CHILDREN, CHIMPS, AND RIGHTS
ARGUMENTS FROM "MARGINAL" CASES

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Are animals the new children regarding legal personhood and rights? Animal law is likely the fastest-growing course offering in United States law schools over the past decade. The core question in this subject is how close law should come to treating animals like humans, with the penultimate issue being whether animals should be granted legal personhood status and some legal rights. Most writers addressing this issue, including prominent scholars such as Cass Sunstein, Lawrence Tribe, Martha Nussbaum and Alan Dershowitz, have supported extending a legal rights paradigm to at least some animals. A thesis that is often called the “argument from marginal cases” is central to many supporters of animal rights. The argument from marginal cases holds that if rights are granted to humans with limited capacity for autonomy, such as young children, they must also be granted to intelligent animals (such as chimpanzees) possessing equal or greater autonomy. This Article rejects the argument from marginal cases, with particular emphasis on efforts to apply the argument to children. Focusing on children’s potential for moral autonomy and the relationship between that potential and the social contract, the problem of overstating similarities between human and animal cognition, and the interconnectedness of humanity and legal rights, the Article concludes that courts and legislatures should decline using children’s rights as a basis for applying legal rights to animals. Rather than creating new rights for animals, society and its laws should place greater focus on humans’ moral responsibility for our treatment of animals.

INTRODUCTION

Legal personhood is an exclusive club. Its only members thus far are humans and, in limited circumstances, creations of humans that serve

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humans’ interests, such as corporations. However, many lawyers and legal scholars have joined a rapidly developing movement arguing for expansion of the legal rights paradigm to include nonhuman animals.

Scholarship and legal activism focusing on animals are growing explosively. Animal Law courses have expanded from being taught in only one or two law schools a decade ago to being taught or having been taught in at least 119 law schools in the United States at present. In the past five years alone, four new law reviews dedicated exclusively to animal law have been founded by Stanford University, the University of Pennsylvania, Michigan State University, and University of Louisville.

1 See, e.g., Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 HASTINGS L.J. 577, 579 (1990) (“To claim legal status, nineteenth century lawyers argued that corporations should be considered ‘citizens’ or ‘persons’ for application of various constitutional provisions.”); Elizabeth Salisbury Warren, The Case for Applying the Eighth Amendment to Corporations, 49 VAND. L. REV. 1313,1317 (1996) (“The Court has followed a trend of extending rights to corporations, but it has not agreed to a wholesale application of the bill of rights protections to corporate entities. Instead of granting blanket protection, the Court has approached amendments separately and has used different reasoning in applying them to corporations.”).

2 Humans are, of course, biological animals too. See generally Tim Ingold, Humanity and Animality, COMPANION ENCYCLOPEDIA OF ANTHROPOLOGY 3-14 (1994). For the sake of brevity this article generally uses the word “animals” to describe nonhuman animals. A recent illustration of efforts to apply legal rights to animals may be found in Tilikum v. Sea World Parks & Ent’m, Inc., No. 11cv2476 (S.D. Cal. Feb. 8, 2012). In Tilikum, the organization People for the Ethical Treatment of Animals alleged that Sea World violated the prohibition of slavery set forth in the Thirteenth Amendment of the United States Constitution by keeping captive orcas at its parks. Id., slip op. at 2. On February 8th, 2012, the United States District Court for the Southern District of California dismissed the lawsuit with prejudice, holding that orcas may not be considered persons under the Thirteenth Amendment. Id. at 7.


Much of the legal scholarship addressing animal law supports an expansive view of animals’ legal status. Many of the scholarly works propose assigning legal rights for at least some animals and/or erosion of animals’ property status.

Comparisons between human children and animals are an important part
of many animal rights activists’ direct efforts to attain legal rights for at least some animals. Such comparisons are also important to rights activists’ efforts to create indirect “stepping stones” encouraging evolution toward rights through treating animals more like humans in several areas of law.

This Article argues that assigning rights to children does not provide a solid basis for assigning rights to animals. Part I analyzes the development of a legal rights paradigm for considering children’s interests. In the early years of the United States, legal rights for children were rarely addressed, and parents had exceptionally broad discretion regarding the welfare of their children. In the late nineteenth century and early twentieth century a period of increasing societal and governmental focus on children’s welfare developed. This period is often described as the Progressive Era.

The Part discusses the Progressive Era, which did not utilize a rights paradigm, and the Children’s Rights Era. The Children’s Rights Era began in the 1960s and continues to the present. The Part introduces the social contract (contractualist) theory of rights that is at the foundation of the United States Constitution, and contrasts it with utilitarian ethics principles that are often articulated by advocates of legal rights for animals. The Part concludes that the children’s rights movement is closely aligned with humanism and with contractualist ideals, and that utilitarianism has little relationship with the evolution of children’s rights.

In Part II the Article addresses efforts to build animal rights from childrens’ rights. The Part begins with a review of animal rights theorists’ hopeful comparisons between legal rights evolution involving humans, such as the evolution away from slavery, and their proposals that rights should evolve for animals. Analogies with children’s rights are particularly common, because children, like animals, do not have the cognitive ability of normal human adults. The Part focuses on a leading philosophical argument for animal rights often called the “argument from marginal cases.” The argument from marginal cases holds that if less capable (“marginal”) human beings, such as young children, are assigned rights, justice requires that other intelligent animals with greater “practical autonomy” than rights-bearing “marginal” humans should be granted rights too. The Part addresses how the argument from marginal cases has been applied to children, and includes an analysis of some variations in how the argument is conceptualized and articulated. The Part concludes by noting the significant disconnect between broadly shared societal values regarding human rights and dignity and the argument from marginal cases.

Part III focuses on special problems that children present to the argument from marginal cases for animal rights. First, the Part addresses the distinction that, unlike animals, most children will eventually attain practical autonomy. Unlike animals, children are the future of the social
contract, and thus the social contract’s rights paradigm is a better fit for children. The Part also challenges the argument from marginal case’s assumption that human and animal cognitive ability is readily comparable on a simple continuum. It highlights recent scientific studies and writings questioning a common pattern of overstating the similarities between human primate minds and the minds of nonhuman primates. The Part also analyzes the centrality of children’s humanity, rather than simply their intelligence or their potential for practical autonomy, to societal decisions to grant them legal rights. Finally, the Part briefly notes that the centrality of humanity to rights and other factors also argue for distinguishing mentally incapable adults from animals.

The Article concludes that animals are not children, and that a legal rights paradigm is simply not a good fit for nonhumans with little relationship to the social contract upon which legal rights are based. However, rather than serving as an excuse to mistreat animals, the social contract places a weighty duty upon morally responsible humans to care for vulnerable animals’ welfare.

I. RIGHTS FOR CHILDREN

This Part addresses the history of children’s rights. It concludes that the impetus for improved treatment of children beginning in the 1800s, and the development of a legal rights paradigm for children in the 1960s, was concern based on children’s humanity, and concern based on children’s future role in the social contract. Neither of these concerns supports arguments for animal rights.

Widespread acceptance of legal rights for children is relatively recent. Previously children were often viewed more or less as a special sort of property, “owned” by their parents or guardians, in the eyes of the law. Parents have always expressed love and affection for their children.8


9 For example, the Christian scriptures focus heavily on the image of God as a loving parent to humans. Jesus is said to have told his disciples “Which of you, if his son asks for bread, will give him a stone? Or if he asks for a fish, will give him a snake? If you, then, though you are evil, know how to give good gifts to your children, how much more will your Father in heaven give good gifts to those who ask him?” Matt. 7:9-11 (New Int’l Version, 1984).
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However, historically children were also often subject to harsh treatment by their parents, and they were often expected to work to provide economic benefits to their parents.

During the industrial revolution children’s work often shifted from labor on a family farm to labor in factories and mines for wages. Many in society viewed childhood labor as a laudable expression of industry and self-sufficiency, at least for those in the poorer classes. For example, in *A Tour Through the Whole Island of Great Britain*, Daniel Defoe, the author of *Robinson Crusoe*, wrote about his visit to an industrial town in England. He noted with apparent admiration that “. . . scarce any [child] above four years old, but its hands were sufficient for its own support.” However, Defoe’s observation was made in 1742, shortly before the industrial revolution matured. By the latter half of the 1700s “competition resulted in a significant deterioration of working conditions.”

In general, a laissez-faire attitude toward both capitalistic business enterprises and parents’ control over children prevailed. In factories and mines, unregulated capitalism led to a race to the bottom regarding working conditions:

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10 See, e.g., Arnott, supra note 8, at 809. (discussing the treatment of children in classical Athens, where abandoning a child did not count as homicide, children were sold into slavery, parents were under no legal obligation to raise their children, and fathers had the right to decide whether to keep a new-born baby or to expose it); Hart, supra note 8, at 53. (noting that prior to the sixteenth century children beyond six years of age were considered to be small adults and were not separated from adults as a class, therefore they endured a “nightmare” of mistreatment and were often ignored, abused, abandoned, sold into slavery, and mutilated).

11 See Marvin Perry, Myrna Chase, Margaret Jacob, and James Von Laue, *Western Civilization: Ideas, Politics, and Society* 513 (2009) (describing children as economic assets during industrialization because they worked, leading to factory workers having more children than other classes); see also George Benjamin Mangold, *Problems of Child Welfare* 298 (1914) (discussing child labor in the 1800s and the “strong impetus” given to the employment of children wherever they could be used); Marvin J. Levine, *Children for Hire: The Perils of Child Labor in the United States* 17 (2003) (noting that in Colonial America, children not only helped out on their own family farms and households, but were also commonly hired out to perform similar tasks at neighboring farms).


14 Anderson, supra note 12, at 23.

Unchecked, the forces of capitalism led factories to seek ever cheaper means to produce ever more goods. This meant longer hours at lower wages, increasingly poor accommodations and conditions, and increasing reliance on the cheapest laborers, i.e., children.\(^{16}\)

The children of the poor were the most likely to fare badly.\(^{17}\) They were often sent to work for long hours every day of the week beginning at a young age. For example, in one mill “children as young as seven years old worked from 5 a.m. to 8 p.m. Monday through Saturday all year long, with just a half an hour for breakfast and half an hour for lunch. On Sunday they had to work for six hours.”\(^{18}\) The children were required to stand all day, they frequently suffered deforming injuries, and many were physically abused by their supervisors.\(^{19}\)

In families, parents were permitted to do as they wished with children to an extent that would be difficult to recognize today.\(^{20}\) Society held parents morally responsible for parenting decisions,\(^{21}\) but the law rarely intervened.

\(^{16}\) Anderson, supra note 12, at 25.

\(^{17}\) Hugh Hindman, The World of Child Labor: And Industrial and Regional Survey 546 (2009) (discussing the employment of poor, orphaned, apprentice children who “lived in the worst conditions, experienced the longest hours of work, and were placed in the greatest risk of accidents.”); Michael F. C. Bourdillon, Deborah Levison, William E. Myers, and Ben White, Rights and Wrongs of Children’s Work 43 (2010) (discussing how during the Industrial Revolution, child employment generally depended on class and was concentrated mainly on children of the poor).

\(^{18}\) Anderson, supra note 12, at 24.

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) From the earliest history of the United States, society carefully scrutinized family affairs, including child-rearing, and exercised “normative, not legal” control over them. Lisa J. McIntyre, Law and the Family in Historical Perspective: Issues and Antecedents, 21 MARRIAGE & FAM. REV. 5, 11 (1995). For example, in colonial America, “[t]he community closely watched over … child-rearing practices and other domestic matters.” Id. Much of this supervision came from the church, whose elders and members felt it was their duty to “supervis[e] people’s conduct[,]” Id. In nineteenth century America, several social programs were established with the goal of protecting children who were born into poor immigrant families. Sandra Meucci, What is a Children’s Policy, Anyway?, 24 SOC. JUSTICE 105, 111-12 (1997). These organizations worked to provide health care, prenatal, dietary, and hygienic information and services to these families, which were often viewed by society as unable to provide a satisfactory living standard for their children without such intervention, even if the parents had not been criminally charged with child abuse or neglect. Id. In another example from the nineteenth century, in statutory rape cases in which the victim was a girl from a working class family, it was the general practice of the victim’s family to try to force the perpetrator to marry the “ruined” girl, rather than to actively seek criminal prosecution against him. See Stephen Robertson, Making Right a Girl’s Ruin: Working-Class Legal Cultures and Forced Marriage in New York City, 1809-1950, 36 J. OF AM. STUD. 199 (2002). Judges generally found this course of action to be acceptable. Id. at 204. However, by the early twentieth century, forcing this result was
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Religious views likely played an important role in the broad latitude afforded parents in raising their children. Christian churches taught that the father was the head of the house, and that he, rather than society, bore direct responsibility to God for the upbringing of his children. With this great personal responsibility came great personal discretion regarding child-rearing decisions.

A. The Progressive Era

Reforms to protect children, inspired primarily by abuses associated with the industrial revolution, developed slowly. The drive for greater protection for children was probably slowed by the economic costs that increased protection for children in the workplace entailed. One writer has analogized the economic disincentive for restricting child labor during the industrial revolution to current economic disincentives for improving animal welfare, particularly regarding animal agriculture.

In the United States, the most active periods of development for “children’s movements” may be divided into two time periods. The first was in the late 1800s and the early years of the twentieth century. This period is sometimes referred to as “the Progressive Era.”

viewed negatively by some members of middle-class society, including social workers, who believed that “such a marriage could only produce a catalogue of social problems.”

22 See STEVEN MINTZ AND SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 54 (1988) (discussing a father’s authority over his family as a link in the great chain of being, the line of authority descending from God); ROGER COX, SHAPING CHILDHOOD: THEMES OF UNCERTAINTY IN THE HISTORY OF ADULT-CHILD RELATIONSHIPS 41 (2006) (describing the father as the “grave governor” of the household who had ultimate responsibility for his family).

23 See Mintz and Kellogg, supra note 22, at 54 (saying fatherhood was associated with sovereignty and that the ideal of patriarchal authority found vivid expression in the realm of law, where the prevailing attitude was that a father had an absolute right to custody and guardianship over his offspring); Cox, supra note 22, at 41 (discussing the patriarchal authority that gave fathers both duties and responsibilities in the Puritan family).

24 See Anderson, supra note 12, at 24 (regarding England, “reform was a long time in coming, primarily because the oppressed workers, and in particular the children, did not hold much power in Parliament”). Reform was even slower in the United States.

25 See GUGGENHEIM, supra note 15, at 3 (noting that it was not until the immigrant population in the United States swelled, providing a cheap alternative to child labor, that restrictions on child labor gained traction).


27 GUGGENHEIM, supra note 15, at 1.

28 Id.

29 Id. See also MICHAEL GRIMES, PATCHING UP THE CRACKS: A CASE STUDY OF JUVENILE COURT REFORM 6 (2005) (“The third period in the history of the evolution of
In the Progressive Era “American society shifted its understanding of children’s well-being as a natural parental responsibility to an issue that government and those who forged official policy had a responsibility to address.” Progressives first worked to change public perceptions regarding society’s duties toward children, and then successfully lobbied for legal reforms designed to protect children.

Importantly, the Progressives were motivated by a desire to build a better society through creating better conditions for children. As explained by Joseph Hawes, “Progressives believed that they had found the means to reshape society: improve conditions for the children of today and the world of the future will be automatically transformed.” They were correct in their belief that their efforts could change society. Several fundamental aspects of modern childhood in the United States, such as universal, free education provided by government, and protection from child labor, are a consequence of the Progressive Era.

One of the Progressives’ most prominent victories was creation of a juvenile court system to address criminal offenses by children. Prior to the Progressive Era children were tried in the same courts as adults. The children’s rights was the Progressive Era, a period that literally ‘straddled’ the end of the nineteenth century and the beginning of the twentieth (1890-1920).”) MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 85-105 (1994).

GUGGENHEIM, supra note 15, at 1-2.


GUGGENHEIM, supra note 15, at 2.

Id. at 4.

In the late nineteenth century, Illinois was the first state to establish, by statute, a juvenile court, which was responsible for the “treatment and control” of children whose tendency to commit criminal activities was partly attributed to a lack of parental supervision and control. Sacha M. Coupet, What to Do with the Sheep in Wolf’s Clothing: The Role of Rhetoric and Reality about Youth Offenders in the Constructive Dismantling of the Juvenile Justice System, 148 U. PA. L. REV. 1303, 1312 (2000). One purpose for creating this court was the Illinois Legislature’s recognition, which later grew to be a broader belief across the entire country, that punishing children in the same way as adults was counterintuitive: children had no control over how they were raised, so it was unjust to hold them criminally responsible if their lack of a decent upbringing contributed to their criminal behavior. See id. at 1212-1213. Furthermore, the belief that children were more
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Progressives felt that society’s future would be better if courts focused on improving errant children rather than on punishing them.\(^{36}\)

The Progressives believed that child-friendly courts should seek to understand the whole of the child and not narrowly focus on the child’s misbehavior. They believed official inquiry into why the child acted as he or she did was even more important than spending considerable efforts to determine what the child did.\(^{37}\)

As discussed below, this focus on treating children differently from adults in the legal system would also become an important issue in the children’s rights movement that blossomed later in the twentieth century.

**B. The Children’s Rights Era**

The Progressive Era generally did not utilize the language of rights in its efforts to change laws related to children. Rather, progressive reformers appealed to a sense of societal responsibility toward children, and they persuaded society both that failing to protect children is a moral failing and that improving conditions for children would enhance society’s future.\(^{38}\)

In the 1960s, things changed. The Children’s Rights Era began in that decade, and continues to the present.\(^{39}\) The children’s rights movement challenged the paternalism of the Progressives, focusing on a rights responsive to rehabilitative measures than adults also contributed to the establishment of a separate criminal justice and punishment scheme for juveniles. \textit{Id.} \(^{36}\)

\textit{John Myers, Child Protection in America: Past, Present, and Future} 65 (2006) (“The juvenile court adjudicated the youngster a delinquent rather than a criminal and provided individualized treatment rather than punishment.”); \textit{Elizabeth Clapp, Mothers of All Children: Women Reformers and the Rise of Juvenile Courts in Progressive Era America} 89 (1998) (describing a focus on the best interest of the child and the need to prevent continuance of wrongdoing, and to encourage positive development of each individual child over the need to punish). \(^{37}\)

\textit{Guggenheim, supra} note 15, at 5.

\textit{See, e.g., C.R. Margolin, Salvation Versus Liberation: The Movement for Children’s Rights in a Historical Context, Social Problems} 443 (1978) (“The Progressive Era brought dramatic increases in the educational and welfare systems, and decreases in child labor . . . The crusaders hoped that helpless children would soon prove good citizens, through the knowledge gained in the public school system and rehabilitation in the juvenile courts.”). \(^{38}\)

paradigm rather than on a welfare paradigm.\footnote{Michael King, Moral Agendas for Children’s Welfare 98 (1999) (citing the rights paradigm and saying “[s]uch a move to ascribe legal personality to children in this way implies a rationality, and a degree of political participation and calculation on their part which sit uncomfortably with contemporary principles of welfarism or best interests grown from the paternalistic disempowerment associated with some early children’s rights movements.”).}

This effort was not lonely as a rights movement in the 1960s. It followed in the larger footsteps of the civil rights movement and the women’s rights movement, both of which loomed large in the 1960s.\footnote{Virginia Smith, Reshaping the World for the 21st Century: Society and Growth 80 (2002) (discussing how demands for rights by a broad array of marginalized groups picked up force especially in the 1960s, when movements such as women’s rights and the black power movement “burst on the world scene all at once.”).} The 1960s were a time of significant social upheaval, and individual rights concepts epitomized much of the change. In her book \textit{Rights Talk}, Harvard Law School Professor Mary Ann Glendon describes the era, continuing to the present, as one in which society has been smitten by the “romance of rights.”\footnote{Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 5 (1991).}

An important aspect of the 1960s zeitgeist was generational conflict, with many younger people feeling oppressed and disempowered by their parents’ generation.\footnote{Mitchell Hall, Vietnam War Era: People and Perspectives 67 (2009) (“. . . the sixties generation cast the whole of the governing elite of America as an oppressive and hypocritical parental entity.”).} “Don’t trust anyone over thirty,” a popular phrase among teens and young adults at the time, exemplified the mood.\footnote{Guggenheim, supra note 15, at 5 (“[M]any activists took seriously the injunction ‘don’t trust anyone over thirty.’”).}

The drive to create a rights paradigm for children was connected to a sense that rights were deserved because of children’s humanity, and that denying rights to children treated them as less than human. As asserted by Richard Farson in the influential 1974 book \textit{Birthrights: A Bill of Rights for Children}, failing to assign rights to children denies “their right to full humanity.”\footnote{Richard Farson, Birthrights: A Bill of Rights for Children 17 (1978), quoted in Guggenheim, supra note 15, at 5-6.}

This concept that children’s rights are tied to their humanity raises a question regarding the nature of rights. Although the term “rights” is employed frequently in legal and societal discourse, consensus regarding what the term means is elusive.\footnote{Charles Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective 7 (1998) (discussing the many different kinds of}
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The concept of rights most familiar to Americans is associated with the philosophical theory known as contractualism. Contractualism promotes the notion of the social contract, in which societally-imposed responsibilities are accepted in exchange for individual rights owed by society. Ideals of freedom and democracy that form the basis of our system of government were inspired by social contract theory. Contractualism views rights as connected to moral agency and the ability to accept societal responsibility in exchange for rights. Whether this ability to accept moral responsibility is individual or applies to humans as a species, regardless of whether some individual humans would not be able to meet this standard, is subject to debate. In any event, applying a rights paradigm for animals does not fare well under most views of contractualism, because no animals, either as a species or individually, are viewed as capable of bearing significant moral responsibility.

The theory of utilitarian ethics has been viewed as providing support for a competing view of rights that has proved popular with many animal rights activists. A utilitarian is “someone who believes that our basic moral duty is to maximize happiness or the satisfaction of preferences and thus to

“rights,” from constitutional rights to “new” rights such as women’s rights, and concluding that “[w]hat precisely these new rights include and how they are to be applied in practice of course remain matters of some dispute.”).
minimize pain and disappointment.” Many animal rights activists may be attracted to utilitarianism because it does not necessarily require that humans be the sole subjects of utility analysis. If an animal is capable of experiencing pain or pleasure, a utilitarian might argue that the animal’s interests should be given equal consideration to the interests of a human in experiencing pleasure and avoiding pain.

Some utilitarians and others have argued that particularly intelligent animals, such as chimpanzees and other great apes, possess as much or more “practical autonomy” than some humans, such as young children or mentally incapable adults. If these marginally capable humans are assigned rights, several activists have asserted, justice demands that rights should also be assigned to intelligent animals that are capable of as much or more practical autonomy. Some animal rights theorists believe that utilitarian ethics are consistent with some level of basic rights for all animals capable of pain or pleasure, regardless of their level of intelligence or practical autonomy.

The Children’s Rights Era’s emphasis on using the rights paradigm to attain “full humanity” for children is a better fit with contractualism than with utilitarianism. This is not surprising, as the social contract is the basis of the United States Constitution, and is the lens through which United States citizens have typically been educated about rights. The Children’s Rights Era’s concern for attaining full humanity is consistent with contractualism based on the idea emphasized by the Progressives many years earlier that “children are our future.” Even if children are not yet capable of full moral responsibility, they most certainly will control society in the future, and thus society has a strong interest in granting them rights to provide protection when they at their most vulnerable stages of development.

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55 SINGER supra note 53, at 15 (“Animals can feel pain . . . there can be no moral justification for regarding the pain (or pleasure) that animals feel as less important than the same amount of pain (or pleasure) felt by humans.”).
56 See infra notes 106 through 119 and accompanying text.
57 See infra note 114 and accompanying text.
58 See PATrick GEORGE DERR, EDward M. MCNAMARA, CASE STUDIES IN ENVIRONMENTAL ETHICS xviii (2003) (discussing how according to utilitarian animal rights theory, all sentient animals deserve equal moral consideration).
59 FARSON, supra note 45, at 6.
60 See supra notes 48 through 52 and accompanying text.
61 See supra notes 32 through 33 and accompanying text.
62 See infra notes 217 and accompanying text.
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guilt or innocence, but rather to determine “what had best be done in his interest and in the interest of the state to save him from a downward career.”

This contractualist interest in protecting children to nurture future participants in the social contract is often implied even when it is not specifically articulated in rights discussions. Indeed, as it is frequently expressed, the impulse to provide rights to weaker members of human society is not particularly intricate. Seeking to ensure that children are treated as “fully human” seems to focus first and foremost on their basic humanity as the foundation for rights, with concern for the social contract’s future being simply implied or perhaps even subconscious.

Unlike contractualism, utilitarianism seems foreign to most of the prominent justifications that have offered in support of children’s rights. Indeed some forms of utilitarianism have been criticized as conflicting with human rights theory generally, although this assertion has been disputed.

It is perhaps telling that utilitarianism is more prominent as an academic theory than as a controlling influence on human society.

In any event, the rationales articulated by both the Progressives and the children’s rights activists tend to focus strongly on the need to respect children’s humanity as the reason for granting them enhanced protection or rights. As noted above, Progressives wanted greater protection of children in order to “reshape society” and to “automatically transform” the future of the world. They wanted to protect the “lives and limbs” of humans who were children. Opposition to reform efforts was decried as “unchristian.”

Regarding children’s rights, due process concerns related to juvenile courts provide a good illustration of the progressive movement’s focus on children’s humanity. As noted above, the Progressives pushed for the creation of juvenile courts in an effort to protect children from the rigidity and harshness of adult courts. Perhaps ironically, “[t]he modern children’s rights activist cut his or her teeth” challenging these juvenile courts.

The seminal legal case of the Children’s Rights Era exemplifies rights concerns related to juvenile courts. In In Re Gault, a 15-year-old boy

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63 In Re Gault, 387 U.S. 1, 15 (1967) (Fortas, J.) (emphasis added).
64 See generally Alan Gabbard, Utilitarianism and Human Rights, 1 SOC. PHIL. & POLICY 92 (1984).
65 GUGGENHEIM, supra note 15, at 2.
66 Anderson, supra note 12, at 29.
68 See supra notes 34 through 37 and accompanying text.
69 GUGGENHEIM, supra note 15, at 6.
70 387 U.S. 1 (1967).
named Gerald Gault was committed to detention as a juvenile delinquent by an Arizona juvenile court.\textsuperscript{71} His alleged offense was making an obscene phone call to an adult woman in his neighborhood with another boy.\textsuperscript{72} The content of the telephone call was “of the irritatingly offensive, adolescent, sex variety.”\textsuperscript{73}

In an opinion written by Justice Abe Fortas, the Supreme Court of the United States negated Gault’s designation as a juvenile delinquent because the Arizona juvenile court had not provided several due process protections that would have been required if Gault had been an adult in criminal court.\textsuperscript{74} The decision led to a proliferation of lawyers in children’s courts, and is a cornerstone of the children’s rights movement.\textsuperscript{75}

\textit{In re Gault} has strong contractualist overtones, and focuses on children’s humanity as the basis for extending constitutional rights to them. Stating that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,”\textsuperscript{76} and that “Under our Constitution, the condition of being a boy does not justify a kangaroo court,”\textsuperscript{77} the Court implied that children also deserve rights because they are human. The decision’s reliance on contractualist rights notions is more explicit, directly referencing the social contract as the basis for our liberties:

Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.\textsuperscript{78}

In short, \textit{In Re Gault}, and the children’s rights movement, extended the Progressives’ contractualist and humanist foundations for furthering children’s welfare to the idea that children’s interests should be protected with a rights paradigm.

\textit{C. Inherent Tension in the Rights Paradigm for Children}

In July 2011, two prominent researchers from the Harvard School of Public Health published an article in the \textit{Journal of the American Medical Association} arguing that in some situations government agencies should
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consider taking severely obese children away from their parents.\textsuperscript{79} They asserted that placing such children in foster care may be appropriate “in carefully selected situations.”\textsuperscript{80}

The authors noted that severe childhood obesity may lead to serious and “potentially irreversible” health consequences, such as Type II diabetes, which significantly decreases life expectancy.\textsuperscript{81} When parents fail to control their children’s severe obesity, the authors argued, appropriate government intervention may consist of “intermediate options such as in-home supports, parent training, counseling, and financial assistance, that may address underlying problems without resort to removal.”\textsuperscript{82}

The authors concluded that in most situations involving severely obese children state intervention is not desirable, practical or legally justifiable, but that in extreme circumstances state intervention under child abuse laws may be necessary to protect children.\textsuperscript{83} In other words, they argued that in some situations it may be appropriate for the state to take obese children away from their parents.

The article immediately provoked significant public controversy, with pundits attacking the proposal as out-of-control governmental paternalism, and pundits defending it as necessary to protect children’s health.\textsuperscript{84} Should


\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} See David Katz, \textit{Should Obese Children Be Taken From Parents?}, HUFFINGTON POST, July 14, 2011, www.huffingtonpost.com/david-katz-md/children-obesity (saying that the “knee jerk” opposition to Ludwig and Murtagh’s proposal that the state take severely obese children away from their families is unwarranted); see also Arthur Caplan, \textit{Obesity Alone is No Reason to Remove Kids From Their Homes}, MSNBC, July 14, 2011, http://news.mobile.msn.com/en-us/articles.aspx?aid=43727876&afid=1 (“... putting the blame for childhood obesity on the home and then arguing that moving kids out of homes where obesity reigns is the answer is short-sighted and doomed to fail.”); Thomas R. Eddlem, \textit{Should Government Take Two Million Children Away From Their Parents?}, NEW AMERICAN, July 14, 2011, http://www.thenewamerican.com/usnews/health-care/8217-should-government-take-2-million-children-away-from-their-parents (citing examples of “governmental incompetency” and saying “faced with such unfathomable and universal government incompetency, the real question in the debate over childhood obesity is: How can an indifferent and incompetent government be trusted to take care of kids better than their parents?”); Helen Whalen Cohen, \textit{Childhood Obesity Now Constitutes Child Abuse}, TOWNHALL.COM, July 13, 2011, http://townhall.com/tipsheet/helenwhalencohen/2011/07/13/childhood_obesity_now_constitutes_child_abuse (describing the United States as “this nanny state run amok” in reference to the proposal that Child Protective Services intervene in cases of severe childhood
parents’ “right” to make childrearing choices prevent this level of government intrusion? Should a child’s “right” not to have potentially permanent medical problems inflicted because of parents’ lack of control justify being removed from the parents in extreme situations involving obesity? Or should a child’s “right” to be with the child’s parents prevent the government from taking an obese child away from the child’s home?

The controversial proposal highlights tension that is inherent in the concept of children’s rights. Parents, children, and the state have legitimate and important roles in making decisions regarding children’s welfare. How to balance parents’ and government’s responsibilities to make decisions for children and the concept of rights for children is a deeply complex problem.

Before Hilary Rodham Clinton became a public figure, she was a lawyer working as a children’s rights activist. In a 1973 article entitled Children Under the Law she wrote that children’s rights was “a slogan in search of a definition.” Nearly forty years later, her observation remains accurate. Proponents of children’s rights often disagree regarding what they mean. Some have taken a rather severe position, arguing that rights are needed because children in modern society have been treated in a manner analogous to slaves. Others have asserted that the rights paradigm includes a “right” to parents’ love, affection, discipline and guidance. If these were legal rights, legal rights would have little meaning. Still others have asserted that children have “a “right not to be deemed capable of making certain decisions.” This may indeed be a right, but it conveys a sense of having a right not to have a right.

Because of the tension over the nature and extent of children’s rights, the United States Congress has declined to ratify the United Nations Convention on the Rights of the Child, a 1990 treaty that has been adopted by almost all other United Nations member states. Critics of the Convention in the United States have argued, among other things, that it

90 See GUGGENHEIM, supra note 15, at 9.
91 See infra notes 204 through 217 and accompanying text.
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allows too much governmental interference with parents’ rights to make decisions regarding how their children should be raised.⁹³

Although the United States has rejected the United Nations’ children’s rights treaty, cases such as In Re Gault and others demonstrate that the paradigm of assigning at least some rights to children is entrenched, and is not likely to erode in the foreseeable future.⁹⁴ However, children do not have all of the full-throated rights of adults, and determining where they should fall on the spectrum between no rights and full adult rights often creates challenges for the paradigm. At a minimum, there seems to be general consensus that children’s rights need to be balanced against parental “rights,” or at least parental responsibility and discretion. As demonstrated by the July, 2011 controversy over whether obese children should ever be taken away from their parents by the government,⁹⁵ the debate over balancing children’s rights and other interests remains ongoing and vibrant.

II. EFFORTS TO BUILD ANIMAL RIGHTS FROM CHILDREN’S RIGHTS

This Part explains frequent comparisons between rights for children and rights for animals. Other than the evolution of rights for slaves, rights for children (and mentally incapable adults)⁹⁶ generate perhaps the most common, and one of the most passionately argued, analogies relied upon by animal rights supporters.⁹⁷ After briefly introducing the slavery analogy, the Part provides a detailed analysis of the argument from marginal cases and how it is applied to children. It then discusses variations in the argument from marginal cases, with particular focus on the differing approaches of prominent philosophers Peter Singer and Tom Regan. The Part concludes

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⁹³ Id.
⁹⁴ See supra notes 38 through 78 and accompanying text.
⁹⁵ See supra notes 79 through 84 and accompanying text.
⁹⁶ See infra notes 233 through 242 and accompanying text.
⁹⁷ See, e.g., SUSAN J. PEARSON, RIGHTS OF THE DEFENSELESS: PROTECTING ANIMALS AND CHILDREN IN THE GILDED AGE 8 (2011) (exploring the history of rights talk, sentimental culture, and law enforcement in post-antebellum America by discussing how humane societies linked the suffering of animals and children in seeking legal protection for abused animals); ROBERT GARNER, ANIMALS, POLITICS, AND MORALITY 13 (2004) (saying that if people deny rights to animals and maintain that only moral agents can be morally worthy of rights “then it follows that children or the mentally deranged do not fit into this category, and therefore we cannot owe direct duties to them either.”); ANGUS TAYLOR, ANIMALS AND ETHICS: AN OVERVIEW OF THE PHILOSOPHICAL DEBATE 126 (2003) (challenging the notion that because people have distinct human capabilities their lives are more valuable than animals’ and asking “what then of those disabled human beings who lack the distinctive human capacities – are they, like animals, suitable material for experiments . . . ?”).
by addressing implications of the obvious and strong disconnect between the argument from marginal cases and broadly shared societal values.

The slavery analogy, which is probably the most plausible contender with the children’s rights analogy as the most commonly articulated comparison favoring animal rights, notes that human slavery was an irrational historical institution that was gradually eradicated through societal evolution and enlightenment. Although the evolution sometimes entailed violence and substantial societal disruption (the United States Civil War provides a dramatic illustration), nearly universal consensus exists that the benefits of eliminating slavery overwhelmingly outweigh whatever societal disruption accompanied the change. Recognizing rights for slaves was of course more than worth any societal and financial costs it entailed, and ultimately inured to the benefit of society as well as slaves.

Many animal rights theorists argue that denying rights to animals (especially regarding intelligent animals, such as great apes) is analogous. As with human slaves, the argument goes, denying rights to at least some animals is irrational. Yet we presently treat animals as property, the status that was also applied to slaves. As society evolves and illogical biases are increasingly challenged, advocates hope that humans will recognize the injustice of “enslaving” at least some animals. Freeing these animals

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98 See, e.g., KENNETH MORGAN, SLAVERY IN AMERICA: A READER AND GUIDE, KENNETH MORGAN 104 (2005) (stating that the growth of antislavery ideas among enlightenment philosophers in Europe was one influential strand in the growth of transatlantic antislavery thought, and adding that Christian evangelicals also influenced moral enlightenment and antislavery ideas); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF THE REVOLUTION, 1770-1823 262 (1999) (referring to slavery as a moral contradiction because it defines and treats other men as physical objects, which was contrary to Enlightenment ideals, and “repugnant to the spirit of the Enlightenment.”); TOM REGAN, DEFENDING ANIMAL RIGHTS 146 (2001) (discussing how during the antislavery movement, people were persuaded that slavery was wrong and that it should be abolished through appeals to their reason, their sense of justice, and their human compassion, not through violence or intimidation).

99 See, e.g., TOM REGAN, supra note 98, at 37 (using to slavery analogy to say “what is true of human liberation is no less true of animal liberation,” and that as in the case of human slavery, there is fundamental wrong with failing to respect animals’ basic moral rights regardless of the potential for human profit from animal exploitation); JEAN KAZEZ, ANIMALS, PROPERTY, AND THE LAW 115 (2010) (citing the slavery analogy in condemning animal exploitation and saying “we’ve come a long way from thinking that African Americans are just animals,” and claiming that people need to adjust their thinking in order to realize that “even animals are not ‘just animals.’”).

100 See KAZEZ, supra note 99, at 173 (asserting that if people can make the generalization that “slavery is always wrong” they should be able to make a similar generalization that using animals as resources is always wrong); see also GARY FRANCIONE, ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION 62 (2004) (acknowledging key differences in the antislavery movement and animal rights movement, but nonetheless relying on the analogy in advocating for “abolition of animal
ARE CHIMPANZEES CHILDREN? from their property status and assigning some rights to them would entail societal disruptions, but, as with abolishing human slavery, these disruptions are perceived by advocates as worthwhile. Starting the abolition of animal slavery with particularly intelligent animals is seen by some theorists as advantageous because: 1) They are the most like humans; 2) Their intelligence makes their “slavery” more intolerable; and 3) The societal disruption that would be caused by granting rights only to a few types of animals that are not relied upon extensively for economic advantage, such as great apes, would be much less than the disruption of granting rights to animals with more economic significance (farm animals, for instance), and thus society is less likely to resist it.  

The slavery analogy for animal rights is highly problematic for many reasons. Indeed, the analogy may understandably be perceived as offensive to humans, and some advocates for human civil rights have criticized comparisons between their struggles and efforts to extend rights to animals. However, this Article focuses on analogies to children. In this context, perhaps the most noteworthy aspect of the slavery analogy is that it is even less convincing than analogies to children. Children have limited autonomy and limited moral agency, but the only limitations on adult slaves’ autonomy are those forced upon them by their enslavers. Unless they are mentally incapable, adult slaves are rational and morally slavery” and calling on people to accept a moral obligation to stop using animals for food, biomedical experiments, entertainment, or clothing).

101 See Taylor, supra note 97, at 176 (discussing “The Great Ape Project,” led by Peter Singer, which advocates extending human rights to apes and including them in the moral community because of their possess a “significant degree of intellectual capacity” and because they “bear striking physical resemblances to us,” and pointing out that the project’s leaders claim it will likely open the door for expanding rights for other animals). Many philosophers and observers of the animal rights movement have remarked that the animal-liberation movement is unlikely to succeed in its goals unless it joins other movements that challenge the assumptions of industrial society that view animals as resources for human use. Id. at 177.

102 See Richard L. Cupp, Moving Beyond Animal Rights: A Legal/Contractualist Critique 46 SAN DIEGO L. REV. 46 (2009) (“Speaking about animal rights and human rights in the same breath and with the same fervor may be perceived as raising the status of animals, but it equally may be perceived as lowering the status of humans.”).


104 See infra notes 106 through 119 and accompanying text.
responsible, and treating them as unequal to other rational and morally responsible adults is entirely unjust.

Children, however, have inherent and often significant limitations on their ability to make moral decisions, as do animals. Some limitations on children’s rights and freedom make sense. Thus, although arguments for animal rights based on granting limited rights to children are unpersuasive, granting rights to animals based on granting rights to slaves is yet more unpersuasive.

A. How the Argument from Marginal Cases is Applied to Children

A philosophical theory that some scholars have named “the argument from marginal cases” is at the core of some of the most prominent justifications asserted for granting rights to animals. The argument, which is often, but not always, assigned the “marginal cases” label, focuses on rights being granted to many human beings who lack a strong degree of cognitive ability. Relatively strong cognitive ability has been thoughtfully described as leading to “practical autonomy,” if not complete moral autonomy.

Some philosophers have argued that true moral autonomy is only rarely achieved even among adult humans. Immanuel Kant most notably asserted this view, postulating that full autonomy is only possible for the most evolved and thoughtful humans.

This position supports viewing moral autonomy as a continuum rather than as an absolute condition. In this continuum, most human adults are

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105 See infra notes 204 through 217 and accompanying text.
106 See generally Michael Rohlf, Immanuel Kant, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2010), http://plato.stanford.edu/archives/fall2010/entries/kant/ (discussing Kant’s belief that human beings achieve ultimate autonomy and freedom by fulfilling their duty to act in accordance with the moral law for the purpose of the achieving “the highest good”).
107 Id.
108 Id.
109 See WISE, RATTLING, supra note 106, at 247 (defining “realisticautonomies” as those that depict what humans actually have and what judges actually try to protect, and saying that while the most complex self-consciousness of the most rational adult humans lie at the high end of the full autonomy, the more complex of the simpler consciousnesses those of young children or the adults of many species of mammals, probably approximate the lower end of a realistic autonomy); ALAN DERSOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 197 (describing a continuum of soulfulness,
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granted full rights even though they perhaps are not capable of full autonomy. This alone might encourage animal rights theorists to argue that animals should also be granted some rights, as fellow occupants of the continuum between no autonomy and full autonomy.

But the real target of the argument from marginal cases is not “normal” imperfect adults. Rather, it is children and adults with significant mental limitations. As addressed above, courts recognize limited rights for children despite their being far from capable of full, or even normal adult, autonomy. The same is true regarding adults with significant mental limitations.

Animals, especially intelligent animals such as chimpanzees, other great apes, and cetaceans, are smarter than most humans believed them to be just a generation ago. Several news stories about discoveries regarding animals’ previously unrecognized abilities are reported in media outlets every year. Some of the studies and reports have sought to compare animals’ abilities in some activities to the abilities of human children. For example, reports in recent years have compared some of chimpanzees’ abilities to the abilities of two-to-three-year-old human children.

Under the argument from marginal cases, animals possessing greater practical autonomy than humans with “marginal” autonomy, such as children and mentally incapable adults, should be granted at least the same limited rights granted to marginally capable humans. Since children and mentally incapable adults are granted the right not to be subjected to invasive or painful procedures without consent, for example, the argument from marginal cases holds that equally capable or more capable animals should have that right as well.

consciousness, sentience, and capacity to feel fear and pain, and concluding that “some animals are closer to the human end of that continuum than some human beings.”).

110 See supra notes 38 through 78 and accompanying text.
111 See infra notes 233 through 242 and accompanying text.
112 See, e.g., Amanda Gardner, Man’s Psychic Friend, Chicago Sun-Times, July 24, 2011, at 14 (describing a study indicating that dogs may have the ability to pick up and act upon behavioral cues from humans); Carl Zimmer, More to a Smile than Lips and Teeth, N.Y. Times, January 25, 2011, at D1 (discussing how chimpanzees have been observed using different types of smiles during various types of social interactions); Jonathan Leake & Georgia Warren, Smarter Than You Think, The Sunday Times (London), January 17, 2010, at 18 (outlining recent acknowledgements in advanced cognition and behavior among several types of animals).
114 See Wise, Drawing supra note 106, at 236 (“[A] normal human child possesses the practical autonomy sufficient for dignity-rights by age eight months . . . Any nonhuman
Challenging the argument that intelligent animals have greater practical abilities than some children and mentally incapable adults would be silly. Any casual observer would concur that a newborn infant child has much less ability to engage in nuanced communication than does a normal adult chimpanzee. The difference in abilities is even more pronounced with comatose humans. With a complete inability to communicate or to act, they have virtually no practical autonomy. If the ability to communicate or to act were viewed as the only basis for rights, most adult chimpanzees and many other animals would come out ahead of some humans.

Translating acceptance of the argument from marginal cases to a legal context would likely require assigning guardians ad litem to assert qualifying animals’ basic rights in courts. This would parallel the use of guardian ad litems for children and mentally incapable adults to protect basic rights in our legal system. As noted above, some leading

animal with practical autonomy is similar to this child in ways highly relevant to the possession of basic legal rights. As a matter of equality, [a chimpanzee] is certainly entitled to them.”); TOM REGAN, THE CASE FOR ANIMAL RIGHTS 151-155 (1st ed. 1983) (asserting that to deny animals membership into the moral community, where legal rights are protected, is to do so solely because they lack the requisite cognitive abilities to be moral agents, and pointing out that mentally incapable adults and children are accepted in the moral community even though they lack the prerequisites to possess moral duties).

Some chimpanzees are asserted to be able to communicate up to 130 words. Carey, Benedict, Washoe, a Chimp of Many Words, Dies at 42. THE NEW YORK TIMES, Nov. 1, 2007 (discussing the life of a chimpanzee who knew 130 signs by the time she died in 2001); see also Jeffrey Klugler, Inside the Minds of Animals, TIME, Aug. 5, 2010 (profiling a bonobo named “Kanzi” who knows around 384 words or “lexigrams,” which she uses to communicate to human handlers by pointing to a list of symbols).

See, e.g., Deborah Rook, Should Great Apes Have ‘Human Rights’? WEB JOURNAL OF CURRENT LEGAL ISSUES, Feb. 27, 2009, http://webjcli.ncl.ac.uk/2009/issue1/rook1.html (discussing an Austrian judge’s denial of a court-appointed guardian for a chimpanzee and calling the decision an “unfortunate decision which clearly rests on the fear of equating apes with humans.”); Marguerite Hogan, Standing for Nonhuman Animals: Developing A Guardianship Model from the Dissents in Sierra Club v. Morton, 95 CAL. L. REV. 513, 518 (2007) (advocating a shift in contemporary standing doctrine to empower non-profit organizations to serve as official guardians ad litem on behalf of nonhuman animals interests); Lauren Magnotti, Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing, 80 ST. JOHN'S L. REV. 455, 495 (2006) (“It is critical that courts allow people and organizations acting on behalf of an animal's best interest--as opposed to the property owner himself--to bring suit based on the injury to the animal.”).

Steven M. Wise, Hardly A Revolution-the Eligibility of Nonhuman Animals for Dignity-Rights in A Liberal Democracy, 22 VT. L. REV. 793, 878 (1998) (discussing how every state has statutory or common law guardianship procedures that allow a substitute decision-maker to exercise an incompetent’s power-rights in her own best interests). Under the doctrine of parens patriae (“Father of the Country”), the state assumes the responsibility for protecting the person and property of those such as children and incompetent adults who cannot protect their own interests. See Thompson, 487 U.S. at 825 n.23 (1988).
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proponents of analogies between rights for children and mentally incapable adults and rights for animals argue for starting the expansion of rights with a focus on especially intelligent animals, such as great apes. Immense creativity is not needed to imagine that activists with a particular passion for animal rights might be the first in line hoping to serve as guardians ad litem for these animals, providing opportunities to seek to persuade courts of what they perceive as the animals’ interests. After attaining basic legal rights for chimpanzees and other great apes, some proponents of the ideas at the core of the argument from marginal cases believe that gradually attaining rights for a broader range of animals – including at some point even farm animals that are presently quite important to our economic structure – might become more feasible.

B. Variations in the Argument from Marginal Cases

Proponents of the argument from marginal cases sometimes differ regarding the basis of their support for the theory and their conceptions of how the theory should be structured. For example, many animal rights theorists base their views on utilitarianism, and many others base their views on a competing deontological foundation.

Peter Singer, one of the world’s best-known living philosophers, is a utilitarian and a prominent proponent of the argument from marginal cases. In his seminal book Animal Liberation, Singer argues that creatures capable of suffering should all be given equal consideration when choices are being

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118 See supra notes 100 through 101 and accompanying text.

119 DANIEL DOMBROWSKI, BABIES AND BEASTS: THE ARGUMENT FROM MARGINAL CASES 55 (1997) (discussing the moral status of a farm animal, a domestic pet, or a ‘wild’ animal and saying “... all these animals deserve equal moral consideration of their interests, at least if marginal cases do; in that they have interests, they equally deserve not to be made to suffer or to be killed gratuitously”). Steven Wise, a leading advocate of initially seeking rights for particularly intelligent animals, has indicated that he might like to see rights eventually extended to a broader range of animals. See WISE, DRAWING, supra note 106, at 34 (“If I were Chief Justice of the Universe, I might make the simpler capacity to suffer, rather than practical autonomy, sufficient for personhood and dignity rights.”).

120 ERIN MCKENNA AND ANDREW LIGHT, ANIMAL PRAGMATISM: RETHINKING HUMAN-NONHUMAN RELATIONSHIPS 18 (2004) (referring to Peter Singer as the “philosophical father of the contemporary animal rights movement”); Marvin Olasky, Blue State Philosopher, WORLD MAGAZINE, Nov. 27, 2004, http://www.worldmag.com/articles/9987 (“The New York Times, explaining how his views trickle down through media and academia to the general populace, noted that “No other living philosopher has had this kind of influence.” The New England Journal of Medicine said he has had “more success in effecting changes in acceptable behavior” than any philosopher since Bertrand Russell. The New Yorker called him the “most influential” philosopher alive.”).
made that will create suffering: “The capacity for suffering and enjoyment is, however, not only necessary, but also sufficient for us to say that a being has interests — at an absolute minimum, an interest in not suffering.”

However, he believes that intelligent creatures deserve the greatest protection against killing, because they have the greatest self-awareness, and thus the loss of utility is the highest for them.

This perspective leads Singer to the argument from marginal cases. He illustrates with the example of a child born “with massive and irreparable brain damage.” Even “[w]ith the most intensive care possible, some severely retarded infants can never achieve the intelligence level of a dog.” The only thing that would support arguments for a “right to life” to a child of limited intelligence if the right is denied to a more intelligent animal, Singer asserts, is arbitrary “speciesism.” He also extends this argument to humans “in a state of advanced senility.” Singer seems to conclude that we should raise our consideration of animals somewhat and lower our consideration of mentally incapable humans somewhat. Daniel Dombrowski summarizes Singer’s preferred application of the argument from marginal cases as being that we should:

change our present attitudes to both mentally defective humans and nonhuman animals, so as to bring them together somewhere in between our present attitudes. This involves holding that both mentally defective humans and nonhuman animals have some kind of serious claim to life — whether we call it a “right” does not matter much — in virtue of which, although we ought not to take their lives except for very weighty reasons, they do not have as strict a right to life as do persons. In accordance with this view, we might hold, for instance, that it is wrong to kill either mentally defective humans or animals for food if an alternative diet is available, but not wrong to do so if the only alternative is starvation.

Tom Regan’s book The Case for Animal Rights is probably second only to Singer’s Animal Liberation in importance as a philosophical

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121 SINGER, supra note 53, at 8.
122 Id. at 17-20; DOMBROWSKI, supra note 119, at 16 (“The strong case against killing that Singer has in mind applies to those animals with well-developed mental facilities: apes, whales, dolphins, monkeys, dogs, cats, pigs, seals, and bears.”).
123 SINGER, supra note 53, at 18.
124 Id.
125 Id.
126 Id. at 19.
127 DOMBROWSKI, supra note 119, at 19 (citing Peter Singer, Animals and the Value of Life, in MATTERS OF LIFE AND DEATH 366-67 (Tom Regan ed., 2 ed. 1983)).
128 See REGAN, supra note 114.
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foundation for the animal rights movement. Although Regan seems to appreciate the role utilitarianism has played in improving sympathy for animals, he rejects utilitarianism as a basis for justice for animals. Instead, Regan focuses on a deontological argument for rights. To deontologists, “some choices cannot be justified by their effects . . . no matter how morally good their consequences, some choices are morally forbidden.” Regan argues that individuals, both human individuals and nonhuman animal individuals, have inherent value that is equal. Because of this equality, “Those who have a more pleasant or happier life do not . . . have greater inherent value than those whose lives are less pleasant or happy.” Because of their inherent value, all humans and nonhuman animals possess a “right to respectful treatment.” Regan concludes that our current model of animal agriculture is wrong, even when the animals are treated “‘humanely,’ since even in this case their lives are routinely brought to an untimely end because of human interests rather than on grounds of preference-respecting or paternalistic euthanasia.” He asserts that using animals in scientific research also fails the respectful treatment test, passionately arguing with italics that “the rights view abhors the harmful use of animals in research and calls for its total elimination.”

Philosopher Daniel Dombrowski, who supports many of Regan’s views, asserts that Regan wavers between a “strong” and a “weak” version of the argument from marginal cases in support of animal rights. The “weak” version of the argument from marginal cases is that “if marginal cases have rights, then animals have them.” The “strong” version of the argument from marginal cases is that “animals have rights because all – or almost all

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129 REGAN, supra note 114, at 235 (“Here I shall embark on offering an alternative interpretation of formal justice, one that is distinctly nonperfectionist and, though egalitarian, nonutilitarian”).
131 REGAN, supra note 114, at 235, 248.
132 Id. at 235-36.
133 Id. at 327.
134 Id. at 394.
135 Id. at 397 (italics in original).
136 DOMBROWSKI, supra note 119, at 26. (Regarding labels, Dombrowski notes that “In one important article where Regan restricts himself to the weak version, he goes out of his way to suggest that it might be more accurate to refer to ‘nonparadigmatic humans’ rather than to ‘marginal humans,’ in that the latter phrase, in a way, subtly suggests a willingness to see such beings as expendable, a willingness resisted by Regan except in the most marginal of marginal cases.” Id., at 26-27, citing Tom Regan, An Examination and Defense of One Argument Concerning Animal Rights, 22 INQUIRY 189-91 (1979).
137 DOMBROWSKI, supra note 119, at 26.
humans have them.”

Although any formulation of the argument from marginal cases is provocative, the strong version of the argument from marginal cases may be a bit more provocative than the weak version. This is because the strong version may be seen as implying that not even all humans may be morally entitled to rights. According to Dombrowski, Regan “at several places turns to the capacity to experience pain rather than to the capacity for rationality or moral agency” to support rights for marginal cases. If this is the basis for rights, it may be that those who do not experience pain – for example, humans or animals in a permanent coma – are not entitled to rights. Dombrowski asserts that under Regan’s view, a person with no cognitive capacity may not even truly be a human being.

C. The Disconnect Between Broadly Shared Societal Values and the Argument from Marginal Cases

Critics of the “argument from marginal cases” are blessed by the phrase’s unsettling tone. Significantly, as noted above, many proponents of versions of the argument do not use “marginal cases” language. However, according to one philosopher, it is “the most common label” for the theory. Dissenting from an argument that, as most frequently described, designates some humans as “marginal,” is not a difficult sell with the public, including the educated public. Academic philosophers might find the position that children and mentally incapable adults are on the marginal edges of humanity, and perhaps comparable with animals, to be an interesting proposition for discussion. Fair enough. But most people, reacting from a framework of societal mores and values rather than from philosophical theory, would surely find the concept quite unattractive. It is

138 _Id._
141 DOMBROWSKI, _supra_ note 119, at 1. Not surprisingly, Dombrowski notes that the label was first used by one of the argument’s detractors. _Id._ Dombrowski also notes that the argument “goes by several names.” _Id._
142 Of course, attaching the label “argument from marginal cases” to a theorist’s position does not mean that the theorist wishes to give children less legal protection. Probably most animal rights theorists attracted to some form of the argument from marginal cases also love children, and love that children have rights. Their comparisons between children and animals may focus on developing rights for intelligent animals rather than reducing them for children. _But see supra_ notes 123 through 127 (discussing the view that Peter Singer may want to bring mentally limited persons’ status somewhat lower and animals’ status somewhat higher).
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the sort of philosophical theory a lay person might point to in seeking to illustrate that academic philosophy is sometimes grossly out-of-touch with the “real world.”

Strongly diverging from the common-sense perspective of an overwhelming percentage of society does not necessarily condemn a philosophical argument. Societal mores and values may be irrational and arbitrary, as animal rights theorists who make analogies to the abolition of slavery correctly point out.143 However, in most situations, presenting a philosophical argument that dramatically contradicts societal mores and values is not a good marker for success. This is particularly problematic for the argument from marginal cases if our general human bias in favor of other humans, including (and perhaps especially) children or helpless adults, over animals is part of our nature, rather than being a conscious and irrational decision we make.144 The prominent jurist and legal scholar Richard Posner probably captured the typical reaction of most members of society when he wrote that the implications of possibly granting greater legal protection to the life of a healthy pig than to a severely retarded human being would be “unpalatable and even bizarre.”145 He adds:

[T]he superior claim of the human infant than of the dog on our consideration is a moral intuition deeper than any reason that could be given for it and impervious to any reason that could be given against it. Membership in the human species is not a morally irrelevant fact, as the race and gender of human beings have come to seem. If the moral irrelevance of humanity is what philosophy teaches, so that we have to choose between philosophy and the intuition that says that membership in the human species is morally relevant, philosophy will have to go.146

143 See, e.g., HAROLD D. GUITHER, ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT 22 (1998) (“ . . . animal activists point out that at one time slavery, limited rights for women, and cruelty to animals were accepted as part of the values and culture of the society. Today these values and practices have changed”); John M. Kistler, People promoting and people opposing animal rights: in their own words 216 (2002) (expressing admiration for animal rights activists throughout history who were able to ignore cultural norms in order to advance their cause, and citing slavery as an example of a past societal norm that eventually changed); NORM PHELPS, THE LONGEST STRUGGLE: ANIMAL ADVOCACY FROM PYTHAGORAS TO PETA 280, 286 (2007) (discussing animal rights in the context of slavery, saying “[A]nimal slavery has a grip on our society that is entirely like the stranglehold that African slavery had on the antebellum South . . . ” and pointing out how societal norms shape acceptance, saying “animal slavery and slaughter are so woven into the fabric of our society that it was naïve of us to think it could be undone in a single generation”).

144 See infra notes 224 through 232 and accompanying text.

145 Posner, supra note 54, at 60.

146 Id. at 65.
Posner’s use of our reaction to an infant to highlight his sense that deep human intuition trumps academic philosophy is not surprising. Situations involving children present some of the most difficult challenges to the argument from marginal cases.

III. Special Problems with Children for the Argument From Marginal Cases

Part II explained the argument from marginal cases as applied to children, some variations on the argument, and implications of dissonance between the argument and societal mores and values. This Part focuses on several difficulties in seeking to assert the argument from marginal cases specifically in regards to children. The Part begins with one of the most obvious distinctions between children and animals regarding the argument: unlike animals, although children lack adult autonomy while children, they will eventually develop it, and society has a strong interest in nurturing and protecting them to preserve its future. The Part considers and rejects concerns that considering potential for autonomy in granting rights creates a slippery slope that might require assigning rights to potential life such as sperm. The Part next addresses difficulties in comparing children’s cognitive abilities and the cognitive abilities of animals, focusing on research suggesting that the similarities between human minds and animal minds are often overstated. The Part also asserts the centrality of humanity rather than autonomy in assignments of legal rights. To support this assertion, the Part discusses the common practice of stronger protection that could be described as rights being assigned to less autonomous children than to more autonomous children, the unfairly maligned intrinsic dignity argument for focusing rights on humanity, and the unique connections between adult participants in the social contract and human children. The Part also briefly critiques efforts to apply the argument from moral cases to mentally incapable adults in addition to applying it to children.

A. Children’s Potential for Moral Autonomy

The most obvious weakness in comparing children and animals in the argument from marginal cases is that, unlike animals, most children will eventually develop the same level of moral autonomy as normal human adult rights holders. As addressed above, the contractualist perspective that provides a foundation for Western society views rights as connected with
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Although children are not fully capable of moral responsibility, they will grow into the adults who participate in the social contract. Animals will never attain the level of moral agency of the adult humans participating in the social contract.

The importance of this distinction is manifest. The concept that “children are our future” is so obvious that it has become a cliché. Rights are appropriate to protect children’s interests in part because children are vital to the ongoing survival of the social contract. According to one study, abuse and neglect increases the likelihood of adult criminal behavior by 28 percent and violent crime by 30 percent. The debate over whether nature or nurture is the strongest factor in children’s development continues, but few if any would argue that nurture does not count for anything. Given that children represent continued societal existence, it is hardly surprising that society assigns them formal legal rights while at the same time strongly emphasizing parental and societal responsibility, both moral and legal, for the welfare of children.

1. Slippery Slope Concerns Regarding Children’s Potential

At first blush, distinguishing between children and animals regarding rights, because children represent the future of the social contract and animals do not, may appear not only persuasive, but unassailable. However, some challenges exist. One criticism is that assigning personhood based on mere potential for practical autonomy may constitute a slippery slope. For example, if an infant should get rights over a chimpanzee because of the infant’s potential for autonomy, should a human fetus also get rights?

If one is willing to assert that a human fetus should be considered a person, what about human embryos? Should presumably unthinking, unfeeling embryos also be given rights that are denied to chimpanzees? Indeed, what about human sperm? It has potential to become a person (or at least part of a person), and an argument for sperm rights might be

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147 See supra notes 48 through 52 and accompanying text.
148 See supra notes 32 through 33 and accompanying text.
150 See DOMBROWSKI, supra note 119, at 21. Rather than arguing that infants should not have rights, Dombrowski seems to emphasize the slippery slope argument to question the idea that intelligence should be the basis for rights. Id.
151 Id.
asserted if the potentialist argument were taken to its extreme.

Another challenge to the potentialist argument for children’s personhood is that it is, in the words of Evelyn Pluhar, “plainly circular.” Pluhar argues that it “assumes the very point at issue” by focusing on the connection between children and human adults to establish children’s entitlement to rights. She asserts that speciesism favoring an individual cannot be justified merely by reference to the individual’s membership in the favored species:

According to speciesism, membership in a species where personhood is the norm is morally relevant. We cannot establish this conclusion by asserting that nonpersons belonging to species where personhood is the norm are thereby more morally significant than nonpersons who are in the normal range for their species.

Pluhar also argues that the burden of proof rests with speciesists to justify that their discrimination is rational, rather than the discrimination being an example, along with racial discrimination and gender discrimination, of treating morally similar persons in morally dissimilar ways.

These criticisms of emphasizing children’s potential to become full adult participants in the social contract, while worthy of consideration, are unpersuasive. First, noting that children are of the same species as human adults and that they will generally grow into moral agents as adults are not pointlessly circular arguments for assigning personhood and rights to children. Part of the problem with the circularity assertion is its effort to place the burden of proof on speciesists to establish that society’s current rights paradigm focusing on humans should not fundamentally change. To the contrary, those seeking to change the status quo have the burden of proving that the change is justified. This probably should be so regarding moral rights, and it is certainly true regarding legal rights.

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152 Evelyn Pluhar, Speciesism: A Form of Bigotry or a Justified View? BETWEEN THE SPECIES 83, 89 (1988), quoted in DOMBROWSKI, supra note 119, at 149. Pluhar is specifically arguing against the idea that we might have “species potential” as humans that elevates our status, even if individual members of our species – such as young children or the mentally incapable, do not have autonomy. Id.

153 Pluhar, supra note 152, at 89.

154 Id. (underlining in original).


156 See generally Charles ALAN WRIGHT, KENNETH W. GRAHAM, JR., VICTOR JAMES GOLD, MICHAEL H. GRAHAM, FED. PRAC. & PROC. EVID. § 5122 Policy Background; Burdens of Proof (2d ed.) (“[I]n a civil suit, the burden is on the plaintiff, the one who wants to change the status quo by taking something from the defendant, to prove his
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Every major theory of rights\(^\text{157}\) has been developed by humans and originally in reference to humans, and those now trying to extend rights to animals bear the burden of establishing that this shift away from humanity makes sense, rather than those arguing that humanity should continue to have moral relevance having to prove it or drop their argument. Supporters of the argument from marginal cases frequently compare animals’ intelligence to humans’ intelligence, asserting that some intelligent animals are more similar to humans than we previously understood.\(^\text{158}\) This approach is understandable, because humans are the status quo baseline for rights. At least under law, the only creatures regarding whom rights have ever had any significance are humans. However, one cannot have it both ways by arguing that while intelligent animals’ similarity to humans may be used to support extending them rights, using human children’s stronger similarity to morally responsible human adults (i.e., the fact that they of the same species and will become those human adults over time) to support assigning rights to children is circular.

Humanity has historically been central to rights (even regarding rights assigned to some things, such as corporations, as a proxy for human interests),\(^\text{159}\) and those seeking to discard the moral relevance of humanity need to establish why it no longer matters. Instead, many of the animal rights arguments seem to focus on humanity and its attributes, seeking to establish that intelligent animals are really quite like humans in many ways.\(^\text{160}\)

Possible concerns that focusing on potential for moral autonomy to support rights lacks a defensible standard and creates a slippery slope toward personhood for fetuses, embryos or sperm are also unpersuasive. Science, philosophy, and religion cannot provide a clear answer to the question of when something transforms from a potential life to a life.\(^\text{161}\) However, the inherent vagueness in the starting point of a human life has not stopped courts from addressing legal protections related to sources of at least potential life. 

*Roe v. Wade* is, of course, the most prominent legal decision of the past 100 years addressing the issue of legal personhood. The Court recognized entitlement to it in every way by a preponderance of the evidence,” citing Keith Fulton & Sons v. New England Teamsters, 762 F.2d 1124, 1133 (1st Cir. 1984).

\(^{157}\) As noted above, no consensus exists regarding the nature of rights, and several conceptions of rights have been articulated and advocated. See *supra* notes 46 through 48 and accompanying text.

\(^{158}\) See infra notes 172 through 201 and accompanying text.

\(^{159}\) See Cupp, *supra* note 102, at 33, 53-55.

\(^{160}\) See infra notes 174 through 176 and accompanying text.

that if a fetus is a person under the Fourteenth Amendment, the legal case for abortion “collapses.”\footnote{Id. at 156.} In \textit{Roe} the Court was careful to acknowledge that it could not say when life begins: “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”\footnote{Id. at 159.} However, the Court could not allow the philosophical conundrum of this eternal question to paralyze its analysis. Immensely important pragmatic interests were at stake: a woman’s interest in autonomy regarding her body, and a state’s interest in protecting the life or potential life of a fetus (as well as the health of pregnant women).\footnote{“[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.” Id. at 154.}

The Court ultimately concluded that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”\footnote{Id. at 158.} But the Court affirmed that government has an “important and legitimate interest in protecting the potentiality of human life.”\footnote{Id. at 162.} The Court also concluded that government’s interest in the potentiality of life increased as a pregnancy comes closer to term, becoming a compelling interest when a fetus reaches the third trimester, which is roughly the point of viability.\footnote{Id.}

Courts have also taken up the challenge of addressing the status of embryos relative to personhood when the issue has pragmatic rather than merely philosophical consequences. In \textit{Davis v. Davis}, in which a divorcing couple was fighting over whether to destroy their preserved embryos, the court held than an embryo holds a position between property and personhood because of its potential to become a person.\footnote{Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).}

Perhaps an academic philosophical theory may be frozen into impasse by the possibility of facing difficult slippery slope issues, but courts addressing pragmatic and consequential issues in cases like \textit{Roe} and \textit{Davis} do not have that luxury. They have demonstrated that they are capable of making decisions regarding the boundaries and significance of personhood and potential personhood despite the theoretical difficulties of line-drawing. Further, the lines they draw are often relatively clear, at least regarding whether special significance should be attached to potential human personhood. \textit{Roe}, \textit{Davis}, and other courts have recognized: 1) That, at least in some contexts, some subjects of litigation, such as pre-viable human fetuses and human embryos, are not considered legal persons (while
recognizing ongoing moral, religious, and philosophical debate on the issue); and 2) Potential human personhood deserves respect and some degree of protection because of its potential to become a human person. Thus, courts have some experience with the problem of the potential human person, and they have found the slipperiness of this slope to be manageable without any inkling of a desire to abandon the rights primacy of children over animals.

Further, although differing philosophical and religious perspectives might lead to disagreements regarding whether a young fetus should be considered a person, and few would argue that a sperm or an unfertilized ovum should be considered a person, they all have something that even the most intelligent nonhuman animal will never have: the potential to become human. In this regard they are closer to rights-bearing humans than are animals, regardless of their complete lack of autonomy in their present state. If potentiality makes the personhood argument for human fetuses stronger in some respects than the personhood argument for intelligent animals, postbirth children have an even stronger rights claim vis-à-vis animals.

Although children’s potential to become participants in the social contract is a significant point in challenging the argument from marginal cases as applied to children, potentiality is probably not the strongest reason for granting rights to children but not to intelligent animals. As addressed in more depth below, the strongest reasons for granting rights to children relate to their humanity, and comparing humans to humans will always reveal closer connections than comparing animals to humans. Children’s present humanity matters even more than their promise of future practical autonomy.

B. Challenges in Comparing Children’s Practical Autonomy and Intelligent Animals’ Practical Autonomy

The argument from marginal cases for animal rights relies upon at least some animals having practical autonomy greater than or equal to the practical autonomy of some humans who are granted rights. This assumes first that autonomy is the key to rights, an idea that is questionable at best. But it also assumes that measuring humans’ autonomy versus animals’ autonomy is a process that may be readily undertaken. Even this second assumption may be more difficult to establish than it may at surface

169 Roe, 410 U.S. at 159.
170 Id. at 150, 154; Davis, 842 S.W.2d at 596, 598, 601-02.
171 See infra notes 202 through 232 and accompanying text.
172 See supra notes 106 through 119 and accompanying text.
173 See infra notes 202 through 232 and accompanying text.
Arguing that intelligent animals’ practical autonomy is equal to or greater than some humans is easiest when comparing the animals to humans with especially severe functional impairments, such as being in a coma. If an animal has any degree of autonomy at all, it would seemingly surpass the autonomy of a comatose human. However, some animal rights activists seek to push the point much further by analogizing some animal’s mental capabilities to the capabilities of young children. These comparisons sometimes reference the similarity between human DNA and the DNA of our closest animal relatives, chimpanzees, and they sometimes reference supposed similarities between the intelligence of some animals (again, often chimpanzees) and the intelligence of young children.

Regarding genetics, it has become popular to note that most of a human’s DNA is the same as a chimpanzee’s DNA. Although estimates

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174 See supra notes 232 through 242 and accompanying text.
175 PETER SINGER, IN DEFENSE OF ANIMALS: THE SECOND WAVE 46 (2006) (discussing personhood-relevant properties and comparing children’s competency in language and introspective awareness to great apes and dolphins); TOM REGAN, ANIMAL RIGHTS, HUMAN WRONGS: AN INTRODUCTION TO MORAL PHILOSOPHY 35, 40 (2003) (comparing the mental awareness of children and animals); WISE, RATTLING, supra note 106, at 145 (referring to the comparison of cognitive capabilities of children, chimpanzees and bonobos).
176 SUNSTEIN, supra note 103, at 194 (“What if [great apes] do not just share so much of their DNA with us but also their thoughts, feelings, memories, and insights?”); WISE, RATTLING, supra note 106, at xii (“Chimpanzees along with bonobos are our closest living relatives, differing from us in structure of DNA by only just over 1 percent”); Stefan Lofgrin, Chimps, Humans 96% Percent the Same, Gene Study Finds, NATIONAL GEOGRAPHIC NEWS, Aug. 31, 2005, http://news.nationalgeographic.com/news/2005/08/0831_050831_chimp Genes.html (quoting primatologist Frans de Waal as saying “‘We are apes in every way, from our long arms and tailless bodies to our habits and temperament.’”).
177 See WISE, RATTLING, supra note 106, at 144-154 (discussing children’s development of consciousness in comparison to chimpanzee’s development of consciousness); see also Jonathan Leake, Scientists say Dolphins Should be Treated as “Non-Human Persons,” THE SUNDAY TIMES, Jan. 3, 2010, http://www.timesonline.co.uk/tol/news/science/article6973994.ece (discussing studies that have found chimp intelligence levels on par with 3-year-old children and proposing that dolphins may in fact be smarter than both); Patty Neighmond, Toddlers Outsmart Chimps on Some Tasks, Not All, NPR, Sept. 7, 2007, http://www.npr.org/templates/story/story.php?storyId=14224459 (discussing a Max Planck Institute study that compared the intelligence of human toddler and chimpanzees and found children did not perform any better than apes on tests that measured “concrete knowledge,” but human children performed better on “social intelligence” tests); Mark Macaskill, Young Chimps Make Chumps of Children, THE SUNDAY TIMES, Oct. 3, 2004 http://www.timesonline.co.uk/tol/news/uk/article489717.ece (discussing a study that showed chimpanzees used more logic to solve a puzzle than did human children, ages 2 to 6, who were less successful in analyzing and solving the problem).
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vary, an approximate 98 percent overlap has been asserted by several sources.\textsuperscript{178} Noting this seemingly overwhelming similarity between human DNA and chimpanzee DNA may serve as a jump-off point for arguing that some intelligent animals such as chimpanzees are much more like us than we understood in the past, and thus we should include them with humans in the echelon of primates receiving rights.

The Great Ape Project is an often-discussed international undertaking initiated following publication of a book by the same name edited by philosophers Paola Cavelieri and Peter Singer.\textsuperscript{179} The Project’s goal is extension of equal rights “to all great primates: human beings, chimpanzees, bonobos, gorillas and orangutans.”\textsuperscript{180} The Project’s mission statement provides a good example of efforts to highlight the genetic similarity between humans and chimpanzees:

From the biological point of view, between two human beings there can be a difference of 0.5\% in the DNA. Between a man and a chimpanzee this difference is only 1.23\%. This similarity is proved, for instance, with the fact that chimpanzees can donate blood to humans, and vice-versa. Today it’s also known that chimpanzees, bonobos and men had an ancestor in common two million years ago.\textsuperscript{181}


Although chimpanzees and other great apes are indeed more capable than humans once understood, at present the similarity between human thinking and animal thinking seems more likely to be overstated than to be understated, at least in the animal rights debate. For example, emphasizing that chimpanzee DNA is 98 or 99 percent the same as human DNA probably creates for individuals unfamiliar with DNA science a much stronger sense of sameness than is justified.

In reality, quite small percentage changes in DNA often lead to quite significant differences. Approximately three billion letters make up the human genome. Assuming 99 percent similarity in DNA, we have still undergone approximately 15 million changes in human genome letters over the six million years that have passed since the human and chimpanzee lineages diverged. Even though there is only one or two percent difference in our DNA, a human brain differs considerably from a chimpanzee brain in size, organization, and complexity.

In recent years some science writers have increasingly questioned the trend toward overemphasizing the similarities between chimpanzees and humans. For example, in the book *What it Means to be 98 Percent Chimpanzee: Apes, People, and Their Genes*, biological anthropologist John Marks asserted in 2002 that the DNA similarity between humans and chimpanzees is often misunderstood, and that chimpanzees and humans are quite different despite their genetic overlap. In 2009, science writer Jeremy Taylor published a book entitled *Not a Chimp: The Hunt to Find the Genes That Make Us Human*, in which he argued that the similarities between chimpanzees and humans are “often grossly exaggerated.”

In 2010 science writer Jon Cohen added his book *Almost Chimpanzee: Searching for What Makes Us Human, in Rainforests, Labs, Sanctuaries, and Zoos*. Cohen’s title seems to be a play on the title of an important

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182 Jonathan Marks, *What it Means to be 98% Chimpanzee: Apes, People, and Their Genes* 40 (2002) (“We find ourselves to be genetically very similar to chimpanzees and yet diagnosably different). Marks notes that when scientists compare human DNA to chimpanzee DNA they often study DNA regions that have either “cryptic biochemical functions or no known function at all,” and that often “[t]he genes we study are not really the genes we are interested in . . . leading to little knowledge on how a body is put together from genetic instructions.” *Id.* at 40-41.


184 *Id.*

185 See Pollard, *supra* note 183, at 45.

186 Marks, *supra* note 182.


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book published in 1925 by psychologist Robert Yerkes, *Almost Human*.\(^{189}\) As described by Cohen, *Almost Human* “teased open many minds” with its argument “that humans and chimpanzees had so many similarities that could be learned if we studied them more carefully.”\(^{196}\) Interestingly, the landmark *Scopes v. The State of Tennessee* trial, in which a school teacher contested being fired for teaching the theory of evolution, took place the same year that *Almost Human* was published.\(^{191}\) According to Cohen, “Yerkes was doing his bit to combat the creationists of his day, and the mounting evidence for a chimp’s humanlike appearance, behavior, and biology made a strong case for the Darwinians, one that continues to resonate.”\(^{192}\)

Cohen asserts that later in the 20\(^{th}\) century Jane Goodall further promoted emphasizing similarities between chimpanzees and humans “for an entirely separate agenda”:\(^{193}\)

As a leading advocate for protecting the habits of wild chimps and a foe of researchers who housed chimps in small cages and conducted invasive biomedical experimentation, she believed that a critical mass of humans would most likely come to her cause if they imagined their own hands reaching for the curl of a chimpanzee’s finger.\(^{193}\)

While praising both Yerkes’ work and Goodall’s work as important at the time it was undertaken, Cohen wrote that “I think the need to emphasize our similarities has abated.”\(^{195}\) He explained:

I am not arguing that we should treat chimpanzees with any less respect, that the case for evolution is any less compelling, or that we should conduct studies of humans to better understand chimpanzees. “Almost human” and “almost chimpanzee” represent two sides of the same coin. But people have many misunderstandings about our relationship to chimpanzees, and I am convinced that we have focused too much attention on the heads rather than the tails.\(^{196}\)

One example of the scientific backlash against overselling similarities between humans and animal minds is provided in an influential 2008 article

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\(^{189}\) ROBERT YERKES, *ALMOST HUMAN* (1925).

\(^{190}\) See COHEN supra note 188, at 3-4.

\(^{191}\) *Scopes v. State*, 152 Tenn. 424, 278 S.W. 57 (1925); see COHEN supra note 188, at 4.

\(^{192}\) See COHEN supra note 188, at 4.

\(^{193}\) *Id.*

\(^{194}\) *Id.*

\(^{195}\) *Id.*

\(^{196}\) *Id.* at 5.
published in *Behavioral and Brain Sciences* by UCLA cognitive psychologists Derek Penn and Keith Holyoak, and University of Louisiana biologist Daniel Povinelli, who serves as Project Director for the National Chimpanzee Observatory Working Group. The frequently-cited article concludes that “the profound biological continuity between human and nonhuman animals masks an equally profound discontinuity between human and nonhuman minds.”  

Covering “a wide range of domains, species, and experimental protocols,” the article found a consistent pattern:

Although there is a profound similarity between human and nonhuman animals’ abilities to learn about and act on the perceptual relations between events, properties and objects in the world, only humans appear capable of reinterpreting the higher-order relation between these perceptual relations in a structurally systematic and inferentially productive fashion. In particular, only humans form general categories based on structural rather than perceptual criteria, find analogies between perceptually disparate relations, and draw inferences based on the hierarchical or logical relation between relations, cognize the abstract functional role played by constituents in a relation as distinct from the constituents’ perceptual characteristics, or postulate relations involving unobservable causes such as mental states and hypothetical physical forces. There is not simply a consistent absence of evidence for any of these higher-order relational operations in nonhuman animals; there is compelling evidence of an absence. 

For example, both humans and intelligent animals can recognize similarities between objects. However, only humans can also recognize similarities between two different ideas, mental states, grammatical constructions or causal-logical relations. The authors argue that these distinctions result in part from “the difference in degree to which human and nonhuman cognitive architectures are able to approximate the higher-order, systematic, relational capacities of a physical symbol system.”

Noting that we have a significantly different cognitive architecture from animals highlights that the differences between how humans think and how animals think cannot be neatly set forth on a continuum, with low-functioning humans at or below the level of intelligent animals. The

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198 *Id.* at 110.
199 *Id.* at 111.
200 *Id.*
201 *Id.*
distinctiveness of human reasoning seems rooted not simply in the degree of our intelligence, but also in the humanness of our intelligence.

C. Children and the Humanity of Rights

Children are humans before they demonstrate any level of practical autonomy. Perhaps some academic philosophers might find meaning in questioning this thesis, but it is a given in our courts and in our societal values. The challenges to using children in the argument from marginal cases to seek rights for animals described above should by themselves dissuade courts from accepting the animal rights argument on this basis. However, as introduced above, children’s humanity, rather than their intelligence or their potential, is probably as a practical matter the most insurmountable obstacle to equating their legal rights status with animals’ legal rights status.

1. Stronger Legal Protection is Given to Less Autonomous Children, Demonstrating the Centrality of Humanity to Legal Rights

Perhaps ironically in light of the argument from marginal cases, children are given stronger legal protection that could be described as rights in some contexts when they have less practical autonomy than when they have more practical autonomy – the opposite of what would be the case if practical autonomy were the sole basis of legal rights.

For example, courts and

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202 See, e.g., People v. Guthrie, 334 N.W.2d 616 (Mich. 1983) (“It is no longer impossible to prove the personhood of the viable unborn and, indeed, as this Court has twice recognized-once in the context of a criminal statute and once in the context of a civil statute-the matter is virtually indisputable”); DiDonato v. Wortman, 358 S.E.2d 489, 491-92 (N.C. 1987) (“We conclude that although the face of the wrongful death statute does not conclusively answer the question before us, case law concerning recovery for fetal injuries and the amending legislation quoted above both point toward acknowledging fetal personhood”); Hudak v. Georgy, 535 Pa. 152, 158, 634 A.2d 600, 603 (1993) (“... today we are reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person”).

203 See supra notes 65 through 67 and accompanying text.

204 This does not mean that less autonomous children have greater rights in every context. For example, a less autonomous ten-year-old child does not have the right to choose to marry under any circumstances, whereas a more autonomous 17-year-old child may have a right to choose to marry in some jurisdictions. 1 Leg. Rts. Child. Rev. 2D § 14:4. See U.S. Department of Health and Human Services, The Legal Status of Adolescents 1980, 43–47 (1981). The age at which marriage can be contracted without parental consent is 18 in all states except Mississippi, Nebraska, and Wyoming. In those states, the minimum age requirements for marriage without parental consent are 21, 19, and 19, respectively. Miss Code Ann § 93-1-5 (1972, Supp 1993); Neb Rev Stat § 42-102 (1988);
legislatures regularly apply graduated consent presumptions to children based on their age and/or their intelligence and experience, with younger, less intelligent, and less knowledgeable children being found to have less capacity to consent than older, more intelligent, and more knowledgeable children.\textsuperscript{205}

This approach is applied broadly in criminal law,\textsuperscript{206} torts law,\textsuperscript{207} and contracts law.\textsuperscript{208} In torts law, children are held accountable for consent variably based on the type of invasion and the level of the child’s development.\textsuperscript{209} “Capacity exists when the minor has the ability of the average person to understand the risks and benefits.”\textsuperscript{210} Thus, although a 17-year-old child might be found capable of consenting to a minor medical procedure such as a smallpox vaccination, a significantly younger child probably would not be held accountable for consenting to any sort of medical procedure.\textsuperscript{211} Therefore, courts would allow a less mentally capable, and therefore more vulnerable, younger child greater ability to seek torts redress than an older child or an adult with greater practical autonomy.

In criminal law, statutory rape and child molestation laws provide analogous illustrations. Regarding statutory rape, state laws often utilize

\begin{itemize}
  \item Wyo Stat § 20-1-102 (1987). The reason for the greater freedom for the older child is doubtless that the younger child needs greater protection from irresponsible decisions.
  \item See, e.g., DeLuca v. Bowden, 42 Ohio St. 2d 392, 395, 329 N.E.2d 109, 111 (1975) (Finding that a child under the age of seven could not be held legally responsible for his intentional or negligent conduct, saying “[o]ur laws and our moral concepts assume actors capable of legal and moral choices, of which a young child is incapable.”); Matter of Andrew M., 91 Misc. 2d 813, 814, 398 N.Y.S.2d 824, 825 (N.Y. Fam. Ct. 1977) (finding that an 8-year-old should not be adjudicated in the juvenile court system because “it was not designed for his level of maturity and development” even though he met the technical requirements of the juvenile statute as “a person over seven and less than sixteen years of age”). This court applied the Common Law defense of lack of capacity due to immaturity, citing doubts about the child’s capability to understand the concepts of criminal liability. \textit{Id.}
  \item See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 1.7(a) (2nd ed. 1986) (“[A]t common law and today generally by statute children under a certain age are deemed completely incapable of crime.”).
  \item See Dan B. Dobbs, The Law of Torts § 98 (2000) (“It is usually said that minors as a class lack legal capacity.”).
  \item People younger than the age of majority are classified as “infants” under the principles of contract law. Joseph M. Perillo, Calamari & Perillo on Contracts § 8.1 (6th ed. 2009). An infant is believed to lack the same capacity as an adult to enter into contracts; however, under modern contracts principles, a contract entered into by an infant is generally considered to be voidable, rather than void. \textit{Id.}
  \item W. Page Keeton, Dan B. Dobbs, Robert F. Keeton & David G. Owen, Prosser & Keeton on Torts 115 (5th ed. 1984).
  \item Id.
  \item See Victor E. Schwartz, Kathryn Kelly & David F. Partlett, Prosser, Wade & Schwartz’s Torts: Cases and Materials 100 (12th ed. 2010).
\end{itemize}
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different presumptions of consent based on the age of the child, with younger children being more strongly presumed not capable of consent.\textsuperscript{212} Regarding child molestation, state laws often impose longer prison sentences for criminals who molest younger children.\textsuperscript{213} For example, in Arizona, where the age of consent is 18, prison sentences for sexual crimes against minors are dependant on the age of the victim: 13 years to life if the victim is under 12, 13 to 27 years if the victim is aged 12 to 14, and 1 to 2.5 years if the victim is between 15 and 17.\textsuperscript{214} Presumably the greater protection for younger statutory rape victims and younger molestation victims stems from especially powerful societal revulsion at the violation of younger victims. This seemingly reflects societal appreciation of children having less autonomy, and thus greater vulnerability, at younger ages. The youngest, most vulnerable children merit the strongest legal standing for protection, precisely because they lack the ability to protect themselves as autonomous humans.\textsuperscript{215} Academic philosophy aside, this dynamic demonstrates that in the legal system rights are not based primarily on practical autonomy. Rather, they are based on protecting humanity and its interests, and the more vulnerable the humanity, the greater the protection afforded.\textsuperscript{216} Certainly a “children are our future” impulse, i.e., recognition that children are society’s future practical autonomy-bearing stakeholders, may play into providing especially strong legal protection of their interests.\textsuperscript{217} However, that rationale is rarely expressly articulated by courts or legislatures. Instead, the protection of

\textsuperscript{212} Statutory rape laws prohibit engaging in sexual intercourse with a person under a certain age, because that person “is presumed incapable of giving informed and valid consent to sexual activity[.]” CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 9 (2004). Therefore, a criminal defendant in a statutory rape case cannot use “consensuality” as a valid defense. \textit{Id.} Between 1885 and 1999, many U.S. states raised the age of majority from 10 to 16. \textit{Id.} at 23.

\textsuperscript{213} See \textit{e.g.}, State v. Quigg, 72 Wash. App. 828, 841-42 (Wash. Ct. App. 1994) (holding that aggravating sentences that justified an exceptional sentence were supported by record where a sexual molestation victim’s special vulnerability due to age was found to be a clear factor.).


\textsuperscript{215} Philosopher Tom Regan describes human infants, as well as other humans with significant mental incapacity, as “moral patients.” REGAN, supra note 114, at 153.

\textsuperscript{216} One of the more common objections to this argument is that rights are in some other contexts extended to nonhumans, such as corporations. See PATRICIA H. WARHANE, PERSONS, RIGHTS, AND CORPORATIONS 56–57 (1985); Michael J. Phillips, Corporate Moral Personhood and Three Conceptions of the Corporation, 2 BUS. ETHICS Q. 435, 450–51 (1992). However, corporate rights are merely a convenient proxy for the interests of the human owners of corporations. For a detailed analysis of this point, see Cupp, supra note 102, at 53-55. \textit{See also} supra note 1 and accompanying text.

\textsuperscript{217} \textit{See supra} notes 32 through 33 and accompanying text.
vulnerable humans seems assumed to provide sufficient justification in itself for the heightened legal protection of less autonomous children.

2. Are Children’s Rights Grounded in Intrinsic Human Dignity?

Arguments are often made that human children deserve rights because of something like “intrinsic dignity.” The concept of intrinsic human dignity is often incorporated into judicial decisions addressing the basis for fundamental rights. For example, in dissenting from a decision denying a writ of certiorari to the United States Supreme Court, Justice William Brennan wrote in *Whisenhunt v. Spradlin* that the Constitution’s right of due process “reflects a sense of basic fairness as well as concern for the intrinsic dignity of human beings.”

Philosopher Peter Singer will have none of this, at least if the intrinsic dignity is limited to humans. Singer asserts that relying on intrinsic dignity to restrict rights to humans is irrational. This is because of difficulties in providing an objective basis for evaluating an assertion that humans have unique intrinsic dignity. Asserting that humans alone have a special kind of inherent dignity justifying rights may seem a bit akin to a parent responding to a child asking "why?" about something with the dismissive phrase "because I said so."

As explained by Daniel Dombrowski, “To say that all and only humans have ‘intrinsic dignity’ will not help much, for this phrase in turn would have to be defined in terms of some other morally relevant capacities or characteristics that all and only humans have.” However, although animals should be treated with dignity and respect too, the argument for uniquely human intrinsic dignity may deserve more credit. As a species,

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218 See, e.g., *Ethical Principles in the Care of Impaired Infants 2:7*, in *MEDICAL ETHICS: POLICIES, PROTOCOLS, GUIDELINES & PROGRAMS* (Aspen, 2006) (“Each infant born possesses an intrinsic dignity and worth that entitles the infant [within constraints of available resources] to all medical and special care that is reasonably thought to be conducive to the infant's well-being”); Evelyn Keyes, *Judicial Strategy and Legal Reason*, 44 IND. L. REV. 357, 370-71 (2011) (“If morality is understood as respect for the intrinsic dignity and worth of every human being, then all human beings have not only intrinsic moral worth but also moral interests, i.e., the intrinsic right to be treated with respect, both substantively and procedurally, regarding matters that affect their lives.”).

219 See Naomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187 (2011) (“In constitutional law decisions, particularly in the United States, intrinsic dignity is reflected in decisions about freedom from interference by the state in areas such as freedom of speech, privacy, and sexual relationships.”).


222 DOMBROWSKI, supra note 119, at 12.
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humans clearly are uniquely capable, and possess unique moral autonomy compared to other known living beings.

This is not irrational chauvinism, it is simply factual. Asserting that, because humans have the capacity as a species to reach much greater practical autonomy heights than other species, members of the human species have a degree of unique intrinsic dignity, is not manifestly unreasonable. This is particularly so given the increasing evidence that our intelligence is not simply greater than the intelligence of other species, but that it is also uniquely human intelligence -- a fundamentally different cognitive architecture rather than a simply superior cognitive ability on the same continuum with other species.\(^ {223}\)

3. Protecting Children’s Rights Because Morally Autonomous Adults Are Uniquely Connected to Children

Two related arguments combine to create one of the strongest defenses for assigning legal rights to children without necessarily assigning them to animals. First, morally autonomous persons (i.e., adults) have a special relationship to human children, and denying rights to children thus also harms the interests of morally autonomous persons. This is most obviously the case when addressing the parents of children. If a child is denied rights, the child’s morally autonomous parents also suffer because they love their child and have a strong drive to seek societal protection of their child’s interests. However, this drive to seek protection for children is not limited to parents. Of course human adults in general tend to feel love, concern, and protectiveness toward children, even when the children are not their own.\(^ {224}\)

\(^{223}\) See supra notes 172 through 201 and accompanying text.

\(^{224}\) Care and protection of children by adults takes many forms. Some adults have made it their lives’ work to protect the welfare of all children, and to call upon other adults to join them in this effort. Sandra Feldman, former president of the American Federation of Teachers, provided an illustration of widely-held views regarding children in writing that “we must not lose sight of the needs all children have in common…[:] to grow up in secure, protected, and nurturing surroundings…[, with] the continuing presence and involvement of caring adults.” Sandra Feldman, The War for Children, 36 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 615 (2005). In addition to kissing babies while on the campaign trail, politicians are also understandably prone toward emphasizing the importance of society protecting children. For example, upon signing the Adam Walsh Child Protection and Safety Act of 2006, President George W. Bush made a manifestly uncontroversial assertion that “[p]rotecting our children is our solemn responsibility. It’s what we must do.” Presidential Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1395, 1396 (July 31, 2006). President Bush went on to laud this legislation as “an important step forward in this country’s efforts to protect those who cannot protect themselves.” Id. at 1396. These protective instincts are not limited to working to prevent child abuse. Adults in positions of power and authority
Thus, assigning rights to human children also protects the interests of most responsible society members. Indeed, humans may even have a biological drive toward protecting human children that goes beyond logic or rationality. Imploring an average human not to favor a child over an animal may be like asking water not to be wet.

The second related argument, emphasized by philosopher and sociologist Ted Benton, is that “All human adult moral agents have once been young children, and will have some memory of that state.” Thus, moral agents relate to and understand human children in a way that they will never relate to and understand animals. We know generally what children think, how they experience the world, and what they need to thrive, because we all once were children (and because many of us as parents spend countless hours observing, interacting with, and thinking about our children). Asserting that the mind of an adult chimpanzee is similar to the

also recognize that children require more protection than adults against other types of societal dangers. See, e.g., Philip J. Landrigan & Lynn R. Goldman, Children’s Vulnerability to Chemicals: A Challenge and Opportunity to Strengthen Health and Environmental Policy, 30 HEALTH AFFAIRS 842 (2011) (proposal to the government by the dean for Global Health at the Mount Sinai School of Medicine to implement stronger regulations of environmental toxins due to children’s increased susceptibility to their effects). Adults also work to build communities that meet the needs of children as well as adults. See, e.g., David Lammy, Making Space for Children, 15 RENEWAL: A JOURNAL OF LABOUR POLITICS 98 (2007) (discussing the efforts of the Labour Party in Britain to rehabilitate urban areas so that they include safe, clean, and enjoyable places for children to play).

See DOMBROWSKI, supra note 119, at 22 (“Most human beings are programmed by biological inheritance and tradition to treat their own young with special tenderness.”). The intensity of this drive to protect one’s children is evident in the phenomenon of “helicopter parenting,” a term that has risen in recent years to describe parents who are so heavily involved in the lives of their children that they have a “propensity to swoop in at the slightest crisis.” Valerie Strauss, Putting Parents in Their Place: Outside Class, WASHINGTON POST (March 21, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/03/20/AR2006032001167.html. This type of parenting style can have the effect of rendering children incapable of coping with disappointment or adversity, leaving them ill-prepared to handle real-world problems and situations, such as establishing positive and mature relationships with co-workers and supervisors, as adults. See id.; see also Nancy Gibbs, The Growing Backlash Against Overparenting, TIME (Nov. 20, 2009), http://www.time.com/time/magazine/article/0,9171,1940697,00.html; Lisa Belkin, Parents Who Can’t Resist Smoothing Life’s Bumps, N.Y. TIMES (Feb. 11, 2007), http://www.nytimes.com/2007/02/11/business/yourmoney/11wcol.html. This type of parenting style, which is also referred to as “Intensive Parenting” has become so pervasive in modern society that legal scholars have actually felt it necessary to argue “that the norms of Intensive Parenting should not be hastily incorporated into the law.” Gaia Bernstein & Zvi Triger, Over-Parenting, 44 U.C. DAVIS L. REV. 1221 (2011).

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mind of a two or three-year-old child is not only a stretch, it is also to some extent a guess. Although scientists learn more about animals’ minds every year, what we do not know greatly outweighs what we know.

Translated to legal rights, this means that a guardian ad litem seeking to enforce the rights of a child has a more solid basis for knowing what that child would want if it could assert its own rights than would be the case in some situations involving a guardian ad litem seeking to assert rights for animals. In many situations, such as the infliction of pain, even an animal’s guardian could safely assert that the animal would not consent to its treatment if the animal had the capacity to consent. However, in more nuanced situations, where it might be unclear whether a challenged activity would be harmful to an animal, or where an animal’s treatment might benefit it in some ways while at the same time entailing some cost to the animal, a guardian ad litem would have less of a basis for knowing how to best assert the animal’s rights. This uncertainty does not lessen humans’ moral duty to make difficult decisions in caring for animals under their control. However, our special capacity to understand children in a manner that greatly exceeds our ability to understand any other living beings adds to the reasons for favoring a rights paradigm for children but a human responsibility paradigm regarding our interactions with animals.

Critics of this line of thinking have noted that, just as human adults tend naturally to favor their own species, they often also favor other humans who look like them. Daniel Dombrowski skeptically poses the following question to those defending speciesism on the basis of human connection: “why should our ethics arise out of, and be justified in terms of, particular affection for kin and friends and one’s own species only, and not also partial affections for members of one’s own nation, race, and sex?”

At least regarding racism and sexism, one powerful response is that, unlike protectiveness and favoritism toward human children, racial and gender differentiation have been proven to be factually baseless in most contexts. Racism is a particularly soft target. Advances in understanding

227 See supra notes 172 through 201 and accompanying text.
228 MARC BEKOFF, COLIN ALLEN, GORDON M. BURGHARDT, THE COGNITIVE ANIMAL: EMPIRICAL AND THEORETICAL PERSPECTIVES ON ANIMAL COGNITION ix (2002) (discussing the volume of studies on animal cognition and remarking “Yet, it is humbling to realize that in terms of the diversity of life itself we cannot claim to have even scratched the surface”).
229 DOMBROWSKI, supra note 119, at 23.
230 Sexism is also irrational, although some differentiation between genders is of course legitimate. For example, one is not a sexist for noting that men and women have different sex organs. Sexism is irrational, unfounded differentiation between genders. JOSÉ B. ASHFORD, CRAIG WINSTON LE CROY, KATHY L. LORTIE, HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT: A MULTIDIMENSIONAL PERSPECTIVE 178-9 (2009) (Comparing
of genetics have led to serious challenges regarding whether any distinct “races” of humans even exist from a scientific perspective. The concept of race is an increasingly outdated societal designation, whereas children’s membership in the human species is on solid scientific ground.

D. Mentally Incapable Adults and the Argument from Marginal Cases

In addition to children’s rights, the argument from marginal cases targets rights assigned to mentally incapable adults to assert that rights should be assigned to at least some animals. As in comparisons with children, some intelligent animals may come closer to practical autonomy than some human adults with mental incapacities. Addressing all of the issues that arise in comparing mentally incapable adults to intelligent animals for purposes of assigning rights, particularly the history and purposes of employing a rights paradigm with mentally incapable adults, is a rich topic that merits additional scholarly work in the future. However, in several respects the issues overlap with questions that arise in seeking to apply the argument from marginal cases to children, and this Article will briefly touch on some of those points of overlap, as well as touching on some distinctions.

The strongest difference between children and mentally incapable adults regarding the argument from marginal cases is that children on the whole have greater potential for eventually attaining practical autonomy. The “children are our future” argument for children’s rights may not be asserted in the same way with some mentally incapable adults, in part because some mentally incapable adults have little or no hope of ever attaining practical autonomy. However, mentally incapable adults with absolutely no potential for practical autonomy are relatively rare. Most mentally impaired adults have some significant degree of autonomy despite their impairment. Even many adults who are comatose have the potential...
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of recovering their consciousness.

Another distinction is that mentally incapable adults with no practical autonomy may be more likely to have previously possessed practical autonomy than is the case with very young children. For example, a fully developed adult may suffer a brain injury or illness that causes a steep drop from strong autonomy to no autonomy. This may happen to children as well, although the amount of potential lost autonomy is generally less since children begin with limited autonomy. This distinction may actually favor rights for mentally incapable adults in this situation over rights for children, in that often their condition resulted from a tragedy rather than from a natural condition.236

Despite these distinctions, the argument from marginal cases should be rejected regarding mentally incapable adults for many of the same reasons it should be rejected regarding children. As with children and animals, our ability to compare the autonomy of animals and the autonomy of mentally impaired adults is limited because of fundamental differences between human and animal cognition.237 Rather than being simply at different points on a continuum of cognition, human brains, presumably even the brains of mentally limited humans, simply seem to think differently than do animals’ brains.238 Also, the connections between rights and humanity (rather than rights being connected only to autonomy) favor the mentally incapable in the same way they favor children since, of course, mentally incapable persons are still humans.239 As with children, mentally incapable adults are in at least some contexts given stronger protection by law when their capacity for autonomy is lower, demonstrating that their rights are based at least in part on protection of vulnerable humanity rather than autonomy.240

The unique intrinsic dignity argument for children’s rights241 applies equally to mentally incapable adults, as in both instances it is based on

“profound” mental retardation. Van R. Silka & Mark J. Hauser, Psychiatric Assessment of the Person with Mental Retardation, 27 PSYCHIATRIC ANNALS 2 (1997). 85 percent of persons with mental retardation have what is designated as only “mild” mental retardation. Id. Persons with “mild” mental retardation have I.Q.s of about 50 to 70. Id.

236 See DOMBROWSKI, supra note 119, at 147, quoting James Nelson, Xenograft and Partial Affections, BETWEEN SPECIES 2 118, 123 (1986). (“I have argued that there is a morally relevant distinction between animals and marginal humans: the marginal humans have suffered a tragedy in becoming the psychological equals of animals – a tragedy that animals have escaped. The sentiments properly evoked by the recognition of such a tragedy – pity and compassion – speak strongly against further injury to someone already so afflicted.”).

237 See supra notes 172 through 201 and accompanying text.

238 See supra notes 197 through 201 and accompanying text.

239 See supra notes 202 through 232 and accompanying text.

240 See supra notes 204 through 217 and accompanying text.

241 See supra notes 218 through 223 and accompanying text.
shared humanity.

Finally, focusing on the unique connections between mentally incapable adults and “normal” adults as a basis for rights is at least somewhat similar to focusing on the unique connections between children and adults as a basis for rights.242 Some distinctions exist in this comparison. Although all adults have been children and thus have a special understanding of children’s minds, most adults have not been mentally incapable as adults. Thus, “normal” adults probably do not have insights into the thinking and experiences of mentally incapable adults in the same way they have insights into children’s thinking. This disconnect may make comparisons between human and animal cognition even more difficult with regard to mentally incapable adults than with regard to children, since the minds of mentally incapable adults are perhaps more mysterious to us than the minds of children.

CONCLUSION

Animals are not children. The legal rights paradigm that has developed for children over the past fifty years entails inherent tensions and remains a subject of controversy, but the core concept of assigning some rights to children based on their humanity and on their relationship to the social contract is sensible, and shows no sign of eroding. Although animals have more cognitive ability than was once believed, the gulf between animal consciousness and human consciousness remains wide. Further, recent scientific research about fundamental differences between human minds and animal minds challenges the notion that the more we learn about animal minds, the more we will understand that they are capable of thinking like we think. Being a speciesist is good, not bad, when substantial differences exist between species. A legal rights paradigm is simply not a good fit for nonhumans with little relationship to the social contract upon which legal rights are based.

Rejecting a legal rights paradigm for animals does not license abuse. To the contrary, appropriate focus on the weighty moral responsibility of the true decision-makers regarding animal welfare – rights-bearing human participants in the social contract – is the most promising route to more humane treatment of animals.

Immanuel Kant’s admonition that “he who is hard in his dealings with animals becomes hard also in his dealings with men”243 is a warning for humans not only regarding their own morality, but also the morality of their

242 See supra notes 224 through 232 and accompanying text.
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children. If humans want their children to grow up to be empathetic and humane toward each other, they had best demonstrate empathy and humaneness toward powerless animals, both through their actions, and through laws requiring that humans act with moral responsibility for the welfare of animals ill-suited to bear legal rights.