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THE CASE AGAINST RIGHTS FOR ANIMALS

David R. Schmahmann*
Lori J. Polacheck**

I. INTRODUCTION

In pressing the boundaries of existing statutory and common law, proponents of radical change in the way humans interact with animals seek to have our institutions take an unprecedented step: to endow animals with legal rights.¹ What this means—what “rights” for animals unavoidably entails as a matter of constitutional and civil law—raises issues that go to the core of our assumptions about ourselves and about the nature, aims, and limits of our institutions.

The term “animal rights” poses vexing definitional issues, and these issues are complicated by the imprecision with which the term is so often used. Many people loosely associate “animal rights” with the idea that people have a moral, legal, or custodial duty to treat animals humanely. Such a gloss allows the notion of rights for animals to appear mainstream and to elicit support across a broad spectrum. Peter Singer, who first articulated the ethical basis upon which much of the contemporary animal rights movement rests, prefers to avoid the use of the word “rights” altogether. “The language of rights is a convenient political shorthand[,]” Singer wrote in his seminal book,

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¹ See, for example, the comments of Joyce Tischler, Executive Director of the Animal Legal Defense Fund (ALDF), in *ANIMALS’ ADVOCATE*, Winter 1994, at 2, 2. Lawsuits brought by the ALDF, Tischler declared, are for the purpose of “protecting animals and laying the groundwork for the establishment of their legal rights.” *Id.*; see *Chimpanzees as Persons*, *ANIMALS’ ADVOC.*, Winter 1994, at 1, 1, 7. Likewise, in the ALDF’s 1991 Annual Report, President Steven Wise wrote that the ALDF was working to establish firmly the concept of “legal rights” for animals. *ANIMAL LEAGUE DEFENSE FUND, 1991 ANNUAL REPORT 1* (1991).

Animal Liberation.² “It is even more valuable in the era of thirty-second TV news clips than it was in [Jeremy] Bentham’s day; but in the argument for a radical change in our attitude to animals, it is in no way necessary.”³

Lawyers, however, in analyzing issues of animal “liberation” (Singer’s preferred term), often find “rights language” indispensable. In an article advocating rights for natural objects, Professor Christopher Stone articulates his common understanding of the meaning of “rights” in this context.⁴ Professor Stone argues that animals should be “holders of legal rights” and that an entity cannot be said to hold legal rights unless a public authoritative body is prepared to review conduct inconsistent with those rights.⁵ Further, each of the following three additional criteria must be satisfied: “[F]irst, that the thing can institute legal actions at its behest; second, that in determining the granting of legal relief, the court must take injury to it into account; and, third, that relief must run to the *benefit of it*.”⁶

Radical changes in our legal institutions would be necessary if animals were to be “holders of legal rights” as so defined. Proponents of animal rights strongly advocate just such changes and an outcome in which our legal institutions would serve the perceived interests of animals as readily as legal institutions presently serve human interests. As one commentator has explained:

Time and time again, without exception, animals are denied the independent jural standing they deserve and are, instead, systematically treated as if they deserve the law’s attention or [protection] only if some human interest is harmed or benefited—for example, our interests in property, or our recreational or aesthetic interests. Thus does existing law continue to foster the no longer tenable moral belief that all our duties to animals are indirect duties. In doing so, the law continues to perpetuate a system that is, in this respect, unjust to the core. For the justice of how animals are treated by us must be fixed by how they are benefited or harmed, not by whether we care about this.⁷

² PETER SINGER, *ANIMAL LIBERATION* 8 (2d ed. 1990).

³ *Id.*

⁴ Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 458 (1972).

⁵ *See id.*

⁶ *Id.* (emphasis in original).

⁷ Tom Regan, *Progress Without Pain: The Argument for Humane Treatment of Research Animals*, 31 ST. LOUIS U. L.J. 513, 517 (1987).

To facilitate the idea of animals as “jural persons”⁸ and to shift the focus to the harm or benefits to animals, numerous commentators—and some lawyers in cases in litigation—have recommended the creation of guardianships for animals.⁹ Some people have also advocated a shift in the focus of legal proceedings from the impact on humans to the impact on animals.¹⁰

This Article explores the issue of legal rights for animals. Section II provides a brief overview of the foundations of animal rights theory. Section III discusses some of the critical flaws in the arguments animal rights advocates make in opposition to the use of animals in medical research. Section IV identifies ways in which the concept of legal rights for animals would threaten the delicate balance of power between government and individuals. Section V summarizes the existing laws that govern our treatment of animals and shows that such laws fail to recognize legal rights for animals in the sense discussed above. Finally, Section VI explains how the doctrine of standing helps to insure that our court system does not become a forum for interspecies disputes.

It is our thesis that it would be both implausible and dangerous to give or attribute legal rights to animals because such extension of legal rights would have serious, detrimental impacts on human rights and freedoms. This Article is not, however, aimed at those who urge that we interact with animal life in ways that are humane, esthetic, and environmentally sound. Nor is this Article aimed at those who worry that society’s present ways of producing food and conducting research may be wasteful and disruptive of nature’s balance. Instead, this Article is aimed at those who believe that every individual animal, in itself, possesses certain rights which, when violated, give rise to claims that may be pursued legally at the animal’s “behest” and for relief running to the animal’s “benefit.”

⁸ See generally Stone, *supra* note 4, at 464–73; Brenda L. Thomas, Comment, *Antinomy: The Use, Rights, and Regulation of Laboratory Animals*, 13 PEPP. L. REV. 723, 739 (1986); Joyce S. Tischler, Comment, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats*, 14 SAN DIEGO L. REV. 484, 500–06 (1977). Professor Stone even extends the concept of endowing legal rights to non-humans beyond the judicial system and into the electoral system. “I am suggesting,” Stone writes, “that there is nothing unthinkable about, and there might on balance even be a prevailing case to be made for, an electoral apportionment that made some systematic effort to allow for the representative ‘rights’ of non-human life.” Stone, *supra* note 4, at 487.

⁹ See, e.g., Tischler, *supra* note 8, at 500–06.

¹⁰ See *infra* notes 135–54 and 164–68 and accompanying text.

II. AN OVERVIEW OF ANIMAL RIGHTS THEORY AND ITS IMPLICATIONS

The entire edifice of animal rights theory, it seems, rests on the notion that animals, if mistreated, suffer as do humans:

Animal rights are built upon a misconceived premise that rights were created to prevent us from unnecessary suffering. You can't find an animal rights book, video, pamphlet, or rock concert in which someone doesn't mention the Great Sentence, written by Jeremy Bentham in 1789. Arguing in favor of such rights Bentham wrote "The question is not can they *reason*? nor, can they *talk*? but, can they suffer?"

The logic of the animal rights movement places suffering at the iconographic center of a skewed value system.¹¹

Whether or not animals suffer, however, only begins the analysis. As interesting as it is to dwell on the relative capacities for suffering of various species¹² and the possibility that some animals may suffer less under human control than when left alone,¹³ the ability to suffer cannot, standing alone, be the sole tool with which access to legal rights and remedies is analyzed.¹⁴ While the capacity for suffering may be a common denominator of humans and animals, and is easily polemicized, legal rights have their origins in and are intertwined with a multitude of complex and subtle concepts that may include, but are in no means limited to, suffering.¹⁵

Perhaps because the common view of the moral and legal status of animals is based on a bright line separating animals from people, animal rights activists are preoccupied with the similarities between animals and people. Some animal rights theorists contend that at least some animals have the capacity for reasoning, language, and self-con-

¹¹ Vickie Hearne, *What's Wrong with Animal Rights?*, HARPERS, Sept. 1991, at 59, 60 (emphasis in original).

¹² ANDREW N. ROWAN, *OF MICE, MODELS, AND MEN: A CRITICAL EVALUATION OF ANIMAL RESEARCH* 74-90 (1984).

¹³ Hearne, *supra* note 11, at 61.

¹⁴ *See, e.g.*, Stone, *supra* note 4, at 479 n.93 (regarding the possibility of plants feeling pain).

¹⁵

Dogs can have elaborate conceptions of human social structures, and even of something like their rights and responsibilities within them, but these conceptions are never elaborate enough to construct a rights relationship between a dog and the state, or a dog and the Humane Society. Both of these are concepts that depend on writing and memoranda, officers in uniform, plaques and seals of authority. All of these are literary constructs, and all of them are beyond a dog's ken

Hearne, *supra* note 11, at 62-63.

sciousness and therefore can and should be holders of legal rights.¹⁶ Professor Tom Regan argues that because animals are “the experiencing subjects of a life” and may directly be benefited and harmed by human acts and conduct, people owe direct moral duties to animals which translate into animal rights.¹⁷

Yet, the differences between humans and animals cannot be ignored, and those differences have made possible all of civilized life. Furthermore, while there are as many formulations of what makes humans “human” as there are philosophers who have considered the subject,¹⁸ it is a central feature of animal rights theory—and its major danger—to dismiss as high sounding rhetoric any attempt to catalog those features that do indeed distinguish humans from animals.

In *Animal Liberation*, Peter Singer deftly attempts to discount rebuttals to his central thesis that “I have and know of nothing which enables me to say, a priori, that a human life of any quality, however low, is more valuable than an animal life of any quality, however high.”¹⁹ Singer writes that “[t]o introduce ideas of dignity and worth as a substitute for other reasons for distinguishing humans and animals is not good enough. Fine phrases are the last resource of those who have run out of arguments.”²⁰ Even relatively moderate commentators like Andrew Rowan concede the battleground on this point:

The various criteria mentioned above [rationality, linguistic ability, the human soul, a God-granted dominion over animals, or the fact that humans are unique in being moral agents as well as objects of moral concern] which have been proposed as conferring a unique moral status on humans have all been strongly chal-

¹⁶ See, e.g., Rebecca Dresser, *Research on Animals: Values, Politics and Regulatory Reform*, 58 S. CAL. L. REV. 1147, 1171 (1985); Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RTS. L. REV. 259, 280–81 (1987).

¹⁷ Regan, *supra* note 7, at 516.

¹⁸ Singer and Rowan are but two of the authorities on animal rights who discuss the evolution of this issue insofar as it pertains to animals and their place in human structures. See generally ROWAN, *supra* note 12; SINGER, *supra* note 2. Humorist P. J. O'Rourke has mused:

Screw the rights of nature. Nature will have rights as soon as it gets duties. The minute we see birds, trees, bugs and squirrels picking up litter, giving money to charity, and keeping an eye on our kids at the park, we'll let them vote.

P.J. O'Rourke, *Save the Planet? We're All Going to Die Anyway*, Providence Phoenix, Sept. 8, 1994, at 6 (quoting then-forthcoming version of P. J. O'Rourke, ALL THE TROUBLE IN THE WORLD: THE LIGHTER SIDE OF OVERPOPULATION, FAMINE, ECOLOGICAL DISASTER, ETHNIC HATRED, PLAGUE, AND POVERTY (1994)).

¹⁹ SINGER, *supra* note 2, at 242 (quoting R.G. Frey, *Vivisection, Morals and Medicine*, 9 J. MED. ETHICS 95–104 (1983)).

²⁰ *Id.* at 239. Susan Goodkin likewise questions the idea that men and women possess any “unique worth” or “inherent dignity.” See Goodkin, *supra* note 16, at 281–82.

lenged in the last decade. In most cases, I believe, they have been found deficient.²¹

Singer is right, of course, that once one dismisses Hebrew thought,²² the teachings of Jesus,²³ the views of St. Aquinas, St. Francis, Renaissance writers, and Darwin,²⁴ and an entire "ideology whose history we have traced back to the Bible and the ancient Greeks"²⁵—in short, once one dismisses innate human characteristics, the ability to express reason, to recognize moral principles, to make subtle distinctions, and to intellectualize—there is no way to support the view that humans possess rights but animals do not.

In the end, however, it is the aggregate of these characteristics that does render humans fundamentally, importantly, and unbridgeably different from animals, even though it is also beyond question that in individual instances—for example, in the case of vegetative individuals—some animals may indeed have higher cognitive skills than some humans. To argue on that basis alone, however, that human institutions are morally flawed because they rest on assumptions regarding the aggregate of human abilities, needs, and actions is to deny such institutions the capacity to draw any distinctions at all. Consider the consequences of a theory which does not distinguish between animal life and human life for purposes of identifying and enforcing legal rights. Every individual member of every species would have recognized claims against human beings and the state, and perhaps other animals as well. As the concept of rights expanded to include the "claims" of all living creatures, the concept would lose much of its force, and human rights would suffer as a consequence. Long before Singer wrote *Animal Liberation*, one philosopher wrote:

If it is once observed that there is no difference in principle between the case of dogs, cats, or horses, or stags, foxes, and hares, and that of tsetse-flies or tapeworms or the bacteria in our own blood-stream, the conclusion likely to be drawn is that there is so much wrong that we cannot help doing to the brute creation that it is best not to trouble ourselves about it any more at all. The ultimate sufferers are likely to be our fellow men, because the final conclusion is likely to be, not that we ought to treat the

²¹ ROWAN, *supra* note 12, at 258.

²² SINGER, *supra* note 2, at 188 ("there is no serious challenge to the overall view, laid down in Genesis, that the human species is the pinnacle of creation and has God's permission to kill and eat other animals.").

²³ *Id.* at 191 ("Jesus himself is described as showing apparent indifference to the fate of non-humans.").

²⁴ *See id.* at 195, 198–99, 211.

²⁵ *Id.* at 213.

brutes like human beings, but that there is no good reason why we should not treat human beings like brutes. Extension of this principle leads straight to Belsen and Buchenwald, Dachau and Auschwitz, where the German and the Jew or Pole only took the place of the human being and the Colorado beetle.²⁶

To some extent, it is a challenge to the value of civilization to dismiss the Judeo-Christian ethic as anthropocentric or speciesist²⁷ and thus deficient, and to minimize the significance of the capacity to express reason, to recognize moral principles, and to plan for ordered coexistence in a complex technological society. "The core of this book," Singer writes in *Animal Liberation*, "is the claim that to discriminate against beings solely on account of their species is a form of prejudice, immoral and indefensible in the same way that discrimination on the basis of race is immoral and indefensible."²⁸ Such an equation, however, allows Ingrid Newkirk, founder of People for the Ethical Treatment of Animals (PETA), to state that "[s]ix million Jews died in concentration camps, but six billion broiler chickens will die this year in slaughter houses."²⁹ The only "pure" human being, Newkirk has theorized, is a dead one. "[O]nly dead people are true purists, feeding the earth and living beings rather than taking from them. . . . We know it is impossible to breathe without hurting or exploiting."³⁰

These forms of doctrinaire "animal rightism" ignore the value that society has placed on human life which enables society to function in an orderly fashion. In effect, the extreme positions of animal rights activists devalue human life and detract from human rights.³¹ "The belief that human life, and only human life, is sacrosanct is a form of

²⁶ A.M. MacIver, *Ethics and the Beetle*, in *ETHICS* 527, 528 (Judith Thompson & Gerald Dworkin eds., 1968).

²⁷ See SINGER, *supra* note 2, at 185.

²⁸ *Id.* at 243.

²⁹ Chip Brown, *She's a Portrait of Zealotry in Plastic Shoes*, *WASH. POST*, Nov. 13, 1983, at B1.

³⁰ Ingrid Newkirk, *Total Victory, Like Checkmate, Cannot Be Achieved in One Move*, *ANIMALS' AGENDA*, Jan./Feb. 1992, at 43, 44.

³¹ In *The Hijacking of the Humane Movement*, Rod and Patti Strand establish that animal protection was a Third Reich legislative priority and that vegetarianism was practiced by many elite Nazis, including Adolf Hitler. ROD STRAND & PATTI STRAND, *THE HIJACKING OF THE HUMANE MOVEMENT* 26-29 (1993). Vegetarianism was considered "a sign of purity and eating meat . . . a symbol of decaying civilizations that still practiced dominationist attitudes over animals." *Id.* at 29.

Who could have imagined that by elevating animals in relationship to people that the relative value of people would have decreased as well? Who would have foreseen that Hitler's statement that 'men should not feel so superior to animals' represents a warning?

speciesism," Singer writes.³² But if the sacredness of all life is equivalent, what is one to make of animals that kill each other and the often arbitrary nature of life and death and survival of the fittest in the wild? What is one to make of the conflict between the seeming arbitrariness of the killing that takes place in nature and the ethical content of human existence that starts with the certainty that the life of every individual person is uniquely sacred?

Sometimes the statements of contemporary radical environmentalists and animal rights activists display a profound misanthropy. "If radical environmentalists were to invent a disease to bring human population back to ecological sanity, it would probably be something like AIDS," writes one author using the pseudonym Miss Ann Thropy.³³ "Seeing no other possibility for the preservation of biological diversity on earth than a drastic decline in the number of humans, Miss Ann Thropy contends that AIDS is ideal for the task primarily because 'the disease only affects humans' and shows promise for wiping out large numbers of humans."³⁴ Ingrid Newkirk has commented that even if animal research resulted in a cure for AIDS, PETA would "be against it."³⁵

The point is that reverence for human life must be both the starting point and the reference point for any ethical philosophy and system of law that does not immediately become unhitched from its moorings in civilization. With respect to animals and their similarities to humans, Singer's dismissal of "fine phrases" notwithstanding, the fact that debate exists about the ethical consequences of such differences is almost distinction enough. It is we—humans—who are having the debate, not animals; and it is a unique feature of humankind to recognize ethical subtleties. This ability to recognize gradations and competing interests is what defines the rules that we live by and the system of rights and responsibilities that comprise our legal system. Animals cannot possess rights because animals are in no way a part

³² SINGER, *supra* note 2, at 18.

³³ RIK SCARCE, ECO-WARRIORS: UNDERSTANDING THE RADICAL ENVIRONMENTAL MOVEMENT 92 (1990) (quoting Miss Ann Thropy, *Population and AIDS*, EARTH FIRST! J., May 1, 1987, at 5, 32).

³⁴ *Id.* Miss Ann Thropy is not alone in her views:

In a 1986 interview . . . that was published in the Australian magazine *Simply Living*, [Dave] Foreman (founder of Earth First!) said that "the worst thing we could do in Ethiopia is to give aid—the best thing would be to just let nature seek its own balance, to let the people there just starve."

Id.

³⁵ Fred Barnes, *No Longer Dismissed as Wierdos, Animal-Rights Groups are Now Threatening Medical Research*, VOGUE, Sept. 1989, at 542, 542.

of any of these processes. On the other hand, any duties we may have respecting our treatment of animals derive from the fact that we are part of these processes.³⁶

III. ANIMAL RIGHTS AND MEDICAL RESEARCH

Medical research involving animals presents a paradigm of the contradiction that animal rights theorists face when beneficial human activities harm animals by necessity. In order to create a jural construct in which humans and animals possess a measure of equivalence, animal rights proponents face their most intractable conundrum in circumstances where some measure of animal suffering is essential to advance human well-being. Although such conflict may be avoidable when it involves food—people can subsist on a vegetarian diet—the credible evidence is that in the field of medical research, while there may indeed be excesses and unnecessary harms, this conflict cannot be sidestepped.³⁷

An attempt at sidestepping is, however, almost invariably the first line of argument advanced by animal rights proponents on this issue. “Isn’t most animal testing done to benefit medical research?” the National Anti-Vivisection Society (NAVS) asks itself in a recent publication.³⁸ “Absolutely not,” is NAVS’s answer.³⁹ “Biomedical research accounts for only twenty-seven percent of the animals currently being used. The majority of this research isn’t even published, which means it has little or no value. *As a result, animal experimentation has had no significant influence on the health of the nation.*”⁴⁰ Peter Singer is

³⁶ See *infra* Section IV.

³⁷ See, e.g., ROWAN, *supra* note 12, at 261.

³⁸ NATIONAL ANTI-VIVISECTION SOC’Y, PERSONAL CARE FOR PEOPLE WHO CARE 6 (7th ed. 1994).

³⁹ *Id.*

⁴⁰ *Id.* (emphasis added). An illustrative analogy is presented by Ingrid Newkirk in her book *Save the Animals*, in which she informs us that “[r]odent infestation is largely preventable.” INGRID NEWKIRK, *SAVE THE ANIMALS* 125 (1990). Similarly, PETA informs us that “killing rats doesn’t work, it only makes space for ‘new’ rats to fill.” D. O’Hara, *The Least of Them*, PETANEWS, Spring 1994, at 9, 11 [hereinafter PETANEWS]. Newkirk goes so far as to suggest that human bites are more of a menace to mankind than rodent bites. Newkirk’s book notes: “Number of reported cases of humans bitten by rats in New York City in 1985: 322. Number reported bitten by other people: 1,519.” NEWKIRK, *supra*, at 125. The solution, PETANEWS informs us, is to use nonlethal rat traps only, those with “a spring-release trap door which allows [people] to take the trap outdoors and release the animal.” PETANEWS, *supra*, at 11.

The truth, however, is that rodents are a tremendous urban problem; a problem in which the promotion of human interests almost always involves harming or killing rodents. For example, in New York City, where the rodent population is estimated to equal or to exceed the human

more subtle in his approach. He writes that “[w]hile some of the [animal] experiments may have led to advances in medical knowledge, the value of this knowledge is often questionable, and in some cases the knowledge might have been gained in other ways.”⁴¹

While there can be little doubt that some animal research is repetitive and unnecessary—some of the psychological experiments Singer describes in lacerating detail seem to be cases in point⁴²—it is misleading to characterize the role animal research has played in medical advances as ambiguously as do Singer and other animal rights proponents.

Adrian R. Morrison, in *Understanding (and Misunderstanding) the Animal Rights Movement in the United States*, describes the importance of basic animal research to advances in medicine.⁴³ Dr. Morrison notes that most basic medical research relies upon studies using animals.⁴⁴ In turn, most medical advances rely upon basic medical research.⁴⁵ For example, “41% of the papers reporting work judged to be fundamentally important to the 10 most important advances in cardiology were concerned with studies that sought knowledge for the sake of knowledge itself.”⁴⁶ Morrison also recounts how the appearance of penicillin and the sulfonamides “did not fall into our laps” but were the product of “[g]enerations of energetic and imaginative investigators [who] exhausted their whole lives on the problem. It overlooks a staggering amount of basic research to say that modern medicine began with the era of antibiotics.”⁴⁷ Andrew Rowan lists the medical advances, some of them spectacular, that can be traced directly to animal research.⁴⁸

population, rodent-related complaints and reported rat bites are soaring. See Marvine Howe, *Residents Mobilize to Root Out the Rats*, N.Y. TIMES, July 31, 1994, § B, at 5. In 1993, the New York City Health Department logged more than 22,000 rodent-related complaints, significant not only because of its esthetic implication but also because infected rodents can carry a number of potentially fatal diseases, including typhus, salmonella, bubonic plague, and the mysterious Hantavirus that killed 40 people in the Southwest in 1993. Rajiv Chandradekaran, *Mysterious Rodent-Borne Virus Found in Virginia*, WASH. POST, Dec. 2, 1994, at B1; Howe, *supra*, at 5.

⁴¹ SINGER, *supra* note 2, at 65.

⁴² See *id.* at 66–68.

⁴³ Adrian R. Morrison, *Understanding (and Misunderstanding) the Animal Rights Movement in the United States* (unpublished manuscript, on file with authors).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 150.

⁴⁷ *Id.* (quoting LEWIS THOMAS, *THE LIVES OF A CELL* 117 (1974)).

⁴⁸ See ROWAN, *supra* note 12, at 177–85. Such advances include the discovery and development of antibiotics, the discovery and use of insulin to treat diabetics, the victory over polio, and the development of advanced surgical techniques. See *id.*

The animal rightists' second line of argument is a fallback to the notion that human health does not justify animal suffering. One cannot argue with this proposition without returning full circle to where we began in this Article—a reasonable reverence for human life must come first in a human philosophical perspective.⁴⁹ Morrison, referring to historical descriptions of “infants with ears streaming pus, schoolboys with facial impetigo, beards growing from heavily infected skin, faces pocked by smallpox or eroded by lupus, or heads and necks scarred from boils or suppurating glands,” describes us as “the healthiest generation in history.”⁵⁰ To those who believe the statement that “[a] life is a life . . . [i]f the death of one rat cured all diseases, it wouldn't make any difference to me,”⁵¹ humanity's movement from such miseries is irrelevant.

Deriding the value of animal research and targeting animal research facilities for particularly venomous and violent campaigns has become a cornerstone of the animal rights movement.⁵² The reason

⁴⁹ See *supra* notes 22–26 and accompanying text.

⁵⁰ Morrison, *supra* note 43, at 150 (quoting W. PATON, *MAN AND MOUSE: ANIMALS IN MEDICAL RESEARCH* 93 (2d ed. 1993)).

⁵¹ The statement is attributed to Chris DeRose, head of the Los Angeles-based activist group Last Chance for Animals. Elizabeth Venant & David Treadwell, *Biting Back: Animal Researchers, Industries Go on the Offensive Against Increasingly Militant Activists*, L.A. TIMES, Apr. 12, 1990, at E1.

⁵² The problem of animal rights extremist harassment of lawful scientific research reached such proportions that Congress passed the Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43 (Supp. V 1993). As Senator Howell Heflin stated in support of the legislation: “The need for this legislation has only intensified with the rising number of break-ins experienced by America's leading research institutions and the increase in the number of threats to America's research scientists.” 137 CONG. REC. S2419–02, S2650 (daily ed. Mar. 5, 1991) (statement of Sen. Heflin). Senator Heflin noted the following several months later:

Unfortunately, there are some people so opposed to the use of animals in this essential research that they are setting fire to research facilities or breaking into laboratories to steal animals and destroy equipment, records and research data. There are dozens of recent examples. In fact, six major break-ins and thefts at research laboratories have been reported across the country since I introduced this legislation in Congress.

.....

In the most egregious of these incidents, a Texas researcher's federally-supported project sustained immediate damages costing \$70,000. His basic research that could benefit victims of Sudden Infant Death Syndrome and those suffering from sleep disorders was halted for more than a year. That researcher has been the subject of a second break-in attempt, death threats and a hate campaign which continues to this day.

.....

Extremists who perpetrate crimes in the name of animal rights ignore not only the rights of others, but also their own rights of free speech. Responsible dissent is protected by law—none of us would have it any other way. But ideological terrorists and vigilantes who take the law into their own hands must be stopped. Everyone can agree that we owe an enormous debt to research animals. Laboratory animals should

that medical research—as opposed to farming, eating meat, and pest extermination—has been the subject of such extreme activities may be more political than philosophical. As Singer has noted, “American animal researchers are a smaller and politically less powerful group than American farmers, and they are based in regions where animal liberationists live. They therefore make a more accessible, and slightly less formidable opponent”⁵³

Animal rights strategists are aware of and exploit the relatively low profile of, and the relative lack of attention paid to, basic scientific and medical research by the public. The symbolic nature of target selection is apparent when one compares the readily available evidence of speciesist carnage in every steak house or fried chicken outlet in the country with the far more obscure and smaller in magnitude activities concerning animals that occurs in the nation’s laboratories.⁵⁴ It is unlikely that the public would tolerate random bombings of its restaurants and supermarkets by animal rights extremists for very long.

The selection of animal research facilities as a target for activism is also consistent with the anti-intellectual bias of the animal rights movement itself. The movement downplays intellect and its accompanying curiosities and ambiguities as a distinguishing feature of humankind. The notion that there is nothing sacred about the right to pursue knowledge is, after all, a central feature of all nonspeciesist analysis.⁵⁵ Those qualities that lead scientists to seek further knowledge—for its own sake or to better the human, and often animal, condition—are precisely the human traits that animal rights activists brand as speciesist and pointless.

Animal rights activists must acknowledge the dramatic advances in our medical knowledge, and thus our health, longevity, and stand-

be utilized only when necessary and must be well cared for and respected for humane as well as scientific reasons. But no one can condone lawless and senselessly destructive acts for whatever reason they are motivated.

137 CONG. REC. S14,834-01, S14,835 (daily ed. Oct. 16, 1991) (statement of Sen. Heflin).

⁵³ SINGER, *supra* note 2, at 37.

⁵⁴ The United States Department of Agriculture reported in 1990 that 58% of animal experiments involved no pain or distress at all, 36% required analgesics or anesthetics, and 6% involved study of pain mechanisms so that chemical relief was not possible. Morrison, *supra* note 43, at 154 (quoting UNITED STATES DEPT OF AGRICULTURE, ANIMAL WELFARE ENFORCEMENT, FISCAL YEAR 1990 (1990)).

⁵⁵ SINGER, *supra* note 2, at 92. Compare the comment attributed to Sir George Duckett of the British Society for Abolition of Vivisection in 1875 that “[m]edical science has arrived probably at its extreme limits . . . [and n]othing can be gained by repetition of experiments on living animals.” STRAND & STRAND, *supra* note 31, at 13 (quoting Duckett).

ard of living, that are attributable to animal research. Once they do so, they will be left with an argument that most people will find unconvincing—that animals should be protected, even at the expense of human lives.

IV. THE CHALLENGE TO HUMAN FREEDOMS POSED BY ANIMAL RIGHTS

If one analyzes the notion that animals should have rights separate and distinct from those protections they have incident to the economic, esthetic, and humanitarian interests of human beings, the following four questions must be kept in mind: (1) *against whom* will such rights exist?; (2) *when and how* will such rights be invoked?; (3) *who will enforce* such rights?; and (4) *who will decide* what the boundaries of such rights are?

Reason, history, and an entire intellectual tradition compel a conclusion that any notion that the interests of animals either warrant or can have expression in a constitutional democracy, wholly independent of human interests, risks casting fundamental freedoms on a devious course. Thomas Paine once commented that “[c]ivil rights are those which appertain to man in right of his being a member of society.”⁵⁶ Paine also wrote the following at the time of the American and French Revolutions: “All power exercised over a nation, must have some beginning. It must be either delegated, or assumed. There are no other sources. All delegated power is trust, and all assumed power is usurpation. Time does not alter the nature and quality of either.”⁵⁷ Power that arises out of, as opposed to over, the people arises out of the consent of the governed,⁵⁸ and the limits of such delegation are carefully defined in a constitution such as ours:

The fact therefore must be, that the *individuals themselves*, each in his own personal and sovereign right, “entered into a compact with each other” to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.⁵⁹

Paine defines civil rights as rights with a foundation in “some natural right pre-existing in the individual.”⁶⁰ Civil rights in a constitutional democracy are those rights the individual reserves to himself after

⁵⁶ THOMAS PAINE, RIGHTS OF MAN 39 (Gregory Claeys ed., 1992).

⁵⁷ *Id.* at 147.

⁵⁸ *See id.* at 41–42.

⁵⁹ *Id.* at 41 (emphasis in original).

⁶⁰ *Id.* at 39.

delegating to the government those powers necessary to the orderly functioning of society.⁶¹

The question which must arise in the context of any proposal that the government endow rights on animals is how such a notion can be reconciled with the very definition of "rights" in a constitutional democracy. Any real acceptance of the notion must mean reposing in the government a wholly new and undefined set of powers, presumably to be exercised on behalf of an entirely new and vague constituency. The notion contemplates the creation of a vast, unprecedented, intrusive, and uncircumscribable jurisprudence in which the government erects barriers to human conduct on the strength, not of competing human interests—be they economic, esthetic, or humanitarian—or the delegation of power to it by individuals, but of assumptions about the interests of animals assessed by the government apart from human interests or experience. Not only may this be impossible, but in the contemplated nonspeciesist world, where there would be no hierarchy within the animal kingdom just as there would be no hierarchy between humans and animals, the "rights" of individual animals would exist in competition with the rights of individual humans. Thus, no rat could be harmed, chicken cooked, or rabbit dissected without government permission or the prospect of government scrutiny. If some government agency were given the power to act in the interest of animals, the result would be the creation of a vast, intrusive structure which would erect barriers to human conduct on the strength, not of competing human interests, but of assessments of the interests of animals conducted without reference to human interests or experience.

What sort of fearsome bureaucracy would purport to institutionalize, standardize, and write regulations pertaining to animals' rights and interests implicated by all legislation? What kind of free-ranging commissions of inquiry would courts become if the requirements of human standing⁶² were removed and any advocate or group of advocates purporting to speak for any animal were entitled judicial access to press the animal's rights and to argue the animal's case?

The only measure—true north, the touchstone—must be human interests. These interests could be aesthetic or humanitarian and could seek to weigh all the factors the range of human dialog about animals includes. But it is human interest, whether it be in the environment, the need to show compassion, or the need to advance sci-

⁶¹ See *id.* at 39–42.

⁶² See *infra* notes 173–79 and accompanying text.

ence, that must be weighed, not any supposed interest in an anthropomorphized rat or a Disneyfied rabbit. When overpopulation of deer threaten a water supply the deer must be culled, and without due process for the deer.⁶³ When rabbits ruin vital crops the rabbits must be exterminated.⁶⁴ When human medical advances require vivisection, vivisection may continue without unnecessary harm but with such harm as may be necessary for its purpose.⁶⁵ We do not see how a legal system in which human rights are enshrined could approach these matters differently. Our moral and legal systems cannot accommodate a theory that purports to detach decisions as to how we should treat animals from an anthropocentric reference point and have these decisions revolve around some other concept, such as that of "civil rights" for beings that cannot articulate their own interests and about whose true sapience, awareness, knowledge of death, and value of life we know so little.

V. THE SALUTARY BALANCE OF EXISTING LAWS AFFECTING ANIMALS

State and federal legislation that presently regulates human interaction with animals is consistent with the views that only humans possess rights and that animal suffering may be an unavoidable consequence of some human activities. Such legislation does not address animals as beings with rights, but rather as beings toward which humans have responsibilities. These responsibilities are derived, not from some conception that animals possess claims against humans, but rather from a recognition that human interests and esthetic sensibilities are impacted by our treatment of animals.

The major federal animal legislation, such as the Animal Welfare Act (AWA),⁶⁶ the Marine Mammal Protection Act (MMPA),⁶⁷ and the Endangered Species Act (ESA),⁶⁸ are—like all legislation—products of a balancing of competing interests. The interests in the balance are the various *human* interests that may be affected by the way we interact with animals; the perceived interests of animals are of impor-

⁶³ See, e.g., *American Bald Eagle v. Bhatti*, 9 F.3d 163, 164 (1st Cir. 1993).

⁶⁴ See, e.g., *Fund for Animals v. Mud Lake Farmers Rabbit Comm.*, 673 P.2d 408, 408 (Idaho 1983).

⁶⁵ See, e.g., *New Jersey Soc'y for the Prevention of Cruelty to Animals v. Board of Educ. of E. Orange*, 219 A.2d 200, 206 (Essex County Ct. 1966), *aff'd per curiam*, 227 A.2d 506 (N.J. 1967).

⁶⁶ 7 U.S.C. §§ 2131–2159 (1988 & Supp. V 1993).

⁶⁷ 16 U.S.C. §§ 1361–1421 (1988 & Supp. V 1993).

⁶⁸ 16 U.S.C. §§ 1531–1544 (1988 & Supp. V 1993).

tance only insofar as it is assumed that mistreatment of animals, especially the gratuitous mistreatment of animals, is unesthetic and inconsistent with a humane view of our place in our environment.⁶⁹

Notwithstanding the above, animal rights activists invoke these statutes in support of their litigation agenda, which has as its aims the enfranchisement of animals and the empowerment of people to assert the civil rights of individual animals and animal species.⁷⁰ Fortunately, courts most often reject the invitation of animal rights activists to analyze the issues raised in such cases beyond the confines of well-established legal principles.⁷¹

A. *State Animal Welfare and Cruelty Statutes*

Most states possess animal cruelty laws that prohibit wanton, purposeless conduct against animals such as torturing, starving, beating, mutilating, and other inhumane acts.⁷² Such laws are premised on the idea that the humane treatment of animals is good for people and rarely restrict "normal human activities to which the infliction of pain to an animal is purely incidental or unavoidable"⁷³ For example, state animal cruelty laws commonly exempt activities, such as farming, pest extermination, fishing, and hunting, that have been fundamental aspects of human existence for millennia.⁷⁴

Some state animal cruelty laws also provide that the infliction of pain and death on animals is justified in the name of education and scientific progress and expressly exclude research and education from their scope. For example, California's health and safety code provides:

The public health and welfare depend on the humane use of animals for scientific advancement in the diagnosis and treatment of human and animal diseases, for education, for research in the advancement of veterinary, dental, medical and biologic sciences, for research in animal and human nutrition, and improvement and standardization of laboratory procedures of biologic products, pharmaceuticals and drugs.⁷⁵

In addition, Idaho confirms the human "right" to "destroy any venomous reptile, or animal known as dangerous to life, limb, or property

⁶⁹ See *infra* notes 80-94 and accompanying text.

⁷⁰ See *supra* notes 4-10 and accompanying text.

⁷¹ See *infra* notes 204-09 and accompanying text.

⁷² See, e.g., MD. ANN. CODE art. 27, § 59 (1994); MASS. GEN. L. ch. 272, § 77 (1990).

⁷³ MD. ANN. CODE art. 27, § 59 (1994).

⁷⁴ See, e.g., IDAHO CODE § 25-3515 (1994); NEV. REV. STAT. § 574.200 (1994).

⁷⁵ CAL. HEALTH & SAFETY CODE § 1650 (West 1990).

. . . [and] to kill . . . all animals used for food or with properly conducted scientific experiments or investigations . . .”⁷⁶ Such statutes reflect the view that, while inflicting pain on animals is inhumane in many circumstances, there are human activities, and even human activities that go beyond those essential to human survival, that have benefits that far outweigh the compassionate human impulse to stop pain wherever it is found.

A similar result has been reached in other states by judicial interpretation of more generally worded animal cruelty statutes.⁷⁷ An early decision by the Essex County Court in New Jersey, *New Jersey Society for the Prevention of Cruelty to Animals v. Board of Education of East Orange*, is illustrative.⁷⁸ The Society for the Prevention of Cruelty to Animals (SPCA) sued the Board of Education of the City of East Orange over an experiment involving live chickens.⁷⁹ A high school student, “strongly motivated toward a career in medical research as a doctor and virologist,” enlisted the assistance of a biology teacher to conduct an experiment which involved injecting four live chickens with the Rous sarcoma virus.⁸⁰ One of the chickens died of a cancerous tumor and another was put to death by the student.⁸¹ The student exhibited the two surviving chickens in a science fair.⁸²

The SPCA argued that the board of education violated New Jersey’s animal cruelty statute.⁸³ The statute punished persons who “[o]verdrive, overload, drive when overloaded, overwork, torture, torment, deprive of necessary sustenance, or cruelly beat or otherwise abuse or needlessly mutilate or kill a living animal or creature”⁸⁴

There is much discussion in the court’s opinion about the value of the research, in the context of whether the student had “needlessly mutilate[d] or killed” the animals or had “inflict[ed] unnecessary cruelty” in violation of New Jersey law.⁸⁵ In the end, the court disagreed with the SPCA and determined that the board of education had not violated the statute.⁸⁶ The student’s motives, the court found, “were

⁷⁶ IDAHO CODE § 25-3515 (1994).

⁷⁷ See, e.g., *Taub v. State*, 463 A.2d 819, 821 (Md. 1983).

⁷⁸ 219 A.2d 200 (Essex County Ct. 1966), *aff’d per curiam*, 227 A.2d 506 (N.J. 1967).

⁷⁹ *Id.* at 202.

⁸⁰ *Id.* at 207. Rous sarcoma virus produces cancerous tumors in chickens, particularly young chickens. *Id.*

⁸¹ *Id.*

⁸² *Id.* at 208.

⁸³ *New Jersey Soc’y for the Prevention of Cruelty to Animals*, 219 A.2d 202.

⁸⁴ N.J. STAT. ANN. § 4:22-26 (West 1994).

⁸⁵ See *New Jersey Soc’y for the Prevention of Cruelty to Animals*, 219 A.2d at 207-10.

⁸⁶ *Id.* at 209.

of the highest calibre and were purely scientific and educational in nature.”⁸⁷ The court also set forth several educational benefits of the student’s project: (1) to offer the student an opportunity to observe life processes which lead to a sympathetic respect for life; (2) to provide future citizens with some knowledge of the nature of sciences and of the techniques and principles of scientific inquiry; (3) to provide future citizens with some knowledge of the principles of health, disease, and medicine and of some aspects of agriculture; (4) to identify the talented student in this field; and (5) to motivate selected students to become the medical and biological scientists of the future.⁸⁸ Under such circumstances, the court held that the Board of Education did not violate the statute, “even if chickens suffered unduly.”⁸⁹

The court in *New Jersey Society for the Prevention of Cruelty to Animals v. Board of Education of East Orange* struck a reasonable balance. Acts that are wanton, cruel, and lack any redeeming quality fall within the statute’s general prohibition.⁹⁰ Human interests in humane animal treatment, however, give way when other human interests, such as scientific progress, food production, or education are particularly compelling.⁹¹ As the court explained:

[T]he specific prohibited acts contained in the [general animal cruelty statute] as well as the other sections in the statute indicate a common characteristic—that is, the acts are wanton and cruel and have no redeeming qualities [E]ducational and scientific achievements might well represent the redeeming quality that would constitute the justification for inflicting pain or suffering on animals—to render the cruelty not unnecessary or the mutilation not needless.

I conclude that if there is a truly useful motive, a real and valid purpose, there can, under the statute, be acts done to animals which are ostensibly cruel or which ostensibly cause pain.⁹²

It is ironic that the high school student’s scientific venture—which almost certainly entailed no more, and perhaps less, “suffering” for the chickens than their competing fate in a slaughterhouse—should have been opposed and subjected to scrutiny while at the same time the judge, court personnel, and defense lawyer too, presumably, sat down to chicken dinners before, during, and after the proceedings with impunity.

⁸⁷ *Id.* at 208.

⁸⁸ *Id.* at 207.

⁸⁹ *Id.* at 210.

⁹⁰ See *New Jersey Soc’y for the Preention of Cruelty to Animals*, 219 A.2d at 206.

⁹¹ See *id.*

⁹² *Id.* (footnote omitted).

Eating, farming, clothes manufacturing, research, and education are not the only endeavors in which society must accept some form of harm to animals. The Supreme Court has recognized that animal sacrifice may be a protected aspect of religious worship. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the United States Supreme Court addressed the constitutionality of a municipal ban on ritual animal sacrifice.⁹³ The Court held that a city ordinance which entirely banned ritual animal sacrifice improperly burdened religion in violation of the Free Exercise Clause of the First Amendment.⁹⁴ In so holding, the Court noted that many types of animal killing, such as fishing, the extermination of mice and rats, hunting, and euthanasia of stray dogs and cats were either permitted or approved of by the statute and city ordinance in question.⁹⁵

Traditional state animal cruelty statutes reject the absolutist view of some animal rights activists: humans' traditional refusal to recognize animal rights is the product of a speciesist perspective; humans should never permit the infliction of pain and suffering on any animal, no matter how great the corresponding benefits of the activity causing the harm.⁹⁶ Such state statutes demonstrate that, while the law generally seeks to insure that animals are treated humanely, the law also recognizes that people should be free to engage in activities that forward their own interests.

B. *The Animal Welfare Act*

Similar principles are reflected in federal animal legislation. The Animal Welfare Act (AWA),⁹⁷ while styled as an animal welfare act, is also a codification of the human right to use animals in research. The AWA provides for the regulation of certain activities that involve animals—including dealing, exhibiting, and researching—by authorizing the Secretary of Agriculture to establish minimum standards for the handling, care, and treatment of animals.⁹⁸ The AWA also provides that researchers should not inflict unnecessary pain and suffering upon animals.⁹⁹ When the infliction of pain and suffering is necessary, however, the research may continue as long as the pain and suffering is minimized.¹⁰⁰ Thus, although the AWA mandates that research ac-

⁹³ 113 S. Ct. 2217, 2225–34 (1993).

⁹⁴ *Id.* at 2234.

⁹⁵ *Id.* at 2232.

⁹⁶ See *supra* Section III.

⁹⁷ Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (1988 & Supp. V 1993).

⁹⁸ 7 U.S.C. § 2143(a) (Supp. IV 1986).

⁹⁹ *Id.* § 2143(a)(3).

¹⁰⁰ *Id.* § 2143(a)(3)(A).

tivities be conducted in as humane a manner as possible, the AWA still validates the essential merit and legality of various activities which are beneficial to humans but which, by their very nature, harm animals.¹⁰¹

In 1966, when Congress passed the original version of what is now known as the AWA, Congress's main concerns were the growing number of thefts of dogs and cats for sale to research facilities and the shortcomings in the care and treatment that research animals received.¹⁰² The nation's vast program of medical research, much of which involved animal experimentation, had created a significant animal abduction problem:

The demand for research animals ha[d] risen to such proportions that a system of unregulated dealers [was] supplying hundreds of thousands of dogs, cats, and other animals to research facilities each year.

. . . .
Stolen pets [were] quickly transported across state lines, changing hands rapidly . . . [and] state laws . . . proved inadequate both in the apprehending and conviction of the thieves who operate[d] in this interstate operation¹⁰³

In addition to protecting pet owners from theft, legislators also sought to balance the well-being of research animals with the need for animal experiments in scientific research:

We have diligently tried to bring back . . . an effective bill which will codify the noblest and most compassionate concern that the human heart holds for those small animals *whose very existence is dedicated to the advancement of medical skill and knowledge* while at the same time still preserving for the medical and research professions an unfettered opportunity to carry forward their vital work in behalf of all mankind.¹⁰⁴

In sum, the framers of the AWA aimed to upgrade laboratory standards without impairing the important functions of medical research.¹⁰⁵

Later amendments to the AWA reflected this priority.¹⁰⁶ In 1970, Congress expanded the definition of "animal."¹⁰⁷ Congress also ex-

¹⁰¹ *Id.* § 2143(a).

¹⁰² *See* S. REP. No. 1281, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635.

¹⁰³ *Id.* at 2636.

¹⁰⁴ H.R. CONF. REP. No. 1848, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2649, 2649 (emphasis added).

¹⁰⁵ *Id.* at 2637.

¹⁰⁶ *See, e.g.*, Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 1560; Pub. L. No. 94-279, 90 Stat. 417 (1976); Pub. L. No. 99-198, 99 Stat. 1650 (1985) (codified as amended at 7 U.S.C. §§ 2131-2159 (1988 & Supp. V 1993)).

¹⁰⁷ 7 U.S.C. § 2132(g) (1970).

panded the categories of people regulated by the AWA.¹⁰⁸ The 1970 amendments, however, did not upset the balance between the protection of laboratory animals and the need for laboratory animals for medical research. The House Report which accompanied the 1970 amendments to the AWA stated that the amendments “represent[ed] a continuing commitment by Congress to the ethic of kindness to dumb animals” and “demonstrate[d] *America’s humanity to lesser creatures while maintaining and promoting the national enlightenment in medicine for the care of all mankind.*”¹⁰⁹

The 1985 amendments to the AWA gave the Secretary of Agriculture the authority to conduct periodic inspections,¹¹⁰ authorized regulations setting standards for the handling, housing, and feeding of research animals,¹¹¹ and established reporting, training, and internal review requirements.¹¹² The 1985 amendments, nevertheless, preserved the researcher’s independence by prohibiting the United States Department of Agriculture from interfering in the “design, outlines, or guidelines” of actual research.¹¹³ Although the Department of Agriculture’s regulatory standards must ensure that animal pain and distress are minimized, scientific necessity justifies painful procedures.¹¹⁴ Thus, “[t]he research scientist still holds the key to the laboratory door.”¹¹⁵

Because the AWA places few real restrictions on animal researchers and is premised on the assumption that animals must be harmed and killed in the name of scientific progress,¹¹⁶ the AWA does not qualify as a true “animal rights” statute. Thus, it is not surprising that animal rights activists have been unsuccessful in their attempts to use the AWA to pursue their agenda in court. In *International Primate Protection League v. Institute for Behavioral Research, Inc.*, the United States Court of Appeals for the Fourth Circuit made it virtually impossible for private citizens to seek relief under the AWA.¹¹⁷ The Fourth Circuit noted that, although the AWA provides for administrative supervision over animal welfare, such supervision is subordi-

¹⁰⁸ *Id.* § 2132.

¹⁰⁹ H.R. REP. NO. 91-1651, 91st Cong., 2d Sess. 2 (1970), reprinted in 1970 U.S.C.C.A.N. 5103, 5104 (emphasis added).

¹¹⁰ 7 U.S.C. § 2146(a) (Supp. IV 1986).

¹¹¹ *Id.* § 2143(a).

¹¹² *Id.* § 2143(a)(7), (b), (d).

¹¹³ *Id.* § 2143(a)(6)(A).

¹¹⁴ *Id.* § 2143(a)(3).

¹¹⁵ H.R. REP. NO. 91-1651, 91st Cong., 2d Sess. 2 (1970), reprinted in 1970 U.S.C.C.A.N. 5103, 5104.

¹¹⁶ See *supra* notes 106-17 and accompanying text.

¹¹⁷ 799 F.2d 934 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). But see *Animal Legal Defense Fund v. Secretary of Agric.*, 813 F. Supp. 882 (D.D.C. 1993) (animal rights organizations brought action in which regulations regarding nonhuman primates found to be arbitrary and capricious).

nated to the continued independence of research scientists.¹¹⁸ The court held that the AWA “does not imply any provision for lawsuits by private individuals”¹¹⁹

To imply a cause of action in [private individuals] might entail serious consequences. It might open the use of animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. In fact, we are persuaded that Congress intended that the independence of medical research be respected and that administrative enforcement govern the Animal Welfare Act.¹²⁰

. . . .
Recent amendments to the Animal Welfare Act have . . . reaffirmed the Congressional finding that “the use of animals is instrumental in certain research and education or for advancing knowledge of cures and treatments for diseases and injuries which afflict both humans and animals.”¹²¹

C. *The Endangered Species Act and the Marine Mammal Protection Act*

The Endangered Species Act (ESA)¹²² and the Marine Mammal Protection Act (MMPA)¹²³ are concerned with the depletion and extinction of animal species.¹²⁴ The ESA and the MMPA are essentially wildlife management statutes that seek to conserve nature’s diversity with an eye towards man’s long-term interests.¹²⁵ Neither statute contains any provisions that give individual animals enforceable claims against people or the state.

The legislative histories of the ESA and the MMPA reveal a congressional intent to protect wildlife resources, not due to any rights or claims inherent in the animals themselves, but rather due to the value of the animals to people. As Congress has stated:

¹¹⁸ *International Primate Protection League*, 799 F.2d at 939.

¹¹⁹ *Id.* at 940.

¹²⁰ *Id.*

¹²¹ *Id.* (quoting H.R. CONF. REP. NO. 99-447, 99th Cong., 1st Sess. 592 (1985), reprinted in 1985 U.S.C.C.A.N. 1676, 2518).

¹²² 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

¹²³ 16 U.S.C. §§ 1361-1421 (1988 & Supp. V 1993).

¹²⁴ See 16 U.S.C. § 1361(2); 16 U.S.C. § 1531(b).

¹²⁵ See 16 U.S.C. § 1361(6); 16 U.S.C. § 1531(a)(3).

From the most narrow possible point of view, it is in the best interest of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.¹²⁶

The ESA is aimed at conserving animal species threatened with extinction and their habitats, because “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”¹²⁷ Similarly, the introduction to the MMPA states Congress’s determination that the health and stability of the marine ecosystem should be maintained because “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic”¹²⁸ The House of Representatives report accompanying the bill which became the MMPA elaborated:

Some . . . groups [formed to advocate stronger protection measures] have been criticized as unrealistic: as failing to recognize that the principal significance of these animals lies in their usefulness to men and, by inference, that *any* use by man is therefore justifiable. This attitude, it seems to the committee, is no more realistic than that of those on the other end of the spectrum—that animals must be left alone altogether. Both fail to recognize that man’s thumb is already on the balance of Nature, and that solicitous and decent treatment for the animals may well also be in the long-term best interest of man.¹²⁹

Unlike the AWA, neither the ESA nor the MMPA make reference to animal pain, suffering, or general well-being. Also, in contrast to the view of many animal rights activists,¹³⁰ the ESA and the MMPA protect animals not by virtue of their very existence, but only by

¹²⁶ H.R. REP. NO. 93-412, 93d Cong., 1st Sess. 5 (1973), *quoted in* Bays’ Legal Fund v. Browner, 828 F. Supp. 102, 105 (D. Mass. 1993).

¹²⁷ 16 U.S.C. § 1531(a)(3). Essentially, the ESA was an aspect of the larger environmental protection movement:

Consideration of this need to protect endangered species goes beyond the aesthetic.

In hearings before the Subcommittee on the Environment it was shown that many of these animals perform vital biological services to maintain a “balance of nature” within their environment. Also revealed was the need for biological diversity for scientific purposes.

S. REP. NO. 93-307, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

¹²⁸ 16 U.S.C. § 1361(6).

¹²⁹ H.R. REP. NO. 92-707, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4145 (emphasis in original).

¹³⁰ *See generally* American Bald Eagle v. Bhatti, 9 F.3d 163 (1st Cir. 1993); Citizens To End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993); In Defense of Animals v. Cleveland, 785 F. Supp. 100 (N.D. Ohio 1991).

virtue of their being members of species whose populations have fallen below a certain minimum level.¹³¹ Neither the ESA nor the MMPA is rooted in a concern for the rights—or even the interests—of the affected animals themselves. Rather, by promoting species conservation, the statutes aim to maintain ecological diversity for the benefit of people.¹³²

In Defense of Animals v. Cleveland Metroparks Zoo illustrates this distinction.¹³³ In Defense of Animals and other animal rights organizations brought suit against the Cleveland Metroparks Zoo to enjoin the zoo's plans to move a gorilla named Timmy to the Bronx Zoo for mating purposes.¹³⁴ In Defense of Animals claimed that the move would subject Timmy to needless pain and suffering, in part because of his nonproductive "romance" with another Cleveland Metroparks Zoo gorilla.¹³⁵ In Defense of Animals argued that, as the result of these conditions, the move violated the ESA.¹³⁶ The United States District Court for the Northern District of Ohio rejected In Defense of Animals' argument and held that the move would not violate any provision of the ESA.¹³⁷ The court's holding clearly reflected the view that the ESA's purpose is to preserve and propagate endangered species, not to protect the "feelings" of individual animals.¹³⁸

Citizens To End Animal Suffering & Exploitation, Inc. v. New England Aquarium exemplifies the similar, limited purpose of the MMPA.¹³⁹ Various animal rights groups brought suit against the New England Aquarium.¹⁴⁰ The groups contended that the aquarium acted unlawfully when the aquarium transferred a dolphin named Kama to the Navy.¹⁴¹ The claim was that, under the MMPA, the parties to the dolphin transfer were required to obtain a permit, which entailed a lengthy and cumbersome process.¹⁴² Significantly, Kama was born in captivity and therefore the transfer did not have any implications for

¹³¹ 16 U.S.C. § 1361 (stating Congressional finding that certain marine mammal species are, or may be, in danger of extinction and that measures should be taken to insure that their populations are not further diminished).

¹³² See 16 U.S.C. § 1361(6); 16 U.S.C. § 1531(a)(3).

¹³³ 785 F. Supp. 100 (N.D. Ohio 1991).

¹³⁴ *Id.* at 101.

¹³⁵ *Id.*

¹³⁶ *Id.* at 103.

¹³⁷ *Id.*

¹³⁸ See *In Defense of Animals*, 785 F. Supp. at 101–03.

¹³⁹ 836 F. Supp. 45 (D. Mass. 1993).

¹⁴⁰ *Id.* at 46.

¹⁴¹ *Id.* at 48.

¹⁴² *Id.*

conservation efforts.¹⁴³ Further, the challenged transfer was from a more confining environment to a less confining environment.¹⁴⁴ Thus, the plaintiffs' concerns were probably quite different from the concerns that the MMPA was intended to address; most likely the plaintiffs sought to make it exceedingly difficult to maintain captive dolphins and to prevent any military use of marine mammals.¹⁴⁵ The plaintiffs' focus was Kama's interests, as perceived by human animal rights activists.¹⁴⁶ The United States District Court for the District of Massachusetts was unreceptive to the plaintiffs' focus and dismissed the plaintiffs' claim for lack of standing.¹⁴⁷

In *American Bald Eagle v. Bhatti*, animal rights organizations brought an action to enjoin controlled deer hunting in the Quabbin Reservation in eastern Massachusetts.¹⁴⁸ Because deer are not an endangered species, the plaintiffs grounded their challenge in the assertion that the hunting would pose a significant risk to bald eagles on the reservation and thereby violate the ESA, which prohibits the "taking" of an endangered species.¹⁴⁹ The plaintiffs claimed that bald eagles would be at risk because the bald eagles would feed on unrecovered deer killed by hunters and thereby consume lead from the lead shot in deer carcasses.¹⁵⁰ The plaintiffs urged the United States Court of Appeals for the First Circuit to find that the imposition of a "significant risk" on an endangered species—such as the bald eagle—constituted a taking and that even a "one-in-a-million" risk of harm would constitute a "significant risk."¹⁵¹ The First Circuit rejected the plaintiffs' argument and held that only "actual harm," and not a numerical probability of harm, could establish a taking under the ESA.¹⁵²

These cases illustrate that courts principally view the ESA and the MMPA as environmental laws, not as animal rights laws. Courts have been unwilling, in cases involving the ESA and the MMPA, to find rights or claims inherent in animals themselves. Rather, courts have focused on the impacts on the *human* environment and have refused to let the well-being of animals outweigh those impacts.

¹⁴³ See *id.* at 53.

¹⁴⁴ See *Citizens To End Animal Suffering & Exploitation*, 836 F. Supp. at 47. At the Navy, Kama could swim away if he so desired. *Id.*

¹⁴⁵ See *id.* at 55.

¹⁴⁶ See *id.* at 49–50.

¹⁴⁷ See *id.* at 59.

¹⁴⁸ 9 F.3d 163 (1st Cir. 1993).

¹⁴⁹ *Id.* at 164; see 16 U.S.C. § 1538(a)(1)(B) (1988).

¹⁵⁰ *American Bald Eagle*, 9 F.3d at 164.

¹⁵¹ *Id.* at 165.

¹⁵² See *id.*

D. *The National Environmental Policy Act*

The National Environmental Policy Act (NEPA)¹⁵³ is concerned with the impact of major federal actions on the human environment.¹⁵⁴ On occasion, however, animal rights activists have invoked the NEPA for the sole purpose of protecting the quality of life of animals.¹⁵⁵ In doing so, animal rights activists turn the NEPA's concept of "human environment" on its head.

Under the NEPA, a recommendation or report on a proposal for a major federal action "significantly affecting the quality of the human environment" must contain a detailed statement of the action's environmental impact.¹⁵⁶ Congress enacted the NEPA to "reverse what seem[ed] to be a clear and intensifying trend towards environmental degradation."¹⁵⁷ Congress hoped to develop a coordinated national policy on environmental quality "to assure that man's capacity to change his environment is devoted to making that change one for the better, while remaining consistent with his future social, economic and other needs."¹⁵⁸ As the Supreme Court explained, "NEPA was designed to promote *human* welfare by alerting governmental actors to the effect of their proposed actions on the physical environment."¹⁵⁹

Although the NEPA is neither an animal welfare law nor an animal rights law, animal rights activists have, on occasion, been able to use the NEPA to assert rights on behalf of animals. For example, in *Progressive Animal Welfare Society v. Department of the Navy*, an animal rights group successfully used the NEPA to protect animal interests instead of the human environment.¹⁶⁰ The Progressive Animal Welfare Society (PAWS) challenged the Navy's plan to use Atlantic bottlenose dolphins at a submarine base in Bangor, Washington.¹⁶¹ As the United States District Court for the Western District of Washington explained, PAWS's real concerns were that the dolphins would not be able to withstand the cold temperatures of Puget Sound and would be isolated in single holding pens.¹⁶² PAWS's legal claim, how-

¹⁵³ 42 U.S.C. §§ 4321-4370 (1988 & Supp. V 1993).

¹⁵⁴ 42 U.S.C. § 4332; 40 C.F.R. § 1508.14 (1995).

¹⁵⁵ See *infra* notes 164-68 and accompanying text.

¹⁵⁶ H.R. REP. No. 91-378, 91st Cong., 1st Sess. 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2753.

¹⁵⁷ *Id.* at 2760.

¹⁵⁸ *Id.* at 2759.

¹⁵⁹ *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1982) (emphasis added).

¹⁶⁰ 725 F. Supp. 475 (W.D. Wash. 1989).

¹⁶¹ *Id.* at 476.

¹⁶² *Id.* at 477.

ever, was that the Navy's "deployment" of the dolphins constituted a federal action for which an environmental impact statement was required pursuant to the NEPA.¹⁶³ The dolphins, according to PAWS, were an integral part of the human environment, and because the dolphins were affected, the human environment was also affected.¹⁶⁴ The court agreed with PAWS. The court held that the Navy's decision to use the dolphins was a major federal action under the NEPA that required an analysis of the effects of that use on the dolphins themselves.¹⁶⁵

One might ask how the Navy's plan significantly affected the human environment. The court's opinion, however, fails to supply an answer. *Progressive Animal Welfare Society* highlights the importance of keeping the human environment in clear focus when analyzing claims under the NEPA that involve animals. If, as PAWS argued, an impact on animal well-being triggers the NEPA, then the "human" part of the NEPA's "human environment" requirement is effectively nullified.¹⁶⁶ Some animal rights activists might desire this result, as it effectively puts the interests of animals on a level equal with the interests of humans. Such a result, however, is supported neither by the NEPA's language nor by the NEPA's legislative history.¹⁶⁷ More fundamentally, such a result is inconsistent with this nation's entire people-oriented legal framework.

VI. THE STANDING DOCTRINE AND THE LEGAL CAMPAIGN FOR ANIMAL RIGHTS

It is in the doctrine of standing that animal rights activists have found their greatest obstacle to the extension of legal rights to animals. The doctrine of standing is grounded in Article III of the Constitution, which gives federal courts jurisdiction over "cases" and "controversies."¹⁶⁸ The concept of standing, as recognized and developed by courts, at times appears tortured and overly technical.¹⁶⁹ Nevertheless, in litigation concerning animals, the standing require-

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 477-78.

¹⁶⁵ *Progressive Animal Welfare Soc'y*, 725 F. Supp. at 479.

¹⁶⁶ Several other cases have involved the claim that an environmental impact statement must be prepared in conjunction with a plan for a federal project with anticipated impacts on animal well-being. *See, e.g.*, *Animal Lovers Volunteer Ass'n, Inc. v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 143 (D.D.C. 1993).

¹⁶⁷ *See supra* notes 153-59 and accompanying text.

¹⁶⁸ U.S. CONST. art. III, § 2, cl. 1.

¹⁶⁹ *See generally* *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

ment is indispensable because the requirement focuses the relevant inquiry on human interests and injuries rather than on animal "interests" and injuries.¹⁷⁰

The Supreme Court has articulated the constitutional standing issue as "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."¹⁷¹ To satisfy the standing requirement, plaintiffs seeking relief in federal court must show that they have suffered a concrete, actual injury caused by the alleged legal violation.¹⁷² Plaintiffs lack standing to assert a claim based on a "generalized grievance" shared by all or a large class of citizens.¹⁷³ Furthermore, plaintiffs must assert their own legal rights and interests and cannot base their claim for relief upon the interests of third parties.¹⁷⁴

The idea of a fish, chimpanzee, bird, or dog filing suit against an alleged oppressor may seem absurd, but animal rights proponents sometimes try to include animals as named plaintiffs in lawsuits. Sometimes, the issue is never addressed directly and the case is thus reported so as to give the impression that an animal actually litigated the case, as in *American Bald Eagle v. Bhatti*¹⁷⁵ or *Mount Graham Red Squirrel v. Yeutter*.¹⁷⁶

In *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, however, the United States District Court for the District of Massachusetts recently held that a dolphin named Kama could not challenge his owner's plans to transfer Kama to the Navy.¹⁷⁷ In its analysis, the court relied on provisions in the MMPA that

¹⁷⁰ See *infra* notes 192–203 and accompanying text.

¹⁷¹ Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (emphasis in original) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

¹⁷² See, e.g., *Defenders of Wildlife*, 112 S. Ct. at 2136.

¹⁷³ Warth, 422 U.S. at 499.

¹⁷⁴ Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982).

¹⁷⁵ 9 F.3d 163 (1st Cir. 1993).

¹⁷⁶ 930 F.2d 703 (9th Cir. 1991). In *Palila v. Hawaii Dept of Land & Natural Resources*, a bird sued a state agency under the ESA. 852 F.2d 1106 (9th Cir. 1991). The United States Court of Appeals for the Ninth Circuit stated:

As an endangered species under the Endangered Species Act, . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right . . . represented by attorneys for the Sierra Club, the Audubon Society, and other environmental parties. *Id.* at 1107. It appears that the parties did not actually dispute the appropriateness of having a bird as a plaintiff.

¹⁷⁷ 836 F. Supp. 45 (D. Mass. 1993).

expressly authorize suits brought by “persons,” not animals.¹⁷⁸ The court also held that the dolphin did not have capacity to sue under Rule 17 of the Federal Rules of Civil Procedure because the dolphin did not fall within the section of the Rules entitled “Parties,” which provides that capacity to sue is determined by the law of the individual’s domicile.¹⁷⁹ The court’s analysis perhaps need not have been so complicated. As previously demonstrated, our legal system simply was not designed to resolve interspecies disputes. Without a clear conception of the status of animals vis-à-vis our government and its laws, however, courts could stumble into the unprecedented territory of animal litigants.

Because animals do not possess standing to sue, animal laws must be enforced either by the government or by individuals and private organizations. When a person brings a private action, the law of standing mandates that the person be among those actually injured by the alleged legal violation and be within the “zone of interests” of the relevant statute.¹⁸⁰ The fact that an animal or the animal’s habitat may have been harmed is simply insufficient to establish standing for that animal.¹⁸¹ Thus, in cases brought by individuals and organizations under the ESA, the MMPA, the AWA, and the NEPA, the threshold inquiry is often how, if at all, *people* have been injured.

An animal rights organization or individual activist rarely suffers physical or financial injury when a federal animal law is violated. As a result, the common strategy is to show that, due to a prior relationship with or experience involving the animal, the individual plaintiff—or, if an organization, one or more of the organization’s members—has suffered a psychological or aesthetic injury.¹⁸² As the Supreme Court has observed, “the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing.”¹⁸³ A review of relevant cases indicates that the standing hurdle may be overcome if plaintiffs establish that they live in the vicinity of the threatened animal’s habitat or have visited the

¹⁷⁸ See *id.* at 47.

¹⁷⁹ See *id.* at 49. Rule 17 of the Federal Rules of Civil Procedure provides that the capacity of an individual to sue or to be sued “shall be determined by the law of the individual’s domicile.” FED. R. CIV. P. 17.

¹⁸⁰ See *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 396–98 (1987); *Port of Astoria v. Hodel*, 595 F.2d 467, 474 (9th Cir. 1979).

¹⁸¹ See, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137–40 (1992).

¹⁸² See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Sierra Club v. Morton*, the Supreme Court indicated that injuries to aesthetic interests may satisfy the “injury in fact” requirement. See *id.* at 734.

¹⁸³ *Defenders of Wildlife*, 112 S. Ct. at 2137; see *Sierra Club*, 405 U.S. at 734.

threatened animal's habitat in the past, have enjoyed observing the animal, and have definite plans to observe the animal again in the imminent future.¹⁸⁴

Although the Supreme Court denied standing on the facts, the Court implicitly approved of this approach in *Lujan v. Defenders of Wildlife*.¹⁸⁵ Environmental groups brought suit under the ESA to challenge a regulation issued by the Secretary of the Interior and the Secretary of Commerce.¹⁸⁶ The regulation excluded the activities of government agencies in foreign nations from a consultation requirement designed to protect endangered species.¹⁸⁷ In response to the government's argument that none of the members of the environmental groups were harmed by the regulation, the environmental groups presented evidence that several of their members had traveled to foreign countries and had observed the habitats of endangered species.¹⁸⁸ The environmental groups, however, were unable to convince the Court that any individual had sufficiently definite plans to return to the foreign countries.¹⁸⁹ The Court thus concluded that the alleged injury was too speculative and too remote to serve as the basis for a suit.¹⁹⁰

Other courts have followed the Court's approach in *Lujan*. In *Fund for Animals, Inc. v. Lujan*, the United States Court of Appeals for the Ninth Circuit held that members of Fund for Animals suffered harm to their esthetic and environmental well-being due to the diminished opportunities to view wild bison in Yellowstone National Park which would result from the defendant's wildlife management plan.¹⁹¹ The court found that the organization's members would also suffer psychological injury if they viewed the killing of bison.¹⁹² Similarly, in *Fund for Animals, Inc. v. Espy*, the United States District Court for the District of Columbia held that an animal rights organization possessed standing to challenge a research project involving the capture of bison in Yellowstone National Park.¹⁹³ Central to the court's holding

¹⁸⁴ See, e.g., *Animal Protection Inst. of Am. v. Mosbacher*, 799 F. Supp. 173, 175-77 (D.D.C. 1992) (granting standing to whale watchers who had concrete plans to view whales within next year).

¹⁸⁵ 112 S. Ct. 2130 (1992).

¹⁸⁶ See *id.* at 2135.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.* at 2138.

¹⁸⁹ See *id.*

¹⁹⁰ See *Defenders of Wildlife*, 112 S. Ct. at 2138.

¹⁹¹ 962 F.2d 1391, 1396 (9th Cir. 1992).

¹⁹² See *id.*

¹⁹³ 814 F. Supp. 142, 150 (D.D.C. 1993).

was that the group's members had observed and enjoyed the bison in their natural habitat.¹⁹⁴

As the above cases demonstrate, a plaintiff does not possess standing when the plaintiff's alleged injury is speculative or when the plaintiff's relationship with the affected animals is tenuous or nonexistent.¹⁹⁵ When plaintiffs are unable to establish that they have ever seen or interacted with the animals at issue, a court will refuse to entertain the claim.¹⁹⁶

Laboratory animals present animal rights activists with special standing difficulties. Because research animals are not accessible to the public, animal research opponents rarely have the opportunity to interact with or enjoy the subjects of their concern. Whether or not the AWA is violated, animal rights activists cannot establish that they have been injured because they cannot establish prior contacts with the particular animal at issue. Further, a general concern for the humane treatment of animals is insufficient to establish standing. In one case on this point, the United States Court of Appeals for the Fourth Circuit stated that such concern "may enhance [the plaintiff's] legislative access; it does not, by itself, provide entry to a federal court."¹⁹⁷

State courts have similarly held that animal rights activists possess no personal legal interest in the use of animals in experimentation and thus are not proper parties entitled to sue under state animal cruelty statutes. For example, in *Lewin v. United States Surgical Corp.*, the Appellate Court of Connecticut held that various individuals and animal rights organizations were not sufficiently aggrieved by a medical supplier's use of dogs to demonstrate the use of surgical staples.¹⁹⁸

¹⁹⁴ See *id.* at 149. In an earlier case, *Japan Whaling Ass'n v. American Cetacean Soc'y*, the Court held that members of wildlife conservation groups were injured by the continued whale harvesting, which would allegedly result from the Secretary of Commerce's failure to enforce whaling quotas against Japan. See 478 U.S. 221, 231-32 & n.4 (1986). The members' whale watching and studying were adversely affected. See *id.*

¹⁹⁵ See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992). As the Supreme Court explained in *Defenders of Wildlife*, "'some day' intentions—without any description of concrete plans . . . do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* In denying standing in *Animal Lovers Volunteers Ass'n v. Weinberger*, the United States Court of Appeals for the Ninth Circuit stated that "[a] mere assertion of organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing." 765 F.2d 937, 938 (9th Cir. 1985); see *International Primate Protection League v. Administrators of the Tulane Educ. Fund*, 895 F.2d 1056, 1059-60 (5th Cir. 1990) (rejecting standing to animal rights organization on three separate grounds).

¹⁹⁶ See *Animal Lovers Volunteer Ass'n*, 765 F.2d at 938.

¹⁹⁷ *International Primate Protection League*, 799 F.2d at 938.

¹⁹⁸ 575 A.2d 262, 264 (Conn. App. Ct.), appeal denied, 577 A.2d 716 (Conn. 1990).

The court summarized the plaintiffs' assertions as follows: "I am a member of Friends of Animals; I own a dog; my dog may one day be lost or stolen and may then fall into the hands of a dog broker who supplies animals to laboratories; and Surgical may eventually gain possession of my dog."¹⁹⁹ The court held, however, that such concerns failed to satisfy the requirement that the plaintiffs have a specific, legal, and personal interest in the subject matter of the case.²⁰⁰ Similarly, in *People for the Ethical Treatment of Animals v. Institutional Animal Care & Use Committee*, the Supreme Court of Oregon held that PETA did not possess standing to challenge the University of Oregon's approval of a grant proposal involving research on the auditory system of barn owls.²⁰¹

The tremendous difficulties faced by animal research opponents in establishing standing to challenge the treatment of laboratory animals are illustrated by a recent decision by the United States Court of Appeals for the District of Columbia Circuit concerning the applicability of the AWA to rats, mice, birds, and aquatic animals.²⁰² Two individuals and two organizations brought suit against the Secretary of Agriculture.²⁰³ The plaintiffs contended that the Secretary's exclusion of these creatures from the AWA's definition of "animal" was unlawful.²⁰⁴ The United States District Court for the District of Columbia agreed and ordered the Secretary to promulgate new regulations.²⁰⁵

The D.C. Circuit reversed the district court's decision on the ground that the plaintiffs did not possess standing.²⁰⁶ One of the individual plaintiffs was a psychobiologist who had worked in laboratories in the past but was not presently employed in one.²⁰⁷ The court held that, although the psychobiologist alleged that she intended to seek such employment in the future and would then suffer injury, she lacked standing because her injury was too speculative.²⁰⁸ The other individual plaintiff, a member of an animal care and use committee, also failed

¹⁹⁹ *Id.*

²⁰⁰ *See id.*

²⁰¹ 817 P.2d 1299, 1303-04 (Or. 1991).

²⁰² *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994), *rev'g* *Animal Legal Defense Fund v. Madigan*, 781 F. Supp. 797 (D.D.C. 1992) (holding that Secretary of Agriculture had no authority to exclude birds, rats, and mice from AWA's protections).

²⁰³ *Id.* at 497. The two organization plaintiffs were the Animal Legal Defense Fund and the Humane Society of the United States. *Id.*

²⁰⁴ *Id.* at 497-98.

²⁰⁵ *Animal Legal Defense Fund v. Madigan*, 781 F. Supp. 797, 806 (D.D.C. 1992).

²⁰⁶ *Animal Legal Defense Fund*, 23 F.3d at 504.

²⁰⁷ *Id.* at 499-500.

²⁰⁸ *See id.* at 500-01.

to establish that he suffered any injury in fact.²⁰⁹ The two organization plaintiffs had established standing at the district court level by complaining that the exclusion of birds, rats, mice, and aquatic animals from the AWA's coverage hampered their ability to gather and disseminate information on the laboratory conditions of these animals.²¹⁰ The D.C. Circuit held that this injury was not within the "zone of interests" of the AWA.²¹¹ Thus, as it currently stands, the exclusion of rats, mice, birds, and aquatic animals from the AWA's coverage is maintained.

In cases involving our animal laws, the search for an actual human injury often leads to tangential inquiries into topics such as the plaintiff's vacation preferences and feelings about animals.²¹² The focus on injury in fact, however, is critical because such a focus confines judicial inquiry to cases or controversies directly involving people. The resolution of disputes between animals and people or between various animal species is simply not within the scope of the judiciary's duties. When animal rights activists seek judicial intervention on behalf of animals in situations that involve no human injuries, they essentially ask courts to make national animal policy and to act as guardians for animals, neither of which are proper functions for our courts. Standing forces both litigants and courts to address situations involving animals from a human perspective, the only perspective from which any of us are truly qualified to analyze an issue.

VII. CONCLUSION

A conviction and often stated belief among animal rights theorists is that the precepts of their movement, like others once despised and rejected, will gain currency over time, and that "animal rights [are] the logical progression in the evolution of natural rights theories."²¹³ It is standard, indeed almost mandatory, preface to writings by animal rights activists to allude to the ridicule with which the ideas of early abolitionists and suffragettes were received.²¹⁴ Human attitudes

²⁰⁹ See *id.* at 501.

²¹⁰ See *Animal Legal Defense Fund v. Yeutter*, 760 F. Supp. 923, 926 (D.D.C. 1992).

²¹¹ See *Animal Legal Defense Fund*, 23 F.3d at 501-04.

²¹² See, e.g., *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990) (holding plaintiffs' affidavits alleging recreational use "in the vicinity" of proposed government action not specific enough to satisfy standing requirement of actual injury to plaintiffs); *Animal Protection Inst. of Am. v. Mosbacher*, 799 F. Supp. 173, 175-77 (D.D.C. 1992) (granting standing to whale watchers who had concrete plans to view whales in wild within next year).

²¹³ Goodkin, *supra* note 16, at 260.

²¹⁴ See, e.g., SINGER, *supra* note 2, at i, 1; Mimi Brody, *Animal Research: A Call for Legislative Reform Requiring Ethical Merit Review*, 13 HARV. ENVTL. L. REV. 423, 437 (1989); Goodkin,

towards animals, the movement that seeks to endow animals with civil rights tells us, are analogous to the archaic attitudes once expressed about women and African-Americans, that the former are "themselves childish, frivolous and short-sighted; in a word, they are big children all their life long—a kind of intermediate stage between the child and the full-grown man,"²¹⁵ and the latter "a clownish, simple creature, at times even lovable within its limitations, but straightly foreordained to walk within the Veil."²¹⁶ Those who express reservations about the concept of civil rights for animals implicitly are warned thereby that as the concept of "rights" continues to expand exponentially to include more categories of being²¹⁷—and Professor Stone goes so far as to mention "humanoids, computers, and so forth" as potential beneficiaries of the rights concept he advances²¹⁸—their opposition to the process will, in time, come to seem quaint, if not distasteful, as archaic as does that of the most patriarchal misogynist or chauvinist race theorist.

The analysis that equates animal rights with the rights of women and African-Americans is as inappropriate as the equation is distasteful, and the progression upon which those who make it rely is not inexorable. For one thing, it is not necessarily true that because history is replete with examples of obduracy and ignorance in making political distinctions, there is no credibility to the distinctions now made between animals and humans. While it may be true that in the context of the relatively brief span of American history the experience of women and African-Americans has been one of ascending from subordination to relative political empowerment, it does not follow that political empowerment is a constantly expanding process, destined eventually to empower not only animals but even other entities

supra note 16, at 259; Douglas O. Linder, "Are All Species Created Equal?" and Other Questions Shaping Wildlife Law, 12 HARV. ENVTL. L. REV. 157, 179 (1988); Stone, *supra* note 4, at 453–55; Thomas, *supra* note 4, at 728.

²¹⁵ Stone, *supra* note 4, at 497 n.128 (quoting A. Schoepenhauer, *On Women*, in STUDIES IN PESSIMISM 105–10 (T.B. Saunders trans. 1893)).

²¹⁶ *Id.* at 456 n.25 (quoting W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 89 (1924)).

²¹⁷ See, e.g., Goodkin, *supra* note 16, at 285; Regan, *supra* note 7, at 515–17.

²¹⁸ Professor Christopher D. Stone writes:

It is not easy to dismiss the idea of "lower" life having consciousness and feeling pain, especially since it is so difficult to know what these terms mean even as applied to humans. Some experiments on plant sensitivity—of varying degrees of extravagance in their claims—include Lawrence, *Plants Have Feelings, Too . . .*, ORGANIC GARDENING & FARMING 64 (April 1971); Woodlief, Royster & Huang, *Effect of Random Noise on Plant Growth*, 46 J. ACOUSTICAL SOC. AM. 481 (1969); Backster, *Evidence of a Primary Perception in Plant Life*, 10 INT'L J. PARAPSYCHOLOGY 250 (1968).

Stone, *supra* note 4, at 479 n.93 (citations omitted).

not yet fully identified. One legal writer postulates that as a general proposition, "a refusal to recognize rights is a dubious position to take in America . . ." ²¹⁹ It is doubtful, however, that such a postulation is true. There are many claimed "rights" which, particularly so in the American political tradition, are roundly refused because they have no grounding in morality, culture, or history or because they conflict with other valued rights.

Far from substantiating an argument that history suggests an inevitable empowerment of animals, history, in fact, suggests the opposite. For one thing, human history abounds in instances of enslavement and liberation, and the political fortunes of women have varied from cultures that are matriarchal to those with prevailing attitudes quite different. No society, however, has ever politically empowered living animals, with the possible exception of Caligula's Rome. Nor should ours do so now.

Animals are not politically empowered under our current array of animal laws. Animals do not possess legal rights as that term is used by Professor Christopher Stone;²²⁰ animals cannot institute legal actions; and courts do not consider animals' harms and benefits in granting and denying legal relief. Instead, our laws properly seek to ensure that people treat animals in a way that is consistent with human interests—including interests in the preservation of our environment—and esthetic sensibilities.

²¹⁹ Goodkin, *supra* note 16, at 285.

²²⁰ See *supra* notes 5–6 and accompanying text.