LEGAL PATIENCY – DEVELOPING A NEW CATEGORY FOR SENTIENT NONPERSONS

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ABSTRACT

All animals with non-borderline sentience are deserving of certain legal considerations independent of their use and relationship to human beings. That is, all sentient beings should have some rights. Given the current organization of the U.S. legal system which divides all entities into property or persons, it is not surprising that animals are relegated to property status. I put forth a proposal to fix this whose central suggestion is that we create a third legal designation, legal patient, into which all non-person sentient animals (those which do not properly belong in either current category) would fit. These animals would receive certain limited rights, which would be implemented through legal structures already in place, such as those used in providing legal advocacy for children.

Key words: Animal ethics, Animal rights, Sentience, Law, Personhood, Property, Patient

1 INTRODUCTION

Legally and socially, we are of two minds about which forms of nonhuman animal treatment are acceptable. We tend to think that it is wrong to harm certain animals such as mammals, but only if these are animals with whom we have a special relationship (i.e. pets). We protect many animals via anti-cruelty laws, but only insofar as it does not disrupt human industry (i.e. factory farming, etc.). We simultaneously view domesticated nonhuman animals as vulnerable beings in need of protection and as exploitable resources.

The way the American Legal system is set up does not help matters. Within our system, domesticated animals only have two options for categorization: persons or property. Despite current attempts[1] no nonhuman animals in the U.S. have thus far been

[1] Steven Wise is perhaps the most well-known animal lawyer, and he represents a group of lawyers who are trying to get certain animals (chimpanzees, elephants) recognized as legal persons. See, for example, Wise,

granted personhood, and thus they are all still property. Despite the fact that certain animals probably do merit consideration as persons, most certainly do not. Were we to include all of the most intelligent animals species, however so defined, into personhood, we would still be left with thousands of species of animals who are sentient[2], but fall short of the personhood threshold. What of them? Surely they are more than property.

To be fair, there are protections for many (though not most) domesticated sentient animals in the form of anti-cruelty legislation, but these do not extend to the realm of civil law, and therefore do not provide those animals with civil rights. They need civil rights to be protected in the way they deserve. This paper will lay out a framework that is capable of remedying the issue, a framework that is both morally sensible and practically feasible. Its main component is that we need a new, third category, which I call *Legal Patiency* so that sentient, nonperson animals may be definitively separated from persons and property alike.

2 WHICH RIGHTS DO SENTIENT NONHUMANS DESERVE?

In a sense, it is helpful to start from scratch in considering rights for sentient nonhumans.[3] If they deserve any rights, it would seem that a good place to begin is the most basic rights that persons enjoy. Some basic rights, such as freedom of religion, are probably not applicable to any nonhuman animals. But others certainly are. There are two main categories of such rights that sentient animals need. The first is freedom from unjustified bodily harm or injury, and the second is the right to sue directly for any harm or injury done to them. The latter would take the form of the ability to bring a civil case to court and sue for damages. These two kinds of right are a good foundation because they are prerequisites for many other rights, but also have a lot of room for interpretation and development.

The right against bodily harm, i.e. the right to bodily integrity is one of the most basic rights a sentient being can have. Although this is not a specific right guaranteed by the U.S. Constitution, the so-called right to privacy is often interpreted as including bodily integrity and therefore bodily harm. This is found in the Due Process Clause of the Fourteenth Amendment of the Bill of Rights, and reads as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

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Steven. (2013). Nonhuman Rights to Personhood. *Pace Environmental Law Review*, 30(3): 1278-1290. Thus far he has not succeeded.

[2] Although there is disagreement over the bounds of sentience, it clearly extends to mammals and birds, if not all vertebrates or even beyond. There is a huge literature on this topic. Here is one good place to start: Proctor, Helen S., Carder, Gemma, & Cornish, Amelia R. (2013). Searching for Animal Sentience: A Systematic Review of the Scientific Literature. Animals (Basel). 3(3): 882–906.

[3] The present discussion will center on sentient nonhuman animals, but most if not all of what is said here may be applied to sentient nonpersons more generally, whomever that category turns out to include.

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Currently, this right has only been applied to born human beings. The right to bodily integrity is defined as, "the right of each human being, including children, to autonomy and self-determination over their own body. It considers an unconsented physical intrusion as a human rights violation." (CRIN 2017) This principle is often used in reference to torture and inhumane treatment. The Eighth Amendment of the United States prohibits "cruel and unusual punishments" which are defined as those that are one or more of 1. Degrading to human dignity, 2. Inflicted arbitrarily, 3. Societally rejected, and 4. Patently unnecessary. These conditions were established by the U.S. Supreme Court in Justice William Brennan's opinion in 1972, which also said that no state should pass a law obviously violating any one of these. (*Furman v. Georgia* 408 U.S. 238) A similar protection is included in the Universal Declaration of Human Rights which was adopted by the UN in 1948. It is important to note that the right to bodily integrity is not considered inalienable, and so it is not absolute. For instance, the death penalty is allowed by all the documents just mentioned. Whatever rights we decide sentient animals must have, they will likely turn out to be alienable as well with certain circumstances warranting exceptions to otherwise universal claims.

Given this understanding, it does not seem too complicated a task to apply the standards of freedom from bodily harm to nonhuman animal care and to be clear on when they are violated. The more complicated issue would likely be to identify those situations in which violations should be permitted.[4] For now, it will be enough to argue that SNP's do in fact need this right. If one of the bases for the right to bodily integrity is autonomy and self-determination, than it seems that many other animals have this right as well. Thanks in part to Steven Wise, arguably America's most famous animal lawyer, there is a fairly large literature supporting the claim that many other animals do have these traits.[5] If he is right, then the basis for *human rights* also supports rights for at least some *nonhumans*.

So let us move on to the second type of right: the right to sue and be made whole. In case any legal patients' rights were violated, that animal should be able to seek damages for the harm done to them. As it currently stands in criminal animal abuse cases, the state or country is the party considered wronged, while in civil cases, the animal's owner is the injured party. The animal themselves is not considered the injured party in either case, which is unjust. When caused harm that violates their bodily integrity, sentient nonpersons should have the right to seek damages by suing in civil court in order for them to be able to take action against and receive benefits from the party that caused them suffering or injury. In legal jargon, this process is called "making whole." To take this term literally would be a mistake, for in most instances it is not possible to undo the damage caused to a victim. Rather, we can think of "making whole" as receiving

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[4] Some instances would be clear, as in cases of harming an animal in self-defense. Others may be less clear, such as if and when research interests would be important enough that sentient animals' rights may be overridden.

[5] See his books, *Rattling the Cage* (2000); *Drawing the Line* (2003). It is also worth noting that the word "autonomy" is not always used to mean the same thing. For an overview of various uses, see Christman (2018).

reparations or compensation for a loss sustained. It is most common for these reparations to be monetary in nature, though other types are possible.

This right to sue for damages is considered a fundamental human right in the U.S. In 1983, the Supreme Court's majority opinion in *Bill Johnson's Restaurants, Inc. v. NLRB* made the point that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." In another case in 2002, Sandra Day O'Connor noted that the right to sue in court was a form of petition, and said, "We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." (*BE&K Construction Co. v.* National Labor Relations Board) Civil cases are there to determine whether the defendant is liable for the plaintiff's injuries, and if so, to compensate the victim for the harm done to her or him. These cases can be brought by, or on behalf of, any legal person.[6]

By definition, a sentient nonperson can be harmed. However, they are not capable (as far as we know) of filing a suit on their own behalf. Were those animals given the right to sue, the court would have to allow a third party to represent the animal in court. One of the most frequently stated reasons that courts have denied this right to animals in the past is the slippery slope argument. Some judges worry that if the door is opened to animals suing as plaintiffs that the courts will be overwhelmed with such cases. Another version of this slippery slope argument is that once we allow the most intelligent (i.e. most human) animals to sue, what's to say that we will be unable to draw a line, and suddenly every half-squashed earthworm will be allowed to have its day in court. In Lock v. Falkenstein, a 1963 case regarding the legality of cockfighting, the judge concluded: "Society could not long tolerate a system of laws which might drag to the criminal bar every lady who might impale a butterfly, or every man who might drown a litter of kittens." (Lock v. Falkenstein 1963) Despite the remark about kittens, there is a real concern here: it may turn out that many more animals are deserving of protection than can be reasonably protected.

The first concern is addressed in section V below. The second, that there is nowhere to draw the line, is false; the line I am suggesting is sentience. Now, of course, there is debate about what counts as sentience (Nay & Fetherstonhaugh 2012) and about whether sentience is a threshold trait or exists on a continuum (as it appears that most abilities do). (Hadley 2015) Surely these questions require a fair amount of attention. But unanswered questions are no justification for perpetuating an injustice.

3 WHY THESE RIGHTS REQUIRE A NEW LEGAL CATEGORY

It may at first appear that we can give animals rights within the category of property. Furthermore, it may seem to us that animals already possess certain rights. In a sense, that's true. Animal cruelty laws, which exist only in criminal law, may be seen as affording to those animals the right not to be treated in certain ways. But I wish to question this interpretation. I will show that 1. Animal cruelty laws are not *animal* rights, that is, they

[6] There is a further related issue, legal standing, into which I will not delve.

are not rights belonging to the animal him or herself,[7] and 2. There is nothing approximating animal rights in civil law. To make this case, we have to answer two questions: What does it mean to have a right? What is the purpose of a right?

There is an entire field of legal theory devoted to such questions which I'll not enter into.[8] Instead I will use the widely accepted Hohlefdian framework for understanding what rights are and what they entail. Hohfeld divided rights into four categories: claims, privileges, powers, and immunities. (Wenar 2015) The kind of rights we are interested in is claim-rights. To have this kind of right means that you have a claim on another to act or not act in a certain way. For instance, I have a claim on you not to assault me without justification. The correlative of a claim is a duty. My claim on you indicates that you have a duty toward me, in this case, the duty to not assault me without justification.

Given this rubric, it may appear as if anti-cruelty laws can be understood as claims-rights that animals have against legal persons, with the correlative duty of persons not to engage in cruel behavior toward those animals. But here is where the distinction lies: In the above example about assault, *I* have a claim against you. What that means is, regardless of any criminal proceedings that may take place, I can seek restoration for *myself* through the civil system. In the case of animal cruelty laws, the entity that is acknowledged as having been wronged is either 1. (In criminal cases) the American people/government (federal, state, municipal) which enacted the law, and/or 2. (In Civil cases) the person who owns the harmed animal. In other words, the government or person has the claim against certain types of animal harm. The animal itself does not have a claim, and therefore has no right.

To be protected against some form of action means that others are restricted in certain ways. For example, the illegality of selling a member of an endangered species imposes a restriction on the would-be purveyor, and if that person violates the law, he or she is held responsible. What that protection *does not* entail is the right of the animal not to be sold. A right is a just or legal claim on something or on some action. If the animal were to have a right, it would be the *animal* who would have been wronged (not the government), and the animal (with the help of a human advocate) who would be able to bring a claim to court.

Mere protection is something that is afforded to all property. My stereo is protected by law. Any and all property is protected in the sense that if it were to be unduly taken from me, broken, or otherwise damaged, I would be entitled to recompense. In this case, it is very clear that being protected does not confer rights. The stereo has no right not to be stolen or broken, even though it is the stereo which is protected. It is *my* right not to have my property messed with from which the stereo's protection derives. One may point out that in my example it is not technically the stereo that is being protected under the law, but rather it is I who am being protected from having my property damaged. Therefore, one might say that anti- cruelty laws, in specifically protecting *animals*, are really conferring rights on them. I'm willing to acknowledge that it may seem like animals

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[7] On my understanding, *no* criminal violations are violations of non-governmental persons because they are all crimes against the government.

[8] For discussions on the nature of rights, see, for example, Feinberg (1970), Hohfeld (1919), and Walen (2019). For discussions on the function(s) of rights see, for example, Hart (1982), Raz (1986), and McCormick (1977).

already do possess some rights (though rather paltry ones) in the realm of criminal law. However, "criminal rights" is not an actual category, since under these laws it is really the government that is being protected. The only rights individuals have are in the civil realm. And there is no analogous law in civil court that directly protects animals.

Animals do not have legal claims, because only persons do. All entities considered property have no recourse under civil law. They cannot seek damages and they have no legal voice. Thus, when an animal is abused by its owner, there is, somewhat absurdly, no crime against the animal. Therefore, even if the abuser is found guilty, the animal is not guaranteed to receive the benefit from any fines (civil or criminal) that the abuser is required to pay. This is an essential difference between causing damage to a person and to a nonperson; the former can receive the damages, and can decide how to spend them, while the nonperson is at the mercy of the suing party. Some of the money may be used to help the animal, or it may not be. That is to say, *legal protection does not entail legal rights*.

4 DAVID FAVRE'S EQUITABLE SELF-OWNERSHIP & FERNANDEZ'S QUASI-PERSON/QUASI PROPERTY

There are several scholars who are working on this problem. They have made various suggestions including everything from granting all sentient animals personhood status to making minor improvements to animal protection laws. It seems clear that the views on either extreme will not be able to solve the problem. In this section, we will take a closer look at two solutions which may at first appear to make substantial revisions to animals' legal status, but which ultimately fail to address the underlying issue— the problematic nature of a two-tier legal system. The person who has come the closest to providing a solution to this discrepancy is, in this author's opinion, David Favre. Although his proposal is not entirely satisfying in terms of the points made in the previous section, if an argument could be made that sentient animals could remain property and be treated fairly, Favre makes it.

Favre (2010) states that his goal is make the relationship of an owner to her cat less like that of an owner to a rock and more like that of a parent to a child, that is, a custodial relationship. He asks, "Can there be created a new property status that would allow animals to have rights?" (p. 12) He discussed, as I have done, the difference between criminal and civil rights, correctly saying that such rights "must be actionable, enforceable by the animal him or herself. The key limitation of the present right of animals… is that… if the state decides not to act in a particular case, then the harmed animal is without remedy." (p. 16)

He notes that our legal system allows a property owner to divide the title over property into two: the legal title and the equitable title. This is a tool commonly used when the owner of property is not the one who is in control of it. An example of when this might happen is when an estate is bequeathed to a child who is incapable of maintaining it. In this case, while the child maintains the equitable title to the estate, someone else is given the legal title in order to make decisions about the estate on behalf of the child, and in his or her best interest.

Since animals are a kind of property, one could split up the elements of their title in the same way. According to Favre, this would provide a framework for allocating

more rights to some animals. An owner of an animal could transfer the equitable title of the animal to the animal his or herself. The human would maintain the legal title, essentially creating in the human a legal obligation to act in the animal's best interest, i.e. making the human a guardian.

On the surface, this suggestion appears to address the crux of the problem. But this view has several difficulties, ranging from moderate to serious. One moderate problem is that Favre's view says nothing about what qualities make an animal able to possess equitable self-ownership. To the contrary, he asserts that such a system would apply to any living thing, saying, "unless a human has an affirmatively asserted lawful dominion and control so as to obtain title to a living entity, then a living entity will be considered to have self-ownership" (p. 236) It is not entirely clear whether he is using imprecise language here or making a rather strong claim that would likely turn most people off. Either way, I consider this is a moderate problem because it is easily fixed by specifying the domain over which such a paradigm would range.

The biggest problem with Favre's view, however, is that it further confuses the categories of personhood and property rather than clarifying them. Property, by definition, does not have rights. To have rights in today's legal system is to be a legal person. All persons have rights, and all rights-holders are persons. On one hand, he acknowledges that animals would still be property— after all, the title of his paper on the topic is "A New Property Status for Animals." On the other hand, he seems to consider those animals persons as well, saying, "As entities with *legally recognized interests*, self-owned animals have sufficient status as juristic persons so as to be able to hold equitable interest in other property." (p. 243, emphasis added) For Favre, certain animals would be both property and persons. But this is precisely the problem we already have! If we were to redefine property to allow some sub-categories to have rights, I'm not sure why, in this hypothetical world, we couldn't put humans into the property category as well, simply as a class of property with more rights than other classes. That is, if we are going to eliminate the fundamental distinction between those property and personhood, why not just eliminate personhood *in toto*? His solution seems to eliminate the only relevant distinction we have in the legal system now.

Angela Fernandez specifically addresses this problem. In her 2018 paper "Not Quite Property, Not Quite Persons" Fernandez agrees that the current dichotomous thinking in terms of personhood versus property status is untenable. She believes that nonhuman animals are not merely property, and more importantly, that they need to have an expanded set of rights. With that in mind, she sets out to develop a category "quasi-person/quasi-property" which she thinks will give sufficient protection to nonhuman animals without making too many waves in the sea of public opinion. This category would allow animals to retain their property status while also having more rights.

She says that in countries where animals have been recognized as having a legal status beyond property (such as "person," "being," etc.) this hasn't necessarily led to reforms in their day-to-day treatment.[9] She therefore argues that giving them these new

[9] Currently, there are 32 countries that recognize animal sentience. The Austrian Animal Welfare Act 2004 suggests that the protection of the wellbeing of animals should be held to a value that is equal to humankind. The Swiss Animal Welfare Act of 2005 protects the welfare and dignity of animals. Several countries, such a Slovakia, have updated their laws to call animals "beings" instead of "things." None of these amount to rights for animals, however, since animals are still considered property in each case. (ABA

"titles" is misleading, and we should continue calling them quasi-property until their handling truly changes. Furthermore, since there are, in fact, restrictions with what a person can do with certain kinds of property, she concludes that property status "is not necessarily inconsistent with non-abuse and the status certainly does not necessarily involve or permit abuse." (42) In other words, personhood status is not necessarily good and property status is not necessarily bad.

However, she *does* seem to acknowledge that property status is bad. She says:

> Is property the problem? Yes and no. It is *a* problem and, indeed, classifying animals as property has facilitated their instrumental use and treatment as objects (rather than subjects) tremendously. However, beyond classification, the bigger problem is the social attitude that normalizes nonhuman animal use (and abuse)… De-classifying nonhuman animals as property will not in-and-of-itself solve those problems. (63)

This is a rather odd thing to say. She agrees that property status has historically allowed animals to be abused and exploited, and she agrees that humans have an attitude toward animals that is problematic, but then concludes that these two things are not related. They *are* related; as she herself acknowledges later on, the language we use to talk about something alters how we think about it. David Nibert, in his book Animal Rights, Human Rights discusses the importance of social and political structures in shaping a culture's system of values. In particular, he argues that prejudice is not the cause of these structures, but becomes widespread because of them. Eventually, such views become "naturalized," so commonplace as to be an invisible premise in our daily lives and actions. (2002) So it is very much the case that animals' status as property affects the seriousness with which we treat laws protecting them.

Furthermore, no one has ever claimed (to my knowledge) that simply changing animals' legal status would fix all the unfortunate aspects of their treatment. Naturally, there would need to be specifications in both law and policy by lawmakers and government agencies, methods by which those laws and policies would be enforced, a judicial system which was able and willing to prosecute such violations, and so on. That was the case when children were first considered persons, and that would be the case were any nonhuman animals to get a new designation. Is property the problem? Yes and yes.

The other main issue with Fernandez's suggestion is that her concern appears to be creating a category which accurately and uncontroversially describes how nonhuman animals are seen by the courts, the legislature, and the general public. Her category is aimed at identifying how people *currently* think about animals, not how they

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2020; Pallotta 2018) In some cases, such as in Quebec, the recognition of animals as sentient beings changes their legal status such that they are not in the same category as inanimate objects. However, in none of these cases do animals gain actual civil rights. (The Canadian Press 2015) a similar upgrade has occurred in Brussels, where animals previously considered objects have been recognized as "living being[s] endowed with sensitivity, interests of [their] own and dignity, that benefits from special protection." (Vincent 2018) Even in these countries, however, animals have not been accorded actual rights.

Additionally, there have been a few isolated examples of nonhuman animals being granted personhood status. For example, in Argentina a captive chimpanzee named Cecilia was granted "nonhuman personhood status." (Choplin 2016) These are certainly positive changes, but 1. they have so far only helped a few individual animals, and 2. There are many sentient animals who will never be considered persons.

should think about animals nor what animals actually *are*. She says, "quasi-property would resonate with how most people think about nonhuman animals…our language should not get too ahead of where most people are in terms of their attitudes towards nonhuman animals." (47) This is descriptive instead of prescriptive. Moreover, Fernandez herself admits that her own solution is not ideal saying, "'[Q]uasi'… accepts an imperfect state of existence, working with it. It is not pure but it might be good enough." (75) Perhaps there's a place in the world for such a theory, but it certainly will not move the world forward or significantly improve the state of animal treatment.

Insofar as practicality must be a consideration in moral theorizing, it does seem unwise to try and get all sentient animals personhood status. Unfortunately, Fernandez feels beholden to the very dichotomous system that she had previously denigrated. She says, "given that both of these categories are so central to legal thinking, this paper argues that we should move towards and into both of those categories, using them creatively and expansively rather than trying to avoid or supersede them." (3) Why? There is no reason that we should dig further into the quagmire of trying to fit round pegs into square holes. Either the peg or hole or both will get damaged in the process. The truth is that these two categories have always been and always will be insufficient to properly describe and protect the kinds of beings that exist in this world. And Fernandez admits this, saying "The goal would be for nonhuman animals to be treated *as if* they are persons, for the purposes of respecting the rights they have, which are appropriate to their situation; and *as if* they are not merely property, in the sense of having their own existence and interests." (76) But her suggestion would not accomplish this.

The myriad suggestions available within the literature are insufficient, many of them sharing the same pitfalls as the two enumerated above. It seems clear that the two-category system is itself at least partly to blame for the sorry state of animal rights. Since most humans are unwilling to include other species within personhood, most sentient animals are not persons anyway, and property cannot have civil rights, these beings are stuck- legal nomads with no place to call home. Instead of endlessly trying to finagle a solution within the existing, problematic system, let us make clean break from property and personhood and create a new category which is precisely designed to accommodate those beings which are neither. We would thus avoid the issue of grouping other animals in with humans while simultaneously releasing sentient animals from the danger of being seen as mere "things."

5 EXISTING LEGAL STRUCTURES FOR HUMAN INCOMPETENTS

It is important to make clear that the present proposal is not that human rights be applied to other animals. Rather, *animal* rights should be applied to animals. In other words, all sentient beings deserve some rights by the mere fact of their sentience. Certainly some of those will overlap with human rights, but all that means is that those are more accurately conceived of as *sentient-being rights*. Given that a new category may be seen by some as a drastic suggestion, it would be preferable to make use of existing legal structure as much as possible. As it turns out, there is already a group for whom we have developed a structure that can be applied to sentient nonhumans: legally incompetent humans. Civil law requires legal competency to enter a contract, sign a will, or make other types of

binding legal commitments. (Barnett 1986) Humans may be deemed incompetent for many reasons, but two of the most common ones are age and mental impairment.[10] I will focus on the former for the majority of this section, and discuss how the current model that is in place for such humans would work for sentient non-humans as well.

Child protection laws were not always as robust as they are today. In fact, for a long time children were considered the property of their parents, and, as such, the latter were legally allowed to do what they wanted with them. (Wagman et al. 2010) Children could be given, transferred, or bequeathed by their parents. They were treated as a commodity in support of the parents' rights.[11] (Maillard 2012) Up until the late 1800s, when the NY Society for the Prevention of Cruetly to Children was founded, there was only occasional intervention in cruel treatment of children. But even as the tide slowly shifted toward a realization that "if children are to be protected from neglect the service must be performed by public agencies," (Falconer 1935) it wasn't until the 1980's that children were actually given legal representation in court. (Wagman et al. 2010)

Even today, in child custody cases, the courts more often reference the child's interests than the child's rights.[12] But there are several important ways in which children do have rights. In the criminal realm, children are entitled to a safe environment, good nutrition, healthcare, and education. Parents do have a pretty broad right to raise their children as they see fit, but if a parent is not meeting the child's basic needs, the state can remove the child. Minors also have rights under the U.S. Constitution; they have the right to equal protection and are also entitled to due process. As children age and become more mature, they accrue other rights, such as a limited right to be free from government restrictions on speech and a right to work. Despite all these guarantees, there are some rights that minors do not have. Children are not allowed to vote, consent to medical treatment, sue or be sued, or enter into certain types of contracts, at least not without a legal guardian acting on their behalf. (Find Law 2019d) We will return to the issue of suing shortly.

Minors are not only protected by criminal law, but also by civil law. There are two ways that children are represented in court, by a court appointed attorney (the specific title varies by state) and/or by a guardian ad litem (GAL). A lawyer can be hired to represent the child her or himself. In divorce and custody cases the court may appoint a lawyer for the child. If the court does not think a lawyer is necessary, a parent or guardian has the option to hire one. However, the court *always* appoints a lawyer in juvenile court cases involving abuse, neglect, or delinquency. (CT Law Help) When a lawyer is hired to represent a child, she or he must be hired by an adult who has been put in charge of the child's care in one way or another.

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[10] Some states expand the realm of incompetent persons to include fetuses at certain developmental stages. (Roden 2010)

[11] Two of the seminal cases that reinforced those principles were Meyer v. Nebraska 262 U.S. 390, 400 (1923) which recognized the authority of parents to make basic choices for their children, and Pierce v. Society of Sisters 268 U.S. 510 (1925) which struck down an Oregon statute requiring children to attend public school.

[12] There is also an interesting question about the "peculiar triangle of rights" between a parent, child, and the state, and how the state approaches apparent conflicts between those parties. See Brumley, Alison M. (1991) "Parental Control of a Minor's Right to Sue in Federal Court," University of Chicago Law Review: Vol. 58 : Iss. 1 , Article 8.

While the court appointed attorney represents the child's legal interests *and* supports the child's best interests, a GAL represents only the latter. The GAL is a person the court appoints to investigate what solutions would be in the "best interests of a child." While the specific laws vary by state, there are some commonalities nation-wide. Here is an example from Maine of the reasons for which a GAL may be appointed:

> The court may appoint a guardian ad litem when the court has reason for special concern as to the welfare of a minor child. In determining whether an appointment must be made, the court shall consider:
> A. The wishes of the parties…
> B. The age of the child…
> C. The nature of the proceeding, including the contentiousness of the hearing…
> D. The financial resources of the parties…
> E. The extent to which a guardian ad litem may assist in providing information concerning the best interest of the child…
> F. Whether the family has experienced a history of domestic abuse…
> G. Abuse of the child by one of the parties… and
> H. Other factors the court determines relevant. (Maine Title 19-A, 3.51)

This is a pretty loose set of requirements, most notably with the last consideration of "other factors".

The GAL can be a lawyer or certain types of mental health professional. The court can ask the GAL to look into the child's overall situation and make recommendations about things like parental rights. But usually, the court will ask the GAL to look into specific issues like mental health or medical records of the parents or child, or a parent's current ability to make rational decisions about a child's care. This is called a "limited-purpose appointment" and will usually name particular people the GAL needs to talk to. The Court may also order the GAL to provide an oral or written report. The law requires parents or guardians to cooperate with the GAL and follow all of their reasonable requests. (Pine Tree Legal Assistance) Interestingly, the GAL is required to make the wishes of the child known to the court if the child has expressed any, even if those wishes do not align with the GAL recommendations.

The other important role that the GAL has is that she or he (or the court-appointed attorney) can sue on the child's behalf if unrelated to the case. In that way, there is someone looking out not only for the child's interests, but for the child's rights.[13] A parent or guardian can also sue on the child's behalf. These three individuals, the parent, guardian, and guardian ad litem have prudential (court-given) standing to sue on behalf of a third party because while older children may be able to file a suit for themselves in certain circumstances, children generally are not presumed to be able to sue on their own behalf.

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[13] One interesting civil right that certain minors have is emancipation. In cases where a child both desires and deserves to be free from the control of his or her parents, the child can sue. Sometimes this is referred to as divorce. In either case, it involves the termination of parental rights and means the minor is now treated as a self-dependent adult. This sort of framework may apply to certain nonhuman animals, but I won't argue that point here.

There are, of course, some disanalogies between human children and SNP's. For one, SNP's will never graduate to adulthood and be able to take control of their own legal battles. Most of them will never be able to express themselves in English to the court or take the witness stand. But that is also true of some humans with severe mental disabilities whom we nevertheless believe have the right to an attorney and to have someone looking out for their best interests. In cases where a person has a mental incapacity such that she can no longer understand enough to manage her own affairs or make important decisions about her life, a guardianship is necessary. (The Elder Law Clinic) In addition to the guardian, an incompetent person may also have a guardian ad litem and a court appointed attorney, just as a minor would. A person is not deprived of their right to sue merely due to incompetence.

When discussing this proposal with lawyers, they often bring up the concern that both lawyers and courts are already swamped with *human* cases. There are two ways to answer this concern. The first is moral: Something being difficult is not a sufficient reason to not do it. However, understanding that there are real logistical concerns, there is a second answer: It would not necessarily lead to a prohibitive increase on the workload. To understand why this is so, we can look Desmond's Law, which was passed in CT in 2016. Desmond's Law is a law that allows legal advocates to testify on behalf of cats and dogs in cruelty and neglect cases. Advocates can be appointed by a judge or requested by prosecutors or defense attorneys. These advocates are pro-bono attorneys or law students, who are enabled by the court to gather information, conduct research, and make recommendations to the court. Because they are volunteers, this process places no additional work on private or public prosecutors. (Pallotta 2017)

These advocates play a role similar to the *guardian ad litem* role discussed above, but they are not formally recognized as such because the dogs and cats do not have a status that would allow them legal guardians. Even so, this program has so far yielded many successes. In addition to having the animals' interests represented in court, law students have been able to gain valuable experience in the courtroom. Were the U.S. to enact a law allowing sentient nonpersons to sue in civil courts, the program could be begun under this framework making use of the 160 Law schools already have animal law classes and 195 law schools that have chapters of the Animal Legal Defense Fund.

6 INCORPORATING SNP'S INTO THE EXISTING STRUCTURE

Were sentient nonhumans to be given the basic rights discussed earlier in this chapter, they could be treated in much the same way as human incompetents, and this method of representation could be extended to them. Once it has been determined that an animal has experienced an actionable harm at the hands of a human, the animal's guardian (a.k.a. owner) or other interested party would file suit on the animal's behalf. *This is the part where they get civil rights, because we could say here that an animal was suing for damages*. If the guardian is not the person filing suit (possibly because the owner was the one who inflicted the harm) the court may appoint a guardian ad litem to represent the animals' interests in court. Just as with minors, the GAL would have the authority to examine the animal's and relevant humans' medical, veterinary, and mental health records, where appropriate. The court would also appoint an attorney (unless the animal's

guardian hired one) who would legally represent the animal in the court case. Both the GAL and the attorney would treat the *animal* as their client, seeking only that which was in the animal's legal and/or best interests. Importantly, just as with minors, these two individuals are in no way beholden to the animal's guardian, so that there is no conflict of interest.[14]

Now what happens if the animal wins? The most common type of damages awarded in tort cases is monetary damages. The court would determine what amount may be awarded to the animal in order to make her or him whole. For instance, the court could consider what kinds of care the animal would need to regain health moving forward, and what those would cost. In the same way that a guardian or GAL would be responsible for taking care of their charge's property in the case of a human incompetent, the animal's guardian or GAL would be responsible for seeing to the animal's care. The fact that the money would "belong" to the animal is not a problem, as animals can already be the beneficiaries of trusts. (Dickinson 2017). The guardian would only have to follow the court's orders and the animal's best interest in dispensing the money.

Let us now consider an example of this might play out in a likely situation. Say a man was fighting his dogs. First, someone would have to lodge a complaint with the court. Who is allowed to do this varies considerably by state. It would then be up to the court to decide whether the case has merit. If it does, then the case would go to court, and the court would assign a GAL and attorney for the dog, who would sue the owner on the dog's behalf. In this hypothetical scenario, let's say that the dog had suffered a broken leg and lacerated face due to the fights he was forced to take part in by the owner. The GAL would be directed by the court to look into the mental and criminal history of the owner and the veterinary records for the dog. She might also be asked to speak with relevant parties, such as the owner and other people who have interacted with the dog regularly including neighbors, etc. The GAL would make this material available to the lawyer and the court, and the lawyer would argue the case with the dog as his client. If the owner were found guilty then the court might determine that the way to make the dog whole would be to provide him with veterinary treatment for his injuries and to find him a suitable home. The court would fine the owner in direct proportion to the cost of these restitutions. The money would be held in escrow until the GAL used the money, on the dog's behalf, and in compliance with the court's order. The dog would receive the treatment he needs and, legally speaking, would be made whole.

Recall that the issue with the current system is that animals are not themselves the beneficiaries of damages received for harms done to them. If an owner sues another human because of harm this human caused to the pet, the owner is the one who gets that money. The owner can then use the money in any way that she sees fit, to benefit the injured pet or not. This only acknowledges that the owner was wronged; it does nothing to recognize that the pet was harmed and is *himself* deserving of restitution. Furthermore, nothing suggested here would require an overhaul of our legal system. As we have seen, this type of system is already in place and well-trodden in regards to so-

[14] While I'm focusing here on individual suits, this method could presumably be applied to class action suits where the care of a group of animals deviates from accepted standards, such as in puppy mills, factory farms, etc.

called incompetent humans. Rather, we should include sentient nonhumans under the existing system. Such treatment is entirely consistent with their lacking full personhood and it would make clear that sentient nonhumans are sentient beings who can be harmed, and deserve restitution for certain of those harms.

7 CONCLUSION

When we look at the U. S. legal system, we can clearly see that the law is trailing behind shifting public opinion and the growing knowledge we have of animal minds. The law still treats animals, in most cases, as no more than inanimate objects to be protected in order to secure the property owner's rights. This is severely misguided. On the other hand, we can also see that the many attempts of getting nonhuman animals recognized as legal persons have failed, and, in fact, do not appear close to succeeding. So what can be done? We can recognize and respect sentient animals for who they are by creating a third category, legal patiency, aimed at accommodating such beings.

There are some potential weaknesses to this proposal, however, it also has several important strengths. It is a strength to not force humans to include other animals in the same category as themselves, if not for moral reasons, then at least for practical ones. It is a strength not to have sentient beings in the same category as toasters. It is a strength to be able to give those animals actual civil rights, so that they cannot be wantonly abused and exploited. Finally, it is a strength not to muddle the two categories we already have by forcing sentient animals into one or the other where most of them do not belong. The legal system was not created with nonhuman animals in mind; but it doesn't have to stay that way. With an increasing awareness of who and what animals are, we cannot in good conscience delay meaningful legal reform any longer. It is time for the law to catch up.

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