

WHAT IF ANIMALS ARE MORAL AGENTS?

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INTRODUCTION: WHY ANIMALS ARE NOT RECOGNIZED AS “LEGAL PERSONS”

In an essay titled *Should Animals Be Able to Sue People?*, Professor Sherry Colb considers *Justice v. Vercher*, a lawsuit brought by Justice, a horse seeking damages for injuries resulting from his previous owner’s gross negligence.¹ Gwendolyn Vercher had already been convicted of animal cruelty and paid the statutorily required restitution, but that restitution was limited to costs incurred for Justice’s care up to the time of the hearing.² Justice will need specialized lifelong care.³ Represented by the Animal Legal Defense Fund, Justice brought suit in his own name for monetary damages sufficient to cover those costs.⁴ Vercher responded with a motion to dismiss on the ground that Justice lacked standing to sue her.⁵

Among other arguments in opposition to the idea of Justice having standing to sue, Colb considers the argument that Justice is not a “legal person” because he lacks the ability to fulfill legal duties, which is frequently viewed by courts as necessary for holding legal rights.⁶ As Colb puts it, there is an “idea that only those who can respect others’ rights are entitled to rights of their own.”⁷ Colb agrees that Justice does not have a legal obligation to respect the rights of humans or other animals, but she analogizes Justice’s situation to that

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¹ Sherry F. Colb, *Should Animals Be Allowed to Sue?*, VERDICT (Jan. 29, 2020), <https://verdict.justia.com/2020/01/29/should-animals-be-allowed-to-sue> [<https://perma.cc/VBC2-BJX9>]; *Justice ex rel. Mosiman v. Vercher*, 518 P.3d 131, 132 (Or. Ct. App. 2022), *review denied*, 524 P.3d 964 (Or. 2023).

² *Id.* at 133.

³ *Id.*

⁴ *Id.* at 132–33.

⁵ *Id.* at 133.

⁶ Colb, *supra* note 1.

⁷ *Id.*

of infants and cognitively incapacitated humans whose rights are recognized and protected without such a requirement of capacity to respect others' rights or to bear duties in relation to them.⁸ Known as the "argument from marginal cases,"⁹ it is a claim that recognizing animals as holders of rights (even if limited) is required as a matter of justice arising from the requirement that like entities be treated alike. For Colb, animals' likeness to humans lies in their sentience, not in their cognitive capacities or their ability to perform legal duties to others.¹⁰ Thus, they should be included in the moral community, and their membership in that community should be reflected in the law in the form of rights and standing to enforce those rights.

Colb also argues that Justice is the logical plaintiff because he is the actual victim of wrongdoing.¹¹ This critical point can be missed during abstract debate about whether or not a horse can or should be recognized as the plaintiff in a lawsuit. No one doubts that Vercher lacked the right as Justice's owner to starve him, fail to provide shelter for him during severe weather conditions, or allow his skin to deteriorate for lack of cleaning and appropriate medical care. No one doubts that Justice is the intended beneficiary of the anticruelty statutes under which Vercher was convicted. What they doubt is that those statutes confer legal rights or that Justice himself should be able to sue her in his own name. Something gets in the way of accepting that the actual, direct victim of acts explicitly recognized under the law as wrongful should be able to sue in their own name, even if that victim is an animal. Yet, if not Justice, who *would* have standing to seek the restitution needed to address the harm inflicted on Justice? Legal standing to address harm to animals is notoriously difficult.¹² Animals cannot yet sue in

⁸ *Id.*

⁹ See, e.g., Tom Regan, *An Examination and Defense of One Argument Concerning Animal Rights*, 22 *INQUIRY* 189, 190 (1979); Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments From "Marginal" Cases*, 45 *ARIZ. ST. L.J.* 1, 22 (2013).

¹⁰ Colb, *supra* note 1.

¹¹ *Id.*

¹² A plaintiff seeking to litigate on behalf of an animal's interest must demonstrate that: (1) the plaintiff suffered an injury-in-fact that is concrete and particularized, (2) a causal connection exists between the injury and actions of the defendant, and (3) the injury will be redressed by a favorable decision. See DAVID S. FAVRE, *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* 338 (2008). "A mere assertion of organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing." *Animal Lovers Volunteer Ass'n, Inc. v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992) (holding that

their own names, and humans cannot reliably redress wrongs to animals except in limited situations in which an owner of an injured or killed animal seeks redress for harm to their property. Animals are not yet understood by courts or legislatures as the sort of beings entitled to be “legal persons.”¹³

Whether an animal can be a legal person was raised also in the case of Happy, an elephant living a solitary life in a grossly insufficient enclosure at the Bronx Zoo.¹⁴ Unlike Justice’s case, Happy’s case was not grounded in tort law. Seeking Happy’s transfer to an appropriate sanctuary, the Nonhuman Rights Project filed a writ of habeas corpus petition on her behalf.¹⁵ Two lower courts rejected the petition on the ground that the writ could not be used for nonhumans because they are not legal persons, basing their decisions on the jurisdiction’s precedent established in a habeas case involving a

aesthetic purposes and the desire to observe animal species is a cognizable injury for standing, but that the “party seeking review [must] be himself” affected). Furthermore, the Supreme Court has added a prudential standing requirement that “a plaintiff’s grievance . . . fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” See *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982)). While Congress may expressly provide standing for private citizens, it has not yet done so under the key federal law for animals, the Animal Welfare Act.

¹³ See *In re Nonhuman Rights Project, Inc. v. Breheny*, 197 N.E.3d 921, 928 (N.Y. 2022) (“[C]ourts have consistently determined that rights and responsibilities associated with legal personhood cannot be bestowed on nonhuman animals.” (citing *In re Nonhuman Rts. Project, Inc. v. Lavery*, 54 N.Y.S.3d 392 (App. Div. 2017); *People ex rel. Nonhuman Rts. Project, Inc. v. Lavery*, 998 N.Y.S.2d 248 (App. Div. 2014); *Rowley v. City of New Bedford*, 159 N.E.3d 1085 (Mass. App. Ct. 2020); *Nonhuman Rts. Project, Inc. v. R.W. Commerford and Sons, Inc.*, 216 A.3d 839 (Conn. App. 2019); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc.*, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012); *Lewis v. Burger King*, 344 Fed. App’x 470, 472 (10th Cir. 2009); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177–78 (9th Cir. 2004); *Citizens to End Animal Suffering and Exploitation, Inc. v. New Eng. Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993); *Miles v. City Council of Augusta, Ga.*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983))). Courts regularly say that legislatures could recognize animals as having the right to sue under situations delineated by those legislatures. Yet, no legislature has yet done that, with the possible exception of pet trusts.

¹⁴ See *id.* at 961 (Wilson, J., dissenting) (“Happy has been living alone at the Bronx Zoo, in a one-acre enclosure.”). The Nonhuman Rights Project has recently brought a similar petition for writ of habeas corpus in the California Supreme Court alleging that three African elephants were denied their right to bodily liberty at the Fresno Zoo. See *Petition for Writ of Habeas Corpus* at 48, *In re Nonhuman Rts. Project, Inc. ex rel. Amahle, Nolwazi, and Mabu* (Cal. 2023) (No. S281614), <https://www.nonhumanrights.org/wp-content/uploads/2023/08/CA-Supreme-Court-Petition.pdf> [<https://perma.cc/VA6F-KMAD>].

¹⁵ *Petition for Writ of Habeas Corpus*, *supra* note 14, at 8.

chimpanzee.¹⁶ The Nonhuman Rights Project filed an appeal in the New York Court of Appeals, seeking to challenge that precedent and to secure for Happy a writ that would allow justice to be done in the form of moving her to a sanctuary where her needs could be met.¹⁷ However, the New York Court of Appeals ultimately adopted the reasoning and outcome of the lower courts.¹⁸ The courts' reasoning was much the same as in *Justice v. Vercher*.¹⁹ Animals cannot be legal persons because they are not humans and cannot be holders of legal duties.²⁰ It is not clear that social contract theory, with its apparently required linkage of rights and duties, is particularly helpful for understanding the recognition of rights and duties of humans, let alone animals.²¹ Nevertheless, as it is currently understood, social contract theory forecloses animals from the community of legal rights-holders, even if they are understood to hold moral rights.

While the matter was pending, Professor Colb, Professor Emeritus Laurence Tribe, and Professor Michael Dorf submitted an amicus brief addressing the contention that Happy could not be a legal person because the ability to bear duties is necessary for having rights.²² They argued that Happy is a legal person for purposes of New York's common law writ of habeas corpus, "which has a noble tradition of expanding the ranks of rights-holders," and that it is a matter of justice that the Court recognize it in this case, as it had in previous habeas corpus cases involving enslaved individuals, women, children, and others not recognized at the time as having any type of autonomous legal status.²³ On a case-by-case basis, the courts had considered as a matter of justice—not rights—whether to provide relief through the "Great Writ." The writ is designed to

¹⁶ *In re Nonhuman Rights Project, Inc.*, 197 N.E.3d at 924.

¹⁷ *Id.* at 923.

¹⁸ *See id.* at 924 (holding that Happy the elephant was a nonhuman animal that did not have a legal right to bring a petition for a writ of habeas corpus).

¹⁹ *See Justice*, 518 P.3d at 137–38.

²⁰ *In re Nonhuman Rights Project, Inc.*, 197 N.E.3d at 928–29.

²¹ *See id.* at 939.

²² Brief for Laurence H. Tribe, Sherry F. Colb, and Michael C. Dorf as Amici Curiae Supporting Petitioner at 1, *id.* (No. APL 2021-00087), <https://www.nonhumanrights.org/wp-content/uploads/Tribe.-Colb-Dorf-brief.pdf> [<https://perma.cc/KM3B-TVZA>]. In addition to this argument, the amicus brief authors argued that the writ of habeas corpus had been used successfully multiple times on behalf of those who were not legal persons, including enslaved individuals and women, on a case-by-case basis when justice required its use. *Id.* at 8.

²³ *Id.* at 7–11.

promote justice, not simply to validate or reject the status of a petitioner as a legal person. Whether or not Happy meets some standard of rights and duty-holding, it is unjust, the amicus brief authors wrote, for the court to deny the writ petition of Happy, a sentient, social being with complex cognitive capacities forcibly brought to this country and kept in isolation from others of her species in an enclosure with grossly insufficient space for her needs, simply because she is not a human. Noting that the request for relief was as modest as those that led to historical uses of the writ, the authors pointed out that granting the writ in Happy's case would not result in a change in her legal status in all conceivable contexts; it would result only in her moving from a harmful environment to a sanctuary where she would suffer less and have greater ability to flourish. Nor would it result in a change of the legal status of other animals; a writ corrects injustice only in the limited ways and contexts spelled out in the writ.

To animal protectionists, legal recognition of animals like Justice and Happy as legal persons is a matter of social justice, whether or not they have legal rights. The Non-human Rights Project's legal representation of Happy resonates most strongly with that position since the writ of habeas corpus had been used previously to promote justice for those who lacked legal rights. But this just raises questions about the nature of "social justice" and the sort of being that can be the focus of social justice claims. Black's Law Dictionary defines "social justice" as "[a] fair and proper administration of the laws that conform to the natural law that covers all people regardless of gender, origin, possessions or religion" and further points to the definition of "civil rights."²⁴ In short, it is a conception of justice that connects legal structures to "natural law," with humans as its focus. Animals are not humans, and so animal protectionists must make three arguments to support the claim that animals should be protected as a matter of social justice. First, they must argue that animals are sufficiently like humans such that justice requires treating them alike. Second, they must argue that "like treatment" means bearing legal rights. Third, they must argue that justice also requires legal opportunity to enforce the rights they hold. No animal protectionist has ever argued that comparability to humans should result in the *same* rights that humans

²⁴ *Social Justice*, Black's Law Dictionary (2d ed. 1910).

hold. For instance, no one has yet argued that animals should have legal voting rights, although Christopher Stone and Robin Wall Kimmerer have come close.²⁵

As to the first matter (sufficient similarity to humans), animal protectionists have argued that animals are similar enough to humans because of sentience or cognitive capacity. Treating sentience (the capacity to suffer) as the standard of comparison results in the inclusion of the most animals in the moral community but limits the reach of legal rights to preventing the infliction of suffering. This is the standard basis of state anticruelty statutes, although any amount of human-inflicted suffering is allowed under those laws if there is “necessity.”²⁶ “Necessity” sweeps broadly to include any treatment or use of animals that benefits humans. Thus, anticruelty statutes protect only against purely gratuitous, senseless infliction of severe suffering and death. Moreover, as the *Vercher* case shows, animals lack standing to use the law even in those situations.

Advocacy for animals based on their similar cognitive capacity to humans covers fewer types of animals, although the types of animals demonstrated to have such capacity has grown to include animals as diverse as whales, elephants, dogs, and bees. As in the case of sentience as a basis, recognition of the human-like cognitive capacity of some animals has resulted in very few legal benefits specific to that ability. For instance, primates can still be used in experiments without restraints on research design that requires their enduring horrific suffering and elephants can still be kept in cramped enclosures, but their housing must include opportunities for intellectual stimulation.²⁷ Unfortunately, the animals

²⁵ Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 487 n.107 (1972) (arguing that a case could be made for an electoral system of apportionment that includes wildlife, but expressly distinguishing legislative apportionment from “voting proper”); ROBIN WALL KIMMERER, *Maple Nation: A Citizenship Guide*, in BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS, 167, 167–74 (2013) (discussing the ways in which maple trees exhibit the qualities of citizenship in their own “nation” and as holding dual citizenship in the United States).

²⁶ See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 142 (1995).

²⁷ See Pamela D. Frasch, *Gaps in US Animal Welfare Law for Laboratory Animals: Perspectives from an Animal Law Attorney*, 57 ILAR J. 285, 289 (2016). Federal law requires that physical environments be adequate to promote psychological wellbeing. *Id.* However, the Animal Welfare Act expressly prohibits the USDA from enforcing or regulating research designs, which might subject animals to “painful experimentation without receiving any pain relief if a researcher simply

themselves and those who care about them lack standing to enforce even those limited protections.

This Article identifies a specific capacity—animals' capacity to make moral decisions and to act morally—to consider whether recognition of that capacity as similar to humans' moral capacity justifies inclusion in the community of legal rights-holders with the legal opportunity to enforce those rights. At the heart of the argument that animals must be able to bear legal obligations in order to have rights is an argument about moral agency. As Matthew Kramer has written, "[t]o bear a legal obligation is simply to be placed under it," and meaningful comprehension of the obligation is a "separate matter."²⁸ As it is now, billions of animals are placed under the obligation to serve the interests of humans in research, entertainment, and food production. What is meant by "holding duties" then is actually "voluntarily and knowingly holding duties as morally binding obligations." Even as to humans, this is not particularly convincing, but where animals are concerned, a deeper problem is that animals are not believed to be capable of holding duties as a moral matter at all because they are not understood to have moral agency.²⁹ Only humans capable of abstract reasoning about moral behavior and members of the archetypal class of humans (such as infants and cognitively impaired humans) are considered to have moral agency sufficient to hold duties and thus hold rights.

states in writing that doing so is a necessary part of the research." *Id.* (citing 7 U.S.C. § 2143(3)(C)(v)).

²⁸ Matthew H. Kramer, *Getting Rights Right*, in *RIGHTS, WRONGS AND RESPONSIBILITIES* 28, 42 (Matthew H. Kramer ed., 2001).

²⁹ It seems that animals' status as the legal property of humans would completely prevent recognition of them as legal persons. However, the scholarship of Jen Girgen and others reveals that even owned animals were treated as legal persons in medieval trials about alleged wrongdoing, with rights of defense by skilled attorneys. See, e.g., Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 *ANIMAL L.* 97, 99 (2003). The status of animals as property is undeniably a huge driver of horrific levels of animal suffering and loss of life. See generally FRANCIONE, *supra* note 26. However, it is not the only relevant feature when considering whether animals could have legal standing. Indeed, that was the claim of the Nonhuman Rights Project and Colb et al. as amicus brief writers. They referenced use of the writ of habeas corpus by enslaved individuals and others who lacked legal autonomy of any kind. See Brief for Laurence H. Tribe, Sherry F. Colb, and Michael C. Dorf as Amici Curiae Supporting Petitioner, *supra* note 22, at 8 ("Throughout history, the writ of habeas corpus has served as a crucial guarantor of liberty by providing a judicial forum to beings, some of whom the law might not (yet) recognize as possessing legal rights or responsibilities on a footing equal to others.").

Animal protectionists often accept the characterization of animals as lacking moral agency and use the argument from marginal cases to defend their view that animals should be protected despite their lack of moral agency, just as many humans (children and those with cognitive incapacity) lack moral agency. However, this view should be reconsidered in light of emerging scholarship revealing that the type of moral decision-making by at least some animals is comparable to that of humans.³⁰ Instead of focusing narrowly on whether animals can hold obligations and duties towards humans who would bear reciprocal duties towards animals, it could prove fruitful and just to consider whether animals have moral consciousness that leads to morally-based behaviors and, if so, whether their ability to make and act on moral decisions makes our failure to protect them as legal persons unconscionable.

I

THE CASE FOR ANIMALS AS MORAL AGENTS

Professor Colb has written about the morality of animals through at least two different lenses. In her book, *Mind if I Order the Cheeseburger?*, Colb opposes the view that humans are morally entitled to eat animals because wild animals eat other animals.³¹ Among other arguments, Colb raises the idea that it is morally wrong for humans to eat animals because they do not need to inflict suffering and death on animals in order to live healthfully and well.³² By contrast, she writes, animals are not acting “immorally” when they hunt and fish other animals because, first, many are obligate carnivores, and second, they are not capable of understanding what they are doing in moral terms; they are not “moral agents.”³³ She contends

³⁰ See, e.g., WILLIAM T. HORNADAY, *THE MINDS AND MANNER OF WILD ANIMALS: A BOOK OF PERSONAL OBSERVATIONS* 219 (1922) (multiple descriptions of different types of animals exhibiting behaviors easily classified as “moral” and concluding that “wild animals *have* moral codes, and . . . on an average they live up to them better than men do to theirs.”); MARC BEKOFF & JESSICA PIERCE, *WILD JUSTICE: THE MORAL LIVES OF ANIMALS* preface at xi (2009) (describing numerous, varied descriptions of apparent moral decision-making by animals and stating that “[m]orality is an evolved trait and ‘they’ (other animals) have it just like we have it.”); Mark Rowlands, *Moral Subjects*, in *THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF ANIMAL MINDS* 469, 469–70 (Kristin Andrews & Jacob Beck eds. 2017) (suggesting that some animals, like humans, are sometimes motivated to act by moral considerations).

³¹ SHERRY F. COLB, *MIND IF I ORDER THE CHEESEBURGER?: AND OTHER QUESTIONS PEOPLE ASK VEGANS* 109 (2013).

³² *Id.*

³³ *Id.* at 105–06.

that, although nonhuman animals do not “altogether lack the capacity for morality,”³⁴ nonhuman animals lack “the ability to engage in the sort of abstract moral reasoning that would lead to the conclusion that they should not cause suffering and pain to other living creatures.”³⁵ That is, she approaches moral agency as a cognitive, rational process from which moral decisions and actions flow. When it comes to animals, Colb applies the category of “moral patient,” by which she means “someone to whom moral agents owe moral obligations but who . . . lacks corresponding moral obligations to others.”³⁶ She argues that humans can owe moral obligations to children and to future generations, even though children and future generations cannot respond in kind as moral agents, so moral obligations can be owed to animals.³⁷

Bringing all of these ideas together, Colb articulates a way of responding to nonhuman animals’ infliction of suffering on humans and other animals, saying that we can understand such instances as tragedies (from the humans’ point of view) rather than as animals’ morally blameworthy actions that call for punishment.³⁸ Colb articulates a central issue with whether animals are moral agents; if they are moral agents, shouldn’t they be punished when they behave immorally? If they are moral patients, not moral agents, their actions can be dismissed as the result of animals not being able to know right from wrong.

In a separate essay, *Is My Dog a Psychopath?*, Colb applies a somewhat different approach when discussing her dog’s killing of a rabbit.³⁹ Her essay illustrates the difficulty of identifying animals as having “moral capacity” without recognizing them as “moral agents.” It also raises the problem of corrective action when a moral agent or a being with “moral capacity” engages in an act that causes harm.

The basic facts are that K, along with his canine companions, B and C, chased a rabbit, who took refuge under the

³⁴ *Id.* at 107.

³⁵ *Id.*

³⁶ *Id.* at 106.

³⁷ *Id.*

³⁸ *Id.* at 108.

³⁹ Sherry F. Colb, *Is My Dog a Psychopath? What Predators May Tell Us About the Insanity Defense*, VERDICT (June 2, 2020), <https://verdict.justia.com/2020/06/02/is-my-dog-a-psychopath-what-predators-may-tell-us-about-the-insanity-defense> [<https://perma.cc/5L5Y-XJLE>].

deck of Colb's house.⁴⁰ While B and C quickly lost interest, K maintained vigilant watch, waiting for the rabbit to emerge from hiding. When that happened, K killed and tried to eat as much of the rabbit as he could as quickly as possible, to the horror of family members who were present.⁴¹ K had no apparent anguish about the rabbit's death. Indeed, Colb notes K's apparent satisfaction with how things unfolded and recalls her daughter asking why K seemed happy about what he had done.⁴²

Consistent with the ideas expressed in *Mind If I Order the Cheeseburger?*, Colb could have taken the position that K was not making a moral mistake because K is a moral patient who does not have the type of moral-reasoning capacity that would enable K to restrain his drive to kill prey animals. K does not reason abstractly to decide whether an act is morally correct. However, Colb's essay does not track cleanly along those lines. She describes K as a dog who actively chooses to engage in empathic behaviors toward his human and canine family members.⁴³ She describes a dog who knows when someone in the family needs care and attention and then provides that love to them.⁴⁴ She also describes K as a dog with a strong prey drive, which he did not restrain when a rabbit came into the yard.⁴⁵ After noting that neither B nor C shared K's strong prey drive toward the rabbit and that dogs can differ in expression of apparent empathy for some prey animals, Colb asks if her dog, K, could be considered a psychopath because he lacked that empathy.⁴⁶

Colb's essay is intriguing and important precisely because she does the work of recognizing K's moral capacity while bringing together ideas about the immorality of a human psychopath with the apparent immorality of her dog, as seen through the eyes of her daughter. An easier pathway for Colb would have been to see K as a moral agent who made a moral mistake because his capacity for empathy was clouded by a strong prey drive. But to pursue that path, Colb would have to believe that K could be considered a moral agent, and

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

that is unavailable to Colb because of her belief that abstract moral reasoning about morally right and wrong behavior is necessary to be a moral agent.

Much of the work of the essay centers on what constitutes a psychopath for purposes of criminal punishment of humans.⁴⁷ An important element of psychopathy as Colb uses the term is the psychopath's intentional toying with and manipulating their victims' behavior such that the psychopath's ultimate betrayal of their victims reveals a calculated intent to harm, without regard for any of the suffering their victims would experience. As Colb puts it, a psychopath lacks more than a theory of mind through which they can see the world through another's eyes, inspiring them to act morally in relation to that other; a psychopath lacks moral conscience to the point of actually learning what would be most devastating to the victim and then taking pleasure in causing that devastation. Seen from that perspective, K does not look like a psychopath to Colb. K looks like an opportunistic, impulsive rabbit-killer rather than a nefarious manipulator of a rabbit's trust in him precisely so that he could betray that trust later. Moreover, Colb notes that, while K lacks both cognitive and emotional empathy for the rabbit, K maintains a strongly empathic attitude towards members of the household in which K lives. She writes, "[w]e can feel compassion for a dog who kills a rabbit, so long as there is 'caninity' in that dog, the expected capacity to truly love his humans and other dogs."⁴⁸ Just as humans who hunt can be seen as moral agents whose empathy is not triggered in the specific context of hunting "prey" animals, K's empathy—while quite strong in relation to his in-group of humans and other dogs in the family—was not triggered when he hunted the rabbit.

As for the human psychopath, Colb concludes that a psychopath's *characterological* inability to care about the suffering of others, their lack of moral conscience sufficient to refrain from the heartless, intentional manipulation of another to advance the goal of severe harm, is the reason that American criminal law does not consider psychopathy to be in the category of an allowed insanity defense.⁴⁹ According to Colb, K is not a psychopath because he does not exhibit moral deficiencies comparable to those of human psychopaths.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

Whether K committed a moral error is a different matter from whether he is a psychopath, however. Here is a dog with considerable moral capacity and empathy towards some, but who was unable to exercise it when he saw the rabbit. Within the bounds of Colb's family, the matter of K's killing of a rabbit could be handled with a compassionate, holistic reading of K's behavior and character. By contrast, one wonders what the rabbit, rabbit's family, or rabbit's owner (if any) would have thought of K's lying in wait for the rabbit to appear and then showing no mercy as he killed them. It seems plausible that the rabbit killed by K, if capable of reasoning about it after death, would not have been satisfied with the outcome of K's family's consideration of what K did. One imagines that the rabbit would have preferred to live and might have wanted retribution and recognition of their suffering and loss of life.

Is the answer to the rabbit's imagined position simply that K, like human hunters, does not bear a moral obligation to care about the suffering of his victim, who was after all a prey animal? I am confident that Professor Colb would not easily allow the human to escape moral condemnation for inflicting such grievous suffering and death on a sentient being if there were alternative means of sustenance. Similarly, K did not need to kill the rabbit for survival. The difference lies in Colb's understanding of the hunter as a moral agent who lacks an insurmountable prey drive and who has no actual need to kill an animal, while she understands K to be a moral patient with some moral capacity but who does have an insurmountable prey drive.

But what if humans and animals are both moral patients and moral agents at different times and in different circumstances? If, as recent advances in understandings of moral decision-making suggest, both humans and nonhuman animals are acting primarily on moral emotions (even if humans engage in more post hoc rationalization about their acts), perhaps nonhuman animals and humans are similar enough that it is inappropriate to label one as a moral patient only and one as a moral agent only. Perhaps with new starting points about animals as moral beings, new responses to opponents' claim that victims like Justice cannot seek justice through the legal system will emerge.

Part I.A explores theories of moral decision-making and their potential applicability to both human and nonhuman animals. Scholarship on the subject is rich with varying perspectives of humans' and nonhumans' moral behavior as driven by (1) the intentional application of consciously understood moral

rules, (2) situation-triggered embodied emotional responses with or without post hoc interpretation of those responses in the context of cognitively understood moral rules, or (3) dual processing of both intellectual and emotional responses. Part I.B considers the applicability of such information in legal cases involving animals who cause harm. While modern societies no longer prosecute animals as they were tried in medieval courts, dogs are regularly accused of breaking the law when they cause harm to humans or other animals. Nina is one such dog, who was accused of violating Los Angeles Municipal Code section 53.34.4 when she injured a child.⁵⁰ Just as Professor Colb provided contextual depth to consider whether K's behavior was psychopathic, this case description provides perspectives on whether Nina was behaving as a moral agent, the behavior of her owners (and other humans involved in her life) as moral agents, and how such complaints can be resolved with an understanding of the accused dogs as moral agents.

A. Moral Agency: Humans and Nonhumans

Beginning with the prevalent view of animals as moral patients rather than agents, this section considers the nature of moral agency and develops a perspective that both humans and animals are, at times, acting as moral agents and that both humans and animals make moral mistakes. This section also explores the implications of research indicating that humans make many, if not all, moral decisions based on embodied or intuitive understandings of the right thing to do and that the basis for their moral agency may be the same as that of nonhuman animals. This appears true even though humans use moral reasoning in some situations in which nonhuman animals cannot, such as debating complex moral issues like abortion access.

For purposes of this discussion, "moral agency" is an individual's behavioral application of prosocial values when relating to others in particular situations. When Colb writes that animals have "moral capacity," she is referring to values such as empathy, altruism, reciprocity, and loyalty, which appear to characterize many animals' behavior both in relation to members of their own species and social groups and also in relation to outsiders under some circumstances.⁵¹ When

⁵⁰ See *infra* Part I.B.

⁵¹ For example, one experiment revealed that rhesus monkeys would rather suffer from hunger than secure food at the expense of delivering an electric shock

she writes that animals lack “the ability to engage in the sort of abstract moral reasoning that would lead to the conclusion that they should not cause suffering and pain to other living creatures . . . ,”⁵² she is adding two additional prerequisites to acceptance of animals as “moral agents.” One is explicit, which is that an animal makes decisions on the basis of abstract rational consideration of “the good.” The other is implicit, which is that humans can know with sufficient certainty that the animal is making the decision through a deliberative process; that is, the behavior cannot be explained as simply reflexive.

The capacity for rational appraisal and reflection in relation to accepted values and choice among behavioral options based on notions of the “good” or the “bad” is certainly helpful in many situations, as when two intuitively based actions conflict with each other or when value change is arising or contemplated. However, it is increasingly questionable that that capacity should be a prerequisite for moral agency. As animal protectionist, author, and entrepreneur Paul Shapiro notes:

[T]he choice of a definition [of moral agency] is a crucial factor in whether moral agency proves to be limited to humans. Philosophers like Pluhar set the standard for moral agency at a relatively high level: the capability to understand and act on moral principles. In order to meet this standard, it seems necessary for a being to possess linguistic capacities beyond those presently ascribed to any other species (with the possible exception of some language-trained animals). However, a lower standard for moral agency can also be selected: the capacity for virtuous behavior. If this lower standard is accepted, there can be little doubt that many other animals are moral agents to some degree.⁵³

The second requirement—that we know and not just assume that there is rational decision-making—is challenging because it is difficult to know what we are seeing when we see possibly morally driven behavior. Consider the numerous sightings of humpback whales preventing orcas from capturing

to a fellow rhesus monkey. Jules H. Masserman, Stanley Wechkin & William Terris, “Altruistic” Behavior in Rhesus Monkeys, 121 *AM. J. PSYCHIATRY* 584, 585 (1964). One study of voluntary prosocial behavior in African gray parrots found that the African gray parrots would transfer tokens to other parrots—receiving no benefits themselves—in order to help their compatriots obtain food. See Désirée Brucks & Auguste M.P. von Bayern, *Parrots Voluntarily Help Each Other to Obtain Food Rewards*, 30 *CURRENT BIOLOGY* 292, 295 (2020).

⁵² COLB, *supra* note 31, at 107.

⁵³ Paul Shapiro, *Moral Agency in Other Animals*, 27 *THEORETICAL MEDICINE & BIOETHICS* 357, 358 (2006).

seals.⁵⁴ Humpback whales must exert tremendous energy, spending down fat reserves, to prevent an orca or group of orcas from killing a seal. They must be fast, which is not their normal speed because an enormous expenditure of energy is required for a humpback whale to move quickly, and they must expend the energy necessary to prevent the orcas from being successful, such as flipping over to carry a seal on their belly until the pursuing orcas give up.⁵⁵ Is such a whale “rescuing” the seal? One explanation based on possible self-interest is that humpbacks are responsive because there are times that they must rescue juvenile humpbacks from orcas. While this suggests cognitive (and moral) commitment to protect one’s own to the point of training for the possibility, it seems unlikely as the most plausible explanation. Adult humpbacks know the difference between juvenile humpbacks and seals and do not need significantly energy-depleting drills to protect them because orcas generally avoid adult humpbacks and the technique of rescuing is fairly straightforward.

Of course, there may be other explanations, such as enmity between orcas and humpbacks,⁵⁶ but why not assume altruism? In fact, there are many instances of dolphins and whales aiding and protecting humans,⁵⁷ just as there are documented instances of humans aiding dolphins and whales. Yet we fully understand little of what we see. Are humans, dolphins, and whales all making conscious decisions? Why must altruism be proved rather than assumed? Is this a function of the valorization of abstract, rational decision-making in which humans believe only humans engage? What if humans, dolphins, and whales are—in the first instance—making intuitive, emotion-based judgments that it is important and good to rescue the other? Even if only humans *subsequently* rationalize their decision in terms of moral principles, are they not the same as animals at the time of action when they “automatically” use skills they have developed for those situations? Humans may be distinguishable from other animals in that they are

⁵⁴ See, e.g., Reader’s Digest, *Why Humpback Whales Protect Other Species From Killer Whales* (Dec. 9, 2019), <https://www.readersdigest.co.uk/inspire/life/why-humpback-whales-protect-other-species-from-killer-whales> [<https://perma.cc/Q46U-5WFC>].

⁵⁵ *Id.*

⁵⁶ Orcas have been known to attack young humpbacks, meaning it is possible that humpbacks respond with anti-predator behavior. *Id.* Alternatively, it could be that specific humpback whales have, themselves, survived orca attacks and feel a personal trauma. *Id.*

⁵⁷ S.F. Sapontzis, *Are Animals Moral Beings?*, 17 AM. PHIL. Q. 45, 45 (1980).

rationalizers (rather than rational), but how much importance should post hoc rationalization be given when categorizing beings as “moral agents?”

How humans think about animals’ morality depends on how humans think about humans’ morality and how continuous human and nonhuman species are considered to be in Darwinian terms, including the development of ethical conduct as conferring evolutionary advantage. In his book *Primates and Philosophers*, noted primatologist Frans de Waal describes two approaches to the question of human morality and its relationship to animals.⁵⁸ One is grounded in an idea of morality as a uniquely human cultural invention. De Waal labels this the “veneer theory” of human morality because it posits that humans’ morality is but a thin, socially constructed veneer overlaying a brutish and selfish nature humans share with animals.⁵⁹ He quotes Ghiselin, “Scratch an ‘altruist,’ and watch a ‘hypocrite’ bleed,” and at greater length, references Wright:

[T]he pretense of selflessness is about as much part of human nature as its frequent absence. We dress ourselves up in tony moral language, denying base motives and stressing our at least minimal consideration for the greater good; and we fiercely and self-righteously decry selfishness in others.⁶⁰

The approach de Waal favors is juxtaposed to the “veneer theory” and rests in de Waal’s understanding of continuity between humans and animals:

Evolution favors animals [human and nonhuman] that assist each other if by doing so they achieve long-term benefits of greater value than the benefits derived from going it alone and competing with others. Unlike cooperation resting on simultaneous benefits to all parties involved (known as mutualism), reciprocity involves exchanged acts that, while beneficial to the recipient, are costly to the performer. This cost, which is generated because there is a time lag between giving and receiving, is eliminated as soon as a favor of equal value is returned to the performer.⁶¹

In addition to references to prosocial behaviors described by other ethologists, de Waal describes multiple examples of

⁵⁸ FRANS DE WAAL, *PRIMATES AND PHILOSOPHERS* 6–7 (Stephen Macedo & Josiah Ober eds., 2006).

⁵⁹ *Id.* at 10.

⁶⁰ *Id.* at 11 (quoting ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1994) (alteration in original)).

⁶¹ *Id.* at 13 (citations omitted).

prosocial behaviors observed among primates. These include a mother helping her son get down from a tree and a grandmother punishing her daughter for not allowing her infant to ride on her body (and the daughter then allowing the infant to climb on to her).⁶²

In contrast to the veneer theory with brutish selfishness at the core of all animal (including human) behavior, de Waal proposes a “Russian doll” theory in which both human and many nonhuman animals are receptive to “emotional contagion” leading to prosocial proclivities.

[A]t the core of the empathic capacity is a relatively simple mechanism that provides an observer (the “subject”) with access to the emotional state of another (the “object”) through the subject’s own neural and bodily representations. When the subject attends to the object’s state, the subject’s neural representations of similar states are automatically activated. The closer and more similar subject and object are, the easier it will be for the subject’s perception to activate motor and autonomic responses that match the object’s (e.g., changes in heart rate, skin conductance, facial expression, body posture). This activation allows the subject to get “under the skin” of the object, sharing its feelings and needs, which embodiment in turn fosters sympathy, compassion, and helping.⁶³

The innermost part of de Waal’s Russian doll model is non-verbal emotional responsiveness to “emotional contagion” emanating from another.⁶⁴ The layer on top of that one is cognitive assessment of the context and reasons for the other’s emotion. Successive layers bring to bear greater degrees of emotional and cognitive sophistication, but the core receptivity to emotional contagion and capacity for empathy are the basis of all morally-driven behaviors of human and nonhuman animals. In the space between emotional responsiveness and resultant action, much is unclear. Surely, the community instructs, rewards, and punishes particular empathically based behaviors. For instance, that humans and many animals mourn the loss of community members has been documented time and time again, but it is difficult to parse what forms of mourning behavior emerge spontaneously and which are influenced by community participation and observation. Colb writes of

⁶² *Id.* at 25.

⁶³ *Id.* at 37.

⁶⁴ *Id.* at 39.

her dog, K, being quick to comfort a family member,⁶⁵ and de Waal writes about humans' unthinking, impulsive rescue of others.⁶⁶ Indeed, it is a known and tragic phenomenon that non-swimmers will attempt to rescue people and animals who are drowning, even under conditions that would make it perilous for experienced swimmers to attempt a rescue.⁶⁷

While rescuing may be mistaken behavior in some cases, the moral impulse is not mistaken. What is important for the purposes of this Article is that animals share with humans moral receptivity to and empathy with others, leading to behaviors expressive of that empathy. Time and time again, ethologists have described observations and conducted experiments that could easily lead to an understanding of animals' sharing with us basic moral intuitions and making choices easily characterized as "moral," motivated by an automatic, embodied understanding of "good" and "bad" or "right" and "wrong."⁶⁸ As de Waal himself points out, this understanding, unlike the veneer theory, comports with basic Darwinian ideas about continuity with animals and the evolutionary basis for human emotion.⁶⁹ Why would animals' empathically-driven behavior be reflexive while humans' empathically-driven behavior originates in the application of cognitively understood principles of moral behavior? Invoking Hume's perspective on emotions—not reason—as guiding human behavior, de Waal contends that we are at the beginning of a "shift in theorizing that will end up positioning morality firmly within the emotional core of human nature. Humean thinking is making a major comeback."⁷⁰

⁶⁵ Colb, *supra* note 39.

⁶⁶ DE WAAL, *supra* note 58, at 14–15.

⁶⁷ *Id.* at 33. See also Bethany Hines, *A Man Who Couldn't Swim Sacrifices His Life to Save a Boy from Drowning*, CNN (JUNE 27, 2018, 10:04 PM), <https://www.cnn.com/2018/06/27/health/iyw-man-who-couldnt-swim-saves-drowning-boy-trnd/index.html> [<https://perma.cc/LV5T-DSGS>].

⁶⁸ See, e.g., sources cited *supra* note 30.

⁶⁹ DE WAAL, *supra* note 58, at 14.

⁷⁰ *Id.* at 57. For a discussion of Hume's consideration of the emotions, see, for example, Rachel Cohon, *Hume's Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/hume-moral/> [<https://perma.cc/E4KW-FTPN>] (last updated Aug. 20, 2018) ("Hume's position in ethics, which is based on his empiricist theory of the mind, is best known for asserting four theses: (1) Reason alone cannot be a motive to the will, but rather is the 'slave of the passions.' (2) Moral distinctions are not derived from reason. (3) Moral distinctions are derived from the moral sentiments: feelings of approval (esteem, praise) and disapproval (blame) felt by spectators who contemplate a character trait or action. (4) While some virtues and vices are natural, others, including justice, are artificial.") (citations omitted).

Just as de Waal is at the forefront of researching animals' moral capacity and agency, Jonathan Haidt, a social psychologist, is at the forefront of assessing the extent to which people make moral decisions through reason or emotion. His research, conducted over the past twenty-five years, reveals that many if not the vast majority of moral decisions are formulated in the "gut" as feelings or intuitions about what is morally good/bad and right/wrong and then rationalized so soon afterwards that it would seem that the decision was reached through the process of moral reasoning. Seen from this perspective, humans are not rational so much as they are rationalizers.

Although Haidt does research with fMRI technology, he also conducts research in which subjects respond to vignettes that raise questions about the morality of specific acts. In one early experiment, participants were asked about whether siblings had done anything morally wrong when they engaged in consensual, protected sex that both enjoyed, that neither had interest in doing again, and where neither had an interest in telling anyone that they had had sex with each other.⁷¹ Most of the respondents answered that the siblings had done something morally wrong and offered various reasons why they thought the act was wrong. For instance, some said that inbreeding can lead to problematic genetic changes, but when reminded that both brother and sister had been using birth control, they lost the basis for their objection. When other reasons offered for deciding that the behavior was immoral were similarly shown to be inapplicable, participants could not articulate reasons for their reaction but continued to hold their belief that the act was morally wrong. Haidt reports that when participants' reasoned responses were shown to be inapplicable, participants finally answered along the lines of "I don't know, I can't explain it. I just know it's wrong."⁷²

Haidt understood this to mean that the question about morality had been answered on the basis of a negative emotional reaction such as "disgust."⁷³ Haidt has also explored participants' rejection on moral grounds of an owner eating the flesh of their companion dog after the dog had died peacefully of natural causes and whose flesh posed no health threat to the

⁷¹ Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCH. REV.* 814, 814 (2001).

⁷² *Id.*

⁷³ *Id.* at 825.

owner.⁷⁴ In that experiment, too, the participants had no basis for finding that behavior morally wrong other than an emotional reaction.⁷⁵ These are but two examples of decisions about the morality of an act in which no reasoned explanation for the decision holds, decision makers believed that they needed a reasoned basis for their decision, and, there being none, finally expressed their decision as a feeling or an emotion, which appeared to be influenced by cultural norms. Like the primates in de Waal's research, community values learned through day-to-day interactions seem to lead to judgments about the rightness or goodness of an act that comports with those values, even without intellectualizing the decision.

Additional research supports the idea that reason is not involved in many decisions about the morality of an act or of a person. One well-known experiment involving seminary students on their way to give a lecture revealed that various aspects of the context in which the decision is made can matter.⁷⁶ In the seminary student experiment, the students were on their way to deliver a lecture on what it means to be a Good Samaritan when they came upon an individual who had been coached in how to behave as though they needed help.⁷⁷ If the students were in a hurry to get to the lecture, they evaluated the situation as less serious and offered little if any assistance.⁷⁸ If the students had more than enough time to get to the lecture, they rendered assistance. Neither the rushed nor the leisurely students reflected on their decisions. Moreover, the experience of hurrying altered the students' perception of an individual's need, thereby informing their post hoc cognitive assessment that they had done a morally good thing by prioritizing those waiting for the lecture over the individual needing help.⁷⁹ Rationalizing an act as "moral" is as contextual as the initial situational responsivity that gave rise to the act subsequently rationalized as moral. Similarly, other research results suggest that participants make harsher moral judgments when they have not washed their hands before evaluating another's

⁷⁴ See *id.* at 817.

⁷⁵ *Id.*

⁷⁶ John M. Darley & C. Daniel Batson, "From Jerusalem to Jericho": A Study of Situational and Dispositional Variables in Helping Behavior, 27 *J. PERSONALITY AND SOC. PSYCH.* 100 (1973).

⁷⁷ *Id.* at 102.

⁷⁸ *Id.* at 104.

⁷⁹ *Id.* at 107.

conduct, as compared to those making moral judgements about another after having washed their hands.⁸⁰

Relying on fMRI research, evolutionary psychologists Denton and Krebs argue that the primacy and evolutionary significance of emotion-intuitive processing can be explained by considering overlapping areas of the brain, which reveals that the processing of emotions generally occurs in older parts of the brain (the amygdala, posterior cingulate cortex, retrosplenial cortex, and ventromedial prefrontal cortex), while rational-reflective processing occurs in subsequently developed parts of the brain (the parietal lobe and dorsolateral prefrontal cortex (DLPFC)).⁸¹ Older-originating brain structures are shared with many animals. They argue that the predominant view of humans as rational moral decision makers is a holdover from Cartesian and Kantian philosophical traditions and an artifact of research designs that force subjects into rational decision-making modes when responding to research prompts.⁸² They agree with de Waal's suggestion that there are solid arguments grounded in evolutionary psychology that (1) emotion-guided decision-making can be a particularly powerful means of achieving important objectives quickly, and that (2) humans and animals who could readily protect and cooperate with group members surely enjoyed greater survival than those who could not.⁸³ They cite moral psychologist Greene for the argument that

Nature doesn't leave it to our powers of reasoning to figure out that ingesting fat and protein is conducive to our survival. Rather, it makes us hungry and gives us an intuitive sense that things like meat and fruit will satisfy our hunger. . . . Nature doesn't leave it to us to figure out that saving a drowning child is a good thing to do. Instead, it endows us with a powerful "moral sense" that compels us to engage in this sort of behavior (under the right circumstances). In short, when Nature needs to get a behavioral job done, it does it with intuition and emotion whenever it can.⁸⁴

⁸⁰ Simone Schnall, Jennifer Benton & Sophie Harvey, *With a Clean Conscience: Cleanliness Reduces the Severity of Moral Judgments*, 19 *PSYCH. SCI.* 1219, 1220–21 (2008).

⁸¹ Kaleda K. Denton & Dennis L. Krebs, *Rational and Emotional Sources of Moral Decision-Making: An Evolutionary-Developmental Account*, 3 *EVOLUTIONARY PSYCH. SCI.* 72, 74 (2017).

⁸² *Id.* at 75–76.

⁸³ *See id.* at 78.

⁸⁴ *Id.* at 81 (quoting Joshua D. Greene, *The Secret Joke of Kant's Soul*, in *MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY* 35, 60 (Walter Sinnott-Armstrong

By contrast, Denton and Krebs write,

From an evolutionary perspective, we would expect people to be disposed to expend their rational powers to make moral decisions when the moral problems they are called upon to solve do not exert a strong activating effect on primitive emotional-intuitive brain networks (that is to say, then the activating stimuli do not evoke strong emotional reactions), when the costs of deliberation are low and the benefits of making rational decisions are high, when the decisions are significant and people are highly motivated [to] make the right decision, and when people have the time to think things through. In addition, people should invoke rational processes to figure out solutions to subtle, nuanced, and ambiguous moral problems, such as those created by acts of omission, philosophical moral dilemmas, and dilemmas that involve conflicts within and between moral intuitions, moral norms, and moral principles.⁸⁵

Krebs and Denton conclude that “researchers have found that people rarely derive real-life moral decisions from the rational forms of moral reasoning . . . because people rarely play the role of philosophers in their everyday lives, even though most people are able to when called upon to do it.”⁸⁶

Considerable neuroscientific research on moral decision-making among humans supports Hume’s idea that humans are creatures of emotion more than reason and that most moral decisions are initiated through emotion-based processes. Research on moral decision-making among some animals supports the idea that they make decisions through emotional processes, also. If Darwin’s ideas about the continuity among species of animals and about human emotion are accepted and there are evolutionary advantages to making decisions emotionally and also deliberately, there are few bases for thinking that animals are extremely different from humans when it comes to moral agency. There are some, however. Haidt suggests two. First, when situations are nuanced and complex or intellectually abstract, an individual’s “gut” might not be able to guide them very well without input from the brain. For instance, it does not seem likely that animals engage in the type of moral decision-making that humans do when considering a subject like abortion. But then animals do not have

ed., 2008)).

⁸⁵ *Id.*

⁸⁶ *Id.* (citations omitted).

apparent need for abstract moral reasoning. Humans' apparent greater intellectual capacity would advantage them in this situation. Second, Haidt posits a type of reflective reasoning about previous choices that could influence how or how quickly the individual's "gut" responds. Moreover, Haidt acknowledges that humans sometimes take into account the expressed reflections of others in shaping the background from which humans make "gut"-based decisions. It is not clear whether and, if so, to what degree animals engage in those types of processes. Some animals do experience remorse, and some animals correct others.⁸⁷

At this point, there is little evidence that animals engage in the two processes Haidt distinguishes from emotion-driven moral decision-making. However, a current lack of information or their actually not doing those things does not necessarily disqualify animals as "moral agents" altogether. Since animals have moral capacity (that is, they exhibit various values, such as empathy and compassion, when interacting with others) and humans make most moral decisions in the same way, it seems that animals qualify as some type of moral agent. This is potentially significant because of the possibility of greater respect for moral agents. If animals cross the threshold for being moral agents, they could be seen as worthy of legal personhood.⁸⁸

B. Legal Recognition of Animals as Moral Agents in Some Contexts: The Case of Nina, a "Potentially Dangerous Dog"

It is certainly possible for legal systems to recognize animals as moral agents. Indeed, scholarship on medieval trials of animals reveals that animals were once considered to have moral agency comparable to that of humans when it came to criminal complaints filed against them.⁸⁹ Represented by competent, sometimes famous and ambitious, attorneys, animals stood trial. They were convicted or acquitted on the basis of witness testimony and other evidence evaluated under rules

⁸⁷ See Fikri Birey, *Rats Experience Feelings of Regret*, SCI. AM. (July 29, 2014), <https://www.scientificamerican.com/article/rats-experience-feelings-of-regret/> [<https://perma.cc/WBF6-ZRPK>]; see DE WAAL, *supra* note 58, at 40.

⁸⁸ Of course, the legal problem might not lie in rational recognition of animals as having moral capacity, moral agency, or any particular characteristic. The legal problem may be a fundamental dislike of the consequences that could flow from recognizing animals as legal persons.

⁸⁹ See Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97, 127 (2003), https://www.animallaw.info/sites/default/files/lralvol9_p97.pdf [<https://perma.cc/6AJ6-ENLP>].

of law. When convicted, they suffered the same punishments meted out to humans and carried out by the same people who carried out the punishments on humans.

Criminal justice scholar Jen Girgen has argued that modern “potentially dangerous animal” proceedings bear some of the characteristics of those earlier trials in which animals were treated as moral agents.⁹⁰ Case outcomes from the UCLA Law Dog Administrative Hearings Clinic support that perspective. Over the course of 4 years, the UCLA Clinic handled approximately 100 complaints about dogs who were accused of being “potentially dangerous animals” when they allegedly violated Los Angeles Municipal Code section 53.34.4 by “attack[ing]”, “bit[ing]”, or “injur[ing]” a person or other animal.⁹¹ Although that section and the section governing procedural aspects of the hearings consistently refer to the owners of accused “potentially dangerous animals,” in the actual proceedings,⁹² it is always the dogs who are considered to be the agents of action. Those dogs’ sense of moral judgment was always at issue.

Consider the case of Nina.⁹³ Nina was a small but stocky young black dog who was strongly attached to her human family and the other two dogs who lived with her. She and the other two dogs lived harmoniously in a quiet Los Angeles neighborhood, primarily in the backyard of a well-kept house rented by the Mendez family, which included Jose Mendez, his daughter, Gabrielle, Gabrielle’s husband, and their daughter and infant son. Nina and the other dogs were known to be gentle and responsive to all family members and visitors.

On October 1, 2018, Nina happened to be in the garage with Jose while he was sorting equipment. Although Jose barely noticed the sounds of someone rifling in the recycling bin, Nina was on high alert. The bins were in the garage bay, just on the other side of the garage door. Wanting to bring in more outside air, Jose opened the garage door, startling Nina, who had never been in the garage when the door was open and who was already apprehensive about sounds on the other side of the door. Nina dashed out through the open door and bit the first living being she saw: a two-year-old child. Later, Gabrielle Mendez would suggest that perhaps Nina was protecting both

⁹⁰ *See id.*

⁹¹ L.A. Mun. Code § 53.34.4(b). (Am. L. Publ’g, 2002), https://codelibrary.amlegal.com/codes/los_angeles/latest/lamc/0-0-0-137100 [<https://perma.cc/Q7LH-AUU8>].

⁹² *Id.* § 53.34.4

⁹³ The participants’ names in this case have been changed to protect identities.

her territory and Gabrielle's baby, but the die had been cast as soon as Nina bit a child. Regardless of the circumstances, the future is dark for dogs who bite children. Nina was impounded by animal control that day, never to return to the only home she had known since she was four months old.

At multiple points in the events that unfolded, Nina engaged in behaviors that the child's grandmother and Nina's owner identified as signs of morally driven decisions. Before the incident, Nina exhibited the desire to protect her family and territory when she heard an unknown noise on the Mendez's property. During the incident, she exhibited remarkable restraint in a situation in which she was already on high emotional alert. Nina exercised truly exceptional bite inhibition, withdrawing her teeth almost in mid-bite, and behaved with apparent recognition of her terrible mistake. After the bite, she immediately showed remorse. Both the child's grandmother and Jose, who were present throughout the incident, noted that Nina immediately backed up in apparent horror at what she had done. As Jose grabbed the child and began applying pressure to his face, Nina crept forward, very low to the ground, softly whimpering, and sought to lean against her owner. When Jose pointed to the garage, she immediately went into the garage.

Although the bite was serious, the child made a full recovery with no signs of physical scarring at all. Despite that recovery and Nina's exemplary behavior before, during, and after the incident, Nina's life was in peril because dogs who bite small children in the face are regularly killed. In this case, however, the UCLA Law Clinic participants invoked various aspects of the law, the spirit of the law, and the circumstances to argue that Nina's life should be spared. A minimal condition that Nina not be allowed in the garage was imposed on the license held by Jose Mendez, but Nina's family did not retrieve her from the shelter. At that point, the General Manager for Los Angeles Animal Services ordered that Nina be adopted, if at all, by a rescue group that would place Nina outside the City of Los Angeles. Very few such groups exist in the City, so I began a search for a group in another jurisdiction.

After multiple failed attempts with other rescue groups, a group in Florida agreed to take Nina. Randall, a volunteer with an animal rescue transport organization, flew to Los Angeles, rented a car, and drove Nina to Florida. Those days on the road with Randall must have been the happiest of Nina's life. Pictures of her in hotel rooms, curled up on a towel on a chair, and videos of her following Randall's commands on walks showed

a dog happy to be in the presence of someone she seemed to consider her “forever person.” Later, after she suffered a horrible death at the rescue facility, Randall would say that he had misgivings about dropping her off because he had seen and knew about many troubling aspects of the rescue group and its facility. Yet, he did drop her off and said nothing to anyone about his misgivings.

The rescue group where Nina spent her last weeks had many shortcomings at odds with their national reputation as a stellar rescue facility. The property where dogs were maintained lacked multiple safety features, and the executive director/manager of the organization was afraid of the types of dogs she rescued. She did not know how to break up a dog fight. All of the dogs living at that facility lived in sheds that had been converted into “tiny houses” for single dogs. There was no fencing around each house, and there was no fencing around the perimeter of the property located in a rural area. These facts were factors in Nina’s death. One day, the executive director, Linda, accidentally put an aggressive fighting dog, Khali, whom she had rescued from Canada, into Nina’s tiny house. Khali immediately attacked Nina. Frightened, Linda closed the door to Nina’s house, leaving Khali in the midst of attacking Nina, and made calls to Animal Control and a volunteer, Katherine. About forty-five minutes later, both Katherine and an animal control agent arrived at the same time. The animal control agent quickly opened the door, subdued Khali, and dragged Nina outside. By that time, Nina was at the edge of death. In fact, she died in Katherine’s arms on the way to an emergency veterinary clinic. Much later, grim facts about how dogs were treated at the facility would emerge. All the dogs were transferred to other facilities, and the rescue group ultimately closed.

If one considers the potential for moral conduct and the actual conduct of those involved in Nina’s case study, Nina is the only individual who shines as an uncomplicated exemplar of moral behavior. Many humans were involved in ways that suggest that identifying moral agents can be a difficult enterprise. People failed Nina at every step of the way. Her family did not retrieve her, the General Manager ordered her placement outside the City despite the lack of legal obligation to do so, the transporter knew that the rescue group was not a reliably good option, and the rescue group was not equipped to handle the dogs they took in.

Indeed, almost every “potentially dangerous animal” case the UCLA Law Clinic handled revealed that dogs consistently

acted in ways that reflected moral sensibility and made decisions that reflected good character. “Bad” behavior was often completely understandable. Indeed, in one case, multiple neighbors who had been bitten by a dog came to the hearing to testify that the problem was how the owner treated the dog and not the dog himself. Owners were much less consistent in making moral decisions and acting in ways that reflected moral regard for animals. Writ large, the central problem of humans’ failure to recognize animals as legal persons is a moral failing of humans, not a problem of animal morality. Humans have blinded themselves to recognizing the moral demand of sentience by creating the seemingly insurmountable obstacle of requiring animals to be the sort of moral beings who voluntarily assume reciprocal duties in relation to rights they might want to protect legally.

As legal scholar Girgen suggests, “potentially dangerous dog” proceedings are a place in which ideas about animals as moral agents can surface and inform our understanding of animals as moral agents.⁹⁴ Colb’s dog, K, would have been treated as a moral agent who either lacked understanding of the urge to kill a rabbit as causing an avoidable harm or who considered killing a “prey animal” an allowed activity analogous to hunting by humans. If the rabbit had brought a case against K, most likely, “terms and conditions of ownership” would have been placed on K such that K could not as easily capture and kill another rabbit. This is what the City of Los Angeles would have decided; there would be no difference between the outcomes if the case had been brought by the City as a matter of public safety or if the rabbit’s family had had standing to bring a case. While this situation is not the same as treating the rabbit’s killing as a “murder,” it does suggest that allowing animals into court as legal persons seeking enforcement of their rights need not be understood as a slippery slope to animals’ taking over society as we know it. In fact, it, like issuing the Great Writ in Happy’s case, is a modest and understandable step forward.

Even so, there is no easy path forward for animals in a legal and societal environment in which animals are so heavily commodified. Whereas owned animals in medieval times appear to have retained individuality, in modern times animals have lost individuality and personhood as a sociological matter, not just as a legal matter. Accordingly, the entire project of reconceptualizing animals as individual, moral beings is quite large. If it is

⁹⁴ See Girgen, *supra* note 89.

to occur at all in legal contexts, it most likely will occur through at least two connected pathways that concern *humans'* moral agency. One is suggested by philosopher Cora Diamond.⁹⁵ Using philosopher Simone Weil's decoupling of justice from rights, Diamond argues that it is not the violation of rights that gives rise to a sense of injustice when animals are harmed. It is the anguish and suffering of the victim of unjust treatment. That awareness of the injustice of suffering must precede the invocation of rights as the solution to injustice. If humans do not empathize with animals, they will not readily sense the outrage and injustice of a situation sufficiently to move forward with rights development, legal personhood, or any other type of legal protection centered on the individual. As long as humans exploit animals without regard to the suffering of those animals, the emotional basis for moral decision-making in regard to them will remain stunted. Franz de Waal's "Russian doll" model relying on "emotional contagion" as a basis for empathy at both felt and reasoned levels cannot operate if humans do not sense the emotional content of animal suffering and do not then respond as predicted by that model.

Similarly, Haidt's "social intuitionist" model relies on a background awareness of animal suffering and a felt sense that it is "outrageous." It is that feeling of outrage that would then spark moral action to address animal suffering. The problem is not that the law cannot be sufficiently capacious to allow for legal personhood. The problem is that such a change requires first, human receptivity to the suffering of animals, then, acceptance of the idea that it is wrong to inflict such suffering on them. Recognizing that animals are the sort of beings who have at least the basics of moral agency could clear some judicial attitudes that they cannot be legal persons and pave the way for animals to come into court as appropriate plaintiffs to press for redress as the true victims of wrongdoing. Society as we know it would not change significantly if Justice could sue Gwendolyn Vercher for the money necessary for the lifelong care necessitated by her cruelty. Nor would allowing for the transfer of a particular elephant, Happy, to a sanctuary have sweeping impacts on exploitation of other animals. Indeed, the bringing of individual cases can be understood as quite modest.

⁹⁵ Cora Diamond, *Injustice and Animals*, in *SLOW CURES AND BAD PHILOSOPHERS: ESSAYS ON WITTGENSTEIN, MEDICINE, AND BIOETHICS* 118, 120-22 (Carl Elliott ed., 2001).

It is the first step that seems the most difficult: stimulating a felt sense of injustice. That this is the most difficult and important step explains and validates the type of argumentation Colb and others used to advocate on behalf of Justice and Happy. In both cases, Justice and Happy were characterized as individuals who suffered unjustly at the hands of their owners. Advocates try in every way possible to promote a *felt* sense of injustice, a sense of the outrage that arises empathically when one looks at the circumstances in which severe harm was inflicted. Risking disrespect as mere “bleeding hearts” engaged in inappropriate anthropomorphism, advocates cannot avoid making animals’ suffering seem fully real in order to dislodge the intellectualism of judicial reasoning that denies such embodied knowledge of wrongdoing in favor of abstractions about reciprocity of rights and duties. Some might argue that establishing a felt sense of injustice based on the suffering of animals would be sufficient to create positive change for animals. However, that advocates have not yet succeeded in cases like Justice’s and Happy’s indicates that it is not.

Although this Article argues that advocates may better address some stated judicial concerns about moral agency by advancing well-reasoned arguments about animals’ moral agency, it is not clear that this approach would be successful at this time, either. A subtext in judicial opinions is the idea that recognizing legal personhood in some animals, such as Justice and Happy, would result in slippery descent into recognizing all animals as having legal personhood, thereby disrupting human uses of them. If the underlying concern is preserving human entitlement to exploit animals, no amount of appeals to animals’ suffering or their moral agency will result in much change. For true change to occur, humans will have to value animal life sufficiently to see animals not as corporate resources with which to produce consumption goods but as beings entitled to life on the planet free from human-inflicted suffering. By that point in the future, arguments about animals’ moral agency made today may well seem superfluous, strained, and illustrative of how arduous the path to respect for animals was.