

2013

Not All Dogs Go to Heaven: Judaism's Lessons in Beastly Morality

Mark Goldfeder
Emory University School of Law

Follow this and additional works at: <https://lawcommons.lclark.edu/alr>



Part of the [Animal Law Commons](#)

Recommended Citation

Mark Goldfeder, *Not All Dogs Go to Heaven: Judaism's Lessons in Beastly Morality*, 20 *Animal L. Rev.* 107 (2013).

Available at: <https://lawcommons.lclark.edu/alr/vol20/iss1/6>

This Article is brought to you for free and open access by the Law Reviews at Lewis & Clark Law School Digital Commons. It has been accepted for inclusion in Animal Law Review by an authorized editor of Lewis & Clark Law School Digital Commons. For more information, please contact sarahjohnson@lclark.edu.

NOT ALL DOGS GO TO HEAVEN: JUDAISM'S LESSONS IN BEASTLY MORALITY

By
Mark Goldfeder*

This Essay examines the moral status of animals and the definition of humanity under traditional Jewish law, as contained in Biblical texts and commentaries by ancient and historical Jewish scholars. Examining whether animals are capable of moral behavior, it provides examples from various Judaic sources to support the idea that animals are capable of making conscious, moral choices. This Essay goes on to investigate the effect that morality has on the rights and rewards given to animals under Jewish law, and whether, as conscious moral actors, animals have souls. Turning more broadly to the definition of humanity, this Essay discusses whether there might be an expansive contextual definition that would encompass animals with the cognitive ability to communicate and interact like people. Possible tests for humanity under Jewish law, all of which could include animals, such as the contextual/functionality test, or the moral intelligence test, suggest that from a Jewish law perspective, animals that possess the ability to make moral choices may be more human than not.

The idea of divine retribution (i.e., reward and punishment in all its different facets, in both this world and the world to come) is a central tenet of the Jewish faith.¹ It is intricately connected to the idea of free will, and the ability to choose rationally between morally acceptable and unacceptable behaviors—choose well, and God will reward you; choose poorly and you will be punished. Those who cannot actually choose their own course of behavior for whatever reason have neither moral responsibility nor culpability; as non-moral actors, they can be neither rewarded nor punished for their actions or inactions.

It has long been assumed that the ability to assess situations and make conscious moral choices is a characteristic unique to mankind. The Bible states that a unique feature of man is his God-like moral intelligence, *lada'at tov vara* (literally, to know good and evil)—i.e., to

* © Mark Goldfeder 2013. Dr. Mark Goldfeder is a senior lecturer at Emory University School of Law in Atlanta, Georgia, and a Senior Fellow at the Center for the Study of Law and Religion. He has written numerous scholarly articles on the topics of law and religion.

¹ E.g. Maimonides, *Introduction to Perek Helek* in *Commentary on the Mishnah* 1, 22 (Maimonides Heritage Center trans.) (available at <http://www.mhcn.org/qt/1005.pdf> [<http://perma.cc/09W4wf7ZBZH>] (accessed Nov. 16, 2013)) (noting that punishments and just rewards, or divine retribution, is one of the Thirteen Principles of Jewish Faith).

differentiate between right and wrong.² In the Midrash *Genesis Rabbah*, the Talmudic sage Rabbi Akiva famously links this concept with free will,³ and in the Middle Ages the Jewish law codifier Maimonides closed the circle, noting that man is the only creature who resembles God in that he has free will.⁴ In light of recent findings, including the work of Frans B. M. de Waal⁵ and the research of Steven M. Wise,⁶ which shed light on the moral behavior and ethical choices found in the animal kingdom, this Essay revisits and explores Judaism's position on animal morality, noting the traditionally accepted views while pushing back to see if there might also be other extant traditions.

Our exploration starts with the idea of animals as divinely ordained creations, formed in God's wisdom and as part of His ineffable plan.⁷ Man, for his part, needs to both know and respect that.⁸ The Bible makes specific mention of the moral lessons that man should learn from the other members of the animal kingdom.⁹ The Talmud also expands upon these instances. Rabbi Yochanan said: "If the Torah had not been given we could have learnt modesty from the cat, honesty from the ant, chastity from the dove, and good manners from the cock who first coaxes and then mates."¹⁰ There is an entire Kabbalistic book dedicated to the subject of how the creatures of creation praise God every day,¹¹ and as the Midrash in *Genesis Rabbah* notes, oftentimes God performs his wondrous actions through the agency of animals.¹² We can accept the premise then that from a Jewish perspective, ani-

² *Genesis* 3:22 (King James).

³ *Genesis Rabbah: The Judaic Commentary to the Book of Genesis, A New American Translation* vol. I, 21:5, 233 (Jacob Neusner trans., Scholars Press 1985) [hereinafter *Genesis Rabbah*] ("Behold the man has become as one who knows good and evil of himself, of his own free will" (internal quotations omitted)).

⁴ Maimonides, *Mishneh Torah* 5:1, 41 (Philip Birnbaum trans., Hebrew Publ. Co. 1967).

⁵ Frans de Waal, *The Bonobo and the Atheist: In Search of Humanism among the Primates* (W.W. Norton & Co. 2013).

⁶ Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Bks. 2000).

⁷ *Psalms* 104:24 (King James).

⁸ See Rabbi Moshe Cordovero, *Tomer Devorah [The Palm Tree of Deborah]* 50 (Moshe Miller trans., Targum Press, Inc. 1993) (stating that just as God "sustains all creatures . . . so, too, should man do good to all, not despising any creature").

⁹ E.g. *Proverbs* 6:6 (King James) ("Go to the ant, though sluggard; consider her ways and be wise[.]").

¹⁰ *The Babylonian Talmud* vol. II, Erubin 100b, 698 (Rabbi Dr. I. Epstein ed. & trans., Soncino Press 1938).

¹¹ See *Perek Shira: Songs of Praise for the Creator* (Jewish Natl. & U. Lib. 1990) (ascribing songs to land animals, winged creatures, insects and residents of the waters, all of which praise their Creator).

¹² See *Genesis Rabbah*, *supra* n. 3, at 10:7 ("Even things that you regard as completely superfluous to the creation of the world, for instance, fleas, gnats, and flies, also fall into the classification of things that were part of the creation of the world. . . . *And the Holy One, blessed be he, carries out his purposes even with a snake, scorpion, gnat, or frog.*" (internal quotations omitted, emphasis added)).

mals do perform what we might think of as good—and even noteworthy—deeds.

Jewish law responds by giving animals some rights. A person is not allowed to kill an animal, for instance, unless it is for legitimate human purposes.¹³ In a case where an animal kills a person, such as the case of the murderous ox,¹⁴ the Talmud notes that the Torah took pity on the animal, and made it very hard to prosecute him.¹⁵ In fact, in order to sentence an animal to death, we need the testimony of witnesses and a high court of twenty-three judges.¹⁶ This is the same standard required by the Talmud as in any human capital case.¹⁷ By requiring a searching examination before killing an ox, the Torah demonstrates the severity of this matter.

Humans are not allowed to cause animals pain. Maimonides, in particular, makes it very clear that animals feel not only physical, but also emotional pain:

It is likewise forbidden to slaughter it and its young on the same day, this being a precautionary measure in order to avoid slaughtering the young animal in front of its mother. For in these cases animals feel very great pain, there being no difference regarding this pain between man and the other animals. For the love and the tenderness of a mother for her child is not consequent upon reason, but upon the activity of the imaginative faculty, which is found in most animals just as it is found in man.¹⁸

Similarly, Nachmanides, an influential medieval authority, adds that animals sometimes even make behavioral choices based upon their feelings.¹⁹

¹³ See *Commentary of Rema to Shulchan Aruch Even Haezer 5:14* (discussing legitimate purposes, e.g., medical purposes); see also Nachmanides, *Commentary on the Torah: Leviticus 17:11* (Charles B. Chavel trans., Shilo Publ. H., Inc. 1974) (discussing the same).

¹⁴ See *Exodus 21:28* (King James) (“If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.” (emphasis in original)).

¹⁵ *The Babylonian Talmud* vol. I, Sanhedrin 55a, 375 (Jacob Schachter & H. Freedman eds., Rebecca Bennet Publications, Inc. 1959).

¹⁶ *Commentary of Rashi to Babylonian Talmud* Sanhedrin 55a (on file with *Animal Law*); see *Sefer HaChinuch* (the unwarranted killing of an animal, i.e., killing an animal for illegitimate human purposes, is rated as bloodshed that is only a little less severe than killing a person) (on file with *Animal Law*); see also *The Babylonian Talmud* vol. I, Sanhedrin 2a, 2 (Jacob Schachter & H. Freedman trans., Rebecca Bennet Publications, Inc. 1959) (“The ox to be stoned is tried by twenty-three The death sentence on the wolf or the lion or the bear or the leopard or the hyena or the serpent is to be passed by twenty-three.”).

¹⁷ See *The Babylonian Talmud* vol. I, Sanhedrin 2a, 2 (Jacob Schachter & H. Freedman eds., Rebecca Bennet Publications, Inc. 1959) (“Capital cases are adjudicated by twenty-three.”).

¹⁸ Maimonides, *The Guide of the Perplexed* pt. III, ch. 48, 599 (Shlomo Pines trans., U. Chi. Press. 1963) (emphasis omitted).

¹⁹ Nachmanides, *Commentary on the Torah: Bereishis/Genesis* (on file with *Animal Law*).

Lest one thinks that the choices animals make are just simple reactions, not based upon intelligent consideration, the Talmud relays several stories about animals making real, conscious decisions. There is, for example, the famous tale of Rabbi Phinehas ben Yair's donkey:

R. Phinehas happened to come to a certain inn. They placed barley before his ass, but it would not eat. It was sifted, but the ass would not eat it. It was carefully picked; still the ass would not eat it. "Perhaps," suggested R. Phinehas, "it is not tithed?" It was at once tithed, and the ass ate it. He, thereupon, exclaimed, "This poor creature is about to do the will of the Creator, and you would feed it with untithed produce!"²⁰

Returning to our original discussion, if divine reward and punishment are based on the making of moral choices and if animals do in fact make good choices, it follows that they are eligible for divine reward and punishment.

Indeed, the Bible hints that this is the case. On the very last night of their enslavement, when the Jewish people were getting ready for the Exodus from Egypt, the Egyptian houses were full of the cries of families bereft of their firstborns.²¹ At midnight, however, at a time when one would expect the animals to join in the howl, out of respect for the children of Israel, no dog moved its tongue.²² Later in the Bible, dogs are mentioned again: the nation is told that if an animal is slaughtered improperly and is therefore not kosher, they should not throw the meat away, but rather *lakelev tashlichun oto* (literally, ye shall cast it to the dogs).²³ The Midrash²⁴ informs us of the underlying reason:

Scripture says: "Ye shall not eat of anything that dieth of itself; thou mayest give it unto the stranger that is within thy gates . . ." Hence, what must Scripture mean by saying: "Ye shall cast it to the dogs"? To the dogs and to such as are like dogs. . . . This is to teach you that the Holy One, blessed be He, does not withhold the reward of any creature.²⁵

That verse and rabbinic explanation are an excellent starting point for the question of beastly morality and just reward, but are not entirely satisfying in and of themselves. In typical Jewish philosophy, the discussions revolving around reward and punishment usually focus on life after death, i.e., reward and punishment in the world to come. And so the next question that we have to ask is: Do animals have souls?

²⁰ *The Babylonian Talmud* vol. II, Chullin 7a-b, 29 (Rabbi Dr. I. Epstein trans. & ed., Soncino Press 1948) (internal citation omitted, punctuation placed inside quotations).

²¹ *Exodus* 11:5-6 (King James).

²² *Id.* at 11:7.

²³ *Id.* at 22:31.

²⁴ A Midrash is "an ancient Jewish exposition of a passage of the scriptures." *Webster's Third New International Dictionary* 1431 (Philip Babcock Gove ed., Merriam-Webster, Inc. 1993).

²⁵ *Mekhilta de-Rabbi Ishmael* vol. II, Kaspas, ch. 2, 466 (Jacob Z. Lauterbach trans., 2d ed., Jewish Publications Socy. 2004) (punctuation placed inside quotations).

Rabbi Moshe Chaim Luzzato (commonly referred to as “Ramchal”), a very influential Kabbalist and philosopher of the eighteenth century,²⁶ wrote that animals do in fact have souls.²⁷ Ramchal asserted that “[o]ne type of soul [*nefesh*] that man has is the same that exists in all living creatures. It is this [animal] soul that is responsible for man’s natural feelings and intelligence.”²⁸

If they do have souls, then one would expect animals to receive reward in the next world for the things they have done in this world. The canonic *responsa* literature, during the period of Jewish masters known as the *Gaonim* (literally, Geniuses, a period roughly from the sixth to the eleventh centuries),²⁹ provides such an opinion. With regard to animals that die for good (i.e., legitimate) reasons, Rabbi Sherira Gaon, writing in the tenth century, explicitly states, “We are of the opinion that all living creatures, the slaughtering and killing of which God has permitted, have a reward, which they may expect.”³⁰

Bringing us back full circle, a set of Midrashim attributed to Rabbi Akiva—the same Talmudic Rabbi Akiva of the first century who linked reward and punishment to free will—goes one step further than the *Gaonim* did.³¹ The Midrash tells us that animals will even have the ultimate reward, and participate and be included in the eventual resurrection of the dead:

When God renews His world, He himself takes charge of the work of renewal. He arranges all the regulations of the last ones, those of the future world . . . the order of each and every generation, of every being, of every animal, and of every bird . . . I have caused all human beings and all creatures to die in this world, and I shall restore their spirit and soul to them and revive them in the World to Come.³²

Considering the amount of literature that is available within the Jewish tradition on the concept of human morality and divine reward and punishment, it seems rather odd that, if animals make the same kinds of choices—even if the animals’ choices are of somewhat lesser degree—we would have to rely on an obscure reference to make the

²⁶ See Dan Cohn-Sherbok, *The Dictionary of Jewish Biography* 187 (Continuum 2005) (describing Ramchal as an Italian Kabbalist and philosopher); see also Samuel J. Levine, *Further Reflections on the Role of Religion in Lawyering and in Life*, 11 Regent U. L. Rev. 31, 34 (1998–1999) (describing Ramchal as a great eighteenth century ethicist).

²⁷ Moshe Chaim Luzzatto, *The Way of God* pt. III, 1:1 (Aryeh Kaplan trans., 6th rev. ed., Feldheim Publishers 1996).

²⁸ *Id.* (final bracketed alteration in original).

²⁹ George Horowitz, *The Spirit of Jewish Law: A Brief Account of Biblical and Rabbinical Jurisprudence with a Special Note on Jewish Law and the State of Israel* 40–42 (Central Bk. Co. 1953).

³⁰ Rabbi Natan Slifkin, *Man & Beast: Our Relationships with Animals in Jewish Law and Thought* 114 (Zoo Torah 2006) (quoting Rabbi Sherira Gaon, *Teshuvos HaGaonim* no. 375).

³¹ Cohn-Sherbok, *supra* n. 26, at 8; see *Genesis Rabbah*, *supra* n. 3, at 21:6 (discussing Rabbi Akiva’s linkage of reward and punishment to free will).

³² Slifkin, *supra* n. 30, at 71 n. 1 (quoting *Osiyos D’Rabbi Akiva, as aleph*).

case. More information on the process of rewarding animals is necessary to understand the concept of beastly morality under Jewish law. The remainder of this Essay shifts to focus on that mystery, and attempts to answer the question of the great lacuna in the text of beastly morality.

We start by noting that the line between humans and animals was not as clear-cut in ancient (rabbinic) times as it is now. Throughout the discussions in rabbinic literature, we encounter part-human and part-animal beings, such as mermaids and other monsters.³³ The rabbis, as legal theorists, were not scientists, and were more interested in how to classify them than whether these creatures actually existed. From their statements and rulings across the Babylonian Talmud, the Jerusalem Talmud, and the Midrashic lore, one can get a sense of the criteria the rabbis used in determining what exactly it was that gave a creature that elusive thing we tend to call—for lack of a better word—*humanity*, with the accompanying rights and benefits.

Jewish law recognizes some of the classic tests of humanity such as biology, moral intelligence and communicative ability, free will, et cetera. However, this Essay argues that it is the shifting contextual/functionality test of humanity, as developed in the Jerusalem Talmud, that is the origin of our obligations to certain animals above and beyond our general obligation to not harm life for no reason—and indeed our fundamental understanding of animals in general.³⁴ If animals display human characteristics—if they look human, or act human in some meaningful cognitive way—they deserve not only human rights but also mutual respect. From a Jewish law perspective, they are, in fact, at some level, “human.”³⁵ That might explain the dearth of specifically animal-focused discussion of morality and compensation; if animals are displaying what we might at first call beastly morality, then perhaps according to Jewish law they have by definition already crossed or started crossing the line into humanity.

³³ See Rabbi Natan Slifkin, *Sacred Monsters: Mysterious and Mythical Creatures of Scripture, Talmud and Midrash* 19 (Zoo Torah 2007) (discussing references to mystical creatures present throughout Jewish literature); see also e.g. *The Book of Jasher* 61:15 (J.H. Parry & Co. 1887) (available at <http://www.ccel.org/a/anonymous/jasher> [<http://perma.cc/BXA6-LL2U>] (accessed Nov. 16, 2013)) (“Zepho . . . came into the cave and he looked and behold, a large animal was devouring the ox; from the middle upward it resembled a man, and from the middle downward it resembled an animal . . .”).

³⁴ Babylonian Talmud, Baba Mezi’a 31a; see also Rabbi Dr. Asher Meir, *Animal Suffering: The Jewish View*, <http://www.virtualjerusalem.com/judaism.php?Itemid=10453> [<http://perma.cc/0uwkvpjTeZ1>] (Aug. 25, 2013) (accessed Nov. 16, 2013) (discussing that, according to the Babylonian Talmud, Baba Mezi’a 31a, the reference to “unloading” pack animals in *Exodus* 23:5 is one source for the prohibition of animal suffering).

³⁵ See Rabbi Michael J. Brody, *Cloning People and Jewish Law: A Preliminary Analysis* pt. III(D), <http://www.jlaw.com/Articles/cloning.html> [<http://perma.cc/0oQEWj29WjC>] (accessed Nov. 16, 2013) (asserting that “humanness” is not dependent on intelligence, and noting the ambiguity in categorizing something as “animal” or “human” (internal quotations omitted)).

There are several places throughout the Bible³⁶ and the Talmud³⁷ where humans are referred to as a *yelud isha* (literally, those born of woman). In describing Eve, the *Targum Onkelos*, an early and influential commentary,³⁸ notes that the verse refers to her as “the mother of all humanity,” because she, Eve, is the progenitor of mankind; anyone born from Eve or her descendants is considered part of mankind.³⁹ This seems to argue for a traditional speciesist definition, and some Jewish law authorities have taken that definition to be authoritative fact.⁴⁰

One story supporting such a reading seems to come from the Talmud, which tells us how one rabbi created a “golem,” a humanoid automaton:

Rab[bah] said: If the righteous desired it, they could be creators, for it is written. But your iniquities have distinguished between [you and your God]. Rabbah created a man, and sent him to R. Zera. R. Zera spoke to him, but received no answer. There upon he said unto him: “Thou art a creature of the magicians. Return to thy dust.”⁴¹

The fact that Rabbi Zera destroyed the golem tells us at least one fundamental thing: “killing” this golem was not considered murder. Why? Because—according to traditional argument—humanity is defined as having been born from a woman, no matter how similar to humanity something looks. While several rabbinic decisors do agree that this is the working definition,⁴² they also add several important points. The first is that, because humanity is species driven, *any* human, no matter how many abnormalities or deficiencies, mental or physical, does not lose the status of personhood.⁴³ Similarly, miscarried fetuses are human for the purpose of mourning and burial.⁴⁴ This leads us to a startling conclusion: If humanity is species driven, as descendants of Eve, then even according to traditional Judeo-Christian

³⁶ See e.g. Job 14:1 (King James) (“Man that is born of a woman” (emphasis omitted)).

³⁷ See e.g. *The Babylonian Talmud* vol. III, Yoma 75b, 698 (Rabbi Dr. I. Epstein ed. & trans., Soncino Press 1938) (“[F]or is there one born of woman”).

³⁸ Israel Drazin, *Targum Onkelos* to Deuteronomy 1 (KTAV Publ. H., Inc. 1982).

³⁹ *Targum Onkelos Commentary* to Genesis 3:20 (Rabbi A. M. Silbermann & Rev. M. Rosenbaum, trans., Silbermann Fam. 1934) (on file with *Animal Law*).

⁴⁰ *Responsa Chacham Tzvi* 93 (on file with *Animal Law*); see Rabbi Michael J. Brody, *Genetically Engineering People: A Jewish Law Analysis of Personhood*, 13 St. Thomas L. Rev. 877, 890 (2001) (noting that, while there are different interpretations as to what makes one human, some groups adopt the “from a human mother” formulation as the exclusive definition of humanness (internal quotations omitted)).

⁴¹ *The Babylonian Talmud* vol. I, Sanhedrin 65b, 446 (Jacob Schachter & H. Freedman trans., Rebecca Bennet Publications, Inc. 1959) (italics and internal footnotes omitted).

⁴² See e.g. Moshe Cordovero, *Pardes Rimonim [Orchard of Pomegranates]* ch. 24, § 10 (discussing killing a “golem”) (on file with *Animal Law*); Rabbi Avraham Azulai, *Chessed LeAvraham, Maayan Revi'i* nahar 30 (discussing the same) (on file with *Animal Law*).

⁴³ *Shut Teshuva Me'ahava* (on file with *Animal Law*).

⁴⁴ *Chazon Ish, Chida* (on file with *Animal Law*).

sources, humans are descended from nonhuman animals, as Adam and Eve were in no sense of the words “born of woman.”⁴⁵

And yet this “born of woman” technicality cannot be the definition of humanity under Jewish law. *Halacha*⁴⁶ is meant to address reality on the ground, and so what happens when we are introduced to a creature that for all intents and purposes looks and acts human, but according to our definition is not? Would anyone feel comfortable telling children who were formed in vitro, or who finished their development in an artificial incubator, that they are not fully human and are therefore not entitled to their basic human rights?

The simple answer is to retain the speciesist argument and redefine “born of woman” to just mean having human DNA; the biblical usage of that phraseology may have been a simple way of referring to the usual method of possessing precise human biological specifications, but not necessarily the only one. This Essay, however, argues that this is not the case, and that indeed *halacha* has developed an alternative proposition for humanity, one which has important relevance for any discussion of animals. A fascinating discussion of tractate Niddah of the Jerusalem Talmud provides,

Rabbi Yasa states in the name of Rabbi Yochanan: “if [a creature] has a human body but its face is of an animal, it is not human; if [a creature] has an animal body, but its [face is] human, it is human.”

This would indicate that when the simple definition does not apply, one examines the creature for “human” features. However, the Talmud continues:

Yet suppose it is entirely human, but its face is animal like, and it is learning Torah? Can one say to it “come and be slaughtered?” [Rather one cannot]. Or consider if it is entirely animal like, but its face human, and it is plowing the field [acting like an animal] do we come and say to it, “come and perform levirate marriage [*yibum*] and divorce [*chalitza*]?” [Rather, one cannot.]

The [T]almudic conclusion seems to be simple. When dealing with a “creature” that does not conform to the simple definition of humanness—borne from a human mother—one examines context to determine if it is human. Does it study Torah (differential equations would do fine for this purpose, too) or is it at the pulling end of a plow?⁴⁷

According to the Talmud, when we cannot apply the biological definition of a human—which may in fact still be the general default definition for the status of personhood—then we apply the contextual definition of a human if it fits. This means that a genetically engi-

⁴⁵ *Sidrei Taharot, Oholot* (on file with *Animal Law*).

⁴⁶ *Halacha* or *halakah*, is the “body of Jewish oral laws supplementing written law or both oral and written law together or any particular law or custom prescribed by the legal codices.” *Webster’s Third New International Dictionary* 1021 (Philip Babcock Gove ed., Merriam-Webster, Inc. 1993).

⁴⁷ Broyde, *supra* n. 35, at pt. III(D) (quoting the Jerusalem Talmud, Niddah 3:2) (alterations in original, punctuation placed inside quotations).

neered person, even one fully incubated artificially, would be human, as it would have both human attributes and human intellectual ability. But it also means that great apes, bonobos, and all other primates who sign, communicate, and interact like people—or even those who do not, such as miscarried fetuses—still possess the species potential to do so, and would be considered people, not animals, by *halacha*.

While this is the Essay's central tenet, it is also important to point out that there are other possible definitions of *halachic* humanity, although it is unclear if these are definitions or more aptly descriptive features of humanity. One is the moral intelligence test, based on the verse in Genesis⁴⁸ *lada'at tov vara* (literally, to know (differentiate) between good and evil).⁴⁹ As noted above, Rabbi Akiva famously links this notion with free will,⁵⁰ and Maimonides claims that what makes man special is that he is the only creature who resembles God in that he has free will.⁵¹ If Maimonides is right, and if animals have the will to make moral choices, then animals are people too, according to *halacha*.

Others have wanted to classify speech as a possible *halachic* criteria for humanity, but that raises some age-old considerations; a human who cannot speak is still human, and there are in fact animals ranging from gorillas to parrots that can both communicate and speak. This is not just a modern phenomenon that began with Alex, the African Grey parrot;⁵² the Babylonian Talmud notes that a certain Rabbi Illish met a man who understood the language of birds.⁵³

Being that we are not willing to give or take away a status of personhood based on just sounds or motions, the idea of speech, or more generally communication, must be a linked concept; and so when we talk about speech as a characteristic of humanity, it means the ability to not just know, but to *express* the differentiation between good and evil. This may not be a separate definition at all, but rather just a description or a test for knowledge of moral intelligence. Or it might be a description or test for our contextual/functional lens—i.e., does this animal behave, contextually, like a human being, exhibiting what we would think of as clearly human intelligence? For instance, does the animal speak? Does the animal communicate, and have knowledge? In all of these ways, at least some animals are “human.”⁵⁴

⁴⁸ *Genesis* 3:22 (King James).

⁴⁹ *Commentary of Rashi to Genesis* 3:22 (available at http://www.chabad.org/library/bible_cdo/aid/8167#showrashi=true [<http://perma.cc/0przpHMGcxc>] (accessed Nov. 16, 2013)).

⁵⁰ *Genesis Rabbah*, *supra* n. 3, at 21:7.

⁵¹ Maimonides, *supra* n. 4, at 5:1, 41–42.

⁵² See Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* 87–91 (Perseus Bks. 2002) (describing the author's interaction with Alex and Alex's ability to speak and identify colors and sounds).

⁵³ *The Babylonian Talmud* vol. I, Gittin 45a, 198 (Maurice Simon trans., Rebecca Bennet Publications 1959).

⁵⁴ In our modern world of widespread corporate personhood, the idea of extending what we think of as “humanity,” for some purposes and not for others, is not shocking.

This idea is not that farfetched. The truth is that the early rabbis, although they did not have bonobos who could sign, did deal with what they felt were border cases of humanity. The classic example is a Mishnah in tractate Kilayim,⁵⁵ which discusses the creature called *adnei hasadeh*, also known as a *yadua*.⁵⁶ While the rabbinic descriptions are terse, the creature seems much like Bigfoot; the early and influential Rabbi Shlomo Yitzchaki, in his commentary to *Job*, describes the creature as having the form of a man while really being an animal of the field.⁵⁷ Maimonides, however, in describing this creature, notes that its speech is similar to a human's, but is unintelligible.⁵⁸ Most importantly, he refers to it in his commentary to the Mishnah as *al nasnas*, which is in fact an Arabic word for monkey.⁵⁹ The *Tiferet Yisrael* explicitly provides that these sources refer to what we call an orangutan.⁶⁰

The Talmud quotes two opinions as to whether or not, from a Jewish law standpoint, we are dealing with humans here.⁶¹ It is, however, unclear if the two positions are in conflict, with one saying yes and one saying no, or if the status is simply that these beings are somewhere in between—i.e., everyone agrees that for some things they are considered human and for other things they are not. According to at least some important commentators, however, this creature is a full human being.⁶² The Jerusalem Talmud in fact refers to it as a *bar nosh d'tor* (literally, a mountain man).⁶³ Presumably, this fits our earlier definition, also from the Jerusalem Talmud: contextually this creature ex-

See e.g. Citizens United v. Fed. Election Commn., 558 U.S. 310, 342 (2010) (recognizing that First Amendment protection extends to corporations).

⁵⁵ *The Babylonian Talmud* Kilayim 8:5, 132 (Rabbi Dr. I. Epstein ed. & trans., Soncino Press 1961).

⁵⁶ *The Babylonian Talmud* vol. I, Sanhedrin 65b, 445 (Jacob Schachter & H. Freedman trans., Rebecca Bennet Publications, Inc. 1959).

⁵⁷ Shlomo Yitzchaki, *Commentary of Rashi to Job 6:23* (on file with *Animal Law*).

⁵⁸ Maimonides, *Commentary to the Mishnah* Kilayim 8:5; *see also* Shlomo E. Glicksberg, *Judaism and Evolution in Four Dimensions: Biological, Spiritual, Cultural, and Intellectual*, in *Origin(s) of Design in Nature: A Fresh, Interdisciplinary Look at How Design Emerges in Complex Systems, Especially Life* 212 (Liz Swan et al. eds., Springer 2012) (describing how Maimonides claimed the *adnei hasadeh* spoke “incessantly” and like a human).

⁵⁹ Maimonides, *Commentary to the Mishnah* Kilayim 8:5 (on file with *Animal Law*). The idea of monkeys as intermediates between man and animal is well-founded in Jewish thought. Discussing the four basic levels of Creation (minerals, plants, animals, and man), Rabbi Yosef Albo writes that, just as coral life and sea sponges represent the intermediate existence between the plant and animal kingdoms, so too does the monkey represent the intermediate stage between animals and man. Yosef Albo, *Sefer Halkarim* [The Book of Principles] 3:1 (on file with *Animal Law*).

⁶⁰ Israel Lipschitz, *Tiferet Yisrael, Yachin to the Mishnah* Kilayim 8 (on file with *Animal Law*).

⁶¹ Jerusalem Talmud, Kilayim 8:5.

⁶² *See e.g. Rash Mishantz, Commentary on Mishnah* Kilayim 8:5 (on file with *Animal Law*) (arguing that the creature is a human); Rav Ovadia Bartenura, *Commentary on Mishnah* Kilayim 8:5 (on file with *Animal Law*) (same).

⁶³ Jerusalem Talmud, Kilayim 8:5.

hibits characteristics that make it seem human, and therefore is human. What we see clearly from the discussion of the *adnei hasadeh*, is that just like we established before, humanness need not be defined solely with reference to a human parent; it may also be defined with a clear, independent functionality test. Either is sufficient to make one human according to Jewish law.⁶⁴

While acknowledging that the Jewish tradition is quite expansive and subject to various interpretations, this Essay finds that Judaism's teachings are in fact quite compatible with a broader and deeper understanding of beastly morality. From the biblical comment that we have much to learn from the ways of the animal kingdom,⁶⁵ to the ancient text of *Perek Shira* (describing, in part, the ways that animals serve and praise God in nature),⁶⁶ the notion that animals have the potential for morality has long been part of the Judaic tradition, and the idea has found resonance in a variety of specific areas within Jewish thought. Philosophically speaking, Nachmanides' assertion that animals do have some form of free will⁶⁷ coincides nicely with the numerous statements throughout the Talmud and the Midrash, which involve animals receiving their punishments and just rewards.⁶⁸ Theologically, the *Gaonic* responsa asserting that animals receive recompense in the afterlife for their worldly afflictions and efforts⁶⁹ makes sense given the stories in the Talmud of righteous animals separating tithes,⁷⁰ and sheds light on the basis for the Midrash which has them taking part in the Great Resurrection.⁷¹ Practically speaking, the Biblical ox that is put on trial by a panel of twenty-three judges⁷² demonstrates the weight that the concept of animal morality is given in the legal arena.

In conclusion, if there does seem to be a disproportionately small amount of literature on the subject of beastly morality, perhaps it is because Judaism already had a broader and deeper understanding of what it means to be practically *human*. Based on the Jerusalem Talmud's contextual definition of humanity, it is quite possible that some

⁶⁴ See R. Akiva Eiger, *Commentary to Yoreh Deah 2* (stating that monkeys cannot perform ritual slaughter not because they are not human, but because they are not observant Jews) (on file with *Animal Law*); see also Maharasha, *Chidushei Aggadot to Tractate Sanhedrin* (implying that if something is alive, like an animal, and exhibits human characteristics, we would in fact consider it human) (on file with *Animal Law*).

⁶⁵ *Proverbs* 6:6 (King James).

⁶⁶ *Perek Shira*, *supra* n. 11.

⁶⁷ Nachmanides, *supra* n. 19.

⁶⁸ See *supra* nn. 20–25 and accompanying text (discussing animals making conscious choices and receiving rewards).

⁶⁹ See *supra* nn. 29–30 and accompanying text (discussing the possibility of reward for animals that die for good reasons).

⁷⁰ *The Babylonian Talmud Chullin 7a–b*, 29 (Rabbi Dr. I. Epstein ed. & trans., Soncino Press 1948).

⁷¹ Slifkin, *supra* n. 30, at 71 n. 1 (quoting *Osiyos D'Rabbi Akiva, as aleph*).

⁷² See *supra* nn. 13–16 and accompanying text (discussing the standards for putting an animal to death).

of the morally responsible subjects of Professor de Waal's and Professor Wise's research were already—from a Jewish perspective—more human than not, with all of the associated rights, duties, privileges, and expectations.