Article

Animal Plaintiffs

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From endangered Hawaiian songbirds to dolphins deafened by Navy sonar to a neglected horse named Justice, nonhuman animals increasingly appear as plaintiffs in lawsuits alleging their subjection to extinction, abuse, and other injustices. These cases are far more than mere novelties or publicity stunts; they raise important jurisprudential questions about what it means to be a plaintiff seeking relief. As we learn more about the richness and diversity of nonhuman life, our legal system will have to rethink its exclusions to meet the demands of interspecies justice.

Drawing on a diverse body of philosophical, jurisprudential, and scientific scholarship, this Article is the first to offer a comprehensive theory of plaintiffhood and apply it to nonhuman animals. It defends the plaintiffhood of animals by articulating the conceptual foundations of the figure of the plaintiff as an entity who complains about injustice, mourns death, and laments the mistreatment of herself and others. Developments in the study of animal behavior and cognitive ethology have demonstrated these features in animals—including inequity aversion in monkeys, grief in elephants, and resistance to exploitation amongst many

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other species. As sentient and plaintive beings, animals are conceptually situated to serve as plaintiffs.

In addition to describing the conceptual contours of plaintiffhood, this Article identifies plaintiffhood's jurisprudential requirements and then analyzes whether animals can meet these expectations. Plaintiffs must be legal persons, possess legal rights, have legal capacity (or a representative to defend their interests), and have standing to pursue their claims. Through an engagement with legal theory and case law, this Article argues that animals are legal persons with legal rights that representatives can enforce in cases where animals have suffered the kinds of injuries that confer standing. As such, it concludes that animals are entitled to be plaintiffs in lawsuits. To deny them the ability to enforce their rights in court is unjustly anthropocentric.

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INTRODUCTION

A tenth-century fable written by an order of Sufi philosophers known as the Ikhwān al-Ṣafā' tells the story of a group of nonhuman animals so aggrieved by their exploitation that they file a lawsuit against all of humanity.[1] Bīwarāsp, the king of the spirits, adjudicates the dispute.[2] He holds a trial during which he hears arguments from humans, who attempt to justify their abuse of animals, and from the animals themselves, who refute the humans' claims to superiority.[3] Although the animals ultimately lose their lawsuit,[4] the underlying message of the fable is remarkably supportive of animal justice, especially for its time.[5] As the Ikhwān explain in a prologue, the story praises "the merits and distinctions of the animals, their admirable traits,

1. EPISTLES OF THE BRETHREN OF PURITY: THE CASE OF THE ANIMALS VERSUS MAN BEFORE THE KING OF THE JINN 99–316 (Lenn E. Goodman & Richard McGregor eds. & trans., 2009) [hereinafter THE CASE OF THE ANIMALS]. For a looser translation that takes more literary license with the original text, see generally THE ANIMALS' LAWSUIT AGAINST HUMANITY (Matthew Kaufmann ed., Anson Laytner & Dan Bridge trans., 2005). The fable is the Ikhwān's twenty-second epistle, out of the fifty-two that comprise the Rasā'il Ikhwān al-Ṣafā' (Epistles of the Brethren of Purity). Lenn E. Goodman, *Introduction* to THE CASE OF THE ANIMALS, *supra*, at 1. Taken together, the collection of epistles serves as an encyclopedia of Islamic philosophy, religion, and science of the medieval period. Nader El-Bizri, *Foreword* to THE CASE OF THE ANIMALS, *supra*, at xx–xxi.

2. THE CASE OF THE ANIMALS, *supra* note 1, at 102–09. *See* THE ANIMALS' LAWSUIT AGAINST HUMANITY, *supra* note 1, at 11 (identifying Bīwarāsp as king of the spirits).

3. THE CASE OF THE ANIMALS, *supra* note 1, at 109–21.

4. In the end, the humans prevail in establishing their spiritual preeminence over nonhuman animals, based on humans' capacity for saintliness and their purported proximity to God. THE CASE OF THE ANIMALS, *supra* note 1, at 312–15 ("[W]e [the humans] have among us prophets and their devisees, imams, sages, poets and paragons of goodness and virtue, saints and their seconds, ascetics, pure and righteous figures, persons of piety, insight, understanding, awareness and vision, who are like the angels on high!"). The original story ends abruptly with the animals conceding humans' supremacy after the humans describe the virtues of saints, but Bīwarāsp never rules on the lawsuit. *Id.* at 313–14. Newer Arabic editions of the text have added a few paragraphs to resolve the narrative arc, with the King ruling "that all of the animals were to be subject to the commands and prohibitions of the humans and remain subject to them until a new age had dawned. But then they would have a new fate." *Id.* at 315 n.566.

5. Goodman, *supra* note 1, at 35 (noting that the theme of "rejecting anthropocentrism and celebrating the intrinsic worth and beauty of all the marvels of nature[] resonates throughout the [epistle]").

pleasing natures, and wholesome qualities," while condemning "man's overreaching, oppression, and injustice against the creatures that serve him—the beasts and cattle—and his heedless, impious thanklessness for the blessings for which he should be grateful."[6] The story recognizes the animals' right to come into court, as well as their substantive entitlement to—if not full equality—at least a measure of justice and respect.

A millennium later, the Ikhwān's fable has proven prescient, with nonhuman animals increasingly populating the captions of lawsuits. From a neglected horse to a selfie-taking crested macaque, from hippopotamuses in Colombia to the entire community of whales and dolphins in the world's oceans, nonhuman animals are voicing their complaints in human courts through human advocates.[7]

This Article examines the conceptual and jurisprudential issues that arise when animals are named as plaintiffs in litigation in the United States.[8] It builds on important scholarly work by philosophers, legal scholars, attorneys, scientists, and animal advocates by synthesizing disparate theoretical questions about justice and jurisprudence with cutting edge scientific research, litigation strategies, and judicial opinions. This Article is the first to offer a comprehensive theory of plaintiffhood by articulating the various expectations, requirements, and capacities that entitle one to be a plaintiff and then asking whether, given these characteristics, nonhuman animals qualify for

6. THE CASE OF THE ANIMALS, *supra* note 1, at 65.

7. Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 132 (Or. Ct. App. 2022) (ruling on a case naming a horse, Justice, as plaintiff in a negligence action); Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018) (ruling on a copyright infringement action following the alleged use of an unattended camera by Naruto, a macaque); Cmty. of Hippopotamuses Living in the Magdalena River, No. 1:21-mc-00023-TSB-KLL (S.D. Ohio Oct. 15, 2021) (issuing an order granting an application, brought in the name of a community of hippopotamuses, to issue subpoenas for the taking of depositions pursuant to 28 U.S.C. § 1782); Cetacean Cmty. v. Bush, 386 F.3d 1169, 1171 (9th Cir. 2004) (ruling on a case brought in the name of a community of whales, dolphins, and porpoises alleging various environmental claims).

8. There have been a number of cases in other countries involving animal litigants. *See generally* Macarena Montes Franceschini, *Animal Personhood: The Quest for Recognition*, 17 ANIMAL & NAT. RES. L. REV. 93 (2021) (describing litigation with named animal plaintiffs across the globe, including in Argentina, Brazil, Colombia, and India). Given procedural and jurisprudential differences between these legal systems and courts in the United States, this Article focuses on cases filed in the United States.

plaintiffhood.[9] Although scholars have considered various components of this issue, such as whether animals can have standing or legal rights, animal plaintiffhood *as such* has remained untheorized.

Although this Article focuses on animal plaintiffhood, it employs frameworks, criteria, and methods that are broadly applicable to questions of procedure, jurisprudence, and philosophy. Animal plaintiffhood raises questions that go to the heart of what it means to be a plaintiff, to plea for relief, and to demand justice. Understanding the concept also requires a deep exploration of jurisdictional and jurisprudential categories that structure our legal system, including personhood, rights, legal capacity, and standing, the discussion of which should be of value to scholars exploring a wide range of legal and policy questions.

Part I of the Article situates the conceptual discussion that follows by providing a brief overview of cases in which lawyers have named animals as plaintiffs. This Part gives concrete examples of the kinds of disputes in which animals' capacity for plaintiffhood is at issue and illustrates the ways that courts have decided them.[10]

Part II then addresses the "why" of animal plaintiffhood, explaining the normative justifications for recognizing animals as plaintiffs. Animal plaintiffhood is both a fundamental issue of justice and an instrumental, utilitarian means of enforcing the substantive entitlements that animals already possess under existing law, including state anticruelty statutes and federal regulatory regimes.[11] This Part also responds to concerns that animal plaintiffhood would open the floodgates of litigation and impractically expand the class of potential litigants.

Part III explores the threshold *conceptual* question of what it means to be a plaintiff and whether animals meet that ideal. This Part draws on the etymological origins of the word "plaintiff" to sketch the figure of the plaintiff as one who complains about their mistreatment.[12] This etymology frames plaintiffs as those who have the capacity to lament their suffering, to

9. This Article is concerned with plaintiffhood in civil litigation, including the capacity to initiate litigation seeking equitable relief and damages for violations of legal rights.

10. *See infra* Part I.

11. *See infra* Part II.

12. *See infra* Part III.A.

complain when they are mistreated, and to plea for relief. Having proposed a conceptual understanding of plaintiffhood, Part III then explores whether animals have the capacity to complain, lament, mourn, and plea. Relying on cutting-edge studies of cognitive ethology (the study of animal minds) and animal behavior, this Part describes how animals demonstrate the very capacities that we expect of plaintiffs.[13] Cows flee slaughter,[14] elephants mourn their dead,[15] and capuchin monkeys protest injustice,[16] to name just a few of the ways that animals resist, lament, and complain about their mistreatment.[17] Given animals' plaintive capacities, this Part concludes that there are no conceptual or categorical reasons that sentient animals cannot be plaintiffs.

Part IV then delves into the *jurisprudential* issues that animal plaintiffhood raises. Under existing legal doctrines, plaintiffs must meet certain requirements and expectations: they must (1) be juridical persons who (2) hold legal rights, (3) possess legal capacity, and (4) have legal standing.[18] This Part addresses whether animals can meet these four legal requirements, concluding that they can, at least in some cases.

In analyzing the first jurisprudential issue—whether animals are juridical persons—Section IV.A begins by

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13. *See infra* Part III.B.

14. *See 40 Cows Flee L.A. Slaughterhouse; Compassion Brings Two to Sanctuary*, FARM SANCTUARY (June 27, 2021), https://www.farmsanctuary.org/news-stories/40-cows-escape-slaughterhouse [https://perma.cc/J3HZ-2APM] (detailing the escape of forty cows from a slaughterhouse and the release of two of the escaped cows to a local sanctuary).

15. *See* Iain Douglas-Hamilton, Shivani Bhalla, George Wittemyer & Fritz Vollrath, *Behavioural Reactions of Elephants Towards a Dying and Deceased Matriarch*, 100 APPLIED ANIMAL BEHAV. SCI. 87, 93–99 (2006) (reporting observations of elephant behavior over a seven-day period following the death of a matriarch).

16. *See* Sarah F. Brosnan & Frans B.M. de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297, 297 (2003) ("Monkeys refused to participate [in the experiment] if they witnessed a conspecific obtain a more attractive reward for equal effort, an effect amplified if the partner received such a reward without any effort at all.").

17. *See generally* SARAT COLLING, ANIMAL RESISTANCE IN THE GLOBAL CAPITALIST ERA (2021) (examining why, how, and to what ends animals resist oppression at the hands of humans); JASON HRIBAL, FEAR OF THE ANIMAL PLANET: THE HIDDEN HISTORY OF ANIMAL RESISTANCE 29–30 (2010) (proposing that captive and mistreated animals resist—escaping their cages, attacking their keepers, demanding more food, refusing to perform, etc.).

18. *See infra* Part IV.

disambiguating personhood from humanness. The term "person" simply denotes an entity, human or otherwise, that is the subject of rights or duties.[19] As long as animals have legal rights (either descriptively under positive law or normatively under natural law), they are legal persons, and courts ought to recognize them as such.[20] This Section analyzes the reasoning of courts that have denied animal personhood on historical, linguistic, and conceptual grounds, rejecting their reasoning by emphasizing an understanding of persons as legal rights-holders.

The second jurisprudential issue—whether animals have legal rights—requires an analysis of what legal rights are. Section IV.B briefly describes Wesley Hohfeld's structural explication of rights as claims, liberties, powers, and immunities, then analyzes the two main competing theories of legal rights—the will theory and the interest theory.[21] This Section applies these theories of legal rights to animals and concludes that the panoply of protections that animals currently receive under state and federal law are properly classified as legal rights. Animals' existing legal protections establish duties for humans and correlative claims and privileges for animals, motivated by concern for the interests of animals themselves.[22]

The third jurisprudential issue is whether animals have the requisite legal capacity to be plaintiffs. Although nonhuman animals lack legal capacity (because our criteria for capacity are structured around fundamentally anthropocentric conceptions of intentionality and rationality), Section IV.C argues that animals should be entitled to proceed as plaintiffs through duly appointed representatives, such as next friends or guardians ad litem.[23] The establishment of these representational procedures could be accomplished through a capacious interpretation of existing procedural mechanisms or the creation of new procedural rules for animal plaintiffs.

The final jurisprudential issue concerns federal and state doctrines of standing. Section IV.D argues that the kinds of injuries that suffice to create justiciable controversies should be evaluated based on the content of the injury rather than the

19. *See infra* Part IV.A.1.
20. *See infra* Part IV.A.2.
21. *See infra* Part IV.B.1.
22. *See infra* Part IV.B.2.
23. *See infra* Part IV.C.

species of the individual who experiences it. Animals are capable of experiencing many of the same kinds of tangible injuries that give human plaintiffs standing, such as physical suffering, aesthetic injury, and even harm to financial interests.[24] There is no defensible jurisprudential reason for allowing such injuries to count when they happen to humans but not when they happen to animals.

This Article concludes that because sentient animals are conceptually and jurisprudentially eligible for plaintiffhood, courts ought to recognize their ability to be litigants in cases that defend them from abuse, exploitation, and injustice.

I. ANIMAL PLAINTIFFS IN COURT

The question of whether animals can be plaintiffs is not merely an academic curiosity; it is increasingly an issue confronting judges in real cases. Attorneys have named animals as plaintiffs (or "relators" in habeas corpus cases) in at least thirty-five lawsuits in federal, state, and tribal courts in the United States.[25] In some cases, the plaintiff has been an individual

24. *See infra* Part IV.D.

25. Jones v. Butz, 374 F. Supp. 1284, 1284, 1294 (S.D.N.Y. 1974) (granting the defendant's motion to dismiss a complaint that names a human plaintiff as "next friend and guardian for all livestock animals now and hereafter awaiting slaughter"); Jones v. Beame, 380 N.E.2d 277, 277, 280 (N.Y. 1978) (issuing a ruling in an action that names a human plaintiff as "[g]uardian for all animals now confined in the Queens, Prospect Park and Central Park Zoos"); Palila v. Hawaii Dep't of Land & Nat. Res., 852 F.2d 1106, 1106–07 (9th Cir. 1988) (affirming a ruling for the plaintiff, a six-inch long finch-billed bird called the Palila, in the Island of Hawai'i); N. Spotted Owl (Strix Occidentalis Caurina) v. Hodel, 716 F. Supp. 479, 480, 483 (W.D. Wash. 1988) (remanding administrative adjudication in a lawsuit brought on behalf of owls in Oregon Coast Range and the Olympic Peninsula in Washington for listing under the Endangered Species Act); N. Spotted Owl (Strix Occidentalis Caurina) v. Lujan, 758 F. Supp. 621, 621, 623 (W.D. Wash. 1991) (reversing the district court's grant of summary judgment designating a critical habitat in a case brought on behalf of a threatened species of owl); Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 551, 554 (D. Haw. 1991) (granting the defendant's motion to dismiss and ruling on other motions in action filed on behalf of the 'Alalā, a bird unique to Hawai'i); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1443, 1463 (9th Cir. 1992) (affirming in part and remanding in part the district court's decision in a case brought on behalf of squirrels living on Mount Graham, a unique biological environment, in Arizona, to halt construction in the animals' habitat); Am. Bald Eagle v. Bhatti, 9 F.3d 163, 163–64 (1st Cir. 1993) (affirming the district court's judgment against plaintiffs, who sought to enjoin deer hunting on behalf of

eagles in Massachusetts); Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium, 836 F. Supp. 45, 45–46 (D. Mass. 1993) (granting a summary judgment motion against plaintiffs, one of whom was a dolphin named Kama); Marbled Murrelet (Brachyramphus Marmoratus) v. Pac. Lumber Co., 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) (enjoining a timber harvest in the murrelet's California habitat); Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461, 462–64 (3d Cir. 1997) (reversing the district court's denial of a preliminary injunction filed on behalf of sea turtles and tree boas that had sought to halt construction in the animals' habitats); Loggerhead Turtle v. Cnty. Council of Volusia Cnty., 148 F.3d 1231, 1234 (11th Cir. 1998) (reversing the dismissal of an action brought on behalf of sea turtles in Florida); Leatherback Sea Turtle v. Nat'l Marine Fisheries Serv., No. 99-00152 DAE, 1999 WL 33594329, at *1, *19 (D. Haw. Oct. 18, 1999) (granting the defendant's motion for summary judgment in an action filed on behalf of turtles in Hawai'i); Coho Salmon (Onchorynchus Kisutch) v. Pac. Lumber Co., 61 F. Supp. 2d 1001, 1004 (N.D. Cal. 1999) (denying the defendant lumber company's motions to dismiss and for summary judgment in an action for injunction on behalf of Coho Salmon); Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d 16, 18, 22 (D.D.C. 2001) (affirming the administrative court's ruling in an action on behalf of Cook Inlet Beluga Whales, a genetically distinct population); Cetacean Cmty. v. Bush, 386 F.3d 1169, 1171, 1179 (9th Cir. 2004) (affirming the district court ruling that an action on behalf of whales, dolphins, and porpoises failed because of a lack of standing); Lewis v. Burger King, 344 F. App'x 470, 470, 473 (10th Cir. 2009) (affirming the district court's dismissal of an action naming a dog, Lady Brown Dog the Enforcer, as a co-plaintiff); Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc., 842 F. Supp. 2d 1259, 1259, 1264–65 (S.D. Cal. 2012) (granting the defendant's motion to dismiss an action naming five orcas, Tilikum, Katina, Corky, Kasatka, and Ulises, as plaintiffs because of a lack of standing); People *ex rel.* Nonhuman Rts. Project, Inc. v. Lavery (*Lavery I*), 998 N.Y.S.2d 248, 249, 252 (N.Y. App. Div. 2014) (affirming the lower court's denial of a habeas corpus petition filed on behalf of a chimpanzee, Tommy); Nonhuman Rts. Project, Inc. *ex rel.* Kiko v. Presti, 124 A.D.3d 1334, 1334–35 (N.Y. App. Div. 2015) (affirming the lower court's denial of a habeas corpus petition filed on behalf of a chimpanzee, Kiko); Nonhuman Rts. Project, Inc. *ex rel.* Hercules v. Stanley, 16 N.Y.S.3d 898, 900, 918 (N.Y. Sup. Ct. 2015) (affirming the lower court's denial of a habeas corpus petition filed on behalf of two chimpanzees, Hercules and Leo); Naruto v. Slater, 888 F.3d 418, 420, 422–27 (9th Cir. 2018) (affirming the district court's ruling dismissing an action naming a macaque, Naruto, as a plaintiff despite finding that Naruto had Article III standing); Legal *ex rel.* White Cloud v. Yolo County, 2018 WL 11462074, at *1–3 (C.D. Cal. Dec. 3, 2018) (dismissing an action on behalf of a cat, White Cloud, for lack of standing); Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 840, 846 (Conn. App. Ct. 2019) (affirming the lower court's denial of a habeas corpus petition filed on behalf of three elephants, Beulah, Minnie, and Karen); Rowley v. City of New Bedford, No. 0257, 2020 WL 7690259, at *1–*3 (Mass. App. Ct. Dec. 28, 2020) (affirming the lower court's denial of a habeas corpus petition filed on behalf of two elephants, Ruth and Emily); Complaint at 2, 30 Barn Owls v. Vilsack, Case 1:21-cv-00968 (D.D.C. Apr. 8, 2021) (suing on behalf of Barn Owls confined at John

animal, such as the horse Justice, the macaque Naruto, or the orca Tilikum.[26] In other cases, the plaintiff has been an animal species, such as the Northern Spotted Owl, the Hawaiian Crow, or the Mt. Graham Red Squirrel.[27] In one case, an attorney named an entire taxonomic order as the plaintiff—the Cetacean Community, that is, the order of marine mammals comprising

Hopkins University); Felix v. Doughtie, No. 2:21-CV-7-FL, 2021 WL 2345252, at *1, *14 (E.D.N.C. June 8, 2021), *aff'd*, No. 21-1740, 2022 WL 2816782 (4th Cir. July 19, 2022) (granting the defendant's motion to dismiss a claim naming the "homeless cats of Hatteras Island, NC" as co-plaintiffs); Complaint at 1, Sauk-Suiattle Indian Tribe v. City of Seattle, Case No. SAU-CIV-01/22-001 (Sauk-Suiattle Tribal Ct. Jan. 6, 2022) (suing on behalf of salmon); Nonhuman Rts. Project, Inc. *ex rel.* Happy v. Breheny, 197 N.E.3d 921, 923, 931–32 (N.Y. 2022) (affirming the lower court's denial of a petition for a writ of habeas corpus filed on behalf of an elephant, Happy); Petition for a Common Law Writ of Habeas Corpus at 15, Nonhuman Rts. Project, Inc. *ex rel.* Amahle v. Fresno's Chaffee Zoo Corp., No. 22-517751 (Super. Ct. Cal. May 3, 2022) (petitioning for a writ of habeas corpus on behalf of three elephants, Nolwazi, Amahle, and Vusmusi); Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 132, 142 (Or. Ct. App. 2022) (affirming the dismissal of a claim naming a horse, Justice, as the plaintiff); Complaint for Declaratory and Injunctive Relief, Horses of Cumberland Island v. Haaland, No. 23CV01592 (N.D. Ga. Apr. 12, 2023) (suing on behalf of horses on Cumberland Island); Verified Petition for Writ of Habeas Corpus at 1, Nonhuman Rts. Project, Inc. *ex rel.* Missy v. Cheyenne Mountain Zoological Soc'y, No. 2023CV31236 (Dist. Ct. Colo. June 29, 2023) (petitioning for a writ of habeas corpus on behalf of five elephants, Jambo, Kimba, LouLou, Lucky, and Missy); Petition for a Common Law Writ of Habeas Corpus at 85–86, 90, Nonhuman Rts. Project, Inc. *ex rel.* Mari v. Honolulu, No. 1CCV-23-0001418 (Haw. Cir. Ct. Oct. 31, 2023) (petitioning for a writ of habeas corpus on behalf of two elephants, Mari and Vaigai); Complaint for Writ of Habeas Corpus at 8–10, Nonhuman Rts. Project, Inc. *ex rel.* Prisoner A (aka Louie) v. DeYoung Family Zoo, No. 23-17621-AH (Mich. Cir. Ct. Dec. 4, 2023) (petitioning for a writ of habeas corpus on behalf of seven chimpanzees, Louie and six who are unnamed).

26. *Justice*, 518 P.3d at 131 (naming Justice, an American Quarter Horse, as plaintiff); *Naruto*, 888 F.3d at 420 (naming Naruto, a seven-year-old macaque, as plaintiff); *Tilikum*, 842 F. Supp. 2d at 1259 (listing five individual orca whales as plaintiffs).

27. *N. Spotted Owl*, 716 F. Supp. at 480 (bringing suit on behalf of the species seeking listing under the Endangered Species Act); *N. Spotted Owl*, 758 F. Supp. at 623 (bringing suit on behalf of the species seeking critical habitat designation); *Hawaiian Crow ('Alala)*, 906 F. Supp. at 551 (naming as plaintiffs the ʻAlalā species, of which twenty-one were believed to exist at the time of filing); *Mt. Graham Red Squirrel*, 954 F.2d at 1441 (bringing suit on behalf of the species seeking critical habitat protection).

whales, dolphins, and porpoises.[28] In other cases, the plaintiffs have been non-specific but ascertainable classes of animals, such as all the animals to be slaughtered for food or all the animals at a zoo.[29]

The claims raised on behalf of animal plaintiffs have varied. Some cases have involved federal statutory claims under the Endangered Species Act (ESA),[30] the Administrative Procedure Act,[31] the Marine Mammal Protection Act (MMPA),[32] the National Environmental Policy Act,[33] the Americans with Disabilities Act,[34] and the Copyright Act of 1976.[35] Others have involved federal constitutional claims, alleging violations of the Thirteenth Amendment's prohibition on slavery and Article I's prohibition on bills of attainder.[36] Some cases with animal plaintiffs have raised state common law claims, such as a tort for negligence or writs of habeas corpus on behalf of animals.[37]

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28. *Cetacean Cmty.*, 386 F.3d at 1171 ("The Cetacean Community is the name chosen by the Cetaceans' self-appointed attorney for all of the world's whales, porpoises, and dolphins.").

29. Jones v. Butz, 374 F. Supp. at 1284 (naming a human plaintiff as "next friend and guardian for all livestock animals now and hereafter awaiting slaughter"); Jones v. Beame, 380 N.E.2d at 277 (naming a human plaintiff as "[g]uardian for all animals now confined in the Queens, Prospect Park and Central Park Zoos").

30. 16 U.S.C. §§ 1531–1544.

31. 5 U.S.C. §§ 500–596.

32. 16 U.S.C. §§ 1361–1423h.

33. 42 U.S.C. §§ 4321–4370.

34. *Id.* §§ 12101–12213.

35. 17 U.S.C. §§ 101–810; *see* Palila v. Hawaii Dep't of Land & Nat. Res., 852 F.2d 1106, 1107 (9th Cir. 1988) (suing under the ESA); *see also* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1171–72 (9th Cir. 2004) (suing under the Administrative Procedure Act, MMPA, ESA, and the National Environmental Policy Act); Lewis v. Burger King, 344 F. App'x 470, 471 (10th Cir. 2009) (suing under the Americans with Disabilities Act); Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018) (suing under the Copyright Act).

36. Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012) (suing on behalf of orca whales under the Thirteenth Amendment); *see also* Memorandum Opinion at 1, 30 Barn Owls v. Vilsack, Case 1:21-cv-00968 (D.D.C. Feb. 1, 2022) (alleging that a statute includes an unconstitutional bill of attainder clause).

37. *See* Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 132 (Or. Ct. App. 2022) (bringing a negligence claim on behalf of a horse); *see also Lavery I*, 998 N.Y.S.2d 248, 249 (N.Y. App. Div. 2014) (seeking a writ of habeas corpus on behalf of a chimpanzee).

This Part offers a brief history and survey of some of these cases to illustrate the significant stakes of animal plaintiffhood. Some of these cases concern the experiential well-being and liberty interests of individual animals, such as the chimpanzees and elephants seeking habeas relief; others involve the continued existence of species on the brink of extinction, such as the birds and cetaceans in the ESA cases. This Part also illustrates judicial resistance to claims brought by animals, framing the conceptual and jurisprudential issues that a theory of animal plaintiffhood must address.

The modern history of animals as plaintiffs begins in 1973,[38] when the animal rights lawyer Henry Mark Holzer filed the first case in the United States in which animals appeared as litigants

38. There is another contender for the first lawsuit brought directly on behalf of a nonhuman animal: *Morabito v. Cyrta*, a 1971 lawsuit filed by inmates at a prison in Suffolk County, New York. *See Hydraulic Transfer of Jail's Resident Rodent from Cage to Sewer Is Upheld*, 9 CRIM. L. REP. 2471, 2471 (1971) [hereinafter *Morabito*] (describing the outcome in *Morabito v. Cyrta*, in which the New York Supreme Court for Suffolk County rejected a claim brought by prisoners concerning guards' killing of a mouse). The lawsuit alleged that prison guards confiscated a tamed mouse named Morris from the inmates and "assassinated" him by flushing him down a toilet. *Id.* at 2471–72; *L.I. Prisoners Sue on 'Assassination' of Morris, a Mouse*, N.Y. TIMES, Aug. 6, 1971, at 37 ("A group of 22 prisoners at the Suffolk County Jail filed suit in the State Supreme Court here today over what they call the 'assassination' of their pet mouse, Morris."); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 455 n.23a (1972) (stating that inmates had tamed the mouse, who was named Morris). It is unclear from the available record whether the inmates raised legal claims on behalf of Morris or raised only their own claims based on the conditions of their confinement. *Id.* According to the decision by Justice L. Barron Hill, the petitioners "*apparently* complain that Morris was subjected to discriminatory discharge and was otherwise unequally treated," *Morabito*, *supra*, at 2472 (emphasis added), so it is possible that the case raised claims on Morris's behalf. But the opinion treats the whole case as a joke, and it is unclear how much Justice Hill is embellishing the allegations in his description of the claim. *See id.* at 2472 (referring to the mouse as "a trespasser [who] could accordingly be ejected by such force as was necessary," noting that the water pressure was not "excessively forceful," and quoting the well-known poem "To a Mouse" by Robert Burns); *see also* Stone, *supra*, at n.23a (noting the claim being treated as "humorous"). I tried to obtain a copy of the complaint from the Suffolk County Supreme Court to see whether Morris was listed as a party, but the clerk's office had no record of the case. Given the opinion's vague characterization of the claims, the lack of any discussion of Morris as a plaintiff, and my inability to see how the case was pleaded in the complaint, I hesitate to designate this case as the first to involve an animal plaintiff. The history is just too ambiguous.

(albeit somewhat indirectly).[39] *Jones v. Butz* unsuccessfully challenged the constitutionality of provisions of the federal Humane Methods of Slaughter Act.[40] Although the complaint did not name the animals themselves as separate plaintiffs, it did designate animal rights activist Helen Jones "as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States" and referred to the animals as "real parties in interest."[41] Because there were numerous human and organizational plaintiffs, the district court never addressed

39. *Jones v. Butz* was the first U.S. case to include animals as rights-holding claimants, but it was not the first case ever to do so. That distinction evidently goes to a Brazilian case filed in 1972, a year before *Jones*, seeking a writ of habeas corpus for all birds in captivity. Recurso Em Habeas Corpus, S.T.F.J., No. 50.343, Relator: Des. Djaci Falcão, 3.10.1972, 892, Diaro da Justiça [D.J.], 10.11.1972, 807 (Braz.) (filing on behalf of all birds). The case is discussed in Franceschini, *supra* note 8, at 95 (noting the importance of the case as being highly progressive for the time period and that it provided a framework for similar legal arguments on behalf of animals, although the claims were unsuccessful at the time). *See also* Tagore Trajano de Almeida Silva, *Brazilian Animal Law Overview: Balancing Human and Non-Human Interests*, 6 J. ANIMAL L. 81, 89–90 (2010) (discussing animal habeas corpus cases in general and case number 50.343 specifically); HERON J. DE SANTANA GORDILHO, ANIMAL ABOLITIONISM: HABEAS CORPUS FOR GREAT APES THEORY 88–90 (2d ed. 2017) (summarizing the case and noting the writ had several procedural errors). The Society for the Prevention of Cruelty to Animals and a bird advocate, Fortunato Benchimol, filed the case, seeking to defend the liberty interests of caged birds. de Almeida Silva, *supra*, at 89 (noting that the district judge found that it was not a case of habeas corpus and that a specific plaintiff needed to be named, not "any birds"). The Brazilian Federal Supreme Court affirmed the dismissal of the case, holding that animals are a "thing or good, only being the object of law, never . . . a subject of law." DE SANTANA GORDILHO, *supra*, at 89–90. The court could not conceive of an animal as a "right holder." DE SANTANA GORDILHO, *supra*, at 90. A subsequent Brazilian habeas corpus case on behalf of a chimpanzee named Suiça made more headway in 2006, with the judge granting a hearing on the issue, but sadly, Suiça died under mysterious conditions before the hearing. de Almeida Silva, *supra*, at 90–91 (detailing the plaintiff's argument that Great Apes were due rights because of their genetic similarities to humans). Brazilian courts have rejected two other habeas cases filed on behalf of chimps. Franceschini, *supra* note 8, at 103–05 (discussing the case of chimpanzees Lili and Debby Megh in 2008 and the case of Jimmy the chimpanzee in 2009).

40. Jones v. Butz, 374 F. Supp. 1284, 1294 (S.D.N.Y. 1974). On the significance of *Jones v. Butz* to the modern American animal law movement, see Joyce Tischler, *The History of Animal Law, Part I (1972 — 1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1, 4–8 (2008).

41. *Jones*, 374 F. Supp. at 1284; *see also* Complaint ¶ 2, *Jones v. Butz*, 374 F. Supp. 1284 (No. 73 Civ. 1).

the propriety of the animals' presence in the caption or their representation by Jones as their next friend and guardian.[42]

In 1978, Sierra Club attorney Michael Sherwood filed the first case naming an endangered species as a plaintiff, *Palila v. Hawaii Department of Land and Natural Resources*.[43] The Palila is a small, bright yellow songbird in the honeycreeper family, now found only in a small area on the island of Hawai'i, amongst the dry forests of mamane and naio trees on the slopes of Mauna Kea.[44] The Sierra Club argued that grazing feral sheep and goats, brought to Hawai'i for sport hunting, were destroying the Palila's habitat, leaving the species vulnerable to extinction.[45] The trial court avoided the question of animal plaintiffhood, holding that the organizational and human co-plaintiffs had standing to pursue the case.[46] In a subsequent related proceeding a decade later, the Ninth Circuit commented in passing that "[a]s an endangered species under the [ESA], the [Palila] also has legal status and wings its way into federal court as a plaintiff in its own right."[47] The court further opined that the Palila had "earned the right to be capitalized since it is a party to this proceeding."[48] In the wake of *Palila*, environmental groups

42. *Jones*, 374 F. Supp. at 1287 ("The plaintiffs are six individuals and three organizations having in common a professed commitment to 'the principle of the humane treatment of animals' and to 'the principle of the separation of church and state.'"). Holzer and Jones used the same approach in 1977 in *Jones v. Beame*, challenging the inhumane confinement of animals at municipal zoos in New York City. Jones v. Beame, 380 N.E.2d 277, 278 (N.Y. 1978). Jones, in addition to being a plaintiff in her individual capacity, sued as "[g]uardian for all animals now confined in the Queens, Prospect Park and Central Park Zoos." *Id.* at 277. The court held that the city's management of the zoos was a nonjusticiable policy question; it did not address the animals' representation by a guardian. *Id.* at 279.

43. Palila v. Hawaii Dep't of Land & Nat. Res., 471 F. Supp. 985, 987 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). For a profile of Sherwood, who also represented other species in several ESA cases, see Tom Turner, *Mike Sherwood: Breaking Legal Ground with a Tiny Bird and King Salmon*, EARTHJUSTICE (Dec. 2, 2013), https://earthjustice.org/features/ourwork/mike-sherwood-breaking-legal-ground-with-a-tiny-bird-and-king-salmon [https://perma.cc/7MPU-JSCJ].

44. *Palila*, AM. BIRD CONSERVANCY, https://abcbirds.org/bird/palila [https://perma.cc/EX4K-8683] (providing an overview of the Palila).

45. *Palila*, 471 F. Supp. at 987.

46. *Id.* at 991–92, 999.

47. Palila v. Hawaii Dep't of Land & Nat. Res., 852 F.2d 1106, 1107 (9th Cir. 1988).

48. *Id.*

continued to name species as plaintiffs alongside human and organizational plaintiffs in ESA cases.[49]

In 1991, in *Hawaiian Crow ('Alala) v. Lujan*, a court finally addressed the question of animal plaintiffhood directly.[50] In that case, the Sierra Club had again named a species—the critically endangered 'Alalā,[51] a Hawaiian crow whose population had dwindled to just twenty-one members at the time of the lawsuit's filing.[52] The district court dismissed the 'Alalā, holding that the species was not a proper plaintiff.[53] The court based its decision on two grounds. First, it held that the ESA confers its cause of action upon "persons" only, thus excluding birds.[54] Second, it held that the Federal Rules of Civil Procedure did not give the 'Alalā the capacity to sue.[55]

That same year, animal protection attorney Steven Wise filed the first case to name an individual animal as a plaintiff, *Kama v. New England Aquarium*.[56] The lawsuit challenged the New England Aquarium's transfer of a dolphin named Kama to the Navy for use in sonar studies in Hawai'i, arguing the transfer violated the MMPA.[57] The district court dismissed Kama from the lawsuit, holding that he lacked standing to sue.[58]

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49. *See, e.g.*, N. Spotted Owl (Strix Occidentalis Caurina) v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988) (naming the N. Spotted Owl as plaintiff along with "a number of environmental organizations"); N. Spotted Owl v. Lujan, 758 F. Supp. 621, 623 (W.D. Wash. 1991) (continuing the litigation following ESA listing).

50. Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 551–52 (D. Haw. 1991) (analyzing animal plaintiffhood).

51. While the court refers to the species as 'Alala, this Article uses the traditional spelling, 'Alalā.

52. *Hawaiian Crow ('Alala)*, 906 F. Supp. at 551.

53. *Id.* at 552 (maintaining the co-plaintiffs, Audubon Societies, as parties).

54. *Id.* at 551–52 (quoting 16 U.S.C. §§ 1540(g)(1), 1532(13)) (concluding that the 'Alalā is not an individual, corporation, partnership, trust, association, or other private entity).

55. *Id.* (citing FED. R. CIV. P. 17(c)) (reasoning that the 'Alalā is not an infant or incompetent person).

56. *See* Docket, Kama v. New Eng. Aquarium, 836 F. Supp. 45 (D. Mass. 1993) (No. 1:91CV11634) (listing the filing date of the complaint as June 14, 1991).

57. Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium, 836 F. Supp. 45, 46–47 (D. Mass. 1993).

58. *Id.* at 50 ("[T]he MMPA and the operation of F.R.Civ.P. 17(b) indicate that Kama the dolphin lacks standing to maintain this action as a matter of law.").

Persuaded by the *Hawaiian Crow* decision, the court held that the MMPA, like the ESA, does not allow animals to bring suit, instead limiting its cause of action to "persons, not animals."[59] The court concluded that "[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."[60] Accordingly, the court ordered Kama removed from the case.[61] The court held that the organizational plaintiffs also lacked standing and dismissed the case.[62]

In 2002, attorney Lanny Sinkin filed *Cetacean Community v. Bush*, a lawsuit on behalf of all of the world's whales, porpoises, and dolphins.[63] The "Cetacean Community," as Sinkin designated the sole plaintiff in the case, alleged that the Navy's use of low-frequency active sonar violated the ESA, MMPA, and National Environmental Policy Act.[64] The Ninth Circuit, with Judge William Fletcher writing for the court, affirmed dismissal of the cetaceans' case.[65] First, addressing the Ninth Circuit's seeming affirmation of animal plaintiffhood in *Palila IV*, the court held that that discussion was nonbinding dicta, "little more than rhetorical flourish[],"[66] and that the question of animal

59. *Id.* at 49 (basing its conclusion on the use of the word "person" in 5 U.S.C. § 702).

60. *Id.* The court also relied on Rule 17(b) of the Federal Rules of Civil Procedure, which states that whether a party has the capacity to sue or be sued depends on the state law of the individual's domicile. *Id.* Because Kama was domiciled in Massachusetts and then Hawai'i, the court looked to the law of both states, concluding that in each state "animals are treated as the property of their owners, rather than entities with their own legal rights." *Id.* at 49–50.

61. *Id.* at 50.

62. *Id.* at 59.

63. Cetacean Cmty. v. Bush, 249 F. Supp. 2d 1206, 1208 (D. Haw. 2003) (noting that the cetacean community includes whales, dolphins, and porpoises, which consists of approximately eighty species).

64. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1171–72 (9th Cir. 2004). Low-frequency sonar entails the use of loud sonic pings that travel hundreds of miles underwater as a means of detecting enemy submarines. *Id.* at 1172. These pings inflict traumatic damage on the sensitive tissues of cetaceans (even causing severe hemorrhage). *Id.* (citing 67 Fed. Reg. 46778). Military sonar also interferes with cetaceans' auditory and sonar systems, which they use to communicate, echolocate, and identify various environmental cues. *Id.*

65. *Id.* at 1171.

66. *Id.* at 1173. Similarly, in *Cook Inlet Beluga Whale v. Daley*, Judge James Robertson called the naming of the whale species as a plaintiff "a *beau geste*" (that is, a nice gesture) that was of "no legal significance." 156 F. Supp. 2d 16, 18 n.2 (D.D.C. 2001).

plaintiffhood was one of first impression.[67] Although the court took the bold step of recognizing that animals could have constitutional standing under Article III, it ultimately dismissed the cetaceans' complaint, holding that they lacked *statutory* standing under the applicable federal statutes.[68]

In recent years, three animal rights groups—the Nonhuman Rights Project (NHRP), People for the Ethical Treatment of Animals (PETA), and the Animal Legal Defense Fund (ALDF)—have filed a number of high-profile cases naming animals as plaintiffs or relators.

The NHRP, founded by Steven Wise (the lead attorney in Kama's case), has filed a series of high-profile cases on behalf of animals, seeking writs of habeas corpus for chimpanzees and elephants.[69] The first such case was *NHRP v. Lavery*, which sought a writ of habeas corpus on behalf of Tommy, a chimpanzee confined alone in Gloversville, New York.[70] Similar cases sought freedom for Hercules and Leo, chimpanzees used in research at Stony Brook University, and Kiko, a former chimpanzee actor confined in a cage in a storefront in Niagara Falls.[71] The Nonhuman Rights Project later filed cases on behalf of Beulah, Karen, and Minnie, elephants confined at the Commerford Zoo in Connecticut; Happy, an elephant confined at the Bronx

67. *Cetacean Community*, 386 F.3d at 1173–74 ("Because we did not hold in *Palila IV* that animals have standing to sue in their own names under the ESA, we address that question as a matter of first impression here.").

68. *Id.* at 1175–79. The court reasoned that the text of Article III does not explicitly limit the ability to bring a claim to humans and noted that suits can be brought in the name of ships and corporations. *Id.* at 1976 ("[W]e see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.").

69. *See generally* Steven M. Wise, *The Struggle for the Legal Rights of Nonhuman Animals Begins — The Experience of the Nonhuman Rights Project in New York and Connecticut*, 25 ANIMAL L. 367 (2019) (detailing cases filed through 2019). NHRP has since filed cases in California, Colorado, Hawai'i, and Michigan. *See infra* note 72.

70. *Lavery I*, 998 N.Y.S.2d 248, 249 (N.Y. App. Div. 2014) (holding that a chimpanzee is not entitled to the protections of a writ of habeas corpus).

71. *See* Nonhuman Rts. Project, Inc. *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652, 653 (N.Y. App. Div. 2015) (seeking an order directing the transfer of Kiko to a different facility); *see also* Nonhuman Rts. Project, Inc. *ex rel.* Hercules v. Stanley, 16 N.Y.S.3d 898, 900 (N.Y. Sup. Ct. 2015) (seeking an order directing the release of the pair to a sanctuary in Florida).

Zoo; Nolwazi, Amahle, Vusmusi, and Mabu, elephants confined at the Fresno Chaffee Zoo in California; Jambo, Kimba, LouLou, Lucky, and Missy, elephants confined at the Cheyenne Mountain Zoo in Colorado; Mari and Vaigai, elephants confined at the Honolulu Zoo; and Louie and six other chimpanzees confined at the DeYoung Family Zoo in Michigan.[72] These cases argued that the animals' autonomous nature and sophisticated cognitive capacities entitle them to writs of habeas corpus to protect their common law interests in liberty and equality. As discussed in more detail below, courts have refused to recognize animals' eligibility for habeas relief, holding that they lack legal personhood, legal rights, and legal standing.[73]

The controversial animal rights group PETA has filed several cases with animal plaintiffs. The first was *Tilikum v. Sea World*, filed on behalf of five orcas (Tilikum, Katina, Corky, Kasatka, and Ulises).[74] The lawsuit argued that the orcas' captivity, including their capture from the wild and their forced labor for Sea World, violated the Thirteenth Amendment's prohibition of slavery.[75] The district court dismissed the case for lack of

72. Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 840 (Conn. App. Ct. 2019) (seeking a writ of habeas corpus for Beulah, Karen, and Minnie); Nonhuman Rts. Project, Inc. *ex rel.* Happy v. Breheny, 197 N.E.3d 921, 923 (N.Y. 2022) (seeking a writ of habeas corpus for Happy); Petition for a Common Law Writ of Habeas Corpus, Nonhuman Rts. Project, Inc. *ex rel.* Amahle v. Fresno's Chaffee Zoo Corp., No. 22-517751 (Super. Ct. Cal. May 3, 2022) (seeking a writ of habeas corpus for Amahle, Nolwazi, and Vusmusi); Press Release, Nonhuman Rts. Project, Civil Rights Group Seeks Hearing in California's Highest Court on Behalf of Fresno Chaffee Zoo Elephants (Aug. 29, 2023), https://www.nonhumanrights.org/blog/hearing-sought-ca-supreme-court [https://perma.cc/438Z-BWEL] (noting that Mabu was added as a plaintiff in February of 2023); Verified Petition for Writ of Habeas Corpus, Nonhuman Rts. Project, Inc. v. Cheyenne Mountain Zoological Soc'y, No. 2023CV31236 (June 29, 2023) (seeking a writ of habeas corpus for Jambo, Kimba, LouLou, Lucky, and Missy); Petition for a Common Law Writ of Habeas Corpus, Nonhuman Rts. Project, Inc. *ex rel.* Mari v. Honolulu, No. 1CCV-23-0001418 (Haw. Cir. Ct. Oct. 31, 2023) (seeking a writ of habeas corpus for Mari and Vaigai); Complaint for Writ of Habeas Corpus, Nonhuman Rts. Project, Inc. *ex rel.* Prisoner A (aka Louie) v. DeYoung Family Zoo, No. 23-17621-AH (Mich. Cir. Ct. Dec. 4, 2023) (seeking a writ of habeas corpus for Louie and six unnamed chimpanzees).

73. *See infra* Part IV.A.2.

74. *See* Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

75. *Id.* at 1261 ("Next Friends contend that the orcas are being held as slaves because they are (1) held physically and psychologically captive;

standing, holding that the protections of the Thirteenth Amendment apply only to human beings.[76] PETA's other high profile animal plaintiff lawsuit is the notorious "monkey selfie" case, *Naruto v. Slater*, filed on behalf of a macaque named Naruto.[77] The lawsuit alleged that Naruto held the copyright to a photograph he took when he clicked the shutter on a camera set up by wildlife photographer David Slater.[78] The Ninth Circuit affirmed the district court's dismissal.[79] The panel felt bound to acknowledge *Cetacean Community*'s holding that animals have Article III standing, but it held that the Copyright Act provides no statutory standing for animals.[80]

ALDF has also sought to transform animals' legal status to allow their plaintiffhood. In 2018, ALDF filed *Justice v. Vercher*, a tort suit seeking damages on behalf of Justice, a horse whose former owner subjected him to severe animal neglect, leaving

(2) without the means of escape; (3) separated from their homes and families; (4) unable to engage in natural behaviors and determine their own course of action or way of life; (5) subjugated to the will and desires of Sea World; (6) confined in unnatural, stressful and inadequate conditions; and (7) subject to artificial insemination or sperm collection for the purposes of involuntary breeding.").

76. *Id.* at 1264 ("As 'slavery' and 'involuntary servitude' are uniquely human activities, as those terms have been historically and contemporaneously applied, there is simply no basis to construe the Thirteenth Amendment as applying to non-humans.").

77. *See* Naruto v. Slater, 888 F.3d 418, 418 (9th Cir. 2018) (filing on behalf of Naruto as his Next Friends).

78. *Id.* at 424 ("[T]he complaint alleges that Naruto is the author and owner of the Monkey Selfies. The complaint further alleges that Naruto has suffered concrete and particularized economic harms as a result of the infringing conduct by the Appellees, harms that can be redressed by a judgment declaring Naruto as the author and owner of the Monkey Selfies.").

79. *Id.* at 427.

80. *Id.* at 426. In 2021, PETA filed its most recent lawsuit with animal plaintiffs, *30 Barn Owls v. Vilsack*, on behalf of barn owls that Johns Hopkins University used in biomedical experiments. Complaint, 30 Barn Owls v. Vilsack, Case 1:21-cv-00968 (D.D.C. Apr. 8, 2021). The lawsuit argued that the exclusion of the owls from the federal law that governs animal research, the Animal Welfare Act, constituted an unconstitutional bill of attainder. *Id.* at 2–10. The district court dismissed the case for lack of next friend standing. Memorandum Opinion, 30 Barn Owls v. Vilsack, Case 1:21-cv-0968 (D.D.C. Feb. 1, 2022) (holding that there is no basis in federal law for next friend standing on behalf of animals).

him emaciated with frostbite on his genitals.[81] The Oregon Court of Appeals affirmed the dismissal of Justice's case, holding that he lacked legal capacity, legal personhood, and legal rights.[82] In another high-profile case, ALDF used a federal discovery procedure to obtain subpoenas for depositions of experts in a Colombian case brought by a community of hippopotamuses—the so-called "cocaine hippos" of the late narcotics trafficker Pablo Escobar.[83]

This brief history illustrates two important points. First, the stakes in animal plaintiffhood cases are high. For animals like Tilikum, the orca (who died in captivity),[84] or Happy, the elephant (who is still held at the Bronx Zoo),[85] the capacity to serve as a litigant may mean the difference between a life of captivity and the possibility of flourishing at a sanctuary. For species on

81. Complaint at ¶¶ 43–53, Justice *ex rel.* Mosiman v. Vercher, No. 18CV17601 (Or. Ct. App. May 1, 2018) (detailing the claim for relief). I am a former ALDF attorney and director of litigation, and I served as lead counsel in Justice's case.

82. Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 142 (Or. Ct. App. 2022) ("Although Oregon law recognizes an animal's sentience and ability to experience pain, stress, fear, and suffering, it does not currently recognize an animal's legal capacity to hold rights and assert them in court."). In February 2023, the Oregon Supreme Court declined to review the appellate decision. Justice *ex rel.* Mosiman v. Vercher, 524 P.3d 964 (Or. 2023).

83. *See* Order, *In re* Community of Hippopotamuses Living in the Magdalena River, No. 1:21-mc-23 (S.D. Ohio Oct. 15, 2021) (authorizing issuance of the requested subpoenas for use in foreign proceedings). ALDF's press release and the subsequent media frenzy described the court's order as a groundbreaking judicial recognition of animals as legal persons. *See* Press Release, Animal Legal Def. Fund, Animals Recognized as Legal Persons for the First Time in U.S. Court (Oct. 20, 2021), https://aldf.org/article/animals-recognized-as-legal-persons-for-the-first-time-in-u-s-court [https://perma.cc/7FEV-DLKN] (describing the court's order as the first such recognition of animals as legal persons in a U.S. court). But this characterization overstates the content, context, and import of the order. Although the court implicitly recognized the hippos as "interested persons" under 28 U.S.C. § 1782, the order contains no analysis or discussion of the theoretical issues surrounding animal personhood. *See* Order, *supra* (offering no discussion of personhood).

84. *See* Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc., 842 F. Supp. 2d 1259, 1261 (S.D. Cal. 2012); Camila Domonoske, *Tilikum, SeaWorld's Famed Orca and Subject of 'Blackfish,' Dies*, NPR (Jan. 6, 2017), https://www.npr.org/sections/thetwo-way/2017/01/06/508534005/tilikum-seaworlds-famed-orca-and-subject-of-blackfish-dies [https://perma.cc/2HZ7-39KK] ("[Tilikum] died Friday morning surrounded by trainers and veterinary staff.").

85. *See* Nonhuman Rts. Project, Inc. *ex rel.* Happy v. Breheny, 197 N.E.3d 921, 923 (N.Y. 2022) (denying a writ of habeas corpus to elephant Happy).

the brink of extinction, plaintiffhood may be an important means of protecting animals from threats to their very existence. Second, these cases illustrate judicial resistance to animal plaintiffhood, which this Article argues is misplaced. Courts' unduly restrictive beliefs about the nature of personhood, legal rights, capacity, and standing have often led them to erroneously deny animals their day in court.

II. WHY PLAINTIFFHOOD FOR ANIMALS?

Before delving into the theoretical and doctrinal issues that animal plaintiffhood presents, we should consider the normative reasons why animals *ought* to be plaintiffs. What are the rationales for including animals within the class of entities with the ability to initiate litigation? This Part makes the normative case for animal plaintiffhood as a matter of procedural and substantive justice and as a means of ensuring the expedient enforcement of the legal rights that animals already possess.

The first reason to recognize animals' plaintiffhood is a fundamental issue of justice. Ensuring that injured individuals have access to judicial intervention when their rights are violated is a central component of both procedural and substantive justice.[86] If animals are subjects of substantive justice—if they are entitled to make certain normative claims about how they ought to be treated (or have such claims made on their behalf)—then they ought to have procedural access to the forums we use to protect their substantive entitlements. And indeed, animals are subjects of justice, as philosophers like Martha Nussbaum and Robert Garner have persuasively argued.[87] Their treatment is not simply an issue of kindness or charity, but one of basic and fundamental entitlements that stem from the fact that animals

86. *See, e.g.*, Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1797–800 (2001) (describing the importance of access to the legal system as well as our collective failure to achieve access to justice for many human beings). *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004) (discussing the unmet need for legal services and lack of access to justice in the American legal system).

87. *See generally* MARTHA C. NUSSBAUM, JUSTICE FOR ANIMALS: OUR COLLECTIVE RESPONSIBILITY (2022) (defending the applicability of principles of justice to animals and defending their substantive entitlement to flourishing lives); ROBERT GARNER, A THEORY OF JUSTICE FOR ANIMALS (2013) (proposing a theory of justice for animals and defending animals' entitlements to substantive rights).

are sentient beings with experiential well-being and the capacity to flourish.[88] As Nussbaum puts it,

> When I say that the mistreatment of animals is unjust, I mean to say not only that it is wrong *of us* to treat them in that way, but also that they have a right, a moral entitlement, not to be treated in that way. It is unfair *to them*.[89]

This entitlement arises from a basic conception of justice that requires that we give each member of the moral community that which they are due, tailored to the specific needs of their form of life and sensitive to what it means for them to flourish without unjust impediments.[90] The justice-based normative argument for animal plaintiffhood posits that sentient animals are members of the moral community and that they are due substantive legal protection of their interests.[91] These substantive protections could range from a simple prohibition on sadistic or gratuitous cruelty to a robust defense of animals' fundamental rights to life, bodily liberty, and bodily integrity.[92]

Animals are not only individual subjects of justice, but as philosopher Robert Jones argues, their treatment is an issue of

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88. NUSSBAUM, *supra* note 87, at 3–4; *see also* Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 299, 305–06 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (advocating for animal flourishing and dignity).

89. Nussbaum, *supra* note 88, at 302.

90. NUSSBAUM, *supra* note 87, at 152–53.

91. *See* NUSSBAUM, *supra* note 87, at 1–8 (defining the ethical significance of animals' capacity to flourish and its relationship to justice); GARNER, *supra* note 87, at 45–49 (discussing the relationship between morality and justice, and defending animals as recipients of justice). On animals' belonging in the moral community, see generally LORI GRUEN, ETHICS AND ANIMALS: AN INTRODUCTION (2d ed. 2021) (2011) (discussing various theories of animal ethics); LORI GRUEN, ENTANGLED EMPATHY: AN ALTERNATIVE ETHIC FOR OUR RELATIONSHIPS WITH ANIMALS (2015) (defending a theory of animal ethics based on our "entangled" relationships with animals); TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983) (defending a rights-based theory of animal ethics); PETER SINGER, ANIMAL LIBERATION (2009 rev. ed.) (1975) (defending a utilitarian, interest-based theory of animal ethics).

92. *See* Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40 OXFORD J. LEGAL STUD. 533, 538–39, 549–50 (2020) (distinguishing between weak, or simple, rights that protect animals' secondary interests and strong rights that protect animals' fundamental interests).

collective *social* justice.[93] Jones conceives of social justice as comprising (1) the protection of the rights of the least-advantaged members of society, (2) concern for the equitable distribution of benefits and burdens amongst society, and (3) an opposition to systemic domination and oppression.[94] Given this definition, animal rights is a social justice issue. Animals, as a class, are subjected to a wide variety of exploitative, marginalizing, and violent practices, shouldering the burdens of human progress while being denied the ability to flourish—all of which humans rationalize through cultural narratives about animals' inferiority.[95] As such, animal justice is not only an issue of just deserts for individuals but also about contesting unjust structural interferences with animals' ability to collectively thrive in their own communities.[96]

As individual and collective subjects of justice, animals are entitled to substantive protections, which may take the form of legal rights.[97] Garner argues, "If we think that animals have moral standing, that we have direct duties to them (a relatively uncontroversial claim), then it is appropriate to frame these obligations in the language of justice, because justice entails legal compulsion."[98] One significant way we recognize the justice-based claims of those who have been harmed is through plaintiffhood.[99] Plaintiffhood is a way of acknowledging someone as aggrieved, which is fundamentally a question of justice—of recognizing the complainant as a member of our moral community

93. Robert C. Jones, *Animal Rights Is a Social Justice Issue*, 18 CONTEMP. JUST. REV. 467, 473–75, 477–78 (2015) (applying social justice theories to animals and arguing that animal rights should be considered a social justice issue).

94. *Id.* at 468. To say that animal rights is a social justice issue is not to compare it to or rank it in relation to other social justice issues, but simply to place it in its proper context. *Id.*

95. *See, e.g.*, Lori Gruen, *The Faces of Animal Oppression*, *in* DANCING WITH IRIS: THE PHILOSOPHY OF IRIS MARION YOUNG 161, 162–65 (Ann Ferguson & Mechthild Nagel eds., 2009) (framing humans' treatment of animals as a form of oppression).

96. *Id.* at 166 (arguing that exploiting and marginalizing nonhuman animals strips them of their power and control, thus frustrating or denying the group the chance to live their lives as their own).

97. NUSSBAUM, *supra* note 87, at 112, 279 (explaining the role of law in enforcing animals' substantive entitlements to justice).

98. GARNER, *supra* note 87, at 59.

99. *See generally* Part III.A (discussing the etymology and significance of plaintiffhood).

who has been treated unjustly.[100] If animals are subjects of justice, if they are entitled to be treated a certain way, then denying them access to the forums we use to protect interests and enforce duties deprives them of procedural justice and, consequently, substantive justice.[101]

A second reason for animal plaintiffhood is instrumentalist. Allowing animals to be plaintiffs promotes the ends of existing animal protection laws and the principles underlying private law by expanding the class of entities that can civilly enforce existing law. Cass Sunstein notes that although animals already have substantive legal rights (a point discussed in detail below[102]), "[t]he reason the relevant rights do not matter in the world—to the extent that they do not—is that little enforcement activity is directed against violations."[103] The systematic underenforcement of animal laws stems from a variety of causes, including regulatory capture, agency apathy, ideological anthropocentrism, prosecutorial discretion, resource limitations, and the extensive political and social power of industries that exploit animals. Prosecutors are sometimes reluctant to prosecute animal cruelty cases due to resource constraints, competing institutional priorities, or lack of experience with the unique evidentiary issues that cruelty cases present.[104] Prosecutors are especially reluctant to prosecute corporate and institutional animal abusers, which inflict suffering on animals on a scale that vastly exceeds that of individuals who commit animal cruelty.[105] At the

100. *See infra* Part III.A.

101. See *supra* text accompanying notes 86–87, for a discussion on how procedural and substantive justice protect an aggrieved party's interests and duties owed them.

102. *See infra* Part IV.B.2.

103. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1363 (2000). *See generally* M.B. Rodriguez Ferrere, *Animal Welfare Underenforcement as a Rule of Law Problem*, 12 ANIMALS 1411 (2022) (describing the underenforcement of animal protection laws).

104. *See Why Prosecutors Don't Prosecute*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/why-prosecutors-dont-prosecute [https://perma.cc/CRT7-M3ZL] (explaining that prosecutors often do not prosecute because animals are a low priority for underfunded and overwhelmed courts and because prosecutors are sometimes unable to prove beyond a reasonable doubt that a perpetrator is guilty due to lack of evidence).

105. *See* Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250, 256–57 (2021) (recognizing the difficulty of corporate prosecution for animal cruelty due to the perpetrator's high status and animal victim's low status as well as the systemic nature of the cruelty).

federal level, critics have cataloged the United States Department of Agriculture's chronic failures to enforce the Animal Welfare Act and the Humane Methods of Slaughter Act by promulgating excessively permissive regulations,[106] failing to conduct effective inspections,[107] failing to levy meaningful penalties for violations,[108] and issuing licenses to substandard facilities.[109]

One possible solution to the problem of underenforcement is for interested humans or animal protection organizations to be plaintiffs in lawsuits that defend animals' interests. But this solution is imperfect, both practically and jurisprudentially. Practically speaking, the animal protection movement is often thwarted on procedural grounds because of the awkwardness of recasting animals' injuries as human injuries for standing purposes, often leaving animals' rights unenforced.[110]

106. *See, e.g.*, Katharine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 952–55 (2002) (pointing to the U.S. Department of Agriculture's (USDA's) capitulation to pressure from the research community to soften the minimum requirements from requiring at least thirty minutes of daily exercise to dogs, to performance standards without specific minimums).

107. *See, e.g.*, Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 116–19 (2011) (describing a 2009 inspection of Bushway Packing during which a USDA inspector looked on as animal abuse occurred and permitted its continued operations until the Humane Society of the United States opened an investigation into the plant); Swanson, *supra* note 106, at 956–57 (describing how the Animal and Plant Health Inspection Services (APHIS) frequently gives prior notice to research facilities, allowing them to modify their operations ahead of inspections).

108. *See, e.g.*, Delcianna J. Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 OHIO ST. L.J. 451, 489–93 (2018) (providing of high recidivism rates in light of lackluster AWA enforcement); Swanson, *supra* note 106, at 956–57 (finding that USDA inspectors routinely demonstrate reluctance to enforce the AWA with the harsher penalties permitted under the statute).

109. *See, e.g.*, Delcianna J. Winders, *Administrative License Renewal and Due Process—A Case Study*, 45 FLA. ST. U. L. REV. 539, 541–43 (2018) (describing USDA's practice of issuing AWA licenses to facilities that chronically violate the statute).

110. *See, e.g.*, Leider v. Lewis, 394 P.3d 1055, 1065 (Cal. 2017) (rejecting injunctive relief action by taxpayer seeking to enforce animal cruelty law against municipal zoo that confined elephant); Animal Legal Def. Fund v. Cal. Exposition & State Fairs, 192 Cal. Rptr. 3d 89, 99 (Cal. Ct. App. 2015) (rejecting taxpayer standing to civilly enforce animal cruelty law against pig exhibition that confined pigs in small metal crates); Animal Legal Def. Fund v. Mendes, 72 Cal. Rptr. 3d 553, 559–61 (Cal. Ct. App. 2008) (rejecting consumer protection standing to civilly enforce animal cruelty law against calf ranch that confined calves

Jurisprudentially speaking, authorizing humans to be plaintiffs in cases where defendants have violated animals' legal rights would run afoul of the real-party-in-interest rule, which requires cases to be brought in the name of the party that has actually suffered the injury that the lawsuit seeks to redress.[111]

A more direct means of closing the enforcement gap is to expand the class of plaintiffs to include those directly injured by violations of these laws—the animals themselves. Doing so would create more opportunities to ensure these laws are vigorously enforced, even in the face of prosecutorial apathy and agency indifference.[112] Moreover, allowing animals to civilly enforce criminal cruelty statutes would allow for more just remedies, such as prospective injunctive relief that stops abuse and suffering,[113] a promising alternative to the carceral remedies that sometimes accompany criminal animal cruelty prosecutions.[114]

Animal plaintiffhood would also promote the goals of private law, including compensating injured individuals, appropriately allocating liability, and deterring undesirable conduct through financial disincentives.[115] If animals were plaintiffs in tort suits,

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in small hutches); Humane Soc'y of U.S. v. State Bd. of Equalization, 61 Cal. Rptr. 3d 277, 287–89 (Cal. Ct. App. 2007) (rejecting taxpayer standing to civilly enforce animal cruelty law against state for offering incentives to farms to confine egg-laying hens in small cages).

111. *See* 67A C.J.S. *Parties* § 12 (2023) ("The general rule at common law is that every action must be brought in the name of the person whose legal right has been invaded or infringed."); FED. R. CIV. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest.").

112. *See generally* Winders, *supra* note 108, at 481–87, 489–93 (discussing agency indifference).

113. There are several methods of applying the standards of criminal anticruelty laws in civil litigation, including private rights of action, nuisance, and negligence per se. *See* Matthew Liebman, *Litigation & Liberation*, 49 ECOLOGY L.Q. 715, 744 (2022) (discussing ALDF's use of public nuisance action to enjoin unlawfully cruel treatment of animals at a zoo).

114. For a critique of carceral animal law, see JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT (2019); CARCERAL LOGICS: HUMAN INCARCERATION AND ANIMAL CAPTIVITY (Lori Gruen & Justin Marceau eds., 2022) (collecting essays critiquing the animal rights movement's use of retributive and punitive approaches to criminal justice).

115. RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST.1979) (describing the purpose of damages as, inter alia, "to give compensation . . . for harms" and "to . . . deter wrongful conduct"); *see also* 74 AM. JUR. 2D *Torts* § 2 (2023) ("Tort law is primarily designed to vindicate social policy. Public policy favors a

for example, they could recover damages that their guardians could use to repair their veterinary injuries and to provide hedonic counterweights to the suffering they have endured. Although, as in the human case, money cannot itself undo the injury an animal has suffered, it can be used to repair injuries through medical treatment or to purchase goods and experiences that offset the negative utility the plaintiffs have experienced. Secondarily, damages awards and injunctive relief can deter or even halt tortious and socially disadvantageous behavior.[116]

Allowing animals to serve as plaintiffs thus forwards the basic interests of justice, the policy objectives of statutory laws, and the compensatory and deterrent ends of private law. Courts have nevertheless expressed policy-related concerns about animal plaintiffhood. In *Justice v. Vercher*, the Oregon trial court concluded that recognizing animals as litigants "would likely lead to a flood of lawsuits whereby non-human animals could assert claims we now reserve just for humans and human creations such as business[es] and other entities."[117] Similarly, the New York Court of Appeals, in *Nonhuman Rights Project v. Breheny*, feared that allowing animals to use the writ of habeas corpus to contest their captivity would lead to an "inevitable flood of petitions."[118] This "would have an enormous destabilizing impact on modern society" and "would have significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others) and medical research efforts."[119] Professor Richard Cupp has raised similar objections to animal personhood, and by extension, plaintiffhood.[120] He argues that allowing

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tortfeasor being responsible for the harm its tortious conduct causes. True tort claims seek compensation for injuries caused by wrongful conduct that has been recognized as detrimental to an ordered society." (footnotes omitted)).

116. *See, e.g.*, Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183 (2011) ("The tort system is . . . carried out with the hope that civil justice . . . limits the possibility of a repetition of plaintiff's tragedy. It is about deterrence.").

117. Opinion Letter, Justice v. Vercher, No. 18CV17601 (Wash. Cnty. Cir. Ct. Sept. 17, 2018).

118. Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 929 (N.Y. 2022).

119. *Id.*

120. *See* Richard L. Cupp, Jr., *Considering the Private Animal and Damages*, 98 WASH. U. L. REV. 1313, 1315 (2021) ("[A]llowing the horse [in *Justice v.*

animals to be plaintiffs in litigation would create "a massive pool of . . . potential plaintiffs."[121]

Yet these arguments reveal what Supreme Court Justice William Brennan famously called "a fear of too much justice."[122] If, philosophically speaking, animals are entitled to justice,[123] and if, jurisprudentially speaking, they have legal entitlements that courts could protect, then the fact that we violate the rights of animals and subject them to institutionalized injustices on an enormous scale seems an odd justification for animals' continued exclusion from courts. If animals are drowning in a flood of injustice and illegal treatment—which is what these fears confess—then we *ought* to open the floodgates of litigation.

Moreover, to say that animals are conceptually eligible to be plaintiffs is not to say that every animal can be a litigant in every case or that every animal's injury will give rise to a justiciable controversy. A variety of gatekeeping doctrines limit who can be a proper plaintiff in a particular case.[124] For example, a plaintiff must have suffered the invasion of a legally protected interest, they must be entitled to the relief that they seek, and they must have a cause of action under the common law, applicable statute, or constitutional provision at issue in the case.[125] Just as these doctrines limit which humans have valid claims, they will limit animals' claims in specific cases as well. Whether a particular animal has a claim in a particular situation will require case-by-case analysis. But excluding animals from plaintiffhood *ab initio* is both fundamentally unjust and bad policy, because it denies

Vercher] to serve as a tort damages plaintiff would greatly harm society and . . . the radical step of making the horse a plaintiff is unnecessary to obtain justice in the case.").

121. *Id.* at 1324.

122. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting). For a critique of the floodgates rationale for denying access to the courts, see Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013).

123. *See generally* NUSSBAUM, *supra* note 87; GARNER, *supra* note 87.

124. Many critics have rightfully argued that some of these doctrines are too readily deployed to deny substantive justice to human litigants. *See, e.g.*, Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 146–47, 149–55 (2011) (arguing that standing doctrine protects racial and class privilege); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1838 (2018) (arguing that the qualified immunity doctrine unfairly excludes meritorious claims).

125. *See* Sundquist, *supra* note 124, at 121 (describing standing parameters).

animals the ability to vindicate their legal rights and leaves animal protection laws underenforced.[126]

III. CONCEPTUAL ANIMAL PLAINTIFFHOOD

Having described the phenomenon of animal plaintiffhood and explained its rationale, this Article now turns to the question of whether it makes *conceptual* sense to recognize animals as potential plaintiffs. This Part describes the archetypal plaintiff as one who suffers and laments her suffering, then applies that description to cutting-edge research in ethology, concluding that animals meet the conceptual expectations of plaintiffhood.

A. WHAT IS PLAINTIFFHOOD?

What does it mean to be a plaintiff? In the most mundane sense, the plaintiff is the entity that initiates litigation and asserts a legal claim. As *Black's Law Dictionary* defines the term, the plaintiff is "[t]he party who brings a civil suit in a court of law."[127] But the simplicity of this definition tells us little about the conceptual underpinnings of plaintiffhood. What assumptions inhere in our idea of what it means to be a party, to assert a claim, or to complain about one's mistreatment?

To get to the root of the concept of plaintiffhood we will have to dig deeper. Etymology is instructive here.[128] By excavating the roots and linguistic relations of words, we can better understand their connotative meanings, embedded assumptions, and future possibilities.[129]

The etymology of "plaintiff" tells us much about the figure of the plaintiff and what it is that plaintiffs do. The word "plaintiff" derives from the thirteenth-century Anglo-Norman word *plaintif* (or *pleintif*) and the Middle French *plaintif*, noun forms of the

126. *See* Sunstein, *supra* note 103, at 1363 (discussing the underenforcement of animal rights).

127. *Plaintiff*, BLACK'S LAW DICTIONARY (11th ed. 2019).

128. Of course, words change over time, and one must be careful to avoid the etymological fallacy of fixing a word's linguistic meaning in its historical origins. *See* PHILIP DURKIN, THE OXFORD GUIDE TO ETYMOLOGY 27 (2009) (explaining the etymological fallacy: "the idea that knowing about a word's origin, and particularly its original meaning, gives us the key to understanding its present-day use"). My intent is not to pin down the "true meaning" of *plaintiff* but to explore its history and conceptual boundaries.

129. *Id.* at 22–27 (explaining how etymology serves to better understand words, their histories, and the assumptions lying behind words).

adjective *plaintif*, which means "plaintive."[130] A plaintiff is thus one who is plaintive.[131] Plaintive means "[a]fflicted by sorrow; grieving, lamenting."[132] Plaintive has the word "plaint" as its root, "[t]he action or an act of plaining; audible expression of sorrow."[133] Plaining, in turn, means "[t]o complain; *esp*. to make a formal complaint of a grievance to a competent authority."[134] A plaintiff, then, is, simply put, one who *plains*, who complains of a grievance. All of these words derive from the Latin *planctus*, which meant "lamentation," and *plangere*, which meant to beat one's breast in grief.[135] The etymology of "plaintiff" orients us to the acts of suffering, mourning, lamenting, grieving, and complaining.[136]

Conceptually speaking, then, paradigmatic plaintiffs are those who, afflicted with grief or sorrow, lament their condition by complaining.[137] To be a plaintiff is to be the kind of being who has interests, the frustration of which entitles one to complain. Descriptively, this conception accurately conveys what the legal system expects out of plaintiffs: that they be injured and aggrieved in ways that civil litigation can address.[138] Normatively, this conception of plaintiffhood makes sense: those whose interests have been violated are entitled to complain about such violations to defend their interests.

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130. *Plaintiff*, OXFORD ENGLISH DICTIONARY ONLINE, www.oed.com/view/Entry/145008 [https://perma.cc/9SPQ-K3SQ].

131. *Id.*

132. *Plaintive*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/view/Entry/145010 [https://perma.cc/B5T6-JN9R].

133. *Plaint*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/view/Entry/145004 [https://perma.cc/B36P-459C]. Synonyms of "plaint" include "agony, anguish, complaint, cry, dirge, discontent, displeasure, dissatisfaction, distress, expression of discontent, expression of grief, expression of pain, grief, grieving, groan, lament, lamentation, moan, outcry, sigh, sorrow, wail, whine, woe." *Plaint*, BURTON'S LEGAL THESAURUS (6th ed. 2021).

134. *Plain*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/view/Entry/144980 [https://perma.cc/46B4-YF3T].

135. *Planctus*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/dictionary/planctus_n?tab=etymology [https://perma.cc/BR3Q-WXG8].

136. *Plaintiff*, THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (T.F. Hoad ed., 1996) ("whence plaintive," "complaining," and "expressive of sorrow").

137. *Id.*

138. *See generally Plain*, *supra* note 134 (making a formal complaint of grievance to a competent authority, i.e., utilizing the legal system to appeal a grievance to an authority).

To be clear, this Article does not suggest that one needs sophisticated mental abilities to qualify for plaintiffhood. A plaintiff need not have a developed self-awareness or a full understanding of what it means to be aggrieved. We already recognize plaintiffs, such as infants or people with substantial cognitive disabilities, who cannot articulate their grievances in terms that others always readily understand.[139] As such, we entitle them to complain through third-party representatives while still recognizing such individuals as the plaintiff in a case—the one who is aggrieved and complaining.[140] It is enough that these plaintiffs have something to complain about, that someone has violated their legal entitlements in a way that gives rise to their aggrievement.[141]

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139. *See, e.g.*, Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266, 282 n.10 (1990) (taking no issue with Cruzan's plaintiffhood despite being in a "persistent vegetative state" with no indications of significant cognitive function).

140. *Id.* at 267–68 (stating that Cruzan's parents, petitioning on behalf of their daughter, sought court leave to terminate Cruzan's artificial nutrition and hydration).

141. The conception of plaintiffhood I offer here is not intended to be exclusive. There may be other justifications for recognizing the plaintiffhood and personhood of entities who cannot be plaintive or complain in any conventional sense. For example, individuals in a persistent vegetative state have been plaintiffs in litigation (through guardians raising claims on their behalf), despite not having the capacity to engage in the complaining behavior this Article characterizes as typical of plaintiffs. *See, e.g.*, *id.* (raising no issue of Nancy Cruzan's plaintiffhood); Schindler v. Schiavo (*In re* Guardianship of Schiavo), 780 So. 2d 176 (Fla. Dist. Ct. App. 2001) (containing no discussion regarding Theresa Marie Schiavo's ability to be a plaintiff); *In re* Quinlan, 355 A.2d 647 (N.J. 1976) (raising no issue of Karen Quinlan's plaintiffhood). There are still conceptual, ethical, and jurisprudential reasons to give such people the ability to contest their treatment in court as plaintiffs represented by guardians. Those reasons might include the precautionary principle (i.e., acknowledging the limitations of our knowledge of consciousness and erring on the side of caution); the possibility that the person may one day regain their capacity for having interests (e.g., by awakening from a coma or recovering from a chronic vegetative state, where the facts indicate such a possibility); their possession of interests that do not depend on consciousness or sentience (e.g., dignitary interests); or the interests of others (e.g., the societal value of treating unconscious people with respect or the interests of family members). These reasons could ground the plaintiffhood of those who cannot complain or who lack interests altogether, but such arguments are outside the scope of this Article. Likewise, my linking of plaintiffhood with plaintiveness is not intended to categorically exclude the possibility of plaintiffhood for non-sentient natural entities, such as ecosystems, rivers, and mountains. *See, e.g.*, Stone, *supra* note 38, at 456 (proposing conferring legal

B. CAN ANIMALS MEET THE CONCEPTUAL EXPECTATIONS OF PLAINTIFFHOOD?

If a plaintiff is one who, afflicted with grief or sorrow, laments their condition through a complaint, the question becomes: Are animals such beings? Can they be aggrieved or wronged? Can they lament their condition? Can animals complain?[142]

Contemporary cognitive ethology—the study of animal minds—suggests that many animals do act in ways that

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rights and standing "to forests, oceans, rivers and other so-called 'natural objects' in the environment, indeed, to the natural environment as a whole"); Alexandra Huneeus, *The Legal Struggle for Rights of Nature in the United States*, 2022 WIS. L. REV. 133, 133–34 (describing the emerging environmental movement of granting nature positive legal rights worldwide). The plaintiffhood of natural entities might be justified on alternative grounds to the ones offered here, such as their inherent value or based on instrumentalist arguments about the need to protect them for other purposes. Alternatively, it is quite possible that natural entities could meet the sufficient condition for plaintiffhood articulated here: that of being sentient and plaintive. Many indigenous cosmologies recognize natural entities and the Earth itself as conscious and sensitive to the injuries inflicted upon it. *See, e.g.*, Navajo Nation Council Res. CN-69-02, tit. 1 ch.1 § 1 (2002) ("Earth and universe embody thinking,/ Water and the sacred mountains embody planning,/ Air and variegated vegetation embody life,/ Fire, light, and offering sites of variegated sacred stones embody wisdom."); Justine Townsend, Alexis Bunten, Catherine Iorns & Lindsay Borrows, *Rights for Nature: How Granting a River 'Personhood' Could Help Protect It*, CONVERSATION (June 3, 2021), https://theconversation.com/rights-for-nature-how-granting-a-river-personhood-could-help-protect-it-157117 [https://perma.cc/3AJF-YXP3] ("The idea that nature is a sentient being isn't new to Indigenous and other traditional peoples. 'The vision of the Innu is that Nature is living. Everything is alive,' said Chief [Jean-Charles] Piétacho [of the Innu Council of Ekuanitshit].").

142. Of course, one must be careful in generalizing about "animals." As Jacques Derrida observed, "there is an immense multiplicity of other living things that cannot in any way be homogenized, except by means of violence and willful ignorance, within the category of what is called the animal or animality in general." JACQUES DERRIDA, THE ANIMAL THAT THEREFORE I AM 48 (Marie-Louise Mallet ed., David Wills trans., 2008). Different animals have widely varying evolutionary and social histories and, consequently, different capacities, interests, and needs. NUSSBAUM, *supra* note 87, at 152 ("Creatures strive for flourishing in manifold ways that don't line up to be graded on a single scale."). Nevertheless, by paying close attention to the experiences of animals and being attentive to their differences and their similarities, I believe we can learn more about their capabilities in ways that are scientifically, ethically, and politically meaningful.

demonstrate the plaintive nature of the plaintiff.[143] Numerous studies have found in animals the very capacities discussed above as sufficient for plaintiffhood, namely the ability to suffer, complain, and grieve.[144] Many animals are conscious and sentient beings with a rich capacity for a wide variety of experiences.[145] They suffer pain and enjoy pleasure.[146] They experience a range of emotions, including joy, sorrow, fear, frustration, sadness, grief, trepidation, excitement, lust, and compassion, to name just a few.[147] Some animals show an aversion to inequity, which suggests a sense of fairness and justice.[148] Some animals grieve losses, which demonstrates their capacity for lamentation and mourning.[149] These details of animal sentience illustrate that at least some animals, conceptually speaking, qualify for plaintiffhood.

1. Consciousness and Sentience

In 2012, a group of prominent neuroscientists issued the Cambridge Declaration on Consciousness, which recognized that "non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with

143. *See, e.g.*, *infra* Part III.B.2 (discussing various species' aversion to inequity).

144. It warrants emphasis that animals' capacity for negative affective states does not encompass the whole of their beings. Animals also have a rich capacity for positive affective states, including joy, love, connection, and contentment. *See generally* JONATHAN BALCOMBE, PLEASURABLE KINGDOM: ANIMALS AND THE NATURE OF FEELING GOOD pt. 2 (2006) (exploring the kinds of pleasure that animals enjoy).

145. *See, e.g.*, Jonathan Birch, Alexandra K. Schnell & Nicola S. Clayton, *Dimensions of Animal Consciousness*, 24 TRENDS COGNITIVE SCIS. 789, 790–97 (describing five dimensions of consciousness that vary across species).

146. Marc Bekoff, *A Universal Declaration on Animal Sentience: No Pretending*, PSYCH. TODAY (June 20, 2013), https://www.psychologytoday.com/us/blog/animal-emotions/201306/universal-declaration-animal-sentience-no-pretending [https://perma.cc/G2KL-PSBA] ("Animal sentience is a well-established fact. Based on the overwhelming and universal acceptance of the Cambridge Declaration on Consciousness I offer here what I call a *Universal Declaration on Animal Sentience*.").

147. *Id.*

148. *See, e.g.*, *infra* Part III.B.2 (discussing various species' aversion to inequity).

149. *See, e.g.*, Ed Yong, *What a Grieving Orca Tells Us*, ATLANTIC (Aug. 14, 2018), https://www.theatlantic.com/science/archive/2018/08/orca-family-grief/567470 [https://perma.cc/JJB5-G7NF] (describing the grief of an orca mother).

the capacity to exhibit intentional behaviors."[150] As such, the scientists concluded many animals, including all mammals and birds and some invertebrates such as octopuses, are capable of consciousness, that is, subjective experience and awareness.[151] The declaration "has allowed debates about animal consciousness to move on from the old question of whether any non-human animals are conscious to the questions of which animals are conscious and what form their conscious experiences take."[152]

Moreover, consciousness is not a single quantifiable phenomenon or a scale by which we could rank species.[153] There are numerous kinds of consciousness, each of which may be uniquely suited to the evolutionary needs of the entity.[154] Philosophers and neuroscientists such as Jonathan Birch, Alexandra Schnell, and Nicola Clayton argue that we should adopt a "multidimensional approach" to consciousness that recognizes different phenomenological experiences in a non-linear way.[155] This approach

150. Philip Low, The *Cambridge Declaration on Consciousness*, FRANCIS CRICK MEM'L CONF. (July 7, 2012), http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf [https://perma.cc/NQ2Y-3G2M].

151. Philosophers call this form of consciousness "phenomenal consciousness," which consists of "the qualitative, subjective, experiential, or phenomenological aspects of conscious experience," such that "there might be 'something it is like' to be a member of another species." Colin Allen & Michael Trestman, *Animal Consciousness*, STAN. ENCYCLOPEDIA OF PHIL. (substantive revision Oct. 24, 2016), https://plato.stanford.edu/archives/sum2023/entries/consciousness-animal [https://perma.cc/3KCV-7QXB]; *see also* Thomas Nagel, *What Is It Like to Be a Bat?*, 83 PHIL. REV. 435 (1974) (arguing that bats have conscious experiences, even if humans cannot conceive what they are like).

152. Birch et al., *supra* note 145, at 789.

153. *Id.* at 790 ("If we ask, 'Is a human more conscious than an octopus?', the question barely makes sense.").

154. For a fascinating exploration of the complexity of animals' *umwelten*, that is, their distinctive and sometimes unfathomable experiences of the world, see ED YONG, AN IMMENSE WORLD: HOW ANIMAL SENSES REVEAL THE HIDDEN REALMS AROUND US (2022). The biologist Jakob von Uexküll introduced the concept of the *umwelt* to describe the experiential lifeworld of biological entities, mediated through the inputs they receive from their surroundings. JAKOB VON UEXKÜLL, A FORAY INTO THE WORLDS OF ANIMALS AND HUMANS; WITH A THEORY OF MEANING (Joseph D. O'Neil trans., 2010) (1934).

155. Birch et al., *supra* note 145, at 790–97. Birch, Schnell, and Clayton focus on five dimensions of consciousness, each of which may be more or less intense depending on the species (and the individual). These are perceptual richness, evaluative richness, integration at a time, integration across time, and self-consciousness. *Id.* at 790. For example, some animals may have a detailed perceptual awareness of color or bodily sensations, but a poorly developed sense

to consciousness counsels in favor of humility and a precautionary approach to which kinds of beings have experiences that ought to ethically matter.[156]

The existence of conscious awareness in animals is closely related to their sentience. Scientist Lori Marino defines sentience as "a multidimensional subjective phenomenon that refers to the depth of awareness an individual possesses about himself or herself and others."[157] At its most basic, sentience, like consciousness, is the capacity for "qualia," which are "the basic units of experience—the hurt of a pain or the seeing of redness."[158] As Martha Nussbaum succinctly puts it, sentient beings have "a subjective point of view on the world."[159] More than that, though, sentience entails a form of consciousness that distinguishes between experiences that have a positive valence, such as pleasure, and those that have a negative valence, such as pain.[160]

The sentience of many nonhuman animals is well established. Marc Bekoff, a prominent cognitive ethologist, argues that the science on animal sentience is sufficiently clear to warrant a declaration on sentience similar to the Cambridge Declaration on Consciousness.[161] According to Bekoff, "[a] majority of scientists agree with what seems like common sense to most everyone else—many animals have rich and deep emotional lives."[162] Indeed, scientific experiments involving animals often presume their sentience, with animals' capacity to experience a wide range of affective states serving as a foundational

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of self. Or they may be colorblind but have the ability to integrate visual perceptions across time.

156. Jonathan Birch, *Animal Sentience and the Precautionary Principle*, 16 ANIMAL SENTIENCE 1, 2 (2017) ("[I]n the absence of certainty as to whether an animal feels pain, the precautionary principle requires giving the animal the benefit of the doubt." (citation omitted)).

157. Lori Marino, *Sentience*, *in* 3 ENCYCLOPEDIA OF ANIMAL BEHAVIOR 132, 132 (Michael D. Breed & Janice Moore eds., 2010).

158. Marian Stamp Dawkins, *Through Animal Eyes: What Behaviour Tells Us*, 100 APPLIED ANIMAL BEHAV. SCI. 4, 5 (2006).

159. NUSSBAUM, *supra* note 87, at 119.

160. Heather Browning & Jonathan Birch, *Animal Sentience*, 17 PHIL. COMPASS e12822, e12822 (2022).

161. Bekoff, *supra* note 146.

162. Marc Bekoff, *Animal Emotions, Wild Justice and Why They Matter: Grieving Magpies, a Pissy Baboon, and Emphatic Elephants*, 2 EMOTION, SPACE & SOC'Y 82, 83 (2009).

assumption of many types of psychological, behavioral, and physiological research.[163]

Many Indigenous people have long recognized these capacities in animals. Angela McGinnis (Métis) and her colleagues observe that, "[t]raditionally, Indigenous peoples positioned animals as equitable partners in an interconnected social network of human and more-than-human beings, animated with spirit and the ability to act and communicate."[164] According to their research, which coded storytelling data collected from Indigenous elders, animals play a variety of "person roles" in Indigenous belief systems.[165] "These person roles are not metaphorical but rather assume all the sentience and agency that the term *person* implies."[166] According to Margaret Robinson (Mi'kmaq), the Mi'kmaq phrase *msit no'kmaq* ("all my relations") conveys the idea that "humans and animals both experience our lives in the first-person, overcoming fears, having adventures, falling in love, raising families, vanquishing enemies, and having a relationship with *Kisu'lk*, the Creator."[167] According to Mi'kmaq culture, animals are "self-aware rational beings whose existence is *for themselves* rather than *for us*."[168] Sarah Deer (Muscogee (Creek)) and Liz Murphy (Choctaw) note that "[i]n many tribal belief systems, animals are treated and revered as sentient beings, and humans are only one among many creatures deserving of reverence and respect."[169]

Animals' sentience makes them the kind of conscious beings who are not only aware of their experiences but invested in them—they pursue the good and try to avoid the bad. As such,

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163. Helen S. Proctor, Gemma Carder & Amelia R. Cornish, *Searching for Animal Sentience: A Systematic Review of the Scientific Literature*, 3 ANIMALS 882, 884 (2013) ("In fact, many experiments rely upon their animal subjects being sentient.").

164. Angela McGinnis, Adela Tesarek Kincaid, M.J. Barrett, Corinne Ham & Community Elders Research Advisory Group, *Strengthening Animal-Human Relationships as a Doorway to Indigenous Holistic Wellness*, 11 ECOPSYCHOLOGY 162, 162 (2019).

165. *Id.* at 166.

166. *Id.*

167. Margaret Robinson, *Animal Personhood in Mi'kmaq Perspective*, 4 SOCIETIES 672, 674 (2014).

168. *Id.*

169. Sarah Deer & Liz Murphy, *"Animals May Take Pity on Us": Using Traditional Tribal Beliefs to Address Animal Abuse and Family Violence Within Tribal Nations*, 43 MITCHELL HAMLINE L. REV. 703, 707 (2017).

they express a sort of satisfaction when they flourish and a sort of lamentation when they languish. When their languishing is caused by the wrongful action of a blameworthy other, they have something to complain about.

2. Inequity Aversion

One particular manifestation of animal sentience is especially salient for animal complainants: inequity aversion. Inequity aversion is "an affective, cognitive and behavioural response to inequitable outcomes."[170] In its simplest form, it describes an "aversion towards outcomes . . . that yield a higher payoff for a partner relative to one's own payoff."[171] Inequity aversion occurs when an animal recognizes the injustice of unequal pay for equal work.[172] Comparative psychologist Lina Oberliessen and her colleagues describe inequity aversion as a kind of "'fairness detector' driven by the aversion against exploitation."[173] Marc Bekoff and Jessica Pierce argue that "a sense of justice is a continuous and evolved trait" that seems to be pervasive among animals, especially those with well-developed social networks.[174]

There is no shortage of anecdotal evidence of animals responding negatively to unfairness. The philosopher Robert Solomon, for example, described his dog Lou getting upset when her brother Fritz got two treats before she got one: "Lou's ears flap forward, her eyebrows go up, and she utters a soft warning growl."[175] Solomon's anecdotal observation is experimentally confirmed by a study that offered "evidence for the presence of sensitivity toward an unequal reward distribution" in dogs.[176] In the study, researchers asked dogs to offer their paw in exchange

170. Lina Oberliessen, Julen Hernandez-Lallement, Sandra Schäble, Marijn van Wingerden, Maayke Seinstra & Tobias Kalenscher, *Inequity Aversion in Rats,* Rattus Norvegicus, 115 ANIMAL BEHAV. 157, 157 (2016).

171. *Id.* This is called "disadvantageous inequity aversion." *Id.* Individuals of some species also demonstrate "advantageous inequity aversion," which is an aversion to inequality even when it benefits oneself. *Id.*

172. *Id.* at 158.

173. *Id.*

174. MARC BEKOFF & JESSICA PIERCE, WILD JUSTICE: THE MORAL LIVES OF ANIMALS 115 (2009).

175. ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT 106 (1990).

176. Friederike Range, Lisa Horn, Zsófia Viranyi & Ludwig Huber, *The Absence of Reward Induces Inequity Aversion in Dogs*, 106 PROC. NAT'L ACAD. SCIS. 340, 343 (2009).

for a food reward.[177] When dogs were paired with a partner, they responded negatively if their partner was rewarded when they were not.[178] The unrewarded dogs "showed a tendency to a higher refusal rate, a significantly longer hesitation, higher stress levels, and increased looking at the partner when the partner was rewarded and they themselves were not."[179] These findings "suggest that dogs are sensitive to an unequal reward distribution."[180]

In another experiment, primatologists Sarah Brosnan and Frans de Waal trained capuchin monkeys to exchange tokens for food rewards.[181] Normally, capuchin monkeys are happy to trade these otherwise valueless tokens for cucumbers (a "low-value" reward).[182] But when a monkey's cage-mate was able to trade her identical token for a grape (a "high-value" reward), the cucumber-receiving monkey expressed her displeasure at receiving the lower-value reward for the same exchange.[183] Aggrieved monkeys engaged in "active rejection, such as tossing the token or reward out of the test chamber," or, as video of the experiment shows, throwing the cucumber at the researcher and slapping the ground in frustration.[184] Remarkably, the capuchins' sense of unfairness caused them to "forfeit[] a directly accessible food that they readily accept and consume under almost any other set of circumstances."[185] And they do so out of a sense of aggrievement.[186] Like the archetypal plaintiff, they lament their unjust treatment—they complain. Similar experiments have demonstrated inequity aversion in chimpanzees, tamarins, crows,

177. *Id.* at 340.

178. *Id.* at 342.

179. *Id.* at 343. Interestingly, the dogs did not show the same aversion when there was a disparity in the type of reward, such as when their partner was rewarded with sausage when they were rewarded with only bread. *Id.*

180. *Id.* at 344.

181. Brosnan & de Waal, *supra* note 16, at 299.

182. *Id.* at 298.

183. *Id.*

184. *Id.* For the video, see TED Blog Video, *Two Monkeys Were Paid Unequally: Excerpt from Frans de Waal's TED Talk*, YOUTUBE (Apr. 4, 2013), https://www.youtube.com/watch?v=meiU6TxysCg.

185. Brosnan & de Waal, *supra* note 16, at 298.

186. *Id.* at 299.

ravens, and rats, among other species, although some of these conclusions remain controversial.[187]

To be clear, this Article is not proposing that animals must demonstrate an aversion to inequity in laboratory experiments to qualify as plaintiffs.[188] As Bekoff and Pierce note, the animal subjects of fairness studies "are living in controlled captive conditions" and "hav[e] been asked to perform tasks that they don't typically perform in the wild."[189] As such, while these studies are illuminating, they should not be treated as litmus tests. Moreover, while inequity aversion describes one salient type of evidence of animals' capacity to complain about injustices inflicted upon them, it is hardly a necessary one. Like humans, animals can be aggrieved even when they do not perceive the injustices inflicted upon them as unjust.[190] Gorillas, for example, do not show an aversion to inequity in lab experiments,[191] but subjecting a gorilla to pain and suffering or interfering with their ability to thrive runs contrary to their interests as sentient beings, thus giving them something to complain about—the core function of a plaintiff.

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187. *Id.* (demonstrating inequity aversion in capuchin monkeys); Sarah F. Brosnan, Hillary C. Schiff & Frans B.M. de Waal, *Tolerance for Inequity May Increase with Social Closeness in Chimpanzees*, 272 PROC. ROYAL SOC'Y B 253 (2005) (demonstrating the behavior in chimpanzees); Katherine A. Cronin & Charles T. Snowdon, *The Effects of Unequal Reward Distributions on Cooperative Problem Solving by Cottontop Tamarins,* Saguinus Oedipus, 75 ANIMAL BEHAV. 245 (2007) (demonstrating the behavior in tamarins); Claudia A.F. Wascher & Thomas Bugnyar, *Behavioral Responses to Inequity in Reward Distribution and Working Effort in Crows and Ravens*, 8 PLOS ONE e56885 (2013) (demonstrating the behavior in crows and ravens); Oberliessen et al., *supra* note 170 (demonstrating the behavior in rats). Evidence for and against inequity aversion in various species is collected in Teresa Romero, Akitsugu Konno, Miho Nagasawa & Toshikazu Hasegawa, *Oxytocin Modulates Responses to Inequity in Dogs*, 201 PHYSIOLOGY & BEHAV. 104, 104–05 (2019).

188. Indeed, keeping animals in captivity for such experiments is ethically dubious. *Cf.* Elizabeth Tyson, *The Harms of Captivity Within Laboratories and Afterward*, *in* THE ETHICAL CASE AGAINST ANIMAL EXPERIMENTS 192, 192–99 (Andrew Linzey & Clair Linzey eds., 2018) (discussing the harmful effects of captivity on animal subjects).

189. BEKOFF & PIERCE, *supra* note 174, at 111–12.

190. Nussbaum, *supra* note 88, at 303–04.

191. Meghan J. Sosnowski, Lindsey A. Drayton, Laurent Prétôt, Jodi Carrigan, Tara S. Stoinski & Sarah F. Brosnan, *Western Lowland Gorillas (*Gorilla Gorilla Gorilla*) Do Not Show an Aversion to Inequity in a Token Exchange Task*, 83 AM. J. PRIMATOLOGY e233326, e233326 (2021).

3. Grief

Plaintiffhood entails an element of plaintiveness—the feeling of mourning and sadness. Studies of animal grief shed further light on animals' capacity for aggrievement and their conceptual eligibility for plaintiffhood. Animal grief illustrates the kind of rich and deep inner-emotional life of concern and complaint that can give rise to plaintiffhood.

As with inequity aversion, the anecdotal evidence of animal grief is longstanding, and science is beginning to confirm what many people already know.[192] In her book *How Animals Grieve*, anthropologist Barbara J. King describes the evidence for grief displayed by chimpanzees, elephants, goats, chickens, and other animals.[193] King describes grief in animals as the feeling of loss and the corresponding change in behavior that follows the death of another animal with whom one was close.[194] Animals may grieve, regardless of whether they have a cognitive concept of "death."[195] The language King uses to describe animals' grief echoes the etymological roots of "plaintiff" discussed above, especially the aspect of lamentation: cats "keen[] for the dead" with "sad yowls" and cows "vocalize[] with plaintive moos."[196] Dogs, horses, and rabbits "mourn" the loss of their companions.[197]

In 2018, an orca named Tahlequah gained international attention after carrying her deceased calf for seventeen days across 1,000 miles of ocean,[198] an evident act of plaintiveness and mourning.[199] One whale researcher remarked, "I have never seen that kind of grief."[200] When Tahlequah tired, other members of the pod took turns carrying the calf's corpse.[201] Scientists and the public alike referred to the orcas' actions as a form of grief and morning, with Pulitzer Prize-winning science

192. *See* BARBARA J. KING, HOW ANIMALS GRIEVE 2–6 (2013).

193. *Id.*

194. *Id.* at 8–9.

195. *Id.* at 14.

196. *Id.* at 13, 18, 38.

197. *Id.* at 24, 33, 47.

198. Daniel Politi, *Grieving Mother Orca Finally Drops Dead Calf After Carrying Corpse for 17 Days*, SLATE (Aug. 12, 2018), https://slate.com/news-and-politics/2018/08/tahlequah-ends-tour-of-grief-mother-orca-finally-drops-dead-calf-after-carrying-corpse-for-17-days.html [https://perma.cc/8VBK-35FU].

199. Yong, *supra* note 149.

200. *Id.* (quoting Ken Balcomb).

201. *Id.*

journalist Ed Yong remarking, in defense of such characterizations, "[i]t is hardly anthropomorphic to ascribe grief to animals that are so intelligent and intensely social."[202]

Chimpanzees mourn, too. In one report, scientists describe the grief expressed by a group of chimpanzees as a female elder named Pansy died.[203] These responses included "pre-death care of the female, close inspection and testing for signs of life at the moment of death, male aggression towards the corpse, all-night attendance by the deceased's adult daughter, cleaning the corpse, and later avoidance of the place where death occurred."[204] The day after Pansy's death, her surviving companions "were profoundly subdued" and in the following weeks, they "remained lethargic and quiet, and they ate less than normal."[205] The researchers characterize the chimpanzees' behavior as a form of "grief [and] mourning."[206]

Another report describes the reactions of eighteen chimps to the death of an adult chimpanzee, Malaika.[207] The responses to Malaika's body varied substantially, from aggression by males towards her corpse to curiosity, grooming, and sniffing by other members of the group.[208] After researchers removed Malaika's body, eight chimps returned to the site of her death, where a male chimp, Fudge, "began a pant hoot that was joined in chorus by the individuals present."[209] The group engaged in other vocalizations that, according to the report's authors, indicate distress and may constitute "manifestations of mourning."[210]

An observational study of collared peccaries (a pig-like hooved mammal) described significant concern among these

202. *Id.*

203. James R. Anderson, Alasdair Gillies & Louise C. Lock, Pan *Thanatology*, 20 CURRENT BIOLOGY R349, R349–50 (2010).

204. *Id.* at R349.

205. *Id.* at R350.

206. *Id.*

207. Fiona Anne Stewart, Alexander Kenneth Piel & Robert C. O'Malley, *Responses of Chimpanzees to a Recently Dead Community Member at Gombe National Park, Tanzania*, 74 AM. J. PRIMATOLOGY 1, 3 (2012).

208. *Id.* at 3–4.

209. *Id.* at 5.

210. *Id.* at 6.

animals for the body of a dead member of their herd.[211] After an older female peccary died, other members "returned to the dead member of their herd, maintained physical contact with [her], and even guarded the carcass against coyotes."[212] Although the researchers could not determine whether the behavior constituted "grieving," the peccaries' "behavioral reactions toward a deceased individual [were] similar to those detected in a few other highly social species," such as humans, chimpanzees, and elephants, whose capacity for grief is widely accepted.[213]

Another recent study sought to determine whether domestic dogs grieve when another canine member of the household dies.[214] According to the study, "[d]og owners reported several statistically significant changes in the surviving dog after the death of the companion dog, both in terms of activities ('playing', 'sleeping', and 'eating') and emotions (fearfulness), which occurred as a function of the quality of the relationship between the two animals."[215] Although the study could not confirm the existence of grief in dogs, it did find strong correlations between negative emotional behavior and the death of a dog with whom the surviving dog had a strong affiliative bond.[216] These examples of animal grief offer further evidence that animals are the kinds of beings who can mourn, plaint, and lament, all of which situate them conceptually as plaintiffs.

The foregoing exploration of the scientific literature on cognitive ethology establishes that animals do, in fact, have the capacities that we associate with plaintiffs. Animals are conscious and sentient, which means they have interests. Because they have interests, they have something to complain about when those interests are frustrated. Some animals even demonstrate further evidence of aggrievement, including inequity aversion

211. Dante de Kort, Mariana Altrichter, Sara Cortez & Micaela Camino, *Collared Peccary (*Pecari tajacu*) Behavioral Reactions Toward a Dead Member of the Herd*, 124 ETHOLOGY 131, 133–34 (2017).

212. *Id.* at 133.

213. *Id.* at 131, 133, 134.

214. Stefania Uccheddu, Lucia Ronconi, Mariangela Albertini, Stanley Coren, Gonçalo Da Graça Pereira, Loriana De Cataldo, Anouck Haverbeke, Daniel Simon Mills, Ludovica Pierantoni, Stefanie Riemer, Ines Testoni & Federica Pirrone, *Domestic Dogs (*Canis familiaris*) Grieve over the Loss of a Conspecific*, 12 SCI. REPS. 1920, 1920 (2022).

215. *Id.* at 1925.

216. *Id.*

and grief, which, although not necessary for plaintiffhood, illustrate the richness and complexity of animal plaintiveness. As bioethicist Jonathan Crane and theologian Aaron Gross contend, "there is an . . . undeniable sense in which some animals are very much like human litigants: they can make humans feel accused."[217]

The legal system is beginning to acknowledge this richness of animals' lives, with some jurisdictions explicitly recognizing animals as sentient beings.[218] In 2013, the Oregon legislature enacted Oregon Revised Statutes section 167.305, which recognized animals as "sentient beings capable of experiencing pain, stress and fear."[219] Vermont's animal cruelty statute defines animal to mean "all living sentient creatures."[220] In April 2022, the United Kingdom passed the Animal Welfare (Sentience) Act, which established an Animal Sentience Committee to produce reports addressing how government policies "might have an adverse effect on the welfare of animals as sentient beings."[221] Animal sentience is a built-in assumption of the criminal animal cruelty laws that exist in jurisdictions across the world, all of which take for granted animals' capacity to suffer. Legal recognition of animals' sentience helps to codify these assumptions while offering symbolic recognition of animals' moral significance and encouraging progressive judicial interpretations of animal protection laws.[222] Legal recognition of animals' sentience

217. Jonathan K. Crane & Aaron S. Gross, *Brutal Justice? Animal Litigation and the Question of Countertradition*, *in* BEASTLY MORALITY: ANIMALS AS ETHICAL AGENTS 225, 225 (Jonathan K. Crane ed., 2016).

218. *See infra* notes 219–21 (discussing state and international statutes recognizing animal sentience).

219. OR. REV. STAT. § 167.305 (2023). Unfortunately, the Oregon statute fails to acknowledge animals' capacity for positive physical and mental states, including pleasure and joy.

220. VT. STAT. ANN. tit. 13, § 351(1) (2023).

221. Animal Welfare (Sentience) Act 2022, c. 22 (UK), https://www.legislation.gov.uk/ukpga/2022/22/enacted [https://perma.cc/3K5F-M6QE]; *see* Joe Wills, *Lobsters and Octopuses Have Feelings, Says New Animal Welfare Bill – So Will UK Law Change?*, CONVERSATION (Apr. 13, 2022), https://theconversation.com/lobsters-and-octopuses-have-feelings-says-new-animal-welfare-bill-so-will-uk-law-change-181078 [https://perma.cc/B6CB-C7N6] (discussing Animal Welfare (Sentience) Bill).

222. Charlotte E. Blattner, *The Recognition of Animal Sentience by the Law*, 9 J. ANIMAL ETHICS 121, 126 (2019) ("Animals' well-being matters to the law, because it matters to them."); Jane Kotzmann & Morgan Stonebridge, *There Is*

also supports animal plaintiffhood. If plaintiffs are those who are entitled to complain about their mistreatment, then those who can experience mistreatment have something to complain about.[223]

IV. JURISPRUDENTIAL ANIMAL PLAINTIFFHOOD

Once we acknowledge the ability of animals to be plaintiffs in a general conceptual sense, a host of related jurisprudential questions arise. Plaintiffhood requires more than the conceptual ability to complain or be plaintive—one can complain about grievances and be plaintive about harms that do not entitle one

Value in Stating the Obvious: Why United States Legislatures Should Explicitly Recognize Animal Sentience in Their Laws, 30 CORNELL J.L. & PUB. POL'Y 425, 425 (2021) ("While animal sentience is obvious to most humans, expressly acknowledging such in legislation will have important consequences, including implications for statutory interpretation of animal welfare legislation, providing animal welfare legislation with a scientific foundation, and promoting the intrinsic worth of animals.").

223. Supporters of reproductive justice and abortion access may be concerned that the arguments presented here might endanger abortion rights by necessitating plaintiffhood and personhood for embryos and fetuses. But as Professors Sherry Colb and Michael Dorf argue, animal rights and reproductive justice are entirely compatible. SHERRY F. COLB & MICHAEL C. DORF, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS 3 (2016) ("[W]e are pro-choice on abortion and we favor animal rights"). Specifically, the theory defended here does not jeopardize the case for reproductive rights, including access to abortion. Most significantly, there is no evidence that embryos or fetuses are plaintive in the sense discussed here. The scientific consensus is that fetuses are not sentient, conscious, or aware of pain until at least twenty-five weeks of gestation. Susan J. Lee, Henry J. Peter Ralston, Eleanor A. Drey, John Colin Partridge & Mark A. Rosen, *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 947 (2005) ("Evidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester."); Raffaele Falsaperla, Ausilia Desiree Collotta, Michela Spatuzza, Maria Familiari, Giovanna Vitaliti & Martino Ruggieri, *Evidences of Emerging Pain Consciousness During Prenatal Development: A Narrative Review*, 43 NEUROLOGICAL SCIS. 3523, 3523 (2022) ("[I]t is rather unlikely that the infant can be seen as a conscious human before 24 weeks of gestational age . . . ."). Ninety-nine percent of abortions take place before twenty-one weeks' gestation. Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2 [https://perma.cc/BBN4-MC6U]. In the one percent of cases where abortions are performed on fetuses that may be sentient, I believe that the fetuses' interests are outweighed by strong countervailing rights claims on the part of pregnant individuals, whose life, liberty, autonomy, and welfare are jeopardized by prohibiting access to abortion.

to plaintiffhood (for example, a broken heart or the death of a loved one from natural causes). Under the legal systems of the United States, to be a plaintiff, one must be a *person*[224] complaining of a violation of one's legal *rights*.[225] Plaintiffs must also have *legal capacity*, or, if they lack capacity, they must proceed through a representative.[226] And to be a "proper" plaintiff, one must also have *standing* to bring their claim.[227] Can animals clear these jurisprudential hurdles? This Part argues that they can.

Before delving into these questions, it is worth acknowledging that there are compelling critiques of the jurisprudential categories discussed here. Critics have questioned the conceptual soundness of our legal system's reliance on the category of the person, the political implications of the discourse of rights, the ableist history of legal capacity, and the doctrinal coherence of standing law.[228] These critiques should cause us to rethink,

224. For an explanation of the meaning of a person in the legal sense, see infra note 229 and accompanying text.

225. 67A C.J.S. *Parties* § 9 (2023) ("In every action, there must be a real plaintiff who is a person in law and is possessed of a legal entity or existence as a natural, artificial, or quasi-artificial person. A suit brought in the name of that which is not a legal entity is a mere nullity."); *Id.* § 12 ("An action at law ordinarily should be brought by the person who has the legal interest in the cause of action or in the property or the subject matter involved in the proceeding; such an action should be brought by the person whose legal rights have been affected.").

226. *Id.* § 10 ("A plaintiff must have a legal capacity to sue, that is, the plaintiff must be free from general disability and have the right to come into court."); 57 C.J.S. *Mental Health* § 325 (2023) ("Whenever it appears that a party to an action, not under guardianship, is mentally incompetent, the court should inquire into his or her mental condition in order to protect his or her interests by the appointment of a representative for him or her.").

227. 67A C.J.S. *Parties* § 14 (2023) ("A person's standing to sue depends on their interest in the action or its subject matter.").

228. For critiques of personhood, see MANEESHA DECKHA, ANIMALS AS LEGAL BEINGS: CONTESTING ANTHROPOCENTRIC LEGAL ORDERS (2021); Colin Dayan, *Personhood*, *in* CRITICAL TERMS FOR ANIMAL STUDIES 267 (Lori Gruen ed., 2018); Roberto Esposito, *Persons and Things*, 39 PARAGRAPH 26 (2016). For critiques of rights, see Josephine Donovan, *Animal Rights and Feminist Theory*, *in* BEYOND ANIMAL RIGHTS: A FEMINIST CARING ETHIC FOR THE TREATMENT OF ANIMALS 34 (Josephine Donovan & Carol J. Adams eds., 1996); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); CHRISTOPH MENKE, CRITIQUE OF RIGHTS (Christopher Turner trans., 2020). For a critique of traditional views of legal capacity, see Michael Bach & Lana Kerzner,

reconceive, and even replace some of the foundational categories of jurisprudence with concepts that are more coherent and more just. Nevertheless, this Part concerns itself with analyzing the existing jurisprudential expectations of plaintiffhood, and as such, it works with those categories as they are explained and articulated by courts and scholars, remaining open to the possibility that there are better and more ethical ways of structuring our jurisprudential categories in the future.

A. PERSONHOOD

The first and most central jurisprudential question for animal plaintiffhood is the issue of legal personhood. To be a plaintiff, one must be a legally cognizable entity, a member of the class of entities whose existence counts before the law—in other words, a legal person.[229]

A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, LAW COMM'N OF ONT. (2010), https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf [https://perma.cc/KG53-MH4U]. For critiques of standing doctrine, see Sundquist, *supra* note 124; Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

229. *See, e.g.*, 67A C.J.S. *Parties* § 9 (2023) ("In every action, there must be a real plaintiff who is a person in law and is possessed of a legal entity or existence as a natural, artificial, or quasi-artificial person. A suit brought in the name of that which is not a legal entity is a mere nullity."). *But see Legal Entity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining legal entities as bodies, other than people, that can "legally[] sue or be sued"). Cass Sunstein and Adam Kolber suggest that animals could be plaintiffs in litigation without recognizing them as legal persons. Sunstein writes, "[i]t seems possible . . . that before long, Congress will grant standing to animals to protect their own rights and interests," a move that he calls "a far more limited step than . . . the recognition of chimpanzees and bonobos as legal persons." Sunstein, *supra* note 103, at 1359 & n.147. He continues: "But plaintiffs need not be or be expressly labeled persons, juridical or otherwise . . . ." *Id.* at 1360. (Elsewhere, however, Sunstein says that "injured animals might be counted as juridical persons . . . ." *Id*. at 1367.) Kolber similarly argues that "[g]ranting standing to great apes does not require us to accept arguments about ape personhood but merely requires recognition of certain obligations to protect animal interests." Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 167 (2001). But neither Sunstein nor Kolber explains how non-persons could be plaintiffs, at least given our current doctrine of personhood. To be a plaintiff, one must be a "legal entity," a concept generally taken as synonymous with a legal person. Where states have conferred the power to sue to entities that were previously non-persons, such as unincorporated associations, commentators have viewed such action as the recognition of legal

1. What Is a Legal Person?

From corporations to fetuses to nonhuman animals to artificial intelligence, the question of legal personhood is central to debates about whose interests should matter within the legal community.[230] Personhood exemplifies "the expressive dynamic through which law communicates norms and values to society," giving personhood not only legal significance but also social significance.[231]

Conceptually speaking, legal personhood is a juridical category rather than a biological one. It is important to disambiguate the concept of the *person* from the concept of the *human*. Despite their colloquial synonymousness,[232] they are distinct legal concepts. Our legal system already recognizes both nonhuman persons and nonperson humans.[233] For example, corporations, ships, and municipalities are legal persons, despite their

personhood. *See, e.g.*, 6 AM. JUR. 2D *Associations and Clubs* § 31 (2023) ("The law of some states . . . recognizes the jural personhood of unincorporated associations for purposes of the capacity to sue and be sued . . . ."). Of course, it would be conceptually possible (even desirable) for a legal system to recognize legal entities with the capacity to sue who are not denominated as persons. *See, e.g.*, DECKHA, *supra* note 228, at 121–22 (proposing "beingness" as an alternative legal status to "personhood"); Angela Fernandez, *Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals*, 5 CANADIAN J. COMPAR. CONTEMP. L. 155 (2019) (proposing "quasi-property/quasi-persons" as an alternative legal status for animals). Perhaps courts or legislatures could recognize "beings," "quasi-persons," or some other non-persons as legal entities with the capacity to be plaintiffs in litigation, but at least for now, the juridical category of "legal entity" is populated only by legal "persons." To give animals the capacity to sue under the existing jurisprudential framework, it is necessary to recognize them as legal persons, at least of a sort.

230. Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL'Y 45, 47 (2012).

231. Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1745 (2001) [hereinafter *What We Talk About*]; *see also* NGAIRE NAFFINE, LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON 11 (2009) ("Through its concept of the person, law helps to define who matters. . . . Law thus absorbs, reflects and expresses ideas in the broader culture about what and who is of value and why.").

232. *See, e.g.*, *Person*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/person [perma.cc/D2FB-NQW5] (defining "person" as "human, individual").

233. *See* Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 372–73 (2007) (recognizing that some human entities such as fetuses are not legal persons, while some nonhuman entities such as corporations are legal persons).

nonhumanness.[234] At the same time, embryos and fetuses are generally not considered legal persons, despite their humanness.[235] Historically, and in many ways continuing to today, the legal system has refused to recognize the full legal personhood of Black people, women, and children.[236] As the New York Court of Appeals put it, legal personhood is "not a question of biological or 'natural' correspondence."[237]

What, then, is a legal person if not a human being? According to the legal scholar John Chipman Gray, "the technical legal meaning of a 'person' is a subject of legal rights and duties."[238] Bryant Smith similarly explained that "[t]o be a legal person is to be the subject of rights and duties."[239] On this understanding, a legal person is a nonbiological concept that can refer to any entity to whom the law confers rights or from whom the law demands obligations.[240] This explains the legal personhood of nonhuman entities like corporations, partnerships, and municipalities, which, though nonhuman, nevertheless have legal rights

234. *Id.* at 373 n.25. For a discussion of nonhuman and artificial personhood, see Nadia Banteka, *Artificially Intelligent Persons*, 58 HOUS. L. REV. 537 (2021). On the personhood of ships, see Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337 (2000).

235. Berg, *supra* note 233, at 389. Fetuses are not persons under federal law but are sometimes treated as persons under state law. *Id.* at 400.

236. *See, e.g.*, Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1836–37 (2022) ("The treatment of Detroiters like Ms. McCorkle [who was denied access to running water] by their local governments begs the question: In a society where all people are guaranteed equal rights under the law, are Black people really people at all? . . . Though centuries have passed since the Three-Fifths Clause was repealed and replaced by the Fourteenth Amendment, the sociopolitical personhood of Black people in America remains an unsettled question."); FRANK B. WILDERSON III, AFROPESSIMISM 228–29 (2020) (arguing that humanness is constructed in contradistinction to Blackness, such that "Human Life is dependent on Black death for its existence and for its conceptual coherence"); Drucilla Cornell, *Are Women Persons?*, 3 ANIMAL L. 7, 8 (1997) (arguing that, by denying women certain rights, the law does not treat them as full legal persons). On children, see Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 261 (1995).

237. Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972).

238. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray rev. 2d ed., MacMillan Co. 1921) (1909).

239. Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283 (1928).

240. W.S. Holdsworth, *Maitland Reissued*, 46 YALE L.J. 801, 804 (1937) ("The law recognizes persons, not from the biological point of view, but as the subjects of rights and duties.").

(such as a corporation's right to own property) and legal duties (such as a municipality's duty to fulfill its contractual obligations).[241]

Must one have both rights *and* duties to be a legal person, or is one or the other sufficient? For Gray, it was enough to be either a rights-holder *or* a duty-holder: "But if there is any one who has rights though no duties, or duties though no rights, he is, I take it, a person in the eye of the Law."[242] Thus personhood is sometimes considered, as Richard Tur puts it, an "empty slot that can be filled by anything that can have rights *or* duties."[243] This disjunctive view, which recognizes persons as either rights-holders *or* duty-bearers, is consistent with the recognition of the legal personhood of those who lack legal duties, such as infants, comatose individuals, and some persons with substantial disabilities, all of whom are rights-bearing persons, even if they are not criminally or civilly liable for their behavior.

2. Are Animals Legal Persons?

Proceeding from the view that persons are the subjects of rights or duties, if animals have legal rights, then they are legal persons. The next Subsection addresses the jurisprudential question of whether animals do possess legal rights, concluding that the panoply of protections that animals currently possess

241. Legal philosopher Visa Kurki has critiqued this "orthodox view" of personhood (that persons are simply the subjects of rights or duties) as inconsistent with jurists' actual beliefs about who counts as a person, especially the view that animals are not persons, even though they have some legal rights. *See generally* VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD (2019). Kurki offers an alternative "bundle theory" of legal personhood, in which personhood is a "cluster property" that is composed of various active and passive "incidents" of personhood. *Id.* at 5. While Kurki's bundle theory may prove to be more descriptively accurate than the orthodox view and could provide strategic guidance for future efforts to reconfigure personhood, it is not yet clear that we need a new theory of legal personhood. As Kurki notes, we could reconcile the orthodox view of personhood with jurists' extensional beliefs by encouraging jurists to adjust their beliefs about personhood to be consistent with the orthodox view through, for example, recognizing the personhood of rights-bearing entities like animals. *Id*. at 16–18. That is precisely what the following Subsection of this Article encourages.

242. GRAY, *supra* note 238, at 27.

243. Richard Tur, *The "Person" in Law*, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 116, 121 (Arthur Peacocke & Grant Gillett eds., 1987) (emphasis added).

are properly characterized as rights.[244] Let us presume for now that this conclusion is correct and that animals have legal rights. If this is true, then animals are legal persons, ipso facto.

Alas, the theoretical simplicity of the "rights or duties" view of personhood collides with legal reality: courts have repeatedly held that animals are *not* legal persons.[245] In *Nonhuman Rights Project v. Breheny*, the New York Court of Appeals rejected an effort by NHRP to establish personhood for elephants and their entitlement to habeas corpus, holding that "nonhuman animals are not 'persons' to whom the writ of habeas corpus applies."[246] Similarly, in an earlier New York case brought by NHRP on behalf of a chimpanzee, *Nonhuman Rights Project v. Lavery* (*Lavery I*), the Appellate Division held that "animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law."[247] Another panel of the Appellate Division held in *Nonhuman Rights Project v. Lavery* (*Lavery II*), that "[n]o precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief."[248] The Appellate Court of Connecticut reached the same conclusion in another NHRP case on behalf of elephants, holding that "the elephants, not being persons, lacked standing in the first instance."[249] In *Justice v. Vercher*, the Oregon Court of Appeals held that "only human beings and legal entities created by human beings are persons under Oregon common law."[250]

The reasons these courts have given for rejecting animal personhood are historical, linguistic, and conceptual. Each of

244. *See supra* Part IV.B.

245. In this sense, Kurki's bundle theory of personhood has great explanatory and descriptive power. *See supra* note 241 (discussing Kurki's bundle theory).

246. Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 931 (N.Y. 2022).

247. *Lavery I*, 998 N.Y.S.2d 248, 249–50 (N.Y. App. Div. 2014).

248. Nonhuman Rts. Project, Inc. *ex rel.* Tommy v. Lavery (*Lavery II*), 54 N.Y.S.3d 392, 396 (N.Y. App. Div. 2017).

249. Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 842 (Conn. 2019).

250. Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 139 (Or. Ct. App. 2022).

these reasons is theoretically and jurisprudentially unsupported.

The historical argument for denying animal personhood relies on the fact that the legal system has traditionally limited personhood to (some) human beings and juridical entities such as corporations and municipalities. In *Breheny*, for instance, the New York Court of Appeals found that "[n]onhuman animals are not, and never have been, considered 'persons' with a right to 'liberty' under New York law."[251] Likewise, in *Commerford*, the Appellate Court of Connecticut observed that "a thorough review of our common law discloses no instance in which a nonhuman animal, or a representative for that animal, has been permitted to bring a lawsuit to vindicate the animal's own purported rights."[252] In *Justice*, the Oregon Court of Appeals noted that "a person with the right to sue to redress a violation of rights is and always has been a human being or an entity created by human law."[253]

This argument, however, undervalues the flexibility and adaptability of the common law. As then-Associate Judge (now Chief Judge) Rowan Wilson persuasively urged in his dissent in *Breheny*, "[t]he correct approach is not to say, 'this has never been done' and then quit, but to ask, 'should this now be done even though it hasn't before, and why?'"[254] The common law has adapted to changing social and ethical norms, including the overturning of racist and patriarchal doctrines that justified chattel slavery, coverture, and marital rape.[255] Although we should not

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251. *Breheny*, 197 N.E.3d at 927.

252. *R.W. Commerford & Sons*, 216 A.3d at 844.

253. *Justice*, 518 P.3d at 137.

254. *Breheny*, 197 N.E.3d at 937 (Wilson, J., dissenting); *see also* Stone, *supra* note 38, at 453 ("Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social, and economic dimensions.").

255. *Breheny*, 197 N.E.3d at 941–49 (Wilson, J., dissenting). Of course, I do not mean to suggest that the legal system has purged its racism and sexism, which remain thoroughly entrenched in law. *See generally* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY (4th ed. 2023) (arguing, broadly speaking, that the structure and operation of the legal system continues to subordinate people of color today); Stephanie Bornstein, *Degendering the Law Through Stereotype Theory*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW

conflate animal exploitation with these forms of oppression in a way that flattens the uniqueness of each form of domination, the point remains that our legal system should not be historically bound to past evaluations of whose interests matter before the law.[256]

The linguistic argument for denying animal personhood relies on dictionary definitions that restrict personhood to human beings and juridical entities. In *Justice*, for example, the court noted that the exclusion of animals from personhood "is reflected in dictionary definitions of ordinary and legal usage."[257] The court quoted from *Webster's Third New International Dictionary* and *Black's Law Dictionary*, both of which refer to human beings in their definitions of "person."[258] The *Commerford* court similarly relied on *Black's Law Dictionary*, which defines person to include "[a] human being" and "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being."[259]

IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., 2021) (collecting essays analyzing the relationship of law to sex, gender, and feminism). My point, and Judge Wilson's, is that the common law has proved, at least in part, responsive to changing moral and social norms.

256. Admittedly, this common law argument for adaptability does not apply to statutory claims, in which the statutory use of the term "person" is limited by textual definitions of the term, as well as legislative intent. Animals' advocates will have a much more difficult time convincing judges to interpret the term "person" in statutes to include animals. This is not so in other jurisdictions. Under English law, the "always-speaking" canon directs judges to construe statutes "in light of contemporary law and policy." Chaim Saiman, *The Law Wants to Be Formal*, 96 NOTRE DAME L. REV. 1067, 1092 (2021). That canon could allow for animal-inclusive interpretation. The American trend towards textualism, on the other hand, "rejects the always-speaking canon and deliberately freezes statutory language as of the moment of its enactment." *Id.* at 1093. As such, courts have been reluctant to read the statutory term "person" to include animals, absent express congressional intent. *See, e.g.*, *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004). The solution to this problem is for judges to turn against textualist conservatism in statutory interpretation and for legislatures to expressly recognize animal personhood through statutes, both of which are, I acknowledge, daunting and glacial tasks. I am grateful to Joe Wills for bringing the always-speaking canon to my attention.

257. *Justice*, 518 P.3d at 137 (citing definitions of "person" found in *Webster's* and *Black's*).

258. *Id.*

259. Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 845 n.8 (Conn. 2019) (quoting *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

Yet the legal concept of personhood is distinct from the colloquial understanding of the term, and we would do well to think about *legal* personhood in ways that are distinct from personhood more generally. Given the orthodox view of legal scholars that legal persons are the subjects of rights or duties, the proper question is not whether animals are humans (or corporations), but whether they have rights. Moreover, as Learned Hand cautioned, courts should be careful not to "make a fortress out of the dictionary."[260] While dictionaries are helpful guides to common and legal usage, they often reflect the prevailing biases of their time.[261] Dictionaries are human-created artifacts, which judges may call upon to support their preexisting commitments, biases, and positions.[262] This makes dictionaries much less definitive on politically fraught questions, including who ought to count as a subject of law.

The conceptual argument that courts have relied on in rejecting animal personhood posits that animals cannot be persons because they lack legal duties, which are supposedly required for the possession of legal rights and legal personhood. In *Breheny*, the New York Court of Appeals claimed that "legal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities."[263] The court in *Lavery* similarly reasoned that "the ascription of rights has historically been connected with the imposition of societal obligations and duties."[264] The Connecticut appellate court in *Commerford* likewise opined that "it is inescapable that an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities required by [the] social compact."[265]

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260. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

261. *See, e.g.*, Chantale Grenon-Nyenhuis, *The Dictionary as a Cultural Institution*, 10 INTERCULTURAL COMMC'N STUD. 159 (2000) (illustrating that definitional variations between English-speaking countries reflect deeper variations in how these societies conceive of key cultural and governmental concepts).

262. Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 279 (1998) (arguing that applications of "strict textualism" in statutory interpretation inconsistently apply dictionary definitions to support particular outcomes).

263. Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 928 (N.Y. 2022).

264. *Lavery I*, 998 N.Y.S.2d 248, 250 (N.Y. App. Div. 2014).

265. Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 845 (Conn. 2019).

But the problem with making personhood dependent upon the possession of duties is that it fails to account for the personhood of infants, minor children, some people with substantial cognitive impairments, and other human beings who lack duties.[266] In New York, where the *Lavery* and *Breheny* courts linked personhood and rights with duties, children under the age of eighteen are not criminally liable for their actions with limited exceptions[267] and may disaffirm contracts without civil liability.[268] Children under the age of four in New York are *non sui juris*—they lack the legal capacity to be held civilly responsible.[269] Yet they are unquestionably legal persons.[270] Judge Eugene Fahey recognized and critiqued this inconsistency when *Lavery* reached the New York Court of Appeals, writing, "[e]ven if . . . nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child or a parent suffering from dementia."[271]

Thus, the courts have tried to reconcile the unsettling implication of linking rights with duties by arguing that duty-less humans are nevertheless persons by virtue of their membership in the human species, a species that—as a *norm*—can accept duties. Professor Richard Cupp has defended this view in a number

266. For an insightful analysis of the connections between ableism and speciesism and a critique of how normative constructions of humanness marginalize both animals and humans with disabilities, see SUNAURA TAYLOR, BEASTS OF BURDEN: ANIMAL AND DISABILITY LIBERATION (2017).

267. N.Y. PENAL LAW § 30.00 (McKinney 2023).

268. *Cf.* N.Y. GEN. OBLIG. LAW § 3-101 (McKinney 2023) (setting out *exceptions* to New York's baseline rule allowing minors to disaffirm contracts on the basis of infancy).

269. *See* Meyer v. Inguaggiato, 16 N.Y.S.2d 672, 673 (N.Y. App. Div. 1940); M.F. *ex rel.* Flowers v. Delaney, 830 N.Y.S.2d 412, 412 (N.Y. App. Div. 2007); Verni v. Johnson, 68 N.E.2d 431, 432 (N.Y. 1946) ("In every reported case where the question has been squarely raised, this court has held that a three-year-old child is conclusively presumed to be incapable of negligence.").

270. *See* 43 C.J.S. *Infants* § 220 (2023) (collecting and summarizing how infancy is treated in various jurisdictions and explaining that "[w]hile an infant under a specified age may be considered as lacking legal capacity, infants are, however, possessed of certain rights" (footnotes omitted)).

271. Nonhuman Rts. Project, Inc. *ex rel.* Tommy v. Lavery (*Lavery III*), 100 N.E.3d 846, 847 (N.Y. 2018) (Fahey J., concurring) (citations omitted).

of articles.[272] Courts in New York and Connecticut have found his arguments persuasive.[273]

Two major assumptions remain unjustified in the claim that all humans and only humans are legal persons because *our species* has the capacity for legal duties, even though individual members of our species lack them.

First, why should duty-bearing be analyzed at the level of species norms rather than in the case of the individual?[274] Species is a biological and taxonomic category (and a philosophically, historically, and socially contested one at that).[275] Species membership has no normative force because it leaves undetermined the existential experiences of the individual. Of course, the experiences of individuals are mediated, constrained, and made possible by the biological and genetic material from which they arise, but phenomenological consciousness is experienced by individuals, not by species. To the extent law is concerned with individuals, why should the individual's *generic* memberships determine their eligibility for legal entitlements? And why should species be the legally and morally salient category rather than other taxonomic categories such as genus or kingdom, or nontaxonomic categories such as the class of rights-bearers or all sentient beings? Even if we could determine the "normal" abilities of a species (itself an empirically dubious and politically dangerous enterprise), Cupp and the courts have failed to explain why those who lack those abilities are still legal persons when

272. *See, e.g.*, Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009) (defending humanness as a litmus test for legal personhood); Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1 (2013) (same); Richard L. Cupp, Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69 FLA. L. REV. 465 (2017) (same).

273. *See Lavery I*, 998 N.Y.S.2d 248, 250 (N.Y. App. Div. 2014) (citing Cupp); Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 845 (Conn. 2019) (same).

274. For a further critique of the argument that moral entitlements flow from the generic or normative abilities of an individuals' species rather than from the experiences of the individual herself, see Nathan Nobis, *Carl Cohen's 'Kind' Arguments* for *Animal Rights and* Against *Human Rights*, 21 J. APPLIED PHIL. 43 (2004).

275. *See, e.g.*, Marc Ereshefsky, *Species*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (Apr. 1, 2022), https://plato.stanford.edu/archives/sum2022/entries/species [perma.cc/ZBU5-HLXG] ("Biologists disagree on the definition of the term 'species,' and philosophers disagree over the ontological status of species.").

they are *homo sapiens* but are nonpersons when they are members of any other species.[276]

Second, why should the capacity to have legal duties undergird personhood at all? Legal personhood describes who the law is *for* and who *matters* before the law.[277] In both the descriptive and normative sense, those without duties still matter, and their mattering is linked to their experiences—their capacity for joy and connection, their vulnerabilities, their suffering, the dignity of their flourishing, and the indignity of their oppression.[278] These experiences are not coextensive with species membership, and they have nothing to do with the duties and obligations of those who experience them. While duties and obligations are obviously a central part of legal relations, they are not necessary conditions for legal belonging. Rather, personhood is more appropriately connected to entities' possession of rights, which stems from their experiences of embodied vulnerability, their possession of interests, and their capacity to flourish, all of which mark the boundaries of legal belonging and concern—and thus personhood—more appropriately than the possession of duties.[279]

Courts have thus refused to consistently apply the traditional understanding of legal personhood—that legal persons are

276. To be clear, my point is not that humans who lack duties should be denied personhood, but that all rights-bearing sentient beings should be recognized as legal persons. I agree with Cupp (and critical disability scholars) that some of the proposals and approaches of animal rights advocates are overly invested in linking cognitive ability with personhood. As the discussion above shows, personhood should not depend on either species-norms (as Cupp argues) or cognitive abilities (as Wise argues), but on the possession of rights. Rights are justified even in the absence of sophisticated cognition.

277. *See What We Talk About*, *supra* note 231, at 1746 ("[T]he law of the person raises the fundamental question of who counts for the purpose of law."); *see also* NAFFINE, *supra* note 231. One could also argue that animals can "matter" before the law without recognizing their personhood, such as through robust animal welfare protections. For an example of this argument, see Richard L. Cupp, Jr., *Edgy Animal Welfare*, 95 DENV. L. REV. 865 (2018). But as Part II argues above, justice for animals requires both robust substantive protections of animals' interests and procedural mechanisms for ensuring the enforcement of those substantive protections.

278. For an explanation of the connection between these capacities in animals and their personhood, see infra note 279 and accompanying text.

279. *See, e.g.*, Matambanadzo, *supra* note 230 (linking personhood with vulnerability); Berg, *supra* note 233, at 375–77 (linking personhood with the capacity to have interests); Nussbaum, *supra* note 88, at 305–06 (linking political and legal inclusion with dignity and the capacity to flourish).

the subjects of rights or duties—in cases involving animals. Instead, they have offered historical, linguistic, and conceptual reasons for rejecting animals' legal personhood that fail to make the case against animals' inclusion in the class of entities about whom the law should be concerned. If, as argued below, animals have legislatively conferred rights and a normative entitlement to substantive rights, they can and should be considered legal persons with the ability to be litigants when someone violates their substantive rights.

B. RIGHTS

In the American legal system, plaintiffs bring lawsuits to vindicate their legal rights. Without a right on the part of the plaintiff and a duty on the part of the defendant, there is nothing for the lawsuit to adjudicate. In order to be plaintiffs, animals would need to have legal rights—that is, they would need to be aggrieved in some legally significant way that entitles them to the intervention of a court. This Section explores the nature of legal rights and examines whether animals have them, concluding that they do.

1. What Are Legal Rights?

Legal scholars and philosophers have written voluminously on the concept of legal rights, but two aspects of the issue are especially important for the purposes of this Article.[280] First, what is the *purpose* of rights? This question orients us to what it is that rights protect and, consequently, to the kinds of beings that might possess rights. Second, what is the *structure* of rights? This question orients us to the juridical relationships that rights create and the empirical question of whether existing legal protections constitute legal rights.

To the first question: What is the purpose of rights? Are rights fundamentally about protecting the autonomous *choices* of rational agents, or are they about protecting the *interests* of those who have interests? The question matters because if we

280. For comprehensive overviews of philosophical theories of legal rights, see Alon Harel, *Theories of Rights*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 191 (Martin P. Golding & William A. Edmundson eds., 2005); F.M. Kamm, *Rights*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 476 (Jules L. Coleman & Scott Shapiro eds., 2002).

conceive of rights as protecting the willful choices of rational agents, then only rational agents capable of choice can have rights. On the other hand, if we conceive of rights as protecting the interests of those who have them, then the class of potential rights-holders includes anyone with interests (including animals).

Defenders of the "will theory" (sometimes called the "choice theory") of rights argue that to have a right is to have the capacity, ability, and discretion to choose whether to either enforce or waive the duty of another person.[281] For will theorists, "[r]ight-holders are agents who are given control over another person's duty and can thus be analogized to a 'small-scale sovereign.'"[282] Those who lack the rational autonomy to choose whether to exercise or excuse another's duty cannot be rights-holders.

Defenders of the "interest theory" reject the centrality of choice and rationality to rights, focusing instead on the ability of rights to protect the interests of their holders.[283] For interest theorists, "rights-holders [are] the *passive beneficiaries* of protective and supportive duties imposed on others."[284] To have a right, one need not be able to decide whether to enforce or waive the right, but simply to be the beneficiary of the protections the right affords.

Which theory of legal rights is most defensible? The interest theory more accurately captures our common usage of the term "rights" and more closely resembles the legal deployment of the concept of rights.[285] Courts and legislatures typically adopt an interest theory approach to rights, widely recognizing that those who lack the type of cognitive capacity that the will theory requires, including children and people with substantial cognitive

281. Harel, *supra* note 280, at 194.

282. *Id.* (quoting H.L.A. Hart, *Legal Rights*, *in* ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 162, 183 (1982)).

283. *Id.* at 195; *see also* Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CANADIAN J.L. & JURIS. 29, 29 (2001) ("[T]he essence of a right consists in the normative protection of some aspect(s) of the right-holder's well-being.").

284. Harel, *supra* note 280, at 195.

285. *See, e.g.*, Visa A.J. Kurki, *Rights, Harming and Wronging: A Restatement of the Interest Theory*, 38 OXFORD J. LEG. STUD. 430, 443 (2018) (arguing that the will theory "is unable to account for a significant amount of legal doctrine" and that the interest theory "can better explain why we may need to compensate children and mentally disabled people for our wrongdoings that affect them").

disabilities, nevertheless have rights.[286] For these reasons (and others), Harel argues that "[t]he political vision [that] animates the [will] theory[] is too narrow to provide a basis for a comprehensive theory of rights."[287] The will theory's limitation of rights holders to those who are rational and autonomous "fails to give an account of some of the paradigmatic cases central to the discourse of rights."[288] The philosopher Matthew Kramer accuses the will theory of being "jarringly and gratuitously at odds with ordinary patterns of discourse."[289] Because our legal system recognizes rights as protections for their beneficiaries, even where the beneficiaries lack the ability to choose to enforce them or waive them, the interest theory of rights seems a more apt account of legal rights than the will theory.

This brings us to the second question regarding rights: What is the structure of legal rights? What makes a particular legal relationship a "right"?

In a pair of highly influential articles published in the early twentieth century, Wesley Hohfeld articulated a theory of the formal structure of legal rights, disambiguating rights into four distinct concepts: claim-rights, privileges (or liberties), powers, and immunities.[290] Distinguishing among various types of rights is important, Hoheld argued—using an animal metaphor—because "chameleon-hued words are a peril both to clear thought and to lucid expression."[291] To clarify the word "rights," Hohfeld schematized a system of "jural relations" that explains the

286. *See, e.g.*, 23 PA. STAT. AND CONS. STAT. ANN. § 5102(a) (West 2023) ("[I]n every case where children are born out of wedlock, they shall enjoy all the *rights* and privileges as if they had been born during the wedlock of their parents . . . ." (emphasis added)); Anderson v. Anderson, 32 A.2d 83, 85 (N.J. Ch. 1943) ("[A] responsibility to observe and protect the *rights* of infants is assumed by the courts." (emphasis added)); 43 C.J.S. *Infants* § 220 (2023) ("While an infant under a specified age may be considered as lacking legal capacity, infants are, however, possessed of certain *rights*." (emphasis added)); N.J. STAT. ANN. § 30:6D-2 (West 2023) ("The Legislature finds and declares that the developmentally disabled are entitled to certain fundamental *rights* . . . ." (emphasis added)).

287. Harel, *supra* note 280, at 194.

288. *Id.*

289. Kramer, *supra* note 283, at 31.

290. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Fundamental Legal Conceptions I*]; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions II*].

291. Hohfeld, *Fundamental Legal Conceptions I*, *supra* note 290, at 29.

structure of various kinds of legal rights, including their correlates and their opposites.[292] A detailed description, analysis, and application of Hohfeld's account is beyond the scope of this Article, but in asking whether animals have legal rights, a brief discussion is necessary.[293]

Of the four types of rights that Hohfeld described, the most important for purposes of this Article are *claim-rights* and *privileges*.[294] For one person to have a claim-right, someone else must have a duty to behave (or refrain from behaving) in a particular way.[295] For this reason, Hohfeld emphasizes that claim-rights are the correlatives of duties.[296] Claims can be formulated like so: "A has a claim that B φ if and only if B has a duty to A to φ" (where φ is some verb).[297] For example, my cat Jasper has a claim-right to be fed if I have a legal duty to Jasper to feed him. Claim-rights can protect one from harm, require the provision of some necessary benefit, or force the performance of a course of action.[298]

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292. Hohfeld, *Fundamental Legal Conceptions II*, *supra* note 290, at 710.

293. For more detailed discussions of Hohfeld and animal rights, see KURKI, *supra* note 241, at 55–87; Stucki, *supra* note 92, at 537–40; Thomas G. Kelch, *The Role of the Rational and the Emotive in a Theory of Animal Rights*, 27 B.C. ENV'T AFFS. L. REV. 1, 6–10 (1999).

294. The two other types of "Hohfeldian incidents" are powers and immunities, which concern their holders' second-order capacity to volitionally alter primary legal relations. Hohfeld, *Fundamental Legal Conceptions I*, *supra* note 290, at 44, 55; Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (Feb. 24, 2020), https://plato.stanford.edu/archives/spr2021/entries/rights [perma.cc/XJ3V-P7KL] [hereinafter Wenar, *Rights*]. A power describes one's ability to alter jural relations (such as by contracting to obtain or waive a claim-right or privilege), while an immunity describes the inability to do so (such as the immunity against self-incrimination). *Id.*

295. Hohfeld, *Fundamental Legal Conceptions I*, *supra* note 290, at 31–32; *see also* Joel Feinberg, *The Rights of Animals and Unborn Generations*, *in* PHILOSOPHY AND ENVIRONMENTAL CRISIS 43, 43 (William T. Blackstone ed., 1974) ("To have a right is to have a claim *to* something and *against* someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principles of an enlightened conscience.").

296. Hohfeld, *Fundamental Legal Conceptions I*, *supra* note 290, at 31–32.

297. Wenar, *Rights*, *supra* note 294; *see also* Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFFS. 223, 229 (2005) [hereinafter Wenar, *Nature*] ("For every claim in A there is some B who has a duty to A. Your right that I not strike you correlates to my duty not to strike you.").

298. Wenar, *Nature*, *supra* note 297, at 229.

A second type of right that Hohfeld describes are *privileges* (also referred to as *liberties*).[299] One who has a privilege has a legal entitlement to behave in a particular way and lacks a duty that would limit that behavior. Privileges can be formulated like so: "A has a privilege to φ if and only if A has no duty not to φ" (where φ is some verb).[300] For example, endangered tigers have the privilege to engage in normal behavior patterns if they have no duty to refrain from engaging in such behavior.[301] The correlative of a privilege is a "no-right," that is, the absence of someone else's claim or entitlement to compel otherwise.[302]

Taken together, the interest theory of rights and the Hohfeldian schema offer a conception of legal rights as including the claims or privileges that correlate to the duties owed to interest-bearing entities. Do animals have legal rights under this conception?

2. Do Animals Have Legal Rights?

This Subsection argues that animals have interests and therefore qualify as potential rights-holders under the interest theory. It also argues that the wide range of protections that animals hold under state and federal law are fairly characterized as claim-rights and privileges in the Hohfeldian sense.

As sentient beings, animals have interests: they have, generally speaking, interests in feeling pleasure and avoiding pain, interests in exercising their species-specific and individual-specific capabilities, and interests in flourishing as the kinds of beings that they are.[303] When animals' interests are frustrated,

299. Hohfeld, *Fundamental Legal Conceptions I*, *supra* note 290, at 32.

300. Wenar, *Rights*, *supra* note 294.

301. *See* 50 C.F.R. § 17.3(c) (2024) (defining "harass" under the ESA to prohibit acts that "create[] the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering"). As Stucki notes, there is an oddness to referring to animals as having no duties to refrain from conduct in particular cases, given that they lack legal duties in general. Stucki, *supra* note 92, at 538. Nevertheless, enshrining animals' privilege to engage in certain natural behaviors may be an important way of creating a "protective perimeter" around their established claim-rights. *Id.* at 537–38.

302. Hohfeld, *Fundamental Legal Conceptions I*, *supra* note 290, at 32.

303. *See, e.g.*, SINGER, *supra* note 91, at 9–17 (defending an interest-based theory of animals' moral standing); NUSSBAUM, *supra* note 87, at xiv–xvii (defending a sentience-based capabilities approach to animals' entitlement to justice).

they suffer. When animals' interests are fulfilled, they flourish. As beings with morally relevant interests, animals are therefore at least conceptually eligible to join the class of rights-holders.[304]

Having established that animals, as interest-bearers, are the kinds of beings that could have legal rights, we must ask whether animals do *in fact* have legal rights that they could defend as plaintiffs. That is, do they have claim-rights that correlate to human duties or privileges that empower them to behave in certain ways? The answer is yes.[305]

Animals are the subjects of laws that protect them from harm (albeit in ways that are quite compromised and imperfect). These statutes create rights for animals and duties upon humans.[306] All fifty states have enacted legislation to protect

304. Stucki, *supra* note 92, at 543; Feinberg, *supra* note 295, at 51. Some philosophers who endorse the interest theory of rights have argued that an entity's having interests is not by itself sufficient to make them eligible to hold rights. Matthew Kramer argues that there is an additional factor that must be present to hold rights: "the moral status of the being to whom the rights-attribution is made." Kramer, *supra* note 283, at 33. In my view, having interests is sufficient to ground moral status, but in any case, whether one approaches the question from a utilitarian, deontological, capabilities, feminist, or post-rationalist perspective, animals do have "moral status." *See generally* GRUEN, ETHICS AND ANIMALS, *supra* note 91, at 24–44 (discussing utilitarian, feminist, and other approaches to understanding what beings have "moral status"); MATTHEW CALARCO, THINKING THROUGH ANIMALS: IDENTITY, DIFFERENCE, INDISTINCTION (2015) (surveying approaches to animals' moral status and advancing a theory that de-emphasizes distinctions and similarities between animals and humans).

305. This Article leaves aside the more complicated question of whether animals have powers and immunities in the Hohfeldian sense. So long as animals have claim-rights or privileges, they are rights-bearing entities. For a discussion of powers and immunities for animals, see KURKI, *supra* note 241, at 73–78. One could argue that animal plaintiffhood would entail the recognition of powers for animals—that is, their power to alter legal relations by initiating litigation. I see plaintiffhood somewhat differently, not as the ability to *alter* legal relations, but rather to enforce existing claim-rights or privileges and give them effect, which would put procedural access to the courts outside of the Hohfeldian schema. If, on the other hand, the procedural right to initiate litigation is properly thought of as a Hohfeldian power, this is not a problem for animal plaintiffhood. Animals' powers could be exercised on their behalf by guardians or other proxies. Stucki, *supra* note 92, at 537 n.17.

306. I focus here on animals' statutorily established rights. Some advocates have argued for the recognition of animals' substantive rights under the common law or for their entitlement to rights under natural law principles. *See, e.g.*, STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 258 (2000) (arguing for the extension of the common law rights of bodily liberty

animals from abuse and neglect.[307] These statutes prohibit both affirmative acts of cruelty and neglectful omissions that cause animal suffering. The federal government has passed statutes to protect endangered and threatened species,[308] regulate the slaughter of farmed animals,[309] and establish animal welfare standards for animals in experiments, exhibition, and the pet trade.[310] Although these laws are highly compromised, they nevertheless create duties for humans to act in certain ways regarding animals.

But the mere fact that humans have legal duties *concerning* animals does not tell us whether animals have legal rights.[311] We can have duties concerning something without having duties *to* that thing. For example, laws requiring the preservation of historic buildings create duties to preserve those buildings, but they do not confer rights upon those buildings because the duty is owed to society or posterity more generally, not to the building itself. The same is true of some laws concerning animals. For example, legal statutes prohibiting cattle rustling confer no correlative right on the cows not to be rustled.[312] Such statutes are concerned not with the intrinsic value of cows but with their status as commercially valuable property. As such, these duties are owed to animals' owners and, in some cases, to human society more broadly, but not to the animals.

To determine whether animal protection statutes, including state anticruelty laws and federal animal laws such as the ESA

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and bodily integrity to nonhuman animals based on values of equality and liberty); Daniel Davison-Vecchione & Kate Pambos, *Steven M. Wise and the Common Law Case for Animal Rights: Full Steam Ahead*, 30 CANADIAN J.L. & JURIS. 287, 309 (2017) (discussing Wise's theory for extending common law rights to animals and finding it "morally defensible and legally feasible"); Gary Chartier, *Natural Law and Animal Rights*, 23 CANADIAN J.L. & JURIS. 33 (2010) (extending natural law theory to theories of animal rights). Defending those positions exceeds the scope of this Article. If such scholars are correct that animals possess (or should possess) common law rights or natural rights, such a fact would also establish their legal personhood as subjects of rights.

307. Pamela D. Frasch, Stephan K. Otto, Kristen M. Olsen & Paul A. Ernest, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 69 (1999).

308. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

309. Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907.

310. Animal Welfare Act, 7 U.S.C. §§ 2131–2159.

311. Feinberg, *supra* note 295, at 45.

312. *See, e.g.*, TEX. CRIM. STAT. § 31.03(e)(5)(A)–(B) (making it a third-degree felony to steal livestock).

and the Animal Welfare Act, confer rights upon animals, we must ask to whom the duties they create are owed: for whose benefit were these laws enacted? In any given case, the answer will be context-specific, with attention given to the relevant statute at issue, its legislative history, and the social milieu from which it arose.

Historically, animal protection laws had anthropocentric motivations—protecting the property rights of animals' owners, avoiding the coarsening of public morals that animal cruelty engenders, recognizing the link between cruelty to animals and cruelty to humans, protecting endangered animals as spectacles or conserving them as rare resources for human use, promoting the efficient processing of animals into meat, and salving human consciences, to name a few. Professor David Favre and Vivien Tsang demonstrate that the purpose of early anticruelty laws was "to protect commercially valuable property from the interference of others, not to protect animals from pain and suffering."[313] Proponents of early anticruelty laws also categorized acts of animal cruelty as "Offenses Against Chastity, Decency and Morality," illustrating that "the concern was for the moral state of the human actor, rather than the suffering of the non-human animal."[314] Because animal "protection" laws were historically concerned with protecting the property interests of their owners or the social mores of human society, their beneficiaries are humans, not animals, and they confer no rights upon animals.

But contemporary animal protection laws are not so singularly motivated by anthropocentrism. To the contrary, state and federal animal protection laws rely in part on the belief that the interests of animals matter—not as much as morality requires, to be sure, but at least *some*. In *Stephens v. State*, a Mississippi Supreme Court case from 1888, Justice James Arnold wrote that the Mississippi anticruelty law exists "for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned

313. David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. COLL. L. REV. 1, 7; *see also* Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 LAW & SOC. INQUIRY 136 (2019) (describing the anthropocentric orientation of early anticruelty statutes).

314. Favre & Tsang, *supra* note 313, at 11.

to their owners."[315] More recently, in *State v. Nix*, the Oregon Supreme Court reached a similar conclusion in analyzing its state anticruelty laws.[316] After reviewing the legislative developments of the Oregon anticruelty law, the court reached the conclusion that "the principal purpose of adopting the legislation that became [the present animal cruelty statute] was to prevent the suffering of animals."[317] The court acknowledged that anticruelty laws were initially concerned with property rights and public morality but concluded that "Oregon's animal cruelty laws have been rooted—for nearly a century—in a different legislative tradition of protecting individual animals themselves from suffering."[318] Similarly, in *People v. Harris*, the Colorado Court of Appeals held that "the language of the [Colorado anticruelty] statute demonstrates that the legislature perceived animal cruelty not as an offense against property but as an offense against the individual animal."[319] This reflects "society's acceptance of the idea that animals ha[ve] an inherent right to be free from unnecessary pain and suffering and that the legal system should recognize that right."[320] In a recent Washington case, the State argued, and the Court of Appeals agreed, that "the purpose of the animal cruelty laws [is] 'not to protect animals as property of their owners, but to protect animals as living, feeling creatures.'"[321]

These cases confirm that at least some animal protection laws have animal-centric motivations, making animals the entities to whom legal duties are owed.[322] As Saskia Stucki notes,

315. Stephens v. State, 3 So. 458, 458 (Miss. 1888).

316. State v. Nix, 334 P.3d 437 (Or. 2014), *vacated on procedural grounds*, 345 P.3d 416 (Or. 2015).

317. *Id.* at 447.

318. *Id.*

319. People v. Harris, 405 P.3d 361, 371 (Colo. App. 2016).

320. *Id.*

321. State v. Doll, No. 55315-5-II, 2022 WL 2313911, at *7 (Wash. Ct. App. June 28, 2022) (quoting Brief of Respondent at 25, *Doll*, 2022 WL 2313911 (No. 55315-5-II)).

322. Political philosopher Will Kymlicka argues that animal laws continue to serve exclusively human ends. According to Kymlicka, "the fundamental purpose of these laws is not to protect animals, but on the contrary to assert the right to use animals. We have animal use laws, not animal protection laws." Will Kymlicka, *Social Membership: Animal Law Beyond the Property/Personhood Impasse*, 40 DALHOUSIE L.J. 123, 126 (2017). For Kymlicka, the "fundamental legal purpose" of animal protection laws is "to provide legal cover to the

"the law already firmly rests on the recognition of (some) animals as beings who possess intrinsically valuable interests."[323] From this recognition, it follows that as the intrinsically valuable holders of claims that place duties on humans, animals have legal rights. Joel Feinberg observes, "if we hold not only that we ought to treat animals humanely but also that we should do so for the animals' own sake . . . then it follows that we do ascribe rights to animals."[324]

Federal law codifies this sentiment. Laws such as the Animal Welfare Act, the ESA, and the MMPA create human obligations to nonhuman animals for the sake of the animals themselves.[325] Christopher Stone, in his famous 1972 law review article *Should Trees Have Standing?*, points to the federal Animal Welfare Act as an example of "[c]hanges in . . . consciousness [that] are already developing."[326] According to Stone, "[t]he time may be on hand when these sentiments, and the early stirrings of law, can be coalesced into a radical new theory or myth—felt as well as intellectualized—of man's relationships to the rest of nature."[327] Cass Sunstein reaches a similar conclusion, contending that "federal law has begun to recognize a wide range of

harming of animals." *Id.* at 126–27. While Kymlicka's view of animal protection laws is well-founded, given the massive amounts of animal exploitation that these laws countenance, it does not follow that animal protection laws deny moral value to animals altogether. Legislative and political struggles by animal advocates have produced significant concessions by the state and by animal use industries that are (grudgingly and imperfectly) responsive to the demands of the animal rights movement. Two centuries of advocacy by animal rights and welfare activists have produced meaningful—albeit highly compromised—legal reforms for animals. *See generally* DIANE L. BEERS, FOR THE PREVENTION OF CRUELTY: THE HISTORY AND LEGACY OF ANIMAL RIGHTS ACTIVISM IN THE UNITED STATES (2006) (discussing the history of animal rights activism in the United States, including hard-won legislative victories); ROBERT GARNER, POLITICAL ANIMALS: ANIMAL PROTECTION POLITICS IN BRITAIN AND THE UNITED STATES (1998) (discussing the same in the United States and Britain).

323. Stucki, *supra* note 92, at 543.

324. Feinberg, *supra* note 295, at 50 (emphasis added).

325. Animal Welfare Act, 7 U.S.C. §§ 2131–2159; Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544; Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1423h.

326. Stone, *supra* note 38, at 497.

327. *Id.* at 498.

animal rights in practice" and that "it is entirely clear that animals have legal rights, at least of a certain kind."[328]

In *Justice v. Vercher*, however, the Oregon Court of Appeals rejected these arguments that animals have legal rights, holding that the anticruelty laws "qualify *a person's right* to exercise otherwise absolute dominion over personal property."[329] According to the court, the anticruelty laws "impose[] duties on persons intended to protect animals from suffering," but they "do not confer substantive or procedural legal rights on animals."[330] In other words, these laws create human duties rather than animal rights. But this is a false dichotomy. As Hohfeld argues, rights are the corollaries of duties.[331] If anticruelty laws create duties for humans (as the Oregon Court of Appeals recognized in *Justice*) for the sake of animals themselves (as the Oregon Supreme Court recognized in *Nix*), then they do establish rights for animals—precisely because a right is the corollary of a duty created to protect the interests of the right-holder.

While existing animal legal protections are properly characterized as legal rights, we must acknowledge their limitations. As Saskia Stucki urges, we should recognize existing animal protection laws as conferring weak, or *simple*, animal welfare rights, which Stucki distinguishes from strong, or *fundamental*, animal rights.[332] According to Stucki, *simple* rights are characterized by their substantive nonfundamentality and their high infringeability, whereas *fundamental* rights are characterized by their substantive fundamentality and their comparatively

328. Sunstein, *supra* note 103, at 1333–35. For a comprehensive list of federal statutes concerning animals, see VIVIAN S. CHU, CONG. RSCH. SERV., 94-731, BRIEF SUMMARIES OF FEDERAL ANIMAL PROTECTION STATUTES (2010); Henry Cohen, *Federal Animal Protection Statutes*, 1 ANIMAL L. 153 (1995).

329. Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 139 (Or. Ct. App. 2022).

330. *Id.* at 139, 140.

331. Hohfeld, *Fundamental Legal Conceptions II*, *supra* note 290, at 717; *see also* Matthew H. Kramer, *Refining the Interest Theory of Rights*, 55 AM. J. JURIS. 31, 32 (2010) ("If someone is the person to whom a legal duty is owed, he is the person who holds the legal right that is correlative to that duty.").

332. Stucki, *supra* note 92, at 552; *see also* Saskia Stucki & Visa Kurki, *Animal Rights*, *in* ENCYCLOPEDIA OF THE PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY 1, 2–3 (Mortimer Sellers & Stephan Kirste eds., 2020), https://doi.org/10.1007/978-94-007-6730-0_407-1 (discussing "weak" and "strong" animal rights).

low infringeability.[333] The fundamentality of a right concerns the primacy and foundational nature of the interests it protects, such as a fundamental interest in life, autonomy, or bodily liberty. The infringeability of a right concerns the justificatory burden of overriding the right in favor of a competing interest. For an animal right to be fundamental, it should protect a primary or foundational interest of animals, and it should set a high bar for violating that interest.[334]

Consider a cow slaughtered for her flesh under the contemporary animal protection regime. The federal Humane Methods of Slaughter Act gives her a right to be rendered insensible to pain before she is slaughtered (unless she is ritually slaughtered).[335] Depending on the state she is in, the applicable anticruelty statute might also give her a right to be free from the infliction of "unjustifiable" suffering.[336] While these are "rights," they are simple ones rather than fundamental ones. Both statutes protect an important interest—the cow's interest in not feeling pain—but that interest is secondary compared to her more fundamental interest in not being killed at all. Moreover, the rights conferred by these statutes are highly infringeable. Under federal law, the cow can be slaughtered without being rendered insensible to pain if there is a religious reason for doing so.[337] Under state law, a trivial human interest such as the desire to eat a hamburger will suffice to justify the suffering that slaughter inherently entails.[338]

For now, the legal system has not recognized the kind of fundamental animal rights that we could analogize to fundamental human rights. However, this does not mean they are rights-less,

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333. Stucki, *supra* note 92, at 552.

334. *See id.* at 555 (discussing the justification for fundamental rights).

335. 7 U.S.C. § 1902.

336. *See, e.g.*, CAL. PENAL CODE §§ 597, 599b (West 2024) (prohibiting torment, torture, and cruelty, which are defined to "include every act, omission, or neglect whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted").

337. *See* 7 U.S.C. § 1902(b) (describing the circumstances under which religious slaughter is allowed).

338. *See* CAL. PENAL CODE § 599c (West 2024) (prohibiting construction of the anticruelty law so as "to interfere with the right to kill all animals used for food"). On the legally sanctioned suffering of animals at slaughterhouses, see GAIL A. EISNITZ, SLAUGHTERHOUSE (2d ed. 2006).

as some contend,[339] only that the rights they do have are weak, simple, and highly qualified. But rights they are. Where the law creates legal duties for the benefit of another, that other has legal rights. And because animals have legal rights, they meet this requirement of plaintiffhood; that is, they have the kind of legally protected rights that plaintiffs enforce through litigation.

C. LEGAL CAPACITY

In addition to being rights-bearing persons, plaintiffs must also possess the legal capacity to sue.[340] This means that the plaintiff "must be free from general disability and have the right to come into court."[341] The presumption is that all natural persons have legal capacity, but some disabilities (legal and cognitive) deprive the plaintiff of capacity to sue, including "infancy, lunacy, idiocy, coverture, want of authority, or a want of title."[342]

The inquiry concerning legal capacity has conventionally taken a "functional approach" that analyzes the cognitive capacities of the individual.[343] These include their ability to make meaningful decisions in a wide range of life areas, including finances, medical care, and legal affairs.[344] Under this functional

339. *See, e.g.*, Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 5 (2010) (arguing that animals currently "lack the capacity to possess any legal right at all" because they have not yet been recognized as legal persons); Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHI. LEGAL F., 137, 163 n.76 ("As legal 'things,' animals have no rights whatsoever; the full package of entitlements is held by their owners.").

340. 67A C.J.S. *Parties* §§ 8, 12 (2023); *see also* 59 AM. JUR. 2D *Parties* § 28 (2023) (describing legal capacity as a requirement for plaintiffs filing suit).

341. 67A C.J.S. *Parties* § 10 (2023).

342. *Id.* (footnotes omitted).

343. Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 94 (2012).

344. Disability rights advocates have rightly assailed this conventional understanding of legal capacity, arguing that it is ableist, exclusionary, and paternalistic. *See id.* at 98 ("The idea of incapacity as an illness or defect that renders the person suffering it to an object of charity and protection, subject to plenary guardianship based on best interests which constrains her personal life and the control of her property has been re-examined and largely rejected."). The denial of legal capacity has often been used to exclude people with disabilities from participating in their legal and financial affairs and controlling their own destinies. Article 12 of the U.N. Convention on the Rights of Persons with Disabilities requires signatories to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." International

approach, a plaintiff who lacks the capacity to sue is unable to direct the course of the litigation or meaningfully participate in decision-making concerning the representation.

Do nonhuman animals have the legal capacity to sue? Although they have a wide range of capacities and, in some cases, perform better than humans on tests of cognitive abilities,[345] there is currently no evidence that they could understand the nature of legal proceedings in a way that would enable them to make major decisions related to the litigation.

But the lack of legal capacity is not a jurisdictional defect that would preclude animal plaintiffhood altogether.[346] Instead, rules of civil procedure authorize the appointment of someone else to represent the interests of a plaintiff who lacks capacity.[347] Under Rule 17 of the Federal Rules of Civil Procedure (FRCP), for example, a guardian, conservator, or guardian ad litem "may sue or defend on behalf of a minor or an incompetent person."[348] Thus, even if animals lack legal capacity, a guardian ad litem could represent their interests in litigation, as is already done for humans lacking legal capacity.[349]

Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 12, Annex I, U.N. Doc. A/Res/61/106 (Dec. 13, 2006), 46 I.L.M. 443. As such, analysis of legal capacity is beginning to shift away from questions concerning the functional cognitive abilities of the individual and toward a "support model" of legal capacity that prioritizes "the will and preferences of the individual." Eilionóir Flynn & Anna Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, 32 BERKELEY J. INT'L L. 124, 124 (2014). Such a model would replace—or at least substantially augment—the substituted decision-making that removes agency from individuals and vests it in a guardian. *Id.* The ability to adapt a support model to nonhuman animal plaintiffs deserves further exploration because substituted decision-making by guardians may not adequately protect the agency of nonhumans.

345. *See, e.g.*, Julia Watzek, Sarah M. Pope & Sarah F. Brosnan, *Capuchin and Rhesus Monkeys but Not Humans Show Cognitive Flexibility in an Optional-Switch Task*, 9 SCI. REPS. 13195 (2019) (finding that capuchin and rhesus monkeys outperformed humans on a cognitive task).

346. *See, e.g.*, Town of Delhi v. Telian, 119 A.D.3d 1049, 1050 (N.Y. App. Div. 2014) ("The issue of lack of capacity to sue does not go to the jurisdiction of the court . . . .").

347. FED. R. CIV. P. 17; *see, e.g.*, CAL. CIV. PROC. CODE § 372 (West 2023) (authorizing appointment of guardian ad litem for "a person who lacks legal capacity to make decisions").

348. FED. R. CIV. P. 17(c).

349. *See* Marguerite Hogan, *Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in* Sierra Club v. Morton, 95 CALIF. L.

One challenge for animal plaintiffs is whether the statutes and procedural rules that presently authorize guardians contemplate the appointment of representatives for animals. In *Hawaiian Crow ('Alala) v. Lujan*, for example, the district court held that FRCP 17(c) did not give the 'Alalā the capacity to sue.[350] Likewise, in *Naruto v. Slater*, the Ninth Circuit held that FRCP 17(c) does not authorize next friends or guardians ad litem for animals, holding that "if animals are to be accorded rights to sue, the provisions involved therefore should state such rights expressly."[351] In *Justice v. Vercher*, the Oregon Court of Appeals concluded that "a procedural mechanism does not appear to exist under Oregon law for a person to sue on behalf of an animal."[352]

These readings of the existing procedures are too narrow. Courts should instead give these rules and statutes a capacious construction, finding that appointing guardians ad litem or next friends effectuates the underlying legislative and judicial purpose of such rules, which is to ensure that rights-holders have a procedural vehicle for defending their rights. If, as is argued above, animals are rights-holding legal persons, existing guardianship provisions should apply for the same reasons they apply in human cases.

If construing existing procedural rules to allow guardians for animal plaintiffs strains the bounds of statutory interpretation too far, two other options remain. First, the relevant authorities could amend the rules to expressly contemplate guardianships for nonhuman animals.[353] Such rules could create

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REV. 513, 517 (2007) ("[T]he American legal system is already well-equipped with a reliable mechanism by which nonhumans may obtain standing via a judicially-established guardianship."); *see also* Stone, *supra* note 38, at 464–65 ("[W]e should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship. Perhaps we already have the machinery to do so." (footnote omitted)).

350. Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 552 (D. Haw. 1991).

351. Naruto v. Slater, 888 F.3d 418, 422 (9th Cir. 2018).

352. Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 134–35 (Or. Ct. App. 2022).

353. Stone proposes the same approach for environmental guardianship. *See* Stone, *supra* note 38, at 465 ("If such an argument based on present statutes should fail, special environmental legislation could be enacted along traditional guardianship lines."). For a survey of models of guardianship in rights of nature statutes, see Craig M. Kauffman, *Guardianship Arrangements in Rights of Nature Legal Provisions*, *in* EARTH LAW: EMERGING ECOCENTRIC LAW 161 (Anthony R. Zelle et al. eds., 2021).

procedural safeguards to account for the concerns of the courts in *Justice* and *Naruto* that lawyers might abuse guardianship appointments on behalf of animals.[354] Second, even in the absence of a statute or procedural rule authorizing such appointment, courts have the equitable authority to appoint a representative to protect the interests of a plaintiff lacking capacity.[355]

The issue of capacity is thus not fatal to animal plaintiffhood. While animals may lack legal capacity, they should be allowed to proceed through a duly appointed representative, appointed under either existing rules, newly created rules, or the inherent authority of the court.

D. STANDING

The final jurisprudential requirement for plaintiffs—in addition to their being rights-bearing persons with either legal capacity or a duly appointed representative—is the requirement of standing. Standing refers to the plaintiff's right to relief.[356] The doctrine of standing asks whether the plaintiff is the right party to seek enforcement of the right or duty at issue in the case. The rationale behind the doctrine stems from concerns related to the separation of powers, ensuring that the judicial branch does not overstep the adjudicatory authority allocated to it.[357] The standing doctrine prevents the judiciary from rendering advisory opinions without a concrete case while also ensuring that litigants are appropriately motivated to present the best possible case.[358]

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354. *See Justice*, 518 P.3d at 135 ("Animal-next-friend standing is particularly susceptible to abuse." (quoting *Naruto*, 888 F.3d at 432 (Smith, J., concurring))).

355. *See, e.g.*, Tutein v. Arteaga, 60 V.I. 709, 714 (2014) (finding that a Superior Court had "inherent authority—even in the absence of a statute—to appoint a guardian *ad litem*"); *see also* Steven M. Wise, *Animal Thing to Animal Person—Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61, 65 (1999) (collecting authorities on courts' inherent power to appoint guardians).

356. 59 AM. JUR. 2D *Parties* § 30 (stating that "[l]ack of standing bars consideration of a plaintiff's claim by the court").

357. Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."). For a critique of standing doctrine's efficacy in serving this purpose, see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

358. Baker v. Carr, 369 U.S. 186, 204 (1962) (describing the "gist" of standing as ensuring that the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens

Standing doctrines exist in both federal and state courts. The federal standing requirement derives from Article III of the Constitution, which limits the jurisdiction of federal courts to the adjudication of "cases" and "controversies."[359] The "irreducible constitutional minimum" for standing comprises three requirements: that the plaintiff have suffered an "injury in fact"; that the alleged misdeed of the defendant have caused this injury; and that the injury be redressable by a favorable court decision.[360] States have created their own standing doctrines, many of which adopt requirements similar to those of federal courts and typically treat these requirements as dispositive threshold questions of justiciability, although sometimes they consider standing nonjurisdictional, especially in cases involving the public interest.[361]

Could animals have legal standing in federal or state court? The answer will be highly case-specific, as it is with human plaintiffs. Whether an animal has standing in a given case will depend on a number of factors, including the jurisdiction, the nature of the injury, the claim being raised, and the relief requested. But there is nothing in standing doctrine that categorically excludes animals from having legal standing.[362]

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the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (explaining the purposes of standing doctrine).

359. U.S. CONST. art. III, § 2.

360. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

361. *See, e.g.*, Mental Hygiene Legal Serv. v. Daniels, 122 N.E.3d 21, 24–25 (N.Y. 2019) ("Thus, if the issue of standing is raised, a party challenging governmental action must meet the threshold burden of establishing that it has suffered an 'injury in fact' and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted'" (alterations in original) (quoting N.Y. State Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 407 (N.Y. 2004))); Teal v. Superior Ct., 336 P.3d 686, 689 (Cal. 2014) (describing similar standing requirements); Christopher S. Elmendorf, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1006–07 (2001) ("Unencumbered by constitutional constraints, state courts and legislatures often relax the background rules of standing in ways advantageous to environmental plaintiffs."); *see also* M. Ryan Harmanis, Note, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 739 (2015) ("[S]tate courts often decide to fill the gap left by the absence of Article III with public interest standing.").

362. *See* Sunstein, *supra* note 103, at 1360–61 (stating that nothing in the Constitution precludes standing for animals).

In federal court, the issue is whether an animal plaintiff could meet the Supreme Court's three-pronged standing inquiry. Animal plaintiffs could easily meet the second and third prongs: in many cases, various public and private defendants cause animals' injuries, and courts could meaningfully intervene to redress those injuries through injunctive or declaratory relief to halt the infliction of their injuries. The only real controversy is whether an injury to an animal is an injury-in-fact for standing purposes.

Can an animal suffer an injury-in-fact? An injury-in-fact is "an invasion of a legally protected interest."[363] The Supreme Court has noted that "tangible harms . . . such as physical harms" are "the most obvious" concrete injuries for standing purposes—at least for humans.[364] The *tangibility* and *physicality* of a harm is no less so because the entity that experiences it is an animal. As the scientist and philosopher Richard Ryder argues, "pain is pain regardless of species."[365] Peter Singer likewise argues that "there can be no moral justification for regarding the pain (or pleasure) that animals feel as less important than the same amount of pain (or pleasure) felt by humans."[366] To be sure, the nuances of suffering will differ significantly between species, given our varying capacities. But as Part III of this Article illustrates, animals can experience many of the kinds of negative affective states that courts recognize as injuries, including physical and psychological harm.

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363. *Lujan*, 504 U.S. at 560.

364. TransUnion LLC v. Ramirez, 594 U.S. 413, 425 (2021). For a critique of the Supreme Court's binary distinction between tangible and intangible injuries in *TransUnion* and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), see Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018). Just as the complexity of human existence demands the constitutional recognition of nontangible and nonphysical human injuries, so too does the complexity of animal existence demand similar recognition of nonphysical animal injuries. What those might be is beyond the scope of this Article but warrants further exploration. Animals might, for example, suffer aesthetic injuries when their habitats are significantly depleted or injuries to their interests in expressing themselves or communicating with others. At the very least, animals' capacity to experience physical and psychological pain ought to count for Article III purposes, but it is not exhaustive of their injuries.

365. Richard D. Ryder, *The Ethics of Painism: The Argument Against Painful Experiments*, 2 BETWEEN THE SPECIES 1, 9 (2002).

366. SINGER, *supra* note 91, at 15.

Consider the following hypothetical. Suppose a branch of the United States military were repeatedly conducting loud tests at all hours of the day adjacent to a residential neighborhood. The tests are so disruptive that the residents find it difficult to eat, communicate, and even mate. The people who live in that neighborhood would certainly have standing to contest the legality of those tests: the noise and disruption alone would constitute a concrete and particularized injury-in-fact, the injury would be fairly traceable to the government, and an injunction from the court could redress their injury by requiring environmental review and mitigation measures.[367] Now suppose that the residents are whales and dolphins and their neighborhood is the ocean. This is, in fact, what happens with military readiness exercises and surveillance systems used by the United States Navy that employ mid-frequency and low-frequency active sonar.[368] These sonar systems create such loud noises and disturbances that they cause cetaceans physical injuries and interfere with their ability to communicate, feed, and breed.[369] There is no reason that the experience of physical discomfort and psychological suffering should count as an injury in the case of the human residents but not the cetacean ones.

The Ninth Circuit has already recognized that animals can have Article III standing in a case concerning exactly these kinds of injuries. In *Cetacean Community v. Bush*, Judge Fletcher concluded that "nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans."[370] In *Naruto v. Slater*, although Judge Bea made clear his disagreement with the *Cetacean* holding, he acknowledged it as binding precedent and applied it to Naruto's case, holding that the monkey's "complaint includes facts sufficient to establish Article III standing."[371] To Judge Bea's chagrin, he noted, "we cannot escape the

367. *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264–65, (1991) (holding that a community group had standing to challenge constitutionality of review board that authorized increased noise from airports).

368. *See* Robin Kundis Craig, *Beyond* Winter v. NRDC*: A Decade of Litigating the Navy's Active Sonar Around the Environmental Exemptions*, 36 B.C. ENV'T AFFS. L. REV. 353, 353, 356–58 (2009) (elaborating on the effects of Navy sonar on marine life).

369. *Id.* at 366.

370. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004).

371. Naruto v. Slater, 888 F.3d 418, 424 (9th Cir. 2018).

proposition that animals have Article III standing to sue."[372] It is thus settled law in the Ninth Circuit that animals already have constitutional standing in federal courts. Given animals' ability to experience at least basic forms of injury, the Ninth Circuit's holding on constitutional standing in *Cetacean Community* is well supported.

But even in the two cases where the Ninth Circuit recognized Article III standing for animals, *Cetacean Community* and *Naruto*, it dismissed the cases for want of *statutory* standing.[373] Statutory standing is a nonjurisdictional inquiry into whether the plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue."[374] According to the Ninth Circuit, the test for statutory standing in animal cases is straightforward: "[I]f an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing."[375] Admittedly, no such federal statutes currently exist, which means there will be very few, if any, instances in which an animal would have a statutory cause of action in federal court.[376] But this is an empirical fact of positive law, not a categorical or jurisdictional obstacle to animal plaintiffhood. If Congress were to give animals or their guardians a cause of action, animals would have both constitutional and statutory standing to defend their rights in federal court.[377]

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372. *Id.* at 423 n.5; *see also id.* at 425 n.7 ("While we believe *Cetacean* was incorrectly decided, it is binding circuit precedent that non-human animals enjoy constitutional standing to pursue claims in federal court."). The Ninth Circuit declined to rehear the case en banc to reconsider *Cetacean Community*, despite the panel's request that it do so. Naruto v. Slater, 916 F.3d 1148, 1149 (9th Cir. 2018) (denying petition for rehearing en banc).

373. *Cetacean Cmty.*, 386 F.3d at 1179; *Naruto*, 888 F.3d at 426.

374. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 (2014); *see also id.* at 128 n.4 (referring to the label of "statutory standing" as "misleading" because it is not a jurisdictional question).

375. *Naruto*, 888 F.3d at 426.

376. Animals might still sue in federal court to enforce constitutional rights (if they could establish that such rights apply to animals or make compelling cases for their extension) or to bring state law claims based on diversity jurisdiction.

377. *See* Sunstein, *supra* note 103, at 1359–61 (discussing the ability of Congress to grant animals statutory standing); *Cetacean Cmty.*, 386 F.3d at 1176 ("[W]e see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name

Analyzing standing for animals in state courts is a more complex endeavor, given the variations among state standing doctrines and their exceptions, as well as the variety of claims that could be raised in state court on behalf of animals—statutory, constitutional, and common law. But to the extent state court standing doctrines concern themselves with ensuring that the plaintiff is herself injured and entitled to relief, the analysis should not differ substantially from the analysis of federal standing above. If animals have legally protected interests under state law, they should have standing to sue when someone violates those interests.

Yet in *Nonhuman Rights Project v. Commerford*, the Appellate Court of Connecticut rejected standing in a habeas corpus case brought by the Nonhuman Rights Project on behalf of three elephants confined at a zoo—Beulah, Minnie, and Karen.[378] The court rejected NHRP's standing as the elephants' next friend, holding that "the elephants, not being persons, lacked standing in the first instance."[379] Because the elephants themselves lacked standing, no one else could stand in as their next friend.[380] In rejecting the elephants' standing, the court cited Connecticut Supreme Court precedent holding that for a plaintiff to have standing, a statute must authorize their suit or they must be "classically aggrieved"—that is, they must have "a specific personal and legal interest in the subject matter of the decision" that has been "specially and injuriously affected."[381] In short, "[a]ggrievement is established if there is a possibility . . . that some legally protected interest . . . has been adversely affected."[382] The elephants lacked standing because, the court reasoned, "they have no legally protected interest that possibly can be adversely affected."[383]

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of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.").

378. Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 840–41 (Conn. App. Ct. 2019).

379. *Id.* at 842.

380. *Id.* at 843.

381. *Id.* at 843–44 (quoting Gold v. Rowland, 994 A.2d 106, 121 (Conn. 2010)).

382. *Id.* at 844 (quoting *Gold*, 994 A.2d at 121).

383. *Id.* at 846.

Is it true that elephants have *no* legally protected interest that could *possibly* be adversely affected? Surely not. Elephants have interests: they are not only sentient but also highly sapient, with a deep capacity for rich experiences along the physical spectrum from pain to pleasure and along the psychological spectrum from depression to joy, to name just a few of their emotional capabilities.[384] Elephants develop long-lasting familial relationships, remember socially relevant information over long durations, and grieve their dead, among other capacities.[385] Elephants have interests, namely the interest in avoiding physical and psychological suffering and thriving as the kinds of beings that they are.

Not only do elephants have interests, but many of these interests are legally protected. Connecticut's anticruelty law prohibits a variety of actions that inflict suffering upon elephants, including overworking, torturing, mutilating, killing, or unjustifiably injuring them.[386] It also gives confined elephants like Beulah, Minnie, and Karen an affirmative entitlement to "necessary sustenance" and "wholesome air, food and water," and "proper food, drink [and] protection from the weather."[387] Thus elephants in Connecticut do have legally protected interests that can be adversely affected, meaning they can be aggrieved in both the etymological sense discussed in Part III and in the legal sense required by Connecticut precedent. To be sure, Connecticut's anticruelty law does not recognize the strong, fundamental liberty interests that the NHRP lawsuit sought to establish, but it does create legal protections for elephants' interests sufficient to establish standing.

Thus, although animals will not *always* have standing in state or federal court, nothing about animals' legal status categorically precludes their ability to have the kinds of injuries that confer standing and entitle plaintiffs to relief from a court.

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384. *Cf.* Joyce H. Poole & Cynthia J. Moss, *Elephant Sociality and Complexity: The Scientific Evidence*, *in* ELEPHANTS AND ETHICS: TOWARD A MORALITY OF COEXISTENCE 69, 69 (Christen Wemmer & Catherine A. Christen eds., 2008) (collecting empirical evidence "verif[ying] elephant intelligence").

385. *Id.* at 71, 87, 90.

386. CONN. GEN. STAT. § 53-247(a) (2023).

387. *Id.*

CONCLUSION

This Article has defended the idea that nonhuman animals are plaintive subjects who suffer unjustly at the hands of human beings in ways that entitle them to plaintiffhood. It argued that animals are subjects of justice and that our legal system ought to include their abuse amongst the kinds of wrongs that it recognizes as issues of concern. If we accept that animals have legitimate substantive claims to just treatment—at the very least, an entitlement not to be subjected to gratuitous cruelty, but also, more fundamentally, an entitlement to flourish—then animals deserve the procedural access to the courts that guarantees these substantive entitlements.

There is nothing in the role of the plaintiff that precludes animal plaintiffhood. On the contrary, the etymological and conceptual foundations of the term *plaintiff* gesture toward a being who plaints, mourns, laments, suffers, grieves, and complains. From the capuchin monkey who is frustrated by the injustice of receiving a cucumber when his partner receives a grape, to the peccary who guards the corpse of her deceased companion, to the elephants in the Roman gladiatorial arena who in 55 B.C.E. "entreated the crowd, trying to win their compassion with indescribable gestures, bewailing their plight with a sort of lamentation,"[388] animals are plaintive beings. Their capacity to suffer indicates their capacity to have something to complain about—precisely what plaintiffs *do*.

Of course, not all complaints are legally cognizable, so this Article has explored the jurisprudential doctrines that guard the courthouse doors: personhood, legal rights, legal capacity, and standing.

With regard to personhood, this Article has argued that animals are already limited legal persons because they possess legal rights. Alternative conceptions of personhood that link it with species membership are untenable because nonhuman persons already exist (i.e., corporations, municipalities, and other similar entities). Similarly untenable are definitions that require persons to bear legal duties or moral responsibilities, given the undisputable personhood of human beings who lack those characteristics.

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388. Nussbaum, *supra* note 88, at 299 (quoting PLINY, NATURAL HISTORY 8.7.20–21 (79 C.E.)); *see also* CASSIUS DIO, ROMAN HISTORY 39.38 (Earnest Cary trans., 1914), https://lexundria.com/dio/39.38/cy [https://perma.cc/HQ56-3SPH].

With regard to rights, this Article has argued that legal rights include the correlates of legal obligations that protect the interests of others. Because existing laws, including state animal cruelty statutes and federal regulatory laws such as the Animal Welfare Act and the ESA, create duties upon humans to behave in particular ways toward animals for the sake of the animals themselves, animals already possess legal rights.

With regard to capacity, although animals lack legal capacity under our current understanding of animal minds and the requirements of the doctrine, animals' legal incapacity is not a barrier to their plaintiffhood. Duly appointed representatives or guardians could defend animals' interests, either under existing procedural statutes and rules, by amending and expanding those rules, or through the inherent equitable authority of courts.

Finally, with regard to standing, this Article has argued that there is nothing about the injuries suffered by animals that precludes their standing in court. Animals suffer "injuries-in-fact" to their physical and psychological interests when we inflict suffering upon them. These injuries count in the human case. There is no reason other than speciesism not to count them in the case of nonhuman animals. Of course, whether an animal has standing in a particular case will require a case-specific inquiry that depends on the forum, the claim, and the factual allegations. But nothing in the doctrine categorically precludes animal plaintiffs from having standing to defend their substantive rights.

As plaintive beings, animals meet the conceptual expectations of plaintiffhood. As legal persons with legal rights who suffer real injuries that can be redressed through representatives acting on their behalf, animals meet the jurisprudential requirements of plaintiffhood. The repeated reluctance of courts to allow animals to plead their cases is thus wrong and misguided. This Article has urged an inclusive and anti-anthropocentric approach to plaintiffhood that is consistent with our contemporary understandings of who animals are, what they need to thrive, and why they are entitled to substantive and procedural justice.

Looking forward, the question of nonhuman plaintiffhood will remain an important one. Scientific knowledge and changing cultural norms will continue to break down the anthropocentric binary between humans and the nonhuman world, especially as human activity threatens the habitability of the planet and

forces us to reckon with the increasingly destructive speciesism of our political, legal, and cultural institutions. The legal system, in particular, will need to reevaluate the inclusivity of its categories of who is and is not allowed to complain about their aggrievement. Courts can facilitate this process by taking an inclusive and capacious approach to understanding who the law is for and how our existing jurisprudential categories might be expanded. Legislatures can do the same by taking affirmative steps to create express procedural mechanisms for animal plaintiffhood and by establishing strong substantive rights. As the Ikhwân al-Ṣafâ's fable illustrates, acknowledging animals' aggrievement is important, but their success as litigants will ultimately depend on the robustness of their substantive legal rights and the seriousness with which we acknowledge their oppression.