

CHANGING THE DIALOGUE ABOUT ELEPHANTS

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There is an old joke in this country that “when you’re up to your neck in alligators, it’s hard to remember that you’re in there to drain the swamp.”¹ You might wonder why in a trafficking conference, when we are talking about the slaughter of so many elephants, and the distinct possibility that they may go extinct, I came here to talk about animal rights? My answer is twofold.

First, the “conservation” and “sustainable use” approach to managing elephants has serious flaws. We need to reframe our attitude and radically alter our treatment of elephants in order to realistically protect them. The fact is, wild elephants have been in this horrible position before. Not that long ago, in the 1980s, elephant populations plummeted by fifty percent due to slaughter by humans.² At that time,

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Tischler’s presentation was given on November 8, 2014 at Quinnipiac University School of Law and can be viewed at *Quinnipiac Law Review—2014 Symposium—Joyce Tischler*, YOUTUBE (Nov. 21, 2014), <http://tinyurl.com/k6axwd5>.

¹ I’ve heard or seen several variations on this quote: up to your waist, your ass, your eyeballs, etc. With all due respect to alligators, they can be rather distracting. In delivering this talk, it was not my intent to take the focus away from critically needed wildlife protection work, but rather, to point out what I see as the root cause of the problem.

² Joseph Vandegrift, *Elephant Poaching: CITES Failure to Combat the Growth in Chinese Demand for Ivory*, 31 VA. ENVTL. L.J. 102, 108 (2013).

there was a response by the Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES)³ and domestic legislation in the U.S. that was effective in bringing elephant populations back.⁴ That's all well. But then the parties to CITES bought into the idea of one-off ivory sales, which stimulated poaching again.⁵ And now the situation is dire. At the root of this seesaw treatment of African elephants is the fact that humans view elephants as renewable resources. We believe that they are ours to take, to control, and to use as we please. We can make them into piano keys, combs, trinkets, or whatever we want. Driving elephants to the point of extinction every thirty years is not only devastating to ecology—it is immoral and reprehensible. It says to me that, as a species, we are nowhere near as enlightened or sage as we'd like to think we are.

The second reason I want to talk about elephant “rights” is that I’m speaking here today to law students and lawyers, people who have been taught about power. We learn how to use it, how to abuse it (or not), and in a given situation, we make choices based on whether we have power, or lack it. Animals don’t have power. They are property under the law,⁶ and when you’re property, you have no power. There have been human beings in the United States who were also property. Starting in the 1600s, African people were kidnapped from their homelands, brought here, and classified as property. Women, children, people who are mentally incompetent, and Native Americans have all been property in the United States. Over time, these humans have been released from their property status. One gains power when one is no longer considered to be property. One gains legal rights when one is no longer the property of someone else; one becomes a legal “person.”

For the rest of today you are going to hear from speakers who are viewing the elephant crisis from the ground, so I am going to offer you a 10,000 foot view and suggest one way to reframe our discussion about elephants. I am an animal rights lawyer; I’m also an animal protection

³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

⁴ See Andrew J. Heimert, Note, *How the Elephant Lost His Tusks*, 104 YALE L.J. 1473, 1473, 1477 (1995).

⁵ See M.G. Cowling & M.A. Kidd, *CITES and the Conservation of the African Elephant*, SAYIL 189, 209–10, 215 (2000).

⁶ SONIA S. WAISMAN, PAMELA D. FRASCH & BRUCE A. WAGMAN, ANIMAL LAW: CASES AND MATERIALS 35 (5th ed. 2014); David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQUETTE L. REV. 1021, 1026 (2010) [hereinafter Favre, *Living Property*].

lawyer because, in the U.S., there really are no legal rights for animals—yet. I co-founded the Animal Legal Defense Fund (ALDF) in 1979 and have worked in this field for thirty-six years. I want to introduce you to the kind of discussions that we have about legal rights and how this could be applied to elephants. The arguments that I make could be applied to other animals, but today, we will address elephants.

In his groundbreaking legal essay written in 1972, USC law professor Christopher Stone wrote, “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.”⁷ For 2000 years, other animals have been categorized as “things.”⁸ It’s not hard to see how this happened 2000 years ago, 1000 years ago, or even 500 years ago. Scientists believed that animals didn’t think and didn’t feel.⁹ They were just a step above plants.

Early religious scholars, particularly in Christian theology, were attempting to elevate humankind and, therefore, sought to distinguish human beings from what they called the lower beasts.¹⁰ They developed a border, “a legal wall,”¹¹ between humans and other animals. This legal wall has persisted, even though the scientific underpinnings have long since eroded.¹² On one side of this wall are human beings and they have legal rights. They’re called persons. On the other side of the wall is the rest of creation: chimpanzees, elephants, chickens, turtles, whales, hawks, cats, dogs, cattle—the list goes on and on. They are all together in there. And they are things, chattel, property, renewable resources. They can be used, held captive, tortured, and killed according to even the slightest perceived need or desire of human beings. The suffering

⁷ Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 453 (1972).

⁸ See Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL AFF. L. REV. 471, 498 (1996).

⁹ Early vivisector, René Descartes stated in his *Discourse on the Method* that “animals are like machines.” See Gary Hatfield, *René Descartes*, STAN. ENCYCLOPEDIA PHIL., <http://tinyurl.com/ps4h7k9> (last updated Jan. 16, 2014).

¹⁰ See Nicholas H. Lee, Note, *In Defense of Humanity: Why Animals Cannot Possess Human Rights*, 26 REGENT U. L. REV. 457, 478 (2014) (“God’s entrusting dominion over the earth to his image bearers gives humans a unique dignity and places us in the exceptional role over animals.”); see also Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 30 (1995).

¹¹ STEVEN M. WISE, RATTLING THE CAGE 4 (2000).

¹² *Id.*

that animals experience, their needs, their interests, and their familial ties are ignored.

In 2000 years, political and social movements have created significant changes in the status of human beings, yet we humans continue to exploit animals at will. And being the technologically savvy creatures that we are, we have refined the process. When African elephants in the wild occupy the same habitat as human beings, it is the elephants who are considered pests and killed or driven away. In the U.S. and in other countries, elephants are very popular as “exhibits” in zoos. People love to go to the zoo and see the elephants. It is a money-maker for the zoos, yet few people consider the impact this captivity has on the elephants.

I am teaching animal law at Lewis and Clark Law School this semester.¹³ As part of the course work, I conducted a field trip to the local zoo.¹⁴ Each of four groups of students was assigned to research a species (elephants, bald eagles, chimpanzees, or mountain lions). The students had to identify what the animals’ lives are like in the wild: their habitat and territorial range, feeding habits and family or group structures. The students also researched what laws applied to their assigned species while in captivity in the U.S. Then, we went to the zoo and each group of students presented their report in front of the exhibit where members of their species were housed in captivity. For the students, it was an eye-opening experience. And, when we got to the Asian elephant exhibit, the student who had researched elephants in the wild started to sob, because the elephant there, a lone bull Asian elephant, was bobbing his head and exhibiting stereotypical captivity behavior. He was in an enclosure with concrete walls and dirt, nothing else. He walked slowly around his small enclosure with nothing to do, nothing to keep him active or his intelligent mind busy. She apologized for crying, as she thought it was unprofessional, but to me, it was perfectly reasonable to cry. She was witnessing the striking difference between what life is like for this captive elephant day-in-and-day-out in a zoo versus the freedom and range of activities he would have had in the wild.

¹³ *Animal Law Fundamentals (449 A)*, LEWIS & CLARK, <http://tinyurl.com/lodhlxe> (last visited Apr. 22, 2015).

¹⁴ The originator of the field trip to the zoo was Pamela Frasch, Assistant Dean of the Animal Law Program at Lewis & Clark Law School, and Executive Director of the Center for Animal Law Studies (CALs), and it has proved to be a powerful tool to teach law students about legal and ethical issues related to captive wildlife.

Being in zoos causes a variety of problems for elephants.¹⁵ Zoos cannot possibly provide elephants with the amount of space that they would have in the wild. They keep elephants in unnaturally small groups. They routinely shuffle them back and forth to other zoos, with callous disregard for the emotional bonds that those elephants may have developed with other elephants they are with. Hours standing on hard surfaces causes foot infections and arthritis, which is the leading cause of death for captive elephants.¹⁶

People are surprised to learn that zoos are often brutal to elephants. At the Oregon Zoo, which is known as one of the better zoos in the United States, it was reported that an elephant named Rose-Tu had 176 gashes and cuts on her skin after she had been repeatedly beaten with a bullhook.¹⁷ According to some witnesses at the Dickerson Park Zoo, an elephant named Chai was beaten with bullhooks and pieces of wood for 2.5 hours.¹⁸

Circuses are even worse than zoos, as you might imagine, because they are training elephants to do ridiculous, unnatural tricks. They use physically violent methods, such as the use of bullhooks, ax handles, and baseball bats to terrify and dominate the elephants and train them to do tricks such as walking around the ring and sitting upright.¹⁹ This is a picture of a baby elephant being “trained.”²⁰

¹⁵ See Kathryn M. Campbell, *Zoos as Prisons: The Role of Law and the Case for Abolition*, 2 MID-ATLANTIC J. ON L. & PUB. POL’Y 53, 68–69 (2014).

¹⁶ *Id.* at 71.

¹⁷ *Honoring Animal Victims: Landmarks in Legislation*, ANIMAL LEGAL DEF. FUND, <http://tinyurl.com/jvzf4sr> (last visited Apr. 22, 2015); Jennifer O’Connor, *Update: Oregon Zoo Director Out of a Job in Wake of Baby-Elephant Barter Scandal*, PETA (Oct. 31, 2011), <http://tinyurl.com/no7k2cu>.

¹⁸ *Get Elephants Out of Zoos*, PETA, <http://tinyurl.com/mwslvj3> (last visited Mar. 21, 2015).

¹⁹ *Circuses*, PETA, <http://tinyurl.com/p87v4bw> (last visited Mar. 21, 2015); *Carson & Barnes Circus Cruelty*, PETA, <http://tinyurl.com/kufolam> (last visited Apr. 22, 2015) (showing undercover video of circus training methods) (WARNING: foul language and graphic images of violence).

²⁰ For an expose on circus methods used to “break” elephants and train them, see *Baby Elephants, Bound and Broken: How Ringling Trains Elephants*, PETA, <http://tinyurl.com/qcz8gff> (last visited Apr. 22, 2015) (WARNING: graphic images).



Photo courtesy of PETA²¹

All of this is for the amusement of the paying customer and the financial gain of the circus.

Sadly, that's not the only problem. There is a mass slaughter of elephants occurring in Africa, and if this killing isn't stopped, African elephants will be extinct in one decade.²² Wild elephants are being killed solely for their tusks, which are made of ivory. Human beings love ivory. They can carve it into beautiful objects. It is a status symbol. It costs a lot of money and it makes people feel wealthier. It is coveted as a possession, but please understand that these extraordinary beings are dying horribly, in great numbers, so that we can have ivory. Our vanity is causing this (WARNING: graphic image).

²¹ *Tools of the Trade: Circuses*, PETA2, <http://tinyurl.com/kv5t7qc> (last visited Apr. 22, 2015).

²² Brad Scriber, *100,000 Elephants Killed by Poachers in Just Three Years, Landmark Analysis Finds Central Africa has Lost 64 percent of its Elephants in a Decade*, NAT'L GEOGRAPHIC, <http://tinyurl.com/pp4lk83>; Christine Dell'Amore, *Beloved African Elephant Killed for Ivory—"Monumental" Loss*, NAT'L GEOGRAPHIC (June 16, 2014), <http://tinyurl.com/qbetyq7>; Matthew Scully, *Inside the Global Industry That's Slaughtering Africa's Elephants*, ATLANTIC (June 6, 2013), <http://tinyurl.com/kod6fms>; Jeffrey Gettleman, *Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits*, N.Y. TIMES (Sept. 3, 2012), <http://tinyurl.com/oe6uvy4>; *The History of the Ivory Trade*, NAT'L GEOGRAPHIC, <http://tinyurl.com/pwdvssh> (last visited Apr. 22, 2015).



© Boubandjida Safari Lodge/IFAW²³

There is another way. Concern for the fate of elephants is growing on an international level. Recently, I went to Kenya to attend a conference sponsored by Kenyan elephant advocates on how to stop the slaughter of wild elephants. The conference was held at Amboseli National Park (Amboseli),²⁴ where we could see from a respectful distance African elephants in the wild, with their children, with their families. It was a moving experience for everyone present. The attendees discussed the importance of keeping elephants alive, both out of national pride for these wonderful native animals and because they are a tourist attraction that brings a significant income to Kenya. Kenyan officials were thinking in new ways about what elephants mean to them and their country.

Now I'd like to ask you to try to move away from viewing elephants solely as a species, solely as members of groups and to try instead to look at them as individuals. In the last ten years, scientists have documented a great deal about the intellectual and emotional lives

²³ See Christina M. Russo, *What Happened to the Elephants of Boubandjida?*, MONGABAY.COM (Mar. 7, 2013), <http://tinyurl.com/kx8gb6h>.

²⁴ *Amboseli National Park*, KWS, <http://tinyurl.com/7wgknhw> (last visited Mar. 21, 2015).

of elephants.²⁵ We now know that they have complex social interactions, large brains, and central nervous systems that are basically like our own. They communicate in sophisticated ways, help and support each other, suffer emotional trauma, and grieve for those elephants who have died.²⁶ Elephants have rich emotional lives and no reasonable person should suggest that these magnificent sentient beings are “things.” Our law has to catch up with what science is telling us. If we can begin to see elephants as they really are, rather than limiting our view to how we want to use them, then our treatment of them will change.

I realize that for some people, thinking of elephants as individuals, as persons, is a very radical notion. So I will take a step back and talk a bit about legal rights and personhood. What is a legal right? We do not normally think about why we, as humans, have legal rights. We simply assume that we have them. Oddly enough, there is no generally accepted definition of the term “legal right.” Roger Galvin, an early animal rights attorney, came up with a definition that works for my purposes:

- (1) A legal right is recognized as such by the law and thereby protected from destruction or infringement.
- (2) The entity holding the right can seek legal protection on its own behalf.
- (3) The assertion of the right should protect the entity from injury.
- (4) The relief the law provides should directly compensate or benefit the holder of the right.
- (5) Incapacity on the part of the holder of the right does not preclude a representative from protecting the best interest of the holder of the right.²⁷

So, why do humans have legal rights? Do they descend from the heavens? No; legal rights come from us. As I mentioned earlier, human beings have been property. In the past 150 years in the U.S., the social contract about who gets rights, and who gets legal “personhood” protection, has expanded to include: people of color, women, children,

²⁵ See, e.g., Ferris Jabr, *Searching for the Elephant's Genius Inside the Largest Brain on Land*, SCI. AM. (Feb. 26, 2014), <http://tinyurl.com/nw4r8om>; Ferris Jabr, *The Science Is In: Elephants Are Even Smarter Than We Realized*, SCI. AM. (Feb. 26, 2014) <http://tinyurl.com/p9c2qv3>; Caitrin Nicol, *Do Elephants Have Souls?*, 38 N. ATLANTIS 10 (2013), available at <http://tinyurl.com/l3oo2em>; Lucy A. Bates, Joyce H. Poole, & Richard W. Byrne, *Elephant Cognition*, 18 CURRENT BIOLOGY 544 (2008), available at <http://tinyurl.com/ks6m7rx>. The Amboseli Elephant Research Project has studied the elephants at Amboseli for decades and has published a wide variety of resources about their lives, cognition, social structure, and habits. See *Program*, AMBOSELI TR. FOR ELEPHANTS, <http://tinyurl.com/nobsh34> (last visited Apr. 22, 2015).

²⁶ See sources cited, *supra* note 25.

²⁷ Roger W. Galvin, *What Rights for Animals? A Modest Proposal*, 2 PACE ENVTL. L. REV. 245, 248 (1985).

gays, lesbians, transgender people, immigrants, Native Americans, people with mental and physical disabilities, and children.²⁸ Legal rights are established by us to protect our lives, our families, our property, and our values. And they evolve.

Let's consider the following example: each of us consciously values our life. Therefore, we have an implied contract that I won't kill you and you won't kill me because we both value remaining alive. What if you breach the contract and kill me? You have crossed the line and our society has set up rules to deal with that. At a minimum, our criminal law system will intervene to investigate and prosecute you. That social contract, however, also says that you are presumed innocent until proven guilty beyond a reasonable doubt (a very high standard), that you have a right to counsel and to a jury of your peers. We value human life so highly that we set up social contracts which are then codified into law. But this social contract concept stops cold when some of us attempt to apply it to species other than our own. We accept, *ipse dixit*, various justifications for why other animals should not have legal rights.

Applying that to elephants, we assume that they should remain property, that they should be denied legal rights. One argument in favor of this position is that elephants do not have the same level of intelligence, or kind of intelligence, as humans do. We have known for some time that elephants are highly intelligent. In the past decade or so, scientists have focused more rigorously on studying the cognition of elephants. Louis Irwin, at the University of Texas, El Paso, reports that both humans and elephants adapted to life in Africa at about the same time.²⁹ Both evolved to live long and migratory lives. Both experienced a dramatic increase in their brain size. Both live in highly complex social systems and both have developed sophisticated systems of communication.

Ferris Jabr, in his article, *The Science is in: Elephants are Even Smarter than We Realized*,³⁰ presented some recent findings that elephants cooperate with each other to solve problems, and that they use tools, such as twigs to shoo away flies. Juvenile elephants learn everything from their elders. Elder matriarch elephants remember the locations of water holes, which are essential to keep their families alive.

²⁸ See, e.g., *Modern Social Movements*, FORDHAM UNIV., <http://tinyurl.com/oftte8p> (last visited Apr. 22, 2015); *Social Movements and History*, ABOUT.COM, <http://tinyurl.com/nfdllkt> (last visited Apr. 22, 2015).

²⁹ Jabr, *supra* note 25.

³⁰ *Id.*

They show empathy: elephants are often observed refusing to leave sick or injured members of their family or struggling to hold up a dying family member.³¹ I recently read a story about an elephant who accidentally injured a ranch herder. She refused to leave him, gently moved him under a tree, kept him out of the sun, and stayed there with him for a day, even though her own family left, until villagers came to rescue him.³² In other words, they have a level of empathy that many researchers believe is a sign of extremely high intelligence and emotional complexity.

But even if you do not accept that, even if you say, “I doubt you,” legal rights in this country do not depend on *how* intelligent you are. Less intelligent adult humans still have the full protection of personhood. And while the average intelligence of human beings may be greater than the average intelligence of elephants, there are individual humans, such as severely mentally disabled people, who are less intelligent than the average elephant, and function at lower levels. But still those human beings are protected as persons under the law.

Another reason given for the dichotomy is that it is assumed that elephants do not have complex emotional lives. For anyone who has studied elephants, I don’t have to say another word, but I will. Elephants assist each other in childbirth. Females spend their entire lives with their family, which is led by a matriarch, and they learn from their family members. I heard a story from one of the researchers at Amboseli about a female elephant who was young; it was her first pregnancy and she was in labor, when the baby was born, she was afraid and ran away. The other female elephants brought her back to the baby and showed her what to do. Wild female elephants spend their lives surrounded by other females. They work together and care about each other. Their emotional lives and social interactions are highly complex.³³

In 2013, *Frontiers of Zoology* published a study entitled *Effects of Social Disruption in Elephants Persist Decades After Culling*.³⁴ The researchers conducted this study in two countries in Africa. First they went to Amboseli in Kenya and studied a group of elephants who had not been involved in a cull and lived in a traditional matriarchal elephant society. The other group of elephants they studied had been orphaned as

³¹ *Id.*

³² Nicol, *supra* note 25, at 17.

³³ See sources cited, *supra* note 25.

³⁴ GRAEME SHANNON ET AL., FRONTIERS IN ZOOLOGY, EFFECTS OF SOCIAL DISRUPTION IN ELEPHANTS PERSIST DECADES AFTER CULLING (2013), available at <http://tinyurl.com/ohucbj5>.

infants in culls that occurred in the 1980s and '90s. These elephants had been relocated to South Africa. The study concluded that the relocated orphaned elephants displayed classic signs of long-term psychological damage, similar to post-traumatic stress disorder (PTSD).³⁵

The traditional elephant family in Amboseli responded to stimuli in traditional coordinated ways, while the social skills of the orphaned elephants were damaged even though the culling had occurred, in some cases, thirty years earlier. The researchers concluded that “extremely disruptive events, including culling, poaching, and translocation to new areas or capture for captivity can ultimately lead to serious disruption of the intricate social networks that underpin social structure in these species.”³⁶ Basically, they determined that the elephants relocated to South Africa were psychologically damaged.

I recently read a story (there are many anecdotal stories about elephants), about an elephant in the circus who was being taught a new trick, and she wasn't getting it. The trainers kept pushing her, and she wasn't responding the way they wanted her to. Finally, she ran from where the trainers were, flopped down, and started to weep uncontrollably. There are many similar stories of elephants weeping.³⁷ I suppose if I were a behavioral scientist, I might say, “Well maybe someone had cut an onion and her eyes were just tearing up.” No; I think we know better. Elephants weep because they are emotionally complex beings.

I'd like to offer one final story, which speaks volumes to me about the emotional lives of elephants: it is about a five-month old elephant whose mother had died. Staff from the David Sheldrick Wildlife Trust, a charity based in Nairobi, went out to where the calf was in order to rescue him and bring him to safety, as he would not survive on his own.³⁸ The rescue took many hours, however, because the calf was clinging to his dead mother and wouldn't leave her, charging at the

³⁵ *Id.* at 5.

³⁶ *Id.* at 4–5.

³⁷ See, e.g., Caroline Howe, *Last Chain on Billie: How One Extraordinary Elephant Escaped the Big Top*, DAILY MAIL (July 21, 2014, 5:49 PM), <http://tinyurl.com/lf9mrcx> (“Another trainer beat an elephant so badly, she was lying on her side, heaving with sobs and tears running down her face. The handlers were so moved, they never beat her again and knelt down beside her to comfort her.”). See generally JEFFREY MOUSSAIEFF MASSON & SUSAN MCCARTHY, *WHEN ELEPHANTS WEEP: THE EMOTIONAL LIVES OF ANIMALS* (1995).

³⁸ *Sokotei—Elephant Orphan History*, DAVID SHELDRIK WILDLIFE TR., <http://tinyurl.com/lyzmljg> (last visited Mar. 21, 2015). One of the Trust's programs is to rescue and foster orphaned elephants, until they are old enough to be placed back into a wild herd.

rescuers to keep them away from his mother.³⁹ We know that elephants mourn the loss of their family members and go through rather intricate ceremonies to grieve and bury their dead.

Another argument I hear for why elephants should not have rights is that they do not look like us. I agree. They do not look like us. They are so much better looking than we are. But let's not hold that against them. How close to a human form do you have to be in order to have rights? What about Thalidomide babies?⁴⁰ Some of you are old enough to remember that tragedy. Did they have rights? Of course they did. If you are missing body parts, an arm or a leg, do you have fewer rights? Of course not. Physical form does not determine the threshold question of legal rights.

We have also been told elephants have no ability to communicate. But we have known for some time that elephants communicate with each other through a combination of chirps and low frequency rumbles—many of which we can't hear—trumpets as well as nudges and kicks and visual signs, such as flapping their ears.⁴¹ Joyce Poole, a leading elephant expert, tells us that when elephants are getting ready to do a group charge, they all look at each other as if to say “Are we all together? Are we ready to do this?”⁴² And then, when they do the charge and succeed, they have an enormous celebration.⁴³ They trumpet, they rumble, they lift their heads high, they clank their tusks together and they intertwine their tusks.⁴⁴

Going back to a scientific study, *Plos One* published an article entitled *African Elephant Alarm Calls Distinguish Between Threats from Humans and Bees*.⁴⁵ In this study, which was conducted on wild elephants in Kenya, researchers recorded and analyzed how wild elephants responded to humans and to bees. They reported that when

³⁹ See Nicole Le Marie, *Elephant Calf's Vigil for Mother: Five-month-old Orphan Stays by his Dead Parent*, METRO NEWS (May 14, 2014, 11:30 PM), <http://tinyurl.com/mq69puw>.

⁴⁰ See Frederick Dove, *What's Happened to Thalidomide Babies?*, BBC NEWS (Nov. 2, 2011, 9:18 PM), <http://tinyurl.com/n7zmav7> (“Thalidomide has strong sedative properties and many women in the early weeks of pregnancy had taken it to ease their morning sickness, utterly unaware its effect on the unborn child can be teratogenic, or ‘monster-forming’. Limbs can fail to develop properly, in some cases also eyes, ears and internal organs. No one knows how many miscarriages the drug caused, but it's estimated that, in Germany alone, 10,000 babies were born affected by Thalidomide. Many were too damaged to survive for long.”).

⁴¹ Jabr, *supra* note 25.

⁴² *Id.* (internal quotation marks omitted).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Joseph Soltis et al., *African Elephant Alarm Calls Distinguish Between Threats from Humans and Bees*, PLOS ONE, Feb. 2014, at 1.

elephants were exposed to the voices of local adult male tribesmen, which would signal danger, they produced vocalizations that were acoustically distinct from the vocalizations they produced when they were hearing the sound of bees. In other words, they were communicating with each other not only that there was danger, but identifying the type of danger, bees versus humans.

Another reason we hear for denying rights to elephants is that they do not possess immortal souls. This is a tough one. The possession of souls by animals has been the subject of heated debate among the world's religions. Mainstream Christianity tells us that animals do not possess souls.⁴⁶ Other religions such as Hinduism believe that animals do have souls.⁴⁷ I believe that I have a soul. But I can't prove it to you or show it to you on an anatomy chart. I don't know where it is. I believe all of you have souls, but I can't prove that either. So why would I assume that these large-brained, emotionally complex, and intelligent beings don't have souls? But, if, for the sake of argument, we assume they do not possess souls, what does this have to do with the law? With the foundational approach to separation of church and state in this country, the question of possession of a soul should be deemed irrelevant to determining legal rights.

Some who argue against animal rights claim that animals can't have rights because they don't have responsibilities. Yet, in the wild, elephants are highly responsible. They assume full responsibility for every aspect of their lives. They protect their families, they travel great distances, they mate, and they find food. That they are captives in the U.S., where they are strangers in a strange land, is no fault of their own and the sooner we end that the better. Besides that, there are certain humans, including babies, small children, and people with severe physical or mental disabilities, who cannot take on full responsibility for themselves, and yet, they have legal rights.

Here is another argument that I find difficult to counter rationally. Richard Posner, who is a distinguished judge on the Seventh Circuit Court of Appeals,⁴⁸ is a firm believer in animal welfare, but he absolutely opposes extending rights to animals. In a letter to philosopher, Peter Singer, Posner wrote,

⁴⁶ Thomas G. Kelch, *Cultural Solipsism, Cultural Lenses, Universal Principles, and Animal Advocacy*, 31 PACE ENVTL. L. REV. 403, 408 (2014).

⁴⁷ *Id.* at 413.

⁴⁸ *Seventh Circuit Judges*, USCOURTS.GOV, <http://tinyurl.com/luegqmd> (last visited Apr. 22, 2015).

I contended in my reply to your first statement that it is wrong to give as much weight to a dog's pain as to an infant's pain, and that it is wrong to kill one person to save 101 chimpanzees even if a human life is only 100 times as valuable as a chimpanzee's life. I rested these judgments on intuition. Against this intuition you have no factual reply⁴⁹

On numerous occasions, Judge Posner has argued that animals cannot have legal rights, based on his intuition that being human is what gives us moral rights, and non-humans cannot have that. And I think for a lot of people, that intuitive sense leads them to conclude: "I am human, you're not. I have rights, you don't." I don't find that argument convincing because my intuition is otherwise. So, if it is my intuition versus Judge Posner's intuition, who wins? I do want to mention that distinguished law professors such as Laurence Tribe, Alan Dershowitz, and Cass Sunstein share my intuition.⁵⁰ They support extending legal rights to animals.

The simple fact is, we don't need to use elephants. They are not essential to our survival. They are not essential to our well-being. We don't eat them, we don't wear them, we don't use them in medical

⁴⁹ Letter from Richard A. Posner to Peter Singer, SLATE (June 13, 2001), *reprinted in Animal Rights: Debate Between Peter Singer and Richard Posner*, UTILITARIAN.NET, <http://tinyurl.com/l8zgwcb> (last visited Mar. 21, 2015).

⁵⁰ See Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 3, 7-8 (2001) ("With the aid of statutes like those creating corporate persons, our legal system could surely recognize the personhood of chimpanzees When people ask my wife Carolyn and me whether we own any dogs, we say no. We don't 'own' our dog Annie. I can't really think of myself as owning a dog. We and Annie are a kind of family. But how do we persuade people to view the situation that way? How do we persuade people that these creatures have rights and must be allowed, through others as their spokespersons, to press moral claims? I don't claim to have figured that out. The secret to making that case may well reside at a level deeper than rational argument and deeper than provable fact, but, paradoxically, in a visceral appeal to our own common humanity."); see also ALAN DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS* 199 (2005) ("Societies that treat animal life with greater respect tend also to treat human life with greater respect. It is preferable to live in a society that seeks to limit the suffering of animals than in one that does not. This does not necessarily mean that a vegetarian society will always be better than a carnivorous one. . . . It is merely a claim that the gratuitous infliction of pain on animals is bad for humans, and its toleration is bad for any human society. This is the soft case for a human-centered approach to animal rights. It requires that when human beings balance their perceived needs against the interests of animals, we must take into account their suffering and seek to minimize it"); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1367 (2000) ("Congress has the authority to grant animals standing to protect their interests, in the sense that injured animals might be counted as juridical persons, to be protected by human plaintiffs initiating proceedings on behalf of animals.").

research, which are the three most common reasons that people give me for the continued exploitation of animals. We don't need to use elephants. We *prefer* to use them. Most zoos continue to exhibit elephants, despite the growing evidence that the elephants' needs are being largely ignored. In 2005, the Detroit Zoo became the first American zoo to close its elephant exhibit and to transfer the elephants to a sanctuary, based on ethical grounds.⁵¹ They had concluded that the elephants' physical and mental health was being compromised.

The debate about keeping elephants in zoos is growing; not fast enough from my perspective, but the debate is heating up. A growing number of circuses, such as Cirque du Soleil, are very popular and financially successful without using animals at all. With the wonderful technology we have, IMAX, You Tube, Netflix, etc., we can watch documentaries about elephants in the wild that will educate us, educate our children, and hopefully embolden conservation efforts. That is what we should be moving toward.

I want to summarize by saying that if we examine the reasons that are generally given for why animals can't have legal rights, they don't stand up; they don't survive rational analysis. Rights holders are really only flexing their muscles and saying "I want to keep it that way because it is convenient and I like it." All of these same reasons have been given previously for keeping human beings as slaves or keeping human beings as property. "We need the slaves to grow the cotton." "We need women to stay at home and raise the children." "We need children to work the farms." The fallacy of those arguments was eventually brought to light. And, in time, each of those groups was removed from the property status. We deny elephants legal rights because we want to continue exploiting them. "Might makes right" is an ethically and morally bankrupt stance. As I said at the start, African elephants are heading toward extinction as a result of this antiquated mind set and attitude. To change that, we need to focus on a small space—that between our ears.

The establishment of legal rights stems from the necessity to protect interests and to resolve conflicts of interests. And not all interests carry equal weight. It is the role of our lawmakers to decide which interests deserve protection as legal rights and to strike a balance among competing interests. Based on the current scientific literature, we know without a shadow of a doubt that elephants possess interests. To quote legal scholar, Roscoe Pound, "We must begin, then, with the proposition

⁵¹ *Detroit Zoo to Send Elephants to Refuge*, USA TODAY (May 20, 2004, 6:59 PM), <http://tinyurl.com/mqmban4>.

that the law does not create these interests. It finds them pressing for security. It classifies them and recognizes a larger or smaller number.⁵²

A fair and just legal system has to take into account the competing interests of other animals and balance those interests against the interests of humans. This is not to say that elephants are in every way like human beings. They are not humans in baggy suits. They don't have to be: they are like us in ways that are morally and legally relevant to the issue of rights. The concept of equality under the law doesn't mean that we are all equal. We're not all equal. We are physically different, emotionally different, and intellectually different. What we have is the right to equal consideration of our interests.

What would legal rights for elephants look like if applied in the U.S.? Earlier this year, some of you may have read about lawsuits that were filed in New York State, on behalf of certain captive chimpanzees located in that state, demanding that they be released from their captivity based on the doctrine of *habeas corpus*. These lawsuits are being spearheaded by the Nonhuman Rights Project (NhRP).⁵³ NhRP's legal team is arguing that chimpanzees are persons, and that the law must treat them as such. Within the next few years, NhRP is going to bring lawsuits aimed at creating personhood status for elephants who are held captive in the United States. Whether these lawsuits win or lose, they are breaking new legal ground and new ground socially in our country. They are altering the discussion about how we view and treat animals.

If NhRP wins these lawsuits, our society will be faced with profound questions about how we treat these animals. If elephants are persons, what rights should they have?⁵⁴ To start with, they should have

⁵² ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* 68 (2d prtg. 2002).

⁵³ Michael Mountain, *Lawsuit Filed Today on Behalf of Chimpanzee Seeking Legal Personhood*, NONHUMAN RIGHTS PROJECT (Dec. 2, 2013), <http://tinyurl.com/lgbgbho>. For information and updates about the NhRP lawsuits, see NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrights.org/> (last visited Apr. 22, 2015).

⁵⁴ See Joyce S. Tischler, Note, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats*, 14 *SAN DIEGO L. REV.* 484, 499–500 (1977). In that early article, I cited to Peter Singer's book, *Animal Liberation*, and suggested that the rights given to a new class of rights holders should reflect the interests of those rights holders. Now, almost forty years later, I am again faced with the admonishment that because, for the most part, elephants cannot communicate their desires and interests to humans, it is presumptuous of me to select rights for them. In proposing that elephants have certain legal rights, I certainly don't wish to seem presumptuous, arrogant, or ridiculous. I am making suggestions based on what I have learned about elephants' intellectual and emotional capacities. Intelligent, self-aware, emotionally complex beings of all species share certain interests: an interest in remaining alive, autonomy, bodily integrity, freedom of movement; an interest in having the basic necessities of life: food, shelter, and safety; an interest in protecting their loved ones, their community. Of course, we

the right to life, the right not to be killed without due process. And they should have the right to autonomy. Obviously, elephants don't belong in the U.S. They are not native to this country and there is no land ready made for them to roam freely here. Elephants are wild animals who belong in their native countries. Unfortunately, elephants who are held captive in the U.S. can't be sent back to their native lands because they lack the skills needed to survive in the wild. They never received the training and upbringing from their native elephant societies that would enable them to take their rightful place in those societies.

Elephants should be freed from, and independent of circuses, zoos and all other institutions and individuals who exploit them. Regarding bodily integrity, an elephant's body should belong to him or her, and is not to be used for the financial or other benefit of others. Elephants have the right to a habitat and care sufficient to support and nurture them. The best available solution would be to send elephants to accredited sanctuaries, where they would be placed into habitats that, as closely as possible, approximate their natural habitat, where they are in appropriate social groupings, which allow them to form and maintain the social bonds that are so important to them, and where they could live out the remainder of their lives with dignity. To ensure that elephants in the wild are safe, all capture of live elephants and import into the U.S. should be banned, along with all sale and possession of ivory and other elephant parts or products. Finally, elephants should have the right to be represented in a court of law, both civilly and criminally, in order to protect against violations of their rights.

What would this look like internationally? On the international level, the only treaty in existence that protects animals is CITES.⁵⁵ It is a conservation treaty, and its provisions do not consider legal rights, or even standards of welfare. When animal protectionists attend CITES conferences, out of respect for the institution, we do not bring these issues up. That needs to change. As presently structured, CITES cannot

don't share *all* of the same interests. For example, I would not suggest that elephants be granted the right to vote, given that we have no evidence they possess such an interest. But, I think we have adequate knowledge to make educated guesses about what interests elephants possess. And by analogy, we do that with certain humans, such as babies, severely disabled persons, or persons in a coma, who may be unable to communicate their interests and desires for their own care. Our legal system has established guardianships and conservatorships to provide legal representation to and protections for such individuals, and I believe that our legislatures and judiciary could apply these or similar tools to determine appropriate rights for the new class of persons I propose. *Id.* at 502–06.

⁵⁵ CITES, *supra* note 3.

offer a realistic solution because it is also the cause of the threatened extinction of elephants.⁵⁶ If the parties to CITES decide that the elephant poaching crisis needs to be challenged, great. But, as we've seen, when CITES embraces "sustainable trade in ivory," elephant populations plummet. We can no longer afford this seesaw approach.

We need to begin to look at elephants differently and stop asking the question, "What is the sustainable use of them?" No use ought to be allowable or appropriate. Twenty years ago, Professor David Favre of Michigan State University developed a welfare treaty for wildlife and companion animals in other countries.⁵⁷ It didn't gain traction then, but the concept is now being reintroduced. I would suggest that, as a first step, a welfare and protection treaty should be thought of as something that we work on.

The establishment of international law that provides legal rights to elephants and other animals seems a long way off, even to a dreamer like me. It would require a great deal of education and debate in the international sphere. But what would it look like? Perhaps, it could be drafted along the lines of the Geneva Conventions.⁵⁸ The Geneva Conventions deal with protection of human victims in international and non-international armed conflicts. They provide that people should be treated humanely, without adverse distinction on the basis of race, color, religion, faith, sex, birth, wealth, and so forth. They offer a model for a similar convention for elephants. Additionally, we could develop something similar to the International Bill of Human Rights, to wit, an International Bill of Wildlife Rights and an International Bill of Elephant Rights. Are these unattainable dreams? I am reminded of a quote from George Bernard Shaw, "You see things; and you say, Why? But I dream things that never were; and I say Why not?"⁵⁹

Those of us who argue for legal rights for animals maintain that the differences between humans and other animals are not legally or morally relevant. In all legally relevant ways, elephants possess qualities that compel us to put aside convention and convenience, and to realize that

⁵⁶ See Vandegrift, *supra* note 2, at 122 ("While CITES acknowledges the problems Chinese demand for ivory creates, CITES cannot provide a solution to the problem, as CITES will not regulate domestic trade" (footnote omitted)).

⁵⁷ David Favre, *An International Treaty for Animal Welfare*, 18 ANIMAL L. 237 (2012).

⁵⁸ See *Geneva Conventions: Overview*, LEGAL INFO. INST., <http://tinyurl.com/nza95mn> (last visited Apr. 22, 2015).

⁵⁹ GEORGE BERNARD SHAW, *BACK TO METHUSELAH* 123 (The Floating Press 2010) (1921) (internal quotation marks omitted).

for too long we have ignored and violated their rights. Elephants are not things. Legal systems which treat them as such are inherently flawed.

What are we going to do to fix this flaw? Are we going to wait until wild elephants are declared “extinct”? Are we going to wait for society to progress? Or are we going to begin now to change the way we look at these extraordinary beings? Those of us who are at the heart of the animal rights movement envision a world in which the lives and interests of all sentient beings are respected within the legal system. Where elephants and other wild animals can live out their natural lives according to their instincts as well as their intelligence, in an environment that supports their needs. We envision a world in which animals are not exploited, terrorized, tortured, or controlled to serve our purposes. I hope that, as you think about the crisis and hear the speakers today, you will consider sharing the vision I am presenting, and work with me toward a more just and compassionate world.

QUESTIONS AND ANSWERS

JESSICA BELL: I am from Michigan State University. I was wondering if you were familiar with the book, *Zoopolis: A Political Theory of Animal Rights*?⁶⁰ The authors use a theory based in disability law to argue for animal rights and I was wondering if you think that might be applied to elephants? Also, I worked with Dr. Bradshaw who did some work on elephant PTSD,⁶¹ and I was wondering if you thought the evidence that elephants do suffer from PTSD in a captive condition could be a further argument for elephant personhood?

JOYCE TISCHLER: Yes. Earlier, I mentioned a study that showed elephants do suffer from something akin to PTSD, even thirty years later.⁶² In terms of how we talk about rights, I started thinking about this

⁶⁰ SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* (2011).

⁶¹ See G. A. BRADSHAW, *ELEPHANTS ON THE EDGE: WHAT ANIMALS TEACH US ABOUT HUMANITY* 150 (2009) (“Many people who live in countries where elephants are not indigenous see an elephant for the first time in the setting of a zoo or circus. Not only are these observers often ignorant of elephant ethology and natural history, but because captivity is culturally sanctioned, the human eye is psychologically conditioned to interpret captive elephant behavior as normal. Even if a person has seen elephants in their native savannahs on television or has visited them on ‘safari,’ the power of social conditioning can blind the viewer to what is going on inside the captive, and to the gradual degradation of an elephant mind and body. As a consequence, ceaseless swaying and pacing by captive elephants is labeled ‘boredom,’ but the same behavior observed in human captives is considered a psychological disorder disturbingly indicative of cruelly imposed stress.”).

⁶² See *supra* notes 34–36 and accompanying text.

subject in 1975, after reading philosopher Peter Singer's book, *Animal Liberation*,⁶³ but I am not a utilitarian. I don't go as far as Singer does, for utilitarianism leads him to say people with disabilities are less important, and I don't wish to go there. I don't want to downgrade human beings at all; I want to upgrade animals.

JESSICA BELL: In *Zoopolis*, the authors argue that assisted agency can help people with disabilities communicate their rights and be an active member of society,⁶⁴ so I think people who are aware of an elephant's intelligence, for example, scientists, could be used to advocate for their rights, because they can help elephants express their agency.

JOYCE TISCHLER: Yes; those authors offer a fresh perspective that is worthy of consideration. And while I like to rely on scientific studies for support of my positions, I regret that scientists often seem unwilling to advocate for animals, out of a fear that they will be criticized by their colleagues. For example, certain scientists have witnessed animals exhibiting emotions, yet they refuse to compare that behavior to a human-like response in their published reports, because they don't want to be accused of being anthropomorphic. But when you read reports, such as the one I mentioned earlier, of an elephant flopping-down on the ground and weeping, what are you going to think? Why is the elephant doing that? I presume the elephant is doing it for the same reason I would; well, I don't flop down and cry too often, but isn't it rational to assume that the elephant is acting out frustration, anger, or exasperation? I can only assume that. Why else would she do that?

When Jane Goodall first starting naming chimpanzees, it caused an uproar in the scientific world.⁶⁵ How, they asked, could she name a chimpanzee? She should have kept her emotions in check and called that chimpanzee "Z72." Well, even if she called him Z72, she was still observing and reporting that Z72 was using tools.

When I first began speaking publicly about animal rights, I tried not to display emotion, and stuck with the facts as much as I could. As I've aged and become more introspective, I've learned to trust, and exhibit

⁶³ PETER SINGER, *ANIMAL LIBERATION* (Harper Collins 2002) (1975).

⁶⁴ DONALDSON & KYMLICKA, *supra* note 60, at 103–08.

⁶⁵ DALE PETERSON & MARC BEKOFF, *THE JANE EFFECT: CELEBRATING JANE GOODALL* 29–30 (2015) (“[Jane] felt that every individual counts, not only among the animals she studied but also when working with people who were concerned about saving other species and their homes. At the time, naming and recognizing individuality were not standard operating procedure in studies of animal behavior, most of which were conducted in various sorts of artificial, captive settings.”).

my emotions and intuitions. And that's a good thing. Some of humanity's worst atrocities happen when we objectify others, and are not in touch with our emotional responses to their suffering.

JENNIFER BROWN: Hi. I'm the Dean of Quinnipiac University School of Law. Thank you for your talk, and more importantly for your work, which is really important and inspiring. I just want to start by locating my own potential bias. I have to out myself as a person who identifies as a Christian. During your talk you referred to Christianity in specific ways and I was wondering if you could say more about that? As distinct from other Abrahamic traditions? Also, we were talking about China, which has a large role currently in this, so I was wondering if you could say something more, is there something specific about Christianity?

JOYCE TISCHLER: During the Roman Empire, the slaughter of both Christians and animals was carried out as entertainment.⁶⁶ Early Christian theologians emphasized the uniqueness of human beings, and placed great emphasis on humanity possessing immortal souls, as a way to separate humans from animals, and encourage greater compassion toward human beings.⁶⁷ The idea that human life is sacrosanct stems from this early Christian theology.⁶⁸ Sadly, greater compassion for animals was left out of this equation, and that dichotomy persists to the present day. Other religions have been more open to acknowledging that beings other than humans can possess souls.⁶⁹ Some religions claim that plants and rocks have souls.

The reason I mentioned Christianity is that animal advocates often have to respond to passages in the Bible, in which we're told that God decreed that humans have dominion over other animals. Does that mean that we are allowed to dominate other species? For me, Biblical references are frustrating, because as a lawyer, I separate church and state. I don't believe that one's religious beliefs should dictate who gets legal rights or protections. And sometimes I see religious references in court decisions. Judges claim that they are not biased; they are merely

⁶⁶ SINGER, *supra* note 63, at 189–90.

⁶⁷ *Id.* at 191.

⁶⁸ *Id.* at 192; *see, e.g.*, Jack Zavada, *Do Animals Have Souls?*, ABOUT.COM, <http://tinyurl.com/bnccgijis> (last visited Apr. 22, 2015).

⁶⁹ SINGER, *supra* note 63, at 191; *see also* GARY KOWALSKI, *THE SOULS OF ANIMALS* (1991).

following the law. And then, they quote the Bible as a rationale for their legal decision,⁷⁰ which I find galling.

MARTA DANIELS: You began your talk with the idea of empathy. The book I quoted in my talk,⁷¹ by Anne Farrow, examines slavery. Farrow has coined a term called “empathic failure.”⁷² She also examines some of the reasons for it, a lot of which is based in Christianity, for example, these were heathens, these were inferior beings. So when you give us the list of things that you would like us to achieve as a culture to change the situation, can you help us understand why you think there has been empathic failure when it comes to these animals. Because if you want to change something, if you are going to get somewhere, you have to know what is causing it. I know you gave us the list, and it all makes sense, but this whole business of empathy, human empathy, where has it gone? Why don’t we have it?

JOYCE TISCHLER: Before I address your question, I want to bring up a relevant point. It is always a bit dicey for an animal advocate to talk about human slavery. I don’t want people to assume that I am comparing black people to animals, because that is done too often in our still very racist society. What I am comparing is one social movement to another; what I am comparing is the lack of empathy that has existed over time for humans and the lack of empathy that exists today for many classes of animals.

As to why so many humans fail to empathize with certain classes of animals, consider how animal exploitation is integrated into our daily routines: when you get up in the morning, you make your breakfast, which may be bacon and eggs; then, you brush your teeth with toothpaste that was probably tested on animals; and when you get

⁷⁰ See, for example, *Lock v. Falkenstine*, 380 P.2d 278 (Okla. Crim. App. 1963), where the decision includes the following:

Before the science of Biology was in existence, a distinction was made between living creatures in the Holy Scriptures, and often referred to as “beasts of the fields, fish of the sea, and fowls of the air”. In the beginning, it was said in Genesis 1.26: “And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.” And, in Genesis 2.19: “And out of the ground the Lord God formed every beast of the field and every fowl of the air”

Id. at 280–81 (omission in original).

⁷¹ See Marta Daniels, *Connecticut’s Role in the Ivory Trade, Part II*, 33 QUINNIPIAC L. REV. 467 (2015).

⁷² ANNE FARROW, *THE LOGBOOKS: CONNECTICUT’S SLAVE SHIPS AND HUMAN MEMORY* 128, 150 (2014).

dressed, you put on your leather belt and leather shoes. We use animals and animal products each and every hour of every day. Our makeup is often tested on animals;⁷³ medical research is done on animals. Animals are in zoos and we bring our children there. When I brought my students to the zoo and we observed the lone bull elephant engaged in stereotypical captivity behavior, we could hear a mother just a few feet away say to her child, “Look, the elephant is dancing.” We use animals in every part of our existence, in ways we don’t even know or think about. If you eat Jell-O, you may not realize that gelatin is made from horse hooves.⁷⁴

To change our diet, to change the food we eat, to change the clothes we wear, to change so much about ourselves, feels overwhelming to most people. They don’t want to make those changes, so they put blinders on to the underlying suffering. We don’t want to think about where the bacon comes from. We don’t want to think about the torture those chickens are going through to accomplish the mass production of eggs. Our exploitation of animals is endemic to our society, so empathizing with them in the ways I am suggesting is very dangerous to the status quo.

LIV BAKER: I am an animal welfare scientist at Wesleyan University. One thing I want to comment on is that it is very misleading, and dangerous actually, to define an animal’s worth based on a definition of consciousness, or cognitive skill, or awareness because those definitions shift all the time—it leaves out a whole group of animals. We should still talk about the emotional complexity and lives of animals. But we shouldn’t stop there and think that is what defines their worth and their importance, and therefore potentially their right to rights. Even what defines tool use changes.⁷⁵ We change that bar all the time to describe what it means to be closer to humans. And it leaves out more and more animals as we do that. I think we need to rethink how we approach what is an animal’s worth, their intrinsic value, and not base it on something that is hard to define and that is constantly changing.

⁷³ Mark Jones, *Animal Testing: The Ugly Secret of the Beauty Industry*, HUFFINGTON POST UK (Apr. 4, 2012, 9:37 PM), <http://tinyurl.com/p6bvycx>.

⁷⁴ See Robert Glenn Ayres, *May Contain Hooves: Why and How the Government Should Implement Plain-Language Disclosure of Animal Products in Food Labels*, 5 STAN. J. ANIMAL L. & POL’Y 1, 8 (2012) (“While gelatin can be obtained through vegetarian sources such as seaweed, virtually all commercial gelatin is obtained through cartilage and hooves collected from slaughtered animals.” (footnote omitted)).

⁷⁵ See, e.g., Robert St Amant & Thomas E. Horton, *Revisiting the Definition of Animal Tool Use*, 75 ANIMAL BEHAVIOUR 1199 (2008), available at <http://tinyurl.com/nh4v7sw>.

JOYCE TISCHLER: Thank you for bringing that up. That's a tough one. If I were a slavery abolitionist speaking to an audience in the year 1750 and I suggested that a black man could be president, that statement would be deemed preposterous. I might not get as far with that audience as I would get by suggesting that a black man feels pain and pleasure and is similar in all relevant respects to a white man. Of course, in 1750, as a woman, I couldn't have attended law school, and probably wouldn't be giving any public presentations! The reality I am conscious of is that at this early stage in the animal rights movement, we may only be able to establish the foundation. The kind of things I am talking about are not going to happen in my lifetime. I am not going to live long enough to see these changes happen. It takes a long time for a social movement to create broad-based change, a painfully long time.

But I know where you are going and I agree with you. You are concerned that if I am trying to convince an audience that elephants are like us, what does that do for dogs, pigs, or other animals who may not have the level of intellectual similarity that elephants do. My response to that is that we have to start somewhere. And we start with the animals who seem most like us because we are trying to convince an audience of people who haven't thought about this before. We're trying to convince them to begin to think about animals in a completely new way. Eventually, somewhere down the line, if we can get our foot in the door with elephants and chimpanzees, then maybe we can move on to dogs, cats, pigs, cows, and others. I agree with what you're saying and I see the inherent problem with what I am doing. But I also think it is a necessary thing to do as a first step.

JOHN THOMAS: First, I want to echo the praise for the thought provoking and articulate presentation. I have a question about your thoughts on an initiative that I think is very successful in Africa right now, which violates a couple of your principles—bodily integrity and autonomy. This is the initiative to saw off rhino horns as a way to remove them from a poacher's vision.⁷⁶ And it does have social consequences. I don't know enough biology to know if it would work with elephants. But it has social consequences in that it changes the hierarchal order because the rhinos with the big horns are no longer the alpha male—they are beta at best. The game reserves that have sawed off the rhino horns and have stored them somewhere in bulk, they don't want to sell it although it's worth a ton of money, have suffered no

⁷⁶ See *De-horning*, SAVE RHINO, <http://tinyurl.com/pkqj2bf> (last visited Mar. 22, 2015).

poaching. None whatsoever. So it is clearly very successful. It clearly is saving a lot of rhinos, but on the other hand it violates most of your propositions.

JOYCE TISCHLER: These are horrible choices to have to make. With rhinos, sawing off their horns creates the possibility of keeping them alive, but it negatively impacts the quality of their lives.⁷⁷ With elephants, most conservationists argue that it is not practical or ethical to saw off their tusks.⁷⁸ We have to leave the elephants intact. We make these kinds of choices all the time. In the United States, we have an over population of dogs and cats, and we are killing four million of them per year. The alternative is to spay and neuter them, so that they don't reproduce. Yet, if we spay and neuter, aren't we violating their bodily integrity? Yes. But the alternative is that we kill large numbers of healthy animals at pounds and shelters. It's pathetic that we have to make these kind of choices, and sometimes difficult to know which choice is the right one for the animals.

RAFAEL WOLFF: I am a federal judge in Brazil and a doctoral student at Pace University. In Brazil, our constitution prohibits animal cruelty.⁷⁹ In ten states the use of elephants in circuses is prohibited.⁸⁰ Anyone who can vote is able to have standing to protect an animal before a judge. Prosecutors and non-governmental organizations (NGOs) have standing too. So my question is, do you think it is necessary for animals to have standing or do they just need to have rights? Because in Brazil the animals have rights and I don't see why they should have standing. I think it would be a problem for them because it would restrict the people who are able to protect them.

JOYCE TISCHLER: Standing. The bane of my existence. I don't know Brazilian law, so I am at a disadvantage.⁸¹ Under U.S. law, NGOs

⁷⁷ *Id.* There is a lot of debate about whether it is preferable to remove the rhinos' horns, or provide rhinos with round the clock guards, or some other tactic.

⁷⁸ See *Statement on Tusk Removal*, AMBOSELI TR. FOR ELEPHANTS (Nov. 23, 2014), <http://tinyurl.com/pow93nq>; M. Sanjayan, *Mountain Bull, Legendary Kenyan Elephant, Found Dead*, CBS NEWS (May 16, 2014, 4:41 PM), <http://tinyurl.com/pfon75v>.

⁷⁹ Constituição Federal [Constitution] art. 225 § 1(VII) (Braz.) (as amended to June 30, 2004).

⁸⁰ See *Circus Acts are Inherently Cruel*, BIG CAT RESCUE, <http://tinyurl.com/oc7qvt> (last visited Mar. 22, 2015) (listing the districts in which the use of wild and domestic animals in circuses is banned: Rio de Janeiro, São Paulo, Pernambuco, Paraíba, Rio Grande do Sul, Espiritu Santo, Mato Grosso do Sul, Alagoas, and a number of bans in cities within another four Brazilian states).

⁸¹ See Galvin, *supra* note 27 and accompanying text. At times, a claim is made that animals have been given legal rights under the law. I would argue that unless the law provides

and individuals generally do not have standing to sue to enforce animal protection laws. In almost every lawsuit we have filed in the last thirty-six years, standing has been a major hurdle for us, and has too often barred our ability to challenge abuses of animals. We often have to resort to a round-about approach, such as suing under the National Environmental Policy Act⁸² and arguing that if the government seeks to remove a group of animals from the wild, this constitutes a major federal action that impacts the environment, and the government has to examine the adverse environmental impacts of its action. We are not able to directly represent the interests of the animals, and that is problematic.

If animals were persons under American law, they would have standing, which would better enable us to represent their interests. What you are saying is that they can have legal rights without being persons, and some theorists agree with you. Professor Cass Sunstein has written that you do not necessarily need to be a person to have legal rights.⁸³ In the U.S., the standing doctrine is generally viewed as a way to keep courts from getting flooded with lawsuits; however, standing has sometimes been used to keep unpopular plaintiffs out of the courtroom. I would like to see standing law broadened in the U.S. If groups such as mine, or some of the other groups represented here, had standing to

for “legal rights” as defined by Roger Galvin, what are offered are protections, which is something less than an actual legal right.

⁸² National Environmental Policy Act, 42 U.S.C. § 4321–4370h (2012).

⁸³ See Sunstein, *supra* note 50, at 1360–61 (“Congress is frequently permitted to create juridical persons and to allow them to bring suit in their own right. Corporations are the most obvious example. But plaintiffs need not be or be expressly labeled persons, juridical or otherwise, and legal rights are also given to trusts, municipalities, partnerships, and even ships. In an era in which slaves were not considered persons or citizens, it was entirely acceptable to allow actions to be brought by slaves. The fact that slaves did not count as persons was no barrier to the suit. In particular, slaves were allowed to bring suit, often through a white guardian or ‘next friend,’ to challenge unjust servitude. A similar understanding seems to underlie the many cases in which animals or species are listed as named plaintiffs. I have suggested that this is a misinterpretation of the relevant statutes, but it is perfectly acceptable as an understanding of the Constitution. In the same way, Congress might say that animals at risk of injury or mistreatment have a right to bring suit in their own name. Indeed, it would be acceptable for Congress to conclude that a work of art, a river, or a building should be allowed to count as a plaintiff or a defendant, and authorize human beings to represent them to protect their interests. So long as the named plaintiff would suffer injury in fact, the action should be constitutionally acceptable.” (footnotes omitted)). Professor David Favre offered a similar argument in his article. See Favre, *Living Property*, *supra* note 6, at 1023.

represent the interests of animals, we could go a long way to protecting animals in ways that we are unable to now.⁸⁴

The American laws related to farmed animals provide a clear example of how an industry can control state legislatures and eliminate all legal protections for an entire class of animals. There are no federal laws, and only a few state anti-cruelty laws, which offer protections to farmed animals while they are being raised in industrial agricultural factories.⁸⁵ We are talking about ten billion animals per year, who are generally living in intensive confinement, filth, their basic needs being completely ignored, and nobody has standing to represent the interests of those animals or challenge their living conditions. In other countries that have less onerous standing requirements, it has been interesting to see how animal protection and environmental groups have been able to do some good things at times.⁸⁶ But in the U.S., for better or worse, some of us are committed to trying to achieve personhood for animals, as the most effective way to directly protect their lives and interests. As I mentioned earlier, this work is at a very early stage, and it is hard to know when, where or if we are going to succeed. I hesitate to use this analogy, but to some extent, you throw everything up on the wall and see what sticks. You look brilliant afterward if you hit the right legal theory, and stupid if you don't.

KIMBERLY OSBORNE: This is related to standing. I am interning at the Attorney General's Office, and when we bring animal neglect cases, it is an *in rem* proceeding, a property proceeding, so the whole thing is framed from the outset. I was wondering whether you had any other ideas about how these claims could be brought to court in a manner in which animals were honored in the way you say.

⁸⁴ See Carter Dillard, *Standing Up for Animals*, ANIMAL LEGAL DEF. FUND (June 27, 2011), <http://tinyurl.com/kb39rrd>.

⁸⁵ See Elizabeth Bennett, *Animal Agriculture Laws on the Chopping Block: Comparing United States and Brazil*, 31 PACE ENVTL. L. REV. 531, 544 (2014); *Farmed Animals and the Law*, ANIMAL LEGAL DEF. FUND, <http://tinyurl.com/mrqqzp6> (last visited Apr. 22, 2015).

⁸⁶ For example, the Israeli Supreme Court banned the force feeding of geese in that country as violative of Israel's animal protection law. Israeli animal protections had standing to bring this case due to Israel's standing law, which is more lenient than standing law in the U.S. See Mariann Sullivan & David J. Wolfson, *What's Good for the Goose . . . The Israeli Supreme Court, Foie Gras and the Future of Farmed Animals in the United States*, 70 L. & CONTEMP. PROBS. 139 (2007), available at <http://tinyurl.com/nz2rpno>; 'Noah', *Israeli Federation of Animal Protection Organizations v. Attorney General, Minister of Agriculture, Egg and Poultry Board*, MICH. ST. UNIV., <http://tinyurl.com/nhkud43> (last visited Apr. 22, 2015).

JOYCE TISCHLER: North Carolina has an interesting law which enables someone to civilly enjoin cruelty.⁸⁷ Such a law is unusual in the U.S. Normally, in the criminal law system, a prosecutor has complete discretion as to whether or not to prosecute, and that applies, as well, to the prosecution of animal cruelty cases. But in North Carolina, if a group such as mine has evidence of cruelty, we can file a civil lawsuit and ask a judge for an injunction to halt the cruelty.⁸⁸ Additionally, this law allows us to gain possession of the animals.⁸⁹ And standing under this law is broad. Starting in late 2004, ALDF used that law in an animal hoarding situation.⁹⁰ Animal hoarding is where someone has a large number of animals who are not receiving even the most basic care and nutrition.⁹¹ The animals can suffer for months and even years at the hands of hoarders. ALDF sued Barbara and Robert Woodley, a couple who kept five hundred dogs in horrible conditions. We were able to convince the court that cruelty was occurring; the judge issued a preliminary and later a permanent injunction, and gave possession of all of the dogs to ALDF. That was challenging, as we had to open and maintain a dog shelter, but we were thrilled to be able to rescue those dogs and give them a far better life.

The Woodleys appealed that decision all the way up to the highest court in North Carolina and ALDF won.⁹² ALDF has gone back to North Carolina several times, as have other groups, and rescued horses and dogs; we even rescued a bear from a roadside exhibit and sent him to a sanctuary.⁹³ So, that is a model I would love to see codified as law in other states. It would enable groups such as ALDF to bring relief directly to the animal victims, and take them out of harm's way.

EMILY CHUMAS: I am a first-year law student at Quinnipiac. In the spirit of changing dialogue, my background is in biomedical and science

⁸⁷ See N.C. GEN. STAT. § 19A-2 (LEXIS through 2014 Reg. Sess.).

⁸⁸ *Id.* § 19A-4(a).

⁸⁹ *Id.* § 19A-4(b).

⁹⁰ *The Horror of Animal Hoarding*, ANIMAL LEGAL DEF. FUND (May 4, 2005), <http://tinyurl.com/njl7du5>.

⁹¹ *Animal Hoarding Facts*, ANIMAL LEGAL DEF. FUND, <http://tinyurl.com/neera22> (last visited Apr. 22, 2015).

⁹² *Animal Legal Def. Fund v. Woodley*, 640 S.E.2d 777 (N.C. Ct. App. 2007).

⁹³ See *Animal Legal Defense Fund Sues to Rescue Starving Horses in Horrific Wake County Neglect Case*, ANIMAL LEGAL DEF. FUND (Jan. 12, 2009), <http://tinyurl.com/kbytfx2>; *Animal Legal Defense Fund Sues to Rescue 100+ Dogs From Real-Life House of Horrors in Raleigh*, ANIMAL LEGAL DEF. FUND (Oct. 31, 2007), <http://tinyurl.com/mmqqgux/>; Press Release, Animal Legal Def. Fund, Judge Grants Ben the Bear Permanent Sanctuary (Aug. 27, 2012), available at <http://tinyurl.com/k2oq79m>.

research, and I worked in a department that protected human subjects in research. One of the first things that physicians and scientists ask is to see the animal models, for if it is safe for an animal, then it is safe for a human being. How do you change that dialogue?

JOYCE TISCHLER: In my experience, you don't. You create technology to replace the use of animals. At ALDF, we spent many years trying to get better conditions for animals in research laboratories by suing the U.S. Department of Agriculture, and we lost repeatedly. We didn't lose because we're bad lawyers. We lost because our society is still not ready to question the use of animals in research. And while Congress pays lip-service to using those animals humanely, we lost every legal battle to achieve more humane care and treatment for the animals in laboratories, to take laboratory primates out of isolation, to give laboratory dogs exercise, and to provide any protection for mice and rats, who constitute 95% of the animals used in research. Indeed, rats and mice are completely excluded from the protections of the Animal Welfare Act,⁹⁴ which is the only federal law that covers the use of animals in research.

Despite valiant efforts, the animal rights/protection movements haven't significantly changed the dialogue about the use of animals in research and testing, certainly not in the thirty-six years that I've been involved. What *has* changed is the development of new technologies—cell cultures, tissue cultures, mathematical models, computer models—that will ultimately begin to replace the use of animals.

That sea change began in 2008 when the National Research Council (NRC) issued a report called *Toxicity Testing in the 21st Century*.⁹⁵ A group of toxicologists on an NRC committee realized that using animals in toxicity testing is no longer working. It is too expensive, takes too long, and the results are questionable at times. This committee of scientists, with only one animal welfare activist present, concluded that we need to develop new technologies that are faster, less expensive, and more predictive about how human beings will respond to chemicals and other materials. There is now a world-wide effort to develop those non-animal (*in-vitro*) alternatives. My hope is that, once this is achieved in toxicity testing, the use of these *in vitro* technologies will bleed over into other areas of research and replace animal use more broadly.

⁹⁴ Animal Welfare Act, 7 U.S.C. § 2131–2159 (2012).

⁹⁵ NAT'L RESEARCH COUNCIL, TOXICITY TESTING IN THE 21ST CENTURY: A VISION AND A STRATEGY (2007), available at <http://tinyurl.com/c7r7z7r>.

To close, I'd like to share with you one of my favorite quotes. It is from Theodore Parker, a Unitarian minister who was also an abolitionist. He died in 1860, before slavery ended. In 1858, Rev. Parker gave a speech at an anti-slavery convention held in the hall of the statehouse in Massachusetts. You may have heard this quote before, and you probably attributed it to Abraham Lincoln or Martin Luther King.⁹⁶ But it was actually Theodore Parker who said:

I do not pretend to understand the moral universe, the arc is a long one, my eye reaches but little ways. I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. But from what I see I am sure it bends toward justice.⁹⁷

My sincere hope is that the arc of justice bends toward the animals. Thank you.

⁹⁶ *Theodore Parker and the 'Moral Universe,'* NPR (Sept. 2, 2010), <http://tinyurl.com/2voaxkn>.

⁹⁷ THEODORE PARKER, TEN SERMONS OF RELIGION 66 (Boston, Crosby, Nichols & Co.; N.Y., Charles S. Francis & Co. 1853), available at <http://tinyurl.com/m9dfb3d>.