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by

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THE ROLE OF THE RATIONAL AND THE EMOTIVE IN A THEORY OF ANIMAL RIGHTS

THOMAS G. KELCH*

This article reviews the law and literature concerning the way that we look at rights issues and the foundational principles that are asserted to be the predicates of rights in our legal system. Particular attention is paid to problems surrounding the possible extension of legal rights to animals. The analysis reveals that while there are many ways of thinking about and grounding rights, most theorists insist on asserting that there is some single principle or concept that is the foundation for the granting of legal rights. It is argued here that this obsessive search for a single explanation for legal rights is folly. Instead, rights should be seen as having composite foundations formed from many moral, policy, social and cultural supports. It is further asserted that among the many things that should have significance in determining whether an entity, human or non-human, is a rightholder is one that is almost universally ignored in animal rights and other rights literature: emotions, and in particular, compassion. Emotions, being essential aspects of our nature and of our moral lives, are of relevance in determining who should be rightholders. If applied to the issue of granting rights to animals, our sense of compassion should count as a reason for granting rights to animals.

INTRODUCTION

Since its genesis,¹ the concept of legal rights has so dilated that some lament it has been pushed beyond its appropriate boundaries

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¹ It is generally thought that the concept of legal rights arose in either the 14th or 17th Century, but it has also been argued that this concept originated in the 13th Century. See Charles J. Reid, *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37, 37-41 (1991).

and no longer has meaning.² On the other hand, others recognize the expansion of legal rights as a natural evolution of social, political, and legal structures.³ The possible extension of rights to animals is an example of this evolution. To many, however, the idea of "rights" for animals seems odd because our ordinary understanding of animals as "things" is incommensurable with their having legal rights.⁴

The purpose of this article is to review and analyze the conceptually fragmented law and literature concerning the foundations of legal rights, and to propose a way of looking at rights that is favorable to the extension of rights to animals. It is not my purpose here to present an argument for the existence of animal rights, although I believe this result is correct; rather, my purpose is to present a conceptual mechanism for analyzing the application of rights to animals. In accomplishing this task it is imperative to review not only the animal rights literature, but also law and literature relating to human rights, since human rights theories are often applied to animals.

The asserted conceptual foundations of legal rights are manifold. Many debate what grounds rights in both the human and animal rights arenas, and there are even those who contend that the concept of rights should be jettisoned altogether.⁵ Review of this debate yields one obvious conclusion—there is no consensus on the appropriate grounding of rights either concerning humans or animals.

Such a review shows there are a number of theoretical camps concerning how rights are grounded.⁶ There are several theories founded on Wesley Hohfeld's famous dichotomous concepts of rights/duties and powers/liabilities.⁷ Others, particularly in the animal rights area, state that the foundation of rights is the existence of "interests" that need protection. Here, rights are granted to those who have interests. Rights may also be viewed as founded on a contract hypothetically arising from some "original position." They may be the

² See L.W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* 15–18 (Oxford Clarendon Press 1987). See also *Sowers v. Civil Rights Comm'n*, 252 N.E.2d 463, 474–75 (Ohio Ct. App. 1969) (stating "rights" are often too broadly construed, and noting liberties are not rights, but immunities).

³ See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 488 (1972).

⁴ See Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity—Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 833 (1998).

⁵ See *infra* notes 10–26 and accompanying text.

⁶ See *infra* Section II.

⁷ See *infra* notes 40–65 and accompanying text.

expression of societal goals. They may just be concepts giving rise to certain remedies in our legal system. There are yet other views.

One common, although not necessarily universal, strand in these myriad theories is to assert that there is *one* foundation for the concept of rights. In other words, one specifiable sort of thing or set of things constitutes the ground on which the profusion of rights lies. This article contends that this obsessive search for one element or one clearly defined set of elements to buttress rights has caused our thought to go awry. Instead, properly speaking, legal "rights" have multifarious grounds and foundations, not one. Any right can appropriately be explained by any number of theories, all of which aid in our understanding of the right in question. As such, we may see the grounding of rights not as a single solid foundational block, but as interwoven webs of numerous conceptual strands.

This article further asserts that an essential strand in this web that is ignored in the law and literature is an emotive element composed of sympathy and caring, or more simply, "compassion." Our Western analytical, scientific culture abhors such assertions, but our concept of rights cannot be fully understood or explained without such an element. Emotion is an essential aspect of our nature and our thought, and it likewise enters our concept of rights. Moreover, due to, among other things, the fact that animals cannot formally assert rights or communicate their interests, this emotive aspect plays a more prominent role in considering animal rights issues than in human rights concerns.

I. THE NEED FOR RIGHTS

Why be concerned with the notion of rights? Legal protection may be given to animals without cloaking it in the rhetoric of rights. Indeed, utilitarian theory eschews rights for utility calculations.⁸

Those enamored of critical legal theory and feminist theory frequently deride rights as tools of repression and the status quo. Those taking this tack may, for example, point out that to say one has a right does not mean that this right is either enforceable or exercisable.⁹ To

⁸ PETER SINGER, *ANIMAL LIBERATION* 5–8 (2d ed. 1990).

⁹ Claims of this nature by socialists and feminists are discussed in Ted Benton, *Animal Rights: An Eco-Socialist View*, in *ANIMAL RIGHTS: THE CHANGING DEBATE* 19, 19–41 (Robert Garner ed., 1996).

be meaningful, rights must be positive; there must be an obligation in others to respect them and they must be enforceable.¹⁰

Critical legal studies scholars deride rights by asserting that rights merely protect entrenched interests in society.¹¹ They choose to analyze the legal system from a position outside these entrenched views that include the concept of rights.¹²

Although there is controversy over the usefulness of rights in feminist literature,¹³ some of this literature views rights as simply part of the male way of viewing the world.¹⁴ In this view, rights are a means of male domination and exploitation of women, animals, and nature.¹⁵ Rights are necessary only because of the competitive and antagonistic system that has been created by male-dominated culture.¹⁶

To socialists, rights are capitalist ploys; those who are disadvantaged in the system are accorded certain rights, but these rights are not meaningfully exercisable by them, given their position in society.¹⁷ Rights may only be a pathology of capitalist society resulting from its underpinnings of competition and self-interest.¹⁸ Rights are necessary to sort out the inevitable conflicts created by a capitalist system. In a more benevolent society, the need for the supposed protection of rights might be lessened or non-existent.¹⁹

Closer to the animal rights issue, Mary Midgley has argued that the concept of rights is in conceptual trouble.²⁰ She claims that the concept is too ambiguous to be truly useful, and, for this reason, cannot be effectively utilized.²¹

The ambiguity of terms like "right," then, does not just express a mistake, but a deep and imperfectly understood connection between law and morality. This is why eighteenth-

¹⁰ See *id.* at 32.

¹¹ SAMUEL J.M. DONNELLY, *THE LANGUAGE AND USES OF RIGHTS: A BIOPSY OF AMERICAN JURISPRUDENCE IN THE TWENTIETH CENTURY* 38–41 (1994).

¹² See *id.* at 42.

¹³ See Barbara Stark, *International Human Rights, Law, Feminist Jurisprudence and Nietzsches' 'Eternal Return': Turning the Wheel*, 19 HARV. WOMEN'S L.J. 169, 169–75 (1996).

¹⁴ See Josephine Donovan, *Animal Rights and Feminist Theory*, 15 SIGNS 350, 358–69 (1990).

¹⁵ See *id.*

¹⁶ Marti Kheel, *Nature and Feminist Sensitivity*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 261 (Tom Regan & Peter Singer eds., 1989) [hereinafter Kheel, 1989].

¹⁷ See Benton, *supra* note 9, at 33.

¹⁸ See *id.* at 35.

¹⁹ See *id.* at 36–37.

²⁰ See MARY MIDGLEY, *ANIMALS AND WHY THEY MATTER* 62 (1983).

²¹ See *id.* at 61–64.

century revolutionaries were able to exploit these ambiguities with such effect in their campaign for the rights of man. Obscure concepts can often be used effectively for reform in this way, so long as they are employed only on issues where their practical bearing is clear The actual word "right," however, cannot, as far as I can see, be salvaged for any clear, unambiguous use in this discussion. It can be used in a wide sense to draw attention to problems, but not to solve them. In its moral sense, it oscillates uncontrollably between applications which are too wide to resolve conflicts ("the right to life, liberty and the pursuit of happiness") and ones which are too narrow to be plausible ("the basic human right to stay at home on Bank Holiday").²²

Some of the problems with the concept of rights may be found in the Western world view.²³ Rights may just be an artifact of dualistic Western thought.²⁴ The world, in this view, is populated with innumerable dualities, including us/them, subject/object, and right/no-right.²⁵ This Western world view is also composed of various hierarchies that form the structures on which rights hang.²⁶ Without such hierarchical structures there might be no need for rights to protect one level of the hierarchy from another. Further, the striations of this hierarchy can be used to justify denying rights to those at low levels of the hierarchy, like animals.²⁷

Notwithstanding these criticisms, there may be good reason not to jettison the concept of legal rights.²⁸ Rights are such an ingrained aspect of our legal system that it seems unlikely they could be purged without the demolition of the current structure of society. Rights are not only deeply set into our legal system, they are a central focus of our legal language. As legal structures, rights also serve the mundane but useful function of shifting the burden of proof to the entity potentially infringing a right to prove that such infringement is appro-

²² *Id.* at 62–63.

²³ See Marti Kheel, *The Liberation of Nature: A Circular Affair*, in *BEYOND ANIMAL RIGHTS* 17 (Josephine Donovan & Carol J. Adam eds., 1996) [hereinafter Kheel, 1996].

²⁴ See *id.* at 17–18.

²⁵ See *id.* at 18.

²⁶ See *id.* at 18–19.

²⁷ See *id.* at 21–22.

²⁸ Benton believes that rights would be necessary even in a society lacking the supposed scarcity and conflict of capitalist society. See Benton, *supra* note 9, at 36.

priate.²⁹ Moreover, it has been argued that rights are necessary facets in the functioning of any human community.³⁰ In such a community there are necessarily obligations and entitlements in members of the community; these obligations and entitlements are expressed as rights.

We have seen that no one can be a member of a community unless there are both things which are due from him to fellow members and things which are due to him from them. . . . His rights (what he is entitled to as a member) consist in all that is due to him; his obligations, of all that is due from him. A community consists of its members in the sense that, unless there are members there cannot be a community. Since to be a member of community is *inter alia* to have rights, without rights there cannot be a community. Having rights is a part of human social living in any form, so there have to be rights if there is to be any human social life at all.³¹

It is also difficult to see how some rights fit into the structure of oppression described by some critics. While such arguments may seem applicable to property rights, it is hard to see the right against self-incrimination, or of free speech, or to be free from unreasonable searches as tools of oppression. Such rights combat oppression.

II. THE MYRIAD THEORIES OF RIGHTS

A. Hohfeldian Theory

Perhaps the most popular way of speaking about legal rights was formulated by Wesley Hohfeld.³² In the Western tradition, he described legal relations in terms of various opposites and correlatives.³³ The opposites he discussed are right/no-right, privilege/duty,

²⁹ See Stone, *supra* note 3, at 488.

³⁰ See A.J.M. MILNE, HUMAN RIGHTS AND HUMAN DIVERSITY: AN ESSAY IN THE PHILOSOPHY OF HUMAN RIGHTS 125 (1986).

³¹ *Id.* at 115.

³² Courts have utilized Hohfeld's structures for analysis of legal terms in case law. See *California v. Farmers Mkts., Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986) (describing property as complex of rights, powers, privileges, and immunities, citing Hohfeld); *Lake Shore & M.S. Ry. Co. v. Kurtz*, 37 N.E. 303, 304 (Ind. App. 1894).

³³ See WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36 (1923).

power/disability, and immunity/liability.³⁴ The correlatives are right/duty, privilege/no-right, power/liability, and immunity/disability.³⁵ In analyzing these terms, Hohfeld found that in legal discourse the term right is typically used broadly to include any legal advantage.³⁶ He found this use of the term to be overbroad. Instead, he believed that the term "right" should be restricted in use to describe those things that correlate to duties.³⁷ "Right" in his theory is synonymous with "claim."³⁸ Rights are simple and atomic; rights are claims based on duties.³⁹

Hohfeldian theory has been refined by later scholars including Carl Wellman.⁴⁰ Wellman does not base rights on single Hohfeldian elements, like *a* duty or *an* immunity. Rather, he claims that a legal right is "a system of Hohfeldian positions that, if respected, confers dominion on one party in the face of some second party in a potential confrontation over a specific domain *and* are implied by the legal norm or norms that constitute that system."⁴¹ One difference between Wellman's view and that of Hohfeld is that Wellman views rights not as simple concepts composed of individual elements, but as complexes potentially composed of many Hohfeldian liberties, powers, duties, and immunities.⁴² Nonetheless, these complexes of Hohfeldian elements have a core element or unifying constituent.⁴³ Thus, there is some duty or other element that stands at the core of a right acting as the cement that holds the other elements of the right together.

³⁴ See *id.*

³⁵ See *id.*

³⁶ *Id.* at 36–38, 71.

³⁷ See *id.* at 38, 71–72. Some case law has reflected this idea. For example, *Sowers v. Civil Rights Comm'n*, 252 N.E.2d 463, 474, holds that liberties are not properly considered rights, but rather are immunities.

³⁸ HOHFELD, *supra* note 33, at 38.

³⁹ SUMNER, *supra* note 2, at 33.

⁴⁰ See CARL WELLMAN, *REAL RIGHTS* (1995) [hereinafter WELLMAN, 1995]; CARL WELLMAN, *A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS* (1985) [hereinafter WELLMAN, 1985]. A similar project of refining the Hohfeldian description of rights is pursued by L.W. Sumner. See SUMNER, *supra* note 2, at 18–53. A Hohfeldian system has also been used to analyze environmental issues. See Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophies*, 59 U. PITT. L. REV. 557, 570 *passim* (1998).

⁴¹ WELLMAN, 1995, *supra* note 40, at 8.

⁴² See *id.* at 80–82. See also *California v. Farmers Mkts., Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986) (describing property as complex of rights, powers, privileges, and immunities, citing Hohfeld).

⁴³ See WELLMAN, 1995, *supra* note 40, at 81–82.

While Hohfeldian theory itself is primarily descriptive, Wellman's theory is normative. Wellman contends that there is an objective morality that grounds rights.⁴⁴ There are true moral propositions and these moral propositions can be utilized to construct Hohfeldian elements from which rights may be fabricated.⁴⁵ Legal rightholders then are those persons who have moral rights.⁴⁶

Hohfeld, of course, did not focus on animal rights issues. Wellman's explication of Hohfeld's theory is not favorable to extending rights to animals. His theory requires that a rightholder be able to assert dominion; that is, a rightholder must be able to make claims against others.⁴⁷ To assert this dominion, Wellman requires a rightholder to have a "will" or the ability to act as an agent, and animals presumably do not have this capacity.⁴⁸ L.W. Sumner, using a Hohfeldian framework, has also concluded that animals cannot have rights since those who are rightholders must be able to comply with normative rules, which excludes animals.⁴⁹ On the other hand, Gary Francione has found Hohfeldian theory to support granting rights to animals, but not in any sense that is actually favorable to the interests of animals.⁵⁰

One might raise a number of objections to Hohfeldian theory. Insofar as Hohfeld posits a "duty implies right" theory, it is not clear that all moral and legal duties imply rights. While a dispute over the rights of parties to a contractual dispute may fit conveniently into Hohfeld's structure, it is not evident that the theory can address more peculiar cases involving rights.

For instance, one can have a moral duty to do the dishes, but it is difficult to assert that anyone or anything has a right that you do so.⁵¹ One might say I have the duty to do the dishes to those with whom I live. But even so, it is difficult to view them as rightholders. Further, if I live alone, to whom could the duty be owed? Surely not to the

⁴⁴ See *id.* at 160–71.

⁴⁵ See *id.*

⁴⁶ See WELLMAN, 1995, *supra* note 40, at 132.

⁴⁷ See *id.* at 105–36.

⁴⁸ *Id.* at 118–23. The concept of "will" is a philosophically loaded concept that is not clearly defined by Wellman.

⁴⁹ See SUMNER, *supra* note 2, at 203.

⁵⁰ See GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW 95–97 (1995).

⁵¹ That duties may exist without corresponding rights is explained by Alan R. White. See ALAN R. WHITE, RIGHTS 62–64 (1984).

dishes. To myself then? It is not clear that a duty to oneself can exist.⁵² Closer to the law, we say that we have duties to the dead through mechanisms like wills, though there is no extant entity having a right corresponding to this duty. Thus, there are instances of duties without corresponding rights.⁵³

Similarly, we can see rights existing independently of duties.⁵⁴ We may, for instance, have a right to think or behave in a certain way without there being any perceptible duty corresponding to the right.⁵⁵ Seeing \$20 on the sidewalk, two people may have the right to pick it up, but there is no duty on the part of either party to allow the other to do so.⁵⁶

Some philosophers assert that those who correlate rights with duties define "duty" much more broadly than is appropriate. Arthur Schopenhauer argues that "duties" are frequently referred to as any act that happens to be praiseworthy.⁵⁷ According to Schopenhauer, "duty" should be limited to circumstances where the omission to act would be a wrong.⁵⁸ Thus, duty exists only where there is an obligation to act, not where the obligation is to refrain from acting. Where one's obligation is to abstain from interfering, such an obligation is not a duty.⁵⁹ Duties then depend on a party having an obligation to act; the paradigm case being where a person has entered into an express agreement to perform an act.⁶⁰

Further, since Hohfeld's theory is largely descriptive, it does not really tell us what grounds our duties and, thus, what ultimately grounds rights. While Hohfeld's theory may help us to identify and explicate legal issues, it is not a method for determining social and legal philosophical issues.⁶¹ More underlies rights than bare duties; duties themselves have grounds. Rights may have moral, policy, or emotive foundations, none of which are explained in Hohfeldian

⁵² See WELLMAN, 1985, *supra* note 40, at 22. The problematic nature of duties to oneself is discussed in LEONARD NELSON, SYSTEM OF ETHICS 126-35 (Norbert Guterman trans., 1956).

⁵³ See WHITE, *supra* note 51, at 62-64.

⁵⁴ See *id.* at 64. See also H.L.A. Hart, *Are There Any Natural Rights?* in THEORIES OF RIGHTS 81-82 (Jeremy Waldron ed., 1984).

⁵⁵ See WHITE, *supra* note 51, at 64.

⁵⁶ See HART, *supra* note 54, at 80-81.

⁵⁷ See ARTHUR SCHOPENHAUER, PHILOSOPHICAL WRITINGS 215 (1996).

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ Arthur L. Corbin, *Foreword* to WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS xi (1964).

theory. Wellman's adaptation of Hohfeld attempts to address this question by providing an objective morality from which are constructed the complexes of Hohfeldian elements that ground rights. This theory, however, requires us to accept that there is an extant objective morality and to agree upon that objective morality.⁶² This is a project of considerable magnitude.

Hohfeldian theory, even in Wellman's conception, is based on an assumption of conflict underlying rights. There must be two protagonists in confrontation before talk of rights arises.⁶³ It is not clear that such conflict must exist for there to be proper talk of rights. A person has a right to free speech outside of confrontational situations where parties are pitted against one another. Conflicts involving rights raise questions of remedy—what mechanism do we use to resolve conflicts involving rights—not questions of the content or existence of rights. To view rights as inherently adversarial reflects a peculiar Western philosophical and political stance, one in which human relations are necessarily adversarial. Conflict is not, however, an essential element of the nature of rights.

As will be developed later,⁶⁴ there are aspects of rights that cannot be captured in any complex of Hohfeldian elements. For this reason, some commentators argue that the Hohfeldian elements, rights, powers, privileges, and immunities, are not sufficiently robust to cover all of the matters relevant to rights; other elements are of significance.⁶⁵ There are, for example, emotive aspects to our concept of rights that are beyond the ken of this theory. Thus, despite the contribution of Hohfeldian theory to our understanding of rights in certain contexts, there are areas in which the theory lacks the fullness that the concept of rights deserves.

B. *Interests as the Foundation of Rights*

Perhaps the most often used theory to ground moral rights in animals is interest theory. The argument underlying this theory has been described as progressing in this fashion:

⁶² See *supra* notes 39–46 and accompanying text.

⁶³ See WELLMAN, 1995, *supra* note 40, at 8.

⁶⁴ See *infra* Sections V–VI.

⁶⁵ See Albert Kocourek, *Tabulae Minores Jurisprudentialiae*, 30 YALE L.J. 215, 222–25 (1921). Some have also argued that Hohfeld's theory contains more elements than are necessary to describe rights. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISC. L. REV. 975, 992–93 (1982).

1. All and only beings with interests can have rights.
2. Animals can have interests.
3. Therefore, animals can have rights.⁶⁶

Although the first premise may be disputed, arguments relating to this theory frequently focus on the second premise—whether animals can have interests.

Those who espouse this theory claim that animals have interests in that they have goods for themselves.⁶⁷ These goods include being free from pain, having physiological needs met, and fulfilling their *telos*, their role or nature. Tom Regan, for example, claims that those entities that are the “subject of a life” have interests worthy of protection.⁶⁸ Being the subject of a life entails having beliefs, desires, perceptions, a sense of the future, an emotional life, and a psychological identity over time.⁶⁹ Similarly, Joel Feinberg posits that to have interests there must be things that are good for the entity as a result of its nature and the entity must have a conative life.⁷⁰ Freedom from pain is probably the most often cited interest mentioned as a foundation for animal interests,⁷¹ but as Regan and Feinberg describe, it is not the only one.

Feinberg conceives of interests as compounds of desires and aims.⁷² In addition, Feinberg argues that to have desires and aims requires that an entity have beliefs.⁷³ To define “interests” in this sophisticated way may considerably narrow the entities that can have interests and, in fact, may preclude animals from having them.⁷⁴

One obvious problem with interests as the basis for rights is that when we speak of “interests,” we generally mean something that is asserted by an entity. To say that I have an interest in a piece of property or to be free from harassment includes the idea that I can assert this

⁶⁶ See R.G. FREY, INTERESTS AND RIGHTS: THE CASE AGAINST ANIMALS 5 (1980); see also NELSON, *supra* note 52, at 136–44.

⁶⁷ See Joel Feinberg, *The Rights of Animals and Unborn Generations*, in PHILOSOPHY AND ENVIRONMENTAL CRISIS 43, 43–68 (William T. Blackstone ed., 1974).

⁶⁸ TOM REGAN, THE CASE FOR ANIMAL RIGHTS 243 (1983).

⁶⁹ See *id.*

⁷⁰ See Feinberg, *supra* note 67, at 43–68.

⁷¹ See FREY, *supra* note 66, at 139–67.

⁷² See Feinberg, *supra* note 67, at 53.

⁷³ See *id.* These issues are also discussed in REGAN, *supra* note 68, at 34–35.

⁷⁴ See *infra* notes 88–94 and accompanying text for discussion of issues relating to grounding interests in beliefs and desires.

interest within some institutional structure. Animals, of course, are not capable of asserting interests in this way.⁷⁵

This problem can be solved by recognizing that interests can, and often are, asserted by representatives. We allow persons who are incapable of asserting interests themselves, the deceased or incompetent, to be represented by executors, custodians, or guardians. There is little reason to believe that animals cannot be represented in a legal system in a similar way. In this regard, Feinberg distinguishes two types of legal representatives.⁷⁶ The first is a representative who acts as the mouthpiece of the principal, doing precisely as directed by the principal.⁷⁷ The second is a representative for a passive principal where the agent makes judgments on behalf of the principal.⁷⁸ This type of representative is used to represent incompetents and the interests of unknown future claimants in bankruptcy cases.⁷⁹ Animals cannot have representatives of the first kind for obvious reasons, but surely can have representatives of the second kind.

Interest theory, perhaps since it has been oft used as a basis for animal rights, has been regularly criticized. It has, for example, been argued that to have interests one must have a will; one must be able to assert one's interests.⁸⁰ For this reason, it is said that animals cannot be rightholders. As we have observed, however, this is patently false even in our present legal structures. We say that incompetents have rights, though they cannot themselves assert them. We even say that unidentified future claimants, entities who are unknown or may not yet exist, have rights to representation.⁸¹ Thus, this objection lacks merit within existing legal structures.

To say that interests are the basis for rights, however, may paint with too broad a brush. For example, it may be "in the interest" of a tree not to be cut down, but most people would not say that a tree has the right not to be cut down. Similarly, I may have an interest in having wine with dinner, but we would not say I have a right to wine with dinner. In the case of the tree we can solve the problem by requiring

⁷⁵ One might, however, see animals as asserting interests when they protect themselves from others or assert dominion over territory. Thus, in some ways animals can be seen as asserting interests. They just are not able to do so in the context of institutions requiring use of language.

⁷⁶ See Feinberg, *supra* note 67, at 47–48.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *In re Johns Manville*, 36 B.R. 743, 757–58 (Bankr. S.D.N.Y. 1984).

⁸⁰ See WELLMAN, 1995, *supra* note 40, at 116, 119.

⁸¹ See *In re Johns Manville*, 36 B.R. at 757–58.

that an entity have consciousness or, in Regan's terminology, be the subject of a life to have rights. On the other hand, this may be seen as an arbitrary and unjustified dividing line. This line, however, does have some sense in that only conscious entities can perceive their interests and this must count for something in defining and measuring the strength of interests. One might also solve the problem by asserting that trees do have interests.⁸²

My interest in wine with dinner presents a different problem. We use "interest" language to describe preferences that are in no sense essential or of great import. With respect to such things we do not use the language of rights. Thus, to define rights in terms of interests, the definition must refer to some subset of interests, not everything referred to in everyday parlance as interests. We are left then with the task of setting parameters on which interests ground rights and which do not. Interests that ground rights must be of some special purport essential to carrying out our *telos*.

Another criticism of interest theory has been explicated by R.G. Frey. According to Frey, to have an "interest" requires two things: that something be in the interest of the entity and that the entity ought to have concern about the thing.⁸³ The former requirement is illustrated by saying that "good health is in the interest of X."⁸⁴ Thus, animals can have interests in this way insofar as there are goods that are in their interest.⁸⁵ But, according to Frey, farm tractors can also have interests in this sense.⁸⁶

Frey's second aspect of an interest is illustrated by saying "X has an interest in good health."⁸⁷ To have an interest in this prescriptive sense requires that an entity have beliefs and desires about the thing in question being good.⁸⁸ Interests in this sense, Frey argues, cannot be said to exist in animals.⁸⁹ This is based on the claim that animals cannot have beliefs and desires. This latter assertion is founded on the argument that in order to have beliefs and desires one must have language, and animals do not have linguistic capacity.⁹⁰ Similarly, Frey argues that animals do not have emotions which also might be a

⁸² See Stone, *supra* note 3 and accompanying text.

⁸³ See FREY, *supra* note 66, at 19.

⁸⁴ See *id.* at 78.

⁸⁵ See *id.* at 79.

⁸⁶ See *id.* at 80–81.

⁸⁷ See *id.* at 78.

⁸⁸ See FREY, *supra* note 66, at 82–83.

⁸⁹ See *id.* at 83.

⁹⁰ See *id.* at 85.

ground of interests.⁹¹ According to Frey, emotions also require beliefs and desires.⁹²

One objection to Frey's argument is that there are simple desires that do not require complex processes like beliefs or emotions, and therefore do not require language. Frey rejects this, stating that no such simple desires exist in those without linguistic capacity.⁹³ Frey asserts this position without clear support.

Frey's challenge to the idea that interests can exist in animals is a serious one. Nonetheless, it is founded on a number of controversial and possibly incorrect premises. It has been argued by Regan that the prescriptive element is really not necessary for there to be interests extant in animals that are not extant in tractors.⁹⁴ Further, it is not clear that at least some animals do not have desires and beliefs, or that desires and beliefs require language.⁹⁵ Animals exhibit desires and beliefs by their behavior. We frequently see them pursuing things that appear to be goals. Also, some animals may use language.⁹⁶

At bottom, the interest theory of rights is the one most frequently asserted in support of animal rights. Interest theory, however, is not without difficulties that limit its usefulness as the sole ground for asserting rights in animals.

C. *Dignity as the Foundation of Rights*

Rights may be grounded in the characteristic or set of characteristics that constitute "dignity." Here it is argued, based on the philosophy of Immanuel Kant, that humans and perhaps other creatures have a characteristic or set of characteristics that we call dignity, that dignity is of value (presumably moral value) and that rights are necessary to protect the value of this dignity.⁹⁷ The sense of dignity involved here is not an "empirical" sense, that is, to act in a "dignified" way, but is dignity in the sense of being a creature having intrinsic value.⁹⁸

⁹¹ See *id.* at 122.

⁹² See *id.* at 123, 127.

⁹³ See FREY, *supra* note 66, at 107.

⁹⁴ See *id.* at 19.

⁹⁵ See JACQUES VAUCLAIR, ANIMAL COGNITION 137-45 (1996); James Rachels, *Do Animals Have a Right to Liberty?*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 214-18 (Tom Regan & Peter Singer eds., 1976).

⁹⁶ See VAUCLAIR, *supra* note 95, at 101-05.

⁹⁷ See Alan Geworth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS 10, 11, 24 (Michael J. Meyer & W.A. Parent eds., 1992); see also Wise, *supra* note 4, at 869-70.

⁹⁸ See Geworth, *supra* note 97, at 12.

Alan Geworth has found this inherent value to arise out of the value of purposive actions taken by entities.⁹⁹ He argues that purposive actions by agents have worth to those agents and from this worth agents regard themselves and others as having dignity.¹⁰⁰ Since all agents see other agents pursuing purposive actions as having dignity, we must commit to grant rights to all such agents so that they may pursue those actions that give them dignity.¹⁰¹

Steven Wise has stated that dignity may be a basis for granting rights to animals.¹⁰² While it is ordinarily thought that dignity requires full Kantian autonomy, that is, the ability to be completely rational in making choices, Wise states that a lower threshold, what he calls "realistic autonomy," is actually used by courts to determine the existence of dignity-related rights.¹⁰³ This realistic autonomy is something less than the perfect ability to make choices.¹⁰⁴ Wise supports realistic autonomy as the foundation of dignity rights by noting that there is case law granting rights to humans who clearly do not have cognitive abilities necessary to make fully rational decisions.¹⁰⁵ Wise argues in *Rattling the Cage* that at least chimpanzees and bonobos can meet this formulation of autonomy.¹⁰⁶

Whether this project will ultimately be successful in imbuing animals with meaningful rights will depend on how broadly the concept of realistic autonomy is interpreted. It may be that it will only bring within the concept of dignity a small number of animals. If the hope is to make rights widely applicable to animals, then dignity as a basis for animal rights may not be successful.

D. Contractual and Other Theories of Rights

Some theorists, including John Rawls, ground rights and other aspects of the legal system on a hypothetical contract basis.¹⁰⁷ In such a theory, we imagine ourselves in some original position, like the state of nature, and determine what sort of contractual arrangement we

⁹⁹ See *id.* at 21.

¹⁰⁰ See *id.* at 23.

¹⁰¹ See *id.* at 24.

¹⁰² See Wise, *supra* note 4, at 900.

¹⁰³ See *id.* at 874.

¹⁰⁴ See *id.* at 873-74.

¹⁰⁵ See *id.* at 877-78. See also *Care and Protection of Beth*, 587 N.E.2d 1377, 1381 (Mass. 1992).

¹⁰⁶ See STEVEN M. WISE, *RATTLING THE CAGE* (forthcoming 1999).

¹⁰⁷ See JOHN RAWLS, *A THEORY OF JUSTICE* 111 (1971); see also Rachels, *supra* note 95, at 221-22.

would arrive at if we were to create a society in which we are required to live with others. In this hypothetical original position, however, we are told in advance that we are rational entities, that is, humans; it is not possible that we ultimately be instantiated as some other species. The contractual view requires reciprocity—there can only be obligations between those capable of respecting the interests of others.¹⁰⁸ This makes sense if one is grounding one's theory in contract. A reciprocity requirement is obviously not favorable to animals since they are not rational beings able to engage in this kind of interplay. The theory is then conceptually loaded against animals.

One problem with assuming a requirement of rationality in our hypothetical contracting parties is that it leaves out of consideration some humans that nearly everyone believes have rights—infants, children, and the mentally handicapped—but do not have full rationality. Also, if we proceed from the hypothetical standpoint of some original position, it is hard to conceive why we must assume that we will not ultimately be instantiated as a species other than human. Indeed, Rawls' theory can be construed to protect the interests of animals.¹⁰⁹ Presumably, we would do this by assuming in our original position that we might come into the world as non-human animals.

It is also argued against this contractual theory that it assumes there are some grounding rules prior to the hypothetical contract.¹¹⁰ In other words, there must be some foundational rule that requires that we go along with the result of the contract that arises out of the original position.¹¹¹ What is this rule and how is it grounded? Without this rule and its foundation, the theory is incomplete and rests on unexplained premises.

At its nadir, this theory does not address how we actually ground rights in our legal system, but rather how we might explain the genesis of a legal system that has rules like ours. It is, thus, an interesting conceptual exercise, but not one that explains the way we actually ground rights or the considerations and policies that actually go into rights.¹¹²

¹⁰⁸ See Rachels, *supra* note 95, at 222.

¹⁰⁹ See ROSEMARY RODD, BIOLOGY, ETHICS AND ANIMALS 241–50 (1990).

¹¹⁰ See EVELYN B. PLUHAR, BEYOND PREJUDICE 235 (1995).

¹¹¹ See *id.*

¹¹² Many other theories have been advanced to explain legal rights but typically have not been applied to animal rights issues. For example, legal realists regard rights as remedies such that having a right requires having the power to obtain a remedy. See DONNELLY, *supra* note 11, at 15; Wise, *supra* note 4, at 816. Ronald Dworkin described several views of rights, including rights as trumps that override policies contrary to the right, and rights as

Except in the case of interest theories and Wise's dignity theory, one common strand runs through the theories reviewed: a focus on human, as opposed to animal or ecological concerns. There has nevertheless been some movement by scholars to spotlight other problems. Laurence Tribe, for instance, outlines a view of ecological issues that is not anthropocentric. He proposes a new paradigm for thinking about ecological issues that looks beyond human needs and concerns.¹¹³ The present anthropocentric paradigm, according to Tribe, defines the world as raw material to be manipulated for human demands.¹¹⁴ This manipulation is performed within a structure of Western dichotomies, God/man, human/animal, etc.,¹¹⁵ that manufactures boundaries between these concepts that cannot be bridged. Tribe calls this the "theory of transcendence" under which human needs transcend all other concerns, including ecology or animals.

A theory that moves diametrically away from such anthropocentricity is one of "imminence" that sees value and sacredness in all of nature and its constituents.¹¹⁶ To Tribe, however, such a view proves too much; it may not be possible or appropriate for society to go this far in changing its fundamental principles.¹¹⁷

Instead, Tribe suggests a synthesis of the transcendence and immanence theories.¹¹⁸ Such a view avoids the ecological pitfalls of anthropocentrism.¹¹⁹ Tribe's view comprehends reverence for nature—nature is something more than just fodder for the satisfaction of human desires.¹²⁰ Accordingly, there are obligations to animal and plant life.¹²¹ Tribe notes in this regard that rights have been given, in

reasons used to justify results of legal disputes. See DONNELLY, *supra* note 11, at 18, 20. H.L.A. Hart has also reasoned that to have a right is to have a reason to restrict the freedom of others. See Hart, *supra* note 54, at 83–84, 89. Rights have also been described as entitlements, resources, rhetoric, and as a reflection of the goals of society. See MILNE, *supra* note 30, at 102; DONNELLY, *supra* note 11, at 25, 45. Rights have even been based on consequentialist moral theory and recognized as a means of enabling communication between groups. See SUMNER, *supra* note 2, at 163, 188.

¹¹³ See Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1326–27 (1974).

¹¹⁴ See *id.* at 1330.

¹¹⁵ See *id.* at 1333.

¹¹⁶ See *id.* at 1336–37.

¹¹⁷ See *id.* at 1338.

¹¹⁸ See Tribe, *supra* note 113, at 1338.

¹¹⁹ See *id.* at 1340.

¹²⁰ See *id.* at 1341.

¹²¹ See *id.* at 1341–42.

certain circumstances, to entities other than humans, like churches, corporations, and animals in animal welfare laws.¹²²

It should be clear by now that there are many divergent and complex views regarding what rights are and what our reasons are for respecting them. The views range from those of critical legal studies scholars and some feminists who believe rights have little or no utility, to those who believe that rights can be used to solve myriad problems, including protection of animals. One typical and critically important characteristic of the many foundational concepts of rights is their attempt to ground rights in some single concept or a very restricted set of concepts. But before discussing this issue, a closer look at rights concepts and animals is required.

III. RIGHTS THEORY AND ANIMAL RIGHTS

Whatever underlying theory of rights one chooses to accept, when the issue is whether animals have rights, discussion inevitably focuses on the issue of what characteristics an entity must have to be a rightholder. It is generally thought that possessors of rights all must share some one common attribute.¹²³

In a prior article, I discussed the justifications for different treatment of humans and animals that ground views that animals cannot have rights.¹²⁴ I will not restate in detail these justifications, but will outline the arguments concerning the characteristics necessary to be a rightholder.

Some scholars ground rights in rationality. Contractarian theorists require rational agency in order to participate in contracting in the original position.¹²⁵ A diluted rationality theory, however, might be used to argue for placing animals in the domain of rightholders.

¹²² *Id.* I do not think the analogy between animals and corporations is a good one. To say that rights other than human rights are recognized when rights are given to corporations and churches is to ignore that the constituents of such organizations are humans. Thus, to the extent that these entities have rights, they are just a form of human rights.

Many people, including myself, dispute that animals have been given rights in the law. There are certain laws that protect animals from certain kinds of treatment, but these do not constitute grants of rights. These laws are little more than laws that prevent vandalism to private property and do not provide for redress on behalf of the animals. They may be seen as laws ultimately intended to protect certain human interests. Nonetheless, for an exposition of the view that some present laws create rights in animals, see Wise *supra* note 4, at 910–13.

¹²³ See *supra* notes 32–122 and accompanying text.

¹²⁴ See Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 559–60 (1998).

¹²⁵ See RAWLS, *supra* note 107, at 111–12.

For instance, if one said that sentience or consciousness, rather than rationality, was the key to rights, then at least some animals might be included among rightholders. For example, Tom Regan proposes that rightholders are entities that are "subjects-of-a-life."¹²⁶ This criterion requires that the animal be something more than just conscious; the animal must have, among other characteristics, beliefs, desires and perceptions, a sense of the future, an emotional life, and a psychological identity over time.¹²⁷ This criterion may spread rights very thinly, however, since it is not clear how many animals have all of the elements necessary to be subjects of a life.

Moral autonomy also has been asserted to be the characteristic necessary to have rights. To have rights under this theory, an entity must be one that can comply with normative constraints.¹²⁸ Such a theory excludes from the group of rightholders animals, incompetents, and children.¹²⁹

It is also argued that in order to have rights one must be able to make claims—to assert one's rights.¹³⁰ Without modification, this requires that a rightholder have linguistic and other abilities that are characteristic of those who have considerable cognitive abilities. The idea can, however, be modified to allow for assertion of rights by animals through the use of representatives.¹³¹

Alan White proposes that those who possess rights are those who can be sensibly spoken about in "the full language of rights."¹³² To be spoken about in the full language of rights requires that an entity be able to assert and exercise rights.¹³³ This, he contends, rules animals out as possessors of rights, since it requires rationality and linguistic ability.¹³⁴

If we ground rights in interests, we broaden the group of entities to whom rights may be granted. If we view being free from pain as an interest that animals possess that is worthy of respect, then rights for animals can be constructed from this interest. Interests might, in addition, include things like physical liberty and freedom in such a way as to construct even more complex rights for animals.

¹²⁶ See REGAN, *supra* note 68, at 243.

¹²⁷ See *id.*

¹²⁸ See SUMNER, *supra* note 2, at 203.

¹²⁹ See *id.*

¹³⁰ See Feinberg, *supra* note 67, at 43–44.

¹³¹ See *id.* at 47.

¹³² See WHITE, *supra* note 51, at 89.

¹³³ See *id.* at 90.

¹³⁴ See *id.*

It is not my intent to settle the issue of what characteristic or characteristics are necessary to be a rightholder. Rather, I merely point out that there is considerable impetus toward identifying some single property as the foundation for being a rightholder.

IV. MORALITY AND LEGAL RIGHTS

In discussing questions of legal rights, it is useful, if not crucial, to determine whether there is or should be a connection between legal rights and morality. Are legal rights just conventional legal remedies as a realist might contend or are they connected, at least ideally, to some system of moral principles?

Legal positivists, who have wielded considerable influence in this century, deny a connection between law and morality.¹³⁵ For legal positivists, there is no law apart from government and its institutions and, as a result, no rights apart from those ceded by the state.¹³⁶ Philosophically, this idea can be traced to Kant, who saw morality existing in the realm of reason, quite separate from the sensible world where the law and, thus, rights operate.¹³⁷ Similarly, Oliver Wendell Holmes stated that morality requires us to look at the internal state of mind of an actor, while the law concerns itself only with external signs.¹³⁸

Nonetheless, there are those who continue to claim a connection between law and morality, and thus, between legal rights and morality. It has been stated that morality logically precedes the law.¹³⁹ In this vein, it is argued that while we can have morality without law, we cannot have law without morality.¹⁴⁰ Morality is necessary for the law, since without it there can be no basis for a general obligation to follow the law.¹⁴¹ In other words, for law to be efficacious, there must be a transcending moral rule that directs compliance with the law.

¹³⁵ See DONNELLY, *supra* note 11, at 15; Wise, *supra* note 4, at 843; RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 10–11 (1990).

¹³⁶ See DONNELLY, *supra* note 11, at 15; Wise, *supra* note 4, at 843.

¹³⁷ See George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 535 (1987).

¹³⁸ See Michele Moody-Adams, *On the Old Saw that Character is Destiny*, in *IDENTITY, CHARACTER AND MORALITY* 111, 113 (Owen Flanagan & Amelie Oskenberg Rorty eds., 1990).

¹³⁹ See MILNE, *supra* note 30, at 28.

¹⁴⁰ See *id.* at 141–42.

¹⁴¹ See *id.*

Natural rights theorists, of course, base the law on moral theory.¹⁴² Carl Wellman, for example, ultimately grounds rights in fundamental moral principles in his expansion of Hohfeldian theory.¹⁴³ In his theory, those who have legal rights are exactly those who have moral rights.¹⁴⁴

There are, of course, a number of ways to connect law and morality. One might subscribe to the idea that there are ontologically extant moral principles finding their source in God or elsewhere that are the basis for the law. On the other hand, one might take a less metaphysically challenging position and claim that there are natural rights that issue from moral theory, but this moral theory does not require ontological entities to represent this morality.¹⁴⁵ Or one might say that moral rights are based on true moral propositions that bear on human conduct in a way that has practical consequences and relevance.¹⁴⁶ To say that there are moral rights, then, is to say that there are true moral reasons, the truth of which can be proven.¹⁴⁷ These moral rights can then be translated into legal rights.¹⁴⁸ The fundamental rights we view as extant in the context of international law are an example.¹⁴⁹

Yet looser connections between law and morality might exist. H.L.A. Hart claims, for example, that while there may be no simple identification of moral with legal rights, there is some "intimate" connection.¹⁵⁰ For Hart, morality creates limits on one's freedom to interfere with others, thereby determining the content of legal rules and rights.¹⁵¹

Ronald Dworkin also believes that morality plays a role in legal rights. He distinguishes between "goals" that he sees as supported by policy arguments and "rights" that are supported by moral principles.¹⁵² Thus, there is a qualitative distinction between matters supported by policy and matters supported by moral principle. The latter acquire the status of rights. Those who claim that rights are based on

¹⁴² See, e.g., WELLMAN 1985, *supra* note 40, at 107–70.

¹⁴³ See *id.* WELLMAN 1995, *supra* note 40, at 132–35.

¹⁴⁴ WELLMAN 1995, *supra* note 40, at 132.

¹⁴⁵ See *id.* at 169–70.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 132.

¹⁴⁸ See *id.*

¹⁴⁹ See, e.g., Wise, *supra* note 4, at 846–57.

¹⁵⁰ See HART, *supra* note 54, at 77, 79.

¹⁵¹ See *id.*

¹⁵² RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90 (1978).

“interests” also ground the existence of these interests on moral arguments, thereby grounding rights in moral principles.¹⁵³ Even critics of rights, like Mary Midgley, recognize that if there are rights, they are in some way linked to morality.¹⁵⁴

For the purposes of this article it will be assumed that there is or should be a connection between morality and law. There is good reason to take such a position. The divorce of law from morality can be seen as the foundation for systems, like Nazism, that base what is right on the wielding of power.¹⁵⁵ Such legal systems may be avoided by firmly grounding the law in accepted moral principles. It is not the purpose of this article to specify these moral principles or to propose a moral theory. Nor is it my goal to claim that there is some set of ontologically extant moral principles that can by one means or another be discovered.¹⁵⁶ Rather, all that need be said is that law and rights have, or should have, a connection to moral principles, whatever these may be—the collective moral precepts of society, true moral propositions, or natural law.

V. ANALYSIS AND SYNTHESIS OF RIGHTS THEORIES

Western thought tends to attempt to reduce disparate concepts to a unified theory. We look for one explanation that resolves all of our questions about a subject. For example, the Holy Grail of physics is the search for a unified theory, resolving conflicts in quantum theory and general relativity theory. While such a structure may fit hard sciences, in human affairs one must question its efficacy.

Similarly, we look at the issue of rights as one that requires a *single* explanation. Hohfeld sees rights as correlative with duties. Wellman refines this by founding rights on a set of Hohfeldian elements, revolving around a single central core. Regan and others see rights as founded in interests. Other theories see rights variously as remedies, reasons, goals, or rhetoric. The common theme is that there is *an* explanation.

Is there *an* explanation of the foundations or sources of rights? Might rights have diverse sources? The notion that a single conceptual foundation adequately describes legal rights appears dubitable.¹⁵⁷

¹⁵³ See REGAN, *supra* note 68, at 87–88.

¹⁵⁴ See MIDGLEY, *supra* note 20, at 62–63.

¹⁵⁵ See Wise, *supra* note 4, at 843.

¹⁵⁶ See WELLMAN 1985, *supra* note 40, at 122–31 (stating that such ontological moral principals are not necessary to argue for connection between law and morality).

¹⁵⁷ See SUMNER, *supra* note 2, at 19–20.

It seems wrong as a matter of fact because it has been widely recognized in the law, at least since Hohfeld, that rights can be described in many ways.¹⁵⁸ As a matter of theory it appears wrong because "importantly different notions of a right, each of them proper, might profitably coexist in the law."¹⁵⁹

When we ask about the foundation or source of a right we actually have many valid answers. For example, if one asked about the foundation of the right to own property, one might say that under the generally accepted moral principles of our society, private property is a fundamental good that we protect through the creation of a "right."¹⁶⁰ Wellman or others might subscribe to some natural inherent liberty right to own property exclusive of others; a person who appropriates property through her effort is protected by a right.¹⁶¹ Or we might say that a person has rights in property because we grant a remedy to the person with title to property when there is some interference with the property. This allows the smooth functioning of society and its institutions. The goal of maximizing wealth in society may be a ground for promoting rights in private property. In one way or another each of these concepts grounds our idea of rights in property, and all of these ideas are in some sense correct.¹⁶²

In an interest theory we can identify the interests of persons who should be free from unnecessary pain and suffering as a foundation for the right to be free from such cruel and unusual punishment. Societal goals supporting a ban on cruel and unusual punishment may include making society compassionate and feeling. In the rhetoric of liberal societies, we see this right as fundamental to the dignity of humans. Again, as in the case of property rights, we can ground the right to be free from cruel and unusual punishment in several ways, all of which appear well founded.

Looking at rights as grounded in a single concept or foundational idea is an oversimplification. Rights are complex concepts

¹⁵⁸ See *id.* at 19.

¹⁵⁹ *Id.* at 19–20.

¹⁶⁰ See Robert H. Welson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 *FORDHAM ENVTL. L.J.* 645, 645–46 (1997).

¹⁶¹ John Locke saw labor as the foundation of ownership of property. See *id.* at 646.

¹⁶² Consider another example. We say that there is a right in criminals not to suffer cruel and unusual punishment. It is evident that our moral sense is offended by the rack and whip. Thus, a concept of rights grounded in any tenable moral theory supports a prohibition on cruel and unusual punishment.

founded on moral, policy, societal, and cultural ideas.¹⁶³ Thus, we should not focus on finding some single basis for a right, but on discovering the sundry elements of a right. The more bases we find for a right the more firmly convinced we may be that it is a legitimate and well-founded right. Indeed, it might be appropriate to call rights "composites"—they are compounds of numerous interconnected ideas that mingle together in a loosely cohesive whole. Unlike Wellman's view of rights as complexes of Hohfeldian components, this "composite" view is not limited in the kinds of things that can serve as foundations for rights and is not committed to some core element as the ultimate foundation of each right. The core of a right may be molecular rather than atomic; it may be a composite of various ingredients.

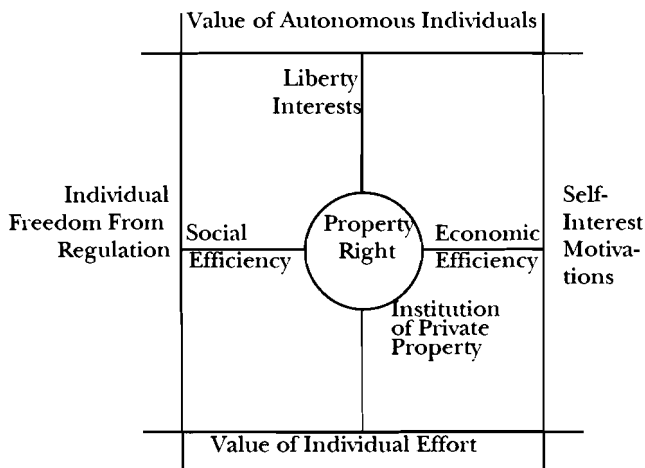
Perhaps W.V.O. Quine's view of knowledge is an apt analogy.¹⁶⁴ Quine viewed knowledge as comprised of interconnecting links (think of a spider web) joined at the core by certain fundamental principles.¹⁶⁵ These central principles are strongly held beliefs that are not easily swayed. As we move away from these central principles, new information may modify the structure of the web. The foundational principles at the center of the web, however, will generally be left unaffected by new information. With respect to rights, certain central ideas may ground rights, while various subsidiary ideas surround these central concepts. The general stability of rights concepts over time is attributable to the strength of the central principles founding rights. The capacity for change over time comes from the gradual reshaping of the perimeter of the web and ultimately, through this reshaping process, modification of the central principles through evolving morals, goals, and other principles.

Consider the earlier example of property rights. In Schematic 1, a number of central founding principles compose a property right, all of critical importance, surrounded by lesser subsidiary ideas.

¹⁶³ This idea is in line with Donnelly's horizons theory. See DONNELLY, *supra* note 11, at 15.

¹⁶⁴ See W.V.O. Quine, *Truth by Convention*, in *THE WAYS OF PARADOX* 77, 101–03 (1976).

¹⁶⁵ See *id.*



This schematic obviously oversimplifies the relations of these concepts. More connections could be made between the various principles and many other subsidiary principles could be mentioned.¹⁶⁶ Nonetheless, this schematic can be seen as “a family tree” for the conceptual foundation of a right to property. It is in this fashion that I believe rights are actually grounded.

VI. AN EMOTIVE ASPECT OF ANIMAL RIGHTS

A. *The Unity of Emotion and Reason*

1. Emotion and Moral Theory

Generally, emotions are thought to be unimportant to moral theory.¹⁶⁷ It is a maxim of Western thought that one is to avoid contamination of moral theory with compassion, sympathy, or caring.¹⁶⁸ This extension of a religion of science into moral theory¹⁶⁹ may ulti-

¹⁶⁶ To represent this schematically, however, would require more than the two dimensions provided by a sheet of paper.

¹⁶⁷ See MICHAEL STOCKER, *VALUING EMOTIONS* 1 (1996).

¹⁶⁸ A number of emotions may be relevant to moral thought. The ones that appear of relevance to animal issues are sympathy and empathy. Sympathy is a harmony of feelings between entities, while empathy is identification with or vicarious experiencing of the feelings of another. The most relevant emotion here may be empathy. Nonetheless, to capture both feelings of sympathy and empathy, I will generally refer to “compassion” as the emotion most relevant to moral issues as they relate to animals.

¹⁶⁹ See STEPHEN R. L. CLARK, *THE MORAL STATUS OF ANIMALS* 154 (1977).

mately be credited to Kant.¹⁷⁰ In Kant's moral theory, duty is the foundation of morality, and through the application of reason we discover our duties.¹⁷¹ Reason is distinguished from emotion. This distinction assumes that emotion is irrational.

In Western thought, what is rational is good and what is not rational is bad.¹⁷² Emotions, overwhelming feelings that cloud rationality and ultimately have deleterious effects, facilitate irrationality. There are certain "commonplaces" or prejudices that we have about emotion and rationality that lead to these views.¹⁷³ Cool rationality is believed to be the best state for inquiry and acquisition of knowledge, and emotions must always be in tight control lest we stray from the proper path to understanding.¹⁷⁴

This gulf between morality (and, thus, law) on one side and emotion on the other is followed by most modern theorists on animal rights issues. Peter Singer, for example, makes a point of stating that his foundation for a new way of looking at the treatment of animals is devoid of emotive elements.¹⁷⁵ Tom Regan also does not allow for consideration of emotion in his interest theory.¹⁷⁶

There are, nonetheless, those who espouse a role for the emotive in moral theory. For example, some feminist thinkers hold open a role for compassion in moral thought, though not for the purpose of finding a foundation for rights.¹⁷⁷ From this perspective emotion and compassion are a normal part of the human condition and can be

¹⁷⁰ See Josephine Donovan, *Attention to Suffering: Sympathy as a Basis for Ethical Treatment of Animals*, in *BEYOND ANIMAL RIGHTS* 147, 148–49 (Josephine Donovan & Carol J. Adam eds., 1996).

¹⁷¹ See MARCIA W. BARON, *KANTIAN ETHICS ALMOST WITHOUT APOLOGY* 112 (1995). Baron argues that perhaps Kant has been misinterpreted. She sees the typical view of Kant's moral theory as not ascribing importance to love, fellow feeling, and the like to be a defect in Kantian moral theory, but reads Kant as actually allowing a role for the emotive in morals. She argues that Kant encourages the development of sympathetic and other feelings as a part of morality. See *id.* at 212–18. To Baron, Kant finds value in emotions in motivating us to do those things that are "imperfect duties," those things that we cannot be expected to do from duty alone. *Id.* at 220. These emotions must, however, be controlled by reason. See *id.* at 203.

¹⁷² See STOCKER, *supra* note 167, at 91–92.

¹⁷³ *Id.* at 92.

¹⁷⁴ See *id.*

¹⁷⁵ SINGER, *supra* note 8, at ii–iii.

¹⁷⁶ REGAN, *supra* note 68, at 123–24.

¹⁷⁷ See generally Karen J. Warren, *The Power and the Promise of Ecological Feminism*, 12 *ENVTL. ETHICS* 125 (1990).

utilized to ground and analyze moral positions.¹⁷⁸ One might say that morality, at bottom, requires that one care about or have certain feelings about an issue.¹⁷⁹ Without such feelings there is no morality.¹⁸⁰

Though perhaps ordinarily foreign to our thought, the idea that emotion plays a role in morality can be extracted from major thinkers in our Western tradition. While most philosophers hold the view that reason must conquer passions, David Hume reversed this idea and claimed that reason should be the slave of passion.¹⁸¹ Hume was of the view that the passions are the basis for all moral thought. His view was based on the idea that reason is inert; it is just the mechanism used for the discovery of truth or falsehood—it concerns the relation of ideas or the existence of facts.¹⁸² Passions, volitions, and actions are not susceptible to being true or false and, thus, cannot be the subject of reason.¹⁸³ Morality is concerned with actions, and since actions have their basis in passions, passions are the foundation of morals.¹⁸⁴ To those who attempt to ground morals in reason, Hume states:

There has been an opinion very industriously propagated by certain philosophers, that morality is susceptible of demonstration [through reason]; and tho' no one has ever been able to advance a single step in those demonstrations; yet 'tis taken for granted, that this science may be brought to an equal certainty with geometry or algebra.¹⁸⁵

Morals are not matters of fact and therefore are not the subject of reason. Nor are morals demonstrable with use of reason:

But can there be any difficulty in proving, that vice and virtue are not matters of fact, whose existence we can infer by reason? Take any action allow'd to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call *vice*. In which-ever way you take it, you find only certain passions,

¹⁷⁸ See Brian Luke, *Justice, Caring, and Animal Liberation*, in *BEYOND ANIMAL RIGHTS* 77, 82–86 (Josephine Donovan & Carol J. Adam eds., 1996).

¹⁷⁹ See Kheel, 1996, *supra* note 23, at 26; Kheel, 1989, *supra* note 16, at 259–60.

¹⁸⁰ See Kheel, 1996, *supra* note 23, at 26; Kheel, 1989, *supra* note 16, at 259–60.

¹⁸¹ See Ronald De Sousa, *The Rationality of Emotions*, in *EXPLAINING EMOTIONS* 127, 127 (Amelie Oskenberg Rorty ed., 1980).

¹⁸² See DAVID HUME, *A TREATISE OF HUMAN NATURE* 510 (1969).

¹⁸³ See *id.* at 509–10.

¹⁸⁴ See *id.*

¹⁸⁵ *Id.* at 515.

motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never can find it, till you turn your reflection into your own breast, and find a sentiment of disapprobation, which arises in you, towards this action.¹⁸⁶

Hume states that there is an innate moral sense that grounds our moral awareness.¹⁸⁷ The vice and virtue that we see in the world are determined by certain impressions or sentiments (feelings) that are innate in humans.¹⁸⁸ Moral evaluations are perception—kinds of pains and pleasures.¹⁸⁹ Morality is felt, not judged.¹⁹⁰

These moral impressions are natural in the sense that all humans have them and all societies reflect them.¹⁹¹ Moral feelings are rooted in our constitution and temper, and cannot be jettisoned except through disease or madness.¹⁹² Marcia Lind argues that Hume viewed emotions as complexes of both feeling and cognitive elements that are inextricably connected and hard wired into our constitutions.¹⁹³ Hume can therefore avoid the charge of being a radical subjectivist concerning morality.¹⁹⁴ Since there is a natural method of connecting feelings with the objects of feelings, this method can be discovered without subjectivism.¹⁹⁵

Schopenhauer held a similar view of the root of morality. He saw compassion as the foundation for morality and an undeniable fact of human consciousness. Compassion is original and immediate, and resides in human nature itself.¹⁹⁶ Even Western science admits of these ideas. Research concerning kin altruism suggests that there is an innate sense of sympathy in other animals, and through Darwinian theory we must recognize this as a part of our makeup.¹⁹⁷

Plato too, though in a more subtle way, held that emotion has a role in morality. He thought that although reason is in control of the

¹⁸⁶ *Id.* at 520.

¹⁸⁷ *See id.* at 520–21; *see also* Donovan, *supra* note 170, at 154.

¹⁸⁸ *See* HUME, *supra* note 182, at 520–21.

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.* at 526.

¹⁹² *See id.* *See also* Marcia Lind, *Hume and Moral Emotions*, in *IDENTITY, CHARACTER, AND MORALITY* 133, 142–43 (Owen Flanagan & Amelie Oskenberg Rorty eds., 1990).

¹⁹³ *See* Lind, *supra* note 192, at 142–43.

¹⁹⁴ *See id.* at 144.

¹⁹⁵ *See id.* at 144–45.

¹⁹⁶ *See* SCHOPENHAUER, *supra* note 57, at 208.

¹⁹⁷ *See* Donovan, *supra* note 170, at 155.

passions, they are allies in the search for moral truth.¹⁹⁸ Aristotle thought that to be a good person one must have the right emotional makeup.¹⁹⁹ Thus, there is considerable support, even in Western thought, for the view that emotion plays a role in moral theory.

As noted earlier, the exile of the emotive from moral theory is based on the idea that emotion is dangerous and must always be governed by reason. It is asserted, by focussing on certain extreme cases of emotional outbursts, that emotions are undesirable elements in inquiry and elsewhere.²⁰⁰ We view emotion as causing utter subjectivity due to the lack of any element of reason.²⁰¹ It is thought that emotion is the antithesis of rationality.²⁰² To allow emotive aspects into moral theory is to descend into an abyss of irrationality and mysticism.

This dichotomy of emotion and reason is false. Reason is sometimes mistaken.²⁰³ Reason can go astray through undue credulity or skepticism, or inappropriate acceptance of authority.²⁰⁴ There are indeed times when it is appropriate to say "don't get rational about this," just as we sometimes admonish people not to get emotional.²⁰⁵ Indeed, Justice William Brennan decried the cold harshness of our focus on reason as being a threat to the human dignity that is the basis of our constitution:

The framers [of the United States Constitution] operated within a political and moral universe that had experienced arbitrary passion as the greatest affront to the dignity of the citizen. . . . In our own time, attention to experience may signal that the greatest threat to due process principles is formal reason severed from the insight of passion.²⁰⁶

There are, in all acts of reason, emotive elements in the background.²⁰⁷ The entry of emotion into consciousness does not empty

¹⁹⁸ See De Sousa, *supra* note 181, at 127.

¹⁹⁹ See STOCKER, *supra* note 167, at 1.

²⁰⁰ See *id.* at 94–95.

²⁰¹ See Lind, *supra* note 192, at 133.

²⁰² See Wise, *supra* note 4, at 824. Wise describes the "subjective" as non-logical and incapable of proof.

²⁰³ See STOCKER, *supra* note 167, at 93.

²⁰⁴ See *id.* at 94.

²⁰⁵ See *id.* at 99–100.

²⁰⁶ William Brennan, *Reason, Passion and 'The Progress of the Law'*, 10 CARDOZO L. REV. 3, 17 (1988).

²⁰⁷ See STOCKER, *supra* note 167, at 100.

the mind of reason.²⁰⁸ Cognition and reason remain notwithstanding the surfacing of emotion into consciousness.²⁰⁹ If emotions are complexes of both feeling and cognitive elements, then the commonplaces about emotions cannot be maintained.²¹⁰ For example, to have compassion, the main emotional element of relevance to animal issues, involves both intellectual and emotional understanding.²¹¹ It is, thus, unlikely that we can ever separate emotion from reason. Our concern, then, in applying emotive elements to moral and legal issues should not be to avoid all emotion but to avoid emotion devoid of reason.

Emotion threatens reason only when it is uncontrolled,²¹² not in the more typical cases of controlled emotion. Ordinarily emotions are unmomentous, long lasting, diffuse, and pervasive.²¹³ Examples are the affection we may have for a friend or the dull fear of going to the dentist. Emotions are not just the extreme occurrences that we often call "emotional" responses.²¹⁴ Instead, much of our emotional life is found "in the backgrounds, the tones and tastes of life."²¹⁵ The mundaneness of ordinary emotional life has been described in the following way:

[T]here is no action without affect, to be sure not always an intense, dramatic affect as in an action of impulsive rage, but more usually a total, sometimes quite marked, sometimes very subtle and hardly noticeable mood, which nevertheless constitutes an essential background of every action.²¹⁶ Thus, emotion is ordinarily a normal, unmomentous and not necessarily disruptive part of our experience.²¹⁷

The employment of the emotive in moral and legal discussions will surely be met with criticism. One problem with adding an emotive

²⁰⁸ See Kheel, 1996, *supra* note 23, at 26; Kheel, 1989, *supra* note 16, at 259–60; MIDGLEY, *supra* note 20, at 33–35.

²⁰⁹ See Kheel, 1996, *supra* note 23, at 26.

²¹⁰ See Lind, *supra* note 192, at 142–43, discussing emotions as complexes of feeling and cognitive elements.

²¹¹ See Donovan, *supra* note 170, at 149.

²¹² See STOCKER, *supra* note 167, at 92.

²¹³ See *id.* at 8.

²¹⁴ See *id.* at 84.

²¹⁵ *Id.* at 85.

²¹⁶ *Id.* at 8 (quoting ERNEST SCHACHTEL, *METAMORPHOSIS* 20 (1984)).

²¹⁷ See STOCKER, *supra* note 167, at 8, 11.

element to moral theory is that emotions are not universal.²¹⁸ Each person's emotional response to a situation is different and thus will inevitably cause dispute concerning how these responses should be incorporated in moral and legal theory.

It is not, however, necessarily the case that such responses will be divergent. If Hume was correct that humans have some innate sense of compassion, then emotional responses of different individuals should be similar.²¹⁹ Moreover, even moral and legal theories presumably founded on utterly rational bases differ as to their efficacy and application. Thus, the possibility of dispute is hardly confined to a moral theory incorporating emotive aspects.

There is, then, considerable support for the view that emotion should play a part in moral theory. The precise role of emotion in such a theory is not within the scope of this article, but at least some explanation of the function of emotion in moral theory is in order.

2. The Role of the Emotive in Moral Theory

There are a number of uses to which emotions can be put in moral theory. Our emotional responses reveal what is of moral value to us.²²⁰ For example, when we are angered at a slight against some person we know, our anger reveals that we value the person slighted.²²¹ Our emotion of anger contains not only the emotion itself but the moral value we attach to the object of the emotion.²²² Similarly, being emotionally upset at the outbreak of war reveals the value we place on human life and suffering.²²³ Our emotions are important not only in that they reveal value, but also in what values they reveal—like the friendship shown by anger from the slight or the value of life revealed in feelings toward those suffering in war.²²⁴

²¹⁸ See Donovan, *supra* note 170, at 157. One response to the problem of a lack of universalizability is to say that this does not constitute a defect in a moral theory. See STOCKER, *supra* note 167, at 144–45. I will, nonetheless, assume that it is a defect and address it as such.

²¹⁹ See Donovan, *supra* note 170, at 158.

²²⁰ See STOCKER, *supra* note 167, at 56–57.

²²¹ See *id.* at 57.

²²² See *id.*

²²³ See *id.* at 56–57.

²²⁴ See *id.* at 83.

In addition, emotions are morally relevant as motivators to action.²²⁵ By pushing us to believe and desire certain things, emotions drive us to act.²²⁶ Acting along with reasoned judgment, emotions give us grounds for action.²²⁷ They act as instrumental aids in our reasoning process, motivating action on behalf of others.²²⁸ Emotions move us to perform in the interests of those that we value, whether human or animal, and this performance can take the form of rescuing the afflicted, pushing for legislation to help those in need, or any other action in the interest of those we have feelings toward.

Similarly, emotions aid us in noticing and attending to things that are of value to us.²²⁹ They guide us in obtaining the knowledge and information necessary to take ethical actions.

Contrary to ordinary thinking, emotions act as aids in rational inquiry. Emotion provides the interest in a subject to which we apply rational thought.²³⁰ This intellectual interest is required for rational inquiry to proceed.²³¹ Emotions also guide the course of inquiry²³² by directing us in certain intellectual directions. Because emotions focus our attention on certain issues, they help assure that our rational processes lead to determinate outcomes.²³³ For this reason, emotions have been described as "determinate patterns of salience among objects of attention, lines of inquiry, and inferential strategies."²³⁴ Emotion determines which elements of a problem we focus on and direct our attention to, thereby aiding the inquiry and discovery of solutions. Emotions also help us in predicting the behavior of others in response to actions.²³⁵ Without emotion, rational inquiry would be hampered.²³⁶

Along the same lines, emotion is necessary for making evaluative judgments.²³⁷ In this regard, it has been argued that those who lack

²²⁵ See STOCKER, *supra* note 167, at 83; see also Amelie Oskenberg Rorty, *Explaining Emotions*, in EXPLAINING EMOTIONS 105 (Amelie Oskenberg Rorty ed., 1980); PATRICIA S. GREENSPAN, EMOTIONS AND REASON 14 (1988).

²²⁶ See GREENSPAN, *supra* note 225, at 159.

²²⁷ See *id.* at 137.

²²⁸ See *id.* at 152-59, 173.

²²⁹ See STOCKER, *supra* note 167, at 85.

²³⁰ See *id.* at 100-01.

²³¹ See *id.* at 101-02.

²³² See De Sousa, *supra* note 181, at 138-39.

²³³ See *id.* at 141.

²³⁴ *Id.* at 137.

²³⁵ See *id.* at 137-38.

²³⁶ See STOCKER, *supra* note 167, at 100-01.

²³⁷ See *id.* at 105-06.

emotion are epistemologically disadvantaged in making such judgments.²³⁸ Since emotion is necessary to see the values inherent in a situation, a lack of emotion will cause a person to overlook and fail to apply moral values to a situation.²³⁹ Thus, only those who are emotionally engaged can make informed and proper evaluative judgments.²⁴⁰ This is shown by the fact that those who have emotional deficiencies have trouble making proper evaluative judgments.²⁴¹ Such persons fail because they are affectless or lack feelings appropriate to the circumstances.²⁴²

The connection between emotion and evaluative judgments is so strong that some philosophers have categorized emotions as being evaluative judgments.²⁴³ This theory views emotions as kinds of factually based beliefs that are partly evaluative.²⁴⁴ For example, fear is the belief that some danger looms.²⁴⁵ This view, however, may oversimplify emotion as it fails to explain the diversity of emotional phenomena—for example, emotions that do not seem to be based on full-fledged beliefs.²⁴⁶ For this reason, Patricia Greenspan has refined this evaluative judgment view of emotion. She claims that emotions are object-directed affects whose object is an evaluative proposition—a statement of value.²⁴⁷ Emotions, then, turn out to be compounds of two elements: (1) affective states of comfort or discomfort and (2) evaluative propositions.²⁴⁸ Fear would then be a feeling of discomfort and the fact (or imagined fact) that danger looms, the latter being the evaluative proposition that is the subject of the feeling of discomfort.²⁴⁹ In this way, the evaluative proposition need not reach the level of being a belief, it need just be a structured evaluation.²⁵⁰ Emotions thus can be seen as a broader set of phenomena than is the case if emotions always require a belief as their foundation.

From Greenspan's view we can more clearly see how emotion acts with reason in making practical reasoned judgments. To make judg-

²³⁸ *See id.*

²³⁹ *See id.*

²⁴⁰ *See id.* at 193.

²⁴¹ *See* STOCKER, *supra* note 167, at 108–12.

²⁴² *See id.*

²⁴³ GREENSPAN, *supra* note 225, at 3.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 3–4.

²⁴⁸ GREENSPAN, *supra* note 225, at 4.

²⁴⁹ *Id.*

²⁵⁰ *See id.* at 54.

ments, one needs the evaluative aspect of emotions.²⁵¹ Emotions, by acting in part to evaluate the world around us, are used in reality testing by humans and are as valuable as rational thought in making these evaluations.²⁵² This is not to say that emotions control our processes of rational thought (the passions are properly in the control of reason), but emotions do, at least sometimes, perform the evaluative work in our reasoned decisionmaking.²⁵³ Due to this connection between emotion and rational decisionmaking, Stocker takes the view that it is simply impossible to separate out the emotional from the rational.²⁵⁴

Emotion then serves morality in a number of ways. It reveals what is of moral portent. It is a moral stimulator. It is a necessary element in evaluation of moral issues. It may, in fact, not be separable from our rational thought processes at all.

3. The Role of Emotion in the Law

If emotion is an aspect of morality, and morality is relevant to the law, then the law can and should reflect emotive concerns. Indeed, there are many aspects of the law that derive largely from emotive concerns. Damages are awarded for emotional distress.²⁵⁵ Such damages are founded on a sense of compassion for the suffering of others even though suffering cannot be easily measured in commercial script as can other elements of damage.

The criminal law provides many emotive features. In providing remedies for the sake of victims and society at large we are evincing emotion in the law. When we refer to "victim's rights" we speak about

²⁵¹ See *id.* at 175–76.

²⁵² *Id.* at 121.

²⁵³ See STOCKER, *supra* note 167, at 125.

²⁵⁴ See *id.*

²⁵⁵ See David A. Cathcart & Richard K. Stavin, *Emerging Standards Defining Contract, Emotional Distress and Punitive Damages in Employment Cases*, C108 ALI-ABA 493, 547 (1995) (stating that damages for violation of Civil Rights Act include compensation for emotional distress); Ken Feagins, 'Wanted—Diversity: White Heterosexual Males Need not Apply,' 4 WIDENER J. PUB. L. 1, 9 (1994) (noting emotional distress is part of damage awards in discrimination cases); Risa B. Greene, *Federal Legislative Proposals for Medical Malpractice Reform: Treating the Symptoms or Effecting a Cure?*, 4 CORNELL J.L. & PUB. POL'Y 563, 584 (1995) (noting part of the purpose of tort law is to compensate for emotional distress); Douglas T. Miracle, *Punitive Damages, Jury Discretion and the "Outer Limits" of the Fourteenth Amendment in Civil Cases*, 13 MISS. C. L. REV. 221, 252 (1992) (arguing that the concept of compensatory damages has broadened to include damages for emotional trauma).

our compassion for those who have been victimized.²⁵⁶ When we speak of retribution we are venting emotions of anger, indignation, and remorse.²⁵⁷ We explicitly recognize the significance of emotion in reducing penalties in crimes influenced by overheated emotions or mental disturbance.²⁵⁸ In sentencing criminals we sometimes weigh compassion not only for the victims, but also for the criminal. We may even see emotion play a role in the doctrine of self defense. The intentions of the other party to a conflict, her emotions, may play a role in whether a claim of self defense is warranted.²⁵⁹

Property law, too, has elements of the emotive. Heirlooms, the value of which are largely emotional, are specially prized in the law, and emotional attachment to goods is an element in determining remedies for loss or damage to such goods.²⁶⁰ Moreover, emotional value is taken into consideration in exemption laws.²⁶¹ Emotional

²⁵⁶ See Jose Felipe Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 *RUTGERS L.J.* 367, 399 (1997); Patrick M. Fahey, *Payne v. Tennessee: An Eye for an Eye and Then Some*, 25 *CONN. L. REV.* 205, 261-62 (1992); Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411, 1416, 1428-29 (1993).

²⁵⁷ See STOCKER, *supra* note 167, at 140. See also Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 *AM. J. CRIM. L.* 375, 399 (1996) (showing that retribution in criminal justice is based on venting of anger of the victim's loved ones); Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 *SETON HALL L. REV.* 459, 484 (1993) (claiming retribution is "an expression of society's anger and moral outrage"); Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 *CLEV. ST. L. REV.* 23, 38 (1996) (noting retribution is not based on reason and logic, but on anger).

²⁵⁸ See *State v. Thornton*, 730 S.W.2d 309, 312-15 (Tenn. 1987) (finding that killing done in passion is not murder in the first degree; it may be manslaughter or second degree murder); Benjamin J. Lantz, *Arave v. Creech: A "Cold-Blooded, Pitiless" Disregard for Constitutional Standards*, 21 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 97, 124 (1995) (stating that manslaughter is killing done in the heat of passion); Richard E. Shugrue, *The Second Degree Murder Doctrine in Nebraska*, 30 *CREIGHTON L. REV.* 29, 38-39 (1996) (citing New York and Nebraska law concerning reduction in charge of murder to manslaughter if the killing was done in the heat of passion); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 *YALE L.J.* 835, 856 (1992) (citing Model Penal Code provisions providing for reduction in first degree murder to second degree murder in the case of killing while impaired by emotional disturbance).

²⁵⁹ See STOCKER, *supra* note 167, at 151.

²⁶⁰ See generally *Campins v. Capels*, 461 N.E.2d 712 (Ind. Ct. App. 1984) (stating that court may consider sentimental value of goods in determining damages for destruction of jewelry).

²⁶¹ See *In re Wilson*, 213 B.R. 413, 414 (Bankr. D.R.I. 1997); *In re Dillon*, 113 B.R. 46, 50 (Bankr. D. Utah 1990).

value has also been imported to the area of damages for injury or death of companion animals.²⁶²

It is clearly false to contend that the law is or should be bereft of emotive considerations. Why, then, should our concept of rights be devoid of emotive considerations?

4. What Emotions Are Relevant to Morality, Law, and Animal Rights Issues?

If emotion plays a role in moral thought, and if there is a role for morality in concepts of legal rights, then it must be recognized that there is or should be an emotive aspect to our concepts of rights. Part of what we are doing in protecting rightholders is expressing compassion and respect.²⁶³ As such, we are recognizing an element of compassion in our concept of rights.

But precisely what types of emotions are relevant to morality, law, and animal rights issues? Arthur Schopenhauer argued that the only actions that have moral worth are those done exclusively for the benefit of another.²⁶⁴ For my action to have moral worth I must actually suffer the woe of another and be identified with her.²⁶⁵ For Schopenhauer, compassion allows for this sacrifice and is the foundation of morality.²⁶⁶

It is simply and solely this compassion that is the real basis for all *voluntary* justice and *genuine* loving-kindness.²⁶⁷ Only insofar as an action has sprung from compassion does it have moral value; and every action resulting from any other motive has none. As soon as this compassion is aroused, the weal and woe of another are nearest to my heart in exactly the same way, although not always in the same degree, as otherwise only my own are. Hence the difference between him and me is no longer absolute.²⁶⁸

²⁶² See *Corso v. Crawford Dog & Cat Hosp. Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979); *La Porte v. Associated Indeps., Inc.*, 163 So.2d 267, 268–69 (Fla. 1964). See generally Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059 (1995).

²⁶³ See DONNELLY, *supra* note 11, at 82.

²⁶⁴ See SCHOPENHAUER, *supra* note 57, at 202–03.

²⁶⁵ See *id.* at 204.

²⁶⁶ See *id.*

²⁶⁷ See *id.*

²⁶⁸ See *id.*

The primacy of compassion in morality is recognized by Rousseau:

Mandeville well knew that, in spite of all their morality, men would never have been better than monsters, had not nature bestowed on them a sense of compassion, to aid their reason: but he did not see that from this quality alone flow all those social virtues, of which he denied man the possession. But what is generosity, clemency, or humanity but compassion applied to the weak, to the guilty, or to mankind in general? Even benevolence and friendship are, if we judge rightly, only the effects of compassion, constantly set upon a particular object: for how is it different to wish that another person may not suffer pain and uneasiness and to wish him happy? . . . In a word, it is rather in this natural feeling than in any subtle arguments that we must look for the cause of that repugnance, which every man would experience in doing evil, even independently of the maxims of education.²⁶⁹

According to Schopenhauer, compassion makes another's suffering my motive for action in two ways. First, it prevents me from injuring others.²⁷⁰ Second, it incites me to aid others.²⁷¹ This latter aspect is the highest level of compassion.²⁷² In having this proactive compassion, the barriers between oneself and others are broken down.²⁷³

While I do not subscribe to many of Schopenhauer's views, I do believe that he correctly identifies compassion as the spring from which our moral sensibilities flow. And it is this emotion that I believe should play a central role in our discussion of the moral and legal issues relating to animal rights. Indeed, there is reason to think that compassion plays a special role in the area of animals rights—an even more pivotal role than it plays in human moral and human rights issues.

²⁶⁹ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 74–76 (1993). Greenspan also notes the significance of what she calls identificatory love, a concept like compassion, in motivating and causing moral actions. See GREENSPAN, *supra* note 225, at 62–63, 74.

²⁷⁰ See SCHOPENHAUER, *supra* note 57, at 207–08.

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ See *id.* at 223–24.

B. *The Role of Emotion in a Theory of Animal Rights*

If morality is connected to legal rights and emotion is appropriately considered in moral theory, then emotion must play a role in how we view rights issues. If emotive concerns are relevant to rights issues, they are of particular force in the case of animal rights. From Descartes' likening of animals' howls of pain to the screeching of machinery, to modern vivisection, our culture has trained us that feelings and emotions are not to be squandered on nonhuman animals. There is no need for concern for them since they do not feel pain or suffering, at least not in the way that we do. There is no reason to feel for them. Feelings are reserved for humans and specifically only those close to us—family and friends.

We know that the Cartesian view is myth. Animals do experience pain.²⁷⁴ Animal pain physiology, though differing in certain ways from that of humans, operates in largely the same way as does human pain physiology.²⁷⁵ Not just pain, but anxiety and other forms of suffering exist in animals.²⁷⁶ Contrary to the Cartesian world view, there is good reason to have compassion for animals since they have the kind of suffering and pain that are appropriately objects of this emotion. To break the hold of Cartesian theory, it is of particular importance in our consideration of animal rights issues to, as we naturally do with respect to humans, fittingly consider our emotions. That it is culturally accepted to do so with humans, but not necessarily so with animals, makes its import in the latter case greater than in the former.

To the extent that the interests of animals are considered in the composite view of rights that I have described, these interests will include animal pain, anxiety, and the like. To evaluate these matters is, at least in part, to have feelings of compassion. Thus, to the extent that interests are part of the reason that we grant rights to an entity, the only way that these interests may be properly gauged is through our own emotional experiences and evaluations.

Animals cannot speak for themselves. They cannot communicate to us through our familiar means of language. The only way that communication can occur is through observations of animal behavior.

²⁷⁴ See TOM REGAN, *ALL THAT DWELL THEREIN* 6–27 (1982); BERNARD E. ROLLIN, *THE UNHEEDED CRY: ANIMAL CONSCIOUSNESS, ANIMAL PAIN AND SCIENCE* 107–201 (1989); SINGER, *supra* note 8, at 9–13, 15.

²⁷⁵ See ROLLIN, *supra* note 274, at 64–66; see also ANDREW ROWAN, *OF MICE, MODELS AND MEN: A CRITICAL EVALUATION OF ANIMAL RESEARCH* 77–79 (1984).

²⁷⁶ See ROWAN, *supra* note 275, at 82–83.

As a result, to determine the needs and interests of animals it is necessary to reason by use of analogy from our own experiences.

If we assume that another being has interests, and ask whether this imposes duties upon us, we must resort to reasoning by analogy. We infer certain inner processes from physical manifestations, which we know to be associated with such processes in ourselves. Such reasoning by analogy may involve greater or lesser difficulties according to the nature of the given case, but this much is certain: either we cannot apply it at all or we must always apply it. Those who advance the argument in question [that we cannot know of an animal's interests] must, then, in order to be consistent, assert that men have no more rights than animals—neither would have any rights at all.²⁷⁷

As a part of this reasoning by analogy we must consider the inner processes of animals by analogy to our own. Moreover, since animals cannot communicate in our language, analysis by analogy to our feelings is even more crucial in the case of animals than in the case of humans. Thus, emotional responses are a necessary part of evaluation of the interests of animals and rights that may arise from these interests.

How might emotional considerations affect our analysis of animal rights issues? While it is not intended here to present in detail precisely what a theory of animal rights would look like if it appropriately considered emotional aspects of the issue, a few ways in which emotion might impact the analysis of animal rights issues can be outlined. On the issue of whether it is fitting to attribute rights to animals in order to protect them from ill treatment, we might ask whether we feel compassion for their suffering. We might ask whether we feel attachment to them, whether we feel a sense of kinship to them, whether we feel a sense of awe at their resilience, and whether these feelings give us a reason to grant them rights. These feelings, none of which put us across an impenetrable gulf from reason, can be seen as elements counting in the analysis of whether rights ought to be accorded to animals.

If we conclude that animals should be accorded rights, as I believe they should, what role might emotion play in determining what rights we grant to animals? Our primary emotional response to ani-

²⁷⁷ NELSON, *supra* note 52, at 138.

mals is to feel compassion for their suffering. As Jeremy Bentham stated, "the question is not, Can they reason? nor, Can they talk? but Can they suffer?"²⁷⁸ Our emotional response to animal suffering must be considered in determining whether a practice violates an animal right. Given that most, if not all of us feel compassion for animals in laboratories or factory farms, this response is a strong reason supporting the abolition of such practices as a matter of right.

Similarly, our feeling of compassion toward those with restrictions on their liberty and freedom would count against practices engaged in by circuses, zoos, and other institutions that confine animals. These same feelings may lead us to broader environmental and ecological issues bearing on the liberty and freedom of not only wild animals, but ourselves.

To achieve the result of applying appropriate emotional responses to questions concerning animal rights requires unifying our rational and emotional natures. One way to do this is to actually experience the conditions that cause human compassion for animals.²⁷⁹ To experience what is done in animal experiments, in the slaughterhouse, or on the factory farm will allow us both to feel and to apply our capacity of reason to real conditions. If we consider our rational nature and appropriate feelings about animal issues, our emotional reactions suggest according rights to animals. Such considerations will also help guide us in determining the content of those rights.

CONCLUSION

Western thought makes us skeptical about the application of emotion in morality and the law. As a result, emotional responses to the plight of animals and others is thought to play no role in animal or human rights issues.

Our theories of rights are modeled on Western scientific reductionism. They are examples of attempts to find a "unified theory" of rights; we seek in morality and law to find something that physics cannot. Rights are thought to be grounded in interests or in some core element of an overarching rational moral theory. Or rights are just remedies that can be empirically discovered in the pages of a law book and the institutions that enforce its precepts.

²⁷⁸ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 381 n.330 (1961).

²⁷⁹ See Kheel, 1996, *supra* note 23, at 27; Kheel, 1989, *supra* note 16, at 262-63.

In reality, rights are not so simple or easily accessed. Rights are actually composites of many elements. When we say that "X has a right to Y" we are saying many things. We are saying that X has an interest in Y, that certain duties are owed to X with regard to Y, that there is a moral imperative behind X's right, and that X is to have a remedy if she is denied Y, and so on.

What we are also saying is that we have some emotional response to X in relation to Y, that we feel that it should morally and legally be the case that X is protected in regard to Y. But this emotive aspect is generally ignored in moral and legal theory. As has been shown, however, there is a role for emotion in moral theory, and if we believe that moral theory is relevant to legal theory, then emotion must play some role in the construction of rights.

I do not suggest that we abandon reason in considering issues of animal rights. Rather, we should consider emotion as a part of our analysis of animal rights issues. Indeed, because of our history of staunchly denying the relevance of feelings toward animals, and due to our inability to communicate with animals and determine their needs and interests, the emotional aspect of our relationships with animals is more important in determining appropriate treatment of them than in the case of humans. If we recognize the emotional aspects of our nature, and take a balanced and unified approach to applying our rational and emotive natures to issues of animal rights, we will have a more realistic and honest approach to animal rights issues.