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Recommended Citation

Bryant, Taimie L. () "Animals Unmodified: Defining Animals/Defining Human Obligations to Animals," *University of Chicago Legal Forum*: Vol. 2006: Iss. 1, Article 6.

Available at: <http://chicagounbound.uchicago.edu/uclf/vol2006/iss1/6>

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Animals Unmodified: Defining Animals/Defining Human Obligations to Animals

Taimie L. Bryant[†]

[T]he definition of women in law and in life is not ours. . . . [W]omen [are not] measured by standards that reflect the experience and aspirations of women as such. We are not allowed to be women on our own terms.

Catharine A. MacKinnon, *Feminism Unmodified* 71 (Harvard 1987).

INTRODUCTION

Palos Verdes Peninsula, home to some of Los Angeles County's most affluent residents,¹ is also home to some of the world's most beautiful birds, including the India blue peafowl. Although there are many species of peafowl, India blue peacocks, with their iridescent blue-green plumage, are the peacocks most Americans think of when peacocks are mentioned. The population of India blue peafowl on the Peninsula is particularly vibrant because, despite the presence of predators, the population is large enough to generate genetically robust and healthy individuals.² Originally from India and resident on the Peninsula since the 1920s, peacocks, peahens, and peachicks are so numerous that they may constitute the largest wild flock of pure India blue peafowl in the United States.³

Although peafowl are not native to the Peninsula, they thrive in those parts of the Peninsula where residents particularly value retention of natural surroundings. In the municipality of Rolling Hills Estates, for example, lot sizes are

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¹ US Census 2000 fact sheet for ZIP code tabulation area 90274, available at <<http://factfinder.census.gov>> (last visited Jan 17, 2006).

² Interview with Dr. Louis Schwartz (Nov 15, 2005).

³ David Seideman, *Beauty or the Beast?*, 31 (3) Nat'l Wildlife 43 (1993).

large,⁴ construction can occur on only a limited percentage of each lot,⁵ residential areas have few sidewalks, and manicured lawns are rejected in favor of abundant naturalistic vegetation. Many residents keep horses, and there are extensive mutual easements for horse trails. Rolling Hills Estates has declared itself an “animal-friendly” city, as evidenced by rules that allow residents to keep a wide range of animals⁶ and a Wild Bird Protection Ordinance that protects all wild birds and their eggs.⁷

Despite these apparently idyllic circumstances for peafowl, the birds have been at the center of many controversies on the Peninsula because they have characteristics that irritate some of the humans who live there. For one thing, they can become fairly raucous during mating season. For another, their penchant for gazing at their own reflection can result in costly damage to car paint when birds decide that windshields are ideal reflective surfaces.

Peafowl, particularly the peacocks, are large birds, and where they live in great numbers, they constitute an undeniable presence. Their number is great enough that they partially define the identities of the human residents of the Peninsula. Residents identify themselves in terms of whether they like or dislike the birds, and polarization can easily emerge.⁸

Municipal governments on the Peninsula are sometimes caught between those residents who defend the peafowl and those who would like to eliminate peafowl or reduce their numbers.⁹ In one such municipality, Palos Verdes Estates, the City’s plan to trap and remove peafowl resulted in a lawsuit brought by a nonprofit organization known as Friends of the Peacocks.¹⁰ In order to settle the dispute, Friends of the Peacocks

⁴ City of Rolling Hills Estates: Housing Element, Section 4.3, at 14-16 (July 25, 1994), available at <http://www.ci.rolling-hills-estates.ca.us/planning/general-plan-section_4.pdf> (last visited Jan 18, 2006). See also Property Development Standards, Rolling Hills Estates, Cal, Mun Code Title 17 (2005) (providing lot size and coverage standards for residential districts in the City of Rolling Hills Estates).

⁵ Rolling Hills Estates, Cal, Mun Code §§ 17.06.070, 17.06.160, 17.06.250, 17.06.320 (2005).

⁶ Rolling Hills Estates, Cal, Mun Code § 17.46.020 (2005).

⁷ Rolling Hills Estates, Cal, Mun Code § 9.04.060 (2005).

⁸ In his National Wildlife article about the peafowl in Rolling Hills Estates, Seideman describes how “The Peacock War” has divided the community between protectors and detractors of the birds. Seideman, 31 (3) Nat’l Wildlife at 44 (cited in note 3).

⁹ Seideman recounts the efforts of the City Council of Rolling Hills Estates to handle complaints and controversy about peafowl in the early 1990s. Id.

¹⁰ *Butler v City of Palos Verdes Estates*, 135 Cal App 4th 174 (2005).

and the City agreed in 1986 to a peafowl management program that required the City to maintain two flocks of peafowl in protected areas of the City.¹¹ For their part, Friends of the Peacocks agreed to a reduced total number of birds. Despite assiduous peafowl management, the City continued to receive complaints from some residents who do not like the peafowl, culminating in a lawsuit filed in 2002 alleging that the City is maintaining a nuisance by “keeping” “domestic” animals in violation of restrictions in the deeds by which they received ownership of the lands involved in the peafowl management program.¹² Central to the lower court’s finding that the City is violating the deed restrictions against keeping such animals was the opinion of poultry expert Dr. Francine Bradley, who opined that the peafowl were “domestic” because they had once been held captive and because the City was “ranging” them (as, for example, a rancher “ranges” cattle).¹³

The City appealed, and on December 2, 2005, the appellate court reversed the lower court decision, holding that it defied common sense to find that the peafowl in question are domestic animals or that the City is keeping them as a cattle rancher “keeps” cattle.¹⁴ The appellate court defined the peafowl in question as “wild” or “feral”¹⁵ and validated the City’s peafowl management activities, thereby sparing the peafowl flocks from eradication.¹⁶

Attempting to define wild peafowl as “domestic” so that they can be removed or eradicated is not unique to the litigation in Palos Verdes Estates. The City of Rolling Hills Estates also

¹¹ *Id* at 177.

¹² *Id* at 178.

¹³ *Id* at 178-79, 181.

¹⁴ *Butler*, 135 Cal App 4th at 181-83.

¹⁵ The court did not establish that for all times and purposes peafowl are “wild” or “feral.” The court ruled that when, as here, the dispute arises from a contract (in this case, deed restrictions) in which a definition has not been supplied by the contract itself, ordinary meanings of the words in dispute would be employed to resolve the dispute. *Id* at 183.

¹⁶ Since this Article is about animal rights and human duties, it is important to note that the appellate decision was not a strikingly animal-protective decision even though it produced a positive outcome for the peafowl flocks and evidenced an apparent judicial willingness to look behind nonsensical definitions of animals. The underlying facts of this case are that individual birds are subject to trapping and removal regardless of the impact on them and that the court analogized this conduct to that of a city’s animal control activities in removing rabid dogs from the community. The Court issued the narrowest opinion possible on grounds that make the decision relatively inapplicable to other controversies involving peafowl. It is quite possible to interpret the decision as protective of the City’s efforts to comply with a settlement entered for purposes of concluding a lawsuit against the City rather than as protective of peafowl. *Id* at 183-84.

considered that legal maneuver as a way of facilitating trapping and removing peafowl without having to amend the City's Wild Bird Protection Ordinance ("Ordinance"). Having learned that Dr. Bradley could be hired to provide an opinion that the birds are not "wild," the City hired her to prepare a report on the classification of peafowl in Rolling Hills Estates. If the City could define the birds as "not wild," trapping and removal could occur without public hearings, which are required to amend the Ordinance. If trapping and removal of these wild birds, defined as "domestic" only for purposes of trapping and removing them, could occur without doing apparent violence to the Ordinance, the City's definition of itself as protective of wild birds could remain superficially intact.

Before the City's plan was fully developed, however, the appellate court in the case against Palos Verdes Estates issued a tentative ruling that rejected Dr. Bradley's characterization of the birds as "domestic" in the context of the birds' circumstances in that particular city,¹⁷ circumstances that are markedly like those of the birds in Rolling Hills Estates. Soon thereafter, the City of Rolling Hills Estates announced a return to its original plan of amending its Ordinance for purposes of trapping and removing peafowl from certain parts of the City. Unlike redefining the birds so that the Ordinance would not apply at all, amending the Ordinance to permit trapping and removal of the birds would require public hearings, which would bring community conflict and tensions to the forefront. The benefit of such hearings, however, is that alternative solutions can also be brought to the forefront if there are intelligent, committed defenders of the birds. There are such defenders in Rolling Hills Estates.

As a direct result of a public hearing held on November 15, 2005, a committee of residents will be established to explore humane means of population monitoring and stabilization so that trapping and removal become last-resort measures instead of first-resort responses to complaints.¹⁸ Bringing debates about peafowl to the surface, instead of defining the birds as "domestic" in order to trap and remove them without public debate, provided the public space necessary for the defenders of peafowl to present alternatives even as to those parts of the City where

¹⁷ *Id.* at 181-83.

¹⁸ Interview with Linda Retz, resident of Rolling Hills Estates and activist in defense of the peafowl (Nov 16, 2005) ("Retz Interview").

peafowl live but their defenders do not. Significantly, in those areas of the City where peafowl and their defenders are few, trapping will be legally allowed but with restrictions established through the advocacy efforts of defenders of peafowl who live in other areas of the City.¹⁹

From some perspectives this outcome seems to be a good resolution for the peafowl because trapping is limited in location (only in certain areas with relatively few peafowl) and in purpose (only for relocation and not for extermination). However, the process assumed that only humans' interests in protecting or removing the peafowl were at issue, only limited affirmative protection other than the right to live (somewhere not of the peafowl's choice) was provided, and there was very little consideration of the motives behind and basis for the demand that peafowl be removed.

This Article begins by considering three issues illustrated in part by the disputes over peafowl on the Palos Verdes Peninsula: (1) animals are not legal persons and, therefore, cannot define their own lives or protect themselves from harm; (2) legal debate and disputes rarely reach the question of establishing such affirmative rights for animals because of protracted, obfuscating battles about legal definitions of animals; and (3) it is preferable to forego disputes to determine which animals are suited for rights and instead focus on duties that can be placed on those who (ab)use animals.²⁰ At the core of human privilege to exploit animals is the first: animals are not legal persons with representatives who can protect them through the exercise legal rights on their behalf. They have no legal rights through which they (through legal representatives) can define their lives. Far from being legal persons, they are instead the legal property of humans, which makes them subject to the vagaries of human definitions of them and their lives. Animals have no stable legal identity as "persons" under the law.

¹⁹ For example, if peachicks are trapped without their mothers, or vice versa, the animals must be released; birds can remain in traps no longer than 4 hours; the trapping must be paid for by the individual property owner but conducted by a City-contracted entity; trapped birds must be relocated to lawfully situated, willing recipients and not destroyed. Voice message from Linda Retz (Dec 15, 2005); City Council Resolution No. 2090, City of Rolling Hills Estates.

²⁰ I use the term "(ab)user" in those instances in which it is important to include those users and uses of animals presumed benign along with those obviously abusive exploiters of animals. There is a variety of opinions among people who think about animal use and abuse, and in order to capture that, I occasionally use the term "(ab)user" to include in the discourse a wider range of readers who might not perceive themselves to be included if one of the other terms ("user" or "exploiter") is used.

To some extent, as other contributions to this Volume illustrate, these issues are a function of the relationship between law and “life”; definitions of human lives and “quality of life” are not stable, either. There are strong differences in what that means for living human animals and living non-human animals, however. Non-human animals’ very right to exist is often at stake, yet challenges to efforts to destroy them are not treated as raising inherently serious questions about definitions of and respect for life. We argue about whether peafowl are “wild birds” and whether they should be trapped and killed or trapped and relocated. We do not spend much time evaluating the legitimacy of the request that they be killed or relocated. Further, as long as the debate about animals centers on whether they suffer, killing them in such a way that they won’t suffer seems to resolve such conflicts. If animals defined their own lives, merely to die without suffering would not likely be their preferred solution to conflicts with humans about habitat.

Because legal definitions of animals that prevent the development of animals’ own rights to define their lives (“legal personhood”) is so central, in Part I, I describe some of the many ways in which laws and legal processes result in definitions of animals that readily lead to disrespect and commodification of animals. Legal definitions of animals change, typically not out of concern about the consequences to the animals themselves. Definitions of animals change at the convenience of humans who want to use them or destroy them. For example, in 2000 California transformed fallow deer from wild animals to domestic animals with a stroke of the Governor’s pen.²¹ Fallow deer were defined as domestic animals for purposes of dismembering their bodies in slaughterhouses, which are legally allowed to dismember only the bodies of “domestic animals.”²² One consequence of becoming a domestic animal under California’s Food and Agricultural Code § 18943 is evident in legislation proposed in 2005 by California State Assemblymember Lori Saldana, which would “provide that: notwithstanding any other provision of law, it is unlawful to kill or to attempt to kill any

²¹ This change was five years in coming; however, it was initiated in 1995 as AB 527 and passed in 2000 (AB 1173, enacted as Chapter 373, Statutes of 2000), available at <http://info.sen.ca.gov/pub/99-00/statute/ch_0351-0400/ch_373_st_2000_ab_1173> (last visited Jan 18, 2006).

²² “Dead or alive” fallow deer were added to an enumerated list of exclusively domesticated animal species that are lawfully slaughtered in California slaughterhouses, see *id.*, modifying Cal Food & Agr § 18943.

cow or bull, calf, horse, mule, sheep, swine, goat, *fallow deer*, or poultry by burning, burying, grinding, drowning, rapid freezing, or suffocation²³

Not only does becoming a domestic animal for livestock purposes subject an animal to practices associated with intensive production of animal-flesh products, once there is an incentive to ranch them, formerly wild animals are increasingly modified physiologically and psychologically through domestication processes whereby humans choose those aspects of animal biology that suit their interests in easily reducing animal flesh to products that humans will want to consume. Through definitional changes, law metaphorically modifies animals and also paves the way to biologically modify animals.

As the Palos Verdes Peninsula peafowl controversies illustrate, the motivations and justifications of those who want to kill or exploit animals are rarely the focus of legal debates about animals. No one questioned those who, behind the scenes, pressed their City Council members to amend the Wild Bird Protection Ordinance. No matter the context, be it a “dangerous” dog hearing or proposed legislation to legalize ferrets as “pets,” serious decisions about animals are made without input from the animals themselves²⁴ and without adequate inquiry into the motives of those who initiate the process of defining animals in ways that can have life or death consequences for the animals.

In Part II, I consider several reasons why most legal debates about animals turn on questions of definitions of animals rather than on questions about the underlying animal exploitation and harm that those definitions help to cloak. I also consider the role of animals’ advocates themselves in focusing on definitions of animals. In doing so, advocates for animals are traveling a path well-worn by advocates in other social justice movements. Historically, American social justice movements have begun with

²³ The bill, known as the Farmed Animal Reform Act, AB 1587, Cal Legis, Regular Sess, 2005-06, died in Committee in January of 2006, available at <http://www.leginfo.ca.gov/pub/bill/asm/ab_1551-1600/ab_1587_bill_20050420_amended_asm.pdf> (last visited Apr 2, 2006) (emphasis added).

²⁴ One might assume that an animal’s owner would be an ideal advocate for animals, but owners sometimes have conflicts of interest with their own animals. An owner may agree to kill his barking dog in order to placate a neighbor, for example. One might wonder about the feasibility of animals’ participation in the discourse about them since they don’t speak the language of humans. Yet, ultimately, we should find a way to include what we believe to be their perspectives, as we do with dependent humans who cannot speak for themselves. Working through such problems is necessary if our society is to move toward respect for animals’ right to define who they are and the circumstances of their lives.

arguments about (1) the need to expand rights-based protection to include those currently denied rights-holding status or particular rights and (2) those qualities in excluded people that make them worthy of having certain kinds of rights.²⁵ As in those other movements to address oppression, seeking the extension of rights to animals might appear to be a good means of legally extricating animals from oppression, even if it means protracted arguments about the qualities in animals that make them worthy of rights-holding status. Lawyers expect to engage in debates about legal definitions, so they un-self-consciously engage in this debate, even when they are operating in political settings in which other starting points and emphases may be possible.

Legal advocates for animals engage in definitional activism for at least three pragmatic reasons: (1) their reliance on the most commonly accepted notion of justice (that like entities should be treated alike) requires them to focus on similarities between humans and animals; (2) their focus on ending animals' suffering, which leads to definitions of animals that rest on animals' capacities to suffer; and (3) their concern that they won't be taken seriously if they don't limit the scope of their advocacy only to those animals who, like humans, can suffer.

Although all three reasons are significant barriers to approaching advocacy by other means, it is perhaps the third reason—concerns about the scope of advocacy—that is the most worrisome. Advocates worry that if animals worthy of rights are

²⁵ Civil rights activists, feminists, gay rights advocates, and the disability rights community have all used the argument that a just society would protect these victimized groups from abuse because of their similarity to legally protected groups. See, for example, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich L Rev 2062, 2071–72 (2002) (“If the social group was able to show political strength . . . its organizational leaders would move toward a public stance which denied inferiority of the group’s defining trait: There is no material difference between blacks and whites, except those created by society and law”); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal L Rev 1279, 1287–91 (1987) (“Women’s inequality . . . results when society devalues women because they differ from the male norm.”); Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 Ohio St L J 867, 919–21 (2000) (discussing shared humanity theory as a means of addressing the dangers of theories of sameness and “homogenizing” strategies associated with the similarity argument); William M. Newman, *American Pluralism: A Study of Minority Groups and Social Theory* 59 (Harper & Row 1973) (describing assimilation by immigrant groups, where “[t]he central tenet . . . was that new groups must conform to the cultural tradition of the majority or dominant group”); Kenneth L. Karst, *Belonging to America* 1–27 (Yale 1989) (documenting the desire to belong as motivating “outsiders” and their utilization of constitutional law to secure equal, albeit often only formally equal, treatment in American society).

not defined first, a prohibition on harming animals would seem to include even bacteria or termites. Could one wash one's hands or protect one's house from termites? Legal advocates for animals' rights fail to fully appreciate that this is exactly the reasoning of opponents of animal rights; the point at which they begin to worry is simply different. While animals' advocates draw one line so that they can wash their hands without concern for bacteria (their only worry being safeguarding their own health), (ab)users of animals draw another line so that they can eat animals without concern for animals (their only worry being their getting enough protein). It is too simplistic to say that humans do not need to eat animals but that they do need to wash their hands. Although humans really don't need to eat animals, they do need to eat, and thoughtless, intensive production of a plant-based diet could have seriously harmful effects on animals, the planet, and themselves. Thoughtless, intensive destruction of bacteria and bacteria strains is no more necessary than eating animals. It is actually harmful to proceed in the manner most likely to kill the greatest number of bacteria the most quickly, and, by "harmful," I mean harmful to the bacteria, harmful to animals, harmful to the environment, harmful to people, and harmful to values that support stewardship rather than domination of nature. When people do not use the least harmful means of producing a plant-based diet or the least bacteria-destructive means of washing their hands, they needlessly subject all animals, people, and the environment to harm. Defining which animals are worthy of protection on the one hand and then destroying the natural nexus in which all animals and people live with one another is counter-productive to the aims of animals' advocates.

This Article argues for a different kind of line-drawing; it argues for drawing lines derived from examination of our own conduct rather than drawing lines on the basis of qualities in animals or aspects of the environment that do or do not qualify them for rights. As legal scholar Christopher D. Stone notes, there is a moral basis for grounding our inquiry in the behavior of humans rather than in qualities of animals:

The moral repugnance at traditional "rattlesnake round-ups" in some parts of the United States, in which the torment and slaughter of snakes is accompanied by feasts and celebration, has less to do with the pain of the snakes

than with the brutishness, arrogance, and ecological stupidity of the perpetrators.²⁶

Ultimately, through establishing duties to the environment and to animals perhaps we can whittle away at the legal definition of animals as “property,” which is the principal process by which law contributes to disrespect and commodification of animals.²⁷ By establishing duties without first establishing rights for “worthy” species of animals, advocates will not only engage in less protracted debates about which animals are worthy, they will be preserving the only means by which animals will be able to define themselves if and when they ever do receive legal entitlements to define and protect themselves. As I will explain later, this does not mean that animals’ advocates should lay down their advocacy for animals and become environmentalists. Environmentalism is surely necessary, but it is not sufficient because environmentalism involves choices that have better or worse impacts on animals now living on the earth. Environmentalism alone will not give rise to adequate inquiry into and cessation of human entitlements to (ab)use animals.

Part III examines the possibility of establishing duties to animals without initially specifying rights for animals. I argue that while it might seem that rights *must* be established first and that duties to animals must be derived from those rights, it may be possible and preferable that duties be established first. Moreover, I argue against the idea that duties must be linked reciprocally to rights. The reciprocal nature of rights and duties appears necessary from an Anglo-American jurisprudential

²⁶ Christopher D. Stone, *Ethics and International Environmental Law*, in Dan Bodansky, Jutta Brunne, and Ellen Hey, eds, *Handbook on International Environmental Law* (forthcoming Oxford 2006).

²⁷ There are other socio-cultural sources of disrespect and commodification of animals. Denial of legal personhood and the status of property coalesce in creating a formidable obstacle to protecting animals. Gary L. Francione emphasizes the property status of animals as the legal determinant of their lesser and vulnerable status. Others do not subscribe fully to the idea that property status is that detrimental. Francione addresses some of those arguments and concerns in *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, 2006 U Chi Legal F 231, 236-47.

On a socio-cultural level, it is possible to imagine abuse of animals that does not necessarily entail reducing them to property in the normal sense. An example is killing animals for sport with no intention of taking trophies or consuming their meat, hides, feathers, etc.—which certainly goes on in real life, as with people who shoot feral cats—unless the very act of deciding to kill an animal (or human) wantonly is construed as exerting ownership, which is a stretch. However, I maintain, as does Francione, that humans’ belief in their entitlement to take such actions stems from the property status of animals.

perspective, but there is no logical or pragmatic necessity to premise duties on rights, other than socio-cultural and historical familiarity with that route. I allude briefly to Asian law systems and other legal systems that have not been premised on reciprocal rights and duties. I also rely on philosophical and legal arguments raised by philosopher Mary Midgley and legal scholar Christopher D. Stone for the proposition that it is possible (and sometimes preferable) for duties to exist even when the entities to which duties are owed are not likely candidates for rights entitlements (for example, future generations of humans or aspects of the environment such as rivers or trees). I use examples from the American legal context for the argument that such an approach is feasible in the United States, and, in fact, already exists.

Ultimately, placing duties on (ab)users of animals enables us to do what is absolutely essential: focus on the motives and behaviors of those institutions and humans who harm animals. As difficult as it may seem to protect animals without first deciding which or whom we want to protect, it is the only meaningful way to begin addressing the problems experienced by animals, and it is also the only means by which we can protect the web of life upon which animals depend for their very existence. Protecting animals *must* mean challenging their (ab)users' practices, and animals' advocates must arrive at that challenge without endless disputes over definitions of animals.

This is not to say that the problems raised by proceeding with duties first do not exist or should be ignored because of the need for duties. Nor is it to say that it is somehow easier to decide which duties to establish than to decide which entitlements animals should have. It is to say that we have little choice but to confront those difficulties head on. The overarching difficulty is to avoid establishing duties that do no more than reinforce the status quo of exploitation. If the duty is only to treat animals more kindly as they are exploited, then exploitation will be furthered, not reduced. Thus, the real work of establishing duties lies in advocacy that forces compliance in accordance with the rights-based principles first enunciated by legal scholar Gary L. Francione in his plan for the incremental establishment of rights for animals.²⁸ Even if incremental in

²⁸ In his book *Rain Without Thunder*, Francione sets out criteria of incremental reform that could lead to rights for animals. Those include the requirements that any specific proposed reform prohibit an act or acts of exploitation that go to the heart of the exploitative enterprise and to the heart of animals' basic needs, without substituting

nature, advocacy must involve establishing duties that can be realized as prohibitions of exploitative practices: practices that go to the heart of animals' status as the legal property or potential property of humans, practices that impede animals' right to define themselves by their own conduct and lives in the world.

I. THE ROLE OF LAW IN DEFINING ANIMALS

Not being heard is not just a function of lack of recognition, not just that no one knows how to listen to you, although it is that; it is also silence of the deep kind, the silence of being prevented from having anything to say.

Catharine A. MacKinnon, *Feminism Unmodified* 39 (Harvard 1987).

Humans do not allow animals to define their own lives for themselves. Animals are effectively silenced, prevented from having anything to say about their lives and their preferences, by humans' ability to control them and by humans' preoccupation with animals' utility to humans. Humans define animals by reference to their own situations, their own preferences, and their own operative categories of animals.²⁹ The peafowl on Palos Verdes Peninsula cannot ask local government to provide better circumstances of life for them; they can only "hope" that local government will protect them from being labeled "pests" worthy of eradication.³⁰ Palos Verdes Peninsula residents who like the peafowl wonder how a "big beautiful bird like an India blue peacock" could fall into the category of a "pest," a term that legally permits the eradication of animals from one's own property, if not from others' property.³¹ People think that

another form of exploitation in its place. Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* 190-219 (Temple 1996).

²⁹ Lynda Birke, *Feminism, Animals and Science: The Naming of the Shrew* 16-29 (Open University 1994); Barbara Noske, *Beyond Boundaries: Humans and Animals* 61-70 (Black Rose 1997); Arnold Arluke and Clinton Sanders, *Regarding Animals* 9 (Temple 1996).

³⁰ See note 28.

³¹ See, for example, Haw Rev Stat § 711-1109 (prohibiting the killing "without need" of "any animal . . . other than pests"). The City's apparent decision to define wild peafowl as "feral domestic" birds allowed individuals to trap and remove peafowl from their own property. Retz Interview (cited in note 18).

The concept of an animal as "pest" sheds some interesting light on the concept of animals as "property," since a pest usually will be an animal that is seen as not fit to be owned either live or dead, but only fit to be destroyed. So the "right" to kill a pest may not

the term labels a class of animals, but the word “pest” is conclusory rather than descriptive of the animal. It labels a person’s conclusion about the desirability of the animal from the person’s perspective, and, in that sense, says much more about the person than anything objective about the animal.

Owners of real property can decide for themselves whether an animal is a “pest” and kill or remove the animal from their property, unless there are legal definitions of the animal that override that decision. For example, if a “pest” animal is a member of an endangered species, the Endangered Species Act would override the landowner’s decision to kill the animal.³² Another example is the case of Rolling Hills Estates, where the peafowl were spared because the birds are “wild” for purposes of the Wild Bird Protection Ordinance, even if they may be “pests” from the perspective of a landowner seeking to eradicate them. Since the Ordinance does not exempt pest eradication activities from its prohibition on harm to wild birds or their eggs, the Ordinance protects the birds even though they could also be considered “pests.”

This is a perennial issue. Cute bunnies are viewed as “pets” when they live indoors but are quickly deemed legal “nuisances” when they are outdoors in large enough numbers to annoy people.³³ The same is true of deer and Canada geese: beautiful and valuable in small numbers, yet completely vulnerable to lawful destruction as “pests” when their numbers exceed human convenience or preferences.³⁴ “Pest” is a term that has a socio-

come from a claim of ownership of the underlying land so much as from a claim that the animal, wherever the animal is, should not be allowed to live.

³² 16 USC § 1531 et seq (2005).

³³ Dave McKibben, *South O.C. Community Has Rabbits in Its Sights*, LA Times B1 (Mar 25, 2005). See also Benjamin Spillman, *Bunnies in Valley Better Beware*, The Desert Sun 1A (Apr 28, 2004) (discussing bill by Assemblyman John Benoit, R-Palm Desert, that would make it easier to legally kill rabbits responsible for destroying homeowner landscapes).

³⁴ The Humane Society of the United States (“HSUS”) provides information about changing population sizes of Canada geese. When the populations are large, killing geese is often proposed, but HSUS has developed a protocol for adding geese eggs so that the number of geese decreases. HSUS, *Animal Protection Groups Question Federal Plan to Kill Millions of Canada Geese*, available at <http://www.hsus.org/press_and_publications/press_releases/animal_protection_groups_question_federal_plan_to_kill_millions_of_canada_geese.html> (last visited May 10, 2006).

Similarly, deer hunting is proposed as a means of reducing the deer population for pest control purposes or as a humane measure. On closer inspection, though, it seems that hunting seasons are rarely primarily about deer population control. HSUS provides information about the relationship between hunting and population management. HSUS, *Learn the Facts About Hunting* available at <http://www.hsus.org/wildlife/issues_facing_wildlife/hunting/learn_the_facts_about_hunting.html> (last visited May 10, 2006). Lawful

cultural starting point and a legal ending point that excludes any value of the animal's life to him- or herself. The reasoning that cascades into the death of the animal is invisible if there are no advocates for an animal defined as a "pest." No one stumps for the protection of the rats living in their midst the way residents of the Peninsula stumped for the protection of the peafowl living in their midst.

Even rats are not consistently seen as "pests," though. There are people who keep them as companion animals, and those people could expect the same legal protections with respect to veterinary care as the owners of other companion animals. There are other people who value rats but for the purpose of experimentation. In laboratory settings rats are valuable "resources," and disrupting or vandalizing a facility in which they are (ab)used can subject a person to severe penalties under the Animal Enterprises Protection Act of 1992.³⁵ Under that Act, the definition of "animal enterprise" broadly encompasses any enterprise that uses any animal.³⁶ Yet, some of the very same animals used in "animal enterprises" are not defined as "animals" under the Animal Welfare Act, which sets limited standards for humane husbandry practices in research laboratories.³⁷ Scientists who use rats have no obligations of care

hunting takes place through permitting systems designed by Departments of Fish and Game to modify the deer population so that a plentiful supply of deer are available to hunt or so that the most desirable kind of deer (such as those with large antlers) are available in greater numbers. Vermont's Department of Fish and Wildlife intentionally manages hunting for the purpose of pleasing hunters, not for the purpose of reducing populations. This information is available at <http://www.vtfishandwildlife.com/Detail.CFM?Agency_ID=932> (last visited May 10, 2006) (contending that some deer hunting regulations would create short-term losses in deer hunting take but that there would be more deer with larger antlers to take in the future). Licensing hunters to kill male deer specifically leaves in place female deer so that they will produce fawns susceptible to hunting in the future. Hunting disproportionate numbers of males may reduce the population but the reduction may be occurring by starvation. In other words, the relationship between hunting and population control is complicated. Jeremy Alcorn, *Hunting as a Method of Population Control*, available at <http://www.veganvanguard.com/positions/hunting_population_control.html> (last visited May 10, 2006).

³⁵ 18 USC § 43 (2005).

³⁶ 18 USC § 43(d) (1) (2005) (defining "animal enterprise" as "(A) a commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing; (B) a zoo, aquarium, circus, rodeo, or lawful competitive animal event; or (C) any fair or similar event intended to advance agricultural arts and sciences").

³⁷ Under the Animal Welfare Act ("AWA"), "[t]he term 'animal' means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary [of Agriculture] may determine is being used or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet . . ." 7 USC § 2132(g) (2005). After considerable pressure from animal advocacy organizations, the Secretary of Agriculture agreed to extend the law to cover rats, mice, and birds but the matter was considered "pending" until amendments to the

to them under the *Animal Welfare Act* because they are not animals for purposes of that law, even if rats *are* animals for purposes of the *Animal Enterprises Protection Act*.

Just as a rat is not an animal when the law says she isn't and is an animal when the law says she is, a chicken is not legally an animal unless a specific law defines chickens as animals. Chickens may be "animals" for purposes of enforcing cockfighting prohibitions,³⁸ but chickens are not animals for purposes of the *Humane Slaughter Act*,³⁹ the only federal statute that confers any protection at all to animals dismembered for food in this country.⁴⁰ Although a few states may have anti-cruelty statutes that purport to cover all "animals," either because of disputes about what constitutes an "animal" under the statute or because of lack of prosecutorial interest in challenging chicken-flesh production practices,⁴¹ chickens can be killed in any number of grossly painful ways—whatever is expedient for the manufacturer of chicken flesh products.⁴² Chickens are also invisible legally while they are being raised for their eggs or their flesh. In fact, most animals produced and dismembered for food are legally invisible; there is no regulation of the flesh-food industry that relates to the care animals (do not) receive while they are "in production."⁴³ Flesh-food animals do

AWA in 2002 removed the possibility. David Favre, *Animals: Welfare, Interests, and Rights* 361 (Animal Legal and Historic Center 2003).

³⁸ See, for example, *State v Cleve*, 980 P2d 23, 26 (NM 1999) (clarifying that the "laws in New Mexico governing hunting and fishing preempt application of the cruelty-to-animals statute to the hunting of game animals"). See also *People v Baniqued*, 85 Cal App 4th 13, 20-21 (App Ct 2000) (construing "every dumb creature" broadly: "the plain language of the statute shows that the Legislature did not intend to restrict the phrase to mammals . . . [t]he category 'every dumb creature' plainly includes roosters and other birds"). Note that cockfighting prohibitions are not typically enacted for reasons of animal protection so much as for purposes of controlling gambling and ancillary crime.

³⁹ 7 USC § 1902 (2005).

⁴⁰ Only California has a state humane slaughter law for poultry. Jordan Curnutt, *Animals and the Law: A Sourcebook* 163 (ABC-CLIO 2001). Even so, "spent hens"—hens who no longer produce eggs on the schedule preferred by egg producers—are not covered by that law. That is one reason they were included in California Assemblymember Lori Saldana's proposal in 2005 to ban the killing of poultry (and other specified species) by "burning, burying, grinding, drowning, rapid freezing, or suffocation . . ." See note 23.

⁴¹ For example, Alabama provides that cruelty to "animals" other than dogs and cats is a class B misdemeanor, but it does not provide a statutory definition of what constitutes an "animal," nor have there been reported prosecutions of cruelty to factory farmed animals under the statute. Alabama Stat §13-A-11-14.

⁴² See note 40.

⁴³ David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 *Animal L* 123, 124 (1996); David J. Wolfson and Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness and the Law: A Modern American Fable*, in Cass R. Sunstein and Martha C. Nussbaum, eds,

not typically exist even for purposes of animal anti-cruelty statutes, most of which explicitly exempt them or standard industry exploitative practices by which they are harmed.⁴⁴ They are not just omitted from legal consideration, they are actively defined out of legal existence for purposes of particular statutes.⁴⁵

The legal process of adjudicating disputes involves the same lack of a stable protective legal identity for animals. For example, the appellate court in *Butler v City of Palos Verdes*,⁴⁶ makes clear that it has decided that peafowl are “wild” or “feral” only as to the dispute before that court.⁴⁷ The court notes explicitly that in other contexts, depending on the uses to which peafowl have been put, peafowl could be defined as “domestic” or “ranged” animals. Another example is the analysis and decision in *Commonwealth of Pennsylvania v Comella*,⁴⁸ in which the court addressed whether a dog is a “domestic animal” for purposes of resolving a dispute about the application of a statute that provides for penalizing an owner of a dog who “kill[s] or

Animal Rights: Current Debates and New Directions 205, 208 (Oxford 2004).

⁴⁴ Wolfson, 2 Animal L at 124 (cited in note 43); Wolfson and Sullivan, *Foxes in the Henhouse* at 208 (cited in note 43). For an overview of the anti-cruelty statutes and exemptions, see Sonia S. Waisman, Bruce A. Wagman, and Pamela D. Frasch, *Animal Law: Cases and Materials* 399–446 (Carolina Academic 2002).

⁴⁵ Many state anti-cruelty statutes specifically exempt standard farming practices. Waisman, Wagman, and Frasch, *Animal Law: Cases and Materials* at 399–446 (cited in note 44). In those states, factory farmed animals are not covered by the anti-cruelty statutes to the extent that they experience harms due to standard industry practices. Although wanton acts of malicious cruelty that fall outside a standard industry practice could be prosecuted, the vast amount of suffering that factory farmed animals experience is due to industry practices defended as necessary for the production of flesh-food products. David J. Wolfson and Mariann Sullivan note the following as to the approximately 9.5 billion animals they report as killed in food production each year in the United States:

[M]aking this many animals disappear from the law is an enormous task. It has been accomplished, in significant part, through the efforts of the industry that owns these animals to obtain complete control, in one way or another, over the law that governs it. While this is not an unusual effort on the part of industry generally, the farmed-animal industry’s efforts have been exceptionally successful. The industry has devised a legally unique way to accomplish its purpose: it has persuaded legislatures to amend criminal statutes that purport to protect farmed animals from cruelty so that it cannot be prosecuted for any farming practice itself determines is acceptable, with no limit whatsoever on the pain caused by such practices. As a result, in most of the United States, prosecutors, judges, and juries no longer have the power to determine whether or not farmed animals are treated in an acceptable manner. The industry alone defines the criminality of its own conduct.

Wolfson and Sullivan, *Foxes in the Henhouse* at 206 (cited in note 43).

⁴⁶ 135 Cal App 4th 174 (2005).

⁴⁷ Id at 181-83; Seideman, 31 (3) Nat’l Wildlife at 8 (cited in note 3).

⁴⁸ 735 A2d 738 (Pa Commw Ct 1999).

inflict[s] severe injury on a domestic animal without provocation while off the owner's property."⁴⁹ Comella's dog had severely injured another dog, but Comella contended that "domestic animal" did not include dogs and that the term was intended to refer only to animals kept as livestock. The appellate court decided that for purposes of the statute involved, a companion animal dog is, as a matter of law, a "domestic animal."⁵⁰

Animals must be defined in order to resolve each and every dispute and in each and every law that refers to them because, as a general legal matter, animals have no consistent legal identity separate and apart from the various statutes that regulate or allow humans to use them. Stated differently, animals are not "legal persons." A "legal person" is allowed by law to define his or her life through individual choices such as work, relationships, and residence. When a person is not mentally or physically able to do so independently, the law provides for a guardian who must act in the best interest of the individual he or she is charged with protecting. By contrast, animals, as the property of humans, cannot define their own lives, and there is no law requiring humans to make decisions "in the best interest" of an animal because humans are not "guardians" of individual animals who have affirmative rights under the law. Even if individual people may care about specific animals in ways other than those animals' legal property value, under the current law, animals are treated as actual or potential resources for humans. As Gary L. Francione contends, this is the legal wellspring of human entitlements to exploit animals.⁵¹ Quite the opposite from enjoying the basic legal identity of a "legal person" with affirmative rights to live a life defined by one's own preferences and abilities, animals are legally defined by reference to their utility to humans; they are the legal property or potential property of humans.

Animals' legal status as potential or current property and their lack of legal personhood are the grandparents of all specific legal definitions of animals. However, removal of the property status of animals and establishing legal personhood are two quite different things. Removal of the property status would secure the "negative" right of not being property. Establishing

⁴⁹ Id at 738.

⁵⁰ Id at 740.

⁵¹ Gary L. Francione, *Animals, Property, and the Law* 15–32 (Temple 1995); Francione, *Rain Without Thunder* 126–39 (cited in note 28); Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* 50–80 (Temple 2000).

legal personhood would provide the “affirmative” right to define one’s own life and protect oneself by way of the law. Simple removal of animals’ status as the property of humans does not provide for affirmative rights to structure a life, and it still leaves open the possibility of exploitation by people. Without affirmative rights and a means to defend those rights, a “freed” animal could not choose to live in a particular habitat or protect his/her food source, for example. There is no tort law provision that he or she could use to redress wrongful acts. He or she could be hunted, tormented, denied his or her freedom, and killed perhaps even more easily than can an owned animal. Who would be able to prevent those acts, if animals are not property but do not have affirmative rights with legal standing sufficient to protect those rights? At least in the case of an owned animal, the owner would be able, if he or she chose, to prevent or redress other humans’ cruel acts against the animal by way of tort law protections for harm to property.⁵² Similarly, criminal prosecution for cruelty is unlikely when the victims of cruelty are unowned and cannot vote elected officials out of office for failure to address their interests.⁵³ Thus, just being “Not Property” does not in itself provide animals with affirmative means of establishing their own lives or protection against abuse and cruel treatment.

There are many challenges in attempting to secure rights for animals. Animals’ status as property must be addressed before

⁵² This is not to say that the property status of animals confers significant protection to animals. Not only do owners have the choice as to whether to protect an animal, animals do not have ready means to protect themselves from their owners. Moreover, damages tied to the market value of animals are so low as to make legal recourse by their owners economically unfeasible. For considerations of the market value of animals as it affects damages for harms done to animals, see William C. Root, Note, “*Man’s Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact of Damages Recoverable for Their Wrongful Death or Injury*,” 47 *Vill L Rev* 423, 424 (2002) (“At the forefront of this [valuation of loss] debate is whether pet owners should be able to recover damages for genuine mental suffering.”). See also Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Animals in Tort*, 70 *NYU L Rev* 1059 (1995) (dealing specifically with the problem of valuation); Rebecca Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 *Marq L Rev* 47 (Fall 2002) (placing the issue of market value calculations in the context of general moral and legal valuation of companion animals); Geordie Duckler, *Animals: A Legal and Anthropological Argument for Special Valuation*, 8 *Animal L* 199 (2002) (arguing that “special” valuation for companion animals depends upon a combination of legal and scientific assessments).

⁵³ For example, I suspect that the City Attorney of Los Angeles would be much more interested in prosecuting cruel acts against street dogs if dogs could vote him out of office. As it is, elected officials can satisfy voters with issues such as education, crime, and environmental quality even if they are not interested in addressing cruelty to animals.

or in concert with establishing those affirmative rights necessary for animals to define their own lives and to protect themselves from human exploitation.⁵⁴ Advocates have not yet fully identified those affirmative rights that are necessary for animals to structure their own lives. One reason for this may be that a focus on stopping human torment of animals, which results from animals' status as property, does not easily permit concurrent focus on which rights would most effectively enable animals to live lives of their own choice. Freeing elephants from the status of property that allows zoos and circuses to exploit them is a different enterprise than pursuing those rights for elephants that would enable them to define their own existence. Chipping away at humans' entitlements to use their property animals as they choose is difficult enough. When it comes to the second step of establishing affirmative rights for animals, there are problems of flex in the concept of legal personhood itself⁵⁵ and of identifying different affirmative rights to self-fulfillment and protection which would necessarily vary among animals.⁵⁶

Even more challenging than deciding which affirmative rights are fundamental to each species is determining what to do about the exercise of such rights in a world that has been so badly damaged by human activity. Even if we could determine which rights, in the abstract, are most useful to animals, we would still have difficulty providing a meaningful environment—both geophysically and socioculturally—for the exercise of those rights. For example, we might decide that it is most important for animals to have basic rights to their natural habitats, but human activity has destroyed so much habitat that now animals

⁵⁴ In this sense, the legal path of animals is comparable to that of enslaved people whose legal freedom under the Thirteenth Amendment had to be accompanied by legal status as persons under the Fourteenth Amendment. For a legal historical account of that recognition and accompanying legislative reform, see Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich L Rev 1323, 1324–25 (1952).

⁵⁵ Ngaire Naffine surveys the field of possible formulations of a legal person and concludes that there are three basic types: conceptions of a legal person as a purely abstract construction for the purpose of accomplishing legal goals; conceptions of a legal person as an entity that bears similarities to everyday understandings of what a “person” is; and conceptions of a legal person as a moral agent. Naffine notes that even though the first type exists in theory, in practice it is infused with understandings more indicative of the other two types. The narrowest type (the third type) is the most problematic for people who do not have the prototypical characteristics of individuality and autonomy. As Naffine recognizes, all conceptions of personhood as applied to animals are problematic. Ngaire Naffine, *Who are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 Mod L Rev 346, 346–67 (2003).

⁵⁶ For example, the right to associate with others of one's kind would also have to include the right to be a loner. What is the best habitat for an animal who has never known freedom?

are squeezed in ways that would make rights-based conflicts inevitable and irresolvable.

Another aspect of the problem of rights that can be meaningfully exercised is the question of how legal entitlements to animals would intersect. If an animal's rights are qualified or enforced subject to the rights of other living beings, what kind of protection will his or her rights actually provide? For instance, how would the rights of particular animals (for example, songbirds) compare to the rights of other animals (for example, feral cats) living in the same habitat? How would the rights of animals compare to the rights of humans? In order to prevail in contests with other rights-holders, animals' rights would have to be unwaivable, but no one has absolutely unwaivable rights—even basic rights of humans can be over-ridden.⁵⁷

These problems—(1) removing the status of property, (2) identifying affirmative rights that animals need to define and protect their own lives, and (3) anticipating solutions to problems of inter-species conflict based on their legal entitlements—are extremely difficult because they involve massive reorientation of society and the law.

These problems are compounded by the fact that animals' advocates are not working in a neutral socio-political or legal environment. Equally central to the question of shifting paradigms about animals is the influence of those who oppose such a paradigmatic shift. Institutional exploiters of animals, such as laboratories and agribusinesses that produce factory-farmed animal products, are active participants in the process of legally defining animals.⁵⁸ For a long time they have controlled

⁵⁷ In Part III of this Article I write more about this problem in connection with the work of Christopher D. Stone who has argued for rights entitlements to be held by aspects of nature such as rivers and trees. Christopher D. Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects* 6–11 (Kaufmann 1972).

⁵⁸ Institutional (ab)users of animals have tremendous power to define what is cruel as to the treatment of animals in their institutions because “[i]n the case of farmed animals, federal law is essentially irrelevant. The Animal Welfare Act, 7 USC § 2131(g) (2003), which is the primary piece of federal legislation relating to animal protection and which sets certain basic standards for their care, simply exempts farmed animals, thereby making something of a mockery of its title.” Wolfson and Sullivan, *Foxes in the Henhouse* at 208 (cited in note 43). And,

[c]ontrary to regulatory schemes generally set up by legislatures to govern industry conduct, criminal anticruelty statutes which govern the farming industry's treatment of animals do not provide for the promulgation of specific regulations to govern animal welfare, and the farming industry is not subject to any sort of regulatory enforcement of farmed-animal welfare standards, does not undergo any inspections to determine whether farmed animals are being afforded appropriate treatment, and is not answerable to any governmental

the political and legal discourse about animals by virtue of claims that those untrained in their practices are not qualified to challenge those practices and that the valuable goods they produce cannot be produced any other way. Opponents of increased animal protection are able to keep the discourse trained on all the problems associated with animal rights; they avoid having the discourse trained on their own violent and exploitative practices.

Institutional exploiters of animals have also controlled actual, on-the-ground definitions of animals. By that I mean they have controlled the nature of animals themselves. For example, according to *Science News*, humans' preference for and overfishing of larger fish has actually resulted in a reduction in the mean size of "food fish" to one-fifth of their previous size.⁵⁹ *Science News*, focusing on the human interest involved, suggested that this may be problematic because smaller fish have lower survivability than larger fish.⁶⁰ In response to this report, a reader wrote the following: "This is not cause for alarm. This is cause for a decision: What do we want, small fish or large fish? Humans are the only creatures on the planet who care about fish size, and the only ones empowered to change it."⁶¹ Stated differently, "A fish is a fish if it is socially classified as one, and that classification is only concerned with fish to the extent that scaly things living in the sea help society define itself. . . . Animals are indeed a blank paper which can be inscribed with any message, and symbolic meaning that the social wishes."⁶²

While it is breathtakingly arrogant to do so, humans are, in fact, legally and technologically empowered to define and to change the very nature of fish. In his book *Fishy Business: Salmon, Biology, and the Social Construction of Nature*, Rik Scarce writes about the domestication and commodification of

administrative agency (federal or state) on the subject of farmed-animal welfare.

Id at 209. The same could be said of the situation of animals exploited in scientific and medical laboratories.

⁵⁹ Janet Raloff, *Empty Nets: Fisheries May Be Crippling Themselves by Targeting the Big Ones*, 167 *Science News* 360, 360 (June 5, 2004).

⁶⁰ This is because smaller fish produce a smaller nutrient sac for fish embryos to consume while they are developing. Id at 361.

⁶¹ Peter Wilson, Letter, 168 *Science News* 95 (Aug 6, 2005).

⁶² Philip W. Sutton, *Nature, Environment and Society* 58 (Palgrave Macmillan 2004) (quoting K. Tester, *Animals and Society: The Humanity of Animal Rights* (Routledge 1991)).

salmon.⁶³ Human farming of formerly wild salmon creates its own selective pressures on salmon, but the process of transforming these wild creatures effectively into man-made machines to produce salmon flesh is picking up speed due to the miniaturization of information gathering tools:

Perhaps the simplest of these new research technologies is the “coded wire tag.” Almost too small to be seen by the naked eye, these tiny pieces of metal are injected into the heads of young fish before they are released from hatcheries. . . . Each wire is notched, and the microscopic indentations may carry information such as the location of the hatchery, date of release, and the like. When the fish return to the hatchery as adults, the tags are located using metal detectors, cut out, and read under a microscope. This allows researchers to track high-seas migrations and to conduct a range of other studies.⁶⁴

Scarce documents how, through such microtechnological developments, the salmon themselves become the research instruments by which salmon are studied. Through the injection of metal wire into their heads, salmon are forcibly enlisted in the process of gathering information that will allow deliberate scientific modification of all aspects of their physical and psychological identities and lives.⁶⁵ Colors, body size, body form, temperament, intelligence, tolerance for various temperatures—all of these characteristics can be chosen by humans through information, selection, and genetic manipulation.⁶⁶

⁶³ Rik Scarce, *Fishy Business: Salmon, Biology and the Social Construction of Nature* (Temple 2000).

⁶⁴ *Id.* at 112.

⁶⁵ *Id.*

⁶⁶ In fish alone, there has been extensive breeding and transgenic research to modify characteristics. Michael Masser and Rex Dunham, *Production of Hybrid Catfish*, Southern Regional Aquaculture Center (July 1998), available at <<http://www.aces.edu/dept/fisheries/aquaculture/pdf/190fs.pdf>> (last visited Apr 2, 2006) (describing the “superior characteristics” of the CxB catfish hybrid, including increased tolerance to crowded conditions, and ease of harvesting); Zhiyuan Gong, et al, *Development of transgenic fish for ornamental and bioreactor by strong expression of fluorescent proteins in the skeletal muscle*, 308 *Biochem and Biophys Rsrch Comm* 58 (Academic 2003) (introducing fluorescent protein genes from various sources into zebrafish to express “vivid fluorescent colors”); Alimuddin, et al, *Enhancement of EPA and DHA biosynthesis by over-expression of masu salmon delta6-desaturase-like gene in zebrafish*, 14 *Transgenic Rsrch* 159 (2005) (using transgenic technology to increase the amount of omega-3 fatty acids in fish); Robert H. Devlin, et al, *Growth of domesticated transgenic fish*, 409 *Nature* 781 (2001) (discussing the growth rates of transgenic fish that over-express growth hormone); Ailye Sarmasik, et al, *Production of transgenic medaka with increased resistance to bacterial pathogens*, 4 *Marine Biotechnology* 310

Not surprisingly, Scarce found that as respect for human power over the fish increased, respect for the fish themselves declined. He notes the rarity of conservation biologist Paul McGuire's point of view:

I care about the animal. . . . I've seen beautiful salmon runs, and I've seen their ebb and flow with the weather, with the climate, with the terrain, and how they fit into the system. It's a marvel to behold. I look far beyond the economic value, as you can tell. So over many years and a variety of studies, I've just gained such an awe and appreciation for their resilience, . . . and their beauty—their pure and simple beauty, visually and in regards to their life history. . . . I've given a lot of thought to them and how they all fit together, how they've evolved. You can't help but gain a great appreciation for them as a fellow organism that fits into the Northwest.⁶⁷

Scarce comments that this view was a minority view in that few would describe "salmon as 'beautiful' or [admit] that they stood in awe of the fish."⁶⁸ Yet, he also describes a time and a Native American perspective during which such "constructions" (as he calls them) of salmon were the norm, rather than the exception. Respect for salmon, indeed for all animals, is a possible element of the human construction of animals, but, as Scarce points out, a scientific attitude of control is incompatible with an attitude of restraint and respect for natural processes whereby fish define themselves.⁶⁹ It is the reverse; it is

(2002) (describing the use of transgenic technology to introduce silk moth genes to express antimicrobial peptides).

⁶⁷ Scarce, *Fishy Business* at 148 (cited in note 63).

⁶⁸ *Id.* at 149.

⁶⁹ The attitude of control and manipulation is perhaps more properly identified with engineering/applied science than with pure science, since pure science could seek only to understand but otherwise leave alone, while engineering has no justification for its existence except to manipulate. However, certainly in America, and in the modern world generally, science is largely Baconian (called so after Sir Francis Bacon, who wrote in the 1500s about science as a tool to control nature and harness her to human will, not just to understand and admire the wonder of creation or other possible uses of science). There are many feminist critiques of this approach and the power of science in shaping our expectations of and beliefs about nature. See, for example, Carolyn Merchant, *Radical Ecology: the Search for a Livable World* 41–63 (Routledge 2d ed 2005) (arguing that the death of nature legitimized the dominion of western mechanistic science and capitalism allowing for exploitable profits and manipulation); Donna Haraway, *Primate Visions: Gender, Race, and Nature in the World of Modern Science* (Routledge 1989) (discussing the domination of Western white male bias in evolutionary theory); Birke, *Feminism, Animals and Science* (cited in note 29) ("The macho scientist does not express feelings, may even be cavalier in his (or her) attitudes towards . . . animals [y]et both [empathy

glorification of human processes that define and modify animals, and such glorification cannot co-exist with respect for the beings so modified and then defined by reference to the modification.

Scarce's example of (com)modification of salmon is instructive and eloquent, but more frightening examples of human control and modification of animals exist in the world of transgenic animal research. To create a transgenic animal, a gene that is foreign to the animal is inserted into the animal's genome. Transgenic animals, also known as chimeras,⁷⁰ such as chickens with human proteins in their eggs or goats with human proteins in their milk, may be used to produce proteins for human medical therapies.⁷¹ Researchers are experimentally producing pigs with human blood and mice with human brain cells, on the theory that closer resemblance to humans makes for better models through which to test drugs or to grow transplant organs for humans.⁷² That is, researchers are attempting to make research animals more like humans so that they can exploit animals more effectively.

If researchers lose respect for salmon when they turn salmon into the means of producing the information through which salmon will be controlled, what of the prospects for a respectful attitude toward chimeras? Certainly, for a long time humans have bred the types of cats, dogs, and livestock they prefer. But this is a new order of control and purposeful construction of animals. Humans' escalating technological capacity to make wholly new animals more quickly than through the slower mechanism of selectively breeding animals for traits that humans value is resulting in escalating losses of respect for the animals they exploit or "make."⁷³ It seems that the more "man-made" an animal, the less autonomous or "natural" the animal, until finally it is possible to define them, socio-culturally and legally, as mere machines for the production of human

and machismo] can coexist in science.").

⁷⁰ The term "chimera" also refers to an animal (or human) who has received an organ transplant from another animal. Rick Weiss, *Of Mice, Men and In-Between; Scientists Debate Blending Of Human, Animal Forms*, Wash Post A1 (Nov 20, 2004).

⁷¹ Id.

⁷² Id.

⁷³ This escalation exists in striking contrast to the apparent underlying theory of the Animal Welfare Act that uses of animals should be reduced, refined, and replaced. As Darian M. Ibrahim points out, this escalation demonstrates that animals' advocates should not trust the methodological imperative to reduce, refine, and replace animal usage as a means of incremental abolition of animal exploitation for research purposes. Darian M. Ibrahim, *Reduce, Refine, Replace: The Failure of the Three R's and the Future of Animal Experimentation*, 2006 U Chi Legal F 195, 223-28.

goods.⁷⁴ Stewardship does not seem to be an option; domination borne of manipulative creation of animals continues in the form of blatant exploitation. Since most Americans do not encounter many non-human-modified (that is, wild) animals, the idea of “animal” is necessarily different from those times during which humans encountered animals they had no hand in designing or controlling.

Given this background of systematically defining animals through the modification of their bodies and temperaments to suit human interests, the challenge of animal advocacy appears at times to be overwhelmingly difficult. Domestication of animals—making animals—is the oppressive act that must be stopped if animals are to be respected, but imagining the world without domestication (oppression) of animals is at least as difficult for animals’ advocates as imagining the world without oppression (domestication) of women is for feminists. As legal scholar Catharine A. MacKinnon observes, women are oppressed by male sexual privilege and by socio-cultural and legal practices that use “man as the measure.”⁷⁵ Animals are also oppressed by humans’ forcibly acting upon the bodies of unconsenting animal individuals, by generalized human exploitative privilege in designing animals’ bodies, and by socio-cultural and legal practices that use “man as the measure” of what constitutes the “good” and the “worthy.”

The acts and thoughts that do violence to women and animals (and others who do not fit the idealized version of the “good” and the “worthy”) are at the heart of oppression, and it is for that reason that the focus should be on the oppression itself. The focus should not be on those qualities of women or animals

⁷⁴ I use the word “natural” to refer to a state of animal-ness in which humans have not intentionally intervened in animals’ seasonal subsistence and reproduction cycle, which Noske describes as the most appropriate definition of “not domesticated” or “wild” or “natural.” Noske, *Beyond Boundaries* at 6 (cited in note 29).

By contrast with the view of nature defined as distinct from human intervention, some may argue that, since humans are natural beings, anything they make or do will also be natural, thereby eliding what they consider to be only an apparent, not real, difference between that which is “natural” and that which is “man-made.” While the argument does illustrate the ease with which some humans can be made to feel comfortable about what they do to animals and to the environment, the argument, if accepted literally, would entitle humans to completely destroy the earth with impunity. Such a literal elision would prevent discussion of topics that have normative resonance, for example, protecting animals and protecting the environment.

⁷⁵ Catharine A. MacKinnon, *Feminism Unmodified* 32–45 (Harvard 1987); Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in Sunstein and Nussbaum, eds, *Animal Rights: Current Debates and New Directions* 263, 270 (cited in note 43).

or excluded others which, if documented, would qualify them for entrance to the community of those worthy of respect. Advocates should, on every occasion, turn the spotlight on exploitative, oppressive acts and thoughts, define them for what they are—exploitative and oppressive—and seek changes in those assumptions, thoughts, and acts that are completely incompatible with respect for others. The problems associated with determining the worthiness of potential rights-holders are so formidable and the process so slow, that resolving those problems first in order to establish rights entitlements which would then lead to duties should be relinquished in favor of attacking oppressive conduct first. It is not just a faster means of generating change (slow as it is), it is the *only* means of generating the paradigmatic shift in socio-cultural and legal definitions of those who do not fit the template of current preferences. We must focus on the violence and oppressive conduct itself in order to reduce violence and oppression, rather than deciding who among those being treated violently and oppressively is worthy of legal recourse.

II. OF ANIMAL RIGHTS (AND BACTERIA)

Differences are inequality's post hoc excuse, its conclusory artifact, its outcome presented as its origin, the damage that is pointed to as the justification for doing the damage after the damage has been done, the distinctions that perception is socially organized to notice because inequality gives them consequences for social power Difference is the velvet glove on the iron fist of domination. This is as true when differences are affirmed as when they are denied, when their substance is applauded or when it is disparaged.

Catharine A. MacKinnon, *Feminism Unmodified* 8 (Harvard 1987).

Animals are treated legally as unworthy of protection from violent and oppressive acts because they have been defined as different from humans who, by contrast, are worthy of protection from violent and oppressive acts. The legal entitlement to define animals literally through research and development, as well as socio-culturally through law, resides first in the legal status of animals as property or potential property and second in their lack of legal personhood. Under laissez-faire capitalist principles,

owners of resources can exploit such resources fully as long as no one's defined legal interests are involuntarily harmed as an immediate consequence.⁷⁶ Exploitation is a term frequently applied to capitalist enterprises but most often with respect to humans exploited by their employers, rather than with regard to animals, about whom there is no question of entitlement to exploit. A difference between animals and workers who are treated like resources is that workers have some de jure rights to prevent some de facto treatment of them as resources. Animals are treated both de jure and de facto as mere resources that can be (ab)used or even destroyed at the owner's discretion. Animals, having no legal interests or rights, cannot be *legally* harmed by any type of exploitation. Similarly, humans who care about animals, having no legal interests or rights in the property of another, cannot be *legally* harmed by the exploitation of those animals. Yet, *actually* both the animals and the humans who care about them are horribly harmed by the exploitation of those animals. They simply are not allowed to use the legal process to define it for what it is to them—blatant cruelty and abuse.

Despite real differences in the exploitation of humans and animals, reduction of privilege to exploit is crucial to systemic reform, whether that exploitation be of humans or of animals. Elsewhere I have written about the need for and benefits of animals' advocates engaging in collaborative advocacy that strikes at the root of exploitation against both workers and animals.⁷⁷ Far from diluting the advocacy for animals, collaborative advocacy, by challenging and changing the root source of oppressive conduct, would redound to the benefit of humans and animals.

When advocacy is focused directly on animals and not on systemic reduction in privilege to exploit, animals' advocates make use of a readily accepted concept of justice: like entities should be treated alike. The argument is that animals similar to humans, either because they are cognitively alike or because

⁷⁶ The emphasis here is on the involuntariness of animals' losses. While humans can decide to waive or contract out of legal protections, animals' losses are always involuntary because they have never had the right to decide for themselves what they might give up in order to get something else. It is an essential characteristic of their status as property that they cannot make such decisions. They have no legal interests, no legal status with which to negotiate, and no legal voice with which to rectify those problems. As legal "things," animals have no rights whatsoever; the full package of entitlements is held by their owners.

⁷⁷ Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J Animal L and Ethics 63 (2006).

they are sentient, should be treated like humans at least as to the basic right to bodily integrity and freedom from physical and psychological torment.⁷⁸ Utilization of this pathway to justice requires repeated assertions of the similarities of animals to humans, similarities which would justify better treatment of animals. This path is intuitively powerful to those who see the false distinctions that society has drawn for its own convenience and exploitative purposes.

As powerful as it is to those on the inside of the social justice movement, however, the similarity argument loses force in dealings with those on the outside of the movement who cannot appreciate its moral vision and who readily manipulate meanings of “similarity” and “justice.” In response to advocates’ claim that animals are sufficiently like humans in sufficiently significant ways that justice demands sparing them from human-caused suffering, opponents simply redefine animals and humans so that animals can be characterized as dissimilar enough from humans that we need not worry about treating them like humans.⁷⁹ For instance, when scientists suggested that fish feel pain,⁸⁰ others responded that, while fish may appear to experience pain like humans experience pain, fish do not cognitively process pain the same way that humans do.⁸¹ Therefore, fish can be seen as different enough from humans that the justice claim that like entities should be treated alike can be dismissed as inapposite. Opponents of animal rights argue that “justice” is something reserved for humans and that humans must, by definition, be unlike animals. Once humans are defined as “not-animal” per se, it is very difficult to invoke a justice argument that calls for like treatment of like entities.

⁷⁸ I have dealt with the similarity argument in more depth elsewhere. Taimie L. Bryant, *Similarity or Difference as a Basis for Justice: Must Animals be like Humans to be Legally Protected from Humans?*, 70 L & Contemp Probs (forthcoming 2006).

⁷⁹ *Id.*

⁸⁰ L.U. Sneddon, et al, *Do fish have nociceptors: evidence for the evolution of a vertebrate sensory system*, 270 Proc Royal Socy London B: Biological Sci. 1115, 1115-21 (2003). See also Michael Stoskopf, *Pain and Analgesia in Birds, Reptiles, Amphibians and Fish*, 35(2) Investigative Ophthalmology & Visual Science 775, 775-80 (1994) (“It is unequivocal that fish have complex nervous systems and that the reflexive responses to painful stimuli are present.”).

⁸¹ *Animal Models of Pain*, The Scientist (Mar 28, 2005), available at <<http://www.the-scientist.com/2005/03/28/S10/1#top>> (last visited Apr 2, 2006). See also William Timberlake, *The Attribution of Suffering*, in Robert M. Baird and Stuart E. Rosenbaum, eds, *Animal Experimentation: The Moral Issues* 76 (Prometheus 1991) (“Both animal rights advocates and scientists want to reduce the suffering of others, but this cannot be done in any reasonable way until we agree on its nature, extent, and relative value.”).

While both animals' advocates and institutional exploiters of animals duel over definitions of animals, no one questions the rationale for harming animals. For example, no one is examining the motives of individuals who want to induce pain in fish or kill peafowl on the Palos Verdes Peninsula. Even in an apparently animal-friendly city with a wild bird protection ordinance, someone who wants to kill peafowl remains completely free of obligation to justify his or her preference. Why shouldn't the focus be on those who harm animals rather than on cramming animals into terminological boxes on the theory that doing so is the only way to secure protection for them?

In pursuing rights for animals based on the similarity argument, animals' advocates are using a historically important avenue for securing rights in this country. Indeed, duties without rights, or as a precursor to rights, is an alien concept here. To whom would an individual owe duties if animals do not even have a legal identity? Rights are the basis for individuation and legal identity, not just the basis of technical requirements, such as standing to speak in a court of law. Moreover, if duties are framed generally—"no harm to animals is allowed"—what of bacteria? Must we not wash our hands? Are bacteria "animals" for purposes of the prohibition on harm to animals? In order to figure out whether we can wash our hands, very quickly we have circled into a world of definitions of animals and of bacteria, and very quickly those definitions revolve around human interests in doing, unimpeded, exactly what humans would like to do.

Most animals' advocates respond by defining "animals" as sentient in ways that distinguish them from bacteria and make it easy to wash our hands but difficult to eat chickens. In other words, they would engage in the same line-drawing exercise as animal exploiters, only drawing the line at a different point, one that would include some animals as protected individuals. This is inadequate. For one thing, sustaining life on this planet—sustaining the lives of animals as well as humans and plants—requires sustaining all different kinds of life, including bacteria.⁸² Deciding that bacteria are not sentient does not tell us

⁸² Marla Cone, *Threat Seen From Antibacterial Soap Chemicals*, LA Times A17 (May 10, 2006) (reporting research that suggests potential harm from large amounts of antibacterial chemicals in waterways and deposited on agricultural fields). For research on the threat to humans of indiscriminate use of antibiotics see John J. Cebra, *Influences of microbiota on intestinal immune system development*, 69 Am J Clin Nutr 1046S (1999) (finding that commensal bacteria in the gastrointestinal tract effect development of the immune system); Katarina Chiller, et al, *Skin Microflora and Bacterial Infections of the Skin*, 6 J Investigative Dermatological Symposium Proc 170 (2001) (finding that

anything about how to sustain a world in which bacteria are part of the fabric that constitutes “life.” It does not tell us anything about how to wash our hands so that we cause the least amount of damage to that fabric of life while reasonably protecting our own health.

In terms of animal advocacy specifically, the line-drawing exercise in which animals’ advocates typically engage excludes the means by which animals survive in the world. If sentience or self-consciousness is the dividing line between those who receive protection and those who do not, then we will be excluding a vast number of beings whose existence is completely intertwined with those on the other side of the line we have drawn. Science, and scientific delays in our ability to understand animals, makes that line arbitrary. Animals’ real and urgent needs make that line nonsensical by any measure of actually assisting animals other than the most basic assistance to some small number of animals: protecting those animals known to feel pain from torture at human hands.

The standard of current line-drawing, requiring human types of consciousness or cognition, is completely (and arrogantly) human-centric. Advocates may argue that it is necessary in order to convince decisionmakers to remove some of the entitlements currently held by animal (ab)users, but such a pathway fails in some significant ways. Even if people can be persuaded that some animals have some rights, there is no guarantee that those rights will not themselves be limited. It is curious that Stone is so emphatic about the need to establish rights when he himself acknowledges that even human rights are subject to limitation and abrogation—even the most basic of rights, the right to live. When it comes to rights for nonhuman entities, the limitations are even more severe:

Now to say that the natural environment should have rights is not to say anything as silly as that no one should be allowed to cut down a tree. We say human beings have rights, but . . . they can be executed. Corporations have rights, but they cannot plead the fifth amendment; *In re Gault* gave 15-year-olds certain rights in juvenile proceedings, but it did not give them the right to vote.

commensal bacteria on the skin protect against pathogens); Richard Weller, *Nitric Oxide is Generated on the Skin Surface by Reduction of Sweat Nitrate*, 107 J Investigative Dermatology 327 (1996) (finding that commensal bacteria convert nitrite in sweat to nitrogen oxide, which may affect blood flow in the skin and protect against pathogens).

Thus, to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment.⁸³

One wonders exactly what it *would* mean to establish rights for animals or for aspects of the environment. It is extremely important to ask this question because simply freeing animals from their legal status as the property of humans will not give them affirmative rights to protect themselves. If in answering the question of "which rights?" the rights of animals will be defined by comparative reference to other rights-holders, it is doubtful that there will be much substantive protection. In other words, establishing the concept of rights as a general matter does not do enough of the work of protecting animals (or the environment) that we can predict with any degree of comfort or certainty how we could resolve basic conflicts between humans and animals regarding rights in those aspects of the environment each defines as necessary for their way of life.

The line-drawing exercise that makes some animals worthy of rights (in other words, respectable) on the basis of how closely they approximate certain human characteristics is a calculation based on scientific results produced by scientists, who have an interest in continued privilege to use animals as they choose. The similarity argument fails animals because it does not generate respect for the wondrous diversity of life that animals contain and represent. For example, even if scientists were engaged simply in figuring out whether animals' characteristics approximate those of humans and animals' advocates were pointing to scientists' agenda-neutral discoveries of similarities in order to justify inclusion of animals in the community of rights-holders, what of animals' abilities that humans will never approximate—the ability to fly or to remain under water, completely unassisted by technological devices? What is more wondrous about our cognitive capacities than about animals' completely different cognitive capacities? The very significance of animals—the diversity they contain at the individual and collective levels—is lost in a paradigm that requires their

⁸³ Stone, *Should Trees Have Standing?* at 10–11 (cited in note 57).

categorization by reference to the qualities by which humans define themselves.

It is simply raw power, not justice, that makes humans the center of value and definition. Just as MacKinnon has argued that women should not be defined by, or be defining themselves by, reference to the achievements and desires of men, animals should not be defined by the abilities and preferences of humans.⁸⁴ The world is a less awe-inspiring, less rich, less tolerant place when humans are the measure of all beings. Our advocacy method should embed the characteristics that will sustain respect beyond simply relieving animals from the torment of raw exploitation in flesh-food production facilities and laboratories. Yet the paradigm of justice currently deployed—that “like entities should be treated alike”—forces a comparison that leaves out those qualities of animals that are *unlike* humans but which nevertheless provide additional bases for respecting them.

But what of bacteria? And what of microalgae? And what of animals who are not “sentient”? Because we lack a socio-cultural basis for valuing life in forms other than the form humans take, it is difficult to value them and even more difficult to envision a world that accommodates them. Advocates for animal rights may well be reluctant to defend rights for bacteria and microalgae because they are certainly different from humans, we have no means of valuing their lives, and it seems literally incredible that anyone would defend them. Herein lies the crux of the problem with rights and the need for an alternative means of helping animals: it is absolutely imperative to protect all life, but seeking rights entitlements cannot accomplish that as long as rights are available only to those who are like humans. The extent of the problem and the need to resolve it through novel means are illustrated by the following *LA Times* description of coral and the “bleaching” of coral:

⁸⁴ Consider MacKinnon, *Feminism Unmodified* (cited in note 75). In her essay *Of Mice and Men*, MacKinnon argues that animals should not be defined by reference to “man as the measure” either. She illustrates the oppressive impact of humans on animals by reference to how the law treats humans’ sexual conduct with animals. Human oppressive impact is far more dramatic and deep than such examples illustrate, however. We literally use the bodies of animals against the animals themselves in order to domesticate and exploit them. As MacKinnon notes, despite the lack of necessity to consume animals, we persist in making our bodies out of their bodies, in making their reduced-to-inanimate selves into our animate selves. That process will not allow for an identity in animals other than their uses to humans who literally consume them. MacKinnon, *Of Mice and Men* at 270 (cited in note 43).

Corals are sensitive animals that require clean, clear water that is warm—but not too warm. In recent decades, clouding from excess sediment, fertilizer, sewage and other pollutants has taken a toll, while overfishing has removed many of the fish that graze algae off reefs and keep them clean.

The Caribbean is known for the fascinating shapes, colors and odd features of its many corals. About 80% of the reefs there have been lost in the last three decades. . . . “We now may be witnessing the rapid loss of [much] of what remains. . . .”⁸⁵

. . . Coral reefs are the composite of millions of tiny animals, called polyps, that build hard exoskeletons of calcium carbonate. These skeletons fuse together in exquisite patterns. . . .

A coral polyp thrives by absorbing micro-algae and sheltering it in its skeleton. The algae, in turn, produce sugars that the corals use as food. This symbiotic relationship fails when ocean water gets too warm and the algae leave or are ejected. The polyp then withers, leaving only a ghostly white skeleton that looks as if it had been bleached.

Reefs can recover from bleaching over several decades if they are colonized by larvae from undamaged corals nearby. But repeated stresses from warming and other environmental assaults can permanently kill corals, including colonies that can live hundreds of years.⁸⁶

None of the creatures mentioned in this description of death and destruction are apparently sentient or self-conscious. None would be protected under a rule of “no harm to animals” in which the definition of animals included only those with sentience or self-consciousness. And why should we protect them? For our own ends in saving the planet itself from further human-caused destruction? Because other animals are dependent on conditions also enjoyed by the coral? Because the coral themselves are inherently valuable? The question should not be whether coral

⁸⁵ Kenneth R. Weiss and Usha Lee McFarling, *Warm Oceans Threaten Caribbean Coral Reefs*, LA Times A16 (Oct 25, 2005) (quoting Nancy Knowlton, a coral reef expert who directs the Center for Marine Biodiversity and Conservation at Scripps Institution of Oceanography).

⁸⁶ Id.

deserve protection; the question should be whether humans deserve to act in ways that violate the very requisites of life for other beings.

Perhaps some would argue that, while the collective death of individual microalgae and coral polyps is meaningful, the individual deaths of micro-algae and coral polyps are not. Perhaps, the argument may continue, environmental law should be the vehicle through which we protect collectivities of nonsentient animals who serve the interests of sentient animals. There are many falsely sharp distinctions embedded in such a view. Just as the distinction between cognition and sentience as a basis for animals' similarity to humans falsely views cognition and sentience as separate qualities, the distinction between nonsentient and sentient animals is too sharply drawn. The distinction between the individual and the collective has similarly little value because of the tremendous overlap between an individual and all the collectivities through which he or she lives and defines his or her self; each is necessary to the other. These distinctions are made to buttress conclusions upon which discriminatory action can be founded. As MacKinnon has noted with respect to women, "[d]ifferences are inequality's post hoc excuse."⁸⁷ Because it serves human interests to treat animals without respect, differences can be identified to support that treatment.

Environmental law need not be, but often is, similarly blind to the uniqueness and value of animals. Environmental law may value animals as "units of biodiversity," but individual animals may well not be valued at all under existent environmental legal paradigms and proposals. So, for example, many environmentalists may not be particularly troubled by the wholesale killing of feral pigs on California's Channel Islands in order to restore the indigenous ecosystem, even when humane population reduction methods exist.⁸⁸ Nor do many

⁸⁷ MacKinnon, *Feminism Unmodified* at 8 (cited in note 75).

⁸⁸ The plan calling for hiring a hunting contractor to eradicate feral pigs also contains plans for changing the populations of other species of animals on the Islands, primarily to save the island fox. Part of the reason for drastic action appears to be that the situation worsened to the point that the Nature Conservancy and the National Park Service deem it an emergency that warrants draconian action. National Park Service, Santa Cruz Island—Plan for Recovery, available at <<http://www.nps.gov/chis/restoringsci/PDFs/FINAL%20Plan%20for%20Recovery.pdf>> (last visited Dec 16, 2005). On the other hand, an "emergency" situation may mean nothing other than that there has been a decision to act quickly without regard for humane methods. This is the argument behind a lawsuit to stop the killing of feral pigs. See Greg Risling, *Lawsuit Seeks to Stop Eradication of Pigs on Santa Cruz Island*, AP

environmentalists seem to consider that testing environmental toxins on animals raises ethical problems in our relationship to those animals. In other words, viewing animals as collectivities and as units of biodiversity is only marginally more respectful of other life than is viewing animals as units of consumption. The only protection inherent in such an approach is protection from extinction as a species. That is why the Endangered Species Act⁸⁹ (“ESA”), despite protecting a broad array of animals and plants through prohibitions on “taking” them and precautionary analysis of impacts on habitat,⁹⁰ is quite limited in what it can accomplish for individual animals. Nevertheless, the ESA does contain preconditions for animal rights, such as species protection and protection of habitat. Enforcing the ESA keeps animals alive long enough and keeps their environment intact enough that they stand a chance of one day acquiring de facto rights of self-determination by way of duties imposed on humans.

(July 6, 2005), available at <http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern_california/12068603.htm?template=contentModules/print_story.jsp> (last visited Jan 21, 2006). Moreover, the decision to protect the island fox at the expense of other animals may seem to signal respect for animals, but it may also simply signal humans’ preferences for a particular animal or a particular ecosystem.

⁸⁹ 16 USC § 1531 et seq (2005).

⁹⁰ Some subscribe to a generalized “precautionary” approach by which risk of harm to the environment would supplant cost-benefit analyses that assume some harm but include counterbalancing benefits in deciding whether to go forward. The “precautionary principle” holds ideological promise, but it is controversial. For descriptions of the principle, see, for example, Ken Geiser, *Establishing a General Duty of Precaution in Environmental Protection Policies in the United States*, in Carolyn Raffensperger and Joel A. Tickner, eds, *Protecting Public Health & the Environment: Implementing the Precautionary Principle*, xxi, xxiii (Island 1999) (“[P]arties should take measures to protect the health of the environment, even in the absence of clear, scientific evidence of harm.”). See also John S. Applegate, *The Taming of the Precautionary Principle*, 27 Wm & Mary Envtl L & Poly Rev 13, 13 (2002) (“[The precautionary principle] reflects the implicit judgment that, in the absence of some degree of *ex ante* regulatory review, new technologies will create novel, severe, and irreversible—but avoidable—harms to human health and the environment.”); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 Nw U L Rev 1315, 1315 (2003) (“In most formulations, the principle entails shifting the burden of proof to proponents of regulatory inaction in the face of health or environmental risk . . .”). There are many critics of the precautionary principle. Cass Sunstein, among others, strongly criticizes the precautionary principle for its potential to paralyze decisionmaking with uncertainty about regulatory inaction or action because the threshold for risk and action is not defined. Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U Pa L Rev 1003, 1003 (2003). See also Frank Cross, *Paradoxical Perils of the Precautionary Principle*, 53 Wash & Lee L Rev 851, 862–908 (1996) (discussing how regulations based on the precautionary principle can perversely cause a net detriment to public health or the environment by restricting potentially risky products or practices, preventing the benefits of their use, and thus producing worse harms than the risks or harms avoided). Sunstein regards the precautionary principle as a “crude way of protecting . . . goals, which should be pursued directly.” Sunstein, 151 U Pa L Rev at 1005.

Simply creating the preconditions for life does not necessarily insure the development of respect for life. The perspective of respect for life (and restraint in manipulating it) that accompanies an ideology of individuation and identity, currently housed in the concept of individual rights, should underlie our efforts to save coral and the lives that are intertwined with theirs. If not, we may well cavalierly substitute other lives for these lives, with a resultant loss of respect for "life" itself and the true diversity of life, diversity that exists at the level of individuals. For example, the same *LA Times* article reflects its author's hope for the discovery of a heat-tolerant strain of microalgae in the Indian Ocean, which, if transplanted to waters becoming increasingly warmer, may help to preserve coral in those areas. While it may help in meeting the human goal of having coral reefs, such a method substitutes lives for lives as though they are of equal value and as though the activity of substitution is harmless. In fact, cavalier human action could cause the irretrievable loss of heat-intolerant microalgae. Humans do not appreciate the lives of microalgae, since our only measure of microalgae is our own qualities. So we don't really know what the loss is. Even if we don't know what the loss is or worry about that type of loss, this does not mean that there has been no loss as an objective matter. This is as true of individual microalgae as it is of collectivities of heat-intolerant microalgae.

While humans cannot prevent all human-caused losses of other lives, we could certainly improve the loss rate by focusing on those of our acts that cause losses. We don't significantly reduce the loss-rate by privileging only a very small assortment of animals who happen to have the capacities to think or to feel as we do. We don't do much to improve respect for life or specific other lives through that avenue, either. It is not only "losses" that we should be guarding against. We should also be guarding against the oppressive acting out of our desires upon the earth and its inhabitants. The focus should be on establishing duties on humans not to behave in arrogantly oppressive ways rather than on defining animals as worthy or not of protection from human's destructive acts. Arguing about whether a particular type of animal deserves protection from humans leaves unexplored and intact the presumption that violent, oppressive conduct is appropriate unless and until a particular animal or entity is removed from the category of "okay to exploit."

III. ESTABLISHING DUTIES TOWARDS ANIMALS

The goal of this dissident approach is not to make legal categories trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality. Its task is not to formulate abstract standards that will produce determinate outcomes in particular cases. Its project is more substantive, more jurisprudential than formulaic, which is why it is difficult for the mainstream discourse to dignify it as an approach to doctrine or to imagine it as a rule of law at all.

Catharine A. MacKinnon, *Feminism Unmodified* 40 (Harvard 1987).

The goal of my approach is to stop categorizing animals by reference to whether they are worthy of protection and to encourage reduction in human entitlements to act in oppressive ways. Since the world as a whole is necessary, breaking the world into discrete elements that will or will not be protected misses the point of interrelationship and, once habitats have been destroyed, obviates the possibility of self-determination. Conservation biologist Paul McGuire, quoted earlier for his minority view of respect for salmon, recognizes that we will have done little for the salmon if we do not protect the rivers in which they swim, breathe, eat, and reproduce.

I feel so saddened when I see the state of our rivers. The Columbia River is such a great example of what we've done to the tremendous stock of salmon that ran through that river, the genetic variability that existed there pre-1920s, 1930s.⁹¹

In fact, water is at the heart of protecting many different species of fish, setting in motion complex considerations for water usage. Governor Schweitzer of Montana raised the issue of the Columbia River basin in connection not just with salmon in Washington and Oregon but also with respect to endangered species of fish in Montana:

[Endangered Species Act issues] are complicated issues. Let me give you another example. Here in Montana, we have a couple more endangered species—fish—the white sturgeon and the bull trout, and they are living in the

⁹¹ Scarce, *Fishy Business* at 148–49 (cited in note 63).

streams that are upriver from the Columbia River basin. Now, in the Columbia River basin they have a Coho and a Chinook salmon that is endangered. Now, Washington and Oregon, to protect their endangered species, they would like us to draw down on our reservoirs at such a time that more water can be placed for the Coho and the Chinook. Unfortunately, that would further endanger our white sturgeon and bull trout. So, while we're trying to protect our species, they're trying to protect their species, and in many cases protecting our habitat, is 180 degrees from their species. These are interrelated issues. They're very complicated, and so there's winners and losers, I understand that.⁹²

The losers are usually the rivers and fish themselves, with humans rarely losing out on rights to use the rivers as they choose. The perspective of harms to the rivers and to the fish usually is missing from debates that occur in the context of policy and legal decisions that affect them. When perspectives are perceived to be missing, there is a strong inclination to look for those whose voices would add those perspectives. Therein lies an impetus for advocacy to include the "voices" of rivers and fish. Yet, as rights-less entities, rivers and fish are legally visible only as the objects of human interests in using them. Proponents of rights for rivers and fish are few in number, for good reason. As Stone noted in *Should Trees Have Standing?*, "[T]o urge a court that an endangered river is 'a person' . . . will call for lawyers as bold and imaginative as those who convinced the Supreme Court that a railroad corporation was a 'person' under the fourteenth amendment, a constitutional provision theretofore generally thought of as designed to secure the rights of freedmen."⁹³ Stone calls for just such imagination and boldness because rights seem indispensable. Rights may well be indispensable, but getting to rights directly is fraught with difficulty. That is why I argue later in this Article that the pursuit of rights must inform the creation of duties on humans to end exploitative privilege but that establishing duties can and should precede the establishment of rights.

⁹² KPCC 89.3 Los Angeles Radio Broadcast, *Airtalk with Larry Mantle: Endangered Species Act Reform* (July 12, 2005), available at <http://www.scpr.org/programs/airtalk/listings/2005/07/airtalk_20050711.shtm> (last visited Dec 16, 2005).

⁹³ Stone, *Should Trees Have Standing?* at 18 (cited in note 57).

At the forefront of establishing legal rights for animals, Francione notes that the legal situation of animals is particularly severe because animals not only do not have rights, they are relegated to a legal status that *precludes* rights; animals are legally the property (or potential property) of humans.⁹⁴ In seeking to remove that legal status, Francione suggests incremental establishment of animals' right to be free from human exploitative practices, the basic right to not be the property of another.⁹⁵ Francione argues persuasively that simply being nicer to animals by way of humane adjustments in the husbandry standards required of owners of personal property animals will not reflect or create the respect that is owed to animals, especially to those animals who, like humans, are sentient. Rather, it will make exploitation more palatable.⁹⁶

Philosopher Mary Midgley also notes the indispensability of moral (if not legal) rights when she writes, "Animal rights' may be hard to formulate, as indeed are the rights of humans. But 'no rights' will not do."⁹⁷ This is because, "[w]here the realm of right and duty stops, there, to ordinary thinking, begins the realm of the optional."⁹⁸ Stone makes the same point when he argues that only rights-holding by non-humans (such as rivers, trees, and animals) will result in serious consideration of harms to those non-humans that result from human action and inaction.⁹⁹ As it is now, disputes between humans, such as those between upstream and downstream riparian rights holders, may not be addressed at all if the costs of addressing them are too great.¹⁰⁰ And, even when humans decide that it is worthwhile to address their own harms, harms to the river itself and to the animals dependent upon the river are not considered. According to Stone,

⁹⁴ Francione, *Animals, Property, and the Law* at 15–32 (cited in note 51).

⁹⁵ In his book *Rain Without Thunder*, Francione sets out criteria of incremental reform that could lead to rights for animals. Those include the requirements that any specific proposed reform prohibit an act or acts of exploitation that go to the heart of the exploitative enterprise and to the heart of animals' basic needs, without substituting another form of exploitation in its place. Francione, *Rain Without Thunder* at 190–219 (cited in note 28).

⁹⁶ Francione argues that such legal welfarist approaches are not just ineffective, they actually impede the development of animal rights. Francione, *Introduction to Animal Rights* at 54–80 (cited in note 51); Francione, *Rain Without Thunder* at 47–146 (cited in note 28).

⁹⁷ Mary Midgley, *Duties Concerning Islands*, in Robert Elliot and Arran Gare, eds, *Environmental Philosophy: A Collection of Readings* 166, 171 (Penn State 1983).

⁹⁸ *Id.*

⁹⁹ Stone, *Should Trees Have Standing?* at 26–28 (cited in note 57).

¹⁰⁰ *Id.* at 15.

only rights-holding can prevent many of the human interest centered trade-offs that leave aspects of the environment totally out of the picture when injunctions or damages are sought for harms that include harms to the environment.¹⁰¹

Stone writes of legal-operational aspects of according rights to aspects of the environment, but he also makes the same point as Midgley when he writes that the psychic and socio-psychic aspects of radically reconceiving our relationship to the rest of nature cannot occur without establishing rights for currently legally invisible aspects of the environment.¹⁰² An entity's "rights" establish normative boundaries for others' conduct, even when those rights are imperfectly protected in courts of law. That is, we take seriously those, and only those, who have rights.

These are not the only scholars who have observed that, theoretically, rights could be established in nonhuman entities and aspects of nature on the grounds that there is inherent value in nature.¹⁰³ If one takes a positive view of legal rights as a means by which our society accomplishes goals, there is no reason that we could not entitle rivers, trees, blades of grass, or animals to rights.¹⁰⁴ Indeed, in his criticism of granting legal rights to animals on the basis of sentience or cognitive ability, Richard A. Posner has argued that legal rights are not established because of qualities in the entities in which they are established; they are established because of what can be accomplished as a result of rights entitlements.¹⁰⁵

Despite the theoretical feasibility of establishing rights for any entity we choose, it is clear that, as a society, we choose very seldom to establish legal rights for formerly right-less entities because legal rights are correlative with legal duties with which most of us do not want to comply. Perhaps that is why the establishment of moral rights seems more easily to precede than to follow the establishment of legal rights and why law is

¹⁰¹ Id at 26–28.

¹⁰² Id at 49–54.

¹⁰³ Consider Nicholas Agar, *Life's Intrinsic Value: Science, Ethics, and Nature* (Columbia 2001).

¹⁰⁴ Nagire Naffine characterizes this stance as one in which a "legal person" is defined by reference to the ends served by defining an entity as a "legal person." Naffine, 66 Mod L Rev 346 (cited in note 55).

¹⁰⁵ Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in Sunstein and Nussbaum, eds, *Animal Rights: Current Debates and New Directions* 51, 57–58 (cited in note 43). This is not to say that Posner thinks that animals should have rights; it is only to say that he is not persuaded by arguments that certain animals should have rights because of qualities they display.

sometimes out of synchrony with current views of morality. There is particularly serious political difficulty in establishing rights for animals and for aspects of the environment. Although many people care about the environment and about animals, neither the environment nor animals constitute voting constituencies on their own. Besides political difficulty, people are heavily invested in using animals and the environment to advance their interests in an ever-expanding consumption-oriented lifestyle. Adequately protecting animals and the environment would require a radical restructuring of human "needs" and "preferences," most of which are currently taken for granted and considered nonnegotiable requisites of a "good" life.

In addition to these formidable obstacles, there are two major socio-legal impediments to establishing rights for animals or elements of the environment. One is this society's preoccupation with a contract-based model of rights and duties as reciprocal arrangements between those *individuals* who have rights and those *individuals* who have duties that correspond to those rights.¹⁰⁶ The model requires symmetry between those who have and enforce rights and those who have duties based on those rights. I emphasize *individuals* because individualism is so central to the workings and legitimacy of a contractual model of rights; rights are appropriate only for those who can identify for themselves what their needs are, articulate entitlements that protect those needs, and have the wherewithal to extract the duties that are owed to them as a result of those rights.¹⁰⁷

Individualism as a foundational principle acts as a double-edged sword in a contractual model. It is the basis for respect for

¹⁰⁶ The concept of reciprocal rights and duties is a constant in legal discourse. Wesley Newcomb Hohfeld's conceptualization of the linkage has been particularly important to theoretical understandings of the relationship between rights and duties. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied* (Yale 1966).

This may be a Western preoccupation and not a necessary feature of legal systems as evidenced by the number of legal systems in which duties exist independently of rights or in which rights are disfavored altogether. See, for example, Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 *Stan J Intl L* 359, 367 (1995) ("[T]he Chinese conception of rights as interests to be balanced more readily lends itself to the view that rights are not something one originally and inalienably possesses but rather are granted by authorities [as suits those authorities' purposes].").

¹⁰⁷ To defend one's rights, one must be a "legal person." Ngaire Naffine, who surveyed the types of "legal persons" in evidence in jurisprudential reasoning, considers this to be the most exclusive of all conceptions because the entities that can be legal persons under this conception are more limited than in other conceptions. While Naffine does not estimate the empirical frequency of the different jurisprudential types she describes, she does note that this is the conception of "legal person" that generates the most criticism from feminists and others who represent those excluded by the model. Naffine, 66 *Mod L Rev* 346 (cited in note 55).

individuals, but it is also the basis for expectations that individuals be able to identify their own interests and press those interests forward.¹⁰⁸ That rights are associated with active assertion of interests, and not just protection from harm, is illustrated by political scientist Tim Luke's question, "Will we allow anthrax or cholera microbes to attain self-realization in wiping out sheep herds or human kindergartens?"¹⁰⁹ For those theorists for whom the model calls for parity among rights-holders as to entitlements to advance one's interests, not just parity in protection from harm, the contractual model of rights and justice seems inapposite to animals and aspects of the environment.

At its heart, this contractual model is the basis of the second major impediment to establishing rights for aspects of the environment: predominance of a model of justice that requires "like entities to be treated alike." Would-be rights-holders must prove that they are sufficiently like current rights-holders in ways that relate directly to the rights they argue justice demands. As to women, feminists initially used this paradigm to argue that, since women are like men in all aspects relevant to work, women should be treated like men with respect to access to work. Analogously, the idea that justice is based on like treatment of like entities has been the source of pressure on advocates to define animals as sufficiently "like humans" to be entitled to basic rights.¹¹⁰ Advocates argue that since some

¹⁰⁸ This is why even though individualism and individual rights are praiseworthy, they carry particular burdens for those who are not defined as individuals or rights-holders. See, for example, Mary Midgley's description of "icy" individualism, despite her praise for respect for the individual and for moral rights to be held by individuals. Midgley, *Duties Concerning Islands* at 180 (cited in note 97).

¹⁰⁹ Cary Wolfe, *Animal Rites: American Culture, The Discourse of Species, and Posthumanist Theory* 26 (Chicago 2003) (quoting Tim Luke).

¹¹⁰ Gary L. Francione suggests adopting the definition of a basic right developed by political theorist Henry Shue, who:

maintains that a basic right is not a right that is "more valuable or intrinsically more satisfying to enjoy than some other rights." Rather, a right is basic if "any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself." Shue states that "non-basic rights may be sacrificed, if necessary, in order to secure the basic right. But the protection of a basic right may not be sacrificed in order to secure the enjoyment of a non-basic right." The reason for this is that a basic right "cannot be sacrificed successfully. If the right sacrificed is indeed basic, then no right for which it might be sacrificed can actually be enjoyed in the absence of the basic right. The sacrifice would have proven self-defeating."

Francione, *Introduction to Animal Rights* at 94 (cited in note 51) (citations omitted). While Francione points to "basic right to physical security" as the most important of the

animals have the capacity to think or to suffer as do humans, animals should be treated like humans as to basic protection from human-caused suffering. Elsewhere I have criticized the use of the similarity argument and the paradigm of justice upon which it is based.¹¹¹ In this particular context, it is important to note only that this paradigm of justice (and the similarity argument it requires) reinforces a contractual model of rights and duties that admits only of symmetrical relationships between rights-holders and duty-holders in which rights and duties correlate closely with each. One has rights because someone else has duties tightly linked to those rights, and one has duties because someone else has rights tightly linked to those duties.

A contractual model of reciprocal, correlative rights and duties presents difficulties for all but the most able-bodied, educated, moneyed, and articulate of humans. Many humans (let alone animals and aspects of the environment upon which they depend) do not “contract” or “protect themselves” in the way that we envision for the purpose of establishing or protecting legal rights.¹¹² Midgley claims that despite the fact that many of the entities to whom we feel emotionally and morally committed are outside this realm of contractual rights and duties, our concept of justice and rights entitlements are premised on those abilities to articulate and to defend one’s position.¹¹³ Indeed, according to Midgley, most everything and everyone we value is excluded from the strictures of a contract model of justice, despite the great pervasiveness of talk of “justice” as an overarching socio-

basic rights identified by Shue, by a “basic right” Francione also means the right not to be the property of another. Id at 95.

¹¹¹ Bryant, 70 L & Contemp Probs (cited in note 78).

¹¹² This has led to considerable debate about exceptions to the model’s requirements of autonomous, individual rights-holding. Animal rights advocates engage in that debate, called “the argument from marginal cases,” because, if marginal cases of humans can be included in the model, then animals perceived to be at the margins, also, should be included. According to one observer of the animal rights movement, this is “probably the most debated issue in the literature.” Robert Garner, *Animals, Politics, and Morality* 14 (Manchester 1993). Perhaps the reason it is so debated is that it is the rendition of the similarity argument that spells out and seeks an answer to the uncomfortable question of treating animals so badly when they have qualities equal to or superior to the qualities of some humans. For a review and consideration of various positions on the question, consider Daniel A. Dombrowski, *Babies and Beasts: The Argument from Marginal Cases* (Illinois 1997). More recently, philosopher Jeff McMahan takes on this problem of “marginal cases” in the specific context of killing, by considering a variety of factors that affect decisions to actively or passively kill individuals, including animals, humans in vegetative states, and anencephalic infants. Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* 203–28 (Oxford 2002).

¹¹³ Midgley, *Duties Concerning Islands* at 172-74 (cited in note 97).

legal value. Midgley identifies a large list of entities inscribed with moral value and worth, which, nevertheless, fall outside the boundaries of a contractual model and so are currently ineligible for rights.¹¹⁴ Midgley's list of entities to whom humans exhibit feelings of duty includes nineteen enumerated categories such as humans who are unable to speak for themselves, future generations,¹¹⁵ nonsentient as well as sentient animals, inanimate entities such as works of art and aspects of the environment, comprehensive categories such as families, ecosystems, and countries, and also entities such as "oneself" and "God."¹¹⁶ The list readily eclipses the relatively short list of those who can have rights by virtue of falling within the boundaries of a contract-based model of correlative rights and duties in which they are fully able to identify and articulate their own needs and preferences. Although Midgley does not directly ask this question, the question exists: If "justice" is based on a conceptual model of correlative rights and duties, but there are so many normative duties for which rights-holders do not symmetrically exist, then what is "justice" *actually* in this society? It would seem that it is reserved for and operable among only a very few of those to whom and with whom we actually have moral commitments. And, when legal justice is reserved for only a few of those to whom moral justice is owed, a gap opens between law and morality. That gap is serious to the extent that people believe that there should be a close connection between law and morality.

If law is to have meaning in capturing the moral value ascribed to those who do not meet the requirements of such a narrow contractual model, we must do something about the contractual model of justice and rights as strictly correlative with duties. Such a model is not inevitable. Asian, South African, East Indian, and Native Canadian legal systems, to name a few, have provided for duties without corresponding rights established in individuals,¹¹⁷ even though establishing rights for

¹¹⁴ Id at 174.

¹¹⁵ Id. I am reading Midgley's category "posterity" as "future generations," although perhaps Midgley means something different by the term. She does not define her term explicitly; she may, however, be alluding to Grice's list of entities lacking natural rights. Id at 167.

¹¹⁶ Midgley, *Duties Concerning Islands* at 174 (cited in note 97).

¹¹⁷ See, for example, Randall Peerenboom, *China's Long March toward Rule of Law* 513-546 (Cambridge 2002) (distinguishing between rights-based democracies and other forms of democracies to argue that China is unlikely to develop the type of rights-based democracy of the West); Tara Chand, *The individual in the legal and political thought*

individuals who would benefit from duty-compliance might have been a good way to enforce duties.¹¹⁸ Even if ease of enforcing duties is recognized as a possible benefit of establishing rights correlative with duties, the individualism that underlies the expectation that beneficiaries would enforce their rights may be undesirable in the overall socio-cultural context of the society. The point is that a correlative rights/duties legal model need not exist, and it may not exist for socially-defined “good” reasons.

If we cannot do away with the correlative rights/duties model altogether because the American legal system is too deeply invested in it or because we value the norms that are linked to it, advocates must at the very least think about the possibility of reversing the order of the current attempt to create legal rights first, followed by the development of corresponding duties. If duties are first established to include and to protect others we value but for whom our previous model has made no room, perhaps at least normative rights (not just normative concern for animals) will be derivative from those duties. Explicitly *legal* rights may ultimately result from such normative rights, effectively eroding the property status of animals. The key to such a progression would be to avoid the creation of duties that simply reinforce the commodification and exploitation of animals by causing their captors to be nicer to them.

and institutions of India, in Charles A. Moore, ed, *The Status of the Individual in East and West* 411 (1968) (discussing the philosophical and legal implications of Indian individuals being embedded in groups to which the individual has duties but not rights); Kawashima Takeyoshi, *The status of the individual in the notion of law, right, and social order in Japan*, in Moore, ed, *The Status of the Individual in East and West* at 429, 431 (“[The Japanese] consider it improper for the [beneficiary] of an obligation to demand or claim that the obligated person fulfill his obligation . . . there is no place for the existence of the notion of ‘right’ . . .”). Western legal concepts of rights may well come into conflict with ideas held by indigenous people. See, for example, Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* 155 (Toronto 1993) (“Are Indians morally obligated to adopt the Western-liberal doctrine of individual rights, as embodied in the Canadian Charter of Rights and Freedoms, as their standard for protection of human dignity?”). Also, in the human rights context, see generally, Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 Colum Hum Rts L Rev 565 (2001). Saul notes that “[N]ot all rights and duties are correlative. If all rights had correlative duties, there would be no need for a separate rights language.” Id at 586-87. Saul also refers to the 1981 African Charter on Human and People’s Rights as “recogniz[ing] duties of an individual towards his family and society, the State and other legally recognized communities and the international community,” and states that the Charter “goes radically beyond the conventional notion that duties are correlative to rights.” Id at 591-92.

¹¹⁸ For example, if duties to provide for children of lawful unions are established in parents but rights to enforce those duties are not established in children or their guardians, then enforcement is up to the state or to a state designee, which is arguably less efficient than establishing rights directly in those who are the intended beneficiaries of the duties.

Although Midgley does not do so explicitly, a logical extension of her arguments concludes that imposition of duties based on normative values of respect and concern for right-less others may have to precede the establishment of rights. After having recognized that rights are essential, she also concludes that “rights” under the Western contractual model are extremely difficult to apply “when we reach the inanimate area.”¹¹⁹ Midgley places great weight on the concept of duties as a term that “can properly be used over the whole range. We have quite simply got many kinds of duties to animals, to plants and to the biosphere. But to speak in this way we must free the term once and for all from its restrictive contractual use.”¹²⁰ If duties are taken seriously, then rights will flow from duties as correlates of those duties, but the definition of “rights” will have to take on a meaning that is different from contractual relationships between those who have duties and those who, through dint of their own individual abilities, can identify, understand, articulate, and enforce their rights.¹²¹

Midgley enters the discussion of moral duties by way of rewriting the story of Robinson Crusoe such that he torches the island as he leaves.¹²² Does Crusoe have duties towards the island even though the island is not a type of entity that is thought to have rights (from which his duties would derive in a correlative rights/duty construct)? Does he have duties towards the island even though it is a “stranger” to him and not his homeland, towards which one would be expected to have normative commitments and duties?¹²³ Midgley concludes that Crusoe can be said to have duties, if duties are defined without reference to the narrow model of Western law and justice:

Duties need *not* be quasi-contractual relations between symmetrical pairs of rational human agents. There are all

¹¹⁹ Midgley, *Duties Concerning Islands* at 175–76 (cited in note 97).

¹²⁰ *Id.* at 176.

¹²¹ *Id.* at 175–76.

¹²² *Id.* at 166.

¹²³ Midgley makes this point in another context as well. In *Animals and Why They Matter*, she argues that animal rights advocates (whom she calls “zoophiles”) call for too simplistic a notion of breaking down barriers to an appropriate consideration of animals. She rejects the idea of speciesism, claiming that it is a natural result of human identification with reference points outside themselves. She argues for respect for animals, regardless of natural human inclinations to value entities that have direct meaning to individuals, such as their immediate families, those who live in the same country, and those of their same species. Mary Midgley, *Animals and Why They Matter* 103–11 (Georgia 1998).

kind of other obligations holding between asymmetrical pairs, or involving, as in this case [of Robinson Crusoe and the island], no outside beings at all. To speak of duties *to* things . . . is not necessarily to personify them superstitiously, or to indulge in chatter about the "secret life of plants." It expresses merely that there are suitable and unsuitable ways of behaving in given situations. People have duties *as* farmers, parents, consumers, forest dwellers, colonists, species members, ship-wrecked mariners, tourists, potential ancestors and actual descendants, etc. As such, it is the business of each not to forget his transitory and dependent position, the rich gifts which he has received, and the tiny part he plays in a vast, irreplaceable and fragile whole.¹²⁴

While Midgley is writing from a moral philosopher's perspective, Stone, who also believes that rights are essential, seems to take a similar tack in proposing that duties can precede the establishment of rights. "What the environment must look for is that its interests be taken into account in subtler, more procedural ways."¹²⁵ He cites the National Environmental Policy Act ("NEPA") as a "splendid example of this sort of rights-making through the elaboration of procedural safeguards,"¹²⁶ which include requirements that potential harms to the environment be assessed as a precursor to "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."¹²⁷ Stone is aware of the problem that procedural mechanisms such as this are only as good as the will to use them and to enforce them, and he is careful to address the issue by stating that NEPA has had positive effects of the type he claims.¹²⁸ For the purposes of this Article, however, the most important point is that that same problem arises in the context of establishing legal rights; questions about the will to use and to enforce laws are not uniquely troubling with respect to establishing legal duties first. The problem of enforcement pervades law.

¹²⁴ Midgley, *Duties Concerning Islands* at 178 (cited in note 97).

¹²⁵ Stone, *Should Trees Have Standing?* at 36 (cited in note 57).

¹²⁶ *Id.*

¹²⁷ *Id.* (citing NEPA).

¹²⁸ *Id.*

The law of animal protection is not totally lacking in examples similar to Stone's example of NEPA. The Animal Welfare Act ("AWA") requires researchers to consider alternatives to using animals in order to accomplish their research objectives.¹²⁹ That provision would most likely have remained an empty legal exhortation had no organization such as the Association of Veterinarians for Animal Rights ("AVAR") taken seriously the requirement of "consideration" of alternatives as including the obligation to actually use viable alternatives. AVAR and members of some veterinary medical school communities petitioned the United States Department of Agriculture ("USDA"), which enforces the AWA, to require veterinary medical schools to actually perform the searches that would lead to alternatives to terminal uses of animals in veterinary medical education programs.¹³⁰ The AVAR petition ("Petition") called for interpretation of the duty to consider alternatives as a duty to actually use the alternatives if consideration yielded viable alternatives to the use of animals.

By the time of the Petition, 13 of the 28 US veterinary medical schools had stopped requiring terminal uses of animals in their core courses, and of those 13 schools, 7 had stopped requiring terminal uses of animals in their elective courses as well.¹³¹ It is not clear that those veterinary medical schools did so because they understood it to be their duty to do so,¹³² but it was, at least, quite clear from their decision that terminal uses of animals were not necessary for veterinary medical education. In response to the Petition, the USDA determined that the AWA

¹²⁹ 7 USC § 2143 (2005).

¹³⁰ *AVAR Files Petition With USDA: Seeks to Eliminate Violations of Federal Law*, 70 AVAR Directions 1, 1 (Winter 2003), available at <http://www.avar.org/avar_winter_2003_directions.pdf> (last visited Jan 21, 2006); Linnea Stull, *AVAR Addresses Violations of Federal Animal Welfare Act With USDA Petition—Students Join as Co-Petitioners*, 23 AVAR Alternatives 1, 1 (Apr 2003), available at <http://www.avar.org/avar_apr_2003_alternatives.pdf> (last visited Jan 21, 2006).

¹³¹ *Harmful Animal Use in Veterinary Training on the Decline*, 77 AVAR Directions 1, 1 (Winter 2005), available at <<http://www.avar.org/dirwinter2006.pdf>> (last visited Jan 21, 2006).

¹³² In the spring of 2003, I was invited to present to associate deans of veterinary medical schools information about students' legal rights to refuse to conduct experiments or lab exercises on healthy living animals. Several associate deans spoke about their alternative programs, which had arisen in a variety of ways including student initiatives, faculty proposals, and outsiders' suggestions (such as specific proposals for supervised diagnosis and treatment of animals actually in need of treatment). At that time, the AVAR petition had been filed but not yet acted upon by the USDA. None of the associate deans whose schools were using alternatives stated that they were doing so because they understood the AWA to require that they do so.

does require veterinary medical schools to use viable alternatives to terminal procedures and not just to “consider” them.¹³³ This interpretation incorporates “use” within “consideration” of alternatives and results in a duty to actually use, not just consider, alternatives when alternatives exist.

Can it be said that the AWA created the duty to use alternatives? I don’t think so. The AWA explicitly created only the duty to consider those alternatives, and “consideration” was not defined. A significant number of veterinary medical schools’ decision to use alternatives created the presumption that consideration of alternatives would lead to their use and that rejection of good alternatives would be tantamount to not considering them at all. Authority was still vested in veterinary medical schools to decide which alternatives are worth considering (and using). Nevertheless, the existence of the AWA’s requirement of “consideration” created the circumstances under which schools that did not want to—and might *never* have wanted to—use alternatives were required to do so nonetheless.

An even more difficult question is whether rights could be or are derived from any of these examples of Crusoe’s duties towards the island, NEPA’s requirement of impact appraisals, and the AWA’s provision that alternatives to animal usage be considered. Midgley raises but doesn’t answer the question, and, after all, her example is purely hypothetical. Stone is definitely troubled by this question, which is why he spends so much time on the central question of his thesis: should trees have standing?¹³⁴ That is, without the means to enforce the duty, the existence of the duty by itself only exhorts correct action but does not, in actuality, require it. Rights approaches do not differ on this score, however. Given the unique characteristics of animals’ communication, establishing legal rights for animals or aspects of the environment does nothing, pragmatically speaking, without the establishment of a guardianship system through which the claims of the rights-holder can be heard. In both cases,

¹³³ *Nearly Every Veterinary School Cited by USDA for Non-Compliance with Federal Law*, 25 AVAR Alternatives 2, 2 (Jan 2004), available at <http://www.avar.org/avar_winter_2004_alternatives.pdf> (last visited Jan 21, 2006).

¹³⁴ In subsequent writings about providing trees and aspects of the environment with standing, Stone examines many of the troubling questions that arise if one seriously contemplates rights for entities that are not humans and not capable of representing themselves directly. For example, he explores the issues of “nonperson” status under the law, the need for guardians, and opponents’ worries about opening floodgates to litigation if every aspect of nature had standing in court. Stone, *Should Trees Have Standing?* (cited in note 57).

humans or organizations will have to represent the rights-holder.

At this point, perhaps it is helpful to contrast the rights advocacy approach with the duties advocacy approach. Suppose that animal rights advocates had decided on the project of banning terminal uses of living animals in veterinary medical schools. This would meet at least some of Francione's requirements for an advocacy project that advances animal rights because it bans the use of animals altogether (albeit only when alternatives exist) rather than simply modifying the means by which such use would continue.¹³⁵ If advocates focus on establishing rights for animals (and among those rights, the right not to be used for terminal procedures in veterinary medical school), animals' advocates must focus on the animals themselves as sufficiently like humans to justify their receiving such rights. Their capacity to suffer, the value of their lives to them, or other aspects of the animals themselves would lead the argument for rights-based protection from (ab)use in terminal procedures.

By focusing on animals' suffering as a means of arguing that animals are sufficiently like humans that justice demands protecting them from this exploitation, advocates would be adopting the framework by which opponents of animal rights have consistently prevailed. That is, opponents of animal rights consistently argue that justice does not require treating animals like humans because, they claim, animals are not sufficiently like humans that their situation invokes similar justice issues and concerns. From an opponent's point of view it is appropriate simply to anesthetize the animal properly so that the animal not suffer. Ironically, in focusing on the similarity between animals and humans with respect to their capacity to suffer, animals' advocates play directly into opponents' position that anesthesia will solve whatever moral dilemma exists in using animals. Advocates may be using the capacity to suffer as an argument for rights that would spare animals from exploitation that results in suffering, but opponents claim that the capacity to suffer entails only the right to freedom from suffering within the context of exploitation. Thus, even if the theoretical feasibility of rights exists, it is virtually impossible to overcome opposition that justice is adequately served with minimal standards of care, that humans and animals are too differently situated to justify

¹³⁵ Francione, *Rain without Thunder* at 192 (cited in note 28).

establishing rights for animals, and that “rights” are not necessary to address most of the specific problems identified by animals’ advocates.

By contrast, advocates seeking enactment of the AWA did not present the AWA as an effort to secure rights for animals at all. In fact, the AWA was originally motivated by the more limited aim of preventing the theft of companion animals for research purposes.¹³⁶ For that purpose, the AWA created a system of licensing suppliers of animals to research facilities.¹³⁷ The Animal Welfare Institute used the occasion of the introduction of the AWA to press for changes in the research setting itself.¹³⁸ The AWA is woefully inadequate from an animals’ advocate’s point of view,¹³⁹ but the same pragmatic result that rights advocates would seek—the duty to use alternatives—has been at least partially realized through a confluence of the development of alternatives to the use of live animals, some veterinary schools’ adoption of those alternatives, and additional advocacy by the Association of Veterinarians for Animal Rights.

The AWA as a whole does not even approximate Francione’s requirements for incremental establishment of rights for animals to be free from exploitation. It actually furthers exploitation of animals. I have already noted the AWA’s exclusion, as a matter of its specific legal definition of animals, of most research animals. There is serious lack of oversight of researchers, and, as legal scholar Darian M. Ibrahim documents, that lack of oversight in concert with the AWA’s emphasis on the “three R’s” of reducing, refining, and replacing animals furthers exploitation of animals.¹⁴⁰ It is only in the effective advocacy use of one little piece of the AWA—the “consideration of alternatives” provision—that an outcome that looks the same as the “rights-based” project of banning terminal procedures on animals in veterinary medical

¹³⁶ Christine Stevens, *Laboratory Animal Welfare*, in Emily Stewart Leavitt, et al, eds *Animals and Their Legal Rights* 66, 73–77 (Animal Welfare Inst 4th ed 1990).

¹³⁷ 7 USC §§ 2133, 2142 (2005). Unfortunately, this has been a total disaster. The licensing system, by creating Class B (“random source”) dealers, actually enhances the possibility that stolen companion animals will be used in research settings. At the time of this writing, bills in Congress purport to solve that problem by changing the Class B dealer system: Pet Safety and Protection Act of 2005, S Rep No 451, 109th Cong, 1st Sess (2005); Pet Animal Welfare Statute of 2005, S Rep No 1139, 109th Cong, 1st Sess (2005); Pet Animal Welfare Statute of 2005, HR Rep No 2669, 109th Cong, 1st Sess (2005).

¹³⁸ Stevens, *Laboratory Animal Welfare* at 71 (cited in note 136).

¹³⁹ Ibrahim, 2006 U Chi Legal F 195, 223-28 (cited in note 73)

¹⁴⁰ *Id.*

education could emerge. Looking for and creating those kinds of advocacy spaces is necessary in a society that is so tremendously invested in animal exploitation despite considerable normative support for sparing animals from cruel treatment.

Due to the significant pragmatic difficulties associated with the power of institutional owners of animals and a paradigm of justice that requires newcomers to prove their similarity to existing rights-holders, it is virtually impossible to be “pure” in the pursuit of rights or duties. Even so, advocates should at least use a rights-based approach to the establishment and enforcement of duties in order to guide their efforts and in order to gauge when to exit a particular legislative reform attempt that might be more successful later, under different circumstances. As a guide to action, advocates would do well to seek imposition of those types of duties on exploiters of animals that can be enforced with the effect of prohibiting practices that a straightforward rights-based advocacy approach would use under the Francione model of legal rights creation. They must then follow-up by using as effectively as possible the small advocacy space that is thereby supplied.

In this regard, Francione’s criticism of “legal welfarism” is as important in the context of duty imposition as it is in the context of rights acquisition.¹⁴¹ Advocates do not meaningfully advance the cause of respect for animals when they urge (or agree to) compromises that allow exploiters to exploit animals more “humanely.” They advance the cause of exploiters. To be a meaningful part of an agenda of removing animals from the category of “commodities,” an advocacy project cannot be

¹⁴¹ While participants in the animal protection movement may distinguish between the pursuit of animal welfare (humane treatment of animals without challenging the institutional practices of exploitation) and pursuit of animal welfare reform for the purpose of incremental abolition of institutional practices of exploitation, Francione considers both welfare for the purpose of welfare and welfare as a step towards rights as flawed. In his view they are flawed because they fail to challenge the foundation of animal exploitation: the legal property status of animals. In particular as to the latter, Francione disputes the idea that incremental abolition of exploitation can occur when reforms fail to remove the entitlements of animal (ab)users to confine and exploit animals as they choose. For example, simply increasing the cage space allocated to hens will not change the basic pattern of exploitation. By contrast, prohibiting the caging of animals would recognize the bodily integrity interest of animals (an animal’s “basic” right) and strike a blow to the basic institutional entitlement to treat animals as things. These ideas are discussed at length in Francione, *Rain Without Thunder* at 126–39 (cited in note 28).

I argue that, similarly, if duties are pursued only with such goals as making cages bigger rather than eliminating cages altogether, duty imposition will result in no more progress for animals than would welfarist legal reform which is mistakenly undertaken to secure rights for animals.

structured around making exploitation more palatable. Seeking a duty on factory farmers to provide more space to hens can be expected only to *increase* commodification and consumption of animals, furthering the definition of them as “things to eat”; it can be expected only to make consumers more comfortable with a choice to consume animals. Rather, the advocacy project should be structured around exposing or banning legal entitlements exploiters have to exploit animals at all.

To remove this human definitional overlay on animals that they are commodities for human consumption, while operating in a society that has gone very far downstream in defining animals as such, requires careful thought as to duties that can be imposed in ways that actually lead to less utilization of animals. Through thoughtful advocacy perhaps the doors to exploitation can be closed even as doors to alternatives are opened until, ultimately, consumers reach the tipping point of choosing non-animal-based products and services. Thoughtful advocacy that opens doors to alternatives are those advocacy efforts that support consumer-palatable vegan choices and effective non-animal-based chemical evaluation measures, for example. Not just any duty to treat animals “better” will do. Thoughtful advocacy that closes doors to exploitation is advocacy premised on the creation of duties to consider and to refrain from animal exploitative actions that directly affect animals’ basic needs for physical safety and bodily integrity. Thus, eliminating abusive practices altogether, rather than modifying them so as to make them less painful, would have to underlie both the effort and the outcome of the advocacy.¹⁴²

CONCLUSION

Feminism seeks to empower women on our own terms. . . .
We seek not only to be valued as who we are, but to have
access to the process of the definition of value itself.

Catharine A. MacKinnon, *Feminism Unmodified* 22
(Harvard 1987).

¹⁴² Perhaps this is a version of the same argument made by Barry Commoner with respect to environmental pollutants. Commoner challenges environmental regulatory goals that seek to identify and maintain pollution at tolerable levels rather than taking the steps necessary to ban known pollutants altogether. Barry Commoner, *The Failure of the Environmental Effort*, 91 *Current History* 564, 564–65 (1992).

Animals are not allowed to define their lives. Indeed, their very bodies are defined by humans, in accordance with human preferences. The process by which we modify and define animals is domestication. Through domestication, humans have changed the very physical nature of animals, and it is an ongoing process by which we create animals we can exploit more and more easily *because* of our previous and continuing distortions of their biology. Previously domesticated animals are being modified further, formerly wild animals are being newly domesticated, and entirely new forms of life are being generated in laboratories around the world. We literally make the very animals whose trust we then betray when we abandon them on streets or to animal shelters, turn them into flesh-foods, or torture them in the interest of extracting a little information that can only *potentially* help us with a problem that is usually of our own making. Manufacturing an animal does not lead to heightened care of animals; manufacturing an animal leads to reduced care of animals because it is the manufacturing process itself, and the sense of entitlement to manufacture animals, that leads to objectification and commodification of animals in ways that preclude attention to their needs.

Domestication as a process and a value is so engrained that the depth of its denigration of animals eludes us. Humans alive today were born into a world already structured around willful distortion and manipulation of animals, and so it is difficult to hear the word “domesticated” as the pejorative, disrespectful label it is. Quite the contrary, domestication is glorified and romanticized as the path by which humans “rescued” animals from nature and by which humans have become reciprocally “tamed” through their association with “gentle beasts.”¹⁴³ Feminists have educated us about what “taming” has done (and continues to do) to women, but the more literal lesson—its origins and literal meaning in the context of domesticating animals—has not received a great deal of focused attention. Feminists have not been quick to draw parallels because most feminists have tried to distance women from the category of animals.¹⁴⁴

¹⁴³ See, for example, Roger Caras, *A Perfect Harmony* (Simon & Schuster 1996) (detailing the ways in which humans’ and animals’ lives have intertwined over time such that humans are made better).

¹⁴⁴ Catharine A. MacKinnon, who has written of the false distinction inherent in separating “mice from men” (see note 75), has also written of women’s perceptions of degradation when they are classified as or compared to animals.

The legal process by which we have facilitated domestication (and an even more rapid technological manufacture of animals through transgenic animal research) is, fundamentally, a process of privatization of animals and human modifications of animals as the legal property of people who have reduced animals to their control. The ability to patent life forms creates incentives to experiment with various combinations of living material and technical processes. Although there were legal disputes about whether mice engineered to develop cancer or bacteria modified

How do you know when a group is on the bottom? It may be some indication when they can be assaulted, and authorities ignore them, physically abused, and people turn away or find it entertaining; economically deprived, and it is seen as all they are worth; made the object of jokes, and few ask what makes the jokes funny; *imaged as animallike*, confined to a narrow range of tasks and functions, and told it is all harmless or inevitable and even for their benefit as well as the best they can expect, given what they are. These are all true of women.

MacKinnon, *Feminism Unmodified* at 30 (cited in note 75) (emphasis added).

Although liberal feminism, with this desire to avoid identification with nature, does seem to dominate feminist discourse, there is a strand of feminism (ecofeminism) that:

[b]egins from the acknowledgement that patriarchal cultures enable the male domination of both nature and women and this potentially opens up a space for an identification of women with nature Rather than challenging the connection between nature and women, some ecofeminists seem to want to celebrate it. The attempt to dominate nature has its corollary in society with men's attempt to dominate and subjugate women. The two forms of domination are intimately connected. This means that women have a special interest in ecology, but also that attempts to defend nature must be attempts to defend women against patriarchal domination. In short, radical ecology is as much about women as it is about nature.

Sutton, *Nature, Environment, and Society* at 106 (cited in note 62). For other overviews of ecofeminist perspectives, see Greta Gaard, ed, *Ecofeminism: Women, Animals, Nature* (Temple 1993) (discussing the interconnection between women and nature); Carolyn Merchant, *Radical Ecology: The Search for a Livable World* 193–223 (Routledge 2d ed 2005) (discussing liberal, cultural, social, and socialist forms of ecofeminism and how each speak to the connection between women and nature); Kathy J. Warren, *Ecofeminist Philosophy: A Western Perspective on What It Is and Why It Matters* 43 (Rowman & Littlefield 2000) (arguing that there are “important interconnections among the unjustified dominations of women, other human Others, and nonhuman nature” and “feminist philosophy should include ecofeminist insights into” these relationships).

There is a strand of feminism that examines specifically questions of feminism and animal liberation. See, for example, Lori Gruen, *Dismantling Oppression: An Analysis of the Connection Between Women and Animals*, in Greta Gaard, ed, *Ecofeminism* 60–91 (Temple 1993) (arguing that no attempt to liberate women can occur without some attempt to liberate nature); Carol J. Adams, ed, *Ecofeminism and the Sacred* (Continuum 1994) (explaining how “environmental exploitation, unbridled consumerism, . . . exploitation of animals, pollution of the Ganges, and other environmental issues are precisely the concerns of ecofeminist spiritualities”); Carol J. Adams and Josephine Donovan, eds, *Animals and Women: Feminist Theoretical Explorations* (Duke 1995) (questioning whether the original male pattern of domination over women was “not itself preceded by and modeled upon the domination of animals by humans”).

by humans could be “property,”¹⁴⁵ for example, it is unremarkable that courts agreed to allow human ownership of such patents and the products of those patents. After all, it was mere extension of existing legal concepts of animals to do so.

Francione makes a strong case for de-privatizing animals by incrementally establishing basic rights for animals. However, that path involves many digressions for the purpose of defining which animals are worthy of rights entitlements, and it may not be the only pathway through which human control and manipulation of animals can be significantly eroded. This Article calls for employing Francione’s criteria for rights-centered advocacy as the basis for advocacy projects designed to establish duties on humans to develop means of meeting human needs in ways that do not exploit animals or destroy their (and our) habitats. Creating such duties appropriately redirects advocacy attention from making humans’ exploitation of animals more acceptable and, instead, places advocacy attention on stripping away commodifying practices and entitlements.

Using the criteria of rights-based advocacy for animals to advocate particular legislation and to enforce the resultant inevitable political compromise legislation requires focused work, because it is difficult to know exactly which duties will actually result in room to prohibit exploitative practices. The duties cannot simply make exploitation nicer for animals, or, as in the case of veterinary medicine, seek alternatives to certain uses of animals. Advocates must seek interpretations of duties that actually prohibit exploitative uses. Despite these difficulties, focusing on duties is advantageous because it addresses three problems with advocacy that focuses on rights: (1) delays and debates about which animals should or can have rights, (2) inability to protect those things essential to animals’ existence, well-being, and ability to define or structure their own lives (because of the narrow definition of who or what can be rights-holders), and (3) difficulty turning the spotlight directly on exploiters and exploitative practices.

¹⁴⁵ *Animal Legal Defense Fund v Quigg*, 932 F2d 920 (Fed Cir 1991); *Harvard College v Canada*, 2002SCR 76 (Canada 2002); *Diamond v Chakrabarty*, 447 US 303 (1980); Andrea Kamage and Julie Heider, *So What, Exactly, Is ‘Human?’: When our DNA blends with that of other beasts, new creatures vex the Patent Office*, Legal Times (June 20, 2005); Gerald Dworkin, *Should There be Property Rights in Genes?*, 352 Philosophical Transactions of the Royal Society B: Biological Sciences 1077, 1079-81 (1997), available at <[http://www.journals.royalsoc.ac.uk/\(wq1dsv45eombhrvp0fxwhh55\)/app/home/content.asp?referrer=contribution&format=2&page=1&pagecount=10](http://www.journals.royalsoc.ac.uk/(wq1dsv45eombhrvp0fxwhh55)/app/home/content.asp?referrer=contribution&format=2&page=1&pagecount=10)> (last visited Jan 21, 2006).

All three problems—delays, inadequate results, and lack of attention to questioning the moral entitlement of exploiters—result from reliance on a narrow model of correlative rights and duties between equally situated actors and a paradigm of justice that defines a just society as one in which like entities are treated alike. It is difficult to prove that animals (not to mention rivers and plants) are sufficiently like humans to justify giving them rights, through which duties to respect those rights could be established. Advocates' claims of "justice" for the environment or for animals fall on deaf ears to the extent that neither the contractual model of correlative rights and duties nor the paradigm of "like entities" is satisfied. Protection of animals premised on the establishment of actual rights for only a select few animals cannot possibly provide the type of protection all animals need in order to continue to co-exist with us on the planet. Besides, establishing rights carries its own set of problems, such as who will speak for animals with rights or how to resolve issues of inter-species competition for limited resources. It will not tell us how to solve problems of protecting endangered fresh water trout and sturgeon in Montana who are dependent on water that may be equally necessary to protect endangered salmon in Washington and Oregon.

Meanwhile, the motivations and machinations of those who want to harm animals go relatively unnoticed and unaddressed. The motivations and entitlements of those who want to trap and remove or eradicate the peafowl on Palos Verdes Peninsula are never part of an explicit debate about peafowl because that debate is focused on how peafowl are or should be legally defined. Nor is the (lack of) need for dismembering fallow deer bodies discussed when the issue is framed merely as one of curing technical flaws in the definition of "domestic animals" or "livestock."

We need to ask by what moral right animals are (ab)used in these ways. How could we become so cavalier about injecting pieces of wire into young salmon's heads so that we can forcibly use their own bodies as scientific research instruments in our quest to distort and modify salmon? We need to focus directly on those attitudes and activities. Instead of debating questions about the worthiness of animals to be protected, we need to ask such pointed, basic questions as who, under what moral right, is manipulating water in disruptive, destructive ways, and who, under what moral right, is manipulating fish populations such that populations are being distorted. I have no doubt that the

debates that ensue from such starting points will circle back into narrow debates about the worthiness of animals. Even so, the focus needs to be continually expanded and brought back to the type and scope of destruction wrought by abusive conduct.

This Article argues that the starting point of advocacy for rights makes a difference. Advocates need to begin by asking questions that make most salient what is at stake when animals and aspects of the environment are reduced to the status of “resources” and “property” of humans. They must also resist engaging in the gaming that surrounds use of the justice claim that like entities be treated alike. They can never win that game because animals can always be defined as sufficiently different from humans to justify treating them much worse than humans. A paradigm of rights and duties that exists outside the frame of contractual negotiation between equally-situated humans will have to emerge from such advocacy. Finally, a paradigm of justice that requires justification for exclusion and intolerance of difference, rather than requiring justification for inclusion and protection, shifts the burden to those who would do harm and requires the search for, and development and use of, alternatives to harmful practices. Without the pressure of a more inclusive paradigm of justice, those “alternatives” can never become the new baseline by which even more respectful “alternatives” are developed. Because domestication and human imperiousness with respect to animals and the environment is so deep-seated, it will be necessary to proceed by creating duties in specific, limited contexts through which specific rights can be derived. Nevertheless, the goal should be challenging the underlying arrogance with which humans literally make and re-make the world without regard to its other inhabitants.