THERE OUGHT TO BE A LAW: DOLPHINS ARE ETHICAL STAKEHOLDERS WHO SHOULD NOT BE CAPTURED FOR FUN AND PROFIT

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"…if we are committed to a deeper biocentric ethic, then it is vital that we try to find appropriate ways to promote it."[1]

—W. Michael Hoffman

I. INTRODUCTION

In considering theories of business ethics, a logical argument can be made that animals are external stakeholders, whose welfare should be taken into account when planning corporate policy. Such thinking is not the norm, however, and since few companies seriously consider animals to be ethical obligees, legislation should directly protect their interests.

This article proposes that we extend legal rights to certain animals in certain situations.[2] For reasons discussed herein, the dolphin has been chosen as the nonhuman being to whom we should first extend legal rights. Perhaps other nonhuman species are more deserving of legal recognition than dolphins, but whatever nonhuman species'

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1.W. Michael Hoffman, *Business and Environmental Ethics,* BUSINESS ETHICS QUARTERLY, April 1991, at 182.

[2] We have, of course, a great deal of legislation (such as anti-cruelty statutes) intended to protect animals from harm, but such laws stem from concepts of moral or property offenses against other humans in relation to the animals being protected by such legislation. The point here, is to recognize moral considerateness toward ani mals, which in turn discloses moral obligations toward animals, whose recognition should be manifested in law.

case is forwarded, the fundamental proposition is that it is time to extend the law's protection to nonhuman entities.[3]

Man is conservative by nature and most people will reject this thesis. Law, however, is the vehicle for furthering the ideal of justice, and neither tradition nor habit provide sufficient moral basis for dismissing a claim to rights. Were that the case, we might still be mired in the moral bankruptcy of the Dred Scott decision,[4] or the many judicial opinions denying equal rights to women.[5]

Detailed legislative drafts are not presented here and the difficulty involved in granting legal rights to animals is not minimized. The law has historically satisfied administrative needs, however, as the penumbra of judicial protection has expanded, and if our evolving community ethic mandates an extension of legal rights to animals, equity and administration shall eventually be reconciled.[6]

When society attains an ethical vision that legislation does not reflect, the law must change. Black people were once considered chattel and women denied the right to vote in the United States. Moral impetus drives the law. If one would reject the thesis presented here, s/he must have a morally logical reason for doing so.

Biocentric jurisprudence propounds the theory that certain, if not all, nonhuman entities are possessed of interests and that these interests create concomitant moral obligations in humans that should be reflected in legislation and judicial opinions that extend beyond the homocentric sphere,[7] into an ecosystemic or biocentric realm.[8] This is not a novel idea. Christopher Stone is generally credited with introducing the concept in his legendary law review article entitled *Should Trees Have Standing??* but he was not the first to do so. In 1964, Clarence Morris, a University of Pennsylvania law professor, published *The Rights and Duties of*

[3] David S. Favre, Professor of Law at Detroit Law School, and Steven Wise, president of the Animal Legal Defense Fund, have recently completed a not-yet-published article of considerable length arguing for the legal rights of chimpanzees, particularly those used in medical research.

4.Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

5.See, *e.g.,* In re Goodell, 39 Wis. 232 (1875) (explaining why women are incapable of practicing law).

6.Which is not to say that no guidelines for the extension of legal rights to nonhuman entities shall be suggested here, as several possible avenues of advancement shall be discussed.

[7] Homocentrism, synonymously known as anthropocentrism, connotes the human- centered view of the universe. *See* note 30 *infra* for further comment on this concept.

[8] This is a fundamental presentation of the concept and more detailed discussion of interests, moral rights, moral agents, and such, will follow.

[9] Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects,* 45 S. Cal. L. Rev. 450 (1972).

Beasts and Trees,[10] in which he argued that legal rights should be "conferred on feral beasts, outcroppings of stone, primeval forests and sweet country air."[11] Morris was writing about a "presumption in favor of nature,"[12] which, he claimed, gives us "reason for protecting birds, flowers, and ponds."[13] His vision was quite similar to what we now call deep ecology.[14]

Morris presaged Stone's vision by suggesting that conservation laws should "confer primary legal rights on nature-rights that can be enforced in courts by nature's next friends, that can be furthered in legislatures by nature's lobbyists ..."[15] His presumption in favor of nature called for "legal action developing safeguards affirmatively creating nature's legal rights ..."[16] In promoting the cause of nature, Morris pondered the importance of its recognition by law, certain that "[i]f the public could be convinced that men have at least a qualified obligation to nature to leave it alone, enactment of needed laws would be more likely, and enforcement would be more certain."[17]

Stone's article, written eight years after the Morris piece, caused quite a controversy in jurisprudential circles. He proposed that "we give legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment."[18] He pointed out that precedent for such rights already existed, in that "[t]he world of lawyers is peopled with inanimate rights-holders: Trusts, corporations, municipalities."[19] Stone reasoned that the rights of natural objects should be protected by granting them standing through representative guardians, just as such standing is granted incompetent humans such as infants and mentally ill persons.[20]

[10] Clarence Morris, *The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects,* 17 J. Legal Educ. 185 (1964).

[11] *Id.* at 191.

[12] *Id.* at 190.

[13] *Id.* at 191.

[14] The most descriptively succinct definition of deep ecology may be that rendered by sociologist and deep ecological author George Sessions, who described it as an "ecological consciousness [that] recognizes a spiritual reciprocity between humans, animals and the land." George Sessions, *Ecological Consciousness and Paradigm Change, in* Deep Ecology 39 (Michael Tobias ed. 1985). He also described it as "some kind of holistic ecological ethic in which the integrity of all individuals (human and nonhuman) is respected." George Sessions, *Appendix H: A Postscript, in* Bill Devall & George Sessions, Deep Ecology: Living As If Mature Mattered (1985).

[15] See *infra* notes 16-17 and accompanying text. *See also* Morris, *supra* note 10, at 189.

[16] *Id.* at 190.

[17] *Id.* at 191.

[18] *See* Stone, *supra* note 9, at 456.

[19] *Id.* at 452.

[20] *Id.* at 464.

Stone argued over twenty years ago that the ecological crisis necessitated such unorthodox action. "Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of right- less 'things' to be a decree of nature."[21] In *Sierra Club v. Morton,*™ Justice William O. Douglas, in a dissenting opinion influenced by Stone's work, stated that:

> [T]he critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of inanimate object about to be despoiled, defaced, or invaded ... Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.[23]

In Stone's later work,[24] he recognized the difficulty of attributing legal rights to inanimate objects and suggested that a nonhuman entity need not be possessed of legal rights to be legally considerateworthy of contemplation in the granting of legal protections. As he put it, "having a legal right is one way to provide something a concern-manifesting legal recognition. But it is not the only way."[25] Stone posits legal considerateness as a broader concept than legal rights, suggesting that legal considerateness provides a more appropriate context for recognizing legal obligations toward nonhuman objects, such as trees. For example, it may be absurd to suggest that a tree has the right to contract, but it can be reasonably argued that a person has a legal obligation not to cut down a tree.

Stone's work was not taken seriously when he first published it, but a 1988 law review article[26] argued that his ideas deserved reconsideration in the decade of ecology, and that legislative bodies should recognize standing in nonhuman entities, such as rivers and animals, since the courts refused to do so.[27] Following others who had pro

[21] *Id.* at 453.

22.405 U.S. 727 (1972).

[23]*Id.* at 741-742 (1972).

24.CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM (1987).

[25]*Id.* at 43.

[26] David Hoch, *Stone and Douglas Revisited: Deep Ecology and the Case for Constructive Standing,* 3 J. OF Env. L. & Litig. 131 (1988).

[27] As the article in question stated, "Ironically, the judiciary's increasingly narrow view of standing comes at a time when our culture is sensitively re-examining its rela tionship with nature." *Id.* at 144.

posed guardianship for would-be protectors of animals and inanimate environmental entities,[28] the author called such guardianship provisions *constructive standing,* and likened them to citizen suit provisions that abound on both the state and federal levels.[29]

The ideas mentioned previously are variations on the same theme, calling for an end to anthropocentric, or human-centered,[30] jurisprudence, and the beginning of a reverence for all of nature's creations with their sanctity protected by law. This necessitates a radical change in the way we view our relationship to the world. As stated previously, a biocentric jurisprudence, that is, the recognition of legal rights in nonhuman beings, is founded upon the belief that humans have moral obligations toward other species.

II. HUMAN MORAL OBLIGATIONS TOWARD NONHUMAN SPECIES

To extend legal protection to a previously unprotected class, we must attach moral rights or considerateness to that class. To find moral considerateness inhering in a class we must attribute interests to its members. We will not find compelling cause to extend the law's parameters without perceiving a moral necessity to do so. Should a logical argument for legally protecting previously unsheltered entities be made, however, we must contemplate doing so.

When discussing matters of ethics, a distinction should be drawn between descriptive ethics and normative ethics. Descriptive ethics studies the moral life as it is. When descriptive ethics examines moral communities and qualifications for membership within those communities, it does so in terms of prevailing standards.

Normative ethics, on the other hand, considers who, and what, should belong to a particular moral community and what principles

28.See Lori A. Zurvalec, Note, *Use of Animals in Medical Research: The Need for Governmental Regulation,* 24 WAYNE L. REV. 1733 (1978); Jonny Frank, *Factory Farming: An Imminent Clash Between Animal Rights Activists and Agribusiness,* 7 B.C. ENVTL. AFF. L. REV. 423 (1979).

29.Federally, for example, there are citizen suit provisions in several environmental protection statutes. *See, e.g.,* 42 U.S.C. § 7604 (1982) (Clean Air Act); 42 U.S.C. § 300J-8 (1982) (Safe Water Drinking Act); 42 U.S.C. § 6972 (1982); (Resource Conservation and Recoveiy Act). State statutes include such provisions as well. See, *e.g.,* N.J. STAT. ANN. § 2A:35A-4 (West 1987) (New Jersey Environmental Rights Act); MICH. COMP. LAWS § 691.1202 (1986) (Michigan Environmental Protection Act); WASH. REV. CODE ANN. § 43.21C.020 (West 1982) (Washington State Environmental Policy Act).

[30] Anthropocentrism, or homocentrism, is the idea that man is the central and superior force in the universe and that nature and all things exist to serve man's ends. Critics of anthropocentrism suggest the notion lacks humility, as well as ecological comprehension.

should be acknowledged by that community. In contrast to the social scientific approach of descriptive ethics, normative ethics deals in moral philosophy. As philosopher Tom Regan explained that "the descriptive ethicist is concerned with *what is the case* (whether it 'ought' to be so or not), whereas the normative ethicist is concerned with *what ought to be the case* (whether it 'is' so or not)".[31] Moral issues are discussed here from the perspective of normative ethics.

Proposition: We have moral obligations toward the higher nonhuman mammalian species, and possibly lower orders of creatures as well, in that they possess interests, and these obligations should be met by bringing such classes into the moral community of those we protect by law. The attribute of *interest* discussed herein means to have the capacity to experience pleasure and pain and to have preferences, however minimal, that create an obligation in others toward any entity possessing such interests. Moral beings are those beings capable of understanding right and wrong, and possessing the capacity to be obliged toward others.

Beings with moral capacities are known as moral agents. Beings that are owed obligations by moral agents, whether or not they themselves are capable of moral discernment, are known as moral patients.[32] If we assume that most animals are incapable of moral reasoning, and preclude them from the category of moral agents,[33] they are still moral patients if they have interests.

Some argue that moral patients are not deserving of moral considerateness, holding that only those beings capable of moral discernment are entitled to moral consideration, which is essentially to argue that only moral agents may oblige other moral agents. Philosopher Robert Nozick holds that a "being has rights only if it is a rational, free moral agent with the ability to regulate and guide its life in accordance with some overall conception it chooses to accept."[34] This argument raises several issues.

Why choose moral discernment as the determinant in deciding to whom moral agents are obliged? It makes no sense. As moral philosopher James Rachels says, "before we can determine whether a difference between individuals is relevant to justifying a difference in treatment, we must know what sort of treatment is at issue."[36]

[31] TOM REGAN, THE THEE GENERATION 21 (1991).

[32] *See* TOM REGAN, THE CASE FOR ANIMAL RIGHTS 151-56 (1983) (discussion of moral agents and moral patients).

33.Recent ethological studies lend evidence to the claim that certain nonhuman species, such as the cetaceans, that is, whales, dolphins, elephants, and such, are capable of and exhibit some moral conduct.

[34] *See* JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 179 (1990).

[35] *Id.* at 177-178.

A dog's presumably less-than-human capacity to reason is a legitimate basis for denying the dog a right to attend school. It is not, however, a legitimate basis for determining that the dog has no right to be protected from suffering at human hands. Rachels suggests that denying moral agents' duties toward moral patients is an "attempt to place a whole class of beings outside the sphere of morality ... on the basis of their possession, or lack, of some one very general characteristic,"[36] in this case, the capacity for rational moral discernment.

An animal's inability to think like a human is not universally dispositive of our moral obligations toward it. As Jeremy Bentham said long ago, the question (regarding animals) is not "can they reason? or can they talk? but, can they suffer?"[37] We know firsthand that suffering is painful and we know through scientific research that nonhuman vertebrate mammals have nervous systems quite similar to ours. We may therefore logically assume that animals suffer just as humans do.

While one can never be certain what another being is experiencing, it is safe to assume that when a dog writhes and howls after being hit by a car, the dog is suffering. If we avoid our own suffering, and we morally oppose the imposition of suffering on other humans, then we should morally oppose the imposition of suffering on nonhumans capable of experiencing pain, whether or not they can think rationally. To deny such obligation would be to deny the protective rights we extend to infants, diseased, and brain-dead persons, for surely many species of higher nonhuman vertebrates have greater reasoning power than infants or Alzheimers victims. To make moral agency a criterion for moral considerateness is to exclude several categories of humans from such considerateness.

Whether or not considerateness constitutes rights is another matter. Stone's introduction of the concept of considerateness[38] allows us to find moral obligations toward other beings, whether or not we attribute rights to those beings. As with the tree above, we may disagree as to whether or not a dog is entitled to actual rights and still agree that we are morally obliged not to harm that dog. If we find the existence of an obligation on our part not to harm the dog, we view him as being morally considerate, and we do so because of our understanding of the dog's capacity to suffer, not because we have established a determinate calculus of threshold rationality that we ascribe to dogs.

36.Id. at 179.

[37] JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION ch. 17 § 1 (1789).

[38] *See* Stone, *supra* note 24.

The dog and human's common capacity to suffer brings them into the same moral community, insofar as the obligation of moral agents not to subject other beings to intentional suffering is concerned. Failure to bring the dog within the moral community brings us back to Rachel's remarks about attempting to place a class of beings "outside the sphere of morality." Tom Regan speaks of this need to extend the moral community as a *formal principle of justice.*[39] Regan, like Rachels, contends that "[I]n order for it to be rational to include one individual in, and exclude another individual from the moral community, one must be able to cite a morally relevant difference between the two."[40]

If one concedes the capacity of animals to suffer, it is difficult to rationally justify excluding them from the moral community. It is most frequently attempted through a reliance upon speciesism, which is "the idea that the interests of the members of a particular species count for more than the interests of the members of other species."[41] This is the same prejudicial process used to defend racism and sexism but none of them meet Regan's "formal principle of justice" test, for the differing characteristics used to justify invidious treatment are, in each case, morally irrelevant.

Stone's moral considerateness standard obliges moral agents to consider the welfare of all considerate beings who may be negatively effected by the consequences of their actions.[42] It does not, however, necessarily grant negatively effected parties any access to relief. To object to injurious conduct for one's own sake, a being must have a right. Whether moral obligations toward others instills rights in those others cannot be decided here, but without legal rights, nonrights possessors must rely on the good graces of rights-bearing third parties to relieve them of suffering imposed from without.

If, for example, Citizen A watches Citizen *B* harshly beat stray dog *C, B* is clearly violating his moral obligation not to cause C to suffer gratuitously, and *C* may have a moral right not to be beaten by A. It is also true in our society, that *A* may bring legal action against *B* under anti-cruelty statutes which may subject *B* to fine or imprison-

[39] *See* Regan, *supra* note 31, at 22.

[40] *Id.*

41. Rachels, *supra* note 34, at 181.

42. If one accepts this proposition, it raises interesting questions of concomitant obligations on an institutional level. Although lengthy discussion exceeds the focus of this essay, the application of moral considerateness to nonhuman rights-bearing entities would dramatically expand the field of indirect or external stakeholders whose welfare would be considered in the setting of corporate policy. For a lengthy discussion of this matter, see David Hoch & Robert Giacalone, *On the Ethics of the Lumber Industry: Ethical Concerns as the Other Side of Profits,* 13 J. Bus. ETHICS 357 (1994).

ment. The creation of these statutes has empowered A with a legal right to seek redress against conduct morally offensive to him. The statute may even have a deterrent value that will cause less dogs to be beaten. Furthermore, the statute imposes legal liability on *B* not to beat stray dogs, *but nowhere in this moral / legal matrix are any legal rights attributed to the dog!* It is understood that were dog *C* to be granted legal rights, their enforcement would require the assistance of a guardian, but the attribution of legal rights to the dog, for his own sake, does not occur in our homocentric system of jurisprudence.

Is there not some ethical deficiency at work here? Is it not morally remiss to grant legal rights to third parties so that they may avoid the psychological offense of seeing others mistreated while those being mistreated are granted no rights with which to seek redress? Yet we structure our system this way, rationalizing the withholding of rights from victims on the bases of speciesism, irrelevant characteristic differences, and anthropocentric presumptions of superiority, by whatever name we give these wrongs. Does not a normative analysis of our relationship to animals suggest that they deserve legal rights to protect them from the imposition of moral wrongs?

Some advocate legal recognition of all natural objects, espousing a philosophy variously called deep ecology, ecological holism, biocentric egalitarianism, and several other things. "The intuition of biocentric equality is that all things ... have an equal right to live and blossom and to reach their own individual forms of ... self- realization ... [T]hat all organisms and entities ... are equal in intrinsic worth."[43] This philosophy is rooted more in spiritual connectedness to the earth, than a detached intellectual analysis of it. While its egalitarian impulse is admirable and inspiring, the first steps toward a biocentric jurisprudence will be difficult enough to achieve, requiring a radical change in cultural thought. To seek legal rights for non-interest-bearing entities is a morally commendable, but currently unrealizable goal. It is not unrealistic, however, to suggest we grant some legal rights to certain animals. Several cases have been tried in American courts where the plaintiffs were animals.[44] As Harvard law professor Lawrence Tribe said:

43. BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED 67 (1985).

[44] *See* Palila v. Hawaii Dep't of Land and Natural Resources, 631 F. Supp. 787 (D. Hawaii 1985), (Palila bird a plaintiff in an Endangered Species Act suit). *See also* Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 510 Supp. 1186 (D.D.C. 1981), *affd,* 685 F.2d 678 (1982), (regions's grizzly bears named as plaintiffs in Endangered Species Act suit).

> [S]o long as we remain within empathizing distance of the objects whose rights we seek to recognize, it seems reasonable to expect the acknowledgement of such rights to be regarded as more than fictitious. Thus, protecting cats and dogs ... seems less jarring conceptually than protecting a forest from clear-cutting on the theory that the threatened trees have an inherent "right to life."[45]

In attempting to remain within the empathizing distance Tribe suggests, we might begin the biocentric expansion of American jurisprudence through the granting of legal rights to dolphins. The case could equally be made for whales, chimpanzees, or several other nonhuman mammals for whom we have great affection and to whom we attribute high intelligence.[46] If one concedes that speciesism per se does not constitute conclusive grounds for denying moral rights to nonhumans, the case can be made for extending legal rights to dolphins and granting *constructive standing* to their human guardians.

III. LEGAL RIGHTS FOR DOLPHINS

If dolphins possess moral rights, or considerateness, we should recognize those rights in law. Why dolphins? Many animals deserve legal protection: Calves raised in veal crates, chimpanzees used in research, domestic pets subjected to horrible treatment. All of them need greater protection. The dolphin, however, may be ideally suited to the role of biocentrism's legal trailblazer.

Dolphins have high intelligence[47] and we have a strong affinity and affection for them. The vast majority of them do not come under

[45] Laurence Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law,* 83 YALE L.J. 1315, 1343 (1974). It is certainly possible that the trees not being protected from clear-cutting have conscious perceptions and therefore some limited degree of interests, as defined in this article, but with the law as yet unwilling to extend its protection to animate nonhumans, the trees, unfortunately, must wait their turn.

[46] This paper will not go into great ethological detail, that is, detail regarding the study of animal behavior, but it seems reasonable to assume most everyone attributes relatively high intelligence and some capacity to reason to dolphins.

[47] While this essay does not go into detail about the mind of the dolphin, Dr. John Cunningham Lilly, the world's foremost expert on dolphin intelligence has written many books on the subject. *See, e.g.,* MAN AND DOLPHIN (1961); THE MIND OF THE DOLPHIN (1967); LILLY ON DOLPHINS (1975); and COMMUNICATION BETWEEN MAN AND DOLPHIN (1978).

domestic ownership and are not considered chattel.[48] Furthermore, the human uses for which dolphins are subjugated[49] are mostly frivolous and nonjustifiable, even in terms of utilitarian ethics.[50] The extension of justice to ever-expanding classes of beings is one of the law's nobler aims. Why should not its protective imprimatur be extended to dolphins?

As law professor David Favre has said, "a distinction can be drawn between the capacity for possessing legal rights, and the capacity for entering into legal transactions or possessing the power to exercise a particular right."[51] In discussing the rights of infants and brain- impaired persons who cannot represent themselves, Favre says "the mere fact that an animal cannot file a pleading or recognize the need to do so should not create a barrier to the determination of whether or not the animal can be the holder of legal rights."[52]

He concedes that "accepting the proposition that individual animals should have legal rights would require a difficult intellectual and cultural transition."[53] So, however, did the granting of equal rights to blacks and women. It is the moral correctness, the normative ethic of the matter that should be determinant. Favre has proposed a constitutional amendment granting wildlife both individual and species rights.[54] He believes that "man's duty to wildlife is

[48] The question of ownership greatly complicates the issue of legal rights for animals. Perhaps all animals deserve a legal right *not* to be owned. The raising of such an issue, which must eventually be dealt with if biocentric jurisprudence is to succeed, goes beyond the scope of this essay, however, which seeks only to find an optimal first grant of legal rights to animals.

[49] Dolphins are primarily captured to serve as entertainment *fish* in large aquariums. The navy uses them in morally dubious experiments to determine if dolphins can serve a war machine, and now we have an increasing number of dolphins being imprisoned in hotel *petting pools.*

[50] A utilitarian argument is frequently employed to justify the subjugation of nonhuman species to man's whim. While it may be persuasively argued that many animals serve greater needs than their individual lives are worth, in such areas as medical research, although this rationale is challenged by the animal rights position that attributes inherent moral value to each animal, regardless of its utilitarian value to humans and their skewed anthropocentric utilitarian calculus, it is quite difficult to justify the containment of dolphins in petting pools, even using a utilitarian framework.

[51] David S. Favre, *Wildlife Rights: The Ever-Widening Circle,* 9 ENVTL. L. 241, 255 (1979).

[52] M at 256.

[53] *Id.* at 272.

[54] For discussion of Favre's proposed Constitutional Amendment, see Favre, *supra* note 51, at 279. He proposed that the amendment's first section state that [A]ll wildlife of the classification mammal, bird, amphibian or reptile shall have the right to natural life. No state shall make or enforce any law that would deprive any wildlife of life, liberty or habitat without due process of law." *Id.* at 279.

most likely to be effectuated by enacting a constitutional amendment."[65] He suggests that we recognize wildlife as a new category of person.

Favre's thoughts exemplify the quintessense of biocentric jurisprudence, but a constitutional amendment of the type he envisions will not be adopted in the foreseeable future. A more realistic strategy for promoting legal biocentrism might be to propose and lobby for a particular legislative enactment, preferably on the federal level, which would grant rights for the first time, to a nonhuman species, ideally, the dolphin.

What specific legislation might be proposed? The choice is difficult because dolphins are abused in so many ways. Most people are familiar with the *incidental taking* of dolphins by the commercial tuna fleet, which has resulted in the death of over six million dolphins.[56] The 1988 reauthorization of the Marine Mammal Protection Act (MMPA),[57] which charges the Secretary of Commerce with protection of marine mammals, failed to phase out the encircling of dolphins with tuna nets, as the industry preserved a loophole allowing the continued killing of 20,500 dolphins a year.[68]

A consumer boycott of tuna products successfully led Heinz (StarKist), Chicken of the Sea, and BumbleBee to cease purchasing tuna caught by encircling dolphin, but this represents only forty percent of the world's tuna supply, and thousands of dolphins continue to be slaughtered in tuna nets. Congresswoman Barbara Boxer (D- CA) sponsored the Dolphin Protection Consumer Information Act in 1989, and it became law in 1990.[59] The Act requires labels to let consumers know what tuna products are *dolphin safe.*

Another provision of the MMPA Amendments of 1988 eliminated Commerce Department discretion regarding embargoes against foreign nations that fail to comply with the Amendment provisions of the MMPA, implementing mandatory language to ban the import of yellowfin tuna products from countries that fail to limit their incidental taking kill to 1.25 times the U.S. rate.[60] Mexico failed to meet such requirements and in a suit brought by environmentalists,

[55] *Id.* at 281.

56. See Andrew Davis, *Can We Save the Marine Mammals? The Deadly Decline of the Marine Mammal Protection Act,* GREENPKACE, Jan.-Feb. 1988, at 11.

[57] Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (1988).

58. "Earth Island Institute, *Legislative Update,* DOLPHIN ALERT, Summer-Fall 1989, at 4.

59. Dolphin Protection Consumer Information Act, Pub. L. No. 101-627, 104 Stat. 4436 (1990), *codified at* 16 U.S.C. § 1853 (West Supp. 1994).

[60] 16 U.S.C. § 137l(aX2)(BXii)(II) (1988).

Earth Island Institute v. Mosbacher,[61] the Ninth Circuit affirmed a preliminary injunction against the Secretary of Commerce, and the embargo mandated by the district court, went into effect in February of 1991.[62]

Mexico filed a complaint with the General Agreement on Tariffs and Trade (GATT) Panel,[63] arguing that the provisions of the embargo were inconsistent with GATT guidelines. The Panel issued a preliminary ruling in favor of Mexico. The United States judiciary was not about to lift its ruling in deference to GATT, and GATT wasn't inclined to make exception to international trade provisions on the basis of America's sovereign law (the MMPA). A resolution of sorts was reached through passage of the International Dolphin Conservation Act of 1992.[64] Under the Act, the embargo against Mexico will be lifted if Mexico takes steps to reduce dolphin mortality and places a five-year moratorium on setting nets on dolphin after 1994.[65]

In Japan, over 150,000 Dali's Porpoises, small cetaceans[66] known as striped dolphins, have been killed for meat in the past five years. The porpoises are driven to shore and then hand harpooned.[67] Driftnets as long as twenty and thirty miles kill tremendous numbers of sea animals, including dolphin. In December 1989, the United Nations passed a resolution calling for a moratorium on large scale driftnetting throughout the world by June 30, 1992,[68] which will mitigate much of the damage. However, pirate ships continue to driftnet unabated and are difficult to apprehend on the open sea. "In Chile, the crab fishery harpoons and shoots thousands of dolphins for use as bait to catch Ring and Snow Crabs."[69]

The U.S. Navy captures and trains dolphins to engage in military activities.[70] Trainers working with the dolphins captured by the Navy "report that dolphins have been beaten, kicked and otherwise

[61] 929 F.2d 1449 (9th Cir.1991), *affg* 746 F. Supp. 964 (N.D.Cal. 1990).

[62] See *United States—Restrictions on Imports of Tuna, Report of the Panel,* para. 2.7, GATT Doc. DS21/R (Sept. 3, 1991).

[63] *Id.* at para. 1.1.

64. 16 U.S.C. § 1411-1418 (Supp. 1992).

65. Id.

66. Cetaceans are those species generally including whales, dolphins, and porpoises. The smaller cetaceans are all quite similar.

[67] *Decimation of the World's Populations of Small Cetaceans,* JOURNAL OF THE UNITED ANIMAL NATIONS, Summer 1991, at 4.

68. Id. at 5.

[69] *Id.* at 4.

[70] See Mitchell Fox, *Uncle Sam Wants Who?,* PAWS NEWS: DOLPHINS IN PERIL, April, 1990, at 68.

mistreated."[71] Twenty percent of the dolphins escape, many with muzzles on their snouts that prevent them from eating.

Perhaps the most unconscionable abuse of dolphins, however, in terms of suffering caused for ethically questionable purposes, is confining them in petting pools, theme parks and hotels. The aquatic theme park industry catches and imprisons many dolphin each year, under licenses granted by the National Marine Fisheries Service (NMFS). With their sensitive sonar, dolphins become disoriented and uncomfortable in the relatively small pools in which they perform.

The dolphins are subjected to high levels of chlorination, molesting spectators, and a tiny prison for a home. The combination of chlorine and brightly painted pool bottoms, which reflect the sunlight's glare, causes eye damage and blindness in most of the dolphins trapped in petting pools. Scott Trimingham, Pacific Director of the Sea Shepherd Conservation Society, supports this claim. "The last time I visited Sea World to see the bloated, lethargic dolphins and whales in the petting pool I could see only a few with their eyeballs still visible. All I could see were dark, puckered holes where the eyes should be."[72] Ric O'Barry, world famous dolphin trainer, who trained the dolphins for the Flipper series and founded the Dolphin Project,[73] considers captivity itself to be the main problem. Says O'Barry:

> [K]eeping a free-ranging and gregarious animal alone in a ... pen is cruel. Most captive dolphins die of stress (in large part) ... because of the nightmare nature of the prisons they're isolated in ... Dolphins "see" and communicate by sound. To imprison them in small concrete pens ... would be disturbing, maddening. Disruptive noise completely throws dolphins off.[74]

In 1992 testimony before the House Subcommittee on Department Operations, Research, and Foreign Agriculture hearings on reautho

[71] Richard O'Barry, *Navy Dolphin Blues,* PAWS NEWS: DOLPHINS IN PERIL, April, 1990, at 66. If one is curious on what his or her tax dollars are being spent, consider the following remarks by O'Barry: "Dolphins are being turned into Kamikaze torpedoes, or trained to attach magnetic explosives to the bottom of enemy ships. Dolphins are also being trained in the swimmer nullification program, wherein a long, hollow, hypodermic needle is placed over the snout of the dolphin for injecting compressed CO_2 into enemy frogmen." *Id.*

[72] Scott Trimingham, *Blinded by the Dollar Signs,* PAWS NEWS: DOLPHINS IN PERIL, April, 1990, at 55.

[73] O'Barry is now opposed to all captive training of dolphins and devotes all of his time to working for the benefit of dolphins.

[74] O'Barry, *supra* note 71, at 66.

rization of NMFS authority to grant capture permits for sea mammals, O'Barry added the following remarks.

> [I]t is not possible to cover all of the abuse that occurs in the billion dollar dolphin amusement park industry ... We might as well rename the Act the 1972 Marine Mammal *Park* Protection Act, because rather than providing protection for the dolphins, it is the industry that is being protected. This profit-motivated industry has failed to educate the public as it claims to do because it is based on deception, greed, and exploitation. Dolphins are imperiled by the very agencies designated to protect them ... I believe it could be proven from a scientific standpoint that keeping these sonic creatures in concrete boxes doesn't work. The problem in doing so is that the marine mammal scientists and veterinarians who would be the logical people to accomplish this are financially dependent on the industry.[76]

It is widely known that dolphins held in captivity lead difficult lives but the National Marine Fisheries Service, until recently the agency with oversight responsibility for marine mammals in captivity, historically granted licenses to almost all aquatic theme parks and hotels that applied for permits, allowing them exemptions to maintain these animals under the Marine Mammal Protection Act. This policy on the part of NMFS has stirred considerable controversy, with little wonder why. The most cursory review of facts surrounding the welfare of dolphins and orcas in captivity is quite revealing.

Since 1973, federal records show that 650 dolphins have died in captivity, and that the average captive dolphin survives fewer than five years in the tank,[76] reducing by at least half, the life expectancy of captive dolphins, in comparison to their counterparts in the wild. It is estimated that dolphins in the wild live an average of forty-five to fifty years.[77]

[75] *Id.*

[76] Mike Vogel, *Aquariums Assailed for Mammal Shows,* BUFFALO NEWS, Nov. 24, 1992, at Al.

[77] While space limitations restricts the inclusion of detailed statistical data pertaining to the empirical measurement of the catastrophic toll of stress on dolphins and orcas in captivity, a sampling of the statistical data is quite disturbing. For example, fifty percent of captured dolphins die within the first two years of captivity; twenty out of twenty- five killer whales have died in twenty years at Sea World. Besides death from captures and the stress of captivity, a large number of marine mammals die from starvation, heat stroke, foreign object ingestion, suffocation, drowning, guard dog attacks, poisoning, and transport injuries. *See* DOLPHIN PROJECT FACT SHEET, undated, at 1 (available upon request from Dolphin Project, P.O. Box 224, Coconut Grove, FL 33233).

In 1993 testimony before the Senate Subcommittee on Foreign Commerce and Tourism Hearings on Reauthorization of the MMPA, John Grandy, Vice President of Wildlife and Habitat Protection for the Humane Society of the United States, said that:

> [T]he four small whale species currently held in captivity ... suffer abberantly high mortality rates, reduced life spans, and low birth rates in captivity compared to populations observed in the wild ... Wild-caught individuals clearly suffer enough to affect longevity and mortality rates and ... it is clear that individuals of these species cannot handle the transition from the wild to captivity ... The capture process itself, where animals are rounded up, netted or lassoed, or driven into shallow water, snatched from family and removed from the water is incredibly cruel and stressful.[78]

Captive orcas, or killer whales, actually represent a species of dolphin which has died from many causes, "but none as spectacular and tragic as those from self-inflicted trauma, from internal injuries resulting from aggression between incompatible animals and from shattered skulls (suffered) from collisions with pool walls caused by panic responses."[79] This does not deter the aquatic theme park industry, which continues unabated in its attempts to obtain capture permits from the NMFS and lobby against curbs on the granting of such permits.

Of all the litigation involving the capture of marine mammals for display purposes, perhaps *Jones v. Gordon*,[80] best exemplified the aquatic theme park industry's view of marine mammals as mere commodities. After heavily attended public hearings and several extensions of the public comment period, the NMFS, in November 1983, granted Sea World a permit to temporarily capture one hundred orcas, recapture any previously released orca up to two more times for a total of three each, and ultimately keep ten of the killer whales for display purposes, despite the fact that the entire resident

[78] *Hearings Before the Senate Commerce, Science and Transportation Committee Subcommittee on Foreign Commerce and Tourism Hearings on the Reauthorization of the Marine Mammal Protection Act; Marine Mammal Public Display and Scientific Research,* 103d Cong., 1st Sess. 4 (1993) (prepared statement of John Grandy).

[79] *Cetaceans in Captivity—Orcas: An Overview,* FUND FACTS: MARINE MAMMAL FACT Sheet No. 2, undated, at 2 (available upon request from The Fund for Animals, 200 W. 57th St., New York, N.Y. 10019) [hereinafter *Fund Facts],*

80.621 F. Supp. 7 (D.C. Alaska 1985).

orca population of Southeast Alaska is estimated to be only three hundred.

A coalition of environmentalists brought suit against officials of the NMFS and other appropriate federal agencies, challenging the failure of the NMFS to prepare an environmental impact statement prior to issuing the permit. Defendants argued that population studies conducted by Sea World before the permit was issued were the "functional equivalent"[81] of an environmental impact statement, and that "because the agency retained the discretion to prevent the capture of whales, (defendants) argued that NMFS (would) assure that no major effect on the orca population (would) occur."[82]

Judge Von Der Heydt held that the permit would have uncertain environmental impacts and pose unknown risks, relying heavily on comments by the Marine Mammal Commission that "[t]he possible adverse effects of the proposed capture ... of killer whales cannot be assessed reliably without better information on the population(s) ... of killer whale pods that could be affected by the proposed taking."[83]

The *Jones* court invalidated the capture license and enjoined Sea World from taking orcas pursuant to the permit. The court's holding, however, is not nearly as interesting as Sea World's request for a permit to capture fully one third of the orca population of the waters off southeast Alaska, and the NMFS's willingness to grant such a permit, in spite of procedural inadequacies attending the application. Surely, the scientific knowledge available to Sea World and the NMFS must have apprised both institutions of the unusually strong social bonding existing amidst orca pods;[84] yet, neither organization evidenced the slightest qualm or ethical trepidation in preparing to systematically and traumatically disrupt the social organization of the entire orca community of Southeast Alaska.

In light of such morally dubious attitudes and seemingly collusory behavior between the NMFS and the aquatic theme park industry, it is hardly surprising that environmentalists and animal protectionists have grown increasingly vocal and organized in their public protests and lobbying activities, aimed at terminating NMFS authority to grant permits to capture dolphins for display purposes. In recent

81.Id. at 12.

82.Id.

[83] Jones v. Gordon, 621 F. Supp. 7, 30 (D.C. Alaska 1985) (plaintiffs motion for summary judgment, Exhibit 4).

84."No orca has yet been seen to transfer permanently from one pod to another ... Each pod retains a specific pod-dialect of vocalizations used in communication ... Some researchers believe the orca may be the most socially bonded species on earth." *Fund Facts, supra* note 80, at 2.

months, the controversy has grown increasingly heated as a result of two incidents concerning Chicago's Shedd Aquarium.

In the fall of 1993, two Beluga whales died from veterinary injections they received shortly after they arrived at the Shedd facility for display purposes. To further exacerbate the problem, in a logistically questionable endeavor, with criticism from the Beluga incident still intense, in December of 1993, the aquarium captured three Pacific white-sided dolphins in the waters off of southern California, allegedly for the purpose of helping to preserve the species.[86] This capture was greeted by large protests attended by several entertainment celebrities, bringing the Shedd further negative publicity. To date, however, the Shedd is still planning to transfer the three dolphins from their Southern California holding pen to the Chicago facility.[86]

In spite of growing pressure from environmentalists to terminate the authority of NMFS to grant capture permits, recent amendments to the MMPA signify an opposite trend and will further dilute the already questionable governmental scrutiny and protection of dolphins captured for display purposes. The Marine Mammal Protection Act Amendments of 1994,[87] have removed the oversight of animals already in captivity from the NMFS and transferred that power to the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture.

APHIS is responsible for enforcing the Animal Welfare Act (AWA),[88] which protects animals used in research, and has a notorious reputation for laxity, having been sued on several occasions for

[85] Sometimes the public relations rationales used by aquatic parks in justifying the capture of marine mammals are dramatically misleading. In House hearings on enforcement of the Animal Welfare Act, dolphin expert Ric O'Barry testified that people "paid to see this abuse (at dolphin shows) and they applauded it... they got ripped off... If they were educated about what they were really seeing, they would most likely be rebelling. (The park in question) had 77 dead dolphins (on their annual Marine Mammal Inventory Report). Even the trainer ... didn't know they had so many deaths. What the industry is doing is educating the people to accept this abuse as normal and natural ... Let's take a look at 'Shamu,' for example, Sea World's corporate name for whichever orca happens to be performing. They have to do that because they have 20 dead orcas out of 26. Eighty percent of all the orcas we have captured are dead. They are telling us that they exhibit whales to educate and sensitize the public, so the public will, in turn, defend and protect these orcas. The truth of the matter is, the orca doesn't have any predators *other than Sea World and the captive display industry*O'Barry, *supra* note 75, at 470-71 (emphasis added).

[86] *See* Commentary/Letters, *Free the Dolphins,* Cm. SUN-TIMES, Jan. 4, 1994, at _____.

[87] Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, _____ Stat. ___ .

[88] Pub. L. No. 91-579, 84 Stat. 1560 (1970), *codified at* 7 U.S.C. §§ 2131-2156 (1982).

failure to enforce provisions of that Act.[89] NMFS will maintain licensing authority for the capture of free-roaming dolphins, but leaving that power with NMFS is small comfort to those concerned with the welfare of marine mammals. Oversight authority for dolphins in captivity should reside in some agency other than the historically failed APHIS, and NMFS should be legislatively proscribed from granting further capture permits.

IV. LEGISLATION

Although the Shedd and several other aquariums steadfastly refuse to alter their policies of displaying marine mammals for *educational* purposes, perhaps, as marine mammal authority Stephen Leatherwood has stated, "[w]e as a culture may soon decide that marine zoological parks and aquariums are outmoded, that the kind of education presented in them can be offered by other means ... [C]apturing animals from the wild for display may no longer be tolerable."[90]

Some aquatic theme parks have already adopted policies against the capture and display of dolphins, but others may soon be forced to do so, if legislation similar to that of South Carolina is indicative of a national trend. In June, 1992, the South Carolina legislature passed a law which prohibits the public display of dolphins or whales.[91] The law, which amends the 1976 South Carolina code, states in part that "[I]t is unlawful for a person or corporation to display a wild caught or captive-bred mammal of the order Cetacean (dolphins and whales) ... A person violating this section is guilty of a misdemeanor ..."[92]

Governor Carroll Campbell signed the bill and, in January 1994, vetoed an attempt to repeal the law, with the repealing legislation being attached as a rider to a bill on shrimp trawling regulations, in order to avoid public controversy.[93] In vetoing the repeal, Governor Campbell said, "South Carolina's Marine Mammal Protection Law (has) taken a strong stand against inhumane treatment of marine mammals, and I will not sign a bill which would repeal (that)

[89] For a detailed discussion of APHIS's failures as an enforcing body, see David Hoch, *Business Ethics, Law, and the Corporate Use of Laboratory Animals,* 21 AKRON L. REV. 201, 226-234 (1988).

[90] *Cetaceans in Captivity—Dolphins: An Overview,* FUND FACTS: MARINE MAMMAL FACT SHEET NO. 1, undated, at 2 (available upon request from The Fund for Animals, 200 West 57th St., New York, N.Y. 10019).

[91] S.C. Code ANN. § 50-17-105 (Law. Co-op. 1992).

[92] *Id.*

[93] South Carolina H. 3200, R-280 (vetoed Jan. 24, 1994).

law ... particularly when it appears that this bill failed to have been fully and fairly debated in the legislature."[94] Other states, particularly Florida, are considering similar legislation but federal action prohibiting the capture of marine mammals for display purposes
would obviate the need to deal with this issue on a state-by-state basis.

A Constitutional amendment granting due process to dolphins or other animals would be a landmark achievement, but we are not about to pass one. We might, however, pass a federal statute recognizing limited legal rights in dolphins. Congressman Goss (D-FL.) recently sponsored a bill entitled the Marine Mammal Public Display Reform Act of 1990, which was later renamed the Marine Mammal Capture, Export, and Public Display Protection Act of 1992,[96] which would give states the right to prevent the issuance of capture permits for marine mammals in their waters. Rights under the bill would accrue to the states, rather than to the dolphins, but it indicates a Congressional willingness to sponsor legislation aimed at protecting
dolphins. The time is ripe to promote a bill which would directly grant them legal rights.

A logical course of action would be to sponsor a bill to prevent the most egregious wrong currently being perpetrated against dolphins. To attain biocentric status, the bill would have to grant legal rights to the dolphins themselves, rather than to a third party, who might use those rights to protect dolphins. It is hereby proposed, therefore, that a federal statute be sponsored to prohibit the National Marine Fisheries Service from granting capture permits for the use of dolphins in aquatic theme parks or petting pools *on the ground*
that dolphins have a statutory right not to be confined in such a manner.

The NMFS is currently empowered with the authority to grant capture permits "for the taking and importation of marine mammals ... for the purposes of scientific research and *public display* ...,"* although the 1988 Amendments to the MMPA theoretically restricted permit issuance by adding language to the Act stating that "a permit may be issued for public display purposes only to an applicant which offers a program for education or conservation pur-

94. Letter from Carroll Campbell, Governor of South Carolina, to The Honorable Robert H. Sheheen, Speaker of the House (Jan. 24, 1994).

95.Marine Mammal Public Display Reform Act of 1990, H.R. 3984, 101st Cong., 2d Sess. (1990). Unfortunately, the Bill has not yet passed and will probably not be enacted in the near future.

96.16 U.S.C. §§ 1361, lOl(aXl) & 104(a) (1988).

poses ..."[97] The proposed statute would attribute a tangible legal right to a nonhuman species. The philosophical import of such an action should not be underestimated. By bringing animals into the community of those possessed of legal rights, legislation of this type would constitute a landmark step in American jurisprudence's evolution toward biocentrism.

While the right would run to the dolphins themselves, they cannot prosecute their own claims for relief. The Act would therefore require provision for constructive guardianship to be assumed by parties with a bona fide interest in representing the rights of the dolphins. Such guardianship would best be granted through a citizen suit provision contained within the statute. The provision would specify that citizens could commence actions on behalf of the dolphins against any person or agency, in this case, the NMFS, alleged to be in violation of the statute, and, as provided, for example, in the Water Pollution Control Act,[98] "against the Administrator (of the agency) where there is alleged a failure of the Administrator to perform any act or duty under this Act..."' The constructive guardianship provision would eliminate the problems created by the Court's making it increasingly difficult to obtain standing,[100] thus insuring that a grant of legal rights to dolphins would prove efficacious, not merely symbolic.

V. CONCLUSION

The passage of such a statute may be the first step into a biocentric future reflective of a normative ethic our society is moving toward. Business ethicist W. Michael Hoffman describes our prevailing ethic as one in which "only human beings have rights or moral standing because only human beings have intrinsic value."[101] He suggests that "... natural things other than human beings are intrinsically valu

[97]Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 104(c), 102 Stat. 4755 (1988), *codified at* 16 U.S.C. §§ 1166, 1361, 1371-74, 1378-80, 1383(a)-1384, 1402, 1407 (1988), *and* 22 U.S.C. § 1978 (1988). Pursuant to its authority under the MMPA the NMFS issued regulation criteria for public display permits.
50 C.F.R. | 216.31(c) (1972). However, the NMFS has not shown an inclination to scrutinize stringently claims by permit applicants that educational programs are being offered. *See* Craig Kasnoff, *In the Swim,* PAWS NEWS: DOLPHINS IN PERIL, April, 1990,
at 58-59.

[98]33 U.S.C. § 1251-1376 (1982).
99.33 U.S.C. § 1365(a) (1982).
[100]*See* Hoch, *supra* note 26, at 135-144.
[101] Hoffman, *supra* note 1, at 177.

able and have, therefore, moral standing."[102] He cautions that when a homocentric view is used to formulate laws, "nonhuman nature will not receive the consideration it deserves."[103]

Hoffman's position is informed by the work of Tom Regan, discussed previously. Regan argues that animals possess inherent rights because they are "the subjects of a life that is better or worse for them, logically and independently of whether they are valued by anyone else."[104] He claims that animals have interests and are therefore morally considerate. If Regan speaks from a philosophically rational position, others came to biocentric world views in different ways. Albert Schweitzer, the late Nobel laureate, took a spiritual path. In searching for the most valid basis for ethics, Schweitzer had a mystical experience in which the phrase, *Reverence for Life* came to him.[106] From this revelation Schweitzer constructed a theory of value, concluding that right conduct for a human is to give "to every will-to-live the same reverence for life that he gives to his own."[106] Schweitzer considered "making kindness to animals an ethical demand, on exactly the same footing as kindness to human beings."[101] He knew this would require a "great... revolution for ethics."[108] Albert Einstein approached the ethics of compassion from a cosmic perspective. Einstein said that:

> [A] human being is a part of the [W]hole, ... a part limited by time and space. We experience ourself ... as something separated from the rest—a kind of optical delusion of our consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest to us. Our task must be to free ourselves from this prison by widening our circle of compassion.[109]

[102] *Id.* at 178.

[103] *Id.*

[104] Tom Regan, *The Nature and Possibility of an Environmental Ethic, in* ALT. THAT DWELL THEREIN: ESSAYS ON ANIMAL RIGHTS AND ENVIRONMENTAL ETHICS 94 (1982). Regan has so far proved to be the most eloquent and well-reasoned philosophical voice supporting animal rights. *See, e.g.,* TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983); TOM REGAN, THE THEE GENERATION (1991).

[105] ALBERT SCHWEITZER, OUT OF MY LIFE AND THOUGHT 185-88 (1933), *quoted in* RODERICK F. NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 60 (1989).

[106] **Id.**

[107] H. Spiegelberg, *Albert Schweitzer's 'Other Thought,'Fortune Obligates, in* AFRICA: THOUGHT AND PRAXIS 1 (1974).

[108] *See* ALBERT SCHWEITZER, THE ANIMAL WORLD OF ALBERT SCHWEITZER 183,187,188 (1950).

[109] Letter from Albert Einstein to THE NEW YORK POST (NOV. 28, 1972), *quoted in* TOM REGAN, THE THEE GENERATION 28 (1991).

Some will consider the thesis of this essay folly, unwilling to broaden the moral community or reflect that growth in law. Others will suggest that we must go farther, protecting all life by law. Perhaps we should. This essay merely proposes a first step toward biocentric jurisprudence, the granting of legal rights to a culturally popular and highly intelligent nonhuman, the dolphin. However modest that may appear, the genuine assignment of such rights would be a quantum leap in legal and moral philosophy. The important thing is not how far this first step would take us toward moral egalitarianism, but that the process will have begun. To shift our focus from a homocentric to a biocentric one is to make fertile the soil in which universal compassion might grow. As Lawrence Tribe wrote:

> [W]hat is crucial to recognize is that the human capacity for empathy and identification is not static; the very process of recognizing rights in those ... with whom we can already empathize could well pave the way for still further extensions as we move upward along the spiral of moral evolution.[110]

When legal rights are extended to dolphins, society also will extend its moral family, and expand the dimension of human compassion.

110.Tribe, *supra* note 45, at 1345.