetarianism do so because they believe it is our duty not to cause animals to suffer,” not because they believe animals are our moral equals.

191 SMITH, A RAT IS A PIG, supra note 22, at 238.
192 WOLTERSTORFF, supra note 137, at 237.
195 WOLTERSTORFF, supra note 137, at 360; see also McCrudden, supra note 194, at 659 (“[B]eing made in the image of God mean[s] that Man was endowed with gifts which distinguish[ ] Man from animals.”).
199 Posner, supra note 25, at 61.
200 Murchison, supra note 17, at 29, 34; see also Genesis 1:25–30, 2:15 (New International Version).
201 SMITH, A RAT IS A PIG, supra note 22, at 237–38.
Therefore, it is easy to reach a justification that humans have inherent dignity and worth through a religious appeal to God, the Creator of man and beast. The end result, Wolterstorff posits, is that “being [made] in the image of God . . . gives great worth to those creatures who bear the image.” 202 Furthermore, he adds, God’s entrusting dominion over the earth to his image bearers gives humans a unique dignity and places us in the exceptional role over animals. 203 “Some animals may engage in behavior rather like the more primitive forms of exercising dominion,” but as Wolterstorff highlights, the simple fact remains that animals cannot exercise control or authority in this world, and they do not have the dignity of being God’s image-bearers. 204

B. A Secular Justification

On the other hand, Smith clarifies, a justification for human exceptionalism does not require a belief in an omnipotent Creator. 205 The inherent worth and dignity of humans appears from a secular worldview as well. As one scholar explains, “[a] pre-religious intuition recognizes there is something awesome, worthy of holding in dread—fearful . . . about a human life,” and as such, “[w]e [do not] dare hasten its end.” 206 Indeed, Immanuel Kant, dubbed by one scholar as the quintessential secularist, 208 believed “that humanity in a human being . . . is the only thing about human beings that gives them worth,” 209 and Ronald Dworkin believes that almost all of us accept “that human life in all its forms is sacred” 210 and humans are the “highest product of natural

202 Wolterstorff, supra note 137, at 347.
203 See id. at 347–48.
204 Id. at 348.
206 It should be noted, however, that even a so-called secular viewpoint is ultimately faith-based in that “everyone reasons from faith, from presuppositions which cannot be proven but are held nonetheless.” W. Ross Blackburn, Arguing for Human Dignity in Bioethics & Public Policy: A Reply to Wesley J. Smith, HUM. LIFE REV., Winter 2012, at 33, 44. The argument simply changes based on one’s presuppositions.
207 David Klinghoffer, Preserved Memories of Wisdom, HUM. LIFE REV., Spring 2012, at 35, 36.
209 Wolterstorff, supra note 137, at 326.
210 Ronald Dworkin, Life is Sacred: That’s the Easy Part, N.Y. TIMES, May 16, 1993, available at Bloomberg, http://www.bloomberglaw.com/ (click on “News”; then click in “Keywords” box; then search “Dworkin ‘Life is Sacred: That’s the Easy Part’”). This further illustrates how any viewpoint is ultimately faith-based, and a secular vocabulary is inadequate for the discussion as Dworkin must “resort to a religious vocabulary in order to . . . explain the value of human life.” Steven D. Smith, Recovering (from)
Smith maintains that the presupposition of human exceptionalism—that every human possesses great status and worth because of an intrinsic human nature seems so obvious it should be uncontroversial; however, it has become the center of this debate. After all, what other species blushes, has five-year plans, moves around the world simply for a change in scenery, cooks its food, clothes itself, seeks pleasure and entertainment at any cost, researches and "show[s] concern about the welfare of other species," “builds civilizations, records history, creates art, makes music, thinks abstractly, communicates in language, envisions and fabricates machinery, improves life through science and engineering, or explores the deeper truths found in philosophy and religion?” Obviously, there is no other. Humans are unique. Scientists have discovered many complex behaviors animals instinctively exhibit that are similar to some human behaviors, but as David Oderberg points out, no experiment has ever shown “that animals know why they do what they do, or are free to choose one course of action over another.”


211 RONALD DWORKIN, LIFE’S DOMINION 82 (1993).

212 See supra text accompanying notes 183–85.

213 SMITH, A RAT IS A PIG, supra note 22, at 238.

214 CHARLES DARWIN, THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS 309 (Univ. of Chi. Press 1965) (1872) (“Blushing is the most peculiar and the most human of all expressions.”).

215 See Jesse Bering, One Reason Why Humans Are Special and Unique: We Masturbate. A Lot, Sci. AM. (June 22, 2010), http://blogs.scientificamerican.com/bering-in-mind/2010/06/22/one-reason-why-humans-are-special-and-unique-we-masturbate-a-lot/ (stating that humans are the only animals that imagine and that humans alone have the power to conjure up images for sexual pleasure).


217 SMITH, A RAT IS A PIG, supra note 22, at 238 (offering his own list of uniquely human characteristics); see also Marc Bekoff, Animal Minds and the Foible of Human Exceptionalism, HUFFINGTON POST (Aug. 5, 2011, 5:21 PM), http://www.huffingtonpost.com/marc-bekoff/animal-minds-and-the-foib_b_919028.html (“[H]umans do indeed show unique capacities such as writing sonnets, solving algebraic equations, and meditating on the structure of the universe . . . “).

218 “[U]nique[. . . . 1a: being the only one[. . . . 2: being without a like or equal: single in kind or excellence[. . . . 3: unusual.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2500 (Philip Babcock Gove ed., 2002).

219 David S. Oderberg, The Illusion of Animal Rights, HUM. LIFE REV., Spring–Summer 2000, at 37, 43. David Oderberg is a philosophy professor at the University of Reading in England who published the book, Applied Ethics, in 2000 containing his arguments against animal rights. Id. at 37.
Human exceptionalism maintains that humans possess the intrinsic qualities that make us the only moral agents. This moral agency is inherent and exclusive to human nature, meaning it is possessed by the entire species, not just individuals who happen to possess rational capacities. As Smith declares, animals cannot and do not have the ability to reason morally. Furthermore, Smith adds, it is only our moral human nature that allows us to recognize or even care about animal suffering, and “[t]his uniquely human capacity to empathize with and appreciate ‘the other’ is one of the best things about us.”

Smith makes clear it is because of these beliefs that humans are situated at the apex of the natural world and are the only moral beings. He then highlights that a core tenet of human exceptionalism is the moral obligation to respect animals, which includes treating them humanely and never causing them frivolous suffering. Humans alone, Smith adds, have these duties to other species, and humans alone bear this burden of moral responsibility to each other and to animals. One famous philosopher even stated that only man has the capacity to be bound by obligation or duty; this is foreign to every other species. This corresponds with Smith’s argument that animals cannot possess morality, honor rights, or bear burdens of moral obligation.

Primatologist Frans de Waal states that bestowing rights is nonsensical unless it is accompanied by responsibilities; therefore, “animals cannot and will not” become rights bearing members of society. Carl Cohen plainly illustrates this with the example of a lion hunting down and killing a baby zebra:

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220 Nicoll, supra note 216, at 307.
221 Smith, supra note 22, at 235; see also Robert P. George & Christopher Tollefsen, Embryo: A Defense of Human Life 112 (2008) (“We are members of a certain animal species—Homo sapiens. Any whole living member of that species is a human being. His or her nature is a human nature. Such a nature is a rational nature. Human beings are rational animals.”).
222 Smith, supra note 22, at 235.
223 Id. at 240.
224 Id. at 3; see also id. at 235.
225 Id. at 3; see also id. at 235.
226 Id. at 239.
227 See id. at 243–44.
229 Smith, supra note 22, at 15; see also Duckler, supra note 1, at 192 (stating that “to have a right means also to be responsible for one’s actions”).
Do you believe the baby zebra has the right not to be slaughtered? Or that the lioness has the right to kill that baby zebra to feed her cubs? Perhaps you are inclined to say, when confronted by such natural rapacity . . . that neither is right or wrong, that neither zebra nor lioness has a right against the other. Then I am on your side. Rights are pivotal in the moral realm and must be taken seriously, yes; but zebras and lions and rats do not live in a moral realm—their lives are totally amoral. There is no morality for them; animals do no moral wrong, ever. In their world there are no wrongs and there are no rights.231

Do we then put the lion on trial for the merciless, inhumane killing of the innocent zebra? Of course not, because we all instinctively know animals are amoral and cannot be held accountable for their actions.232

Humans, Cohen states, being moral beings, have rights, and when other humans violate those rights, we say a person has been wronged.233 We call this a crime.234 Cohen analogizes to a basic principle of our humancentric jurisprudence system; the actor’s moral state of mind determines whether a crime was committed.235 As most law students learn and as Cohen highlights, the actus reus must be accompanied by a mens rea, a morally guilty mind.236 Through the analogy, Cohen reasons that this knowledge of moral duties governs our actions, and no animal will ever possess the requisite moral agency to be aware of moral duties, let alone develop a mens rea.237 Wesley Smith and David Oderberg reach similar conclusions, essentially stating that since an animal cannot even comprehend the concept of rights, much less make a conscious demand for its rights,238 so-called animal rights would have to be enforced by humans.239

Smith admits that “animals certainly have exceptional capabilities” that are exclusive to their species.240 A human obviously cannot run as fast as a cheetah, fly like an eagle, or swim to the depths like a whale.241

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231 COHEN & REGAN, supra note 114, at 30–31 (emphasis omitted).
232 Cohen, supra note 232, at 98.
233 Id.
234 Id.
235 Id. Smith exposes how animal rights activists further distort terms when they condemn eating meat because it is murder even though “this term is applicable only to the killing of human beings.” SMITH, A RAT IS A PIG, supra note 22, at 203.
236 Cohen, supra note 232, at 98.
237 Id.
238 Oderberg, supra note 219, at 42.
239 SMITH, A RAT IS A PIG, supra note 22, at 232.
240 Smith, Bioethics Threat, supra note 205, at 68.
241 Smith presents “the bat’s sonar or the gorilla’s strength” to illustrate some such capabilities. Id.
As he explains, however, these characteristics are merely physical distinctions, having no moral implications upon one’s inherent worth. Therefore, he argues that the differences between humans and animals are not only physical differences of degree, such as the extent each species uses tools or has intelligence or communicates, but also moral differences of kind, such as rationality, creativity, abstract thinking, and accountability. Contrary to Singer, Smith argues that “[m]oral value should not be based on the capacities of each individual.” Rather, Smith holds, inherent worth should be based on the intrinsic nature of the species, and capacities such as creativity, responsibility, language, and the like that indicate moral differences in kind are all “capacities that flow from the nature of humans and are absent from the nature of all animals.”

Cohen describes how some refute this assertion by arguing infants and the senile do not have these moral capacities, but they have rights. He responds, however, that it is not individuals who are awarded rights once they achieve some level of special capacity. This argument arises out of the mistaken supposition that rights are tied to individual capabilities. As he clarifies, rights exist solely in the “human moral world,” and it is the fact one is a human with an inherent, moral human nature that gives the human species rights. He asserts that it is beside the point that some animal resembles human intelligence or demonstrates remarkable capabilities in some obscure experiment or test. He logically concludes, therefore, that capabilities are not at issue in this debate. Neither intelligence, rationality, the ability to communicate or feel pain, self-consciousness, practical autonomy, nor any other capacity animal rights advocates champion as an equalizer has any bearing on the human rights equation. It is humans’ innate moral nature that generates rights; thus, humans

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242 Id.
243 Id. (emphasis omitted).
244 SMITH, A RAT IS A PIG, supra note 22, at 240–42.
245 Id. at 241 (emphasis omitted).
246 Id. (emphasis omitted).
247 Cohen, supra note 232, at 97.
248 Id.
249 Id.
250 Id.
251 Id.
252 See id.
253 Id.
254 Id. at 97–98.
possess human rights exclusively because they are human.\textsuperscript{255} This discussion clearly illustrates “the absurdity of the whole concept of animal rights."\textsuperscript{256} As Smith makes clear, “the entire issue of animal rights [is not] actually about ‘rights’ at all,"\textsuperscript{257} “[r]ather, it is an exclusively human debate about the nature and scope of our responsibilities toward animals—responsibilities that are \textit{predicated solely on our being human}.”\textsuperscript{258} Ultimately, Smith concludes, animal rights activists arguing against human exceptionalism are actually calling for the very thing human exceptionalism requires of humans: that we maintain the highest level of respect for and duties toward animals.\textsuperscript{259} Smith ironically points out, therefore, that the argument animal rights activists make actually lends “proof [to] the unique nature of the human species, or what some call ‘human exceptionalism.’”\textsuperscript{260}

V. \textbf{HUMAN RESPONSIBILITY IS THE APPROPRIATE SOLUTION}

A direct consequence of rejecting human exceptionalism is that the weak lose status and can be abused by the strong.\textsuperscript{261} Judge Posner highlights that we all instinctively know a human infant is immeasurably more valuable than a chimpanzee, and no amount of philosophy will change that fact.\textsuperscript{262} He adds that being part of the human species is a morally relevant fact, and “[i]f the moral irrelevance of humanity is what philosophy teaches, so that we have to choose between philosophy and the intuition that says that membership in the human species is morally relevant, philosophy will have to go.”\textsuperscript{263} He goes on to state the potential social value of human exceptionalism in that it may encourage people to behave better and hold all life in higher regard.\textsuperscript{264}

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\textsuperscript{255} Cochrane, \textit{supra} note 69, at 236; see Smith, \textit{A RAT IS A PIG, supra note} 22, at 253.
\textsuperscript{256} Smith, \textit{A RAT IS A PIG, supra note} 22, at 234–35.
\textsuperscript{257} \textit{Id.} at 235.
\textsuperscript{258} \textit{Id.; see also} Duckler, \textit{supra} note 1, at 191–92 (stating that any discussion of rights must be a humancentric one because rights adhere in a human conception of justice and “animals do not have a concept of ‘justice’ or of ‘fair play’ at all”).
\textsuperscript{259} Smith, \textit{A RAT IS A PIG, supra note} 22, at 232.
\textsuperscript{260} \textit{Id.} at 235.
\textsuperscript{262} See Posner, \textit{supra note} 25, at 67.
\textsuperscript{263} \textit{Id.} at 65 (emphasis omitted).
\textsuperscript{264} \textit{Id.} at 61–62.
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Furthermore, he reasons, if we fail to maintain the human-animal dichotomy, “then as denizens of the jungle we [would] have no greater duties to the other animals than the lion . . . has to the [zebra],” and “we may end up treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings.”

Viewing animals as moral equivalents and granting them human rights, Smith adds, “would degrade the importance of rights altogether, just as wild inflation devalues money.” As one Darwinian stated, if we are all “the same in the eyes of nature, [then we are all] equally remarkable and equally dispensable.” Richard Cupp points out that the inevitable result of viewing animals more like humans would be to view humans more like animals, and the detachment of rights from human moral agency and human concerns would have deleterious effects to life as we know it. Ultimately, “a world with less emphasis on human dignity and moral responsibility would not be better for it.”

Therefore, giving animals human rights would add “billions of potential new plaintiffs” along with billions in litigation costs to an already overburdened court system, and thus it is not the correct solution for protecting animals. A more sustainable and effective focus for animal advocates would be to promote the prohibition of “the most indefensible practices.” Posner suggests that instead of “rights mongering,” the solution should include making animals property and more vigorously enforcing “laws that forbid inflicting gratuitous cruelty on animals.” He rightly concludes that a humancentric solution focused on human responsibility and duty is best. As he points out, if enough people come to understand the suffering animals are capable of

265 Id. at 61.
266 Id.
267 Smith, A Rat Is A Pig, supra note 22, at 243.
269 Cupp, Moving Beyond Animal Rights, supra note 4, at 79.
270 Id.; see also De Waal, supra note 108, at 215 (“Human morality as we know it would unravel very rapidly indeed if it failed to place human life at its core.”).
271 Cupp, Dubious Grail, supra note 9, at 52.
272 See Posner, supra note 25, at 59.
274 Posner, supra note 25, at 59 (stating that “people tend to protect what they own” and that gratuitous is the operative word).
275 Id. at 66.
feeling and learn how to ease that suffering without substantially affecting human comforts or progress, then “public opinion and consumer preference [would] induce . . . change.”

CONCLUSION

In the end, we all instinctively know humans and animals are not equal, and making us equal is not the appropriate way to protect animals. Some animals may display some seemingly human qualities or capabilities, but neither practical autonomy nor cognitive capacities warrant treating animals as humans with attendant legal rights. Seeking to promote the humane treatment of animals is important. As Richard Cupp warns, however, attempting to humanize animals in any regard “is misguided and dangerous for both humans and animals.” Furthermore, as Wesley Smith highlights, the appropriate solution is not granting animals human rights. The solution must be some “middle ground that doesn’t grant unwarranted rights to animals but does permit robust protection of their welfare.” This is certainly an achievable goal. “Our legal system is intrinsically human,” and “all law is established for men’s sake.” Humans enjoy rights based simply upon the fact that we are moral beings of immeasurable worth. Just as Cupp concluded in Dubious Grail, I also conclude that “the protection and humane treatment of animals is a basic human responsibility, not a basic animal right.”

Nicholas H. Lee

276 Id.
277 See Smith, A Rat Is a Pig, supra note 22, at 246–49.
278 Cupp, Dubious Grail, supra note 9, at 54.
279 Smith, A Rat Is a Pig, supra note 22, at 232.
280 Id.
281 See id.
282 Cupp, Dubious Grail, supra note 9, at 54.
283 Dig. 1.5.2 (Hermogenianus, Libro Primo Iuris Epitomarum 1) (The Digest of Justinian (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985) (c. 534 B.C.)).
284 Cupp, Dubious Grail, supra note 9, at 54.
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