

IN DEFENSE OF HUMANITY: WHY ANIMALS CANNOT POSSESS HUMAN RIGHTS

INTRODUCTION

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

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

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

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

³ MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE, at x (1991).

⁴ *Id.* at 5; see also Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique,* 46 SAN DIEGO L. REV. 27, 28 (2009) [hereinafter Cupp, *Moving Beyond Animal Rights*] (footnote omitted) ("Since important legal victories against racial discrimination and other forms of discrimination in the 1950s and 1960s, many legal scholars and lawyers have been increasingly attracted to the 'romance of rights.' For these scholars and lawyers, analogies to the civil rights movement seem especially appealing as vehicles for achieving societal change in new fields.").

“rights are not what they used to be.”⁵

Glendon observes that the law talk permeating society today is far removed from traditional dialogue by its “simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness . . . , and its silence with respect to personal, civic, and collective responsibilities.”⁶ This dialogue of rights “has become the principal language that we use in public settings to discuss weighty questions of right and wrong.”⁷

One of the most rapidly expanding fields in this new era of rights is so-called animal rights.⁸ This expansion is evidenced by, among other things, the relatively recent growth in the number of law schools offering courses on animal law⁹ and establishing animal rights centers,¹⁰ the number of journals focusing on animal law,¹¹ the number of established Animal Legal Defense Fund chapters,¹² and, perhaps most telling of all, the amount of money spent each year in animal rights activism.¹³

⁵ Cupp, *Moving Beyond Animal Rights*, *supra* note 4.

⁶ GLENDON, *supra* note 3, at x.

⁷ *Id.* at x–xi (noting also that “[t]his unique brand of rights talk often operates at cross-purposes with our venerable rights tradition”).

⁸ Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 29.

⁹ Compare Richard L. Cupp, Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status*, 60 SMU L. REV. 3, 4 (2007) [hereinafter Cupp, *Dubious Grail*] (stating that in 1997 “there were only perhaps one or two animal law courses being taught at United States law schools”), with *Animal Law Courses*, *Animal Law Section*, NAT’L ASS’N FOR BIOMEDICAL RESEARCH, http://www.nabranimallaw.org/Law_Schools/Overview/ (last visited Mar. 31, 2014) (“There are now at least 119 law schools in the United States that offer or have offered credit for an animal law course”).

¹⁰ Since 2001, “Bob Barker, [former] host of the television show *The Price Is Right*, has provided million-dollar gifts to nine highly respected law schools to establish animal rights centers.” Cupp, *Dubious Grail*, *supra* note 9, at 4; see Tamie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, 60 J. LEGAL EDUC. 237, 237 (2010).

¹¹ Since 1994, five exclusively animal law journals have been established. *Animal Law Journals*, *Animal Law Section*, NAT’L ASS’N FOR BIOMEDICAL RESEARCH, http://www.nabranimallaw.org/Law_Schools/Animal_Law_Journals/ (last visited Mar. 31, 2014).

¹² The Animal Legal Defense Fund started its first student chapter at Lewis & Clark Law School in 1993. Nancy V. Perry, Introduction, *Ten Years of Animal Law at Lewis & Clark Law School*, 9 ANIMAL L. ix, ix (2003). Today there are 177 chapters in the United States, including at the Regent University School of Law, and nineteen international chapters. *Student Animal Legal Defense Fund Chapters*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/about-us/saldf/student-animal-legal-defense-fund-chapters/> (last visited Mar. 31, 2014).

¹³ People for the Ethical Treatment of Animals (PETA), with over 3,000,000 members, spent more than \$31.8 million on operations in 2012. See *Financial Reports: 2012 Financial Statement*, PETA, <http://www.peta.org/about-peta/learn-about-peta/financial-report/> (last visited Mar. 31, 2014); *Membership Services*, PETA,

Indeed, the animal rights discussion “has moved from the periphery and toward the center of political and legal debate.”¹⁴ Consistent with society’s increasing focus on rights, the core of this move is concentrated on gaining intrinsically human rights for animals.¹⁵ Suits are being filed regularly as activists try to utilize the courts to confer rights upon animals.¹⁶

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

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

<http://www.peta.org/donate/membership-services/> (last visited Mar. 31, 2014). In 2011, the Humane Society of the United States spent \$54,885,997 on “Advocacy and Public Policy” as part of its total expenses of \$159,905,374, and ended the year with \$200,482,599 in total net assets. THE HUMANE SOC’Y OF THE U.S. & AFFILIATES, CONSOLIDATED FINANCIAL STATEMENTS 2–4 (2011), available at <http://www.humanesociety.org/assets/pdfs/financials/hsus-and-affiliates-consolidated-financials-2011.pdf>.

¹⁴ Cass R. Sunstein, *Introduction: What are Animal Rights?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 3, 4 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

¹⁵ Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 31.

¹⁶ See Michael Mountain, *Lawsuit Filed Today on Behalf of Chimpanzee Seeking Legal Personhood*, NONHUMAN RTS. PROJECT (Dec. 2, 2013), <http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/>; see, e.g., *Tilikum v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012) (explaining that Next Friends filed a lawsuit on behalf of a group of orcas at Sea World); *Sarah v. Primarily Primates, Inc.*, 255 S.W.3d 132, 135–36 (Tex. Ct. App. 2008) (dismissing claims filed by attorneys on behalf of a group of primates for lack of standing).

¹⁷ William Murchison, *Wesley J. Smith v. Matthew Scully: Animal Rights and Wrongs*, HUM. LIFE REV., Spring 2010, at 29, 31.

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

¹⁹ Murchison, *supra* note 17, at 31.

²⁰ IMMANUEL KANT, LECTURES ON ETHICS 240 (Louis Infield trans., 1978).

²¹ SUSAN SPERLING, ANIMAL LIBERATORS: RESEARCH AND MORALITY 2 (1988) (explaining that the animal rights movement questions “assumptions about the human relationship to animals that have been fundamental to Western culture,” and it does not want to merely reform animal use by humans; it wishes to abolish it altogether).

this is where the advocate and the activist diverge.²² By showing that certain animals possess attributes or capacities that are akin to humans, today's activists argue that animals are equal to humans²³ and should be given similar rights, including legal personhood and standing to sue.²⁴ This debate raises important issues about animal welfare and the proper balance between man and beast; however, few animal activists have addressed the implications of the rights they seek for animals.²⁵ This Note argues that the answer to these issues correctly lies in human responsibility and stewardship—not animal rights. “Developing an artificial construct of formal rights for animals would be harmful both to humans and, ultimately, to animals.”²⁶

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

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

²² WESLEY J. SMITH, *A RAT IS A PIG IS A DOG IS A BOY: THE HUMAN COST OF THE ANIMAL RIGHTS MOVEMENT* 14–15 (2010) [hereinafter SMITH, *A RAT IS A PIG*]. Throughout this Note the term “advocate” will refer to one who seeks animal welfare, while the term “activist” will refer to one who fights for animals to have moral equivalence and human rights. This difference between animal welfare advocates and animal rights activists is further explained in Part I.

²³ See PETER SINGER, *ANIMAL LIBERATION* 11 (Updated ed. 2009) [hereinafter SINGER, *ANIMAL LIBERATION*].

²⁴ STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* 7 (2000) [hereinafter WISE, *RATTLING THE CAGE*]; see also *Tilikum v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1260 (S.D.Cal. 2012); *Sarah v. Primarily Primates, Inc.*, 255 S.W.3d 132, 135 (Tex. Ct. App. 2008).

²⁵ See Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 51, 56–57 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

²⁶ Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 28.

²⁷ *Wesley J. Smith, Senior Fellow—Discovery Institute*, DISCOVERY INST., <http://www.discovery.org/p/13> (last visited Mar. 31, 2014).

of Law and Associate Dean for Research at Pepperdine University School of Law.²⁸ Smith's seminal book, *A Rat Is a Pig Is a Dog Is a Boy*, articulates human exceptionalism and refutes animal rights in great detail.²⁹ In the same regard, several of Cupp's works on animal rights theory provide excellent background on the rights movement and a thorough framework through which to view and rebut animal rights arguments.³⁰ The works of these two expert authors, therefore, are the main sources on which the arguments and logic of this Note relies in espousing the theory of human exceptionalism.

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

I. ANIMAL WELFARE VS. ANIMAL RIGHTS

Animal welfare societies have done much to further the prevention of cruelty to animals, but as Wesley Smith explains, "animal welfare and animal rights represent incompatible moral principles and mutually exclusive goals."³¹ Citing animal law attorney Michael Schau, Smith lauds animal welfare, or animal protection advocacy, as having grown out of admirable "principles of humane care and treatment" for animals.³² Smith warns that these legitimate animal welfare activities, however, must not be conflated with today's animal rights movement because the moral principles and goals of each group sharply diverge after their shared general concern "with the way people treat animals."³³

²⁸ Cupp, *Dubious Grail*, *supra* note 9, at 3 n.*.

²⁹ SMITH, *A RAT IS A PIG*, *supra* note 22, at 15.

³⁰ See, e.g., Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 32–34.

³¹ SMITH, *A RAT IS A PIG*, *supra* note 22, at 15.

³² *Id.* at 15–16 (citing Michael Schau, *Animal Law Research Guide*, 2 BARRY L. REV. 147, 148 (2001)).

³³ *Id.* at 15.

Schau explains that animal welfare advocates seek to improve animal husbandry methods, alleviate needless pain and suffering, and ensure that animals receive “essential food, water[,] shelter, [and] health care.”³⁴ Smith adds that welfarists accept human exceptionalism and “believe we have a human duty to prevent *unnecessary* animal suffering.”³⁵ They do not believe that animals should be given human-type rights, and they “acknowledge that, assuming appropriate practices, we are entitled to benefit from animals in furtherance of human interests.”³⁶ Most importantly, however, is that animal welfare advocates “do not seek to create a moral equivalence between human beings and animals.”³⁷

Animal rights activists, on the other hand, do seek moral equivalence. They fervently “deny that human beings have the right to use animals to further any human purpose,”³⁸ period, and they zealously oppose “the idea that animals can ever properly be considered property.”³⁹ Even Professor Gary L. Francione, a leading animal rights advocate and author, admits that today’s “animal ‘rights’ movement is fundamentally different from . . . the animal welfare movement” because it patently rejects the beliefs that animals are the property of humans and that animals may be used for human benefit.⁴⁰ Additionally, he states that animal rights activists think that at least some animals should possess rights that absolutely insulate them from harm, just as human rights protect humans from harm.⁴¹ Thus, they demand the “abolition of *all* exploitation of animals, on the grounds that animals have inherent, inviolable rights” that are non-negotiable.⁴² Moreover, animal rights activists believe that animal welfarism is “per se

³⁴ Michael Schau, *Animal Law Research Guide*, 2 BARRY L. REV. 147, 148 (2001).

³⁵ Smith, *Four Legs Good*, *supra* note 1, at 8 (emphasis added). Welfarists do not seek to end *all* animal suffering. *See id.*

³⁶ SMITH, A RAT IS A PIG, *supra* note 22, at 15; *see also* Schau, *supra* note 34, at 148 (“[Animal welfare] advocates will ardently support animal use practices that are perceived to produce widespread benefits to society, thus justifying required use of animals, but reject support for nonessential use.”).

³⁷ SMITH, A RAT IS A PIG, *supra* note 22, at 15.

³⁸ *Id.* at 16.

³⁹ *Id.*

⁴⁰ Francione, *supra* note 18, at 397 n.*, **, 401; *see also* ROBERT GARNER, ANIMALS, POLITICS AND MORALITY 60 (2d ed. 2004) (“[T]he terms welfare and rights are indicative of the key division within the animal protection movement; between those who consider that animal interests should take a subordinate, albeit important, position and those who recognise a higher moral status for animals.”).

⁴¹ Francione, *supra* note 18, at 401.

⁴² JAMES M. JASPER & DOROTHY NELKIN, THE ANIMAL RIGHTS CRUSADE: THE GROWTH OF A MORAL PROTEST 9 (1992) (emphasis added).

insufficient,”⁴³ “outdated and fundamentally immoral.”⁴⁴

The significance of the differences in the two movements seems more or less clear; however, Smith explains that animal rights activists have muddied the waters by co-opting the welfare approach.⁴⁵ He points to early activists who recognized that arguing for human-type rights for animals might be viewed as radical by the “general public that love[s] animals but still consider[s] them less important than people.”⁴⁶ Accordingly, Smith reasons, animal rights organizations are able to ride the coattails of support that animal welfare organizations enjoy by concealing their true intentions.⁴⁷ Through this tactic, rights organizations are able to pursue their radical ideologies by garnering “substantial financial and moral support from animal lovers who believe they are promoting animal welfare.”⁴⁸ Smith points out, however, that in the long run this has had a detrimental effect for animals because organizations pursuing radical ideologies “have drained funds from traditional welfare activities . . . which have really helped animals historically.”⁴⁹

II. THE THEORIES

The animal rights movement has developed many theories to support its pursuit of moral equality for animals. Some activists cite consciousness,⁵⁰ some cite sentience,⁵¹ others cite autonomy,⁵² and still others base their argument upon an amalgamation of the three. The two major theories, however, are those espoused by Peter Singer and Steven Wise. Accordingly, this Note will address those two theories in turn.

A. A Utilitarian Quality of Life Ethic

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

⁴³ Francione, *supra* note 18, at 400.

⁴⁴ SMITH, A RAT IS A PIG, *supra* note 22, at 17.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 18.

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting Interview by Wesley J. Smith with Frederick K. Goodwin (Oct. 28, 1998)) (internal quotation marks omitted).

⁵⁰ See STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 35–38 (2002) [hereinafter WISE, DRAWING THE LINE].

⁵¹ See Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 127 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁵² See discussion *infra* Part II.B.

Liberation in 1975.⁵³ It was in this book that Singer popularized the term “speciesism,” which had been conceived a few years earlier by British psychologist Richard Ryder.⁵⁴ Singer defined speciesism as “a prejudice or attitude of bias in favor of the interests of members of one’s own species and against those of members of other species,”⁵⁵ and he later asserted that “[s]peciesism is logically parallel to racism and sexism.”⁵⁶ Under his utilitarian framework, Wesley Smith points out, Singer was the first to seriously argue “that the ‘interests’ of animals should be accorded ‘equal consideration’ with those of people.”⁵⁷ Ultimately, Smith argues, Singer’s ideology is a masked argument supporting a “new moral hierarchy in which individual capacities are what matter morally.”⁵⁸

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

⁵³ See SMITH, *A RAT IS A PIG*, *supra* note 22, at 23; see also Neale Duckworth, *Living and Dying with Peter Singer*, PSYCHOL. TODAY, Jan.–Feb. 1999, at 56, 57.

⁵⁴ Joan Dunayer, *Advancing Animal Rights: A Response to Jeff Perz’s “Anti-Speciesism,” Critique of Gary Francione’s Work and Discussion of My Book Speciesism*, 3 J. ANIMAL L. 17, 35 (2007).

⁵⁵ SINGER, ANIMAL LIBERATION, *supra* note 23, at 6.

⁵⁶ Peter Singer, *Ethics Beyond Species and Beyond Instincts*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 78, 79 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁵⁷ SMITH, *A RAT IS A PIG*, *supra* note 22, at 23; see also R. George Wright, *Michael Perry, Peter Singer, and Quasimodo: Persons with Disabilities and the Nature of Rights*, 14 J.L. & RELIGION 113, 128 (1999–2000).

⁵⁸ SMITH, *A RAT IS A PIG*, *supra* note 22, at 231.

⁵⁹ See PETER SINGER, *RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS* 190–91 (1994) [hereinafter SINGER, *RETHINKING LIFE AND DEATH*]; SMITH, *A RAT IS A PIG*, *supra* note 22, at 27.

⁶⁰ See, e.g., John Harris, *The Concept of the Person and the Value of Life*, 9 KENNEDY INST. ETHICS J. 293, 307 (1999) (discussing how the re-definition of personhood to account for a creature’s “capacity to value existence” allows for the neutral characterization of all species).

⁶¹ SMITH, *A RAT IS A PIG*, *supra* note 22, at 31; see SINGER, ANIMAL LIBERATION, *supra* note 23, at 19.

⁶² SMITH, *A RAT IS A PIG*, *supra* note 22, at 27 (quoting PETER SINGER, *PRACTICAL ETHICS* 74 (3d ed. 2011)).

⁶³ *Id.*

In this equation, the “person” with “higher capacities, whether human or animal, [is] deemed to have greater value than [the “person”] with lower capacities,” and thus, when the interests of two “persons” are in conflict, the interests of the being estimated to have the greater value receives priority.⁶⁴

At first glance, one may not notice the inherent atrocities that this theory supports. Smith concedes that Singer’s language of equality can be misleading.⁶⁵ Smith, however, uses Singer’s own words to illuminate the radical departure in human morality that Singer is suggesting:

To avoid speciesism we must allow that beings who are similar in all relevant respects have a similar right to life—and mere membership in our own biological species cannot be a morally relevant criterion for this right. . . . We may legitimately hold that there are some features of certain beings that make their lives more valuable than those of other beings; but there will surely be some nonhuman animals, whose lives, by any standards, are more valuable than the lives of some humans. A chimpanzee, dog, or pig, for instance, will have a higher degree of self-awareness and a greater capacity for meaningful relations with others than a severely retarded infant or someone in a state of [advanced] senility. So, if we base the right to life on these characteristics we must grant these animals a right to life as good as, or better than, such retarded or senile human beings.⁶⁶

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

Suppose a dog menaced a human infant and the only way to prevent the dog from biting the infant was to inflict severe pain on the dog—more pain, in fact, than the bite would inflict on the infant. Singer would have to say, let the dog bite, for Singer’s position is that if an animal feels pain, the pain matters as much as it does when a human being feels pain, provided the pain is as great; and it matters more if it is greater. But any normal person . . . would say that it would be monstrous to spare the dog, even though to do so would minimize the sum of pain in the world.⁶⁷

Smith illuminates, therefore, that accepting Singer’s theory—that being human “is irrelevant to moral value” and to protecting human interests—would mean the end of universal human rights.⁶⁸ Dr. Alasdair Cochrane submits that universal human rights are grounded in the notion that “human beings possess dignity,” and thus we have “direct

⁶⁴ *Id.*

⁶⁵ *See id.* at 26.

⁶⁶ *Id.* at 27 (first alteration in original, bracketed alteration corrects Smith’s misquotation of Singer) (quoting SINGER, ANIMAL LIBERATION, *supra* note 23, at 19).

⁶⁷ Posner, *supra* note 25, at 64.

⁶⁸ SMITH, A RAT IS A PIG, *supra* note 22, at 26.

moral obligations” to every human.⁶⁹ He highlights that the Universal Declaration of Human Rights recognizes this: “All *human beings* are born free and equal in dignity and rights.”⁷⁰ The United States Declaration of Independence is grounded in the same notion: “W[e] hold these Truths to be *self-evident*, that all *Men* are created equal, that they are endowed by their Creator with certain unalienable Rights.”⁷¹

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

B. Practical Autonomy

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

⁶⁹ Alasdair Cochrane, *Undignified Bioethics*, 24 *BIOETHICS* 234, 236 (2010).

⁷⁰ *Id.* (emphasis added) (quoting Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 1, at 2 (Dec. 10, 1948)) (internal quotation marks omitted).

⁷¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

⁷² SMITH, A RAT IS A PIG, *supra* note 22, at 27.

⁷³ *See id.* at 27–28; Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 *ANIMAL L.* 75, 100 (1997).

⁷⁴ SMITH, A RAT IS A PIG, *supra* note 22, at 28.

⁷⁵ SINGER, RETHINKING LIFE AND DEATH, *supra* note 59, at 220. Through this philosophy, Singer justifies his argument “that infanticide and euthanasia should be permitted.” David P. Gushee, *Can A Sanctity-of-Human-Life Ethic Ground Christian Ecological Responsibility?*, 23 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 471, 483 (2009).

⁷⁶ SMITH, A RAT IS A PIG, *supra* note 22, at 61; Cupp, *Dubious Grail*, *supra* note 9, at 7; David J. Wolfson, *Steven M. Wise: Rattling the Cage—Toward Legal Rights for Animals*, 6 *ANIMAL L.* 259, 260 (2000).

but no animal, to basic dignity rights.⁷⁷ Wise argues, however, he has identified the one quality that is “sufficient to entitle *any* being, of *any* species, to basic liberty rights.”⁷⁸ He calls this quality “practical autonomy.”⁷⁹ According to Wise,

[a] being has practical autonomy, and is entitled to personhood and basic liberty rights, if she

1. can desire;
2. can intentionally try to fulfill her desire; and
3. possesses a sense of self sufficiency to allow her to understand, even dimly, that she is a being who wants something and is trying to get it.⁸⁰

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

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

Wise utilizes the abolition, civil rights, and gender equality movements as a roadmap⁸⁵ to illustrate the “history of extending rights to formerly excluded persons.”⁸⁶ Similarly, other animal rights activists

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

⁷⁸ *Id.* at 27 (emphasis added).

⁷⁹ *Id.*

⁸⁰ *Id.* at 32. Wise also clarifies that “[c]onsciousness . . . and sentience are implicit in practical autonomy.” *Id.*

⁸¹ See WISE, DRAWING THE LINE, *supra* note 50, at 35–37.

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

⁸³ Francione, *supra* note 51, at 127.

⁸⁴ See TOM REGAN, THE CASE FOR ANIMAL RIGHTS 243 (1983) (emphasis omitted).

⁸⁵ WISE, RATTLING THE CAGE, *supra* note 24, at 49 (using *Somerset v. Stewart*, the famous English slavery case, and *Dred Scott v. Sandford* to “set the stage” for his arguments); see also Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 43.

⁸⁶ Posner, *supra* note 25, at 55.

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

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

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

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

⁸⁸ Cupp, *Dubious Grail*, *supra* note 9, at 8, 20.

⁸⁹ Steven M. Wise, *An Argument for the Basic Legal Rights of Farmed Animals*, 106 MICH. L. REV. FIRST IMPRESSIONS 133, 134 (2008).

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

⁹¹ *Id.* at 35.

⁹² *Id.* at 38.

⁹³ See *id.* at 38, 43.

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

⁹⁵ Cupp, *Dubious Grail*, *supra* note 9, at 15.

having rights.”⁹⁶ By comparing the highest functioning animals to the lowest functioning humans, such as infants and mentally incapable adults who may have less autonomy than certain animals but are still afforded rights, Wise creates a “surface appeal” for his argument that some animals should be given rights.⁹⁷ Cupp’s argument, and many others like it, rely on this comparison to “the rights status of children and incompetent adults to illustrate that rights exist on a scale, and that personhood [and its concurrent rights] may be granted” to animals on the same scale.⁹⁸ However, “[d]espite its intuitive appeal . . . important distinctions exist.”⁹⁹ A child or incompetent adult may lack certain aspects of autonomy, and therefore, according to the practical autonomy scale, a highly intelligent ape may be considered more autonomous.¹⁰⁰ However, the ape and the infant still “differ in kind.”¹⁰¹ Cupp contends that the infant has “the potential for full autonomy” because he or she is human.¹⁰² The ape, on the other hand, will never possess the consciousness of a human.¹⁰³

The practical autonomy theory also leads to other untenable consequences.¹⁰⁴ Cupp reasons that if the basis for personhood is consciousness, then “even computers demonstrating artificial intelligence may one day need to be granted personhood status.”¹⁰⁵ Furthermore, he explains, assignment of rights based on comparisons to mental capacities endangers the weakest members of human society and directly challenges human dignity.¹⁰⁶ Cupp determines that if some animals are awarded rights because “they are sufficiently intelligent,” this necessarily “implies that perhaps some humans should lose their dignity rights if they are sufficiently unintelligent.”¹⁰⁷ Ultimately, though some of their arguments create a surface appeal for awarding animals rights, both Singer’s and Wise’s theories are tragically misguided and create outrageous consequences that would mean the end

⁹⁶ Posner, *supra* note 25, at 56 (giving the right to vote as an example of a right to which autonomy is relevant).

⁹⁷ Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 46–48, 50–51.

⁹⁸ Cupp, *Dubious Grail*, *supra* note 9, at 17.

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.* at 17–19.

¹⁰¹ MORTIMER J. ADLER, HOW TO THINK ABOUT THE GREAT IDEAS 64–65 (Max Weismann ed., 2000).

¹⁰² Cupp, *Dubious Grail*, *supra* note 9, at 18–19.

¹⁰³ See ADLER, *supra* note 101, at 86.

¹⁰⁴ See Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 76.

¹⁰⁵ Cupp, *Dubious Grail*, *supra* note 9, at 19.

¹⁰⁶ Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 76.

¹⁰⁷ *Id.* at 76–77.

of human rights as we know them.¹⁰⁸

III. A LEGAL SYSTEM FOR HUMANS BY HUMANS

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

A. *The Intrinsic Humanness of our Legal System*

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

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

¹⁰⁸ See FRANS DE WAAL, *GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS* 215 (1996).

¹⁰⁹ DIG. 1.5.2 (Hermogenianus, *Libro Primo Iuris Epitomarum* 1) (*THE DIGEST OF JUSTINIAN* (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985) (c. 534 B.C.)); see also Duckler, *supra* note 1, at 180.

¹¹⁰ Duckler, *supra* note 1, at 180.

¹¹¹ *Id.*

¹¹² Cupp, *Dubious Grail*, *supra* note 9, at 54.

¹¹³ SMITH, *A RAT IS A PIG*, *supra* note 22, at 233.

¹¹⁴ CARL COHEN & TOM REGAN, *THE ANIMAL RIGHTS DEBATE* 30 (2001).

¹¹⁵ See 28 THOMAS AQUINAS, *SUMMA THEOLOGICÆ* pt. I–II, Q. 95, art. 1, at 101–03 (Thomas Gilby O.P. trans., Blackfriars, Cambridge 1966) (1495) (“Not all [men], however, are like that; some are bumptious, headlong in vice, not amenable to advice, and these have to be held back from evil by fear and force, so that they at least stop doing mischief and leave others in peace This schooling through the pressure exerted through the fear of punishment is the discipline of human law. Consequently we see the need for men’s virtue and peace that laws should be established . . .”).

¹¹⁶ THE FEDERALIST NO. 51, at 291 (James Madison) (Glazier & Co., 1826).

survival, and prosperity,¹¹⁷ and they are instituted to protect and promote our fundamental human rights.¹¹⁸ Indeed, a foundational aspect of our law is that it must protect the most vulnerable humans among us;¹¹⁹ the exact same humans animal rights advocates desire to trample over while clambering to elevate animals to human status.¹²⁰

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

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

¹¹⁷ See ADLER, *supra* note 101, at 380–81.

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

¹¹⁹ See Alon Harel & Gideon Parchomovsky, Essay, *On Hate and Equality*, 109 Yale L.J. 507, 526, 531 (1999).

¹²⁰ See SINGER, *RETHINKING LIFE AND DEATH*, *supra* note 59, at 220.

¹²¹ ADLER, *supra* note 101, at 85.

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

¹²³ Duckler, *supra* note 1, at 182.

¹²⁴ *Id.* at 181.

¹²⁵ *Id.*

¹²⁶ Claire E. Rasmussen, *Are Animal Rights Dead Meat?*, 41 SW. L. REV. 253, 253 n.*, 256 (2012) (internal quotation marks omitted) (quoting Elizabeth Susan Anker, Elizabeth Costello, *Embodiment, and the Limits of Rights*, 42 NEW LITERARY HIST. 169, 170 (2011)).

is the relevant prerequisite in our human legal system.¹²⁷

Historically, theoretically, and by its very nature, the structure of our legal system is intrinsically human; therefore, animal welfare and protection must be addressed with “a humancentric approach.”¹²⁸ Duckler explains that this is precisely the reason “legal rules should not be applied to animals as if they were no different than humans.”¹²⁹ The animal rights movement, he argues, fails to adequately address this reality,¹³⁰ and it seeks to convince the courts to operate in contravention to and outside of “the parameters within which law operates to define rights and make those rights useful.”¹³¹

B. The Rights Activists Seek: What Are They? Where Do They Originate?

What are these so-called rights that animal activists seek? Steven Wise advocates for what he calls “dignity-rights,” which are the rights to bodily integrity and bodily liberty.¹³² Peter Singer proposes all animals be given moral equivalence with humans,¹³³ and still others advocate for additional rights.¹³⁴ They all feverishly work, however, to gain rights for animals, often without attempting to describe or justify what rights are or from where they originate.¹³⁵

Legal thinkers and philosophers have debated the rights question for decades. The Universal Declaration of Human Rights states human rights belong to everyone, everywhere, and that these rights are grounded in “the inherent dignity . . . of all members of the human family.”¹³⁶ Nicholas Wolterstorff, a former Yale philosophy professor and prolific author on rights and ethics,¹³⁷ defines rights as “a normative social relationship . . . , [that is,] a legitimate claim to the good of being treated a certain way by persons and by those social entities capable of rational action.”¹³⁸ Carl Cohen, a University of Michigan philosophy

¹²⁷ *Id.* (first alteration in original) (internal quotation marks omitted).

¹²⁸ Posner, *supra* note 25, at 66–67.

¹²⁹ Duckler, *supra* note 1, at 182.

¹³⁰ *Id.* at 200.

¹³¹ *Id.* at 191; *see also id.* at 192.

¹³² WISE, RATTLING THE CAGE, *supra* note 24, at 49, 267.

¹³³ *See* SMITH, A RAT IS A PIG, *supra* note 22, at 23, 28 (quoting SINGER, RETHINKING LIFE AND DEATH, *supra* note 59, at 220).

¹³⁴ *See, e.g.,* WISE, RATTLING THE CAGE, *supra* note 24, at 7; Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 31.

¹³⁵ *See* Duckler, *supra* note 1, at 191.

¹³⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmb., (Dec. 10, 1948).

¹³⁷ NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS, at back cover (2008).

¹³⁸ *Id.* at 385–86.

professor,¹³⁹ defines rights as “valid claim[s], or potential claim[s], that may be made by a moral agent, under principles that govern both the claimant and the target of the claim.”¹⁴⁰ These claims are all “states of affairs.”¹⁴¹ Wolterstorff explains, for example, that the rights to have some object or to not be physically harmed are the states of affairs of owning that object or of “persons treating and refraining from treating one in certain ways.”¹⁴² Therefore, he reasons, “rights are inherently social,”¹⁴³ and this “sociality is built into the essence of rights.”¹⁴⁴ Wolterstorff adds that a right is always related to someone;¹⁴⁵ consequently, “[r]ights themselves are foundational to human community.”¹⁴⁶

Human rights are characterized in many different ways and separated into many different categories. Wolterstorff lists and provides examples of, among others, the following categories of rights.¹⁴⁷ *Legal* or *socially conferred* rights are those given by the “legislation of some organization or the rules of some social practice.”¹⁴⁸ The right to Social Security, which is bestowed by legislation of Congress, is a socially conferred right.¹⁴⁹ *Standing* rights are those that ensue by virtue of one’s office or position.¹⁵⁰ For example, a military officer has the intrinsic right and authority to issue commands to his troops and the right to his troops’ obedience.¹⁵¹ The troops’ obligation to obey and the officer’s right to their obedience “are not generated by the officer’s commands; they were already there” by virtue of the officer’s standing.¹⁵² Then there are *benefit* or *positive* rights, which are rights to be treated a certain way, such as the right to the benefit of a formal education,¹⁵³ and there are

¹³⁹ COHEN & REGAN, *supra* note 114, at 323.

¹⁴⁰ *Id.* at 17.

¹⁴¹ WOLTERSTORFF, *supra* note 137, at 137.

¹⁴² *Id.* at 137–38.

¹⁴³ *Id.* at 246.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 5–6.

¹⁴⁷ The examples provided are not an exhaustive list and are lacking greatly in detail. For an excellent and detailed exposition of many additional categories of rights and the justification and grounding of those rights, see generally WOLTERSTORFF, *supra* note 137.

¹⁴⁸ *Id.* at 288.

¹⁴⁹ *Id.* at 291–92.

¹⁵⁰ *Id.* at 269–70.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ WOLTERSTORFF, *supra* note 137, at 314; see Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 26(1–2) (Dec. 10, 1948).

freedom or *negative* rights, which are rights to not be treated a certain way, such as the right not to be tortured.¹⁵⁴ Wolterstorff categorizes the final set of rights as *natural* rights.¹⁵⁵ They are natural, he explains, because they “have not been socially conferred” upon anyone or, phrased a different way, they are rights “that one would possess even if they had not been socially conferred,”¹⁵⁶ regardless of any other factor. These rights are “inherent to those who have them,” and “they have them on account of the worth of beings of their sort.”¹⁵⁷

Wolterstorff holds that inherent *natural* rights are the base rights upon which all other rights are founded and evaluated,¹⁵⁸ and “[n]atural law for the right ordering of society is what ultimately grounds justice . . . not the inherent rights of members of society.”¹⁵⁹ To that end, rights are tied to justice; they “are trumps.”¹⁶⁰ In other words, Wolterstorff explains, no other considerations matter, “[t]he face value of the cards makes no difference,” and rights win no matter what.¹⁶¹ St. Thomas Aquinas wrote that justice is “rendering to each his right[;] . . . [a] man is called just because he safeguards right.”¹⁶² In Justinian’s *Digest*, the Roman jurist Ulpian defined justice as a “steady and enduring will to render unto everyone his right.”¹⁶³ Wolterstorff reasons that according to this formula “[p]rimary justice . . . is present in society insofar as the members of society enjoy the goods to which they have a right.”¹⁶⁴

Therefore, because justice is grounded in inherent rights, and because inherent rights and all other rights built upon them inhere on account of a human’s worth, the idea of human dignity and worth is central to any discussion of justice or rights.¹⁶⁵ Consequently, all rights flow from “the status of being a human being, a member of the species *Homo sapiens*,” and the worth that is attached to that status.¹⁶⁶ Wolterstorff provides the following example: one who has the status of

¹⁵⁴ WOLTERSTORFF, *supra* note 137, at 315 n.8, 16.

¹⁵⁵ *Id.* at 33.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 10–11.

¹⁵⁸ *Id.* at 386.

¹⁵⁹ *Id.* at 11.

¹⁶⁰ *Id.* at 291.

¹⁶¹ *Id.* at 23, 305–06.

¹⁶² AQUINAS, *supra* note 115, vol. 37 at pt. II–II, Q. 58, art. 1 (emphasis omitted).

¹⁶³ DIG. 1.10 (Ulpian, Libro Primo Regularum 1) (THE DIGEST OF JUSTINIAN (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985)).

¹⁶⁴ WOLTERSTORFF, *supra* note 137, at 24.

¹⁶⁵ See *supra* notes 136–44 and accompanying text.

¹⁶⁶ WOLTERSTORFF, *supra* note 137, at 313.

being a United States citizen age sixty-five or older has the right to a monthly Social Security payment, and everyone understands this to mean “the government shall send this payment to such persons [having attained the status], *period*.”¹⁶⁷ In deciding whether to send the payments, the government is not to consider any utilitarian or capacity-based calculation.¹⁶⁸ The right to the payment comes along with the status, and that right trumps all others.¹⁶⁹ He argues, therefore, that just as the right to Social Security inheres in the status of United States citizen age sixty-five or older, so too do all inherent, natural human rights inhere in the status of human being.¹⁷⁰ No utilitarian or capacity based calculation enters the equation. The whole is greater than the sum of its parts. Wolterstorff argues it is simply because we are *human* that we enjoy *human* rights;¹⁷¹ therefore, his “trumping principle affirms . . . [n]o human being has a price”¹⁷² and each is “irreducibly precious.”¹⁷³

IV. HUMAN EXCEPTIONALISM¹⁷⁴

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

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

¹⁶⁷ *Id.* at 292.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 292, 313.

¹⁷¹ *Id.* at 313.

¹⁷² *Id.* at 308.

¹⁷³ *Id.* at 361.

¹⁷⁴ The structure of some arguments in this section is based on Wesley J. Smith’s *A Rat Is a Pig Is a Dog Is a Boy*. See generally SMITH, *A RAT IS A PIG*, *supra* note 22, at 231–49.

¹⁷⁵ Peter Augustine Lawler, *Commentary on Meilaender and Dennett*, in HUMAN DIGNITY AND BIOETHICS 278, 282 (2008).

¹⁷⁶ Leon R. Kass, *Defending Human Dignity*, in HUMAN DIGNITY AND BIOETHICS 297, 298 (2008).

¹⁷⁷ *Id.*

¹⁷⁸ See Goodall, *supra* note 122, at 10.

¹⁷⁹ SMITH, *A RAT IS A PIG*, *supra* note 22, at 3, 235; see also Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the*

merely because it is human.”¹⁸⁰ Smith holds, just as Alasdair Cochrane similarly explains, that this objective, intrinsic value every human possesses is “the bedrock of universal human rights.”¹⁸¹ Therefore, if one were to accept the argument that humans do not possess inherent worth derived solely from our nature, then the basis of universal human rights and the foundation that all our liberties are built upon are rendered defunct.¹⁸²

Animal rights activists argue that “believing in human exceptionalism shows hubris, a disdainful pride that leads us to believe we are entitled to treat animals as cruelly as we desire.”¹⁸³ This could not be farther from the truth. Human exceptionalism maintains that humans are unique and superior.¹⁸⁴ As Smith explains, it does not suggest human beings not recognize the nobility of animals or not believe we owe them kindness and respect,¹⁸⁵ and it does not advocate that humans have unlimited license to make animals’ lives miserable or to destroy their habitats at will without any thought to the consequences.¹⁸⁶ Smith, as well as other proponents of human exceptionalism, believes the absolutist view that animals are purely property is “as wrong from its end of the spectrum as animal rights ideology is from the other extreme.”¹⁸⁷

A. A Faith-Based Justification

Most people believe humans have unequalled importance and intrinsic dignity;¹⁸⁸ however, some have come to question¹⁸⁹ this “self-evident” truth.¹⁹⁰ Smith points out that a justification for this instinctive belief that human life matters most can be made from faith-based or

Transnational Discourse, 35 B.C. INT’L & COMP. L. REV. 331, 392 (2012) (stating that intrinsic value “identifies the special status of human beings in the world”).

¹⁸⁰ Wesley J. Smith, *The Human Exceptionalist*, DISCOVERY INST. (Mar.–Apr. 2012), <http://www.discovery.org/a/18881>.

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

¹⁸² See MORTIMER J. ADLER, *THE DIFFERENCE OF MAN AND THE DIFFERENCE IT MAKES* 263–64 (1967).

¹⁸³ SMITH, A RAT IS A PIG, *supra* note 22, at 243.

¹⁸⁴ *Id.* at 235, 248.

¹⁸⁵ *Id.* at 248–49.

¹⁸⁶ See Francione, *supra* note 18, at 398.

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

¹⁸⁸ Lawler, *supra* note 175, at 282.

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

¹⁹⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

secular grounds.¹⁹¹ Furthermore, as Nicholas Wolterstorff explains, a faith-based justification is fairly easy to come by, “since virtually all major faith traditions promote the proper care of animals but also assert that humans have greater worth than animals.”¹⁹²

The Christian tradition teaches man was made in the image of God,¹⁹³ and therefore God has bestowed intrinsic dignity and worth upon mankind.¹⁹⁴ Wolterstorff asserts that God loves every human equally, and that love confers matchless worth on humans above any other creature.¹⁹⁵ Another illustration of this principle is Jesus telling his disciples they “are worth more than many sparrows.”¹⁹⁶ One theologian points out that St. Francis of Assisi, who founded the Franciscan order of the Roman Catholic Church and is the patron saint of animals and the environment,¹⁹⁷ espoused a “hierarchical view of creation, according to which every living being praises God but is also available for human use and consumption as food.”¹⁹⁸ In fact, Judge Posner highlights that “Aquinas and other traditional Catholic thinkers [espoused the belief] that animals are entitled to no consideration, at least relative to human beings, because animals lack souls.”¹⁹⁹ However, William Murchison, another proponent of human exceptionalism, explains that the dominant Christian belief is that “man [is not] the owner of the world, rather just the tenant, with positive responsibilities for his treatment of the property and its other inhabitants.”²⁰⁰ Smith expounds that “[e]ven religions that doctrinally require vegetarianism do so because they believe it is our duty not to cause animals to suffer,” not because they believe animals are our moral equals.²⁰¹

¹⁹¹ SMITH, A RAT IS A PIG, *supra* note 22, at 238.

¹⁹² WOLTERSTORFF, *supra* note 137, at 237.

¹⁹³ *Genesis* 1:26–27 (New International Version).

¹⁹⁴ See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 658–59 (2008).

¹⁹⁵ WOLTERSTORFF, *supra* note 137, at 360; see also McCrudden, *supra* note 194, at 659 (“[B]eing made in the image of God mean[s] that Man was endowed with gifts which distinguish[] Man from animals.”).

¹⁹⁶ *Matthew* 10:31 (New International Version).

¹⁹⁷ Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 59 (2002); Keith Douglass Warner, *The Moral Significance of Creation in the Franciscan Theological Tradition: Implications for Contemporary Catholics and Public Policy*, 5 U. ST. THOMAS L.J. 37, 49 (2008).

¹⁹⁸ David Grumett, *Vegetarian or Franciscan? Flexible Dietary Choices Past and Present*, 1 J. FOR STUDY RELIGION NATURE & CULTURE 450, 450 (2007).

¹⁹⁹ Posner, *supra* note 25, at 61.

²⁰⁰ Murchison, *supra* note 17, at 29, 34; see also *Genesis* 1:25–30, 2:15 (New International Version).

²⁰¹ SMITH, A RAT IS A PIG, *supra* note 22, at 237–38.

Therefore, it is easy to reach a justification that humans have inherent dignity and worth through a religious appeal to God, the Creator of man and beast. The end result, Wolterstorff posits, is that “being [made] in the image of God . . . gives great worth to those creatures who bear the image.”²⁰² Furthermore, he adds, God’s entrusting dominion over the earth to his image bearers gives humans a unique dignity and places us in the exceptional role over animals.²⁰³ “Some animals may engage in behavior rather like the more primitive forms of exercising dominion,” but as Wolterstorff highlights, the simple fact remains that animals cannot exercise control or authority in this world, and they do not have the dignity of being God’s image-bearers.²⁰⁴

B. A Secular Justification

On the other hand, Smith clarifies, a justification for human exceptionalism does not require a belief in an omnipotent Creator.²⁰⁵ The inherent worth and dignity of humans appears from a secular worldview as well.²⁰⁶ As one scholar explains, “[a] *pre-religious* intuition recognizes there is something awesome, worthy of holding in dread—*fearful* . . . about a human life,” and as such, “[w]e [do not] dare hasten its end.”²⁰⁷ Indeed, Immanuel Kant, dubbed by one scholar as the quintessential secularist,²⁰⁸ believed “that humanity in a human being . . . is the only thing about human beings that gives them worth,”²⁰⁹ and Ronald Dworkin believes that almost all of us accept “that human life in all its forms is sacred”²¹⁰ and humans are the “highest product of natural

²⁰² WOLTERSTORFF, *supra* note 137, at 347.

²⁰³ *See id.* at 347–48.

²⁰⁴ *Id.* at 348.

²⁰⁵ Wesley J. Smith, *The Bioethics Threat to Universal Human Rights*, HUM. LIFE REV., Winter–Spring 2011, at 63, 68 [hereinafter Smith, *Bioethics Threat*].

²⁰⁶ It should be noted, however, that even a so-called secular viewpoint is ultimately faith-based in that “everyone reasons from faith, from presuppositions which cannot be proven but are held nonetheless.” W. Ross Blackburn, *Arguing for Human Dignity in Bioethics & Public Policy: A Reply to Wesley J. Smith*, HUM. LIFE REV., Winter 2012, at 35, 44. The argument simply changes based on one’s presuppositions.

²⁰⁷ David Klinghoffer, *Preserved Memories of Wisdom*, HUM. LIFE REV., Spring 2012, at 35, 36.

²⁰⁸ ALEX SCHULMAN, THE SECULAR CONTRACT 12 (2011).

²⁰⁹ WOLTERSTORFF, *supra* note 137, at 326.

²¹⁰ Ronald Dworkin, *Life is Sacred: That’s the Easy Part*, N.Y. TIMES, May 16, 1993, available at Bloomberg, <http://www.bloomberglaw.com/> (click on “News”; then click in “Keywords” box; then search “Dworkin ‘Life is Sacred: That’s the Easy Part’”). This further illustrates how any viewpoint is ultimately faith-based, and a secular vocabulary is inadequate for the discussion as Dworkin must “resort to a religious vocabulary in order to . . . explain the value of human life.” Steven D. Smith, *Recovering (from)*

creation.”²¹¹

Smith maintains that the presupposition of human exceptionalism—that every human possesses great status and worth because of an intrinsic human nature²¹²—seems so obvious it should be uncontroversial;²¹³ however, it has become the center of this debate. After all, what other species blushes,²¹⁴ has five-year plans, moves around the world simply for a change in scenery, cooks its food, clothes itself, seeks pleasure²¹⁵ and entertainment at any cost, researches and “show[s] concern about the welfare of other species,”²¹⁶ “builds civilizations, records history, creates art, makes music, thinks abstractly, communicates in language, envisions and fabricates machinery, improves life through science and engineering, or explores the deeper truths found in philosophy and religion?”²¹⁷ Obviously, there is no other. Humans are unique.²¹⁸ Scientists have discovered many complex behaviors animals instinctively exhibit that are similar to some human behaviors, but as David Oderberg points out, no experiment has ever shown “that animals know *why* they do what they do, or are *free* to choose one course of action over another.”²¹⁹

Enlightenment?, 41 SAN DIEGO L. REV. 1263, 1302 n.158 (2004) (citing RONALD DWORKIN, LIFE’S DOMINION 68–101 (1993)).

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

²¹² See *supra* text accompanying notes 183–85.

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

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

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

²¹⁶ Charles S. Nicoll, *A Physiologist’s Views on the Animal Rights/Liberation Movement*, 34 PHYSIOLOGIST 303, 307–08 (1991).

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

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

²¹⁹ David S. Oderberg, *The Illusion of Animal Rights*, HUM. LIFE REV., Spring–Summer 2000, at 37, 43. David Oderberg is a philosophy professor at the University of Reading in England who published the book, *Applied Ethics*, in 2000 containing his arguments against animal rights. *Id.* at 37.

Human exceptionalism maintains that humans possess the intrinsic qualities that make us the only moral agents.²²⁰ This “[m]oral agency is inherent and exclusive to human *nature*, meaning it is possessed by the *entire species*, not just individuals who happen to possess rational capacities.”²²¹ As Smith declares, animals cannot and do not have the ability to reason morally.²²² Furthermore, Smith adds, it is only our moral human nature that allows us to recognize or even care about animal suffering, and “[t]his uniquely human capacity to empathize with and appreciate ‘the other’ is one of the best things about us.”²²³

Smith makes clear it is because of these beliefs that humans are situated at the apex of the natural world and are the only moral beings.²²⁴ He then highlights that a core tenet of human exceptionalism is the moral obligation to respect animals, which includes treating them humanely and never causing them frivolous suffering.²²⁵ Humans alone, Smith adds, have these duties to other species,²²⁶ and humans alone bear this burden of moral responsibility to each other and to animals.²²⁷ One famous philosopher even stated that only man has the capacity to be bound by obligation or duty; this is foreign to every other species.²²⁸ This corresponds with Smith’s argument that animals cannot possess morality, honor rights, or bear burdens of moral obligation.²²⁹ Primatologist Frans de Waal states that bestowing rights is nonsensical unless it is accompanied by responsibilities; therefore, “animals cannot and will not” become rights bearing members of society.²³⁰ Carl Cohen plainly illustrates this with the example of a lion hunting down and killing a baby zebra:

²²⁰ Nicoll, *supra* note 216, at 307.

²²¹ SMITH, A RAT IS A PIG, *supra* note 22, at 235; *see also* ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 112 (2008) (“We are members of a certain animal species—*Homo sapiens*. Any whole living member of that species is a human being. His or her nature is a *human* nature. Such a nature is a *rational* nature. Human beings are *rational animals*.”).

²²² SMITH, A RAT IS A PIG, *supra* note 22, at 235.

²²³ *Id.* at 240.

²²⁴ *Id.* at 3; *see also id.* at 235.

²²⁵ *Id.* at 3; *see also id.* at 235.

²²⁶ *Id.* at 239.

²²⁷ *See id.* at 243–44.

²²⁸ HANS JONAS, THE PHENOMENON OF LIFE 283 (Greenwood Press, Inc. 1979) (1966).

²²⁹ SMITH, A RAT IS A PIG, *supra* note 22, at 15; *see also* Duckler, *supra* note 1, at 192 (stating that “to have a right means also to be responsible for one’s actions”).

²³⁰ Frans B. M. de Waal, Op-Ed., *We the People (and Other Animals)* . . . , N.Y. TIMES, Aug. 20, 1999, at A21; SMITH, A RAT IS A PIG, *supra* note 22, at 247.

Do you believe the baby zebra has the right not to be slaughtered? Or that the lioness has the right to kill that baby zebra to feed her cubs? Perhaps you are inclined to say, when confronted by such natural rapacity . . . that neither is right or wrong, that neither zebra nor lioness has a right against the other. Then I am on your side. Rights are pivotal in the moral realm and must be taken seriously, yes; but zebras and lions and rats do not live in a moral realm—their lives are totally amoral. There is no morality for them; animals do no moral wrong, ever. In their world there are no wrongs and there are no rights.²³¹

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

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

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

²³¹ COHEN & REGAN, *supra* note 114, at 30–31 (emphasis omitted).

²³² Carl Cohen, *Do Animals Have Rights?*, 7 ETHICS & BEHAV. 91, 98 (1997).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* Smith exposes how animal rights activists further distort terms when they condemn eating meat because it is murder even though “this term is applicable only to the killing of human beings.” SMITH, A RAT IS A PIG, *supra* note 22, at 203.

²³⁶ Cohen, *supra* note 232, at 98.

²³⁷ *Id.*

²³⁸ Oderberg, *supra* note 219, at 42.

²³⁹ SMITH, A RAT IS A PIG, *supra* note 22, at 232.

²⁴⁰ Smith, *Bioethics Threat*, *supra* note 205, at 68.

²⁴¹ Smith presents “the bat’s sonar or the gorilla’s strength” to illustrate some such capabilities. *Id.*

As he explains, however, these characteristics are merely physical distinctions, having no moral implications upon one's inherent worth.²⁴² Conversely, "humans are exceptional in ways that separate us morally—rather than physically."²⁴³ Therefore, he argues that the differences between humans and animals are not only physical differences of degree, such as the extent each species uses tools or has intelligence or communicates, but also moral differences of kind, such as rationality, creativity, abstract thinking, and accountability.²⁴⁴ Contrary to Singer, Smith argues that "[m]oral value should not be based on the capacities of each individual."²⁴⁵ Rather, Smith holds, inherent worth should be based on the intrinsic nature of the species, and capacities such as creativity, responsibility, language, and the like that indicate moral differences in kind are all "capacities that flow from the nature of humans and are absent from the natures of all animals."²⁴⁶

Cohen describes how some refute this assertion by arguing infants and the senile do not have these moral capacities, but they have rights.²⁴⁷ He responds, however, that it is not individuals who are awarded rights once they achieve some level of special capacity.²⁴⁸ This argument arises out of the mistaken supposition that rights are tied to individual capabilities.²⁴⁹ As he clarifies, rights exist solely in the "human moral world," and it is the fact one is a human with an inherent, moral human nature that gives the human species rights.²⁵⁰ He asserts that it is beside the point that some animal resembles human intelligence or demonstrates remarkable capabilities in some obscure experiment or test.²⁵¹ He logically concludes, therefore, that capabilities are not at issue in this debate.²⁵² Neither intelligence, rationality, the ability to communicate or feel pain, self-consciousness, practical autonomy, nor any other capacity animal rights advocates champion as an equalizer has any bearing on the human rights equation.²⁵³ It is humans' innate moral nature that generates rights;²⁵⁴ thus, humans

²⁴² *Id.*

²⁴³ *Id.* (emphasis omitted).

²⁴⁴ SMITH, A RAT IS A PIG, *supra* note 22, at 240–42.

²⁴⁵ *Id.* at 241 (emphasis omitted).

²⁴⁶ *Id.* (emphasis omitted).

²⁴⁷ Cohen, *supra* note 232, at 97.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *See id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 97–98.

possess human rights exclusively because they are human.²⁵⁵

This discussion clearly illustrates “the absurdity of the whole concept of animal rights.”²⁵⁶ As Smith makes clear, “the entire issue of animal rights [is not] actually about ‘rights’ at all,”²⁵⁷ “[r]ather, it is an exclusively human debate about the nature and scope of our responsibilities toward animals—responsibilities that are *predicated solely on our being human*.”²⁵⁸ Ultimately, Smith concludes, animal rights activists arguing against human exceptionalism are actually calling for the very thing human exceptionalism requires of humans: that we maintain the highest level of respect for and duties toward animals.²⁵⁹ Smith ironically points out, therefore, that the argument animal rights activists make actually lends “proof [to] the unique nature of the human species, or what some call ‘human exceptionalism.’”²⁶⁰

V. HUMAN RESPONSIBILITY IS THE APPROPRIATE SOLUTION

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

²⁵⁵ Cochrane, *supra* note 69, at 236; see SMITH, A RAT IS A PIG, *supra* note 22, at 253.

²⁵⁶ SMITH, A RAT IS A PIG, *supra* note 22, at 234–35.

²⁵⁷ *Id.* at 235.

²⁵⁸ *Id.*; see also Duckler, *supra* note 1, at 191–92 (stating that any discussion of rights must be a human-centric one because rights adhere in a human conception of justice and “animals do not have a concept of ‘justice’ or of ‘fair play’ at all”).

²⁵⁹ SMITH, A RAT IS A PIG, *supra* note 22, at 232.

²⁶⁰ *Id.* at 235.

²⁶¹ See ADLER, *supra* note 182, at 265. See generally W. Ross Blackburn, *Evolution, Human Dignity, and Crafting Public Policy*, CRISIS MAG. (May 3, 2012), <http://www.crisismagazine.com/2012/can-public-policy-ever-reflect-human-dignity> (stating that human history reveals this belief in the actions of “people who made the opposite argument—that some were sub-human due to a lack of certain characteristics”); Tom L. Beauchamp, *The Failure of Theories of Personhood*, 9 KENNEDY INST. ETHICS J. 309, 315–16 (1999).

²⁶² See Posner, *supra* note 25, at 67.

²⁶³ *Id.* at 65 (emphasis omitted).

²⁶⁴ *Id.* at 61–62.

Furthermore, he reasons, if we fail to maintain the human-animal dichotomy, “then as denizens of the jungle we [would] have no greater duties to the other animals than the lion . . . has to the [zebra],”²⁶⁵ and “we may end up treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings.”²⁶⁶

Viewing animals as moral equivalents and granting them human rights, Smith adds, “would degrade the importance of rights altogether, just as wild inflation devalues money.”²⁶⁷ As one Darwinian stated, if we are all “the same in the eyes of nature, [then we are all] equally remarkable and equally dispensable.”²⁶⁸ Richard Cupp points out that the inevitable result of viewing animals more like humans would be to view humans more like animals, and the detachment of rights from human moral agency and human concerns would have deleterious effects to life as we know it.²⁶⁹ Ultimately, “a world with less emphasis on human dignity and moral responsibility would not be better for it.”²⁷⁰

Therefore, giving animals human rights would add “billions of potential new plaintiffs” along with billions in litigation costs to an already overburdened court system,²⁷¹ and thus it is not the correct solution for protecting animals.²⁷² A more sustainable and effective focus for animal advocates would be to promote the prohibition of “the most indefensible practices.”²⁷³ Posner suggests that instead of “rights mongering,” the solution should include making animals property and more vigorously enforcing “laws that forbid inflicting gratuitous cruelty on animals.”²⁷⁴ He rightly concludes that a humancentric solution focused on human responsibility and duty is best.²⁷⁵ As he points out, if enough people come to understand the suffering animals are capable of

²⁶⁵ *Id.* at 61.

²⁶⁶ *Id.*

²⁶⁷ SMITH, A RAT IS A PIG, *supra* note 22, at 243.

²⁶⁸ John Darnton, *Darwin Paid for the Fury He Unleashed: How a Believer Became an Iconoclast*, SF GATE (Sept. 25, 2005, 4:00 AM), <http://www.sfgate.com/opinion/article/Darwin-paid-for-the-fury-he-unleashed-How-a-2567847.php#page-1>.

²⁶⁹ Cupp, *Moving Beyond Animal Rights*, *supra* note 4, at 79.

²⁷⁰ *Id.*; see also DE WAAL, *supra* note 108, at 215 (“Human morality as we know it would unravel very rapidly indeed if it failed to place human life at its core.”).

²⁷¹ Cupp, *Dubious Grail*, *supra* note 9, at 52.

²⁷² See Posner, *supra* note 25, at 59.

²⁷³ Cass. R. Sunstein, *Slaughterhouse Jive*, NEW REPUBLIC, Jan. 29, 2001, at 40, 42–43 (reviewing GARY L. FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* (2000)).

²⁷⁴ Posner, *supra* note 25, at 59 (stating that “people tend to protect what they own” and that gratuitous is the operative word).

²⁷⁵ *Id.* at 66.

feeling and learn how to ease that suffering without substantially affecting human comforts or progress, then “public opinion and consumer preference [would] induce . . . change.”²⁷⁶

CONCLUSION

In the end, we all instinctively know humans and animals are not equal, and making us equal is not the appropriate way to protect animals.²⁷⁷ Some animals may display some seemingly human qualities or capabilities, but neither practical autonomy nor cognitive capacities warrant treating animals as humans with attendant legal rights. Seeking to promote the humane treatment of animals is important. As Richard Cupp warns, however, attempting to humanize animals in any regard “is misguided and dangerous for both humans and animals.”²⁷⁸ Furthermore, as Wesley Smith highlights, the appropriate solution is not granting animals human rights.²⁷⁹ The solution must be some “middle ground that doesn’t grant unwarranted rights to animals but does permit robust protection of their welfare.”²⁸⁰ This is certainly an achievable goal.²⁸¹ “Our legal system is intrinsically human,”²⁸² and “all law is established for men’s sake.”²⁸³ Humans enjoy rights based simply upon the fact that we are moral beings of immeasurable worth. Just as Cupp concluded in *Dubious Grail*, I also conclude that “the protection and humane treatment of animals is a basic human responsibility, not a basic animal right.”²⁸⁴

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²⁷⁶ *Id.*

²⁷⁷ See SMITH, A RAT IS A PIG, *supra* note 22, at 246–49.

²⁷⁸ Cupp, *Dubious Grail*, *supra* note 9, at 54.

²⁷⁹ SMITH, A RAT IS A PIG, *supra* note 22, at 232.

²⁸⁰ *Id.*

²⁸¹ See *id.*

²⁸² Cupp, *Dubious Grail*, *supra* note 9, at 54.

²⁸³ DIG. 1.5.2 (Hermogenianus, Libro Primo Iuris Epitomarum 1) (THE DIGEST OF JUSTINIAN (Theodore Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985) (c. 534 B.C.)).

²⁸⁴ Cupp, *Dubious Grail*, *supra* note 9, at 54.

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