ANIMAL WRONGS: ON HOLDING ANIMALS TO (AND EXCUSING THEM FROM) LEGAL RESPONSIBILITY FOR THEIR INTENTIONAL ACTS

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With rights come responsibilities. All of the various social mandates that allow us to exercise rights to engage in certain activities at the same time impose on us obligations to not engage in others and to comport ourselves with innumerable social mores. The physical confinement of a prison, the financial confinement of a contract, the imposition of a debt, and the burden of spousal and parental responsibilities all weigh heavily upon us on account of, not in spite of, the freedoms we enjoy in our roles as citizens, as consumers, as parents, or as spouses. Animal rights advocates clamor for their slice of the rights cake, but have remained mute about the more distasteful obligations with which such a treat must by necessity be served. There has been no talk about the corresponding inevitability of animal jails, animal accountability, or animal/owner termination hearings, examples of institutional devices and actions that would seem to logically accompany the bestowment of animal freedoms.

With animal rights come animal responsibilities, QED. What those burdens mean legally is a question to be confronted, not ignored, and to be addressed now, not later on when inconsistencies have arisen in the form of difficulties in enforcement. Since the imposition of a legal burden is regularly attended by the imposition of procedural ones, this article specifically confronts two pieces of an initial procedural quandary in tort law that will arise should animal rights become more formally established: one, a court's difficulties in determining an animal's intent to harm others, and two, a court's difficulties in factoring in another's provocation of the animal into engaging in such harm.

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INTRODUCTION

> The most evident difference between man and animals is this: the beast, in as much as it is largely motivated by the senses and with little perception of the past or future, lives only for the present. But man, because he is endowed with reason by which he is able to perceive relationships, sees the causes of things, understands the reciprocal nature of cause and effect, makes analogies, easily surveys the whole course of his life, and makes the necessary preparations for its conduct.[1]

I begin this article with the axiom that legal rights operate in tandem with procedural restraints, and that being empowered with the former by necessity requires—whether one likes it or not in terms of political correctness—being beholden by the latter. I then apply that balancing game to nonhuman animals in particular (herewith "animals") and conclude that those who advocate for animals' entitlement to legal rights must account for the procedural intractability of a real world application of those rights. The article posits a line of propositional dominos, arranged in order from slightly abstract to more concrete within the practice of tort law, with each piece pushing the next over as it falls. My six dominos are envisioned to tumble as follows:

1. That animal legal rights require animal legal obligations;

2. That animal legal obligations require determinations of animal misconduct;

3. That determinations of animal misconduct require the decipherment of animal intent;

4. That the consideration of intent must excuse from culpability provoked acts;

5. That "provocation" requires the exercise of independent judgment and self-restraint;

6. And therefore that animals, not possessing such features, cannot be held legally culpable for their conduct nor, consequently, entitled to rights.

Positioning the first domino in the line demands an assumption that animals have been granted legal rights, and I have selected, as a

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[1] MARCUS T. CICERO, DE OFFICIIS, (44 BCE), http://xml.education.yahoo.com/reference/quotations/quote/22561.

representative right, the right not to be harmed, i.e., abused, exploited, eaten, or physically impaired in some manner. Part I of this article explicates tort law's penalization of intentional harms and describes the law's tentative forays into deciphering intent in general and animal intent in particular. Part II of this article confronts the concept of "provocation" and describes what obstacles lawyers might face in justifying certain intentional acts of animals that have been instigated by another's conduct. Parts III and IV address evidentiary concerns about the proof of intent, and Part V points out issues with provocation as specifically applied. The article concludes with the last domino toppled by the insurmountable problems that fact-finders and jurists have encountered and will continue to encounter in evaluating and applying the doctrines of both animal intent and provocation.

I. RIGHTS ARE TIED TO SELF-REGULATED CONDUCT AND LANGUAGE

All animals have instincts—humans, of course, included.[2] One of the fundamental distinctions the law employs to separate humans from all other animals is that humans can voluntarily restrain their instinctual behaviors, whereas animals seem compelled to involuntarily express (and act subservient to) such behaviors.[3] A complementary distinction is that we use language to ascertain that others will voluntarily restrain *their* instinctual behaviors in exchange for us restraining ours; in contrast, spoken or written promises are simply not available from animals.[4] The "agreement" is an exclusively human invention. Laws, also an exclusively human invention, both arise from and give richness to the core idea of what an "agreement" is. Our twin capacities for self-imposed restraint, and the means to broadcast that we are engaging in such restraint are weighty foundations underlying our rapacity for mutually negotiated rules of performance, the *aqua vitae* of agreements. Your "agreement" with your neighbor about your dog is critically different, in the eyes of the law, from your "agreement" with your dog about your neighbor.

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[2] *See, e.g.*, W. H. THORPE, LEARNING AND INSTINCT IN ANIMALS (2d ed. 1966) (discussing how instincts guide the learning of worms, arthropods, fish and mammals). *See generally* THE ORIGIN AND EVOLUTION OF HUMANS AND HUMANNESS (D. T. Rasmussen ed., 1993) (suggesting that instincts guided the learning and evolution of early hominids).

[3] *See* State v. Negro Will, 18 N.C. 121 (1 Dev. & Bat.) (N.C. 1834) ("The law demands it as a duty that we should tame our passions to suit the condition which it has assigned us.").

[4] *See generally*, Steven Pinker, The Language Instinct 268-69 (1995) ("In all [human] cultures, social interactions are mediated by persuasion and argument. How a choice is framed plays a large role in determining which alternative people choose. . . . [E]volving humans lived in a world in which language was woven into the intrigues . . . that played key roles in individual reproductive success.").

From *The Prince*[5] to "the prisoner's dilemma,"[6] sociologists have appreciated the fact that "playing by the rules" confers a greater advantage on the player than does violating the rules. What those rules are, and just how to play, are in turn transmitted from one person to the next, as well as from one generation to the next, by language—the rich and complicated acts of speech and writing. Our past is, in large part, a game that has lasted for millennia, the players being people socially obligating themselves to other people in a world where self-interest supports the practice and biology provides the vehicle. Evolution by natural selection has fashioned both the ability to use, and the interest in using, mutually-fashioned symbols and concepts to circumscribe our interactions with other people in the world around us.

Contrast humans with animals. Animals do not have social obligations—a truth able to be stated in large part because they are not reasonably expected to be able to truly restrain their instinctual conduct, and in somewhat smaller part because our lack of real communication with them makes it nearly impossible for us to ascertain their *intent* to restrain themselves.[7] Animals, like humans, can be taught by other animals (particularly humans) to do certain things, and we have investigated a rich variety of species, from earthworms to elephants, which can be observed to restrain *some* behaviors through what they have learned (or at least what we *think* they have learned).[8] The true scope of the learned restraints, however, depends heavily on the type of animal, the type of learning, who or what is doing the teaching, the motivations of the teacher and the student, and a variety of very specific environmental circumstances affecting the efficacy of the lesson.[9] Out of caution and experience, even our expectation that *some* animals can control *some* learned behaviors has so far not been enough to justify the inclusion of any animal in general within the intricate and special rules of social conduct that we currently impose upon

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[5] NICCOLO MACHIAVELLI, THE PRINCE (George Bull trans., 1999).

[6] *See, e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION 109-23, 206-07 (1984) (developing the iterated prisoner's dilemma in which prisoners who cooperate with other prisoners gain an advantage over those who do not). *See generally* Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. OF BIOLOGY 35 (1971) (presenting a model of society in which cooperation is to the advantage of individuals and reciprocally altruistic behavior is naturally selected).

[7] Norman Malcolm, *Thoughtless Brutes*, 46 PROC. & ADDRESSES OF AM. PHIL. ASS'N 5-20 (1973). "The relationship between language and thought must be . . . so close that it is really senseless to conjecture that . . . animals *may* have thoughts." Id. at 17-18.

[8] *See generally*, WILD MAMMALS IN CAPTIVITY (Devra G. Kleiman et al. eds., 1996).

[9] For a comprehensive, but somewhat dated, review of scientific studies, see Sara J. Shettleworth, *Constraints on Learning*, *in* 4 ADVANCES IN THE STUDY OF BEHAV. 1, 1-61 (Daniel S. Lehrman et al. eds., 1972).

ourselves.[10]

The empirical fact that many animals can learn is, in general, primarily of interest to the ethologist and the zoologist—scientists who study just what it is that animals actively do during their day.[11] On the other hand, the fact that only a *few* animals can learn what we would call "self-restraint" is also of interest to the lawyer and the sociologist—non-scientists who study the roles and interplay of social relations. Animal rights advocates nevertheless tend to overlook the fact that the foundational trick—i.e., voluntarily restraining one's own behaviors–made its appearance due only to the pressures of millions of years of natural selection necessary to accomplish it. In seeking to grant privileges to a host of animals, animal rights proponents fail to account for the fact that evolution has excluded animals from the entire panoply of social expectations as to conduct.[12] Since rights arise from formalized social expectations, animals are excluded from the expectations of rights as well.

II. RIGHTS RELATED TO INTENTIONAL HARMS TURN BOTH WAYS

Why is self-regulated conduct (and the capacity to communicate about what the regulations are) such an important predicate to legal rights? As I have already noted, the benefits of social relations arise from the burdens created by voluntarily engaging in them; rights are tightly welded to responsibilities because responsibilities *define* rights. Of what value is a victim's right to participate in the sentencing of a convicted perpetrator if non-victims are not restrained from participating? Of what value are bankruptcy protections to a debtor if the financially solvent are not laden

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[10] I am not equating "animal rights" with "animal protections." While I have no quarrel with attempts to legislate certain protections for animals, including through new rights and remedies for certain types of animal *owners*, I cannot and do not say the same for attempts to grant legal rights to animals themselves.

[11] *See, e.g.*, DONALD R. GRIFFIN, ANIMAL THINKING_(1984) (discussing research findings and making the case for animal consciousness).

[12] The problem, when it has been acknowledged at all, is addressed as if it were merely a historical curiosity already easily explained away: "[In the past] it could matter whether an animal committed a deliberate or accidental harm. It could also matter whether the animal was provoked or whether it acted in self-defense against, say, the attack of other animals." Richard A. Epstein, *Animals as Objects, or Subjects, or Rights*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, 143, 146 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). In his most current work on the subject, Steven Wise, one of the most vehement writers in the arena of animal rights and a practicing lawyer, dismisses the entire topic of "legal obstacles" in the space of a single paragraph, curiously unimpressed by any idea that animal obligations would be of much concern for the law. *See*, Steven M. Wise, *Animal Rights, One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 19, 25 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

with duties to creditors? A person's right to rely on and enjoy the use of private property without unreasonable interference, for example, has value by virtue of society's imposition on him or her of a need to recognize and respect the concept of "boundary lines" in general. Similarly, a person's right to not be unjustly harmed has value by virtue of agreeing to a social compact—the grudging understanding that she will be held physically or financially accountable when she unjustly harms others.

We tend to express the value of those rights through legal procedures. The Fourth Amendment right to be secure in our homes and persons is given its most concrete expression primarily through the machinations of the motion *in limine*, a procedure used to exclude certain types of evidence. The First Amendment right to freely express ourselves and freely associate with others is given its most concrete expression through the intricacies of the restraining order and the absolute and qualified privileges, procedures used to protect and constrain witnesses. It makes sense that we would therefore value animal rights by giving them expression through procedure as well; to the extent that it is not self-evident, the rule of law mandates that animals would have to labor under some manner of procedurally-defined obligation were they to obtain similar constitutional or statutory privileges.[13]

The ability to communicate conceptually with each other is absolutely essential to the concept of a "privilege," or a "motion," or a "witness." The immense, manipulative power of speech and writing, in turn, is what gives our enjoyment of any freedoms, and our displeasure at any restraints, true meaning. Conceptual and symbolic speech, in all their permutations, invest our enforcement mechanisms with far greater persuasive power than a club or a rock ever could; speech acts can traverse time and distances in a manner that is orders of magnitude above the non-speech threat of the most expressive of physical displays or postures.

Take the right not to be harmed: those who stump for the right for animals not to be harmed look expectantly to a bevy of protections from injury or death being granted directly to animals, but tend to ignore that fundamental fairness to "rights-holders" in general would require three

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[13] The District of Columbia Circuit has used analogous reasoning:

> This sense of justice assumes that there is a faculty called reason which is separate and apart from instinct, emotion, and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts. This ordinary sense of justice still operates in terms of punishment. To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.

Holloway v. United States, 148 F.2d 665 at 666-67 (D.C. Cir. 1945).

obligations being imposed in conjunction with each protection. Those obligations arise in terms of conduct ranging from quite tame to most severe, and are embraced in the class of acts that require the intensely creative power of linguistic communication to give them effect.[14] These obligations are: the formal, public assertion of the right by the act of *pleading*; the formal, public uncovering of the right by the act of *discovery*; and, the formal, public presentation of the right by the act of trial.

Pleading is a very stylized form of written communication that frames a factual problem in the accoutrements of legal terminology. Discovery is a very stylized form of oral and written communication that marshals the evidence necessary and sufficient for resolving the problem. Trial is a very stylized form of oral and written communication that marries the pleading to the facts to the evidence to the law to ultimately resolve the problem publicly. There is not a single stage in the entire set of steps that does not impart both a burden and a benefit on any participant who wishes to resolve concerns through the application of law.

Of the three, the most powerful form of showing the manner in which social and legal obligations are imposed is the trial. Cultural images and perceptions associated with the courtroom trial reflect the fact that trials are one of the most commanding and authoritative ways we have of projecting the legal ideas we set down on the printed page into the public mind. Yet what role could rights-bearing animals play in a courtroom trial? "If the animals had in any proper sense rights, we should no more be entitled to put them to death without a fair trial, unless in strict self-defen[s]e, than to torture them for our own amusement."[15]

The casual oddity of the image of animals standing trial[16] reveals a serious intrinsic problem with the pragmatism of a right to not be harmed. It stands to reason that animals who possess their own tort claims as to

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[14] *See* STEVEN PINKER, THE LANGUAGE INSTINCT 334 (1995) (explaining how human language differs from other animals' means of communication).

> [H]uman language has a very different design [compared to nonhuman communication]. The discrete combinatorial system called 'grammar' makes human language infinite (there is no limit to the number of complex words or sentences in a language), digital (this infinity is achieved by rearranging discrete elements in particular orders and combinations, not by varying some signal along a continuum like the mercury in a thermometer), and compositional (each of the infinite combinations has a different meaning predictable from the meanings of its parts and the rules and principles arranging them).

Id.

[15] David G. Ritchie, *Why Animals Do Not Have Rights*, *in* ANIMAL RIGHTS AND HUMAN OBLIGATIONS 181, 184 (Tom Regan & Peter Singer eds., 1976).

[16] *See, e.g.*, People v. Fabing, 570 N.E.2d 329, 333 (Ill. 1991) (holding in part that snakes are not entitled to due process).

harm, just like humans, would be expected to "tame their passions to suit the condition assigned," as it were, to restrain their instinctual behaviors and propensities to harm, and to be socially obligated to control themselves in the same public aspects that humans control themselves. Animals extended that manner of recognition would then, *ipse dixit*, suffer under (and be granted defenses against) the possibility of incarceration, punishment, or loss of some privilege, for violating those social obligations.[17]

The particular idea of harming and being harmed arises frequently in discussions of animals, obligations, and the extent of the law that addresses both. Many of our legislated and litigated rules affecting animals revolve around incidents of attack, physical confrontation, and personal injury. For that reason, incidents of personal and physical harm seem to be a fruitful area in which we might try our hand at seeing if fashioning any animal right is ever going to be *procedurally* viable. Under the analysis stated above, and no different than with humans currently, it seems eminently rational to suggest that animals, as beings protected against assault, battery, and the like, should shoulder *procedural* obligations for themselves intentionally harming others, as well as be relieved of some of the sting of such procedural obligations for engaging in harmful acts in circumstances where the acts are considered socially justified.

For purposes of most criminal codes, humans are held to have acted intentionally whenever they act with a conscious objective to cause the result or to engage in the conduct with which they have been charged. The focus of those statutes is the extent to which the defendant subjectively intends the *result*, as opposed to merely intending the act that caused the

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[17] Some animal rights advocates are quick to express moral outrage at the idea of imposing obligations on animals at all, and vocally, albeit not very logically, push on the rights door to swing only one way – against humans:

> In short, more attention must be given to both the needs of the animals and the culpability of the human actors. Prosecutors and judges must lift responsibility from the shoulders of the animals, and place it where it more properly belongs—with the human guardians of the offending animals. They must zealously enforce anti-cruelty laws when private citizens take the law into their own hands and kill animals suspected of harming human beings. Notions of humanity, justice, and equity require that we revisit the idea of giving animals some measure of due process before taking their lives. Perhaps it is time that we seriously consider re-extending to alleged animal offenders at least basic judicial due process protections before killing them.

Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals* 9 ANIMAL L. 97, 133 (2003). Girgen's article, a historical review of animal punishments, represents standard animal rights fare: weighty with adjective-laden anecdote, infected with moral indignation and righteousness, yet feather-light on either scientific support or rational legal analysis, especially in confronting the mutual and reciprocal nature of what exactly legal rights themselves are.

result.[18] *If* animals are granted the right to not be harmed, and *if* they are to be held responsible for engaging in their own intentional misconduct, then we need to get a firm grip on just what their intentional conduct encompasses. We therefore need to examine cases in which animals subjectively intend the result of their directed conduct. In that sense, the type of intent in which we should most be interested is that where the consequences of the actions are intended, not just the actions themselves.[19]

At the very threshold of such an analysis is a recognition that intentionality in that sense requires the existence of some manner of "mind," and, as lawyers, we have some familiarity with that first tender step into the deep waters of animal psychology. Fortunately, for well over a century in our legal system, American courts have occasionally incorporated into their decisions the acknowledgment that at least some animals do have minds.[20] Examples of jurists' recognition of the phenomenon appear sprinkled throughout the common law—albeit more with the flourish of the romantic novelist than with the dryness of the field biologist:

> 1. Even a human being, under a railroad bridge when a train thunders over it, will instinctively seek a place of greater security elsewhere; and if this feeling exists in the human breast, what must the effect of such an experience be upon the mind of an animal?[21]
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> 2. As the complaint fails to allege that the cow had an evil disposition, such as would lead her to attack human beings, necessarily there is no charge that the appellant had notice of any such evil disposition; and as the willful conduct of the animal in attacking the appellee was not such as the appellant had a right to expect, or might anticipate, he is not responsible for the injury

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[18] *See, e.g.*, OR. REV. STAT. § 161.085(7) (2006) (explaining that acting intentionally means that "a person acts with a conscious objective to cause the result"); State Farm Fire and Cas. Co. v. Parker, 1 P.3d 498, 500 (Or. Ct. App. 2000) (finding that defendant acted intentionally because defendant intended to shoot the victim and intended to cause the resulting injury).

[19] I follow Heyes and Dickinson's convention of defining "intentional" to mean rational action based on a belief that the action will attain a desired result. *See* Cecilia Heyes & Anthony Dickinson, *The Intentionality of Animal Action*, 5 MIND & LANGUAGE 87 (1990) (defining intentionality as comprised of beliefs, desires, and the inferential ability to produce action based on beliefs and desires).

[20] Most others will also casually acknowledge that animals have minds. See, for example, the curious census taken in S.L. Davis, and P.R. Cheeke, *Do Domestic Animals Have Minds and the Ability to Think?* 76 J. ANIMAL SCIENCE 2072-79 (1998) (polling students, faculty and staff at a university to find out whether they believe that animals have minds).

[21] Miller v. Engle, 172 S.W. 631, 633-34 (Mo. Ct. App. 1915).

caused by such unexpected and willful conduct.[22]

> 3. It was on a zero night in February, at a time when all good and valuable horses should have been at home and in bed, that the poor, senseless animals were killed. And, under the circumstances, who will blame the animals or reflect on their intelligence if they deliberately committed suicide by running across the railway in front of a train running at 50 miles an hour? All their troubles and starvation was [sic] ended in a moment.[23]

> 4. I, for one, find the threat of dogs (including packs of wild poodles) with split personalities a slim reed on which to base interpretation of the statute before us.[24]

> 5. While we do not pretend to read the mind of a bovine animal, it seems apparent that these animals do not want to be lassoed, thrown to the ground and tied up so that their horns and other anatomical parts can be severed. The prospect that "muggers" will not be gentle certainly must loom on the animal's horizon.[25]

Legal opinions reflect, occasionally, our common sense and our common consensus about what is socially acceptable, and certainly we do not need judges to tell us what we know in our bones—that intentionality is one of the key distinctions between dogs and dishwashers.[26] Yet what does a dog, for instance, subjectively intend in the sense that it would be *legally* held to "know" that its acts would cause injury?[27] We tend to generally refrain from extrapolating ultimate goals out of immediate actions, and we certainly would not be keen on making such projections with animals. To be fair, there really has been no need to do so: our legal concerns have always been about owner responsibility, not animal responsibility, and so

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[22] Doe v. Barnett, 251 N.E.2d 688, 692 (Ind. Ct. App. 1969).

[23] Brown v. Minneapolis, St. P. & S.S.M. Ry. Co., 180 N.W. 792, 792 (N.D. 1920).

[24] Katsaris v. Cook, 225 Cal. Rptr. 531, 544 (Cal. Ct. App.,1986).

[25] Domenghini v. Evans, 70 Cal. Rptr.2d 917, 919 (Cal. Ct. App. 1998).

[26] Geordie Duckler, *On Redefining the Boundaries of Animal Ownership: Burdens and Benefits to Evidencing Animals' Personalities*, 10 ANIMAL L. 63, 69 (2004).

[27] In law, dogs seem to get the most attention of any animal. *See, e.g.*, Johnson v. McConnell, 22 P. 219, 220 (Cal. 1889) ("[I]t is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt."). In addition, the majority of scientific studies on animal behavior focus on domesticated animals such as dogs. *See, e.g.*, E.B. Hale, *Domestication and the Evolution of Behavior, in* THE BEHAVIOR OF DOMESTICATED ANIMALS 22, 22-42 (2d ed. 1969) (listing a number of criteria to explain which animals, like dogs, have traits that are adapted to domestication); J.P. Scott, *The Effects of Selection and Domestication Upon the Behavior of the Dog*, 15 J. NAT'L CANCER INST. 739, 739-58 (1954) (explaining that dogs have existed in conditions favorable to their domestication throughout history).

our rules have developed accordingly. In other contexts, we find that the general rule courts currently apply is that the intent of an animal is immaterial to a determination of an owner's responsibility for the animal's actions.[28] It is the opinion of many courts that attempting to more particularly determine an animal's intent—as to either its acts *or* the consequences of its acts—would be a project that would lead one into a "morass of subjectivity."[29] It is in that morass that we find ourselves surrounded by the problems and promises of language. Owners can explain their intentions and their knowledge of consequences, but animals cannot. The morass is a natural byproduct of two discrete and organic limitations: the absence in animals of a spoken language, and the vast breadth of animal species in which intent would have to be deciphered from an even vaster array of non-linguistic animal acts.

III. THE DETERMINATION OF INTENT REQUIRES THE USE OF LANGUAGE

More colloquially, the first limitation in the morass may be phrased: if they cannot talk, then how do we know what they mean?[30] If our answer demands a reference to non-verbal conduct, then the second limitation kicks in, and may be phrased: if we are to substitute meaningful behaviors for meaningful speech, then *which* behaviors of *which* animals qualify in *which* circumstances and under *which* interpretations? At the outset of addressing both limitations, we must at least agree as a premise that the animals themselves cannot tell us these things directly:

> Most animal research [regarding animal personality] has focused on traits, behaviors, and abilities, but no research has examined personal projects,

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[28] See, e.g., Mercer v. Marston, 3 La.App. 97 (La. Ct. App. 1925) (holding that a dog that is mischievous but not vicious can nonetheless cause its owner or handler to be liable for injuries to another); Zuniga v. Storey, 239 S.W.2d 125, 127 (Tex. Civ. App. 1951) (finding for plaintiff-appellant by reversing a jury verdict for defendant-appellee whose bull escaped and injured the plaintiff's wife, where the defendant should have known of the bull's violent tendencies); Crowley v. Groonell, 50 A. 546, 547 (Vt. 1901) (affirming a lower court's decision to hold an owner responsible for the injuries caused to another by his dog regardless of whether the dog was acting in a malicious or playful manner).

[29] Lewellin v. Huber, 456 N.W.2d 94, 98-99 (Minn. Ct. App. 1990) (Randall, J., dissenting) (discussing a statute that covered both "playful" and "vicious" bites). However, proclaiming the prohibition on determining an animal's intent has hardly stopped courts since the last century from violating it, often in the same breath. *See, e.g.*, *McConnell*, 22 P. at 222 (McFarland, J. dissenting) ("The rule that a man's intentions must be gathered from his conduct applies still more forcibly to dogs, and if a dog be found chasing sheep in a field of his owner's neighbor, the common judgment of mankind is that his intent is bad.").

[30] Of course, the very rare talking cat is an exception to this assertion. *See* Miles v. City Council of Augusta, Ga., 710 F.2d 1542, 1543 n. 5 (Ga. Ct. App. 1983) (refusing to recognize a talking cat's right of free speech).

> identity, attitudes, and life stories. Presumably, this discrepancy between the domains of human and animal personality is largely driven by the nature of the latter concepts, which require participants to articulate their internal motives, feelings, and beliefs. Clearly, any phenomena dependent on self-reports by the research participants cannot be examined in nonhuman populations.[31]

A reliance on behavior alone spells trouble. The rule-making opportunities inherent in sifting through the repertoire of animal behaviors are daunting to say the least: with tens of millions of species to work with[32] and tens of thousands of individual behavioral "acts" to consider—from the tip of the nose (flaring of the nasal membranes), to the tips of the toes (curling of the lateral digits)—with an uncountable number of environmental circumstances to confine an interpretation, and with potentially more than six billion human-oriented personal opinions and ideas on what *that motion the animal engaged in right then* truly meant, the combinatorial explosion of interpretation possibilities would keep lawyers, not to mention evidence book writers, occupied for a ridiculous period of time. Animal scientists, ever the optimists, are nevertheless already quite busy with this project.[33] It is courts, on the other hand, which have not done well with maintaining any consistency in their approaches as to what behaviors by what animals have meant what and to whom:

Example 1: As to bulls and men:

> At best, Duren's evidence merely established that the bull had exhibited behavior such as trying to climb a fence or snorting and pawing when in a sale ring. This does not establish dangerous propensities in and of itself.[34]

Example 2: As to leopards and children:

> We are not speaking of domesticated animals gone amuck. We are concerned with naturally wild and ferocious animals whose basic instincts are predatory from the day they are born. This observation cannot reasonably be a matter of dispute. In the absence of proper safeguards, even a caged wild animal presents a "manifest danger" to persons attracted to such an exhibit. . . . "No member of such a

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[31] Samuel D. Gosling, From Mice to Men: What Can We Learn About Personality from Animal Research?, 127 PSYCHOLOGICAL BULLETIN 45, 58 (2001).

[32] There are currently about 1.4 to 1.8 million named species, but it is estimated that the actual number of species in the world ranges from 5 to 14 million. P. Hammond, *The Current Magnitude of Biodiversity*, *in* GLOBAL BIODIVERSITY ASSESSMENT 113, 116-20 (1995).

[33] *See* Gosling, *supra* note 31, at 48 tbl.1.

[34] Duren v. Kunkel, No. WD 42920, 1990 WL 154090, at *2 (Mo. Ct. App. Oct. 16, 1990).

species, however domesticated, can ever be regarded as safe, and liability does not rest upon any experience with the particular animal."[35]

Example 3: As to dogs and trains:

[The] presumption that [a] dog will get out of the way in time to avoid injury or not move into danger exists only where 'there is nothing in the circumstances of its approach or manner of its being upon the track to indicate to a reasonably prudent operator that the animal is helpless, or indifferent to its surroundings and danger.' . . . [A] dog 'must be placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of all his faculties,' and that the presumption would not apply to 'a dog near or upon the track in a position which showed that he was helpless, or totally oblivious of his surroundings.' [It is] reasonable to place a dog on 'somewhat the same footing as a human being when in the possession of all his faculties and capable of seeing the danger and escaping from it. [There is] no reason to apprehend danger to a dog on the track, or duty to stop the car 'unless there is something about the dog's actions and movements, or his inaction, to indicate that he is either unable to get off the track or oblivious to the approach of the car.'[36]

Example 4: As to mules and trucks:

There was nothing unnatural about the action of these two old mules. It is the natural instinct of all animals to shy away from danger when they see it. We might excuse from this class the bovine species which apparently relies upon the judgment or instinct of man to save himself when they are in the way. The two mules in this case were old, one sixteen years of age, and the other much older. They were gentle and unafraid of automobiles and other motor vehicles. This is proved by the fact that they displayed no fear of this big truck and two graders, which certainly are much noisier than a car or a light truck, such as did frighten them. It is further demonstrated that they were gentle by the fact that they did not run away after jumping off the road, and were brought to a stop within ten or twelve feet, pulled the wagon back up on the road, and quietly went on their way. It appears to us that the mules used good judgment in jumping off the road.[37]

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[35] Eyrich v. Earl, 495 A.2d 1375, 1377 (N.J. Super. Ct. App. Div. 1985) (internal citations omitted).

[36] Lloyd v. Alton R.R. Co., 159 S.W.2d 267, 273-74 (Mo. 1941) (internal citations omitted).

[37] Smith v. La. Power & Light Co., 158 So. 844, 846-47 (La. Ct. App. 1935).

Courts, struggling to reconcile a philosophical refusal to treat animals solely as machines with a historical refusal to treat them identically to humans, have created a solution of sorts by invoking the concept of "propensity,"—the idea that present instincts and past behaviors might somehow mesh together to at least circumscribe the possible range of the animal's otherwise undecipherable intent.[38] Many judges are extremely reluctant to simply infer an animal's present bad purpose from its historical record of bad acts,[39] but will at least entertain the notion that some manner of history makes the current charge more likely than it otherwise would be—hence "having a propensity to harm" is less persuasive than "did actually mean to harm," but more incriminating than "did not actually mean to harm." Apart from the fact that it is nearly always applied to dogs as opposed to any other animal, the concept of "propensity"—as a legalistic fence straddling mechanism to get past the muddiness of deciphering the intent and the directed consequences of non-language users—is nevertheless not without its own troubles:

> The lower courts held that the dog did not "attack" the child since its act of lunging for the chicken was merely instinctual. In a similar fashion, Appellees assert that because the dog was attempting to recover a piece of chicken, the dog did not possess "the obvious intent to destroy, kill, wound, injure or otherwise harm the object of its action." We disagree. Although we are constrained to follow the statutory language, we must also assume that the legislature did not intend an absurd result. It would be contrary to the purpose of the Act to hold that a child whose injuries were so severe as to require plastic surgery had not been attacked by the animal that inflicted the wounds. If the lower courts' narrow interpretation were to be adopted, a dog could repeatedly inflict severe injury upon individuals and not be declared dangerous if the injuries were inflicted while the animal was "playing" or, as in this case, attempting to recover food. Each incident would not be considered an "attack" and therefore a "history or propensity to attack" could never be established. Although we cannot ascertain the intent of the animal, we presume that because the dog in fact severely injured the child, it intended to do so in order to recover the chicken she was attempting to eat.[40]

As the last sentence of the above opinion indicates, at least some courts have been internally conflicted over whether the common law can or cannot recite and rely upon beliefs about an animal's intent. A thorough review of the myriad ways in which the propensity concept has been applied by the

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[38] Propensity evidence of humans is normally excluded. *See* FED. R. EVID. 404 (generally prohibiting propensity evidence).

[39] *See, e.g.*, Cockerham v. Nixon, 33 N.C. (11 Ired.) 269 (1850) (stating that an owner of an animal is not liable when the animal had never before committed the same type of bad act complained of in litigation).

[40] Eritano v. Pennsylvania, 690 A.2d 705, 708 (Pa. 1997) (internal citations omitted).

state courts over the last 50 years will convince even the most optimistic of legal scholars that the concept hampers, not helps, a judicial analysis of animal minds and what they signify:

> While the statute focuses on the dog's intent, prior case law held that intention forms no part of an animal's assault and battery, and the mood in which it inflicts harm is immaterial, so far as the owner's duty goes. [In Groner v. Hedrick, 169 A.2d 302 (1961)] we stated, "[a]lthough an animal is actuated solely by mischievousness or playfulness, rather than maliciousness or ferociousness . . . it has a vicious propensity within the meaning of the rule holding the owner or keeper liable for injuries resulting from vicious propensities of which it has knowledge."[41]

In the logic that lawyers employ, the discord could not be more manifest: can an object that is simply "actuated" by events at the same time be one that purposely engages in an assault and battery? The propensity concept is, at its core, a legal escape device powered by sentiment and public policy. It relies on the sentiment of what "instinct" represents to people at a high school biology level, while also invoking—but not adhering strictly to—scientific-sounding assessments of natural behaviors. While the term "propensity" is defined as "an often intense natural inclination or preference," the common law plays freely with the intonation in that definition as to what is "natural": "It is the act of the animal and not the state of mind of the animal from which the effects of a dangerous propensity must be determined."[42] Thus, "proof of habitual acts of ferocity or mischief is proof of a ferocious or mischievous nature."[43]

In applying law to people, we do not bother concerning ourselves with "human nature," or with formally evidencing what our own inner nature emboldens, shames, or commands us to do as individuals. With some odd exceptions, the defense of "it was just in my nature to do that" has never been generally accepted in our courtrooms, and a witness is not usually allowed to testify that the reason a person engaged in a certain act was because it was his nature to have to do so. We are not automatons. Few judges would allow a human behaviorist to provide expert testimony as to the cultural "meaning" of certain acts or an anthropologist to testify as an expert on how humans should truly operate—those types of testimony would be struck as impermissible character evidence under Federal Rule of Evidence 401 or its equivalent.

In contrast, it is not uncommon for courts in cases concerning animal

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[41] *Id.* at n.6.

[42] Doe v. Barnett, 251 N.E.2d 688, 694 (Ind. Ct. App. 1989).

[43] Merritt v. Matchett, 115 S.W. 1066, 1068 (Mo. Ct. App. 1909).

owners to enlist animal behaviorists to help extricate the fact-finder from the sorry tangle of deciding whether the "propensity" that certain animals might or might not have to act in a certain manner *is* due to their genetics, to their circumstantial upbringing, to their immediate physical environment, to human influences, to the effect of "inner nature," or to some filtered and prejudiced combination thereof.[44] To be on the safe side, most animal behavior experts simply coalesce a plethora of factors together as if each could not possibly be safely or efficiently winnowed out, and then justify the desired result by using the vagaries of multi-factorial causation.

For example, in an unpublished opinion on a criminal case against the owner of two Rottweillers which had mauled a young child, a trial court accepted a behaviorist's personal premise that the animals were a form of automata, constrained to act the way they did regardless of whatever their actual intent may have been in the incident:

> An expert opined that, based on the two dogs' breed, lack of training, and how they were raised and maintained, they had a strong propensity toward aggressive behavioral responses. He testified that if a dog is aggressive in a particular situation, the dog "becomes pretty consistent and regular" in displaying such behavior in the same context and with the same stimuli.[45]

The language used, employing concepts such as "stimuli" and "behavioral responses," is language derived from the long outdated science of "behaviorism"[46]—a scientific discipline that posited that animals are, at best, complicated organic machines with readily predictable responses to specific stimuli, and, at worst, inanimate objects altogether.[47] The underlying premises of the behaviorist model—and coincidentally the prevailing judicial viewpoint—has been most clearly expressed by J.F. Wittenberger, a sociobiologist:

> We cannot assume that animals make conscious decisions because we cannot monitor what goes on inside their heads. Nevertheless, it really does not matter what the proximate bases of those decisions are when evolutionary reasons underlying their behavior are our principal concern. . . . Particular stimuli or contexts elicit particular behaviors. An animal need not know why those stimulus-response relationships exist. It need only know what the

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[44] *See, e.g.*, Hayden v. Sieni, 601 N.Y.S.2d 327, 328 (N.Y. App. Div.,1993) (discussing plaintiff and defendant's use of animal behaviorists at trial).

[45] People v. Schneider, No. C044795, 2004 WL 2191322, at *6 (Cal. Ct. App. Sept. 30, 2004).

[46] For a discussion of the science of behaviorism, *see* B.F. SKINNER, ABOUT BEHAVIORISM (1974).

[47] *See* Harrold v. Rolling J Ranch, 23 Cal. Rptr. 2d 671, 677 (Cal. Ct. App. 1993) ("We view sudden movements of a horse just as inherent in horseback riding as the presence of moguls on a ski slope are to skiers.").

> relationships are. This knowing need not involve conscious awareness, though in many cases animals are undoubtedly conscious of what they are doing; it need only involve the appropriate neurological connections. . . . Animals can be goal-directed without being purposeful, and they can behave appropriately without knowing why.[48]

Among other concerns, including whether behaviorism is even appropriate for the law to employ, is a critical evidentiary problem for the courtroom lawyer: What are consistently acceptable and usable "units" of behavior? Physical-style units—i.e., anatomical traits—are relatively easy to define; one can just count feet, or parts of bodies, or even whole lives. The very concreteness of the (comparatively) discrete nature of anatomical traits points out the trouble which fact-finders find themselves in when asked to determine the proof of a behavioral trait: behaviors in general simply "do not come already carved up into distinct chunks like cuts of meat in a butcher's window."[49] In a tape of a dog barking, even the ability to say specifically what differentiates one bark from another gets muddled quickly in semantics.

It is facile but true that most animals seem to have a relatively restricted repertoire of behaviors, and that most repertoires seem to be relatively constant across species.[50] It is also facile but true that courts will often help the fact-finder by establishing, by fiat, random slices of that spectrum, including by not requiring proof, but simply taking judicial notice of, overly common animal actions. Damning the semantics, courts have been minimally comfortable holding that pigs root,[51] that dogs whine and howl,[52] that gentle horses can lunge,[53] that cats wander,[54] cattle roam,[55] and that all

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[48] JAMES F. WITTENBERGER, ANIMAL SOCIAL BEHAVIOR 48 (1981).

[49] KENAN MALIK, MAN, BEAST, AND ZOMBIE, 229 (2000).

[50] *See* STEPHEN BUDIANSKY, IF A LION COULD TALK: HOW ANIMALS THINK 32 (1998) ("It is not as if plovers, as a predator approaches, sometimes fake a broken wing and sometimes dance the Charleston. All predators stalk, all opossums play dead, all plovers fake broken wings. No other explanation answers but these are innate, genetically programmed instincts, honed by evolution because they work.").

[51] *See* Jarvis v. Koss, 427 A.2d 364, 365 (Vt. 1981) (finding that defendant's pig harmed plaintiff's crop and that the habits and qualities of common animals are matters of common knowledge and a proper subject of judicial notice).

[52] *See* Georg v. Animal Def. League, 231 S.W.2d 807, 811 (Tex. App. 1950) (holding that although it is common knowledge that dogs bark and howl, injunctive relief for landowners restraining the construction of an animal shelter is not appropriate because shelter serves the public interest).

[53] *See* Crosby v. Burge, 1 So. 2d 504, 507 (Miss. 1941) (noting that it is "common knowledge" that any horse may lunge forward in holding that an employer is not an insurer for his employees in a negligence action for injuries sustained by employee from an allegedly unsafe horse provided by his employer).

[54] *See* Bischoff v. Cheney, 92 A. 660, 661 (Conn. 1914) (holding that, where a domestic

mules are stubborn.[56] Nevertheless, in certain quantities, even that childhood-level assertion of repertoire can quickly become imposing and unmanageable.

While scientists often assist courts in making factual determinations about the way the world works, they have not done at all well in the arena of animal intent. Certainly, most of the work done on what one might call the "personality" of the animal as it is manifested through its actions has remained in the laboratory or the field, and has not been translated into the law books. To the extent that empirical work is currently being conducted on the psychological bases of animal personalities, much has been done—yet an enormous amount remains to be done just at a core research level.[57] Among other concerns is that the way that animals "grasp" and "utilize" social concepts is not the way humans do:

> Animals struggle with each other for food or for leadership, but they do not, like human beings, struggle with each other for that which stands for food or leadership: such things as our paper symbols of wealth (money, bonds, titles), badges of rank to wear on our clothes, or low-number license plates, supposed by some people to stand for social precedence. For animals, the relationship in which one thing stands for something else does not appear to exist except in very rudimentary form.[58]

Animal incapacities in manipulating symbols not only present minor obstacles toward us understanding them clearly, but also comprise massive handicaps to determining if they even have what we would call "intent" at all.

IV. EVIDENTIARY RULES MAKE ANIMAL INTENT PROBLEMATIC

To briefly recap:

1. To invest animals with rights requires holding animals responsible for intentional acts.

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cat exhibits neither mischievous nor vicious tendencies, liability will not attach to the owner when the cat trespasses and causes injuries).

[55] *See id.* at 661 (noting that cattle, unlike cats, are a species "whose instinct is to rove").

[56] *W.R. Peete & Co. v. Jackson*, 4 Higgins 678 (Tenn. Civ. App.1913).

[57] *See, e.g.*, Samuel D. Gosling, *Personality Dimensions in Spotted Hyenas (Crocuta crocuta)*, 112 J. COMP. PSYCHOL. 107-18 (1998) (suggesting that there is some cross-species generality of personality traits such as excitability, sociability and assertiveness). Again, for an excellent review of the current field, the reader is directed to Samuel D. Gosling, *From Mice to Men: What Can We Learn About Personality From Animal Research*, 127 PSYCHOL. BULL. 45-86 (2001).

[58] SAMUEL I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 23 (1939).

2. To determine which animal acts are ones in which the consequences were subjectively intended requires:

a) communicating with animals without a common language or the use of symbolic communication; and

b) agreeing upon *which* acts of *which* species mean *what.*

For lawyers, trouble ensues at both steps. When it comes to effective legal procedure to deal with rights determinations, two discrete and practical tools that the law works with are *presumptions* and *inferences*. Inferences are mechanisms based on logic and are certainly not relegated strictly to the courtroom; presumptions, in slight contrast, are more legal-oriented mechanisms based on the shifting of evidentiary burdens and the allocation of fairness within the requisites of a contested matter. As to many facts of nature, geographical depictions, historical occurrences, and certain mental activities, courts have been willing to both infer and presume that certain facts demand only slight or even no percipient proof of their existence. As to how the mind works with respect to intent, courts will sometimes infer that an actor had a subjective intent to cause harm or injury as a matter of law, but only when such subjective intent is the *only reasonable inference* that may be drawn from the actor's conduct.[59] With people's minds, courts also will infer a subjective intent where public policy demands it—such as in criminal[60] or sexual abuse[61] scenarios.

Minds are intensely problematic objects, however, and courts will more rarely *presume* that an actor had the intent to harm in special circumstances. Presumptions about and inferences from behavior are often the only means left to determine intent when speech itself is unavailable, as say with the mute witness. It would be much less burdensome to rely solely on inference and presumption in delineating animal intent. But can we really do so? What reasonable inferences may be drawn from animals' conduct? Ask any two animal behaviorists and there will likely be two very different answers. Indeed, ask any two percipient witnesses to an animal-related incident or any two judges confronted with a certain animal's pattern of conduct, and

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[59] *See, e.g.*, Allstate Ins. Co. v. Stone, 876 P.2d 313, 315 (Or. 1994) (holding that, because it was stipulated by the parties, actor did not intend to harm another driver when he committed suicide by driving into the path of a truck).

[60] *See* Allstate Ins. Co. v. Sowers, 776 P.2d 1322, 1323 (Or. Ct. App. 1989) (rejecting officer's suit against insurer because the officer's injury resulted from criminal conduct of the insured).

[61] *See* Mutual of Enumclaw v. Merrill, 794 P.2d 818, 819 (Or. Ct. App. 1990) (quoting the trial court's comment that "intentional sexual abuse is the type of conduct from which an intent to cause harm must necessarily be inferred as a matter of law").

one will likely get two different answers as well.[62]

Let us take, as a particular example, the act of biting, something animals commonly do and something that tort claims commonly present, often through lawsuits. Is there only one reasonable inference to glean from a bite? Is it legitimate to presume that when an animal bites it has a specific state of mind in doing so? Are bites only animal-specific or can they be animal-independent? Are bites only species-specific or can they be species-independent? Are bites only breed-specific or can they be breed-independent? None of those questions can be answered easily. If we do not infer or presume facts about the mindset of a biting animal, on the other hand, and if we do not have the animal's own voice to tell us what they were thinking, we become pushed to use more attenuated tricks of proof, or, perhaps, to accept no proof at all, and we end up merely speculating about what state of mind may have existed. Even if there were to be a public policy against biting sufficient to justify an initial inference for social reasons (that harm was intended, for example), the situational complexity of any given biting incident makes us sensitive to the fact that, without language, we are truly guessing at what is going on: first, that another has a mind which is expressing itself through an action; and second, what thoughts are themselves in the other's "mind."

Among humans, we defer to the complexity and sophistication of "minds" to operate under the rule that witnesses cannot speculate on the thought processes, including the intent, of another:

> "It is recognized generally that the mental status of another is a matter of opinion rather than fact. A witness therefore is precluded under the opinion rule from testifying that another did or did not know a certain fact or feel a certain way. The proper procedure for examining such a witness is to have him detail the facts from which such a conclusion of knowledge or feeling could be drawn by the trier of fact."[63]

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[62] *Compare, e.g.,* City of Boulder v. Stewardson, 143 P. 820, 822 (Colo. Ct. App. 1914) (declining to infer that the horse at issue had to have been frightened by a steamroller since witnesses reported that other horses were not so frightened), *with* Rosenthal v. Hill Top Riding Academy, Inc., 110 N.W.2d 854, 856 (Minn. 1961) (noting that it is "common knowledge" that horses are anxious to return to their stable in the evening, that many horses fear motorcycles and motor scooters, and that "as night approaches, even gentle horses become restless and difficult to handle, particularly when in the hands of an inexperienced rider").

[63] Click v. State, 695 So.2d 209, 228 (Ala. Crim. App. 1996) (quoting C. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 128.08 (4th ed.1991)). *See also*, People v. Madson, 638 P.2d 18, 31 (Colo. 1981) (concluding that inclusion of a murder victim's assertions regarding boyfriend did not fall under an exception to the hearsay rule and constituted reversible error); Wilson v. State, 265 S.E.2d 79, 80 (Ga. Ct. App. 1980) (holding that it was not reversible error to exclude testimony by witness as to what they believed to be the defendant's intent);

Our experiences and suspicions about what others are using their mind's complexity and sophistication to do make us focus keenly on detail. Detailing facts is key, and creating such detail through the rigors and formalities of language and writing thus becomes paramount.

Of course, the challenge can be and often is raised at this point that the law provides for the intent of many other non-speakers to be ascertained—primarily infants, the infirm, and the mentally incapacitated. Since dogs, like the mute, cannot talk, goes the analogy, we can surmount the obstacle of detailing the facts and the intent by applying the same evidentiary rules to dogs that we have already applied to those groups with the same results.

Our unease with the analogy begins with a general unease that fact-finders often have—the need for reliability. At least five factors influence the reliability of any mute witness. One, an observer acquaintance with the mute subject often influences the resulting interpretation: the better the observer knows the mute subject and the lengthier the historical tie between the two, the more subjective the observation. Owners ostensibly know their animals fairly well, and the acquaintance angle threatens to taint reliability when it is the owner him or herself who is assessing intent. Two, communication among observers often inflates or deflates agreements about what is meant or intended: competing shared opinions as to meaning create competing interpretations. Testimony about animal intent seems to encourage duplicative witnesses, thereby fostering unreliability. Three, differential exposure to the mute subject alters opinions: a single instance is likely to be interpreted differently than a series of multiple occasions. Four, some groups (dogs, for example) are simply going to be easier to interpret than others. Five, some traits (anger, for example) are undoubtedly going to be significantly easier to interpret than others.

Worse, all of this analysis is going to have to take place in the contrived and artificial atmosphere of a courtroom, festooned as those locales are with concerns about respect, formality, and security. Just in case one gets too excited about the development of the common law in even this small respect, it is instructive to note that animals are universally kept out of courtrooms, and that of all fifty states, so far only Washington has held specifically that physical observation of an animal inside a courtroom is

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Kimp v. State, 546 N.E.2d 1193, 1196-97 (Ind. 1989) (holding it was improper, though harmless error, to ask police officer's opinion regarding cashier's mental state after robbery); State v. Bennett, 258 N.W.2d 895, 898 (Minn. 1977) (holding that an officer may describe the meaning conveyed to him by defendant's conduct under the circumstances, without opining about defendant's subjective intent); State v. Shook, 248 S.E.2d 425, 429-30 (N.C. Ct. App. 1978) (finding it harmless error to admit testimony of officer relating to defendant's mental state prior to signing a statement).

even permitted.[64]

Our unease may continue with the nagging feeling that we are going to need something of a stronger procedural arsenal to be ready for all contingencies were we to even get the animal in the door. At the least, the arsenal will need to be stocked with: a) a whole new common language to utilize in the courtroom that borrows creatively from biology, psychology, ethology, and sociology; b) a standardized set of characteristics translated into species-typical behaviors; and c) a new set of independent experts in animal communication to rely upon. A judge will have to subject each proffered study to the fire of the evidentiary crucible, assessing the relevance and materiality of each exhibit or piece of testimony offered into evidence ranging from classical operant conditioning lab tests of domestic dogs to straight-faced scientific claims of observing anxiety in worms.[65] Activists sensitive to what inhumane uses we currently subject animals to may be displeased that all of this work to establish the vehicle for rights will necessarily *increase*, not decrease, animal-based scientific research.

Furthermore, our unease may solidify when we look for, and do not find, the subtle psychological clues in animals that children do provide us, that show us they recognize the import of their actions:

> [R]emorse or guilt requires a grasp of wrongdoing and the need for reparation. Clearly a being unable to learn to talk of the past, to know what the past is and that I can be atoned for, ought not to be said to be remorseful. What seems to be important . . . in the case of remorse, like that of hope also, but *un*like that of fear, is that there is an absence of *characteristic* prelinguistic prototypes which would provide grounds for attributing remorse or hope to creatures that do not use language . . . [I]t is the only possible area in which these feelings operate.[66]

There is, in other words, a solid empirical basis for the unease we may feel in extrapolating the mind of an animal into the mind of a mute child. Muteness is a superficial similarity between animals and children; the core dissimilarities go much deeper. "Personhood" is in fact a vast and critical distinction between what humans are and what other animals are, and our evidentiary rules and our justice system work well in recognizing the gap as a legally critical one. There is no doubt that many animals are individuals

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[64] *See* Arnold v. Laird, 621 P.2d 138, 141 (Wash. 1980) (finding no negligence on part of dog owners in a negligence suit, stating that "[w]hen the issue in dispute is the dog's condition and demeanor . . . showing the dog to the jury could, in some cases, be the most probative evidence available").

[65] *See* Jay Boyd Best, *Protopsychology*, 208 SCI. AM. 54-75 (1963)(discussing the ways in which planarians behave and learn).

[66] MICHAEL P.T. LEAHY, AGAINST LIBERATION 133 (1991).

in the very rough sense that they have distinct character suites; domesticated animals such as dogs and cats can act as if they were playful, or suspicious, or aggressive, or mischievous,[67] or ridiculous in the sense that we intuitively know humans can be. But cognitive scientists recognize that our inter-specific differences go far beyond the differences in our outward appearances, our actions, or even our inner anatomical structures; humans are individuals in a fundamentally different sense:

> [W]e are self-created beings who realize ourselves through our relations with other such beings. Humans are persons, not simply individuals, because we are capable of being agents responsible for our actions. We are individuals with rights, duties, and obligations, individuals who have control over our actions, and not simply conduits for natural impulses.[68]

Animals lack the ability to control themselves for the long-term future, to forestall that moment's gratification, to constrain a present inclination because of a future need. It is true that animals, in their psychological makeup, and in our interpretation of what their non-verbal behaviors might "mean," are certainly much more like human infants than adult humans at all. Human infants begin as creatures of natural impulses with no control over themselves; however, as the infant learns to control its movements and its body, it slowly begins to construct its "self," and only as it develops into producing and comprehending language does it become social in the sense that it becomes free to act independent of its environment, to make choices, and to mold and affect the behaviors of others by acts of will. *That* manner of freedom, the capacity to act rationally in a social milieu, is the type of freedom that creates legal rights.

> Our minds have been built by selfish genes, but they have been built to be social, trustworthy, and cooperative . . . Human beings have social instincts. They come into the world equipped with predispositions to learn how to cooperate, to discriminate the trustworthy from the treacherous, to commit themselves to be trustworthy, to earn good reputations, to exchange goods and information, and to divide labour. In this we are on our own. No other species has been so far down this evolutionary path before us, for no species has built a truly integrated society [such as ours].[69]

From what we learn in our own childhood and from our close observations of others, we naturally expect that, over time, a human infant will change and, as it develops a "self" with advancing age, become slowly

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[67] *See* People v. Schneider, No. C044795, 2004 WL 2191322, at *2 (Cal. Ct. App. Sept. 30, 2004) (finding that instructions given to jury regarding whether or not defendant's dog was "mischievous" were inadequate).

[68] MALIK, *supra* note 49, at 366.

[69] MATT RIDLEY, THE ORIGINS OF VIRTUE 249 (1996).

enmeshed in the complex web of rules with which adults embroider their lives. In marked contrast, we do not naturally expect that animals would change as they get older, to become possessed of any more recognition of self than they ever had at any age.[70] That distinction is crucial to a comparison of animals with infants. It is perhaps true that were the rules on infants to be applied anyway to animals, we might then be a step closer to treating animals differently than as simply property—but of course only as children.

Animals are not currently treated as children under the law,[71] although if they were, there might be a public policy reason to excuse them from their own voluntary acts:

> [M]inors under the age of 5 are, as a matter of law, deemed incapable of negligent acts, i.e., failing to exercise reasonable care under the circumstances. "The proposition that 'An infant may be so very young that no negligence may legally be imputed to him' is predicated on the principle that a child of very early years is 'incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence." Given the legal incapacity of minors under the age of five to act with reasonable care, the sole factual issue in this case concerning the victim was his age: was he under the age of five and, therefore, excused due to incapacity from taking reasonable precautions against the attack that killed him.[72]

We cannot logically treat animals as children, however. No useful change in an animal occurs as a function of ontological time, but neither would such change occur as a function of neurology—the "essential capacity of mind" needed to "create liability for negligence" does not exist at any stage of animal development.

V. THE DEFENSE OF PROVOCATION REQUIRES SELF-REGULATED CONDUCT

Beyond the troubles examined above, an even blacker cloud looms on the horizon. If animals are to be granted a right not to be harmed, and cloaked with the accompanying responsibility to abstain from harmful acts, then our common law requires that, as with humans, animals must be exempted from some responsibility in circumstances in which they have

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[70] *See, e.g.*, Giles v. Russell, 180 S.E.2d 201, 203 (S.C. 1971) ("[I]t is not likely that the traits of an animal will change rapidly.").

[71] *See, e.g.*, Jett v. Mun. Court, 223 Cal. Rptr. 111, 115 (Cal. Ct. App. 1986) ("While a child preparing for homework or cleaning a bedroom may exhibit turtle-like qualities or creep toward school in turtle pace, we decline to equate title to a tortoise to the relationship between a parent and a child. Jett owns Rocky. Parents have custody of children.").

[72] People v. Berry, 2 Cal. Rptr. 2d 416 (Cal. Ct. App. 1991) (citations omitted).

been provoked. This theme is developed across the board for all not-to-be-harmed rights-holders; defenses accompany applications. The need to determine what provokes them into engaging in certain acts must then materialize.

The particular defense of provocation is appropriately raised because restraint and provocation are two sides of a single coin. The concept of provocation is founded upon the understanding from psychological studies that an actor can be stirred to an action that he or she otherwise would not intend were it not for a driving or compelling force directing him or her to so act.[73] Provoked actions, therefore, occur in spite of a person's best efforts to restrain him or herself from acting, and it is these best efforts that justify the protection.

Whether animals can be "stirred to an action they otherwise would not intend" depends, of course, on what it is they intend, and as we have seen above, a morass awaits those who venture too far in that regard. In addition, applying a provocation defense to animals would invoke a premise that animals make best efforts not to be stirred, and we have seen that premise is faulty. However, courts have not had great difficulty in applying provocation rules to animals—again, primarily dogs. In doing so, human psychology seems to transfer in part to animal psychology:

> The statute also requires that the dog [which bit a child] acted without provocation. Although the Dog Act does not define the term "provocation," "to provoke" has been defined by *Webster's Ninth New Collegiate Dictionary* 948 (1986), as to "arouse to a feeling or action; to incite to anger; to call forth; to stir up purposely." A child attempting to eat a piece of chicken clearly does not fall within such definition.[74]

A recent jury instruction related to animal provocation defined provocation as "any action or activity, whether intentional or unintentional, which would reasonably be expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence."[75] An older textbook defines provocation as any "action by a person which causes the dog to immediately engage in a response that is motivationally different from the response it was engaged in just prior to the action of the

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[73] BLACK'S LAW DICTIONARY 1225 (6th ed. 1990) ("The act of inciting another to do a particular deed. That which arouses, moves, calls forth, causes or occasions. Such conduct or actions on the part of one person towards another as tend to arouse rage, resentment, or fury in the latter against the former, and thereby cause him to do some illegal act against or in relation to the person offering the provocation.").

[74] Eritano v. Commonwealth, 690 A.2d 705, 709 (Pa. 1997).

[75] Brans v. Extrom, 701 N.W.2d 163, 165 n.4 (Mich. Ct. App. 2005).

person."[76]

In most authors' opinions, causation is primarily inferred by the immediacy of the change—the quicker a dog goes behaviorally from point A to point B, the more likely the change was caused by an inciting act. The animal's motivation, however, is still measured by using a work shed full of factors, including an assessment of its temperament and behavior immediately before the incident, the context of the incident, the animal's past behaviors, and even its current medical condition.[77] However, motivation is never predicated on an assumption that the animal had self-control that simply had been overcome by an act of will.

Because animals do not have rights, it is currently the owner who benefits from the protection of the doctrine of provocation, and because animals do not have obligations, it is also humans who are held responsible for creating the provocation.[78] A child's act of hugging a dog,[79] stepping on a dog's tail,[80] and pulling on a dog's chain[81] have all been ruled to be acts of provocation. Curiously, a few jurisdictions have toyed with defining provocation as arising from either persons or other animals.[82] It is less problematic to consider an animal to be a provoker than it is to consider them to be provoked: all sorts of animate and inanimate objects (and events) seem to have an ability to incite, whereas only things with both "minds" and language seem to be readily incitable.

In other words, not only actors with intent can provoke—as the jury instruction indicates. Under common law, provocation is a matter of whether particular actions are likely to cause an animal to react, by biting, for instance, and not whether the actor intended to perform the act; provocation includes both intentional and unintentional acts.[83] Still, no case has yet held that provocation was justified by an animal's acts as opposed to

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[76] DAVID FAVRE & PETER BORCHELT, ANIMAL LAW AND DOG BEHAVIOR 349 (1999).

[77] *Id.* at 349-350.

[78] *See* Pisciotta v. Parisi, 547 N.Y.S. 2d 352, 354 (N.Y. App. Div. 1989) (Spatt, J. dissenting) (surveying older cases holding that the provoker must be a person or an individual). *But see*, Logan County Animal Control Warden v. Danley, 569 N.E.2d 1226, 1229 (Ill. App. Ct. 1991) (stating without explanation "that there is a qualitative difference between provocation by a human being and provocation by another animal.").

[79] Palloni v. Smith, 429 N.W.2d 593 (Mich. 1988).

[80] Nelson v. Lewis, 344 N.E.2d 268 (Ill. App. Ct. 1976).

[81] Reed v. Bowen, 503 So. 2d 1265 (Fla. 1986).

[82] *See, e.g,* Rabon v. City of Seattle, 957 P.2d 621, 625 (Wash. 1998) (examining the Seattle Municipal Code, which exempts animals from falling into the "vicious animal" characterization "where a person or other animal has provoked it").

[83] *See* Brans v. Extrom, 701 N.W.2d 163, 165 (Mich. App. 2005) (defining provocation to include intentional and unintentional acts).

a person's. This fact likely stems from the prejudices inherent in courtroom psychology that the act of inciting can only come from those who can think and exert control upon thinking:

> Amiability of disposition does not serve as a safe guarantee against violent movements. In defense or offense, the horse's heels are relied on as its most forceful weapon. They are put in motion almost involuntarily in cases of defense, when quickness of action is deemed necessary to immediate safety or relief. In the present case, should it have been possible to interpret the thoughts of the mare, it would not be surprising to learn that she really kicked at plaintiff because she believed him to be the one who applied physical force to her. The close proximity of her position to him made it possible for her offensive action to cause injury. This position was not due to her own volition but to her master's. It was he who rode her so close to plaintiff, and it was he who unnecessarily did that which provoked her to wrath, so to speak. The kicking was not the proximate cause of the injury. That cause was the act of the rider which provoked the kicking.[84]

Therefore, the hard question is how can an animal display propensity, the "natural inclination or preference,"[85] to a certain type of behavior, yet not at the same time be deemed an agent capable of provoking another, "arousing them . . . to action[?]"[86] The answer is in part that provocation carries with it an odd mixture of elements of reflex, retaliation, desire, and undue influence (or at least unfair influence), and all those phenomena are intimately associated with communication in the form of human language. Provocation, in essence, seems to be the very touchstone of human consciousness and conscious communication. No machine or other inanimate object ever was sincerely provoked into action because no other machine or other inanimate object exhibits the type of consciousness with which we consider sufficient to identify or converse.

It is presently accepted that animals, unlike inanimate objects, can have memories, and can be capable of remembering past incidents to connect to—and fuel—present intentions.[87] If animals are given a right not to be harmed, as humans enjoy, then the propensity rule must be jettisoned and the character evidence rule put in its place. To be consistent, the evidence rules we currently apply to animal minds versus human minds would be turned on their heads. Yet, the logic of the dominos I have pushed does not allow us the luxury of that conclusion: rights require liabilities; liabilities

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[84] Matthews v. Gremillion, 174 So. 703, 706 (La. Ct. App. 1937).

[85] *See supra* note 38 and accompanying text.

[86] Provoke, Dictionary.com, http://dictionary.reference.com/browse/provoke (last visited Nov. 14, 2006).

[87] *See* Stroop v. Day, 896 P.2d 439, 442 (Mont. 1995) (declining to dispute the contention that a dog is capable of remembering and being provoked by events from its past).

require exemptions; exemptions include forcibly compelled acts; provocation requires self-awareness; self-awareness requires language; language requires a special type of brain. Evolution through natural selection has, however, fashioned that type of brain for only one species on the planet, *homo sapiens*:

> When we study human language, we are approaching what some might call the "human essence," the distinctive qualities of mind that are, so far as we know, unique to man and that are inseparable from any critical phase of human existence, personal or social. Hence the fascination of this study, and, no less, its frustration. The frustration arises from the fact that despite much progress, we remain as incapable as ever before of coming to grips with the core problem of human language, which I take to be this: Having mastered a language, one is able to understand an indefinite number of expressions that are new to one's experience, that bear no simple physical resemblance and are in no simple way analogous to the expressions that constitute one's linguistic experience; and one is able . . . to produce such expressions on an appropriate occasion, despite their novelty. . . . The normal use of language is, in this sense, a creative activity. This creative aspect of normal language use is one fundamental factor that distinguishes human language from any known system of animal communication.[88]

At first glance, the idea of holding animals legally responsible for their own intentional acts smacks of little more than academic gamesmanship, the "poor sport" rubbing salt into the wound of already daunting animal burdens. On deeper reflection, however, one may come to accept the fact that our formalization of social relationships is, ultimately, game-playing, and that the burdens of games are rarely, if ever, democratically balanced. Sitting at the core of every childhood game and mutual adult activity, including law, are the ideals of rules with their hoped-for fairness, the realities of games in practice, and the concepts of what set of agreed-upon conventions might at one and the same time both confine *and* liberate social relationships. The cynical admonition that "[w]hat the large print giveth, the small print taketh away"[89] acts as a real-world reminder that one must beware of and labor under the agreements and rules that all human activities involve.

The small print, the rules, the inherent unfairness, and the extrinsic need to play the games with others all come to us through language. Language, the direct ancestor of law, is an *ultimate social activity*. The translation of organic processes inside our heads into thoughts and ideas requires a social

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[88] NOAM CHOMSKY, LANGUAGE AND MIND 100 (Harcourt, Brace, Jovanovich 1972) (1968).

[89] Murray Ohio Mfg. Co. v. Cont'l Ins. Co., 705 F. Supp. 442, 444 (N.D. Ill. 1989) (quoting lyrics written by musician Tom Waits).

world, with a language that binds members of that world together, and agreed-upon conventions to make sense of how language is used:

> It is only because we live not as individuals, but within a social community and, moreover, within a community bound together by language, that we can make sense of our own inner thoughts and feelings. No animal possesses either language or a social network like ours. Therefore it is simply not valid to assume that [animals] have inner experiences as we do.[90]

In turn, language leads directly and inexorably to the conception and implementation of rights. Adult humans, unlike any other creature, including the great apes, "live within a web of reciprocal rights and obligations created by our capacity for rational dialogue."[91]

Rights are the products of a *historically*-founded social compact. *Historically*, the agreement among members of the vast majority of social groups has been that if a person does not want to be unreasonably constrained by the others, she will agree to reasonably constrain herself. *Historically*, we have cemented such agreements by talking and writing about them. If animals are to be inducted into our presently existing social compact, then their entitlement to rights—rights of freedom, rights of due care, rights of life, etc.—can arise only through their own developing history and only as a condition of two burdens: one, if they bind themselves to certain obligations, thereby to be punished or penalized if they violate the compact; and two, if sophisticated communication with them about the seriousness of the obligations can be relied upon. A voluntary agreement to adhere to a communal standard is what incarceration, breach of contract, and termination of parental rights are all about: in governing ourselves, we require ourselves to be subject to procedural and institutional strictures, and, we formally codify those strictures by statute. *Adhering to mutually agreed-upon written rules* is the whole point of the law game. If one cannot be a fundamental part of that agreement, one cannot play.

VI. CONCLUSION

Currently, animals—minds, bodies, and all—are personal property under the law, and, as with all personal property, are treated as having owners.[92] Animal owners, in turn, are those upon whose shoulders rest the obligation to adhere to social norms resulting from ownership. As owned

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[90] MALIK, *supra* note 49, at 219.

[91] *Id.* at 372.

[92] *See, e.g.*, OR. REV. CODE ANN. § 609.020 (2003) (declaring dogs to be personal property).

objects, animals are currently free of personal obligation. In essence, animals have the unfettered freedom to do whatever it is they wish to do (to the extent that their physical environment allows them, their genetic and anatomical structure constrains them, and their interactions with others directs them); it is those who own the animals who are truly fettered by assuming the legal responsibility for the animals' actions.[93] Humans may not be the ones with the collars and the muzzles, but we are captives nonetheless, our tethers being much harsher bonds, self-created through law.

Yes, it is both a promise and a prospect of the animal rights movement that part of the property concept could and might change. Of course, putting rationality aside for the moment, it has more than once been observed that animal rights advocates still deem it morally distasteful to levy *any* burden on the shoulders of animals, legal or otherwise, as that prospect flowers:

> As maturing children [people] begin to know what they should and should not do and are praised or censured accordingly; up to a point they become *responsible*. Yet no liberationist would wish to admit this of animals since it would allow them to be punished for *wrongdoing* (rather than for permissible training purposes) of which all are agreed they can have no conception.[94]

It will be a curious day when, perhaps, there may be "termination of animal ownership rights" proceedings that parallel the termination of parental rights proceedings, through which an owner's violation of an animal's rights results in the State taking away his or her ownership rights. It will be a curious day when, perhaps, there may be "animal civil rights violation" suits that parallel the U.S.C. Section 1983 civil rights suits

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[93] For example, the Supreme Court of Idaho has asserted:

> The dog is generally recognized as an essential part of every well-regulated family, and of a higher degree of intelligence than other domestic animals, and given privileges not generally conceded to other members of the animal family; but we are inclined to the opinion that, notwithstanding this fact, and notwithstanding the fact that the dog occupies a higher position in the social world of the animal family, and an important one in human affairs, still that the owner of such animal should not be excused from liability for injuries done by the dog when invading the rights of person or property. This position that the dog has well earned, by reason of his heroic acts and deeds of valor, might be a reason for exacting from the owner a higher duty as to responsibility for the dog's acts; *but it certainly is not a reason why the owner of such animal should not be equally responsible for the wrongs done by a dog as for wrongs done by other domestic animals, and we believe, both upon reason and authority, that when a dog invades and trespasses upon the legal rights of a person and injures person or property, and such invasion and trespass is the result of the negligence of the owner, the owner is liable for the damages done.*

McClain v. Lewiston Interstate Fair and Racing Ass'n, 104 P. 1015, 1021 (Idaho 1909) (emphasis added).

[94] MICHAEL P. T. LEAHY, AGAINST LIBERATION 25 (1991).

concerned with human rights deprivations, and when an offender's violation of an animal's privacy or personal rights would result in compensation to the animal or vindication of the animal's interests.

If that day occurs, if animals reach maturity as rights-holders, it will only be because they have communicated to us that they know what they should and should not do and that they can self-reward or self-censure accordingly. The law could then apply to them completely, not partially, and they will have become (in the legal and moral sense) truly *responsible*. I believe that the reason we would allow those rights to be established and enforced would be because we had also decided to allow the animal to be punished for *wrongdoing* (rather than solely for permissible training purposes). All would have to be in agreement that the animals involved had some conception of membership in the social compact and knew the meaning of "fault" and "blame," "fairness" and "penalty". The idea of "blame the dog," which so many people casually engage in, might finally be replaced by human-animal legal relations based in a reliable understanding of human-animal communication at a fundamental level.